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## GROUND CONTROL TO MAJOR CONFLATION—UNIFORM DISABILITY ACCOMMODATIONS, POLICY & PRACTICE IN HIGHER EDUCATION

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“Policy is not a static commodity. It is a dynamic road map that periodically should be reviewed within the context of legal precedents, evolving developments in the field, and emerging ‘best practices.’”<sup>1</sup>

– Stan F. Shaw et al.

### Abstract

This Note addresses academic accommodations for learning-disabled law students in public higher education. No uniform policies or procedures exist to

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<sup>1</sup> Stan F. Shaw et al., *Disability Documentation, the Americans with Disabilities Act Amendments Act, and the Summary of Performance: How are they linked?*, 22 J. POSTSECONDARY ED. & DISABILITY 142, 146 (2010) as quoted in L.C. Brinckerhoff et al., *Postsecondary education and transition for college students with learning disabilities* (2d ed. 2002).

ensure that students at ABA-accredited law schools receive fair consideration when seeking reasonable accommodations under the Americans with Disabilities Amendments Act of 2008 and Section 504 of the Rehabilitation Act of 1973. Uniform policies and procedures for determining reasonable accommodations for learning-disabled law students should be implemented as a part of the Requirements and Standards for ABA accreditation. While other scholars have discussed this idea, this Note adds to the discussion by providing the underpinnings for uniform disability accommodation policies and procedures in light of revised implementing regulations for Title II and Title III of the Americans with Disabilities Amendments Act of 2008.

### Introduction

No uniform policy exists for making disability accommodation decisions, which puts learning-disabled students at risk for disparate treatment in public higher education. This Note focuses on disability accommodation policies at ABA-accredited public law schools and the need for uniform guidelines, policies, and procedures for disability accommodations in higher education.<sup>2</sup> It also looks specifically at learning-disabled law students who seek reasonable academic accommodations due to the functional limitations that they face as a result of their learning disabilities. This Note addresses key concepts of “notice,” “equal opportunity,” “fair evaluation,” and “substantial limitation” in the context of academic accommodations based on disability. This Note addresses where we’ve been, where we are, and where we need to get to when making disability accommodation decisions for learning-disabled students.

This Note uses law students and ABA-accredited public law schools as illustrative examples. The discussion that follows will reference a sixteen-point rating system created by the Author,<sup>3</sup> to help identify which schools are getting it right and which schools are getting it wrong when making disability accommodation decisions for learning-disabled students. We will look at what the American Bar Association (ABA) has done to recognize learning-disabled law students, asking why nothing has been done to normalize learning disability documentation processes among ABA-accredited law schools. The model guidelines described in this Note build on recently revised guidance for disability

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<sup>2</sup> At the outset, an important distinction underlies this discussion. The term “reasonable accommodation” refers to modifications or adjustments made by employers that enable employees with disabilities to “enjoy equal benefits and privileges of employment.” The term “reasonable modification” is generally the appropriate term for purposes of Title II and Title III of the ADA and the implementing regulations requiring public and private entities to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . [where] the modifications would [not] fundamentally alter the nature of the service, program, or activity.” The two terms are often used interchangeably, and may be treated as synonymous. For our discussion, “accommodations” will be used as synonymous with “modifications.” Office for Civil Rights, *Protecting Students With Disabilities*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last modified Oct. 16, 2015).

<sup>3</sup> See Appendix B.

## *Uniform Disability Accommodations, Policy & Practice in Higher Education*

accommodation practices from the Association of Higher Education and Disability (AHEAD). Where AHEAD does not clearly address best practices, this Note advocates a “commonsense standard”<sup>4</sup> in addressing reasonable disability accommodation practices, and references other guidance for support, where appropriate. Finally, this Note focuses on the Americans with Disabilities Amendments Act of 2008 and Section 504 of the Rehabilitation Act of 1973, and provides specific guidance for avoiding conflation of disability determinations with reasonable accommodation determinations.

Part I of this Note provides background information on the changing legal landscape of disability laws affecting the disability accommodation process. This background is helpful for understanding the challenges that learning-disabled students face when seeking accommodations after transitioning from the K-12 level (elementary, middle, and high school) to the postsecondary level (higher education). Part II provides insight regarding: (1) general concerns, law school grading practices, and how learning-disabled law students are disadvantaged compared to their peers; (2) the ABA’s efforts in recent years to normalize disability accommodations policies and procedures at ABA-accredited law schools; and (3) current ABA accreditation standards affecting disability accommodation decisions, with special emphasis on the inadequacy of the current Standards 207 and 508. Part III discusses recently modified implementing regulations to relevant disability accommodation laws.<sup>5</sup> Part III also addresses the potential for conflation of disability determinations and reasonable accommodation determinations, and how to avoid confusing the two. Part IV provides data and takeaways from the Author’s research of 83 ABA-accredited public law schools’ disability accommodation policies, based on a sixteen-point rating system created by the Author to assess the adequacy of these policies.<sup>6</sup> Part IV discusses sixteen rated criteria, as well as five non-rated criteria, that must be addressed in setting the foundation for uniform disability accommodation policies. Part IV also discusses the disability accommodation process, proposes ideal policy and documentation guidelines for *all* higher education institutions, and advocates for the creation of a uniform Learning Disability Verification Form. This Note concludes by setting the stage for future discussions about developing uniform disability accommodation policies and documentation guidelines in higher education, and charging the ABA with revising current Standards 207 and 508 to reflect the ABA’s history of staunch advocacy for disability rights.

### I. Background

In the years following the passage of the Americans with Disabilities Amendments Act of 2008 (ADAAA), the United States educational system has

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<sup>4</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, ASSOC. ON HIGHER ED. AND DISABILITY, [https://www.ahead.org/uploads/docs/resources/Final\\_AHEAD\\_Supporting%20Accommodation%20Requests%20with%20Q&A%2009\\_12.pdf](https://www.ahead.org/uploads/docs/resources/Final_AHEAD_Supporting%20Accommodation%20Requests%20with%20Q&A%2009_12.pdf). (last visited Sept. 13, 2017).

<sup>5</sup> See Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 201–310 (2016); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2015).

<sup>6</sup> See Appendix B.

been reeling in its quest to comply with principles of equality and academic fairness when determining who can be qualified as “disabled” for purposes of the statute and what constitutes “reasonable accommodation” in the educational context.<sup>7</sup> Twenty or so years of experience has resulted in an evolution of the educational landscape and has framed the legal environment that learning-disabled law students will encounter in the future. The Individuals with Disabilities Education Act (IDEA and subsequent amendments), and Section 504 of the Rehabilitation Act of 1973 (Section 504) control this discussion. Section 504 is applicable to both K-12 and postsecondary education. However, IDEA is specific to K-12 education, and it is often relevant to students with learning disabilities before they reach higher education.

To provide context, the discussion that follows focuses on disability accommodation practices for learning-disabled students at the K-12 level under IDEA and Section 504, generally. It should be noted that higher education institutions do not necessarily implement the same practices as K-12 institutions, nor do higher education institutions provide the same protections for college students.<sup>8</sup> Based on several changes in education and disability law over a relatively short period of time, we are now seeing a cohort of students entering higher education where some students who are truly learning-disabled are “regarded as” having a disability because they have a history of diagnosis and academic accommodation, and other students who are truly learning-disabled are NOT regarded as having a disability since there is no history of diagnosis or academic accommodations to “carry over” into the postsecondary environment.<sup>9</sup>

In 1997, Congress amended the Individuals with Disabilities Education Act of 1975 in order to give guidance to K-12 schools when identifying, evaluating, and assisting children in need of special education or related services. IDEA 1997 used an ability/achievement discrepancy model to identify the existence of learning disabilities in K-12 students.<sup>10</sup> Under the ability/achievement discrepancy model, students with differing disabilities were individually assessed to ensure they received their right to a free and appropriate public education (FAPE).<sup>11</sup> Likewise,

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<sup>7</sup> See Rehabilitation Act of 1973, 29 U.S.C. § 701; see also *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017) (addressing the scope of Free Appropriate Public Education (FAPE) and IDEA, and the level of benefit required when giving reasonable accommodations).

<sup>8</sup> This background discussion deals largely with the application of these laws at the primary and secondary level (K-12). It is important to understand that higher education is just now starting to see the first wave of students who have come up through this changing legal landscape. See Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204 (codified at 28 C.F.R. Parts 35 & 36).

<sup>9</sup> Previous documentation of a learning disability diagnosis and any academic accommodations the student received before college or law school is often helpful when petitioning for accommodations.

<sup>10</sup> Barbara Jackson Gillman et al., *Critical Issues in the Identification of Gifted Students With Co-Existing Disabilities*, 3 SAGE OPEN 1, 3-5 (2013).

<sup>11</sup> See generally *Protecting Students With Disabilities*, supra note 2 (helpful information about FAPE and the relationship to IDEA and Section 504 is contained in the Frequently Asked Questions).

under the ability/achievement discrepancy model, both underperforming students<sup>12</sup> and gifted students who demonstrated discrepancies in one or more areas of academic achievement<sup>13</sup> could theoretically qualify for services under Section 504.<sup>14</sup>

In 2004, Congress amended IDEA, again, resulting in a departure from the ability/achievement discrepancy model, shifting to the current Response To Intervention model (RTI).<sup>15</sup> The purpose of RTI is to provide a proactive approach and assist underperforming students before special education or related services are considered.<sup>16</sup> One way of looking at RTI is as a front-line intervention meant to make sure that students don't fall too far behind minimum performance standards.<sup>17</sup> The RTI process was never envisioned to be *the* all-encompassing

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<sup>12</sup> This means students who are not performing at grade level.

<sup>13</sup> Gillman et al., *supra* note 10, at 3-5. These children are referred to as "twice-exceptional." A twice-exceptional student may qualify as gifted, overall, but may demonstrate only average or slightly below average performance in one academic area. Since the student's achievement in that one area was not consistent with achievement across all other academic areas, it was often the case that the student could qualify for some accommodations under Section 504 to bring the child up to speed in the weak area.

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> *See id.*

<sup>16</sup> Under RTI, a student is not identified for referral for special education evaluation until the student has failed to meet achievement goals set by the teacher over a minimum period of 12 weeks. During the minimum 12-week period, the teacher provides the underperforming student with additional assessments to measure progress and get a sense of whether the student may need special education intervention in order to bring the student's achievement to a level consistent with the student's average age and grade level. The addition of this extensive observation period was a change from the previous ability/achievement discrepancy model and appears to have been implemented with the goal of providing data to support accommodations decisions.

<sup>17</sup> Below is an explanation of one way in which RTI is implemented in K-12 education:

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts vary in how they address performance problems of regular education students. Some districts employ teams at individual schools, commonly referred to as "building teams." These teams are designed to provide regular education classroom teachers with instructional support and strategies for helping students in need of assistance. These teams are typically composed of regular and special education teachers who provide ideas to classroom teachers on methods for helping students experiencing academic or behavioral problems. The team usually records its ideas in a written regular education intervention plan. The team meets with an affected student's classroom teacher(s) and recommends strategies to address the student's problems within the regular education environment. The team then follows the responsible teacher(s) to determine whether the student's performance or behavior has improved. In addition to building teams, districts may utilize other regular education intervention methods, including before-school and after-school programs, tutoring programs, and mentoring programs.

*Protecting Students With Disabilities, supra* note 2.

identifier of students who should or should not qualify for special education or related services (forms of reasonable accommodation at the K-12 level), but this is generally the application.<sup>18</sup>

While underperforming students with learning disabilities may be more easily identified under RTI, it is possible that a large population of learning-disabled students are overlooked in K-12 education.<sup>19</sup> A student may excel in all other subjects, but perform only at grade-level expectations (average) in math, for example. In that case, the student may simply not perform as well in math, *or* there could be a subtle, underlying disability. With a focus on underachieving students, students suffering from more subtle disabilities, like the student used in this example, would not be identified under RTI for early intervention. The student here does not qualify for services under IDEA 2004, because no special education or intervention is warranted. Instead, this student's parents may seek some type of intervention for the student under Section 504, which allows for individual accommodations or modifications based on the individual academic needs of the student in his or her particular academic program.<sup>20</sup>

RTI and the most recent IDEA guidelines resulted in a focus on "underachievement" without regard to a student's overall performance. Because RTI focuses on underachievement, it is not well-suited for identifying gifted students who may benefit from more challenging coursework, like the student in the example above. Accelerated education programs like "gifted" are also considered academic modifications at the K-12 level, and are analogous to "special" education programs. This is not to say that "gifted" and "special education" are the same. To the contrary, the two are very different programs. The point of the example where the student performs only "average" in math, but excels in other areas is that under RTI, no mechanism exists to identify that student as one who might benefit from some remedial coursework in math, in order to bring his or her achievement to the same level of exceptional achievement across other academic areas.

If not identified for some type of academic intervention, otherwise high-performing students may, over time, compensate for lower performance by "learned behavioral or adaptive neurological modifications"<sup>21</sup> and other strategies to cope with an undiagnosed learning disability.<sup>22</sup> This means that the student may learn to make up for inadequacies in academic performance. One way to measure the effect of these learned behaviors and adaptations is through psychological

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<sup>18</sup> See Gilman et al., *supra* note 10, at 5–6.

<sup>19</sup> Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,204 (Prior academic success does not necessarily preclude a finding of the existence of a substantially limiting learning disability.)

<sup>20</sup> See Part III(C), *infra*.

<sup>21</sup> See Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,237.

<sup>22</sup> See Gilman et al., *supra* note 10, at 5–10 (discussing by example some common coping strategies used by students and parents in the early years of education through college); see also 81 Fed. Reg. 155, 53,237

testing over the course of a student's academic career. There are several psychological tests designed to measure a student's academic achievement and overall intelligence.<sup>23</sup> A student with a learning disability that is self-mitigated by learned behaviors and adaptations may demonstrate a lower intelligence quotient (IQ)<sup>24</sup> when compared to a similarly situated student receiving intervention or some type of academic accommodations to address discrepancies in achievement for one or more academic areas. When these self-mitigating measures are at play, one might expect to see more even levels of achievement across the board when compared to prior evaluations.<sup>25</sup>

During the critical years of the shift from the ability/achievement discrepancy model to RTI, two students with the same learning disability, if identified a couple of years apart, could be subject to very different interventions. Students identified as learning-disabled before IDEA 2004 would be better situated to gain access to accommodations to help them with their disabilities through graduation from high school because those students would be "regarded as having [a disability]."<sup>26</sup> After IDEA 2004 and the implementation of RTI, it is possible that a student with the same learning disability would not even be identified due to progress with interventions.<sup>27</sup> If an unidentified student is evaluated either by the school system or a private evaluator and found to have a learning disability, the student will not qualify for intervention under the new law until the student's grades fall below minimum standards.<sup>28</sup>

The takeaway from this background sketch is that in the K-12 realm, IDEA is geared toward special education services, and Section 504 is geared toward accommodations (i.e. "related services") that do not rise to the level of special education intervention. The student in the sketch above who excels in other areas,

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<sup>23</sup> WAIS-IV, Woodcock-Johnson III, Wide Range Achievement. Some of these tests measure IQ, aptitude, ability (WAIS) and some measure achievement (WJ-III). *See, e.g.,* Gilman et al., *supra* note 10, at 5-10.

<sup>24</sup> IQ is representative of a student's overall ability or aptitude. For purposes of this Note, "ability" and "aptitude" will be considered synonymous.

<sup>25</sup> If the student excels in reading but is only average in math, one would expect to see those two achievement scores come closer together over time if no intervention is in place—with reading scores being lowered, and math scores rising when evaluations are compared over time. *See* Gillman et al., *supra* note 10, at 5 (discussing discrepancies that may arise in assessment scores for twice-exceptional students (students who are "gifted," but also learning-disabled)). In essence, think of this as the student's mental resources and ability as a commodity. Then imagine the student shifting his or her of mental resources and abilities to the area of weakness by drawing mental resources away from a higher-performing ability to "average out" the discrepancy in overall achievement.

<sup>26</sup> The student may be better able to establish the existence of disability under the "regarded as" prong of the ADAAA. 42 U.S.C. § 12102(1)(C) (2008).

<sup>27</sup> Gilman et al., *supra* note 10, at 3.

<sup>28</sup> However, with this private-party diagnosis, some students may be able to receive accommodations based on broader requirements in Section 504 when they are not eligible for intensive special education intervention under IDEA. Other learning-disabled students (and their parents) may be satisfied with academic performance, and they may never entertain accommodations under Section 504. For additional, brief background information on RTI, see SWANSON ET AL., HANDBOOK OF LEARNING DISABILITIES 28-29 (2d ed. 2014).

but is only average in math would need to seek accommodations under Section 504 in order to receive some beneficial remediation. Similarly, a student who qualifies for special education intervention under RTI is (in theory) automatically eligible for future, less-intensive accommodations under Section 504. Both IDEA and Section 504 require a disability determination and an accommodation determination. The ADA governs the disability determination at both the K-12 level and the post-secondary level. Section 504, alone, governs accommodation determinations at the post-secondary level.

For purposes of the discussion that follows, the reader should have a basic understanding of the shift from the ability/achievement discrepancy model advocated in IDEA 1997 to the underachievement model (RTI) advocated in IDEA 2004. This shift in how students are identified, or not identified, early in their academic careers and the potential academic consequences for the student over time are important to bear in mind because students are identified as learning-disabled at different ages.<sup>29</sup>

## II. Posture for Uniform Standards

### A. The Law School Example

Historically, scholars and legal professionals have argued that undergraduate GPA and LSAT<sup>30</sup> scores are the best predictors of success in law school.<sup>31</sup> If this belief is to ring true into the future, both legal education and the world of lawyering are headed for trouble based on recent trends. Scores on LSAT and bar exams continue to drop.<sup>32</sup> At the same time, law schools are gradually relaxing admissions standards so that they can admit enough students to stay in business.<sup>33</sup>

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<sup>29</sup> AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 71 (5th ed. 2013) (“Changes in manifestation of symptoms occur with age, so that an individual may have a persistent or shifting array of learning difficulties across the lifespan.”); see also SWANSON ET AL., *supra* note 28, at 34–47 (discussing identification of learning disabilities and different classification models).

<sup>30</sup> The Law School Admission Test is administered by the Law School Admissions Council, which is a private organization. The LSAT is the most commonly accepted entrance exam for students applying to law school. *But see*, Stephanie Francis Ward, *Harvard Law will accept GRE as entrance exam*, A.B.A. J. (Mar. 9, 2017, 8:35 AM), [http://www.abajournal.com/news/article/harvard\\_accepts\\_gre\\_entrance\\_exam](http://www.abajournal.com/news/article/harvard_accepts_gre_entrance_exam).

<sup>31</sup> See, e.g., Mark Hansen, *What do failing bar-passage rates mean for legal education--and the future of the profession?*, A.B.A. J. (Sept. 01, 2016), [http://www.abajournal.com/magazine/article/legal\\_education\\_bar\\_exam\\_passage](http://www.abajournal.com/magazine/article/legal_education_bar_exam_passage) (discussing recent declines in both LSAT and Multistate Bar Exam (MBE) scores and the correlations among LSAT scores, success in law school, and bar passage rates). However, the Author took the LSAT three times and his highest score was 146. After 30 hours in the part-time Juris Doctor program at Savannah Law School, the Author's GPA was 3.36, and he ranked second in the part-time class. Author does not receive academic accommodations and did not request accommodations on the LSAT.

<sup>32</sup> See *id.*

<sup>33</sup> See Stephanie Francis Ward, *LSAT scores at high-risk schools getting worse, according to analysis by law school reform group*, A.B.A. J. (Feb. 2, 2017, 2:25 PM), [http://www.abajournal.com/news/article/lsat\\_scores\\_at\\_high\\_risk\\_schools\\_getting\\_worse\\_says\\_paper\\_in\\_favor\\_of\\_tight](http://www.abajournal.com/news/article/lsat_scores_at_high_risk_schools_getting_worse_says_paper_in_favor_of_tight) (discussing “exploitation” practices by at least 22

Despite the rigorous admissions process, applications for the Juris Doctor program (J.D. program) have seen a small increase.<sup>34</sup>

Many prospective law students have suffered through open house at this school or that school, trying to decide which law school is the best fit. For those of us who have had the privilege to be a part of this dialogue, we often find ourselves answering a common question: “Is it true that they try to weed you out in the first year?” Yes, the misconception that law schools are trying to “weed out” students in their 1L year is alive and well. The concern expressed by these prospective students is well-founded. Students do have to worry about “beating” their peers if they want a small slice of the “A-pie.” Most law schools evaluate students based on a curved grading structure, with recommended distributions.<sup>35</sup> Each student is graded in comparison to his or her peers. A paper that gets an “A” in one cohort, might very well be a C in another. Just like the old law school adage: “it depends.”

Rightly or wrongly, many employers and most federal clerkship positions available to fresh law school graduates require high standing in the student’s graduating class. In a professional field, where grades and academic performance are directly correlated to early success in the legal profession, law students must give their best performances on high-stakes, time-pressured exams if they want a head start in the legal field after law school.

Notably, learning-disabled students often stand at a disadvantage to their peers when it comes to processing speed and the ability to rapidly synthesize information.<sup>36</sup> A learning-disabled law student with a processing deficiency may not do well on timed exams in the traditional “issue spotting” format with multiple fact patterns. The issue-spotting exam format requires a student to identify the legal issues in the fact pattern, remember the rules (the law), and apply his or her knowledge of the law to a new set of facts (just read in the exam room), then clearly write out an essay answer IRAC format.<sup>37</sup> The law student only has

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law schools, where “very high risk” law schools admitted students with lower LSAT scores. According to the article, an investigation by the Law School Transparency group revealed that “26 ABA-accredited law school were an ‘extreme risk’ for exploiting students for tuition.”)

<sup>34</sup> Stephanie Francis Ward, *Slight increase in 1Ls for 2016, new ABA data shows*, A. B. A. J. (Dec. 15, 2016, 1:10 PM), [http://www.abajournal.com/news/article/slight\\_increase\\_in\\_1ls\\_for\\_2016\\_aba\\_consumer\\_info\\_shows/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/slight_increase_in_1ls_for_2016_aba_consumer_info_shows/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email).

<sup>35</sup> See, e.g., *2014–15 School of Law Catalog [archived]*, WASH. & LEE U., [http://catalog.wlu.edu/preview\\_program.php?catoid=12&poid=491](http://catalog.wlu.edu/preview_program.php?catoid=12&poid=491) (last visited July 10, 2018). However, Harvard and other Ivy League schools are moving toward a three-tiered grading structure that allows for less emphasis on grades and more emphasis on “experiential learning.” See *Harvard Law School Grading Policy*, HARV. L. SCH., <http://hls.harvard.edu/dept/ocs/employers/hls-grading-policy/> (last visited July 10, 2018) (“All Harvard Law School courses, seminars, clinicals and written work . . . will be graded Honors, Pass, Low Pass, or Fail (‘H, P, LP, or F’).”).

<sup>36</sup> In layman terms, a processing-deficient student is often slower at completing complex tasks than his or her peers. See, e.g., Gilman et al., *supra* note 10, at 10 (discussing Student E as a learning-disabled law student with processing deficiencies).

<sup>37</sup> Issue, Rule, Application, Conclusion. Several other answer formats exist. See RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE*, 109–47

about three hours to come up with a coherent essay answer. A learning-disabled law student with information processing deficiencies may do better on exams when given only one complex fact pattern, where the grade is based primarily on depth of analysis. By giving a processing-deficient law student less new information, the student may be better able to apply his or her knowledge of the law to the facts, and may stand a better chance at receiving a fair grade when given an exam format that is compatible with his or her information processing weaknesses.<sup>38</sup>

When learning-disabled law students find themselves not experiencing the same level of academic success that they are used to, they may resort to remedial measures to combat their deficiencies. Learning-disabled law students may start meeting more frequently with professors, they may start utilizing supplemental materials (such as commercial outlines and canned briefs), or they may ask for some type of academic accommodations to better their chances at receiving a fair evaluation of their knowledge of the law.<sup>39</sup>

It is possible that while attending law school, a law student may discover for the first time that he or she has a learning disability that has gone undiagnosed.<sup>40</sup> Typically, if a learning-disabled law student chooses to seek academic accommodations, he or she will bear the burden of proof to establish the existence of a qualified disability or handicap that substantially limits one or more major life activity.<sup>41</sup> The student must provide supporting documentation that (1) establishes the existence of a learning disability; (2) explains how the learning disability currently affects the student's life; and (3) describes the relationship of the disability to the requested accommodations.<sup>42</sup> After submitting the required documentation for review, the student receives a response from the decision-maker as to whether accommodations have been granted or denied. If accommodations are denied, the learning-disabled law student may be able to exercise appeal rights established by the school, if any exist.

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(2009) (Pages 109 to 147 of the 2015 reprint. Chapter 9 How To Spot Issues, and What To Do Once You Spot Them. Discussing issue spotting and IRAC format of law exams.). The essay portion of the bar exam is also structured this way.

<sup>38</sup> This does not necessarily mean the exam is "easier." In the example given in the text, if the processing-deficient student is given an exam where the grade is based on depth of analysis of a single fact pattern, more analysis and application of law to fact should be expected than would be expected on an exam with multiple fact patterns. In the Author's opinion, the ability to quickly identify legal issues is not as important as the ability to identify and express understanding of the legal theories applicable to those legal issues.

<sup>39</sup> Common testing accommodations are extra time and/or a private or semi-private testing room. See Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,205-17.

<sup>40</sup> See AM. PSYCHIATRIC ASSOC., *supra* note 29, at 66-74 (discussing Specific Learning Disorders and development and course throughout the lifespan, pages 70-72).

<sup>41</sup> 28 C.F.R. § 35.130 (2016); 28 C.F.R. § 36.309 (2016).

<sup>42</sup> See 28 C.F.R. Part 35; Rehabilitation Act § 504. Essentially, the person seeking accommodations should describe how the accommodations will help ameliorate the hindering effects of the disability.

*Uniform Disability Accommodations, Policy & Practice in Higher Education*

Public law schools vary widely in their policies and procedures regarding documentation required to receive academic accommodations based on the presence of a learning disability.<sup>43</sup> Many public law schools are part of a larger public university, and those law schools may defer to university policies and procedures when it comes to disability accommodation decisions. In many instances, it may not be clear exactly who will be reviewing disability documentation or what type of documentation is needed. It is necessary to establish uniform policies and procedures when reviewing disability accommodation requests in order to ensure fair treatment and provide an equal opportunity for learning-disabled law students to succeed.

B. The ABA On Disabilities & Reasonable Accommodations:

In 2011, the ABA Commission on Mental and Physical Disability Law recognized that “[t]here has been a small but steady rise in the number of law students with disabilities who request accommodations over the past few years” noting that “[a]lthough there is a rise in total students enrolled over this period, the percentage of law students who request accommodations has increased as well.”<sup>44</sup> The percentage of law students enrolled in both J.D. and LL.M. programs who were provided accommodations rose from 3.2% in 2009–2010 to 3.4% in the 2010–2011.<sup>45</sup> The ABA Commission on Mental and Physical Disability Law noted that “despite such increases . . . these figures do not reflect an actual estimate or figure as to how many law students in ABA-accredited law schools have a disability.”<sup>46</sup>

Amid concerns about practices by LSAC when flagging scores as “non-standard” when accommodations were granted for the LSAT, the Section of Legal Education and Admissions to the Bar (LEAP) established a Standards Review Committee to review ABA Standards related to disability accommodations. On April 19, 2011, the first email and memorandum were sent to the committee. That email read, in part:

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<sup>43</sup> For additional background and context, two articles are particularly helpful. Susan E. McGuigan, *Documenting Learning Disabilities: Law Schools’ Responsibility to Set Clear Guidelines*, 36 J. COLLEGE & UNIV. L. 191 (2009). McGuigan’s article is an excellent backdrop for the discussion in this Note, as her research had similar focus and dealt solely with ABA-accredited law schools. See also LaToya Jones Burrell, *So What’s Next? Life After the Americans with Disabilities Amendment Act of 2008 for the Learning Disabled Law Student*, 41 SOUTHERN UNIV. L. REV. 59 (2013). Burrell’s article is an excellent discussion of the questions and concerns raised in the time between McGuigan’s work after the ADAAA, and now, after revisions to the ADAAA implementing regulations at 28 C.F.R. Part 35. This Author’s Note focuses on the concepts and research models proposed in each of these articles and builds on the recommendations of both McGuigan and Burrell.

<sup>44</sup> A.B.A. COMMISSION ON MENTAL & PHYSICAL DISABILITY LAW, A.B.A. DISABILITY STATISTICS REPORT (2011) (quoted from section entitled “Lawyers with Disabilities in the Legal Profession,” section III(c)(i) of report).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

As you may know, the Standards are what all ABA-approved law schools must meet in order to receive ABA-accreditation. The legal education community takes the Standards very seriously. Some of the Standards touch on disability either directly or indirectly, and nearly all of these Standards do so in an inadequate manner. . . . Without going into too much detail at this time, there are serious and well-founded concerns that applicants and law students with disabilities are facing problems in receiving accommodations from testing agencies and law schools. There also appears [sic] to be problems in eliminating bias within the profession regarding this population. Whether it is flagging on the LSAT, a denial of JAWS for a civil procedure final, or the faulty assumption that someone with a learning disability is automatically unfit to attend law school, those in the early part of the legal profession's pipeline who happen to have disabilities need help!<sup>47</sup>

The memorandum attached to the above email proposed changes to Standard 213, Reasonable Accommodations for Qualified Individuals with Disabilities<sup>48</sup> (Standard 207, as of 2017). Among the changes included was a provision that stated: "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;]."<sup>49</sup>

Of particular note in the memorandum is the recommendation for the "Creation of Appendix 4. Accommodating Standardized Test-takers."<sup>50</sup> The creation of Appendix 4 was suggested by LEAP in order to "assist testing agencies in providing reasonable accommodations to applicants with disabilities."<sup>51</sup> This reference was clearly geared toward the Law School Admissions Council (LSAC), and most likely suggested in reaction to a class action lawsuit involving denial of accommodations for, and the flagging of scores where accommodations were granted on the Law School Admissions Test (LSAT, administered by LSAC).<sup>52</sup>

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<sup>47</sup> Email and Memorandum from William J. Phelan, IV, Esq., Special Projects & Technology Coordinator, Section of Legal Education & Admissions to the Bar, Commission on Mental and Physical Disability Law, A.B.A. (Apr. 19, 2011) ([https://www.americanbar.org/content/dam/aba/uncategorized/2011/2011Apr21\\_SRC\\_comments.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/2011/2011Apr21_SRC_comments.authcheckdam.pdf)) (on file with author) [hereinafter "LEAP, April 2011 Email & Memorandum"].

<sup>48</sup> *Id.* at 2–7.

<sup>49</sup> *Id.* at 3 (alteration suggested in original text).

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.*

<sup>52</sup> Dep't. Fair Emp. & Hous. v. Law Sch. Admissions Council, Inc., 896 F. Supp. 2d 849 (N.D. Cal. 2014); see also *Law School Admission Council Agrees to Systemic Reforms and \$7.73 Million Payment to Settle Justice Department's Nationwide Disability Discrimination Lawsuit*, U.S. DEPT. OF JUST. (May 20, 2014), (<https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice>) (announcing the settlement under consent decree resulting in "\$7.73 million in penalties and damages to compensate over

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Despite the circumstances that spurred the Appendix 4 suggestion, the proposed language was quite useful and generally mirrored many of the ideal guidelines proposed in this Note. For example, one of the suggested provisions was that “test[s] 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.”<sup>53</sup> Another suggestion was to give “[d]eference to the opinion and diagnoses of the applicant’s primary treating medical professional when deciding whether to grant an accommodation.”<sup>54</sup> Other suggestions included: (1) providing for appeals processes; (2) explaining the accommodations process and responsibilities of the person seeking accommodations; (3) making timely decisions and providing approximate timelines; and (4) providing “adequate detail as to why . . . accommodation was denied and the basis for the denial.”<sup>55</sup>

The Creation of Appendix 4 made it into the May 2, 2011, revision of the memorandum for updating the Standards with the same language as explained above.<sup>56</sup> However, if we look at the Standards today, the two appendices to the Standards address academic freedom and tenure (Appendix 1), and “LSAC Cautionary Policies Concerning LSAT Scores” (Appendix 2).<sup>57</sup> There is no mention of disability or impairment whatsoever in Appendix 2. Appendix 2 shifted focus from an advocacy of applicants and test takers to a “C.Y.A.” approach for LSAC and law schools who consider LSAT scores in their admissions processes.<sup>58</sup>

Standard 207 now addresses Reasonable Accommodation for Qualified Individuals with Disabilities.<sup>59</sup> The full 165-word text of Standard 207, and Interpretation 207-1, reads as follows:

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6,000 individuals nationwide who applied for testing accommodations on the Law School Admission Test.”)

<sup>53</sup> LEAP, April 2011 Email & Memorandum, *supra* note 47, at 7 (citing 28 C.F.R. § 36.309(b)(1)(i)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Email and Memorandum from William J. Phelan, IV, Esq., Special Projects & Technology Coordinator, Section of Legal Education & Admissions to the Bar, Commission on Mental and Physical Disability Law, A.B.A. (May 2, 2011), [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011May11\\_standards\\_infogaterhing.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011May11_standards_infogaterhing.authcheckdam.pdf) [hereinafter “LEAP, May 2011 Email & Memorandum”].

<sup>57</sup> A.B.A., *2016–2017 Standards and Rules of Procedure for Approval of Law Schools*, Appendix 1 & 2, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_appendices.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_appendices.authcheckdam.pdf) (last visited July 10, 2018) [hereinafter “A.B.A. LAW SCHOOL STANDARDS AND RULES”].

<sup>58</sup> See *id.*

<sup>59</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017*, A.B.A. Standard 207. Reasonable Accommodation for Qualified Individuals With Disabilities, (2017), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter2.authcheckdam.pdf) (last visited July 10, 2018) [hereinafter “Standard 207”].

Standard 207. Reasonable Accommodation for Qualified Individuals With Disabilities

(a) Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 205, requires a law school to provide such students, faculty and staff with reasonable accommodations consistent with applicable law.

(b) A law school shall adopt, publish, and adhere to written policies and procedures for assessing and handling requests for reasonable accommodations made by qualified individuals with disabilities.

*Interpretation 207-1*

Applicants 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 and each student’s qualifications in light of reasonable accommodations. Reasonable accommodations are those that are consistent with the fundamental nature of the school’s program of legal education, that can be provided without undue financial or administrative burden, and that can be provided while maintaining academic and other essential performance standards.<sup>60</sup>

As currently written, Standard 207 is utterly useless. The language “qualified individuals with disabilities” in Standard 207 does not track the “qualified handicapped person” definition in the implementing regulation for Section 504, and it does not lend itself to the broad coverage of “disability” in the implementing regulation for the ADA.<sup>61</sup> The current Standard 207 language keeps “qualified” in its text, over the LEAP Standards Review Committee’s suggestions for deletion in April and May, 2011.<sup>62</sup> The LEAP Standards Review Committee also suggested adding an interpretation to this Standard that would clarify “applicable law,” such as Section 504 and the Americans with Disabilities Act and the implementing regulations, which would have given fair notice to schools about what laws are “applicable.”<sup>63</sup> The previous point may seem absurd, considering that these are *law schools* we are discussing, but research for this Note revealed that only seventy-four of eighty-three public law schools had disability accommodations policies that cited relevant laws, and—even when relevant laws were cited—there was no uniformity.<sup>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> See 34 C.F.R. § 104.3(k) (2016); 28 C.F.R. § 35.108 (2016).

<sup>62</sup> LEAP, April 2011 Email & Memorandum, *supra* note 47, at 2–3; see also LEAP, May 2011 Email & Memorandum, *supra* note 56, at 1–3.

<sup>63</sup> LEAP, May 2011 Email and Memorandum, *supra* note 56, at 2–3.

<sup>64</sup> See Part IV, *infra*.

Furthermore, current Standard 207 language incorporates *none* of the “broadening” suggestions from the LEAP Standards Review Committee, which would have clearly brought Standard 207 more in line with the broad coverage intended by Congress when passing the ADA. Specifically, the current Standard 207 language appears to have flatly rejected the suggested language describing reasonable accommodations as “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;].”<sup>65</sup> What is particularly embarrassing about the *rejection* of this change is that “the inserted language ‘maximum extent feasible’ comes from a 1991 ABA resolution regarding providing benefits to ABA members with disabilities.”<sup>66</sup>

Perhaps there is still hope to be had if we look to Standard 508 (Student Services) which sets forth certain “basic student services” that “[a] law school shall provide.” In May 2011, the LEAP Standards Review Committee suggested revision of the Standard (Standard 511 at that time) to include “disability support services” and “mental health/substance abuse support services.”<sup>67</sup> The full text of Standard 508 reads:

Standard 508. 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 and debt counseling, and career counseling to assist students in making sound career choices and obtaining employment. If a law school does not provide these student services directly, it shall demonstrate that its students have reasonable access to such services from the university of which it is a part or from other sources.<sup>68</sup>

If you didn’t notice, “disability support services” didn’t make the cut, as suggested by the LEAP Standards Review Committee in May 2, 2011. Specifically, LEAP explained in May 2011 that “[m]any law schools have disability support services within their law school, and many more have these services at the

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<sup>65</sup> LEAP, May 2011 Email and Memorandum, *supra* note 56, at 2–3 (proposed alteration in brackets, and later noting that the changes would “reflect the basic legal requirements under the ADA”).

<sup>66</sup> *Id.* at 3 (citing ABA Resolution on Benefits to Members with Disabilities (Feb. 1991), [http://www2.americanbar.org/sdl/Documents/1991\\_MY\\_102.pdf](http://www2.americanbar.org/sdl/Documents/1991_MY_102.pdf)). This hyperlink is correct according to the email, but the cited document is no longer available online, even when searching the ABA archives.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017*, A.B.A., [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter5.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter5.authcheckdam.pdf) (last visited July 10, 2018) [hereinafter: “Standard 508”].

university-wide level” and further cautioned that “it is imperative to make sure such services are available to assist students with disabilities.”<sup>69</sup>

In January 2014, the ABA Task Force on the Future of Legal Education (hereinafter “Task Force”) issued its Report and Recommendations.<sup>70</sup> Although this report focused primarily on broad financial concerns and increasing societal access to legal services, the report also acknowledged the ABA’s hesitation to create prescriptive standards for law schools. The report noted that “[t]he current ABA Standards are largely prescriptive” but that “[p]rescriptions, when well crafted, can have the benefit of marking boundaries of what is permissible or obligatory.”<sup>71</sup> Additionally the report noted that “in appearing to control action . . . [prescriptive Standards] seem to provide easy solutions” and such Standards “only work if they can credibly be enforced.”<sup>72</sup> With an apparent focus on cost saving and essentially wiping the slate clean to make way for future change, the Task Force acknowledged that such enforcement mechanisms are often complex and that “[p]rescriptions, if effective, are also relatively inflexible . . . [and] requir[e] periodic updating to adapt to changing conditions.”<sup>73</sup> Ultimately, the Task Force did not recommend “new prescriptions as solutions to current problems in the system of legal education.”<sup>74</sup> Instead, the Task Force recommended “that a number of the Standards be repealed or dramatically changed.”<sup>75</sup>

The concerns of the Task Force hint at the idea of doubtful enforcement. However, these concerns have no real footing when it comes to the significant regulatory structure and body of law supporting the inclusion of disabled persons in society.<sup>76</sup> The Task Force report stated that “[w]hat is lacking is coordination, a full understanding of tools available to effect change, mechanisms for assessment of progress, and a strategy for long-term continuous improvement.” This language has some validity when it comes to establishing uniform disability accommodation policies, considering the complexity of that task. However, the ABA must recognize its position as the de facto warden of law in America, and it

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<sup>69</sup> *Id.* (proposing addition of “disability support services, mental health/substance abuse support” to Standard 511. Student Support Services, which is currently Standard 508).

<sup>70</sup> *Report And Recommendations*, A.B.A. TASK FORCE ON THE FUTURE OF LEGAL ED. 19 (Jan. 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) (last visited July 10, 2018).

<sup>71</sup> *Id.* at 19.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *See* Burrell, *supra* note 43, at 103. (“Just because one does not agree with a law does not mean they can elect not to follow the law.”). In the conclusion of her article, Burrell’s statement comes after proposing that the A.B.A. should incorporate disability accommodations guidelines in the Standards for accreditation.

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must recognize its powerful influence in legal education as the voice of change and direction. The ABA would do well to remember:

Policy is not a static commodity. It is a dynamic road map that periodically should be reviewed within the context of legal precedents, evolving developments in the field, and emerging “best practices.”<sup>77</sup>

As one of the largest business leagues in the world, the ABA has a history of staunch advocacy for disabled persons.<sup>78</sup> In recent years, the ABA has expressed concerns over diversity and inclusion with specific focus on gender, race, national origin, etcetera—and to a lesser extent—disability.<sup>79</sup> As the Task Force noted, “[l]aw schools and legal education do not function in isolation.”<sup>80</sup> A guiding principle of the Task Force is to “minimize obstacles for those who wish to pursue a career in legal services and who have the ability to do so.”<sup>81</sup>

At the time of the LEAP Standards Review Committee’s suggestions to change and broaden some of the Standards addressing disabilities, perhaps it was reasonable that the ABA did not adopt those changes because there had not yet been a resolution to the class-action lawsuit that impliedly spurred the suggestions.<sup>82</sup> The ABA compartmentalized the issue in *Dep’t. Fair Emp. & Hous. v. Law Sch. Admissions Council, Inc.*, as specific to admissions practices because the case involved LSAC’s lack of transparency and questionable practices in administering and scoring the LSATs of disabled test-takers who had requested accommodations.<sup>83</sup> However, as of January 26, 2015, the Final Report of the “Best Practices” Panel from this case provides adequate guidance for addressing reasonable accommodations requests and is cited by the DOJ’s Civil Rights Division as “Model Testing Accommodation Practices Resulting From Recent Litigation.”<sup>84</sup>

To be fair, the ABA passed Resolution 111 in February 2012, which fairly incorporated some of the concerns expressed by the LEAP Standards Review

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<sup>77</sup> Stan F. Shaw et al., *supra* note 1, at 142.

<sup>78</sup> See generally *About Us*, A.B.A. COMM. ON DISABILITY RIGHTS, [https://www.americanbar.org/groups/disabilityrights/about\\_us.html](https://www.americanbar.org/groups/disabilityrights/about_us.html) (last visited July 10, 2018) (for history and background).

<sup>79</sup> See, e.g., *List of House of Delegates Resolutions 107, 111, 113*, A.B.A., [https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions.html](https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions.html) (last visited July 10, 2018) (for overview of resolutions) [hereinafter “A.B.A. Resolution 107,” “A.B.A. Resolution 111,” and “A.B.A. Resolution 113”].

<sup>80</sup> *Report And Recommendations*, *supra* note 70, at 6.

<sup>81</sup> *Id.* at 8.

<sup>82</sup> See *Dep’t. Fair Emp. & Hous. v. Law Sch. Admissions Council, Inc.*, 896 F. Supp. 2d 849 (N.D. Cal. 2014).

<sup>83</sup> See *id.*

<sup>84</sup> See *Testing Accommodations*, U.S. DEPT. JUST. CIV. RIGHTS DIV., [https://www.ada.gov/regs2014/testing\\_accommodations.pdf](https://www.ada.gov/regs2014/testing_accommodations.pdf) (last visited July 10, 2018); see also *Final Report of the “Best Practices” Panel*, A.D.A., [http://www.ada.gov/lisac\\_best\\_practices\\_report.docx](http://www.ada.gov/lisac_best_practices_report.docx) (last visited July 10, 2018); see also *Dep’t. Fair Emp. & Hous.*, 896 F. Supp. 2d.

Committee.<sup>85</sup> Unfortunately, there is still little mention of disability accommodations in the ABA Standards for Accreditation, and what language does exist is far too ambiguous for such a complex topic. The current language of Standard 207 does not accurately reflect the intent of the ADA, nor does it track the language of Section 504. Instead, it *requires* law schools to come up with “written policies and procedures for assessing and handling requests for reasonable accommodations.”<sup>86</sup> This strangely ambiguous requirement opens the door for wildly different interpretations as to what policies and procedures are adequate.

Despite the valiant efforts of Mr. William Phelan, IV, Esq., and the LEAP Standards Review Committee, it appears that little was done to “[help!] those in the early part of the legal profession’s pipeline who happen to have disabilities.”<sup>87</sup> Although there is no shortage of guidance for LSAC disability accommodation practices, there is no clarity on what, if any, persuasive value this guidance has for ABA-accredited law schools. The proposed 2011 changes to Standards 207 and 508, and the suggestion for the “Creation of Appendix 4” would have given law schools a legitimate starting point in drafting the written policies and procedures required by Standard 207.<sup>88</sup>

As the Task Force on the Future of Legal Education noted, “[e]nablement or empowerment sometimes needs to be coupled with facilitation to assist the empowered person in taking action or implementing an appropriate plan.”<sup>89</sup> This Author has been empowered and is taking action by writing this Note. Our discussion now turns on creating uniform policies and procedures for addressing requests for reasonable accommodations.

### III. Disability Accommodations Process & the Laws of Conflation

#### A. Enter Major Conflation (A.K.A. — AHEAD)

Learning-disabled students are especially vulnerable to conflated determinations of disability versus determinations of reasonable accommodation because the same documentation (psychological evaluation) is often used for both determinations. The disability accommodation process requires the decision maker to look at the same documentation and evaluate it under two separate standards. For the disability determination, Congress intended a broad standard that “usually will not require scientific, medical, or statistical evidence.”<sup>90</sup> For the accommodation determination, the standard is an individualized determination of

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<sup>85</sup> See A.B.A. Resolution 111, *supra* note 79 (addressing LSAT accommodation practices).

<sup>86</sup> Standard 207, *supra* note 59.

<sup>87</sup> LEAP, April 2011 Email and Memorandum, *supra* note 47, at 7, (and accompanying text).

<sup>88</sup> LEAP, May 2011 Email and Memorandum, *supra* note 56, at 7–8 (suggesting revision to section IX of proposal “in order to offer guidance not only to test administration agencies, but also law schools for exams and tests”).

<sup>89</sup> *Report And Recommendations*, *supra* note 70, at 21.

<sup>90</sup> 28 C.F.R. § 35.108(d)(1)(vii) (2016).

whether the accommodations are reasonable and appropriate to the needs of the student. To understand how to differentiate the two determinations while looking at the same documentation, we need step back and look at some broader guidance for making disability accommodation decisions.

In 2012, the Association of Higher Education and Disability (AHEAD) stated in its guidance for documentation practices on accommodation requests that:

*Disability and accommodation requests should be evaluated using a commonsense standard, without the need for specific language or extensive diagnostic evidence. Using diagnostic information as a tool in reviewing requests for accommodation is different than using it for treatment. Determining accommodations requires a more limited range, level, and type of information. These two processes should not be conflated.*<sup>91</sup>

If you weren't confused by that language, perhaps you could be an excellent decision maker for disability and accommodation determinations. If you are still confused, you are probably not alone. At first blush, it might appear that the block quote above is distinguishing disability determinations from accommodation determinations. Not so fast. The above block quote may be where the conflation of disability determinations with accommodation determinations began.

The first sentence of the block quote describes how “disability and accommodation requests” should be evaluated with a commonsense standard. So far so good. But what did AHEAD mean by the second sentence: “Using diagnostic information as a tool in reviewing requests for accommodation is different than using it for treatment”? How is anything related to “treatment” relevant? The third sentence discusses the proper scope of “accommodations determinations,” but there is no discussion of “disability.” The third sentence appears to have changed the subject from “disability and accommodation requests” to “accommodations” only. The conclusion to the block paragraph warns that the “two processes should not be conflated.” Can you identify the “two processes?”

If we take advice from *Plain English for Lawyers*, we can avoid ambiguity by “clarify[ing] the reach of a modifier by repeating words. . . .”<sup>92</sup> By using “disability and accommodation requests” as the subject, the common understanding might be “disability requests and accommodations requests.” However, only “accommodations determinations” are discussed later in the paragraph. Even if we assume that the words “disability and accommodations” are modifiers for “requests,” there is no such thing as a “disability request.” Who would “request” a disability?

The two most logical interpretations for this ambiguous subject are (1) “disability [ ] accommodation requests” and (2) “disability [*determinations*] and accommodations requests.” If we subscribe to the first interpretation, there is

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<sup>91</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4, at 4 (emphasis added).

<sup>92</sup> RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 52 (5th ed. 2005) (discussing arranging words with care).

only one subject—disability accommodations requests—where the requests are those for “disability accommodations.” If we subscribe to the second interpretation, there are two subjects—disability determinations and accommodations requests—which would make more sense later in the paragraph when AHEAD says “[t]hese two processes should not be conflated.”

The advice given by AHEAD on avoiding conflation is essentially indecipherable. For our discussion, and for the sake of progress, we will assume that what AHEAD meant by *two process* was the following:

First Process: Granting accommodations is not a form of “treatment” for a disability. The primary purpose of the diagnostic information contained in medical or psychological evaluations is to assist treating professionals in providing proper treatment for a *patient’s* diagnosed disability.

Second Process: When the same documentation is considered in an academic setting as a basis for requesting disability accommodations, the decision maker does not assume the role of a treating professional. The accommodations decision maker should only use such medical or psychological documentation to make a commonsense judgment on whether requested accommodations are reasonable *in light of the student’s diagnosed disability*.<sup>93</sup>

Roughly four years after this indecipherable anti-conflation guidance was published by AHEAD, the United States Department of Justice (DOJ) published a revised Final Rule to Implement Title II and Title III of the ADA Amendments Act of 2008 (ADAAA).<sup>94</sup> The Title II regulations apply to public entities receiving federal funds, and the Title III regulations apply to private entities receiving federal funds. The regulations require these federal fund recipients to comply with the ADAAA.<sup>95</sup> For our discussion on public law schools, 28 C.F.R. Part 35 is the relevant ADAAA implementing regulation.<sup>96</sup> Appendix C in 28 C.F.R. Part 35 interprets the relevant implementing regulation.

In the revised regulations DOJ identified a now-familiar, common misconception that postsecondary institutions encounter when considering the disability/accommodation decisions and alluded that the changes came about partly because of testing agencies “conflating the disability determination with the

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<sup>93</sup> Marlan J. Eller, *Ground Control to Major Conflation: Protecting Learning-Disabled Law Students With Uniform Disability Accommodations Policy*, 5 SAVANNAH L. REV. 239.

<sup>94</sup> See 28 C.F.R. Parts 35 & 36 (2016).

<sup>95</sup> Appendix E in 28 C.F.R. Part 36 (for private entities) defers to Appendix C in 28 C.F.R. Part 35 (for public entities), therefore public and private law schools are subject to the same guidance. See 28 C.F.R. Part 36, app. E (2016). (“For Guidance providing a section-by-section analysis of the provisions to 28 CFR parts 35 and 36 published on August 11, 2016, see appendix C of 28 CFR part 35.”).

<sup>96</sup> 28 C.F.R. Part 35 applies to public entities (public law schools). 28 C.F.R. Part 36 applies to private entities (private law schools). The two regulations generally mirror each other in language and layout.

reasonable accommodation determination.”<sup>97</sup> DOJ clarified that the ADAAA is used for determining whether a person has a disability, *not* for determining whether accommodations based on a disability are reasonable.<sup>98</sup> In the disability/accommodation context, “the reference to academic standards in post-secondary education is unrelated to the purpose of [the ADAAA] and should be given no meaning in interpreting the definition of disability.”<sup>99</sup> This language clearly establishes that, in the academic context, the disability determination and the accommodation determination are distinct and separate.<sup>100</sup> This new guidance is extremely good news for learning-disabled students, who are especially vulnerable to conflated determinations of disability versus determinations of reasonable accommodations.

B. The disability determination—the ADA Amendments Act of 2008 and 28 C.F.R. Part 35

With the passage of the ADA Amendments Act of 2008 (ADAAA), Congress broadened the definition of “disability” “in response to earlier Supreme Court decisions that significantly narrowed the application of ‘disability’ under the ADA.”<sup>101</sup> The Final Rule issued by the United States Department of Justice (DOJ) clarified that the legislative intent in passing the ADAAA was “to restore the understanding that the definition of ‘disability’ shall be broadly construed and applied without extensive analysis.”<sup>102</sup> The DOJ further clarified that “Congress did not intend . . . for the threshold question of disability to be used as a means of excluding individuals from coverage.”<sup>103</sup> The purpose of issuing the Final Rule in August 2016 was to “incorporate the ADA Amendments Act’s changes to titles II . . . and III . . . of the ADA into the Department’s ADA regulations and to provide additional guidance on how to apply those changes.”<sup>104</sup>

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<sup>97</sup> Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,204–43; *see also* 28 C.F.R. Part 35, app. C (2016).

<sup>98</sup> *Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008*, 81 Fed. Reg. at 53,204–43; *see also* 28 C.F.R. Part 35, app. C; 28 C.F.R. Part 36, app. E.

<sup>99</sup> 28 C.F.R. Part 35, app. C; *see also* 28 C.F.R. Part 36, app. E (referring to full text of app. C).

<sup>100</sup> *See* 28 C.F.R. Part 35, app. C (“The Department [of Justice] does not consider it appropriate to include provisions related to testing accommodations in the definitional sections of the ADA regulations. . . . To the extent that testing entities are urging conflation of the analysis for establishing disability with that for determining required testing accommodations, such an approach would contradict the clear delineation in the statute between the determination of disability and the obligations that ensue.”) (responding to comments from testing entities requesting more guidance on the disability/accommodation relationship).

<sup>101</sup> Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,204.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 53,206 (citing H.R. Rep. No. 110–730, pt. 2, at 5 (2008)).

<sup>104</sup> *Id.* at 52,304.

In conducting an Initial Regulatory Assessment, DOJ “focused on estimating costs for processing and providing reasonable modifications and testing accommodations to individuals with learning disabilities and ADHD for extra time on exams as a direct result of the ADA Amendments Act.”<sup>105</sup> A primary focus of the Final Regulatory Assessment (published in the Federal Register) was “the increase in the number of postsecondary students or national examination test takers requesting and receiving accommodations—specifically, requests for extra time on exams—as a result of the changes made to the ADA by the ADA Amendments Act.”<sup>106</sup> This focus was borne out of Congressional intent when passing the ADAAA wherein “Congress was concerned about the number of individuals with learning disabilities who were denied reasonable modifications or testing accommodations (*e.g.*, extra exam time) because covered entities claimed these individuals did not have disabilities covered by the ADA.”<sup>107</sup> Finally, in addressing concerns that the revised ADAAA implementing regulation would result in significant increases in the number of students seeking accommodations in postsecondary education—thus resulting in higher costs for things like providing extra time on exams and hiring additional staff—the DOJ noted that the increase in these requests is most likely attributable to several different factors, unrelated to the language of the implementing regulation.

When seeking disability accommodations, a student must first establish disability under one of the following ADAAA definitions: (1) student has “a physical or mental impairment that substantially limits one or more major life activities of an individual;” (2) student has “a record of such an impairment;” or (3) student is “regarded as having such an impairment.”<sup>108</sup> This three-part definition was modeled after the definition of “handicap” in Section 504 the Rehabilitation Act of 1973.<sup>109</sup> In 2016, DOJ recognized that Congress intentionally modeled changes in the ADAAA with the expectation that courts would interpret the “definition of ‘disability’ and related terms, such as, ‘substantially limits’ and ‘major life activity’ . . . expansively and in favor of broad coverage.”<sup>110</sup> It is

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<sup>105</sup> *Id.* at 53,205. *But see id.* at 53,208 (“[T]he Department believes that persons with *all types of impairments* . . . will benefit from the ability to establish coverage under the ADA as amended.”) (emphasis added).

<sup>106</sup> *Id.* at 53,205. Also reference *id.* at 53,208 (“The Department’s regulatory assessment is not a statement about the coverage of the ADA. Rather it is a discussion of identifiable incremental costs that may arise as a result of compliance with the [ADAAA] and [the] implementing regulations. . . . [T]he Department believes that those costs are limited primarily to the context of providing reasonable modifications in higher education and testing accommodations by testing entities.”).

<sup>107</sup> *Id.* at 53,209 (“Congress anticipated that the [ADAAA] expanded definition [of ‘disability’] would especially impact persons with learning disabilities who assert ADA rights in education and testing situations.”).

<sup>108</sup> 42 U.S.C. 12102(1)(A)–(C); *see* 28 C.F.R. § 35.108(a)(1) (2016).

<sup>109</sup> *See* Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53,206 (“Congress expected that [these definitions] would be interpreted under the ADA ‘consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act. . . .’”) (citations omitted).

<sup>110</sup> *See id.*

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possible that among accommodations decision makers in higher education, this modeling of language between the two statutes and their implementing regulations has created some confusion as to the separate applications of the ADAAA and Section 504.

If disability is established solely under the “regarded as” prong, “entities covered by the ADA are not required to provide reasonable modifications” and the learning-disabled law student will need to demonstrate that he or she suffers from an “actual” disability that substantially limits a major life activity.<sup>111</sup> Learning disabilities are considered mental impairments that qualify as disabilities under the ADAAA.<sup>112</sup> In the revised regulation, DOJ did not change provisions stating that the person asserting disability must be substantially limited in one or more major life activity as compared to members of the general population.<sup>113</sup> Major life activities include, but are not limited to, breathing, speaking, learning, and writing.<sup>114</sup> The regulation interprets *nine rules of construction* for the term “substantially limits,” and specifies that the term is not meant to be a demanding standard.<sup>115</sup>

The disability determination must be made without consideration of ameliorating effects of mitigating measures.<sup>116</sup> Some examples of mitigating measures include medication, reasonable accommodations, and learned behavioral or adaptive neurological modifications.<sup>117</sup> The only mitigating measures that may be considered under the disability determination are “ordinary eyeglasses or contact lenses.”<sup>118</sup> After a decision maker has determined that a student’s documentation establishes the existence of a disability under the ADAAA, the decision maker must then consider the requested accommodations and determine whether the accommodations are reasonable (i.e. if granted, the requested accommodations would not result in a fundamental alteration to the student’s educational program).

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<sup>111</sup> *Id.* at 53,207–08; *see* 42 U.S.C. § 12201(h) (2008).

<sup>112</sup> *See* 28 C.F.R. § 35.108(b)(2) (2016).

<sup>113</sup> 28 C.F.R. § 35.108(d)(1)(v) (2016).

<sup>114</sup> *See* 42 U.S.C. § 12102(2)(A) (2008); 28 C.F.R. § 35.108(c) (2016).

<sup>115</sup> 28 C.F.R. § 35.108(d)(1) (2016). Additionally, in 28 C.F.R. Part 35, app. C, the Department of Justice stated, “[T]he nine rules of construction interpreting the term ‘substantially limits’ provide ample guidance on determining whether an impairment substantially limits a major life activity and are sufficient to ensure that covered entities will be able to understand and apply Congress’s intentions with respect to the breadth of the definition of ‘disability.’”

<sup>116</sup> *See* 42 U.S.C. § 12102(4)(E). This list is non-exhaustive.

<sup>117</sup> *See Protecting Students With Disabilities, supra* note 2.

<sup>118</sup> 42 U.S.C. § 12102(4)(E).

C. The modifications/accommodation determination and Section 504 of the Rehabilitation Act of 1973

Section 504 and its implementing regulation govern the accommodation decision at the postsecondary level.<sup>119</sup> Public law schools are required to comply with Section 504 under 34 C.F.R. Section 104.41, which applies to “postsecondary education programs or activities . . . that receive Federal financial assistance” *i.e.* federal student loans.<sup>120</sup> For public law schools, the J.D. program can be considered a “program or activity” in that “program or activity means all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education. . . .”<sup>121</sup>

The accommodation decision is more individualized and not as broad an inquiry as the disability determination under the ADAAA. Evidence of this individualized determination can be seen in the language of the implementing regulation of Section 504:

For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, *but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person’s needs.*<sup>122</sup>

In order to qualify for accommodations under Section 504 at the postsecondary level, the requesting student must be a qualified handicapped person “who meets the academic and technical standards requisite to admission or participation in the recipient’s education program.”<sup>123</sup> Here, the definition of “handicap” mirrors the definition of “disability” as defined by the ADAAA implementing regulation at 28 C.F.R. § 35.108(a)(1) in that “[h]andicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”<sup>124</sup>

As with the ADAAA regulations, major life activities are defined essentially the same under Section 504.<sup>125</sup> As with the ADAAA regulations, specific learning disabilities are included in the list of physical or mental impairments applicable

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<sup>119</sup> 34 C.F.R. § 104.1 (“The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.”).

<sup>120</sup> 34 C.F.R. § 104.41. While the scope of this Note focuses on public higher education institutions, there is no distinction between public and private institutions in the language of the law in this instance.

<sup>121</sup> 34 C.F.R. § 104.3(k)(2)(i).

<sup>122</sup> 34 C.F.R. § 104.4(a)(2) (2016) (emphasis added).

<sup>123</sup> 34 C.F.R. § 104.3(l)(3) (2016).

<sup>124</sup> 34 C.F.R. § 104.3(j)(1) (2016). *Compare* 34 C.F.R. § 104.3(j)(1); *with* 42 U.S.C. §§ 12102(1)(A)–(C); *and* 28 C.F.R. § 35.108(a)(1).

<sup>125</sup> *See, e.g.*, 34 C.F.R. § 104.3(j)(2)(ii) (2016).

under Section 504.<sup>126</sup> This redundancy of language in both ADAAA and Section 504 may serve as a plausible basis for confusion over what these laws mean to accomplish individually, and may contribute to conflation of disability determinations under the ADAAA with accommodation determinations under Section 504.

It seems circular to provide substantially the same language in these laws if each is meant to accomplish a different goal. But one must remember to distinguish the intent of the ADAAA—which is to provide expansive coverage for a broad class of disabled persons—from the intent of Section 504—which is to ensure that recipients of federal funds (i.e. public law schools) do not “limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.”<sup>127</sup>

Note well, however, that there is *no definition* of “substantially limits” in the Section 504 implementing regulation.<sup>128</sup> The Department of Education, which establishes the implementing regulations for Section 504, says only that “[i]t should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities.”<sup>129</sup> In response to comments, the United States Department of Education acknowledged that “[s]everal comments observed the lack of any definition in the proposed regulation of the phrase ‘substantially limits,’” and further stated that “[t]he Department [of Education] does not believe that a definition of this term is possible at this time.”<sup>130</sup>

#### Wait... What?

Where practically identical language has been included in the implementing regulations for both the ADAAA and Section 504, why would the Department of Education not adopt the same or similar language with respect to “substantially limits?” Absence of a definition of “substantially limits” in the implementing regulation for Section 504, versus the substantial treatment of the same term in the relevant implementing regulation for the ADAAA provides a strong inference that any substantial limitation identified in the disability determination is not necessarily the same as considered for the accommodations determination under Section 504. Thus, the concept of “substantial limitation” is appropriately viewed as *specific* to the disability determination under the ADAAA implementing regulations, where the term is defined by *nine rules of construction* at 28 C.F.R. § 35.108(d).

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<sup>126</sup> See 34 C.F.R. § 104.3(j)(2)(i).

<sup>127</sup> 34 C.F.R. § 104.4(b)(1)(vii) (2016); see also 34 C.F.R. § 104.4(b) (2016); 34 C.F.R. § 104(a) (2016) (“No qualified person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”).

<sup>128</sup> See 34 C.F.R. § 104.3 (definitions section).

<sup>129</sup> See 34 C.F.R. Part 104, app. A (2017).

<sup>130</sup> See *id.*

As written, Section 504 only contemplates substantial limitations for purposes of establishing that the student is a qualified handicapped person; it does not contemplate substantial limitations in the context of an accommodations decision. When looking at revised guidance from AHEAD, we can get a sense of why Section 504 does not entertain verbose and lengthy explanations or definitions:

Course modifications or auxiliary aids or services that are ineffective or constitute a fundamental alteration will not be reasonable and therefore will not meet the ADA and Section 504's minimal standards. The ADA establishes the "floor" not the "ceiling" of protection. The ceiling is established when a proposed accommodation would result in a fundamental alteration to a course or the program of study.<sup>131</sup>

Based on this guidance, it would not appear that a strict interpretation of "substantially limits" is in line with the ceiling established by Section 504, which may be why the Department of Education declined to define the phrase. So, what are decision makers to do with all of this complexity, and how should they go about avoiding conflating disability determinations with accommodation determinations?

#### D. Avoiding Conflation In Disability & Accommodations Decisions:

As any good law student knows, sometimes the answer to a difficult question requires asking more questions. Based on the review in the preceding pages, perhaps the best question to ask is whether "substantial limitation" is the proper phrase for describing what an accommodation determination encompasses? Under the disability determination, the relevant question is whether a student can demonstrate that he or she has a learning disability that substantially limits a major life activity (e.g., learning, reading, writing, concentrating, or thinking).<sup>132</sup> Under the accommodation determination, the relevant question would *appear to be* whether the requested accommodations are reasonable, considering the student's *substantial limitations to a major life activity*—but this is NOT correct. The implementing regulation for Section 504 does not define "substantially limits" whereas the implementing regulation for the ADAAA provides nine rules of construction for "substantially limits."<sup>133</sup>

This is the heart of the conflation problem when making disability/accommodation decisions for learning-disabled law students. The accommodation determination is much more particularized to the needs of the student. The individualized accommodations inquiry is not well-served by

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<sup>131</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

<sup>132</sup> See 28 C.F.R. § 35.108(c)(1).

<sup>133</sup> Compare 34 C.F.R. § 104.3(j); 34 C.F.R. Part 104, app. A ("Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time."); with 28 C.F.R. § 35.108(d)(i)–(ix).

considering the same “substantial limitations” for both the disability determination (designed for broad coverage) and the accommodation determination (particularized to the individual student).

In the practical sense, a specific learning disability may negatively impact one or more areas of academic performance.<sup>134</sup> Academic difficulties are often the reason that learning-disabled law students seek accommodations.<sup>135</sup> If a learning-disabled law student seeks academic accommodations, the person or group of persons who will ultimately decide whether to grant accommodations (the decision maker) must first make a legal determination of disability by identifying at least one substantial limitation to at least one major life activity.<sup>136</sup> If the student is found to be disabled, the decision maker must then determine what accommodations are reasonable and appropriate to the student’s needs.

In most instances, a specific learning disability evaluation and a professional diagnosis are typically needed for a student who wishes to establish disability.<sup>137</sup> Diagnosis of a specific learning disability is usually accomplished by interpreting diagnostic information gained through psychological evaluations designed to measure a student’s academic aptitude/ability, academic achievement, and information processing ability.<sup>138</sup> The diagnostic information in a psychological evaluation often provides direct insight into any “substantial limitations” faced by the student with regard to the major life activities relevant to learning disabilities (e.g., learning, reading, writing, concentrating, and thinking). In other words, the psychological evaluations used to diagnose a specific learning disability often bring to light the *exact* type of academic difficulty faced by a learning-disabled student.<sup>139</sup> Hence, it is easy to assume that the goal of a learning-disabled

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<sup>134</sup> SWANSON, *supra* note 29, 66–72 (discussing diagnostic features supporting diagnosis and effects of specific learning disabilities on academic domains).

<sup>135</sup> *But see* Burrell, *supra* note 43 at 76–77 (“[M]any students will not utilize the services and assistance available to them as a result of not wanting the negative stigma associated with their success. . . . The learning-disabled student may elect to be viewed as unprepared, lazy, unwilling, or unorganized as opposed to being labeled as learning disabled.”).

<sup>136</sup> 28 C.F.R. § 35.108(a)(2)(iii).

<sup>137</sup> *See* 28 C.F.R. § 35.108(d)(1)(vii) (“The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph . . . is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.”).

<sup>138</sup> There are many types of learning disabilities. For example, reading disabilities such as dyslexia and mathematics disabilities such as dysgraphia negatively impact different areas of academic performance.

<sup>139</sup> For example, a learning-disabled law student with deficits in both academic fluency and reading rate could be provided extra time on tests. This decision appears to be based in common sense, as far as reasonableness is concerned. What if the student is disabled as stated, but ranks within the top 25% of the class? The accommodations decision would most likely weigh heavily on the evidence of performance of the student, and because of the student’s perceived success, no extra time may be given on exams. Does this mean that the student simply doesn’t need the accommodations, or does this mean that by denying accommodations, the decision maker has deprived the learning-

law student seeking accommodations would *appear to be* a request to the decision maker to help the student alleviate “substantial limitations” to one or more of the major life activities associated with learning disabilities (e.g., learning, reading, writing, concentrating, thinking), thus resulting in improved academic performance. Again, this is NOT correct. The “substantial limitations” in major life activities are related to disability status, only. The student seeking accommodations is not asking the decision maker to “treat” his or her disability by assisting in amelioration of the substantial limitations he or she faces in daily life.

For accommodation determinations, the relevant question for the decision maker *should be* whether the requested accommodations are reasonable, considering the student’s declared, *current functional limitations* as a result of his or her learning disability.<sup>140</sup> For learning-disabled students, this is a workable solution because, most often, learning-disabled students will be required to submit a psychological evaluation with diagnostic data that provides direct insight into the *functional limitations* [not substantial limitations] faced by the student because of his or her learning disability. The functional limitations of a learning-disabled student in the academic environment are not to be confused with the substantial limitations faced by the learning-disabled student in life both in and out of the academic environment. These decisions are tricky precisely because of the overlap in difficulties that learning-disabled students experience in daily life because of an inability to “keep up” in the academic environment to the same extent as members of the general population.<sup>141</sup>

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disabled student of the “equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement” which is presumably available to all law students, regardless of *actual* performance? See 34 C.F.R. § 104.4(b)(2). What about academic integrity? Are the standards too low? Is the learning-disabled law student somehow no longer able to demonstrate his or her full aptitude? Is the learning-disabled law student being tested on his or her disability?

<sup>140</sup> Shaw et al., *supra* note 1, at 146 (noting that for determinations of reasonable academic accommodations, “[t]he critical issue . . . becomes the determination of the impact of a disability on a student’s functional performance, and demonstration of the need for specific accommodation”).

<sup>141</sup> For example, a learning-disabled law student with a processing deficiency or significantly slower reading rate may spend a disproportionate amount of time reading assignments outside of class than an “average” student. Meaning that the learning-disabled law student is fully capable of grasping the same (or better) understanding as an “average” counterpart, but the learning-disabled law student sacrifices in other areas of life (spending less time socializing or performing other daily life activities) than his or her “average” counterpart. In this way, the learning-disabled law student may experience social isolation and possibly more anxiety, in general, due to fear of falling behind. The substantial limitation to a major life activity is the disproportionate amount of time it takes for him or her to read assignments when compared to the general (law student) population. This is something that the decision maker has no control to ameliorate. The decision maker can only assist the student in the academic environment, and issues outside of the academic environment are best left to qualified treatment professionals who are better positioned to advise and assist the learning-disabled student in how to cope with these substantial limitations in society and at home.

E. The Two Processes, Plain & Simple

1. Disability Determination

First, in order to establish eligibility for reasonable accommodations, students must establish that they have a disability that substantially limits a major life activity, such as reading, writing, speaking, or learning.<sup>142</sup> Second, “[t]he determination of reasonable accommodations is separate from determining disability status.”<sup>143</sup> Third, new interpretive guidance from DOJ clarifies that “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA,” and is to be interpreted with regard to the nine rules of construction set forth in the implementing regulation for the ADA. <sup>144</sup> Fourth, the determination of substantial limitation to a major life activity must be made without regard to the ameliorative effects of mitigating measures, such as medication, reasonable accommodations, and learned behavioral or adaptive neurological modifications.<sup>145</sup> Fifth, learning-disabled law students “may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including . . . reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.”<sup>146</sup> Finally, and most importantly, “[t]he ultimate outcome of an individual’s efforts should not undermine a claim of disability, even if the individual ultimately is able to achieve the same or similar result as someone without the impairment.”<sup>147</sup>

2. Reasonable Accommodation Determination

First, “[t]he impact of an individual’s disability on functional ability [not on substantial limitations] should be the focal point of the determination as to what is a reasonable academic accommodation.”<sup>148</sup> Second, in an academic context, the functional impact of a student’s learning disability may not be readily apparent based on demonstrated academic performance and diagnostic information from psychological evaluations. Instead, the learning-disabled student’s self-report to decision makers regarding his or her functional limitations in the academic setting often shed more light on the difficulties in the academic context than any impressions contained in a psychological report. Third, decision makers “will need to look beyond standardized scores as derived from a diagnostic battery to consider historical evidence attesting to the *use or lack of use* of accommodations

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<sup>142</sup> See 28 C.F.R. § 35.130(b)(7)(i); 42 U.S.C. § 12201(h); 28 C.F.R. § 35.108(c)(1) (discussing major life activities).

<sup>143</sup> Shaw et al., *supra* note 1, at 145.

<sup>144</sup> 28 C.F.R. § 35.108(d)(1)(i)-(ix).

<sup>145</sup> See 28 C.F.R. Part 35, app. C.

<sup>146</sup> *Id.* Also see *supra*, note 141 for the Author’s description of the daily struggle to achieve the same or better level success in law school while living with a learning-disability.

<sup>147</sup> *Id.*

<sup>148</sup> Shaw et al., *supra* note 1, at 146.

and discuss[] why accommodations may not have been necessary previously[] but are currently needed.”<sup>149</sup> Fourth, ABA-accredited public law schools are not required to grant accommodations that result in fundamental alterations to the academic requirements of the J.D. program.<sup>150</sup> Finally, accommodations are reasonable when they are “effective in ameliorating the [functional] limitations of a student’s disability”<sup>151</sup> and when granting accommodations will help to “ensure that the results of . . . evaluation[s] [*i.e.* course exams] represent[] the student’s achievement in the course, rather than reflecting the student’s impair[ment].”<sup>152</sup>

#### IV. Data and Takeaways

##### A. Revising McGuigan’s Work (Partially); 8 Years Later

In researching for this Note, I drew from the work of Susan E. McGuigan and her article, *Documenting Learning Disabilities: Law Schools’ Responsibility to Set Clear Guidelines*,<sup>153</sup> which examined all ABA-accredited law schools’ learning disability documentation guidelines. Eight years later, I posed the question of whether law schools had heeded her suggestions for better learning disability documentation guidelines. While this Note is distinguished from McGuigan’s work in that only public law schools are addressed, I still found lack of uniformity across the board.

This lack of uniformity was surprising. In evaluating the adequacy of disability accommodation policies for students with learning disabilities at eighty-three ABA-accredited public law schools, I identified the following areas to address in discussing the creation of uniform policy guidelines and specific learning disability documentation procedures to be applied at ABA-accredited public law schools. The model guidelines and documentation procedures explained in the remainder of this Note should serve as a useful aid to administrators and staff involved in the disability/accommodation process not only at law schools but also in higher education, as a whole.

##### B. Methods

In reviewing the academic accommodation policies of ABA-accredited public law schools, I began with an approach similar to that of McGuigan.<sup>154</sup> I compiled a list of all ABA-accredited public law schools from the ABA’s website listing all public law schools that are ABA-accredited.<sup>155</sup> Public law schools were organized

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<sup>149</sup> *Id.* This is a difficult hurdle to overcome for a learning-disabled law student with no prior history of diagnosis or accommodations.

<sup>150</sup> See 28 C.F.R. § 35.130; 34 C.F.R. § 104.44 (2016) (discussing scope of accommodation duty and reasonable academic adjustments, generally).

<sup>151</sup> Shaw et al., *supra* note 1, at 146.

<sup>152</sup> See 28 C.F.R. § 35.130; 34 C.F.R. § 104.44(c).

<sup>153</sup> McGuigan, *supra* note 43.

<sup>154</sup> See *id.* at App. A (discussing methods for researching policies).

<sup>155</sup> *Public Law Schools*, ABA 2017, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/public\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/public_law_schools.html) (last visited Aug. 14, 2017).

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by state, alphabetically, by cross referencing a similar list from Wikipedia.<sup>156</sup> Public law schools were organized alphabetically, by common name, under each state, then indexed for reference.<sup>157</sup>

To evaluate a total of eighty-three ABA-accredited public law schools,<sup>158</sup> a sixteen-point rating system was created along with rationale for each scored criterion.<sup>159</sup> Data was also collected for five additional, “unscored” criteria. The rationale for scoring and results of these policy evaluations are described in the following sections. Where a policy was not clear or was ambiguous regarding a certain criterion, no credit was allocated.

Research for this Note involved visiting the official website for each public law school. If the website had a search feature, searches were conducted using “disability accommodations,” or some disambiguation. This method usually returned at least one sufficient result to start the process of browsing for the different criteria evaluated in my sixteen-point rating system. If the law school was part of a larger university, and unless the law school was distinctly separate from the larger university,<sup>160</sup> deference was given to the larger university policy where the law school had no policy.<sup>161</sup> All research was conducted after October 11, 2016, which is when the revised Title II and Title III Regulations to Implement ADA Amendments Act of 2008 took effect.<sup>162</sup>

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<sup>156</sup> *List of law schools in the United States*, WIKIPEDIA 2017, [https://en.wikipedia.org/wiki/List\\_of\\_law\\_schools\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_law_schools_in_the_United_States) (last modified July 25, 2017, at 08:41 PM). It should be noted that this list included all law schools in the United States that held ABA-accreditation and those that did not. Only ABA-accredited law schools were chosen, and this list was cross referenced with the ABA official link listing all ABA-accredited law schools, alphabetically. In the case of any name discrepancy (i.e. an “old” name for a school), the name from the school’s official website prevailed.

<sup>157</sup> Research on file with Author. This method of alphabetical by state, then alphabetical by school name was used to assist in further research for litigation. The indexing system used should help future researchers more easily sort schools by federal circuit in order to examine litigation in this area and any trends associated with particular circuits.

<sup>158</sup> As of Spring 2017, there were eighty-five ABA-accredited public law schools. The two schools not included in evaluation were The Judge Advocate General’s Legal Center and School (does not offer a J.D. program) and the University of Puerto Rico School of Law (the website was in Spanish, and the Author is not fluent in Spanish).

<sup>159</sup> See App’x. B for checklist used (sixteen-point rating system). Research on file with Author.

<sup>160</sup> The University of Maine Law School appears to be a separate entity. The University of Maine does not include a link for a law program, and the law school website does not refer the student to the University of Maine. Thus, a reasonable assumption, as a future student, is that the University of Maine Law School is not associated with the University of Maine.

<sup>161</sup> For instance, a law school could refer to the larger university for their disability accommodations policy, or the law school could command complete control over the disability documentation and accommodations process.

<sup>162</sup> See Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. at 53204–43.

This research was limited to only the portions of these policies that were publicly available through the schools' websites.<sup>163</sup> For the policies of each of the eighty-three public law schools evaluated, absence of any criterion should not be viewed to indicate that a school does not implement some form or documentation related to that criterion. Instead, any absences should be viewed only to reflect that a reasonably prudent researcher may not have been able to locate the information without contacting the school.<sup>164</sup> The goal of my method was to mirror McGuigan's approach, where I placed myself in the shoes of a learning-disabled law student who was researching which law schools he or she wanted to attend, where the requirements of the accommodations process weighed heavily on the decision to apply to the school.<sup>165</sup>

### C. Policy Areas Evaluated and Results for Public Law Schools

The model policy guidelines proposed here have three main goals: (1) user friendliness in that the information is reasonably accessible through the website of the public law school; (2) transparency with relation to the accommodations processes employed at the school; and (3) providing adequate information on rights and responsibilities of all parties involved at all stages of the accommodations process. Based on the 16-point rating system created for the research for this Note, the minimum possible score that a public law school could receive was 0 points, and the maximum possible score was 16 points. Only one public law school scored 0 points.<sup>166</sup> Five public law schools achieved scores of 13 points.<sup>167</sup> The national average score was 9.83 points.<sup>168</sup>

The following discussion addresses ideal uniform disability accommodations documentation and policy guidelines. Each section begins with results from 83 public law schools evaluated, followed by a brief description of rationale for the criterion and whether the criterion was scored for purposes of the 16-point rating system, followed by the "takeaway" for the reader. The discussion is organized

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<sup>163</sup> See Complaint Resolution Letter, University of the District of Columbia, OCR Complaint No. 11-13-2088 (May 1, 2014) <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11132088-a.pdf>. (discussing internet accessibility of the school's disability accommodation policy and the accommodations application process); see also *infra* note 182.

<sup>164</sup> As an example, Brigham Young University Law School requires a student to be logged into the student portal in order to view any policies, student handbook, or any forms relating to the student/law school relationship. It should be noted that BYU is a private school, and was not evaluated as a part of this public school inquiry. Future work by the Author may include comparison of private law school policies, similar to this Note.

<sup>165</sup> See McGuigan, *supra* note 43, at App. A (discussing her internet research method).

<sup>166</sup> The University of Maine Law School scored 0 points. Research on file with Author. See App. A-4, A-5, & A-6 *infra*; see also *supra* note 160.

<sup>167</sup> These five schools are: (1) Louisiana State University, Paul M. Hebert Law Center; (2) University of Michigan Law School; (3) University of New Mexico School of Law; (4) Pennsylvania State University, Dickinson School of Law; and (5) University of Wisconsin Law School. See App. A-4 *infra*. Research on file with Author.

<sup>168</sup> See App. A-4, *infra*. Research on file with Author.

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as follows: (1) General Policy & Documentation Guidelines; (2) Specific Learning Disability Policy & Documentation Guidelines; and (3) Grievance Procedures.

1. General Policy & Documentation Guidelines

The following are general policy and documentation guidelines that should apply to all disability accommodation requests in higher education.

a. Existence of a Disability Accommodations Policy

Approximately 80% of public law schools had some form of policy statement that directly addressed students with disabilities.<sup>169</sup>

Public law schools receiving federal funds (i.e. federal student loans) are required to provide what amounts to a non-discrimination notice.<sup>170</sup> These general non-discrimination notices were not considered as point-worthy for purposes of this criterion. The minimum threshold for a law school to receive credit under this criterion was for the law school to have a simple statement, separate from the required notice, acknowledging that the law school provided disability accommodations. Statements ranged from some form of the minimum requirement, to those that explained in some detail how the law school handled disability accommodations, and those that briefly acknowledged that they provided disability accommodations, but directed the student to an administrator or disability services office for further information.

Guidance from the Association of Higher Education and Disability (AHEAD) encourages the inclusion of the “full range of stakeholders and experts when reviewing and developing policy.”<sup>171</sup> Further guidance indicates that in order to keep pace with changes in relevant law, institutions should review related policies and practices related to disability accommodations every three to five years.<sup>172</sup> AHEAD also recommends that the documentation process be accessible and flexible for disabled students who have difficulty in describing the need for accommodations.<sup>173</sup>

The takeaways are that public law schools: (1) are required to provide a non-discrimination notice; (2) should provide a statement, apart from the required notice, that provides students with further information on the disability accommodations process; (3) should establish policies and procedures for determining disability accommodations; and (4) should regularly review disability accommodations policies in light of changing laws.

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<sup>169</sup> 66 of 83 public law schools. See App. A-1, *infra*. Research on file with Author.

<sup>170</sup> Post-secondary institutions receiving federal funding (i.e. federal student loans) are required to give notice that they do not discriminate “on the basis of handicap in violation of section 504.” See 34 C.F.R § 104.8 (2016).

<sup>171</sup> See *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4, at n.viii.

<sup>172</sup> *Id.*

<sup>173</sup> See *id.*

## b. Policy in Handbook Form

Approximately 72% of public law schools had handbook provisions related to accommodating students with disabilities.<sup>174</sup>

This criterion incorporates the concept of “notice” to learning-disabled law students. Under this criterion, credit was allocated if the handbook provisions referenced the procedure or contact point for students, faculty, or administrators in the form of some separate handbook, brochure, or equivalent document designed to address disability services for students.<sup>175</sup> Recent guidance from AHEAD indicates that postsecondary institutions should “[d]istribute policy and procedure(s) on availability of services via *all relevant campus publications* (catalogs, programmatic materials, web sites, etc.).”<sup>176</sup> Although no handbook provision is required by 34 C.F.R. § 104.8 (discussing notice requirements for compliance with Section 504), it is reasonable for schools to provide a handbook provision that effectively gives students or faculty more information on the disability accommodations process.

Some public law schools provided a separate law student handbook or a handbook designed specifically for law students with disabilities who might require accommodations.<sup>177</sup> Presumably, all students are encouraged to be familiar with the student handbook, and learning-disabled law students seeking information would likely seek out further information in the law school handbook or some other publication related to disabilities before speaking with administrators or faculty about their disabilities.

The takeaway is that public law schools are required to give notice of nondiscrimination in compliance with Section 504,<sup>178</sup> and they should include in these notices some information about services for students with disabilities in all

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<sup>174</sup> 60 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>175</sup> Under this criterion, disability accommodations handbook provisions considered were those contained within: (1) the law school student handbook; (2) other publicly accessible faculty or student handbook; or (3) similar publications by the public law school or university.

<sup>176</sup> *AHEAD Program Standards and Performance Indicators*, ASSOC. ON HIGHER ED. AND DISABILITY (2017), [http://www.sfasu.edu/disabilityservices/docs/Final\\_Program\\_Standards\\_Performance\\_Indicators.pdf](http://www.sfasu.edu/disabilityservices/docs/Final_Program_Standards_Performance_Indicators.pdf) (available via Word document download from hyperlink “Program Standards”) (last visited Aug. 4, 2017).

<sup>177</sup> See, e.g., *Office of Accessibility Student Handbook, Law Students*, THE UNIV. OF AKRON, <http://www.uakron.edu/dotAsset/3cac350a-7028-483e-a42c-b20b9116800e.pdf> (last visited Aug. 4, 2017). But cf. *Academic Regulations*, U. MEM. LAW 41 (Dec. 14, 2016), <http://www.memphis.edu/law/documents/Regs%20Updated%20through%20122116.with.TOC.pdf> (regarding disability accommodations, Section 25 of the policy, referenced here, simply refers the student to the most recent student handbook for the larger university).

<sup>178</sup> See 34 C.F.R. § 104.8.

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relevant campus publications.<sup>179</sup> A handbook provision related to disability accommodations and how to access them is a reasonable, common-sense inclusion, and would help provide adequate notice to learning-disabled students.

#### c. Policy on Website

Approximately 98% of public law schools had a publicly accessible disability accommodations policy.<sup>180</sup>

Disability accommodations policies should be visible and reasonably available to both learning-disabled law students and learning-disabled students who are considering applying to law school. Under this criterion, credit was allocated where the law school's official website directed students to the disability accommodations policy. If the law school had no policy (section (a), above), credit was allocated if the law school directed students to a larger university policy. Guidance from AHEAD indicates that institutions should "[e]nsure referral, documentation, and disability services information is up to date and accessible on the institution's web site."<sup>181</sup>

Suitable guidance for this criterion is appropriately drawn from a recent Office of Civil Rights Complaint involving the University of the District of Columbia, David A. Clarke School of Law. The University entered into a voluntary resolution agreement, resolving a complaint by a law student who claimed discrimination based on disability, citing the University's "fail[ure] to provide . . . academic adjustments for the 2012-2013 and summer 2013 academic terms."<sup>182</sup> The resolution agreement required the University to revise their handbook provision for procedures for providing academic adjustments and make it clear that the procedure "applies to all students at all levels, including Law School students."<sup>183</sup> Further, the University was required to "incorporate[e] a 'hyperlink' on the Law School website page to the University's revised [academic adjustments] Procedure, and to [disability resource center] forms."<sup>184</sup>

The takeaway is that public law schools and the universities with which they are associated should now consider themselves on notice that they should provide websites and handbook provisions relating to the accessibility of disability accommodations and academic adjustment procedures. Although the website and handbook requirements discussed here do not constitute any binding policy or law

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<sup>179</sup> *AHEAD Program Standards*, § 2.1 *Disseminate information through institutional electronic and printed publications regarding disability services and how to access them*, *supra* note 176.

<sup>180</sup> 82 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author. The University of Maine Law School appeared unique in that it did not clearly associate itself with the larger University of Maine. This law school scored 0 out of 16, and had no information on disability accommodations available on its official website. *See* App. A-3, A-4.

<sup>181</sup> *AHEAD Program Standards and Performance Indicators*, *supra* note 176.

<sup>182</sup> Complaint Resolution Letter, University of the District of Columbia, OCR Complaint, *supra* note 163 (May 1, 2014) <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11132088-a.pdf>.

<sup>183</sup> *See* Resolution Agreement, *supra* note 182.

<sup>184</sup> *Id.* at 2.3.a.

outside of the context of this complaint and resolution agreement, these requirements are reasonable ways to provide adequate notice and transparency in the disability accommodations context.

d. Relevant Law Cited

Approximately 89% of public law school policies (or policies of the larger university they are associated with) referenced the relevant law under which the disability/accommodation decision would be determined.<sup>185</sup>

Under this criterion, credit was allocated if *some* relevant disability law was cited in reasonable connection with the disability accommodations policy. No credit was allocated for general notices required by 34 C.F.R. § 104.8. Laws cited ranged from specific state discrimination laws (in combination with some federal law), to boiler-plate recitations of relevant sections of the ADAAA or Section 504.<sup>186</sup>

Student knowledge of relevant disability laws implicated in accommodations decisions should not be presumed. On the other hand, while schools should be commended for doing so, they should not be required to explain in copious detail how these laws will be applied in the disability/accommodation context.

The takeaway is that public law school disability accommodations policies should provide, at a minimum, references to the ADAAA, Section 504, and their implementing regulations. By providing reference to these laws, a learning-disabled law student is better informed on what specific laws to look to for additional guidance in the accommodations process.

e. School Recommends or Requires Syllabus Statement for Students with Disabilities

Approximately 78% of public law schools recommended or required inclusion of a syllabus statement, in each course syllabus, directing students to the appropriate administrator or disability services office if a student wished to seek academic accommodations.<sup>187</sup>

This criterion informs overall transparency and notice aspects of the policy at each school. Under this criterion, credit was allocated when a policy offered *publicly accessible, specific provisions*, and/or examples of recommended or required

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<sup>185</sup> 74 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author.

<sup>186</sup> The most common laws cited are the Americans with Disabilities Act of 1990 (and/or 2008 Amendments); the Rehabilitation Act of 1973, Section 504; relevant Code of Federal Regulations sections; and in some cases, references to public or state laws concerning disability status. For a helpful table that explains the interrelationship of disability laws that are applicable to public law schools, see Stephen B. Thomas, *College Students and Disability Law*, LD ONLINE, <http://www.ldonline.org/article/6082/> (last visited Oct. 9, 2017) (referring to Table 1 on this website).

<sup>187</sup> 65 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author.

language for the syllabus statement.<sup>188</sup> AHEAD guidance indicates that institutions should “[i]nclude a statement in the institutional publications regarding self-disclosure for students with disabilities.”<sup>189</sup> Although this guidance does not directly relate to syllabus statements, the effect of these statements generally amounts to a requirement that students self-disclose disability status to an administrator or other point of contact who is responsible for overseeing disability services.<sup>190</sup>

The takeaway is that each course syllabus should include a statement that has the effect of informing students on the first day of class who the appropriate first point of contact is if they know they have a disability or suspect that they suffer from a disability for which accommodations may be appropriate.

f. Policy Refers Students to an Administrator

Approximately 54% of public law school policies directed students to an administrator who could assist in the disability accommodations process.<sup>191</sup>

This criterion assesses the accessibility of information for students seeking disability accommodations by informing them of an appropriate contact point. Under this criterion, credit was allocated where a school referred students to an administrator for further information on disability accommodations. Appropriate administrators could include deans, associate deans, or directors of disability services.<sup>192</sup>

Section 504 requires public law schools with fifteen or more employees to designate a responsible employee to coordinate compliance with Section 504.<sup>193</sup> Guidance from AHEAD encourages institutions to “[e]nsure key administrators remain informed of emerging disability issues on campus that may warrant a new or revised or policy” and to “[f]oster . . . collaboration on disability issues among key administrative personnel (e.g., deans, registrars, campus legal counsel).”<sup>194</sup> AHEAD also recommends that each institution should have “[a]t least one full-time professional [who] is responsible for disability services as a primary role.”<sup>195</sup>

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<sup>188</sup> It is entirely possible, indeed probable, that all 83 public law schools evaluated have policies requiring professors to have such a syllabus statement. Because this criterion speaks to transparency, credit was allocated only when the information was publicly available through the official website(s).

<sup>189</sup> *AHEAD Program Standards and Performance Indicators*, *supra* note 176 (emphasis added).

<sup>190</sup> Penn State University (Dickinson School of Law) has an excellent example of easy-to-read language that is succinct and approachable for this purpose. *See Syllabus Statement*, PENN STATE EDUC. EQUITY, <http://equity.psu.edu/student-disability-resources/faculty-handbook/syllabus-statement> (last visited July 12, 2017).

<sup>191</sup> 45 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author.

<sup>192</sup> The administrator may be associated with the law school or with the larger university’s disability services office.

<sup>193</sup> *See* 34 C.F.R. § 104.7(a).

<sup>194</sup> *AHEAD Program Standards and Performance Indicators*, *supra* note 176.

<sup>195</sup> *Id.* (emphasis added).

Whether this latter option is actually workable at every law school is likely determined case-by-case.

The takeaway is that public law schools should: (1) designate a coordinator for disability accommodations; (2) inform students who that individual is; and (3) provide information as to where, when, and how the coordinator can be contacted for further information regarding disability accommodations.

g. Policy refers students to a Disability Services Office

Approximately 72% of public law schools referred students to a disability services office or some equivalent.<sup>196</sup>

Under this criterion, credit was allocated if the policy had specific language referring the law student to a disability services office, or if the official website provided direction to the disability services office through reasonably accessible hyperlinks. Guidance from AHEAD encourages appropriate training for those reviewing disability accommodation requests in order to “[e]nsure staff can understand and interpret assessments/documentation.”<sup>197</sup>

The takeaway is that if a public law school is part of a larger university, it should collaborate with a disability services office, if one exists. If no disability services office is available, public law schools should designate at least one appropriately trained, full-time professional to serve as a coordinator for disability services. If hiring an appropriately trained, full-time professional is not a workable solution due to budgeting or other legitimate concerns, public law schools should establish a disability services committee composed of faculty, administrators, and other relevant personnel. In all instances, decision makers who review requests for disability accommodations should be appropriately trained to interpret any assessments or documentation involved in a disability accommodation decision.

h. Student Responsibilities

Approximately 95% of public law schools (or the larger university they are associated with) provided some type of student responsibilities in the disability accommodation process.<sup>198</sup>

Under this criterion, credit was allocated where policies described, at a minimum, what the student should do to initiate the accommodations process. Policies evaluated ranged from those requiring the student to apply with a disability services office, to policies that provided copious detail about what the

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<sup>196</sup> 77 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author. In the context of public law schools, the law school is part of a larger university that has some type of office related to services directed toward students with disabilities. The names of these offices differ, but the function remains the same—a point of contact for students seeking some type of academic or structural modification because of a disability.

<sup>197</sup> AHEAD Program Standards and Performance Indicators, *supra* note 176.

<sup>198</sup> 79 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

student's responsibilities were in the accommodations process.<sup>199</sup> AHEAD guidance recommends that institutions develop "policies regarding students' responsibility to meet the Institution's qualifications and essential technical, academic, and institutional standards" as well as informing students of their "responsibility to provide recent and appropriate documentation of disability."<sup>200</sup>

The takeaway is that public law schools should inform students of what steps are necessary to begin the accommodations process. Additionally, students should be informed that they are required: (1) to self-identify as a disabled person in need of accommodations; (2) to provide appropriate, recent documentation to support the assertion of disability; and (3) what obligations the student has regarding continued communication with appropriate staff throughout the disability accommodation process.

i. Faculty/School Responsibilities

Approximately 81% of public law schools (or the larger university they are associated with) described the responsibilities of faculty members or the school in the accommodations process.<sup>201</sup>

Disability accommodations policies should clearly communicate school and faculty responsibilities in the accommodations process. Under this criterion, credit was allocated for statements relating to the responsibility of faculty members or the school during the disability accommodations process. These policy statements ranged from those requiring faculty members to refer students to a disability services office or an administrator, to those that provided faculty or school responsibilities in detail.<sup>202</sup>

AHEAD recommends that schools should "[i]nform faculty of their rights and responsibilities . . . [and] procedures that students must follow in arranging for accommodations."<sup>203</sup> Faculty should also be informed of the "responsibility to provide accommodations to students and how to provide accommodations and modifications [and] [p]articipate in administrative and staff training to delineate responsibilities relative to students with disabilities."<sup>204</sup> Policies should mirror Section 504 language when informing students that the school is prohibited from

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<sup>199</sup> Many schools provided a separate student handbook or provision of policy where "student responsibilities," or some disambiguation thereof, was clearly stated.

<sup>200</sup> *AHEAD Program Standards and Performance Indicators*, *supra* note 176.

<sup>201</sup> 68 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author.

<sup>202</sup> University of New Mexico School of Law refers students to the UNM Accessibility Resource Center, which has published quite an extensive and helpful handbook for students who may need disability accommodations. UNM Accessibility Resource Center, *Student Handbook for Disability Issues: Expect Access* 8-9, 39-42 THE UNIV. OF NEW MEXICO, <http://arc.unm.edu/students/current-students.html> (last visited July 12, 2017) (providing an excellent example of succinct language for this purpose). To access the document, click the Student Handbook "here" link under the "Arc Student Handbook" heading, which will initiate a download of the Word document. On file with Author.

<sup>203</sup> *AHEAD Program Standards and Performance Indicators*, *supra* note 176.

<sup>204</sup> *Id.*

discriminating against the student on the basis of disability, and that the school is *not* obligated to provide accommodations or modifications that are not reasonable or would result in fundamental alteration to the program of study.<sup>205</sup>

The takeaway is that faculty responsibilities should be defined to include, at minimum: (1) responsibility to refer students to an appropriate administrator, disability services office, or point of contact if the student requests accommodations or modifications; (2) responsibility to include in each course syllabus a statement relating to disability accommodations; (3) responsibility to challenge accommodations that do not appear reasonable or may result in fundamental alterations to the program of study, based on the expertise and experience of the faculty member in the program of study; and (4) responsibility to provide reasonable accommodations or modifications when granted.

#### j. General Documentation Guidelines

Approximately 81% of public law schools provided some sort of general guidelines for documentation of disability.<sup>206</sup>

Under this criterion, credit was allocated where general disability documentation guidelines were more than summary statements. Most schools provided general documentation guidelines that were identical or similar to revised documentation guidance established by AHEAD.

AHEAD provides adequate guidance on what types of disability documentation are appropriate. In summary, these guidelines provide that documentation may include the following: (1) a student self-report describing how the disability affects the student; (2) impressions and conclusions from disability professionals knowledgeable about the student's disability and the impact that the disability has on the student; and (3) any evidence of previous accommodations provided to the student.<sup>207</sup> AHEAD further recommends that (4) "[d]isability documentation should be current and relevant but not necessarily 'recent.'"<sup>208</sup>

The takeaway is that these four general documentation guidelines are reasonable, publicly available, and could easily be included in any law school or university policy relating to documentation of a disability. For purposes of our discussion on learning-disabled law students and the disability accommodations process, uniform guidelines should include, at a minimum, the four guidelines discussed in this section. Additionally, public law schools may not create documentation requirements that are especially burdensome or have the effect of discouraging disabled students from seeking reasonable accommodations.<sup>209</sup>

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<sup>205</sup> See 34 C.F.R. § 104.44(a), (c).

<sup>206</sup> 68 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>207</sup> See *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

<sup>208</sup> *Id.*; see also Part IV(2)(b) Recency, *infra*.

<sup>209</sup> See *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4, at n.xix (“A university is prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to

These general documentation guidelines should be accessible through the official website of the law school.<sup>210</sup>

## 2. Policy & Documentation Guidelines for Learning Disabilities

### a. Specific Learning Disability Documentation Guidelines

Approximately 63% of public law schools provided documentation guidelines for students with learning disabilities.<sup>211</sup>

This criterion clarifies that the school recognizes the existence of learning-disabled students. Under this criterion, credit was allocated where schools established some type of documentation guidelines specific to either “learning disabilities” or “specific learning disabilities.”<sup>212</sup>

As guidance from AHEAD demonstrates, “28 CFR 36.309(iv) states that ‘[a]ny request for documentation, *if such documentation is required*, is reasonable and limited to the need for modification . . .’ indicating that entities can require documentation though they are not obligated to do so.”<sup>213</sup> This guidance implies that there is no requirement for a law school to request documentation, but schools may reasonably do so.

Learning disabilities manifest in different ways, and specific diagnoses by clinical professionals may not fall under commonly recognized definitions of specific learning disabilities.<sup>214</sup> Diagnostic and clinical impressions related to a learning disability diagnosis often speak directly to the area of academic difficulty for a learning-disabled student.<sup>215</sup> Therefore, public law schools should require

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reasonable accommodation.”) (citing *Guckenberger v. Boston University*, 974 F. Supp. 106, 135–36 (D. Mass. 1997)).

<sup>210</sup> See Resolution Agreement, *supra* note 182 (requiring school to have procedures in place in the law school handbook that directed students to the DRC and documentation requirements).

<sup>211</sup> 53 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>212</sup> For purposes of this Note and research, “learning disabilities” means any “hidden” or “specific” learning disabilities for which a diagnosis would be appropriate based on the current Diagnostic and Statistics Manual (DSM-V) and/or International Classification of Diseases (ICD-10) would be appropriate. See AM. PSYCHIATRIC ASS’N, *supra* note 29, at 67–68 (discussing diagnosis under DSM-V and proper coding procedures under ICD coding requirements).

<sup>213</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4, at n.x. It should be noted that 28 C.F.R. § 36.309 addresses testing accommodations for all entities offering exams related to professional licensing or credentialing programs (such as the J.D. program).

<sup>214</sup> See AM. PSYCHIATRIC ASS’N., *supra* note 29, at 66–70 (discussing Recording Procedures and Diagnostic Features).

<sup>215</sup> *Id.* at 66. (“Because of ICD coding requirements, impairments in reading, impairments in written expression, and impairments in mathematics, with their corresponding impairments in the subskills, must be coded separately.”). See also *Using DSM-5 in the Transition to ICD-10*, AM. PSYCHIATRIC ASS’N (2017), <https://www.psychiatry.org/psychiatrists/practice/dsm/icd-10> (“Effective October 1, 2015, HIPAA-covered entities must use ICD-10 codes. . . . DSM-5 contains the standard criteria and definition of mental disorders now approved by the American Psychiatric

some type of documentation related to a student's learning disability so that decision makers can make informed decisions on what accommodations might be reasonable, given the recommendations of the evaluator or diagnosing professional.

The takeaway is that learning disabilities are often difficult to identify without data from psychological or other evaluations, therefore public law schools should develop and implement separate documentation forms for learning disabilities. The next several sections of this Note will discuss criteria to be included in a uniform "Learning Disability Verification Form" that should be adopted by all public law schools.

#### b. Recency

Approximately 45% of public law schools required that documentation for a disability be current within either three or five years.<sup>216</sup> Approximately 33% of law schools had other guidelines that documentation be reasonably current or at least reflect the current functional limitations of the student.<sup>217</sup>

Disability documentation policies should include relevant guidance from AHEAD when evaluating whether documentation is reasonably current.<sup>218</sup> Because the term "reasonably current" is a broad term, and some schools had multiple recency guidelines, this criterion was not scored for purposes of the sixteen-point checklist. As AHEAD recognized in revised guidance from 2012:

The concept of "recency" of documentation has, for some, taken on meaning that is not supported by science or law, but is more an outgrowth of assumptions within the special education field, which has required that students be reevaluated on a regular basis to establish the continued eligibility for *special education*. . . . The ADA and Section 504 are civil rights protections, generally providing a less intensive level of benefit or intervention than special education, but to a larger group of individuals.<sup>219</sup>

As previously discussed, special education is not relevant at the postsecondary level, and Section 504 operates as the vehicle for postsecondary students requesting academic accommodations. In the postsecondary context, AHEAD guidelines do not specify a number of years when determining whether

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Association (APA) and it also contains both ICD-9-CM and ICD-10-CM [Clinical Manual] codes . . . selected by the APA.").

<sup>216</sup> 36 of 83 public law schools evaluated. *See* App. A-3, *infra*. Research on file with Author.

<sup>217</sup> 27 of 83 public law schools evaluated, or approximately 32%. *See* App. A-3, *infra*. Research on file with Author.

<sup>218</sup> *See Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012, supra* note 4 ("Disability documentation should be current and relevant but not necessarily 'recent.'").

<sup>219</sup> *Id.*

disability documentation is current and relevant.<sup>220</sup> However, schools often impose arbitrary requirements based on the age of the student.<sup>221</sup>

The takeaway is that “recency” of documentation is not beholden to a three to five year limitation, or any other arbitrary year requirement. Where learning disability documentation presents a clear picture of the current impact of the learning disability and current functional limitations faced by a learning-disabled law student, public law schools should consider such documentation current and relevant.<sup>222</sup>

c. Qualifications of Diagnosing Professional

Approximately 91% of public law schools (or the larger university they are associated with) provided some guidelines as to what type of professional is considered “qualified” for purposes of diagnosing a disability.<sup>223</sup>

Diagnosing professionals should be qualified to diagnose the disability that the student is claiming.<sup>224</sup> The most common “qualified professionals” referenced for diagnosing learning disabilities are licensed or credentialed psychologists, school psychologists, neuropsychologists, psychiatrists, learning disability specialists, or physicians.<sup>225</sup>

The takeaway is simple—the Learning Disabilities Verification Form should include a statement that effectively communicates that the diagnosing professional should be qualified to diagnose a learning disability. This is a simple and reasonable requirement that does not require intensive consideration or contemplation—in line with the idea of the “commonsense standard” advocated by AHEAD.<sup>226</sup>

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<sup>220</sup> Note that AHEAD references “current functional limitations” and “reasonably current.”

<sup>221</sup> Some schools require documentation within three years of high school graduation, or within five years if the student is over the age of eighteen. Some do not specify a year range. Some are hard line on three or five years. Some use the three-year benchmark as a suggested guideline without being beholden. Others stick to a “common sense” approach in evaluating the scintilla of documentation relative to its recency.

<sup>222</sup> In practice, each school will undoubtedly face the “reasonableness” question in this instance. The three to five-year limitation is not necessary. What if the documentation is ten years old? When decision makers entertain these “numerical questions,” they lose focus on the objective of the disability/accommodation process. Decision makers should avoid this type of linear thinking.

<sup>223</sup> 76 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>224</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

<sup>225</sup> *E.g.*, Division of Student Affairs, *Learning Disabilities Documentation Guidelines*, IND. U. BLOOMINGTON, <https://studentaffairs.indiana.edu/doc/dss/documentation-learning.pdf> (last visited July 12, 2017).

<sup>226</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

d. School Provides In-House Psychological Evaluations or List of Local Service Providers

Approximately 42% of public law schools (or the larger university they are associated with) either provided in-house psychological evaluations for learning disabilities or provided a list of local service providers who offer equivalent services.<sup>227</sup>

Under this criterion, credit was allocated for schools offering in-house evaluations or when the school provided a list of local service providers that provided equivalent services.<sup>228</sup> Documentation of a learning disability generally requires psychological testing in the areas of academic aptitude/ability, academic achievement, and, sometimes, information processing.<sup>229</sup> Psychological testing can be expensive, but many larger universities may offer in-house evaluation services for free or for a fee on a sliding scale.

AHEAD recommends that institutions “[d]isseminate information to all students with disabilities regarding available campus and community disability resources [and] [p]rovide information and referrals to assist students in accessing campus resources.”<sup>230</sup> For learning-disabled law students who are discovering, for the first time, that they may have a learning disability, and for students who might need updated evaluations, providing a list of local service providers who provide psychological testing for learning disabilities gives learning-disabled students a good starting point when deciding where to get an evaluation if their law school does not offer the same services. In accordance with AHEAD guidelines, public law schools should provide a list of such local service providers if the school does not offer in-house evaluations. Any doubts about conflicts of interest can be resolved by providing the contact information of all known local service providers offering psychological testing, accompanied by a statement that the list is provided only for information, and that the law school does not specifically recommend any service provider.<sup>231</sup>

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<sup>227</sup> 35 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>228</sup> Although there is lack of uniformity in disability accommodations policies across the board in post-secondary education, the most constant requirement among colleges and universities with either general or specific learning disability documentation guidelines is that the student must demonstrate a diagnosis from a qualified professional. AHEAD also suggests this as documentation to support any reasonable accommodations at the post-secondary level.

<sup>229</sup> See AM. PSYCHIATRIC ASS’N., *supra* note 29, at 66–74 (discussing Specific Learning Disabilities and diagnosis).

<sup>230</sup> AHEAD Program Standards and Performance Indicators, *supra* note 176.

<sup>231</sup> The University of Mississippi (School of Law) provides in-house testing at the Psychological Services Center. The cost of an evaluation is based on a sliding scale. “Complete evaluations, including testing, test scoring, report preparation, and the feedback meeting, are \$800.” Psychological Services Center, *Fees: Psychological Assessments Clinic Testing Fee Scale*, THE U. OF MISS., <http://psc.olemiss.edu/fees/> (last visited Aug. 14, 2017). By contrast, Temple University’s Disability Resource Center (Beasley School of Law) does *not* provide in-house testing services, but the university does provide students with a list of local options for independent evaluations. Temple

Difficulties facing learning-disabled students can change over time,<sup>232</sup> and learning-disabled students may wish to seek a more recent psychological evaluation. In that case, the student may choose whether to provide that documentation if any existing prior documentation is found to be outdated or irrelevant. If prior documentation is accepted by the school as current and relevant, it would be good practice for the student to provide more recent documentation, but the student has no obligation to do so.<sup>233</sup> This strikes a balance between the interests of the school and the privacy rights of learning-disabled students, and encourages schools to thoroughly evaluate documentation provided by a learning-disabled student.

The takeaway is that public law schools should provide a list of local service providers offering psychological testing for learning disabilities, regardless of whether documentation is considered, or would be considered, current and relevant. Even if the school provides in-house services, learning-disabled students should be aware of all available options for receiving an initial or updated evaluation at any time.

e. Printable Documentation Form for Learning Disabilities

Approximately 8% of public law schools (or the larger university they are associated with) provided a printable learning disability documentation form.<sup>234</sup>

Under this criterion, credit was allocated where a school provided a printable documentation form that was specific to learning disabilities. Some schools may use the same form for ADD/ADHD/Psychological/Cognitive/Mental Health disabilities and include learning disabilities as a subset of one of those categories.<sup>235</sup>

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University's downloadable Resources for Educational Evaluations document includes the following statement: "DRS [Disability Resources and Services] does not endorse or recommend any specific evaluators. This list is offered as a service to students who request information and the information is based on responses from local clinics and practitioners." Disability Resource and Services, *Resources for Educational Evaluations*, TEMPLE U., <http://disabilityresources.temple.edu/sites/disabilityservices/files/resources-for-educational-evals.pdf> (last updated Sept. 25, 2013). On file with Author.

<sup>232</sup> AM. PSYCHIATRIC ASS'N., *supra* note 29, at 71 ("Changes in manifestation of symptoms occur with age, so that an individual may have a persistent or shifting array of learning difficulties across the lifespan.").

<sup>233</sup> See 28 C.F.R. Part 35, app. C (discussing that a person asserting disability may provide whatever documentation he or she believes is appropriate in order to support a determination of disability).

<sup>234</sup> 7 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>235</sup> The University of Texas at Austin uses a single verification form for ADHD and psychological disabilities. These "psychological disabilities" impliedly encompass learning disabilities due to the request to the evaluator to provide "Psychoeducational testing" which is indicative of language geared toward learning disabilities. See Division of Diversity and Community Engagement, *Services for Students with Disabilities Verification Form for Students with Attention-Deficit/Hyperactivity Disorder and Psychological Disabilities 1-2*, U. OF TEXAS AT AUSTIN, <http://diversity.utexas.edu/disability/wp-content/uploads/2015/07/PsychADHD.VerForm-2015.pdf> (last visited July 12, 2017). In the Author's text, "same form" should be taken quite literally,

Learning disabilities are among the most common disabilities for which accommodations are sought in higher education.<sup>236</sup> Several learning disability documentation forms are publicly accessible.<sup>237</sup> Thus, it would be reasonable for a school to identify a separate form for documenting learning disabilities.

The takeaway is that public law schools should provide a Learning Disability Verification Form that can be downloaded and printed via the official website of the law school or disability services office. A Learning Disability Verification Form has the advantage of providing clear notice to the school, student, and diagnosing professional for the type of disability for which accommodations are being requested/recommended. An accessible, printable Learning Disability Verification Form could be completed either in-house or by a third-party evaluator. This comports with AHEAD guidance that the disability documentation process should not be unnecessarily burdensome to the student.<sup>238</sup>

#### f. Documentation Form Provides Guidance for Diagnosing Professional

Approximately 2% of public schools (or the larger university they are associated with) provided learning disability documentation forms that also offered some type of documentation guidelines for the diagnosing professional.<sup>239</sup>

The Learning Disability Verification Form should help the diagnosing/evaluating professional answer the following question: “Would an informed and reasonable person conclude from the available evidence that a [learning] disability is likely and the requested accommodation[s] [are]

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as a remarkably similar form is used by North Carolina Central University. *See* Student Disability Services, *Services for Students with Disabilities Verification Form for Students with Attention-Deficit/Hyperactivity Disorder and Psychological Disabilities*, NORTH CAROLINA CENTRAL U., [http://www.nccu.edu/formsdocs/proxy.cfm?file\\_id=3775](http://www.nccu.edu/formsdocs/proxy.cfm?file_id=3775) (last visited July 12, 2017). Both forms on file with Author.

<sup>236</sup> *E.g.*, Disability Services: Division of Student Affairs, *Statistics*, TEXAS A&M U., <http://disability.tamu.edu/Statistics> (last visited Aug. 15, 2017). TAMU had approximately 600 students enrolled for accommodations in Fall 2005 and the number was over 2000 in Fall 2016. 800 of those students in Fall 2016 were accommodated for a learning disability.

<sup>237</sup> *E.g.*, Services for Students with Disability, *Disability Verification Form*, U. OF MICH., <https://drive.google.com/file/d/0By-lfENntcBNY3RfZV9uNmZ4Vms/view> (last visited Aug. 15, 2017); Disability Services: Division of Student Affairs, *Documentation for Learning Disabilities*, GEORGIA STATE U., <http://disability.gsu.edu/files/2016/09/Learning-Disabilities-Verification-Form.pdf> (last visited Aug. 15, 2017).

<sup>238</sup> *See Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4. (“A university is prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation.”) (citing *Guckenberger v. Boston University*, 974 F. Supp. 106, 135–36 (D. Mass. 1997)).

<sup>239</sup> 2 of 83 public law schools evaluated. *See* App. A-1, *infra*. Research on file with Author.

warranted?”<sup>240</sup> Under this criterion, credit was allocated where learning disability documentation forms included statements that explained the relevance of particular parts of the documentation form to the documenting professional. Credit was also allocated where learning disability documentation forms included examples of preferred language that could serve as a guideline for the diagnosing professional to connect the disability diagnosis to the legal determinations of the existence of a learning disability and reasonable accommodations needed because of the learning disability.

The takeaway is that the Learning Disability Verification Form should provide the diagnosing/evaluating professional with adequate guidance on how to communicate the following findings to the decision-maker: (1) the existence of a learning disability; (2) the need for academic accommodations because of the learning disability; and (3) recommendations of appropriate accommodations in the J.D. program, based on the requirements of the academic program and the professional judgment of the diagnosing/evaluating professional.<sup>241</sup>

g. Diagnostic Criteria

Approximately 37% of public law schools (or the larger university they are associated with) required or preferred a disability diagnosis based on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).<sup>242</sup>

No credit was allocated under this criterion because some schools referenced more than one diagnostic criteria. For example, a school might reference both the DSM-V and the International Classification of Diseases, Tenth Edition (ICD-10). Approximately 21% of public law schools required or preferred a diagnosis according to the DSM-IV or DSM-IV-TR, which are prior versions of the DSM.<sup>243</sup>

The most current guidelines from the American Psychological Association establish that diagnosing professionals should use the most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V, 2013) as the primary source for diagnostic criteria and supplement the most recent version of the International Classification of Diseases manual (ICD-10) for any additional diagnostic statements and medical billing codes. Policies referencing previous manuals of the DSM, such as the DSM-IV or DSM-IV-TR, should be considered outdated. A diagnosing professional who is qualified to diagnose a learning disability should be aware of the most up-to-date practices for diagnosis.

A short illustration demonstrates why clear guidelines are important. Suppose in the year 2017, a learning-disabled law student seeks accommodations. Suppose the law school requires: (1) documentation of a learning disability must be current within five years; and (2) learning-disability diagnosis must be based on

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<sup>240</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

<sup>241</sup> See Part (IV)(2)(j) *infra*, for discussion on providing guidance to the diagnosing/evaluating professional about the requirements of the J.D. program.

<sup>242</sup> 31 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>243</sup> The DSM-IV was published in 1994; the DSM-IV-TR was published in 2000; and the most recent version, the DSM-V, was published in 2013.

the “most recent edition” of the DSM. Now suppose the student was diagnosed in 2012. Although the student’s documentation is: (1) current within five years, the documentation fails to satisfy the requirement that (2) diagnosis must be based on the “most recent edition” of the DSM, which was released in 2013, one year after the student’s diagnosis.

In the example above, does “most recent edition” literally mean the “most recent edition” (DSM-V), or does the phrase mean the “edition that was most recent at time of diagnosis?” If we suppose the latter, the student can satisfy both documentation requirements. If we suppose the former, it is impossible for a student diagnosed in 2012, to comply with both requirements. The student would need a new diagnosis, hence a new evaluation. Additionally, relevant guidance from AHEAD states that “[n]o specific language, tests, or diagnostic labels are required. Clinicians’ training or philosophical approach may result in the use of euphemistic phrases rather than specific diagnostic labels. Therefore, reports that do not include a specific diagnosis should not be interpreted to suggest that disability does not exist.”<sup>244</sup>

The takeaway is that decision makers at public law schools should first address whether documentation is current and relevant. If documentation is considered current and relevant, decision makers should ask whether the diagnosis is supported by the most recent diagnostic criteria that was available at the time of diagnosis. For updated documentation or new diagnoses, the Learning Disability Verification Form should include language that fairly communicates to diagnosing/evaluating professionals that the most recent editions of the DSM and/or ICD manuals should be used when detailing diagnostic impressions. This requirement allows flexibility for learning-disabled students providing documentation, and for diagnosing/evaluating professionals when citing relevant diagnostic criteria.

#### h. Evaluation Criteria

The most common areas evaluated to support diagnosis of a learning disability include academic aptitude/ability, academic achievement, and information processing ability.<sup>245</sup>

Approximately 60% of public law schools (or the larger university they are associated with) required or recommended evaluation of aptitude.<sup>246</sup> Approximately 61% of public law schools required or recommended evaluation of

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<sup>244</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012*, *supra* note 4.

<sup>245</sup> *See, e.g.*, SWANSON, *supra* note 29, at 33–42 (discussing Cognitive Discrepancy Models). It should be noted that the editors are critical of Cognitive Discrepancy Models based in part on reliability issues. Of particular note on page 38, the editors note that “[s]imple comparisons of aptitude and achievement measures are associated with regression to the mean and will under identify people with lower aptitude as ‘not-LD’ and overidentify people with higher aptitude as LD.”

<sup>246</sup> 50 of 83 public law schools evaluated. *See* App. A-3, *infra*. Research on file with Author.

academic achievement.<sup>247</sup> Approximately 44% of public law schools required or recommended evaluation of information processing ability.<sup>248</sup>

No credit was allocated under this criterion for purposes of the sixteen-point rating system because schools requiring or recommending evaluation of one area did not necessarily recommend or require evaluation of another area.

Policies referencing ability/aptitude, achievement, and information processing (when appropriate), should be considered the most thorough because this approach captures a wider range of learning disabilities. For instance, a learning-disabled law student of high aptitude with average or above average achievement scores may still possess deficits in processing ability.<sup>249</sup> The student in this example would most likely be diagnosed with a learning disability related to substantial limitations in academic fluency.<sup>250</sup>

Some public law school policies still rely on standard deviation when looking at overall academic ability (aptitude) as compared to a significant discrepancy in an area of academic achievement or information processing.<sup>251</sup> However, students

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<sup>247</sup> 51 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>248</sup> 37 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>249</sup> For an excellent study on this very point, see Robert Weis et al., *When Average is Not Good Enough: Students With Learning Disabilities at Selective, Private Colleges*, HAMMILL INST. ON DISABILITIES, SAGE J. OF LEARNING DISABILITIES (2016), where researchers studied students with above average IQ and average achievement, who received accommodations in college. With regard to this Note's discussion, perhaps the circumstances of a learning-disabled law student may be best summarized as follows: "Although these students may believe their academic abilities and test-taking skills are impaired compared to their intellectually talented and high-achieving classmates, there is often little evidence that they experience substantial limitations in academic skills compared to most people in the general population, as characteristic of a disability." *Id.* at 14. The researchers here advocated an empirical, data-driven approach that is similar to the guidelines proposed in this Note. *But cf. infra* note 250.

<sup>250</sup> See generally *id.* at 6 (discussing specific deficits in academic fluency subtests of reading, math, or writing fluency). Note, however, that the study referenced here focused on differences in DSM-IV and DSM-V criteria, with no discussion of supplemental guidance or coding requirements under ICD, which would be used in practice to further specify a learning disability related to academic fluency in one or multiple areas. The focus on DSM-V criteria implies "cut-off" points at discrepancies of 1.5 and 2.0 standard deviations (SD) for any ability/achievement discrepancies in a particular academic domain. However, the DSM-V does provide for a level of professional judgment. See *infra* note 252. Remember that these "substantial limitations" in academic fluency are part of the disability determination, and this is not meant to reference the functional limitations as a result of substantial limitations in academic fluency.

<sup>251</sup> See *Student Handbook, Section I, Part I: Academic Rules and Requirements, Subpt. M. Accommodations for Students with Disabilities* 29–30, IND. U. ROBERT H. MCKINNEY SCH. OF L. (Updated Mar. 29, 2017), [https://mckinneylaw.iu.edu/students/\\_docs/handbook/partI.pdf](https://mckinneylaw.iu.edu/students/_docs/handbook/partI.pdf) (last visited Aug. 18, 2017) ("Documentation for a student with a learning disability must establish that the student's score on a test of processing ability . . . [listing acceptable instruments], or score on a test of academic achievement . . . [listing acceptable instruments] is at least 1.5 standard deviations below the student's intelligence quotient."); see also *Student Handbook 2016-2017* 41–42, U. BALT. SCH. OF L., [287](http://law.ubalt.edu/academics/policiesandprocedures/2016-</a></p></div><div data-bbox=)

and their disabilities should not simply be reduced to numbers formulae. Even if standard deviations are used, the DSM-V advocates professional judgment in the use of a more lenient standard of 1.0 to 2.5 standard deviations for representing a significant discrepancy in ability and achievement.<sup>252</sup>

The takeaway is that the Learning Disabilities Verification Form should include sections for discussion of learning-disabled law students' aptitude, academic achievement, and when appropriate, information processing ability. This approach allows flexibility for the diagnosing/evaluating professional, and allows for a broader range of learning disabilities to be captured in the documentation. Hence, this approach is congruent with Congressional intent in passing the ADA.

#### i. Evaluation Instruments

Approximately 31% of public law schools (or the larger university they are associated with) recommended specific evaluation instruments.<sup>253</sup> Approximately 10% of public law schools specifically required evaluation data from a particular instrument.<sup>254</sup> Approximately 16% of public law schools limited the instruments that the diagnosing professional may use for evaluating the student.<sup>255</sup> Under this criterion, it was possible for schools to require and limit, recommend and limit, or recommend in one area, require in one area, and limit in another area.<sup>256</sup> Due to this discrepancy, no credit was allocated under this criterion for purposes of the sixteen-point rating system.

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2017%20Student%20Handbook%20FINAL.pdf (last visited Aug. 20, 2017) (noting that one of "four criteria necessary to establish a student's eligibility for learning disability adjustments or accommodations [is]: . . . (2) the presence of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized achievement which is 1.5 standard deviations or more below the level corresponding to a student's sub-scale of full-scale IQ"). On file with Author.

<sup>252</sup> AM. PSYCHIATRIC ASS'N., *supra* note 29, at 68–70. If you recall, IDEA prior to 2004 seemingly tracked the most recent language in the DSM-V because of the old "ability/achievement discrepancy model." See Background section, *supra*.

<sup>253</sup> 26 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author. The most commonly recommended instruments were the Wechsler Adult Intelligence Scales (WAIS) and the Woodcock-Johnson (WJ). The most recent versions of these instruments are the WAIS-IV and the WJ-III. Policies differed in the recommended versions of these instruments, and some schools recommended the WAIS-III or a prior version of the WJ. This suggests that the policies citing prior versions of these instruments are not kept up-to-date by persons qualified in the field of learning disabilities or mental disorders, in general. At most, this suggests that the policies are not sufficiently revised to reflect the most recent and reliable measures of aptitude and achievement.

<sup>254</sup> 9 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>255</sup> 14 of 83 public law schools evaluated. See App. A-3, *infra*. Research on file with Author.

<sup>256</sup> For instance, a school may require aptitude evaluation based on certain measures, and recommend that achievement be evaluated by certain instruments while, at the same time, limiting the instruments that the diagnosing professional may use for evaluating the students' information processing ability.

*Uniform Disability Accommodations, Policy & Practice in Higher Education*

When documenting learning disabilities, most schools (approximately 60%) require that comprehensive psychological testing be conducted in the areas of both academic ability/aptitude and academic achievement.<sup>257</sup> Generally, the most commonly accepted psychological test for overall aptitude (IQ) is the Wechsler (WAIS),<sup>258</sup> and the most commonly accepted psychological test for academic achievement is the Woodcock-Johnson (WJ).<sup>259</sup> Many schools will use the WAIS and WJ as non-exclusive examples of acceptable measures.<sup>260</sup> Conversely, some schools may *require* specific testing instruments or may limit the types of psychological testing instruments that a diagnosing professional may consider for purposes of documenting a learning disability in order to receive academic accommodations.<sup>261</sup>

Any policy requiring or restricting psychological testing instruments has the potential to interfere with the professional judgment of the diagnosing professional. Schools must recognize that the professional judgments of diagnosing professionals are vital to the legal decision whether a disability exists, and these professional judgments can, at times, supplement the student's self-report in assisting the decision maker in determining whether accommodations are reasonable in light of the functional limitations faced by the student.<sup>262</sup> As AHEAD guidance states "[t]he rationale for seeking information about a student's condition is to support the higher education professional in establishing

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<sup>257</sup> 50 of 83 public law schools evaluated required evaluation of a learning-disabled student's aptitude (IQ). 51 of 83 public law schools evaluated required evaluation of a learning-disabled student's academic achievement. *See* App. A-3, *infra*. Research on file with Author.

<sup>258</sup> Some policies specify use of the WAIS-III. The most recent version is the WAIS-IV.

<sup>259</sup> Policies are not uniform as to which version to use. The most current versions are the WJ-III and WJ-Revised.

<sup>260</sup> *E.g.*, Disability Services, *Documentation Guidelines for a Learning Disability*, U. COLO. BOULDER, <http://www.colorado.edu/disabilityservices/required-documentation-learning-disability-0> (last visited August 18, 2017).

<sup>261</sup> For example, University of Iowa requires use of the WAIS-IV. Student Disability Services, *Specific Learning Disability Documentation Guidelines*, U. IOWA, <https://sds.studentlife.uiowa.edu/assets/specificlearningdisabilitydocumentationguidelines.pdf> (last visited July 27, 2018), and University of Colorado Boulder specifically forbids use of the WRAT as the sole measurement of achievement. Disability Services, *supra* note 260.

<sup>262</sup> While the University of Tennessee provides for specific testing requirements for learning disability verification purposes, it does so in a way that recognizes the importance of professional judgment. *See Learning Disabilities Documentation Guidelines*, U. TENN. KNOXVILLE (last revised Sep. 24, 2015) <http://sds.utk.edu/wp-content/uploads/sites/2/2015/10/Learning-Disabilities.pdf> (last visited July 27, 2018). Reference this form's "Interpretive Summary" section in that:

Assessment instruments and the data they provide do not diagnose; rather, they provide important elements that must be integrated by the evaluator with background information, observations of the client during the testing situation, and the current context. *It is essential, therefore, that professional judgment be used in the interpretive summary.*

*Id.* (emphasis added).

disability, understanding how disability may impact a student, and making informed decisions about accommodations. *Professional judgment is an essential component of this process.*<sup>263</sup>

The takeaway is that the Learning Disability Verification Form should not require or limit any specific evaluation instrument for testing a learning-disabled student's aptitude, academic achievement, or information processing ability. Public law schools may recommend certain, well-known instruments widely used for evaluating these areas; however, a qualified diagnostician should be aware of the most up-to-date and reliable evaluation instruments, and should be able to communicate the justification for any deviation from common practice. Thus, statements requiring and/or limiting the use of specific instruments inappropriately reach beyond the scope of the decision maker and into the realm of professional diagnosis.

j. Documentation Form Describes Academic Program

Zero public law schools (or the larger university they are associated with) provided a learning disability documentation form that described the relevant academic program (J.D. program) for the diagnosing professional.<sup>264</sup> This criterion was considered for the sixteen-point rating system, but no school earned credit here.

AHEAD guidance states that:

Each situation must be considered individually to understand if and how the student is impacted by the described condition. . . . There is no one-to-one correspondence of disability to accommodation. Institutions should consider the student's disability, history, experience, request, and the unique characteristics of the course, program, or requirement in order to determine whether or not a specific accommodation is reasonable. A clear understanding of how disability impacts the individual establishes the reasonableness of the accommodation for the individual. However, to determine whether the accommodation is reasonable in context requires an evaluation of the unique attributes and requirements of the course, program, or activity.<sup>265</sup>

How can a diagnosing professional provide any reasonable suggestion for appropriate accommodations if the requirements of the academic program are not outlined? In the J.D. program, a student with a learning disability related to mathematics would not need the same type of accommodations as a student with a learning disability related to reading or writing. Yet, even out of the seven public

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<sup>263</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012, supra* note 4 (emphasis added).

<sup>264</sup> 0 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>265</sup> *Supporting Accommodation Requests: Guidance on Documentation Practices – April 2012, supra* note 4 (emphasis added).

law schools that provide a specific learning disability documentation form, none of these forms described the academic requirements of the J.D. program.

Critics may argue that a reasonable interpretation could be made for what accommodations may be reasonable in the J.D. program, or that a diagnosing professional need not know the requirements of the academic program to recommend reasonable accommodations for a learning-disabled law student. The latter is folly, and the former would require a diagnosing professional to hypothesize about the rigors of law school. Professionals qualified to diagnose learning disabilities have most likely never been to law school, and they should not be presumed to understand the academic requirements of the J.D. program. This presents a conundrum for learning-disabled law students who seek accommodations early in law school, and may not yet understand the full extent of the academic requirements of the J.D. program. Furthermore, it is entirely possible that without proper guidance from decision makers, neither the law student nor the diagnosing professional will look beyond the four corners of the Learning Disabilities Verification Form.

The takeaway is that diagnosing/evaluating professionals should not be presumed to understand or left to postulate on legal determinations of disability versus determinations of reasonable accommodations based on a disability without adequate information or understanding related to the requirements of the academic program. Only when guidelines are provided to diagnosing professionals can they then make reasonable, clinical judgments and appropriate recommendations as to whether the student needs academic accommodations *in that student's program of study*.

k. References to Medication in Policy

Approximately 49% of public law schools referenced medication in their policies or documentation forms.<sup>266</sup> Approximately 22% of public law schools did not reference medications.<sup>267</sup> For approximately 27% of public law schools, no conclusion could be made as to whether medications were considered in the disability accommodations process.<sup>268</sup> For example, if policies or documentation forms were unclear or non-existent, it was impossible to tell whether the law school either purposely included or purposely omitted consideration of medications in the accommodation process. For this reason, no credit was allocated under this criterion for the sixteen-point rating system.

The ADA and its implementing regulation at 28 C.F.R. Part 35 clearly states that the disability determination is to be made without regard to the

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<sup>266</sup> 41 of 83 public law schools evaluated. *See* App. A-3, *infra*. Research on file with Author.

<sup>267</sup> 19 of 83 public law schools evaluated. *See* App. A-3, *infra*. This means that compared to those public law school policies and documentation forms that specifically included medications, there were no public law schools that had references to medications in similar locations, and a reasonable inference could be drawn that the omission was purposeful. Research on file with Author.

<sup>268</sup> 23 of 83 public law schools evaluated. *See* App. A-3, *infra*. Research on file with Author.

ameliorating effects of medication.<sup>269</sup> On the other hand, Section 504 does not specifically forbid consideration of mitigating measures for the accommodations determination. In higher education, the United States Department of Education does not provide specific guidance on this topic. However, at the K-12 level, the Department has stated that:

[I]n determining if a student has a disability, the school district should ensure that it follows the expanded Amendments Act interpretation of disability, including the requirement that ameliorative effects of mitigating measures not be considered. Once a school district determines that a student has a disability, however, that student's use of mitigating measures could still be relevant in determining his or her need for special education or related services.<sup>270</sup>

In the language quoted above, the term "related services" fairly implies accommodations under Section 504. For purposes of our discussion, it will be assumed that postsecondary schools have a right, under Section 504, to consider mitigating measures, like medication, when making reasonable accommodation determinations, but not when making disability determinations.

Research suggests that public law schools have struggled when addressing this criterion in their policies and documentation forms. Some schools use generic language in forms when inquiring about medication,<sup>271</sup> while other schools do not reference medication in their forms.<sup>272</sup> Other schools provide statements that may benefit the student by noting in documentation guidelines that "[c]omprehensive documentation will include a description of both current and past medications . . . and accommodations, including their effectiveness in ameliorating *functional impacts* of the disability."<sup>273</sup> Statements similar to the latter are reasonable under

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<sup>269</sup> 28 C.F.R. § 35.108(d)(1)(viii).

<sup>270</sup> *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEPT. OF ED., <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> (citing 34 C.F.R. § 104.35(a)) (last modified Jan. 19, 2012). Again, it should be noted that special education services involve more intensive interventions than accommodations under Section 504.

<sup>271</sup> Although Texas A&M only had an ADHD-specific form at the time of this research (and no form specific to learning disabilities), the form has a space for a healthcare provider to "[d]escribed [sic] any currently prescribed medication, including dosage, side effects, and effectiveness." Disability Serv., *Attention-Deficit/Hyperactivity Disorder Documentation Form*, TEX. A&M U., [http://disability.tamu.edu/sites/disability.tamu.edu/files/ADHD\\_Documentation\\_Packet-2016Rev.pdf](http://disability.tamu.edu/sites/disability.tamu.edu/files/ADHD_Documentation_Packet-2016Rev.pdf) (last visited Aug. 18, 2017). On file with Author.

<sup>272</sup> E.g., Disability Serv., *Documentation for Learning Disabilities*, GA. ST. U., <http://disability.gsu.edu/files/2016/09/Learning-Disabilities-Verification-Form.pdf> (last visited Aug. 18, 2017). On file with Author.

<sup>273</sup> Disability Resource Center, *Required Documentation*, UNIV. OF D.C., <https://www.udc.edu/drc/required-documentation/#learn> (last visited Aug. 18, 2017) (emphasis added). Again, note the inclusion of "functional impacts" and not "substantial limitations" in the academic accommodation context.

this criterion when the objective is to strike balance among: (1) compliance with ADAAA (thus better protection from discrimination claims); (2) privacy rights of students with regard to how they choose to manage their disabilities; and (3) the right of the decision maker to consider mitigating measures for the accommodation determination under Section 504.

If a learning-disabled law student is medicated, but performing well, the law school should still consider the student as disabled, but the student's performance (i.e. grades) will most likely be a significant factor when determining what academic accommodations are reasonable without resulting in a fundamental alteration of the J.D. program. However, it is important to remember to avoid conflation of disability determinations and accommodation determinations in that "[t]he ultimate outcome of an individual's efforts should not undermine a claim of disability, even if the individual is able to achieve the same or similar result as someone without the impairment."<sup>274</sup> Unless a school can prove that a certain ceiling for performance on course exams would result in a fundamental alteration to the course of study, high-performing, learning-disabled law students should be afforded reasonable accommodations that allow them to be evaluated based on their knowledge of the law, not their functional limitations.<sup>275</sup>

This is perhaps the most controversial part of the entire process. How do we justify granting academic accommodations to otherwise high-performing students with learning disabilities? Some may argue that a high-performing, learning-disabled law student is not entitled to any additional time on an exam, for instance, because the student does not demonstrate a need for additional measures to ensure an equal opportunity at success because the student is already successful. This is a debate worth having. This raises the question of whether these high-performing, learning-disabled law students stand to gain an unfair advantage *because of* their disability? This is a moral and philosophical question that may deserve some attention in the future. Would granting academic accommodations to these students unfairly place a heavier burden on "the rest of the pack" of that cohort of law students to perform at an even higher level? Or, would granting academic accommodations to these students simply allow them the opportunity to demonstrate the full potential of their competence and ability to demonstrate their knowledge of the law? Whichever view you subscribe to, against whom are we discriminating?

The first takeaway is that public law schools should inform students that they have a right to a determination of disability without consideration of the mitigating effects of medication, as required by Title II of the ADAAA.<sup>276</sup> Learning-disabled law students should also be informed that mitigating effects of medication may be considered when determining whether accommodations are reasonable.

The second takeaway is that the Learning Disabilities Verification Form should clearly delineate the disability determination from the accommodation determination. There should be no reference to medication in the disability

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<sup>274</sup> 28 C.F.R. Part 35, app. C.

<sup>275</sup> See 34 C.F.R. § 104.44 (discussing reasonableness of academic adjustments).

<sup>276</sup> 42 U.S.C. § 12102(4)(E).

section of the Learning Disabilities Verification Form, because consideration of the mitigating effects of medication are forbidden in the disability determination.<sup>277</sup> However, in the accommodation section of the Learning Disabilities Verification Form, the school may inquire as to any medications the student is currently taking, as well as any side effects that negatively affect academic performance.

The final takeaway is that by delineating the two sections, and inquiring about medications in the accommodations section only, the school gains the additional ability to inquire about the effectiveness of the medication in mitigating any current limitations faced by the student because of his or her learning disability. For learning disabilities, this is a reasonable inquiry because the “evidence” of functional limitations faced by learning-disabled students may often be reflected in academic performance.

### 3. Grievance Process

Approximately 55% of public law schools (or the larger university they are associated with) provided a publicly accessible grievance process that was specific to the disability accommodations process.<sup>278</sup>

Under this criterion, credit was allocated for law schools that provided publicly accessible grievance policies with some intermediate appeal procedure before a complaint to the Office for Civil Rights was suggested. Credit was also allocated for schools that provided a detailed grievance form or links to law school or university policies for informal or formal complaint processes related to disability accommodations decisions.

Public law schools with at least fifteen employees are required to “adopt grievance procedures that incorporate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by [Section 504].”<sup>279</sup> The Office for Civil Rights (OCR) enforces Section 504.<sup>280</sup> There is no requirement to exhaust administrative remedies when disability accommodations are denied, nor is there any requirement that OCR mediate disputes over denied accommodations, and a student may file a private lawsuit at any time.<sup>281</sup> Litigation costs time and money. It is simply unreasonable to suggest that the proper remedy for denial of academic accommodations is to file a private discrimination lawsuit against the school in federal court.

The Office for Civil Rights “may offer to facilitate mediation, referred to as ‘Early Complaint Resolution,’ to resolve a complaint filed under Section 504.”<sup>282</sup> This process is available where both the school and the student agree to allow

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<sup>277</sup> *Id.*

<sup>278</sup> 46 of 83 public law schools evaluated. See App. A-1, *infra*. Research on file with Author.

<sup>279</sup> 34 C.F.R. § 104.7 (2017).

<sup>280</sup> See *Protecting Students With Disabilities*, *supra* note 2 (“OCR has been given administrative authority to enforce Section 504.”).

<sup>281</sup> See *id.*

<sup>282</sup> *Id.*

OCR to facilitate immediate resolutions to complaints.<sup>283</sup> Remedial action, voluntary action, and self-evaluation described in 34 C.F.R. § 104.6, allow recipients (public law schools) an opportunity to identify and resolve shortcomings related to discriminatory practices in violation of Section 504. Any agreement between the law school and the student will not be monitored by OCR.<sup>284</sup>

Administrators, faculty, and staff at public law schools should have sufficient collective knowledge and capabilities to implement a committee review process when academic accommodations are denied. Formal OCR complaints and resolution letters become public records.<sup>285</sup> These types of public records can cast a shadow on the reputation of a law school. In the interest of propriety, it would be reasonable for a public law school to provide some type of intermediate grievance process.

The first takeaway is that public law schools should have grievance policies that are specific to denial of disability accommodations. If an appropriate, general grievance policy exists, public law schools should ensure that students are informed that the general grievance policy is to be followed when appealing denials of disability accommodations requests. Public law schools should provide a short and plain statement to this effect, and include a hyperlink on the public law school's official website.

The second takeaway is that grievance policies should provide some detail as to what the student should do when appealing denial of accommodations. These policies should describe procedures to be taken by all affected parties when appealing denied accommodations. The grievance policy should also specify: (1) what form the grievance should take (written or otherwise); (2) to whom the grievance should be addressed; and (3) a timeline and explanation of the appeal and review processes, before an OCR complaint is suggested.<sup>286</sup>

## Conclusion

Changes in both disability law and education law over the past twenty or so years have resulted in more diagnoses of learning disabilities in K-12 students. The first wave of these K-12 students has begun to enter higher education, and there has been an increase in requests for reasonable academic accommodations based on disability. As these learning-disabled students graduate from college and continue on to law school, how will we greet them? Will we offer them lesser protection than is clearly legally afforded?

The research of numerous scholars and disability advocates such as Latoya Jones Burrell, Susan E. McGuigan, Stan F. Shaw et. al., William J. Phelan, IV, and now the research of this Author amount to much more than a mere scintilla of

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> See, e.g., Resolution Agreement, *supra* note 182.

<sup>286</sup> This does not mean that the policy seeks to limit the student's ability to move straight to an OCR complaint, only that the school has sought to provide intermediate options for settling grievances before an official OCR complaint is filed for discrimination in violation of Section 504.

evidence. There are serious discrepancies among ABA-accredited public law schools regarding disability accommodation policies. If one of the goals of the American Bar Association truly 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,” what better place to start than the Standards for ABA Accreditation?<sup>287</sup> Current ABA Standards do not provide adequate guidance to ABA-accredited public (or private) law schools for “adopt[ing], publish[ing], and adher[ing] to written policies and procedures for assessing and handling requests for reasonable accommodations” made by learning-disabled law students.<sup>288</sup>

This is no simple subject matter. Historically, there has been significant overlap in relevant definitions under the implementing regulations of Section 504 of the Rehabilitation Act of 1973, and relevant definitions under the implementing regulations of the Americans With Disabilities Amendments Act of 2008. Revised guidance published in the implementing regulations for the Americans With Disabilities Amendments Act of 2008 help to clarify that Congress intended broad coverage for people with disabilities, and urged against conflating disability determinations with reasonable accommodation determinations. We now know that the determination of disability is governed by a broad standard designed to provide maximum coverage. In the academic context, we now know that the determination of reasonable accommodations is governed by a narrowly tailored standard that places specific focus on the needs of individual, disabled students in their particular academic programs.

We are not talking about a miracle here—we are talking about uniform disability accommodation policies and procedures that would in no way conflict with existing federal laws and federal regulations that apply to all higher education institutions. The guidelines proposed in this Note are a starting point for setting the framework of uniform disability accommodations policies not only in ABA-accredited public law schools, but also in higher education, generally. In response to Burrell’s question, “So What’s Next?”<sup>289</sup>—the answer began with two emails suggesting revisions to ABA Standards, proposed by the Section of Legal Education and Admissions to the Bar (LEAP), Standards and Review Committee in April and May, 2011. The time has now come for creating uniform disability accommodations policies and procedures if the American Bar Association is to stay true to its commitment to increase diversity and break long-held stereotypes about disabilities in legal education. By getting ahead on the disability accommodations curve, the ABA and public law schools may once again shine as

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<sup>287</sup> Commission on Disability Rights, *Mission Statement of the American Bar Association*, A. B. A., [http://www.americanbar.org/groups/disabilityrights/about\\_us.html](http://www.americanbar.org/groups/disabilityrights/about_us.html) (last visited Aug. 18, 2017).

<sup>288</sup> *2016-2017 Chapter 2 of the ABA Standards and Rules of Procedure for Approval of Law Schools*, A. B. A., [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter2.authcheckdam.pdf) (last visited Aug. 18, 2017).

<sup>289</sup> Burrell, *supra* note 43.

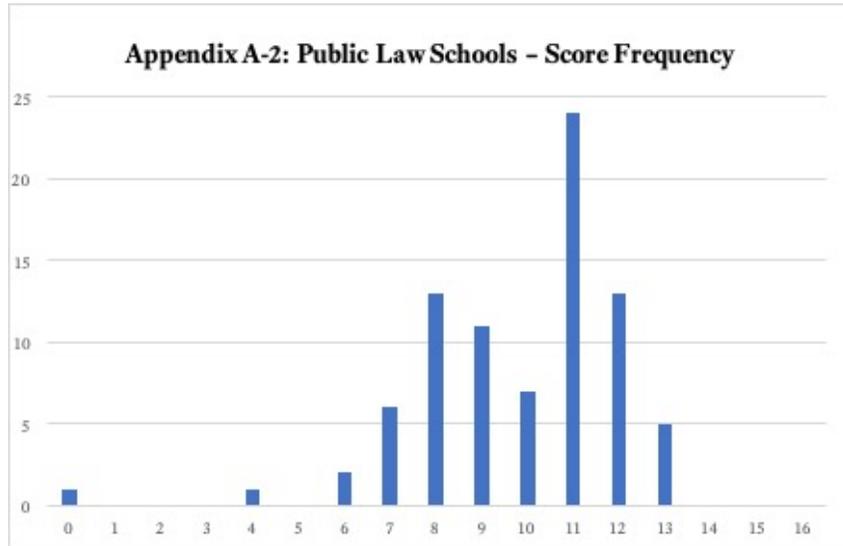
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models for all other higher education institutions and regain public support and confidence for the legal community, which has been lost in recent years.

## APPENDIX A

APPENDIX A: Data from evaluations of learning disability accommodations policies from eighty-three ABA-accredited public law schools. A-1 shows the number and percentage of schools who met the Author's criteria. A-2 shows score frequency for comparison. A-3 shows data for non-rated criteria. A-4 shows each public law school's score based on Author's criteria, organized alphabetically by state then by school (Index Code for research reference purposes only). A-5 shows a pass/fail list for each state based on public law school overall average score compared to national average from sixteen rated criteria. A-6 shows a pass/fail breakdown by federal circuit, which may prove useful in litigation in the future when tracking disability accommodation case developments.

	<u>Appendix A-1</u>	
	Number	Percentage
<b>Source of Policy</b>		
Law School Has Policy	66	79.52%
Refers Student to Administrator	45	54.22%
Refers Student to DSO	77	92.77%
<b>Policy Location</b>		
Policy on Website	82	98.80%
Policy in Handbook	60	72.29%
<b>Policy Content</b>		
General Documentation Guidelines	68	81.93%
Specific Learning Disability Documentation Guidelines	53	63.86%
Cites Law	74	89.16%
Student Responsibilities	79	95.18%
Faculty/School Responsibilities	68	81.93%
Grievance Process Accessible	46	55.42%
<b>Form/Documentation Quality</b>		
Printable Documentation Form	7	8.43%
Describes Academic Program	0	0.00%
Documentation Guidelines for Diagnosing Professional	2	2.41%
<b>Bonus</b>		
List of Local Service Providers	35	42.17%
Syllabus Statement	65	78.31%



**Appendix A-3: Non-Rated Criteria**

<b>Recency</b>	N/A	3 Years	5 Years	Other	
	23	20	16	27	
	27.71%	24.10%	19.28%	32.53%	
<b>Diagnostic Criteria</b>	N/A	DSM-V	DSM-IV(TR)	ICD-9	ICD-10
	38	31	18	2	9
	45.78%	37.35%	21.69%	2.41%	10.84%
<b>Medication References</b>	N/A	Yes	No		
	23	41	19		
	27.71%	49.40%	22.89%		
<b>Evaluation Instruments</b>	N/A	Recommend	Require	Limit	
	53	26	9	14	
	63.86%	31.33%	10.84%	16.87%	
<b>Evaluation Criteria</b>	N/A	Aptitude	Achievement	Information Processing	
	32	50	51	37	
	38.55%	60.24%	61.45%	44.58%	
<b>Qualifications of Diagnosing Professional</b>	N/A	Some Guideline			
	7	76			
	8.43%	91.57%			

**Appendix A-4: Individual Scores**

**National Average** **9.83**

**States With No Public Law School Data\***

Alaska	N/A**
Delaware	N/A
Maryland	N/A
Rhode Island	N/A
Vermont	N/A
Virginia	NOT RATED***
Puerto Rico	NOT RATED***

<b>State:</b>	<b>Index Code:</b>	<b>School:</b>	<b>Score:</b>
Alabama	A1	University of Alabama School of Law	12.00
Arizona	A2	Sandra Day O'Connor College of Law, Arizona State University	8.00
	A3	Univeristy of Arizona, James E. Rogers College of Law	11.00
Arkansas	A4	University of Arkansas School of Law	11.00
	A5	Univeristy of Arkansas at Little Rock, William H. Bowen School of Law	8.00
California	C6	University of California, Berkeley School of Law (Boalt Hall)	9.00
	C7	University of California, Davis School of Law (King Hall)	8.00
	C8	University of California, Hastings College of Law	7.00
	C9	University of California, Irvine School of Law	4.00
	C10	University of California, Los Angeles School of Law	11.00
Colorado	C11	University of Colorado Boulder, College of Law	8.00
Connecticut	C12	University of Connecticut School of Law	11.00
District of Columbia	D13	David A. Clarke School of Law, University of the District of Columbia	12.00
Florida	F14	Florida A & M University College of Law	8.00
	F15	Florida International Univeristy College of Law	8.00
	F16	Florida State University College of Law	10.00
	F17	University of Florida, Levin College of Law	11.00
Georgia	G18	Georgia State University College of Law	11.00
	G19	University of Georgia School of Law	12.00
Hawaii	H20	William S. Richardson School of Law, University of Hawaii	8.00

Idaho	I21	University of Idaho College of Law	12.00
Illinois	I22	Northern Illinois University College of Law	11.00
	I23	Southern Illinois University School of Law	12.00
	I24	University of Illinois at Urbana-Champaign College of Law	8.00
		I25	Maurer School of Law, Indiana University Bloomington
Indiana	I26	Indiana University, Robert H. McKinney School of Law	11.00
	I27	University of Iowa College of Law	11.00
Iowa			
Kansas	K28	University of Kansas School of Law	11.00
	K29	Washburn University School of Law	7.00
Kentucky	K30	Northern Kentucky University, Salmon P. Chase College of Law	7.00
	K31	University of Kentucky College of Law	7.00
	K1	University of Louisville, Louis D. Brandeis School of Law	12.00
		L2	Louisiana State University Paul M. Hebert Law Center
Louisiana	L3	Southern University Law Center	7.00
	M4	University of Maine School of Law	0.00
Maine			
Maryland	M5	University of Baltimore School of Law	12.00
	M6	University of Maryland, Francis King Carey School of Law	10.00
Massachusetts	M7	University of Massachusetts School of Law	9.00
Michigan	M8	University of Michigan Law School	13.00
	M9	Wayne State University Law School	10.00
Minnesota	M10	University of Minnesota Law School	9.00
Mississippi	M11	University of Mississippi School of Law	12.00
Missouri	M12	University of Missouri School of Law	11.00
	M13	University of Missouri-Kansas City School of Law	7.00
Montana	M14	University of Montana, Alexander Blewett III School of Law	11.00
Nebraska	N15	University of Nebraska-Lincoln College of Law	6.00
Nevada	N16	University of Nevada-Las Vegas, William S. Boyd School of Law	9.00
New Hampshire	N17	University of New Hampshire School of Law	8.00
New Jersey	N18	Rutgers School of Law-Camden, Rutgers University	11.00
	N19	Rutgers School of Law-Newark, Rutgers University	11.00
New Mexico	N20	University of New Mexico School of Law	13.00

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New York	N21	City University of New York School of Law	11.00
	N22	University at Buffalo Law School, SUNY	10.00
North Carolina	N23	North Carolina Central University School of Law	12.00
	N24	University of North Carolina School of Law	10.00
North Dakota	N25	University of North Dakota School of Law	9.00
Ohio	O26	Cleveland-Marshall College of Law, Cleveland State University	12.00
	O27	Michael E. Moritz College of Law, Ohio State University	11.00
	O28	University of Akron School of Law	11.00
	O29	University of Cincinnati College of Law	9.00
	O30	University of Toledo College of Law	10.00
Oklahoma	O31	University of Oklahoma College of Law	8.00
Oregon	O1	University of Oregon School of Law	8.00
Pennsylvania	P2	Beasley School of Law, Temple University	9.00
	P3	Dickinson School of Law, Penn State University	13.00
	P4	University of Pittsburgh School of Law	12.00
South Carolina	S6	University of South Carolina School of Law	9.00
South Dakota	S7	University of South Dakota School of Law	6.00
Tennessee	T8	Cecil C. Humphreys School of Law, University of Memphis	8.00
	T9	University of Tennessee College of Law	9.00
Texas	T10	Texas A & M University School of Law	11.00
	T11	Texas Tech University School of Law	11.00
	T12	Thurgood Marshall School of Law, Texas Southern University	12.00
	T13	University of Houston Law Center	11.00
	T14	University of Texas School of Law	11.00
Utah	U15	S.J. Quinney College of Law, University of Utah	11.00
Virginia	V16	George Mason University, Antonin Scalia Law School	11.00
	V18	University of Virginia School of Law	9.00
	V19	William & Mary Law School	11.00
Washington	W20	University of Washington School of Law	10.00
West Virginia	W21	West Virginia University College of Law	12.00
Wisconsin	W22	University of Wisconsin Law School	13.00
Wyoming	W23	University of Wyoming College of Law	9.00

**\*\*NOTE:** "N/A" means that this state does not have a public law school.

Appendix A-5: Scores by State

National Average: 9.83

**States With No Public Law School Data\***

Alaska	N/A**
Delaware	N/A
Maryland	N/A
Rhode Island	N/A
Vermont	N/A
Puerto Rico	NOT RATED***

State	Average Score****	Pass/Fail (Compared to Nat'l Avg.)
Alabama	12.00	P
Arizona	9.50	F
Arkansas	9.50	F
California	7.80	F
Colorado	8.00	F
Connecticut	11.00	P
District of Columbia	12.00	P
Florida	9.25	F
Georgia	11.50	P
Hawaii	8.00	F
Idaho	12.00	P
Illinois	10.33	P
Indiana	9.50	F
Iowa	11.00	P
Kansas	9.00	F
Kentucky	8.66	F
Louisiana	10.00	P
Maine	0.00	F
Massachusetts	9.00	F
Michigan	11.50	P
Minnesota	9.00	F
Mississippi	12.00	P
Missouri	9.00	F
Montana	11.00	P
Nebraska	6.00	F
Nevada	9.00	F
New Hampshire	8.00	F
New Jersey	11.00	P
New Mexico	13.00	P
New York	10.50	P
North Carolina	11.00	P
North Dakota	9.00	F

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Ohio	10.60	P
Oklahoma	8.00	F
Oregon	8.00	F
Pennsylvania	11.33	P
South Carolina	9.00	F
South Dakota	6.00	F
Tennessee	8.50	F
Texas	11.20	P
Utah	11.00	P
Virginia	10.33	P
Washington	10.00	P
West Virginia	12.00	P
Wisconsin	13.00	P
Wyoming	9.00	F

**\*NOTE:** “State” includes all 50 states, U.S. Territory of Puerto Rico, and District of Columbia. Only 46 states had public law schools that were scored.

**\*\*NOTE:** “N/A” means that this state does not have a public law school.

**\*\*\*NOTE:** The University of Puerto Rico’s School of Law was not rated for this research. The website is in Spanish, therefore no data was ascertained.

**\*\*\*\*NOTE:** Figures after 2 decimal places were dropped.

**APPENDIX B**

APPENDIX B: Sixteen-point rating system used in policy evaluations for this research. This checklist also includes five non-rated criteria. See Appendix A for further breakdown of data.

**Appendix B**

**School Name:**

**Source of Policy:** (Yes) (No)     /    3  
 Law School has Policy  
 Refers Student to Administrator  
 Refers Student to DSO

**Policy Location:**     /    2  
 Policy on Website  
 Policy in Handbook

**Policy Content:**     /    6  
 General Doc. Guidelines  
 Specific LD Doc. Guidelines  
 Cites Law  
 Student Responsibilities  
 Faculty/School Responsibilities  
 Grievance Process Accessible

**Form/Documentation Quality:**     /    3  
 Printable Documentation Form  
 Describes Academic Program  
 Doc. Guidelines for Diag. Prof

**Bonus:**     /    2  
 List of Local Service Providers  
 Syllabus Statement

    /    16

<b><u>Recency</u></b>	N/A	3 years	5 years	Other	
<b><u>Diagnostic Manual</u></b>	N/A	DSM-V	DSM-IV (TR)	ICD-9	ICD-10
<b><u>Doc. References Medication</u></b>	N/A	Yes	No		
<b><u>Testing Instruments</u></b>	N/A	Recommend	Require	Limit	
<b><u>Testing Areas</u></b>	N/A	Aptitude	Achievement	Information Processing	
<b><u>Qualifications of Diagnostician</u></b>	N/A				