



# The State Bar of California

---

## **OPEN SESSION AGENDA ITEM II. B AUGUST 2023**

**DATE:** August 18, 2023

**TO:** Members, Committee of Bar Examiners

**FROM:** Judge Robert Brody, Member, Committee of Bar Examiners  
Dr. Michael Cao, Member, Committee of Bar Examiners  
Christina Doell, Program Manager

**SUBJECT:** Action on Revisions to the Testing Accommodation Rules: Recommendation to Adopt Following Return from Public Comment

---

### **EXECUTIVE SUMMARY**

The State Bar is revising the rules and process for handling requests for testing accommodations for exams administered by the State Bar. These revised rules were initially circulated for a 60-day public comment period. The working group assigned to these rule changes recommended significant modifications to the proposed rules based on public comments received. Due to the substantive changes proposed, the working group recommended, and the committee and board agreed, to circulate the proposal for a 45-day public comment period.

The committee received 42 public comments. A copy of the comment chart is included as Attachment A, and the letters provided by commenters is included as Attachment B. After evaluating the comments, the working group proposes two options to broadening the scope of the automatic approvals, which will in turn, further streamline the process so that decisions on requests for testing accommodations can be made in a shorter timeframe. The working group was split on how to further expand the automatic approval process and offers two options for the committee's consideration, one that extends the automatic approval process for requests up to 100 percent additional time (double time), and one that includes accommodations approved in law schools for timed exams into the automatic approval process.

Should the committee choose to expand the automatic approval process, the changes will be sent for circulation for a third public comment period.

---

## **BACKGROUND**

After receiving feedback during the first public comment period, the committee recommended significant changes to the rule proposal including: broadening the scope of automatic approvals by eliminating the five-year time limit, giving considerable weight to accommodations approved in college or law school for timed examinations, eliminating the framework and rolling the requirements into the rules, extending the timeline for submitting a request for review to 14 days, and committing to reviewing additional timelines for processing requests after two exam cycles. With these modifications to the proposed rules, the committee recommended circulating the rule changes for a second public comment period. At its May 2023 meeting, the Board concurred and circulated the proposed rule changes for a 45-day public comment period which closed on July 31, 2023.

A working group consisting of two committee member volunteers and State Bar staff have provided guidance and direction for the proposed modifications to the testing accommodation rules. The working group thanks the commenters for participating during both public comment periods. The comment chart, as set forth in Attachment A, identifies each commenter, whether the person is an attorney or a public member, their affiliated organization (if any), and their position on each of the six key issues addressed by the modified changes within the rule proposal. The comments, in full, are included as Attachment B.

The committee received 42 public comments. A summary of the six topics and the commenter's position on those topics is outlined below.

## **DISCUSSION**

In June 2023, the revised testing accommodations rule proposal was posted for a 45-day public comment period, concluding on July 31. In addition to individuals who had signed up through the State Bar website as wanting to hear of public comment opportunities, an email was sent to over 2,500 applicants, attorneys, law school staff and disability rights organizations requesting comments on the new proposal. The committee received 42 public comments. The numerical and percentage split for and against each of the topics is detailed below.

To help in the review of the comments, staff invited the public to comment on six specific issues, or any other issues they wished. The six topics were identified as some of the key issues from the public comments from the first version of the proposal circulated. Many of the comments used a letter template that reflected the same essential recommendations. The working group has attempted to extract the key issues raised by the commenters in those areas. The topics and the breakdown of comments by topic are as follows:

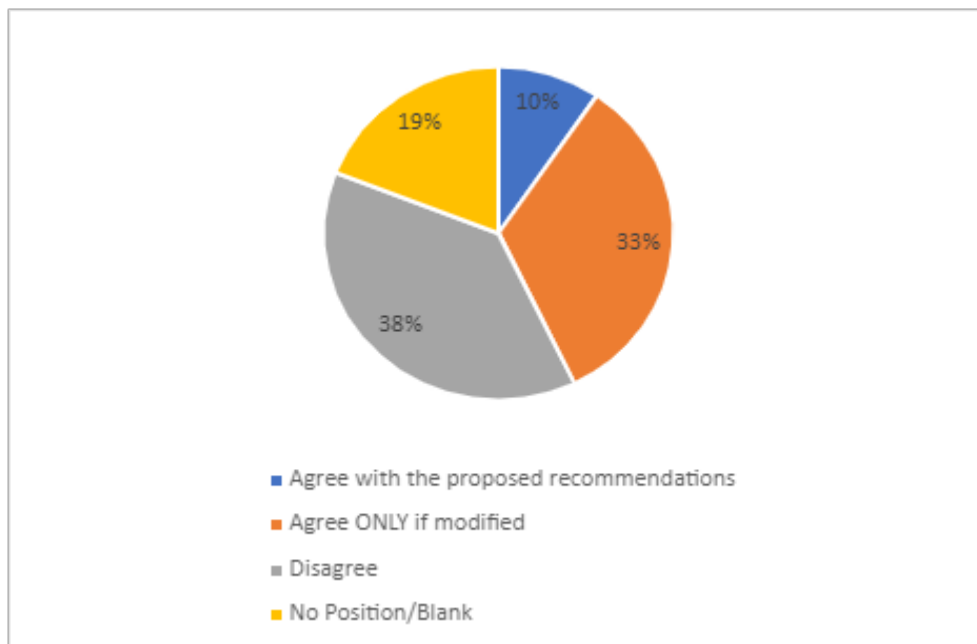
- Automatic approval of accommodations previously granted for high stakes exams
- Accommodations granted in law school or college
- Timelines for processing initial requests

- Appeal/review process
- Documentation
- Denial only permissible after evaluation of initial request by disability accommodations expert

## **APPROVAL OF ACCOMMODATIONS PREVIOUSLY GRANTED FOR HIGH STAKES EXAMS**

The proposed rules allow automatic approval for the same (or lesser) accommodations as those previously granted for high stakes exams based on a permanent physical or mental disability. With the automatic approval process for the same accommodations received on previous high stakes exams, applicants need only to provide proof of the prior accommodation and certify that they still experience the same functional limitations. High stakes exams include the California Bar Exam, First-Year Law Students' Exam, a bar exam in another U.S. jurisdiction, and various standardized tests. This change aims to streamline application processing and significantly reduce approval time.

16 disagree with the proposal or parts of it, 4 in agreement, 14 in agreement if modified, and 8 which did not identify a position.



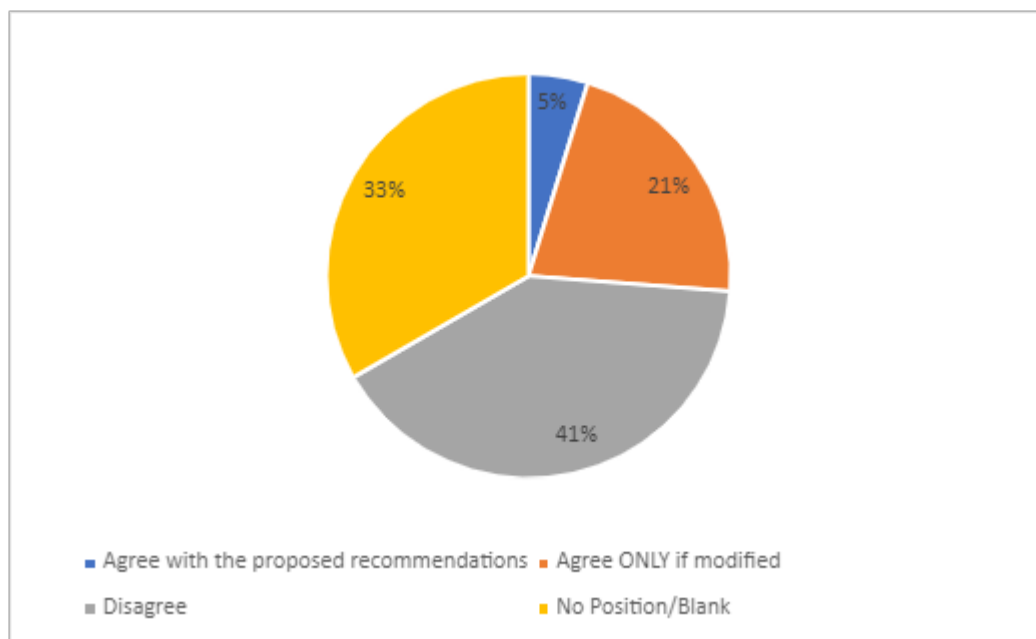
The working group was evaluated the comments and considered further expanding the automatic approval process, but was split on how to appropriately accomplish the expansion. The working group had a robust discussion centered around requests for more than 50 percent additional time and requests for the same accommodations granted in law school. The working group offers two options for the committee's consideration, one that extends the automatic approval process for requests up to 100 percent additional time (double time), and one that includes accommodations approved in law schools for timed exams in the automatic approval process.

Under the first option, the modified rule would specify that “a request for more than 100 percent extra time and/or a private room” will be evaluated in the same manner as other accommodation requests that are not subject to the automatic approval process. The working group continues to recommend the need for documentation to support a request for a private room. Applicants requesting a private testing room will be evaluated in the same manner as other accommodation requests that are not subject to the automatic approval process, and the qualified professional certification must include an explanation of why accommodations that allow for testing in a semi-private room are insufficient.

### **ACCOMMODATIONS GRANTED IN LAW SCHOOL OR COLLEGE**

The State Bar will give considerable weight to past testing accommodations provided for timed exams in college or law school. Applicants who have not received testing accommodations for a high stakes exam but have in college or law school must provide limited, reasonable, and specific documentation to establish their need for accommodation.

17 disagree with the proposal or parts of it, 2 in agreement, 9 in agreement if modified, and 14 which did not identify a position.

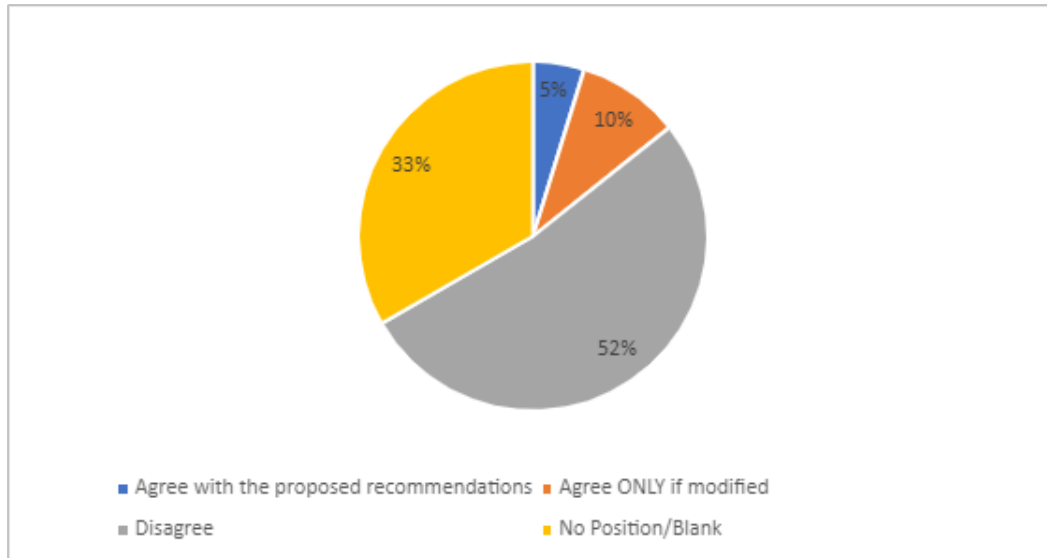


While the Committee of Bar Examiners did not recommend automatically approving such accommodations during the first public comment period due to the challenge of ensuring consistency and rigor across all institutions that evaluate testing accommodation requests, the working group re-evaluated the proposal. A second option proposed by the working group would incorporate into the automatic approval process those testing accommodation approved by law schools for timed exams.

### **TIMELINES**

The State Bar will notify applicants within 30 days of receipt of the request if the request is incomplete. The applicant will be notified within 60 days after submitting a complete application if the request is approved, partially approved, denied, or action is pending. Once the rules have been implemented for two bar exam cycles, the timelines will be brought back to the Committee of Bar Examiners for further consideration.

22 disagree with the proposal or parts of it, 2 in agreement, 4 in agreement if modified, and 14 which did not identify a position.



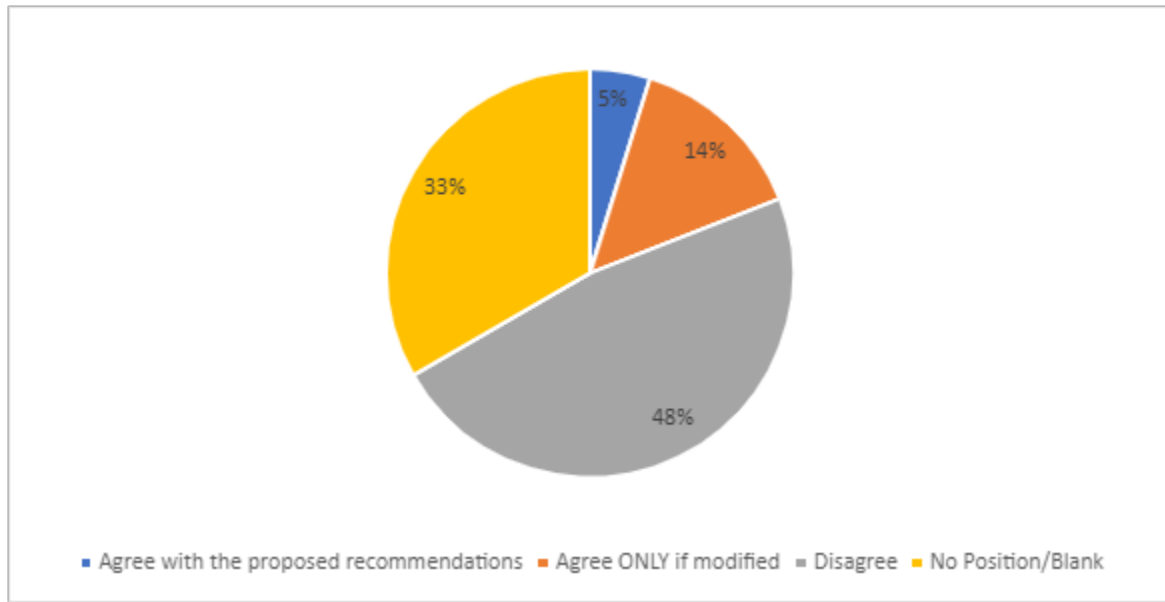
The proposed rules state that the State Bar will promptly evaluate all complete requests received by the deadline and will aim to complete the evaluation as far in advance of the exam as practicable. Under the new procedures, staff anticipates being able to process the requests of those asking for the same accommodations approved for prior high stakes exams more expeditiously than under the current process. The State Bar set outer limits of the timelines for notifying applicants within 60 days after submitting a complete application if the request is approved, partially approved, denied, or action is pending.

Comments suggested that the rules should require the State Bar to act on a request for testing accommodations within two weeks of receipt. However, the timelines for requesting accommodations were left unchanged in the rules until staff has the opportunity to fully implement the new process. The working group is committed to further exploring timelines after the new process, forms, and updates to the AIMS Applicant Portal are completed and we can see if there are opportunities to identify a specific, aggressive yet achievable timeline. The committee is scheduled to review the timelines for further consideration after the rules have been implemented for two bar exam cycles.

## **APPEAL/REVIEW PROCESS**

The proposed rules extend the deadline for requesting review to 14 days unless exam scheduling necessitates a shorter period. The State Bar will continue its practice of offering extra time, upon request, to submit the documentation to support the request for review, but not beyond the appeal deadline, which is the first business day of the exam month. Applicants can request a review once per exam cycle.

20 disagree with the proposal or parts of it, 2 in agreement, 6 in agreement if modified, and 14 which did not identify a position.

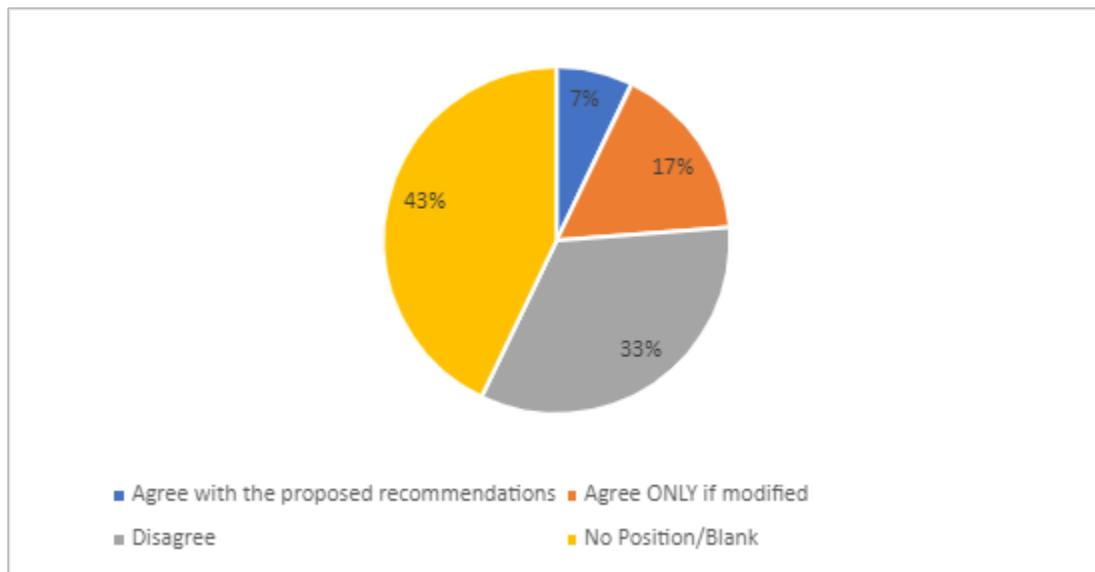


The working group discussed a tiered approach to allow applicants additional time to request review by the committee using the same deadlines as set by [California Business and Professions Code section 6060.3](#). The timeline for requesting review by the committee would be extended to 30 days for applicants that requested review by the timely filing deadline. Those requesting testing accommodations outside the timely filing deadline will be granted 14 days to request review unless the exam scheduling necessitates a shorter period.

## DOCUMENTATION REQUIREMENTS

The proposed rules seek to limit an applicant's need to secure additional documentation or testing by only requiring that which is reasonable and narrowly tailored to determine their need for the requested testing accommodations. The State Bar will defer to documentation from a qualified professional who has made an individualized assessment of the applicant. The applicant and their qualified professional are given flexibility in providing supporting documentation for disability-related functional limitations, access needs, and requested testing accommodations.

14 disagree with the proposal or parts of it, 3 in agreement, 7 in agreement if modified, and 18 which did not identify a position.

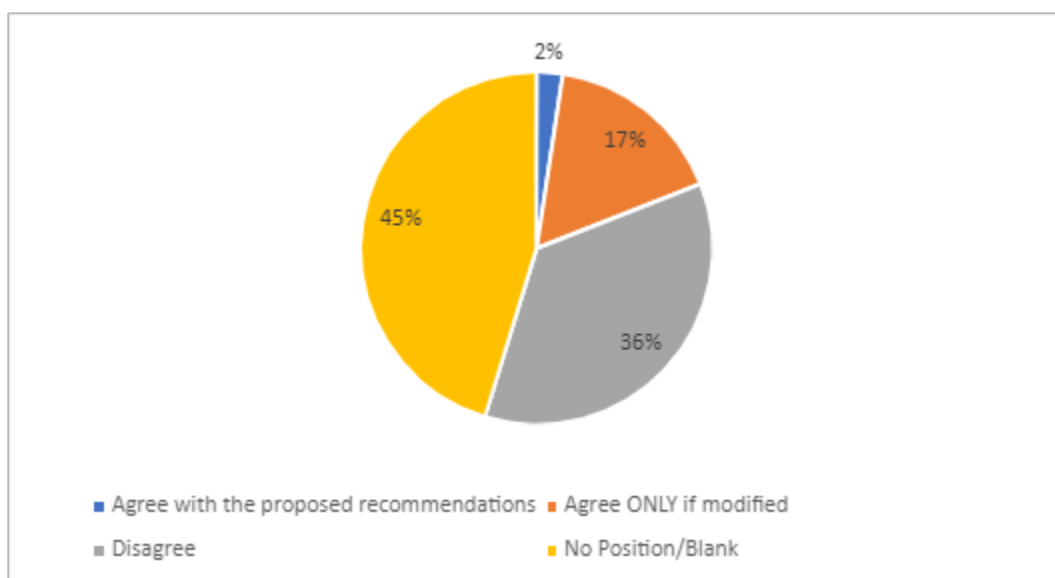


The working group does not propose changes in response to public comments in this area.

#### **DENIAL ONLY PERMISSIBLE AFTER EVALUATION BY DISABILITY ACCOMMODATIONS EXPERT**

The proposed rules require that any request for testing accommodations not part of the automatic approval process shall be sent to a disability accommodations expert for review. A denial or approval of reduced accommodations must include a detailed report from this expert, explaining the reasons for such decisions to ensure the applicant has fair notice of the State Bar's reasoning.

15 disagree with the proposal or parts of it, 1 in agreement, 7 in agreement if modified, and 19 which did not identify a position.



The working group is not proposing changes in response to public comments in this area.

The State Bar is committed to enhancing diversity, equity, and inclusion in the profession. The working group values diversity of the profession in general and agrees that the public benefits from a profession that welcomes licenses lawyers with disabilities. In addition to proposing changes to the testing accommodation rules, the State Bar has increased the number and diversity of expertise in its pool of consultants used to evaluate requests for testing accommodations. In the past year, five additional consultants have been brought onboard to assist the State Bar in its review of testing accommodations requests. The consultants' areas of expertise include Assistive Technology, Clinical Neuropsychology, Counseling Psychology, Forensic Psychiatry, Neuropsychology, Occupational Medicine, Orthopedic Surgery, Psychiatry, and Vision.

## **AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA**

Repeal Title 4, Division 1, Chapter 7 (commencing with Rule 4.80), and add new Title 4, Division 1, Chapter 7 (commencing with Rule 4.80).

## **FISCAL/PERSONNEL IMPACT**

Depending on the action taken by the committee, examination costs are expected to rise as more applicants are granted testing accommodations, particularly those accommodations requiring additional resources such as extended time, additional days, private rooms, and the reduced ratio of proctors to applicants used in testing accommodation sites. These costs may be offset by the automatic approval process and the reduced need for a disability accommodation expert to review applicants' requests for testing accommodations.

If the committee recommends folding the accommodations granted in law school or college into the automatic approval process, the costs associated with a disability accommodation expert reviewing applicants' request for accommodations will decrease. The time between an applicant submitting a request for accommodations and receiving a decision will decrease.

According to the cost analysis report from the February 2023 exam, it cost approximately \$415 to administer the exam to an applicant at a standard test center compared to approximately \$3,831 for each applicant taking the exam at a test center for accommodations applicants. Should the committee expand the automatically approval process, it will be necessary to explore other cost-savings options for administering the exam.

## **RECOMMENDATIONS**

It is recommended that the Committee of Bar Examiners discuss options to expand the automatic approval process or lengthen the timeline to request review based on the timely filing deadline. Any proposed modifications to the rules will be circulated



for another public comment period. The working group proposed incorporating into the automatic approval process those testing accommodations approved by law schools for timed exams. Staff recommends adoption of the rule proposal without including law school testing accommodations in the automatic approval process, but including requests up to 100 percent additional time based on previous high stakes exams, as long as the applicant certifies under penalty of perjury that they continue to experience the same functional limitations and need the same accommodations.

## **PROPOSED MOTION**

Should the Committee of Bar Examiners agree with the recommendation, the following motion would be appropriate:

**MOVE** that the Committee of Bar Examiners circulates the modified rules set forth in Attachment C which incorporate into the automatic approval process those testing accommodations approved by law schools for timed exams for a 45-day public comment period.

OR

**MOVE** that the Committee of Bar Examiners circulates the modified rules set forth in Attachment C which incorporate into the automatic approval process those testing accommodations up to 100 percent additional time if previously approved by another high stakes exam for a 45-day public comment period.

## **ATTACHMENTS LIST**

- A. Public Comment Summary Chart
- B. Public Comments
- C. Modified Rules Proposal Following Public Comment

Comment #	Name	Attorney	Representating Organization	Organization	Position <sup>1</sup> on Automatic Approvals	Position on Accommodations in Law School	Position on Documentation	Position on Timelines	Position on Denials of requests	Position on Appeals Process
1	Sophia Hanif	No			AM	AM	AM	AM	AM	AM
2	Melissa Gant	No			D	NP	NP	NP	NP	NP
3	Tanya Bowley	No			NP	D	NP	NP	NP	NP
4	Sharon Baumgold	Yes			NP	NP	NP	D	NP	NP
5-9, 13	Shannon Dillon	Yes	Yes	National Federation of the Blind of California	D	AM	AM	D	AM	D
6	Grayce Zelphin	Yes	Yes	ACLU of Northern California	AM	AM	D	D	D	D
11	Emma Martin	No	Yes	The Center for Independent Living	D	D	D	D	D	D
12	Kendra J. Muller	Yes	Yes	Disability Rights California	D	D	D	D	D	D
14	Robin E. Miller	Yes			NP	NP	AM	NP	NP	AM
15	Katherine Perez	Yes	Yes	The Coelho Center for Disability Law, Policy and Innovation	D	D	NP	D	NP	D
16	Thomas Walker	No			AM	NP	NP	NP	NP	NP
17	Claudia Center	Yes	Yes	Disability Rights Education and Defense Fund, Disability Rights Advocates	D	D	D	D	D	D
18	Chelsea Yuan	Yes	Yes	UC Berkeley School of Law	AM	AM	AM	AM	AM	AM
19	Jack Londen	Yes	Yes	California Access to Justice Commission	AM	NP	NP	NP	NP	NP
20	Areta Guthrey	Yes			D	D	D	D	D	D
21	Kathleen Jane Becket	Yes			D	D	D	D	D	D

---

<sup>1</sup> A = Agree with proposal; AM = Agree if modified; D = Disagree with proposal; NP = No position on proposal/Blank



## **Commenter 1**

I agree. My testing accommodations took forever to get approved. It was only approved 3-4 weeks before the bar exam for July 2023. I stress of it was a distraction in studying productively.

Notice that a re cert is required came 30 days after my application. I took a long time to get a appt with my medication providers.

July 31, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

#### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. *See* Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without

completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

As a current California Bar Exam candidate who requires testing accommodations and has had to personally deal with the above addressed issues with the current testing accommodation model, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

Melissa Gant



### **Commenter 3**

All Accommodations requests from those that had accommodations granted in law school should be automatically granted. This would save lots of time and money for the California State Bar as well as the applicant.

#### **Commenter 4**

I request that the initial petition turnaround time be set at two weeks. Sixty days (or more) just won't work. Further, the time for an applicant to appeal a denial should be at least 30 days (as long as the initial petition was submitted two months or more before the exam). It is simply unfair to refuse to provide requested accommodations; there should not be a generic category of "not offered" nor should a candidate be required to attest to "exceptional need." There must be a level playing field, with the State Bar to shoulder the responsibility to demonstrate how the accommodations constitute fundamental alteration or undue burden. Moreover, an appeal should not be decided merely on the application or other documents; instead, applicants should be given the opportunity to a hearing on denied requests. A hearing on a denied application is already within the State Bar process when a denial is based on a moral character decision. Just like those applicants, disabled applicants have a liberty interest in pursuing their chosen profession.



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Appeals/Review Process**

Dear State Bar of California:

The National Federation of the Blind of California (NFBCA) disagrees with the proposed appeals/review process.

**Deadlines to Appeal:**

Like current rules, Proposed Rule 4.88 sets forth two deadlines that operate on an earlier-of relationship (once either one lapses, the applicant's appeal would be untimely). Proposed Rule 4.88(A) requires the appeal to be submitted within 14 days of the initial decision, a slight extension from the 10 days under current rules, while Proposed Rule 4.88(B) requires the appeal to be submitted by the first business day of the month of the exam. If an initial decision comes after that date – as Admissions Staff are expressly, yet improperly authorized to do by Proposed Rule 4.84(E) even for timely petitions – the State Bar does not afford the applicant any opportunity to appeal for that exam cycle.

While Proposed Rule 4.88(B)'s deadline of the first business day of the exam month could be reasonable under normal circumstances if appropriate other reforms were implemented to facilitate the feasibility of that deadline for applicants,<sup>1</sup> applicants who

---

<sup>1</sup> E.g.: (1) imposition of the two-week cap on initial decision turnaround time from complete petition submission; (2) the elimination of Proposed Rule 4.84(E); and (3) provisions to toll deadlines for initial petition submission and that in Proposed Rule 4.88(B) where – as with the October 2020 exam – the State Bar fails to disclose the standard conditions of the exam at least two months in advance of the final petition deadline. Without these safeguards, the amount of time Proposed Rule 4.88(A) provides from the initial decision holds little relevance even if extended to 30 days or more, as staff may withhold initial decisions until just before the Proposed Rule 4.88(B) cutoff at best and just after it at worst to evade review of unwarranted denials they wish to make or the added work of processing an appeal, or otherwise create

petition early enough that the initial decision is rendered more than two weeks before the Proposed Rule 4.88(B) deadline should not have to nevertheless turnaround complete appellate briefing and responsive treating expert documentation within the mere 14-day time limit that Proposed Rule 4.88(A) independently imposes from the date of decision. They should instead get until the sooner-of the 4.88(B) deadline or thirty days from decision.

Such amendments to Proposed Rule 4.88(A) and the other interacting rules discussed in footnote 1, *supra*, would ensure that disabled applicants who submit their petitions at least two months before the exam starts should receive at least thirty days from the initial decision to complete their appeal submission. The difference between fourteen and thirty days is profound in effect upon the availability of obtaining medical documentation from treating doctors that is responsive to any explanations of the State Bar's reasoning for denials or substitutions, access to legal advice, and the fundamental effectiveness of the appeal submissions made. Just as importantly, thirty days is necessary to avoid timely completing the extremely time-consuming logistical requirements of compiling an effective appeal from unduly burdening the applicant, such as by requiring them to pull all-nighters and/or to reschedule and/or sacrifice other important medical, professional, and personal commitments on short notice to clear their schedules once the accommodations decision is communicated. Particularly where admissions staff have routinely dropped initial decisions for the February exam on the decision-making staff members' way out the doors to their own December holidays – and consequently put disabled applicants in a position of **canceled their own participation in their own annual holiday gatherings with their friends and families to work around the clock to turnaround their appeals within the requisite ten days from the decision** – that ten day period must be extended to at least thirty days rather than fourteen days as now proposed by staff for the incremental extension to meaningfully alleviate the undue burden this deadline has imposed on disabled applicants. See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9<sup>th</sup> Cir. 2004) (concerning Title II's prohibition on policies and procedures that unduly burden disabled applicants, even when consistently enforced to all similarly situated applicants); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729 (9<sup>th</sup> Cir. 2021) (policies and procedures that systemically cause adverse disparate impact among the disabled not allowed under Title II); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144 (discussing the degree of burden imposed on disabled applicants by a subject entity in their procedural requirements to seek accommodations that would or would not be permissible under the ADA).

The Working Group remarked in its responses to the first round of public comment on the original proposal that – even assuming the proposal were amended to require initial decisions within two weeks – allowing an extension of the appeal deadline in Proposed Rule 4.88(A) to thirty days instead of fourteen days from the present ten days would not be feasible, because if the petition was submitted on the petition final filing deadline it

---

situations where through no fault of the disabled applicant, they are unable to petition timely to receive their decision in time to have the opportunity to appeal.

could allow appeals to be submitted as late as a few days before the exam would start. That hypothetical is foreclosed by Proposed Rule 4.88(B)'s provision that all appeals must be received by the first business day of the month of the exam. While its true that applicants could not both wait all the way to the deadline and receive the full thirty days to complete their appeal, applicants who petition even a couple of weeks before the deadline would be able to with this amendment, while deciding initial petitions within two weeks of receipt would still ensure those who submit on the deadline will receive their decision in time to submit an appeal if they can turn it around in roughly sixteen days.

Notwithstanding the above, the State Bar could fairly impose an earlier deadline – such as fourteen days from the decision – for the applicant to provide notice that they intend to appeal, as long as the proposal is amended to clarify that deadline as only for such notice, and to provide that any additional materials to be considered in deciding the appeal are expressly considered as a matter of right up until thirty days from the decision or the Proposed Rule 4.88(B) cutoff of the first business day of the month of the exam, whichever comes first.

Examinations program manager Christina Doell represented to Trustee Mark Toney at the May 2023 Board of Trustees meeting that the fourteen days deadline in Proposed Rule 4.88(A) was already only intended to be for a notice of appeal, and not for a completed appeal submission. Yet, her statement is not only absent from – and in considerable tension with – the text of the operative proposal that has been circulated for public comment, but would irreconcilably contradict the boilerplate admonitions and instructions regarding appeal contained in the decision letters sent to disabled applicants, which expressly mandate all materials to be considered as of right be received by the sooner deadline. Such a policy as Ms. Doell identified – if clearly enumerated into the Rules by amendment to the proposal – could in any event be an acceptable resolution to the defects of Proposed Rule 4.88(A) if implemented alongside the other reforms described at footnote 1 above.

### **Processing Time of Appeals:**

Credit should be given where it's due, and here, the Working Group's amendments to the proposal following the first public comment period largely *do* accomplish an appropriate processing time for appeals. See Proposed Rule 4.88(C) (requiring the Director of Admissions to complete their initial review of the appeal by the sooner of fourteen days or what the exam schedule would require given the potential need for CBE consideration). Still, the "as soon as is practicable" language in Proposed Rule 4.88(D) for consideration by the Subcommittee on Examinations is unduly vague and that lack of a concrete timeframe has in the past been abused to permit months of delay, which prevents disabled applicants from obtaining adequate lead time to prepare for the exam with equal opportunity and without bearing unequal financial risks to arrange such preparation aids (i.e., classes and tutoring regime) adequately in advance of the exam. The rule should adduce that applicants receive the Examinations Subcommittee's decision on the appeal "as soon as is practicable, and no longer than

ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.” (Emphasis added).

### **The Rules Should Provide the Right to a Hearing:**

The CBE offers all applicants whom staff consider at risk of being denied a positive moral character determination a hearing by the Moral Character Subcommittee before any such denial can be made, but does not offer any such similar hearing by the Examinations Subcommittee to applicants to whom staff recommend partly or wholly denying requested testing accommodations. This distinction is illogical: would-be testing accommodation denials – for applicants with disabilities – implicate the same liberty interest in a meaningful opportunity to practice a chosen profession and therefore deserve similar protections – even if only upon an appeal that cannot be granted on the papers. Consideration of written submissions by the Subcommittee does not substitute for a live, interactive dialogue where the applicant and their supporting professionals (e.g., treating experts and/or legal counsel) can respond to the State Bar’s various concerns in real-time and clear up far more areas of confusion than can be done by 1-2 exchanges of written correspondence within the time constraints of the process. Even public comment does not compare, both due to the three-minute time limit per speaker and the one-sided monologue nature of the format.

### **Cap on Number of Administrative Appeals:**

The cap on number of appeals an applicant can make, Proposed Rule 4.88(F), seems largely a solution in search of a problem, because an applicant receiving a decision on a first appeal in time to complete and submit a subsequent appeal by the first business day of the exam month, as required by Proposed Rule 4.88(B), would be exceptionally rare and require an applicant to petition extremely early. Under the excessive timelines as currently provided by the operative proposal, an applicant would have to petition several months earlier than the petition deadline to plausibly have time for even two appeals, which inherently would only be an option for applicants who are not immediate repeaters and start their petition during an exam cycle prior to the one on which they seek accommodations. In that instance, of course, the staff time expended on that applicant in reviewing a petition followed by multiple appeals would be spread over at least two exam cycles, just as with applicants who need to retake and are permitted a new petition and appeal for the next exam cycle (in terms of staff time expended; the latter, unlike the former, requires the applicant to endure unnecessary and costly retake(s), and its resulting adverse collateral effects on the applicant’s lifelong employment opportunities).

Even assuming the absence of a cap was implemented with the two-weeks petition processing time limit requested, given that unsuccessful appeals capable of forming the subject of another appeal would need to be reviewed by the Subcommittee following the Director decision, applicants would still need to at a minimum petition over a month early to have the opportunity to assert two appeals, and several months early to submit

three appeals, which is the maximum number that could conceivably fit into a single exam cycle in any event.

If anything, allowing more than one appeal subject to the deadlines provided would encourage applicants to petition as early as possible, and allow for the most interactive process possible. Like with offering applicants two-weeks processing time, if the demands on staff capacity would prejudice other applicants and create an “unfair situation,” that means the Office of Admissions is improperly understaffed to fulfill its duty to provide equal opportunity, not that disabled applicants’ needs should be played against each other in a zero-sum game for the State Bar’s preferred, yet insufficient level of staffing. Rather, the State Bar is obligated to provide staff resources dynamically to the extent needed to ensure disabled applicants receive equal opportunity to nondisabled applicants, including an interactive process to resolving testing accommodation requests that – time allowing – ideally would include more than two iterations if there was a dispute that would require months of adjudication to resolve. If multiple reviews by the Subcommittee is genuinely impracticable, applicants should still be permitted to submit subsequent requests for reconsideration of denial to the Director of Admissions only, up until the first business day of the month of the exam as provided under Proposed Rule 4.88(B).

### **California Supreme Court Review:**

To the extent that the State Bar prefers the California Supreme Court to Federal Court as the forum for applicants wishing to exercise their right to judicial review of the State Bar’s administrative determinations on their disability-related rights secured by federal and state laws, it should add to the rules revision initiative a recommendation to the California Supreme Court for amendments to the California Rules of Court, rule 9.13(d) to: (1) make that judicial review procedure more compatible with the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules; and (2) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review) in stark contrast to the present treatment of discretionary review granted only to extraordinary cases, and it should do so on a *de novo* standard of review with no greater deference to administrative findings than would be given in a Federal lawsuit.

California Rules of Court, rule 9.13(d) presently provides for a briefing schedule that would require at least 65 days from the filing of the petition to completed briefing, plus any backend adjudication time for the Court to decide whether to grant review on the merits. This would also not include the time from the Subcommittee’s decision on administrative appeal required by the applicant to obtain counsel and allow said counsel (or the applicant, if representing themselves) a meaningful opportunity to draft an effective petition, nor the additional time required by the California Supreme Court to decide the merits of the applicant’s petition once merits briefing is complete.

Accordingly, absent amendment to Cal. Rules Ct. 9.13(d), realistically an applicant would need to obtain the Subcommittee’s decision on appeal at least 120 days before

the start of the exam in order to have a meaningful opportunity to be heard by the California Supreme Court. This means that, under the State Bar's presently operative proposal, the applicant would need to first petition the State Bar nearly a full year in advance of the bar exam they intend to take, and hope that subsequent medical developments or changes in State Bar standard conditions does not require any updates between then and the exam. This is too early to provide equal opportunity and satisfy Federal law under DOJ guidelines.

Even if the State Bar amended the proposal so that the Admission Rules would reflect the reforms to the procedural timeline requested in these comments, the applicant would still have to petition at least six months in advance of the exam to have a meaningful opportunity to be heard by the California Supreme Court under the present textual provisions of Cal. Rules Ct. 9.13(d) – and thus amendment to that rule too is still necessary to both comply with DOJ guidelines on equal opportunity requirements under federal law and allow the California Supreme Court, rather than Federal Court, to be a forum where applicants will receive a meaningful opportunity to be heard. Yet, the California Supreme Court has the authority to amend the California Rules of Court just as readily as it can amend the State Bar's Rules. The State Bar may thus simultaneously move that Court for both kinds of amendments. For these reasons, the State Bar should recommend that the briefing schedule be streamlined so that applicants who petition the Court within two weeks of the Subcommittee's decision can be provided a decision from the California Supreme Court in time for the next administration of the bar exam.

The State Bar should further recommend that the California Supreme Court amend Cal. Rules of Ct. 9.13(d) to provide for mandatory – not discretionary – review on the merits, at least where the CBE decision the petitioner seeks review of is a denial or substitution of requested testing accommodations, for at least two reasons.

*First*, eliminating the initial round of briefing on whether the case at hand is a worthy candidate for the Supreme Court's time/judicial economy, so that the applicant and State Bar may focus only on briefing the merits of whether the CBE's decision should or should not be overturned by the Court, would streamline the adjudication timeframe and in so doing improve the feasibility of fitting both administrative review by the State Bar and judicial review by the California Supreme Court into one exam cycle.

*Second*, the review by the California Supreme Court in this context being mandatory is further warranted by the fundamental tradition that parties with redressable legal claims in judicial forums receive at least two opportunities to have their disputes addressed on their merits under mandatory review by the tribunal: the court of original jurisdiction, and for at least one appeal as of right, typically to an intermediate appellate court. Discretionary review is typically justified only for where a court of last resort would be hearing a second round of appeal from an intermediate appellate court, and the parties afforded at least that much prior process, or for where a party seeks to appeal a preliminary determination early (e.g., interlocutory appeals) before the lower court has made a final determination that would then be subject to appeal as of right.



In contrast, applicants who petition the California Supreme Court have not received any prior judicial review, and by even *petitioning* for such discretionary review – that they can expect to rarely be granted, no less – they must forfeit any future opportunities for mandatory judicial review they may otherwise have had for even Federal law claims arising out of the challenged testing accommodations decision. This is because, under the U.S. Supreme Court’s Feldman-Rooker Doctrine,<sup>2</sup> only the U.S. Supreme Court has subject matter jurisdiction to review state court decisions, and that Court too would offer only discretionary review. That jurisdictional bar to adjudication in lower Federal Courts attaches upon the petition to the California Supreme Court, even if the petition for review is denied and the merits never reached.

Accordingly, as by seeking discretionary review to the California Supreme Court would require applicants to sacrifice all rights to have their disability law claims considered on their legal and factual merits by any other Court even if discretionary review is denied; and even if granted, would also limit any *first* judicial appeal to similarly discretionary review by the U.S. Supreme Court, in order to uphold fundamental fairness and due process of law principles, Rule 9.13(d) should be amended to change the type of review from discretionary to mandatory. Even putting the fairness dimension aside, this is precisely what applicants who bring their challenges in Federal Court forum are entitled, and thus what the California Supreme Court must compete with if it and the State Bar wish it to be the forum in which this kind of challenge is heard.

### **Conclusion:**

Wherefore, for the above reasons:

1. Proposed Rule 4.84(E) should be stricken;
2. Proposed Rule 4.88(A) should be amended to provide for thirty days from the decision instead of fourteen days; or alternatively to specify that a notice of appeal must be submitted within fourteen days, but that appeal statements and new evidence may be submitted up until thirty days from the decision or the cutoff in Proposed Rule 4.88(B), whichever comes first. Either way, it should further provide that applicants who submit their petitions at least two months before the start of the exam must receive at least thirty days to submit their completed appeal and still receive a decision thereon before the next administration of the exam.
3. Proposed Rules 4.84(B) and 4.88(B) should both be amended to provide for tolling of the deadlines therein where the State Bar changes the standard conditions of the bar exam less than two months before the Proposed Rule 4.84(B) deadline (or after that deadline).
4. The unduly vague phrase “as soon as is practicable” in Proposed Rule 4.88(D) should be amended to adduce it to: “...as soon as is practicable, and no longer

---

<sup>2</sup> See, e.g., *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.”

5. Proposed Rule 4.88(E) should be amended to provide applicants whose appeals cannot be fully granted by the Director of Admissions according to Proposed Rule 4.88(C)-(D) with a teleconference hearing by the Examinations Subcommittee similar to that provided to applicants at risk of being denied a positive moral character determination by the Moral Character Subcommittee; in which hearing the applicant, their treating expert(s) if available, their legal counsel if applicable, all “disability accommodations [reviewing] experts relied on by the State Bar, and the Director of Admissions participate collaboratively.
6. Proposed Rule 4.88(F) should ideally be stricken, but alternatively should be narrowed to apply only to the CBE/Subcommittee review portion of the appellate remedy, and otherwise allow subsequent reconsideration by the Director of Admissions within the same exam cycle to the extent applicants submit those subsequent reconsideration requests by the deadline in Proposed Rule 4.88(B).
7. The State Bar should move the California Supreme Court to simultaneously amend Cal. Rules of Court, rule 9.13(d) to, at least in testing accommodations cases: (1) streamline and expedite the briefing schedule provisions enough to make that judicial review procedure compatible with the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules, to the extent that applicants who petition the California Supreme Court within two weeks of the Subcommittee’s decision on their administrative appeal will receive a ruling from the Court in time for the next scheduled administration of the exam; and (2) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review, not the present discretionary review), on a *de novo* standard of review with no greater deference to administrative findings than would be given in a Federal lawsuit.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National Federation of the Blind of California

July 31, 2023

*Submitted Via Online Portal at <https://fs22.formsite.com/sbcta/fwdav5flxh/index>*

Ruben Duran, Chair  
Brandon N. Stallings, Vice-Chair  
Mark Broughton, Trustee  
Hailyn Chen, Trustee  
José Cisneros, Trustee  
Juan De La Cruz, Trustee  
Gregory E. Knoll, Trustee  
Melanie M. Shelby, Trustee  
Arnold Sowell Jr., Trustee  
Mark W. Toney, Ph.D., Trustee  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: **Opposition to Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations**

Dear Board of Trustees:

We write on behalf of the Impact Fund and ACLU of Northern California and Southern California (“ACLU”) to oppose the proposed amendments to the rules of the State Bar pertaining to testing accommodations.

The Impact Fund is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. As a State Bar-funded Support Center, we are well aware of the justice gap that the State Bar identified in our state and struggle to understand why it would adopt new barriers to the admission of qualified attorneys.

The ACLU are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation’s civil rights laws. The ACLU works to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. We strive for a society free of discrimination against people with disabilities, where they are valued, integrated members of society with full access to education, homes, health care, jobs, voting and beyond. The contributions of our legal colleagues who are disabled, both within our organization and in the broader civil rights community, are invaluable to our fight for equity and justice.

With that in mind, the Impact Fund and ACLU adamantly **OPPOSE** the proposed amendments to the rules of the State Bar. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

## **I. The Amendment's Definition of Disability is Divergent from California and Federal Law and is Problematically Underinclusive**

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

## **II. The Proposal's Automatic Approval Process is Inadequate and Fails to Include Necessary Accommodations**

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### III. The Proposal Fails to Adopt Lawful Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. *See* Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### **IV. The Proposal Fails to Permit Stop-the-Clock Breaks**

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1.

#### **V. Additional Problems with the Proposal**

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC* Consent Decree, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

#### **VI. Conclusion**

For the reasons stated in this letter, we **OPPOSE** the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations.

Sincerely,

Grayce Zelphin  
Senior Staff Attorney

Lindsay Nako  
Director of Litigation & Training

ACLU Foundation of Northern California

Impact Fund

Victor Leung  
Director of Advocacy / Legal Director  
ACLU Foundation of Southern California



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Review by Disability Accommodation Expert Procedural Requirement to Deny Requests**

Dear State Bar of California:

The National Federation of the Blind of California (NFBCA) agrees only if modified with the proposed review by disability accommodation expert procedural requirement to deny requests.

While speciously framed as adding a new safeguard against improper denials of testing accommodations requests, the provisions within Proposed Rule 4.82(G) merely continues an existing component of the State Bar's testing accommodation request review practices and procedures. The recommendation of a reviewing expert cannot and should not – as implied by this framework and reflected in current State Bar practices – in and of itself form a sufficient basis or explanation for the denial and/or modification of the applicant's requested accommodation(s), particularly if those requests are supported by the recommendations of an applicant's treating expert(s). Accordingly, greater specificity as to whether and where the State Bar can rebut the presumption of reasonableness treating expert recommendations confers upon an applicant's requests should be enumerated into the rules revision to provide State Bar Staff implementing these rules clarity that they may not rely determinatively solely on a *reviewing expert's mere disagreement* with the *treating expert* recommendations.

Rather, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its



threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert's recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don't just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant's expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert's otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that was provided would support. For this reason, the proposal should be amended to expand Proposed Rule 4.82(G) consistent with the above in order to clarify the limited circumstances where "disability accommodations experts" disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar's definition of "disability accommodations expert," Proposed Rule 4.80(B), be further defined as someone in the particular specialty of the disability they are reviewing (or a panel with disability accommodations experts from each such medical specialty if there are multiple disabilities across multiple medical specialties), trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); "knowledge" of ADA requirements relating to testing accommodations is too vague.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National Federation of the Blind of California



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Timelines for Processing Initial Requests**

Dear California State Bar:

The National Federation of the Blind of California disagrees with the proposed timelines for processing initial requests.

**THE URGENT NEED FOR ADMISSION RULES TO CAP  
REVIEW/PROCESSING TIMES OF INITIAL REQUESTS  
TO NO MORE THAN TWO WEEKS:**

Proposed Rule 4.86(A)-(B) – especially coupled with Proposed Rule 4.84(E), which codifies what, in practical effect, the former necessitates – unacceptably maintains the facially discriminatory and unlawful status quo: up to 30 days to confirm threshold eligibility for consideration (“completeness”), Proposed Rule 4.86(A), followed by an aspirational<sup>1</sup> target period of sixty days of non-collaborative review to resolve the petition to an initial decision, Proposed Rule 4.86(B).

This timeline – self-servingly created and consistently insisted upon by admissions staff to maintain their desired workload and margin for slippage – consumes nearly all of the available time between administrations of the bar exam, and in so doing imposes extraordinary burdens on disabled applicants at best and procedural inaccessibility of due testing accommodations at worst in order to achieve this maximization of

---

<sup>1</sup> This timeline, consistent with current rules, is aspirational, as although State Bar examinations program manager Christina Doell suggested to the Board that sixty days represents the “outer limits” of processing time to reach an initial decision on testing accommodations petitions, that allegation is belied by the experiences of many disabled applicants, who often receive their initial decisions considerably after sixty days from complete submission and rarely receive them significantly sooner than sixty days. In practice, sixty days is closer to a floor than a ceiling.

convenience and leeway for staff to the opposite effect for disabled applicants. Not only do the prejudicial effects of such a timeline facially violate DOJ guidelines interpreting the requirements of various binding ADA regulations, such as 28 C.F.R. 35.130(b) and 28 C.F.R. 36.309(b)(1)(vi), and unduly burden and disparately impact disabled applicants in violation of the ADA,<sup>2</sup> but they present such an unfair mismatch between the interests of admissions staff versus those of disabled applicants as to effect grave miscarriages of justice.

This mismatch is exacerbated by the considerably asymmetric capacities of admissions staff to absorb such logistical burdens compared to disabled applicants, who face the laborious task of drafting and seeking from third-parties extensive documentation and assembling those materials into a “complete” petition (and then, for many, an appeal) on their own time and coordinated around all other life responsibilities and typically substantial health care needs. In contrast, State Bar staff in turn process the petitions as part of their full-time job duties. As such, apportioning admissions staff nearly all of the available time between exam cycles for their side of the process while simultaneously requiring disabled applicants to, at best, scramble in order to assemble in days what admissions staff insist requires months to evaluate, represents grave miscarriages of justice.

Examples of the prejudicial effects of this timeline on disabled applicants include, but are not limited to:

- (1) Improperly requiring (in effect) even disabled applicants who are not immediate repeaters to petition at least six months before the exam to expect any opportunity to appeal denials, which at best effectively imposes an earlier registration deadline for disabled applicants than for nondisabled applicants;
- (2) Leaving even the most diligent disabled immediate repeater applicants (e.g., those who begin expeditious work on their petition to repursue denied accommodations or pursue expanded accommodations for worsened impairment as soon as their previous taken exam ends) inherently insufficient time to have equal opportunity to competitively prepare for the exam without bearing undue and disproportionate financial risks, or to seek judicial review (by the California Supreme Court or otherwise) after exhausting administrative remedies, even to the extent they receive an administrative appeal remedy within the State Bar (if one subject to at most 14 days turnaround for completed submission, Proposed Rule 4.88(A), and without the benefit of a hearing);
- (3) Leaving those immediate repeater disabled applicants who wait for confirmation of failure on their last taken exam, yet still petition timely (or even slightly – if not months – early), without even the opportunity to administratively appeal denials under Proposed Rule 4.88(B); e.g., see also Proposed Rule 4.84(E); let alone sufficient time to prepare for the exam with equal opportunity, which is destroyed

---

<sup>2</sup> See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9th Cir. 2004); *Townsend v. Quasim*, 328 F.3d 511, 518 n.2 (9th Cir. 2003); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144; *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999).

by the Hobbesian Choice of either unequal financial risks or insufficient lead time to participate in competitive exam preparation, even in instances where all requested accommodations are eventually granted by the State Bar.

DOJ guidelines require that testing entities respond to requests for testing accommodations in a timely manner, such that examinees can register with their nondisabled peers, respond to any request for any additional information requested, and complete any review procedures needed, in time to take the test in the same testing cycle with equal opportunity to prepare for the exam. With about seven weeks between the registration deadline and the bar exam, an initial decision from State Bar staff within two weeks of receipt is necessary to accomplish this.

A two-week response window leaves five weeks between the initial decision and the bar exam for applicants who petition on or around the State Bar's deadline, a period which is necessary for the applicant to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal. Such an amendment – combined with the effect of Proposed Rule 4.88(B) – would facilitate the feasibility of amending Proposed Rule 4.88(A) to provide for 30 days instead of the insufficient 14 days, and would thus enable the State Bar to permit at least those disabled applicants who submit their petition at least two months before the start of the bar exam to receive at least 30 days from the decision to appeal, a difference critical to obtaining responsive medical documentation from treating doctors and allowing applicants a *meaningful* opportunity to be heard in their appeal.

A two-week response window also would allow applicants who request their accommodations early (weeks or months before the registration deadline) an opportunity to exhaust all administrative review options and know their final approved testing accommodations prior to embarking on test preparation, typically an eight-to-ten-week endeavor (as well as have a meaningful opportunity for judicial review, if needed), and to do so even if they are an immediate repeater seeking expanded accommodations on the next exam cycle as long as they begin working on their petition as soon as their last taken bar exam has been administered. This knowledge allows candidates to make informed plans about test preparation, which might include taking time off from work, hiring a tutor, enrolling in a preparation class, and taking timed practice exams.

For an exam that most applicants (disabled or not) fail despite most graduates studying full-time for months and spending many thousands of dollars on preparation that does not remain fresh until the following exam cycle, applicants with disabilities cannot be fairly expected to commit this degree of resources prior to confirmation that the attempt those resources go towards will be meaningful and provide them equal footing, at risk of waste most disabled applicants cannot financially afford and that would likely deprive them of the financial resources to repeat those arrangements if and when they do secure sufficient testing accommodations for a meaningful retake. For that reason, a later final administrative decision (e.g., a decision on appeal) than eight weeks before the next exam – in theory even one granting all requested accommodations – has

already inherently deprived the applicant of equal opportunity to their nondisabled peers.

Moreover, exhaustion of all administrative remedies with the State Bar later than 120 days before the exam renders any purported opportunity for judicial review in the form of a petition for discretionary review to the California Supreme Court pursuant to Cal. Rules of Ct. rule 9.13(d) under the timeline therein (at least 65 days not counting the time to draft the petition after the decision or the turnaround time needed by the Court following completed briefing either for threshold decision to review or deciding the merits) as not a meaningful means to be heard by that Court.

**ADDRESSING THIS ISSUE SHOULD NOT BE TABLED FOR YEARS UNTIL A  
SUBSEQUENT RULES REVISION TO BE INITIATED AFTER  
THE PRESENT RULES REVISION HAS BEEN IN EFFECT  
FOR TWO BAR EXAM CYCLES:**

The Working Group's reasoning for rejecting the opinions of most commenters on the original proposal requesting this two-week processing time limit – that the merits of that proposal turn on the results from an experiment that would be years away – had been premised on State Bar Staff's expectations that this rules revision and its other reforms (like summarily granting accommodations granted on certain prior exams) would increase their capacity at present headcount to process accommodations requests faster, if by an unknown degree. They therefore propose leaving the status quo intact until they have been able to experiment with the degree of staff resource-sparing effect the rest of the rules-revision accomplishes, and then revisit a new rules revision after the amended rules have been in effect for two exam cycles.

Even if the present Rules Revision did not result in other much-needed amendments on return from the second public comment period, it would realistically take effect no sooner than for the July 2024 exam, as it would need to be approved at the CBE's August 2023 meeting and the Board's November 2023 meeting before it could go on motion to the California Supreme Court, which Court would likely then take until 2024 to approve it – too late to govern petitions made for the February 2024 exam. The soonest Staff's timeline on a new rules-revision could allow for it to be initiated, then, would be at the August 2025 CBE meeting. Even if public comment was authorized for late 2025-early 2026, and was reapproved as-is by the CBE and Board on return therefrom, this would delay reforming processing timelines at least until the February 2027 exam, an unacceptably long delay to remedy a defect that facially deprives disabled applicants of equal opportunity. And of course, as both this rules revision and that one could plausibly be sent out for more public comment periods, each one needing to be separately authorized by both the CBE and Board, the wait could be far longer than February 2027. More importantly, the information State Bar Staff hope to gain from this proposed experiment not only fails to justify the delay, but is irrelevant to the merits of the two-weeks processing time cap. Taking action to shorten the present months of non-collaborative processing time to two weeks should not be tabled for years merely to collect data on the extent to which the currently proposed reforms would allow such

changes without expanding staff capacity, when even a finding that more staff capacity would be required would not absolve the necessity of implementing such a two-week processing time limit to providing disabled applicants with equal opportunity, and so change the policy outcome.

**CONCLUSION:**

For the above reasons, and as even a finding that – alongside the other proposed reforms – more staff capacity would still be required to process testing accommodations requests to an initial decision within two weeks, such a finding would not absolve the necessity of implementing that time limit to providing disabled applicants with equal opportunity, and so change the policy outcome: Proposed Rule 4.84(E) should be stricken and Proposed Rule 4.86(A)-(B) should be replaced by a requirement that complete testing accommodations requests be decided in two weeks or less from receipt. These amendments should be made as part of *this* rules-revision, and not delayed until a future one.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National Federation of the Blind of California



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Approach to Documentation Standards**

Dear California State Bar:

The National Federation of the Blind of California strongly urges the State Bar of California to amend its proposed approach to documentation standards in its proposed amendments to testing accommodations.

The State Bar has, to its credit, made a number of significant and appreciated positive reforms to the Proposed Rules in this iteration of the Rules Revision, responsive to the overwhelming public comments received on the original proposal. *E.g.*, Proposed Rules 4.81(A); 4.82(C), (E), (F); 4.83(A)(1)-(5), (B)-(D); 4.85(B); 4.86(C). The bulk of these favorable amendments have been in the area of documentation standards.

Nonetheless, fatal flaws remain that prevent even this domain of the proposal from achieving readiness to advance for adoption.

*First*, Proposed Rule 4.85(C) improperly heightens the detail of explanation required to make a procedurally complete request for accommodations that require administration over more than three days (and of a private room). The substance of the additional explanations the State Bar requires within the rules does – for requests that actually would be outside the norms of what adequately ameliorates most disability impairments – seem acceptable, if not optimal due to the likelihood the increased time and complexity it adds to the treating doctors' task (relative to the kind of doctor's letters they're used to writing in an insurance-accepting clinical, not expert opinion witness practice) causes more applicants to have difficulties persuading their doctors to provide documentation that would satisfy the State Bar even if they do in fact have functional limitations justifying that degree of accommodation.

Unfortunately, the State Bar has not drawn the line at the appropriate boundary with its choice of three days as the boundary past which accommodations would trigger these

additional requirements, even accepting the addition of such a boundary, nor by including private rooms as among those that do so. The Rules Revision purports to be guided by the LSAC/DOJ consent decree panel's best practices report, which expressly defines accommodations up to double time as routine (even if only 50% is eligible for summary match absent multiple disability functional limitations or a visual impairment), and up to triple time as reasonable in certain contexts (e.g., both visual impairment and non-visual disability impairment). Extra time may also require more than the proportionate number of additional days (and thus more than three days even with as little as 50% extra time) if the applicant needs to test fewer hours per test day due to their disability and/or needs additional breaks for unrelated functional impairments than those on which they request extra time. The LSAC report also designates such breaks as common accommodations that must be presumed reasonable. Therefore, if the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over (ideally six, and no less than four) days.

Second, the new mandatory evaluator forms impermissibly require treating experts to attest the applicant has "exceptional need" for these accommodations to recommend them. Otherwise, the State Bar will designate the applicant's entire petition as not "complete" and refuse to consider it. ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what "best ensures a level playing field" to nondisabled applicants, which – where met – creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9<sup>th</sup> Cir. 2011); *see also* 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9<sup>th</sup> Cir. 2013). Designating accommodations that have not been demonstrated to constitute fundamental alteration or impose undue burden as requiring "exceptional need" to be individually considered facially conflicts with the above standard.

Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly insurmountable for the disabled applicant, as opposed to whether an unnecessary residual disability-based handicap remains without the sought accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor – per LSAC guidelines – to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all.



Moreover, the State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III's "not readily achievable" standard).

While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations they request meets the best ensures level playing field standard, once they have done so the applicant's requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9<sup>th</sup> Cir. 1999), it cannot categorically designate certain accommodations as requiring attestation of "exceptional need" as on the new evaluator forms. Those forms should be rephrased to conform to the better phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.

*Third*, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert's recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don't just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant's expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert's otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that was provided would support. For this reason, the proposal should be amended to clarify the limited circumstances where "disability accommodations experts" disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar's definition of "disability accommodations expert," Proposed Rule 4.80(B), be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); "knowledge" of ADA requirements relating to testing accommodations is too vague.

*Fourth and finally*, Proposed Rule 4.81(B)(3) improperly sets the applicant's burden of proof at "to the satisfaction of the State Bar" rather than a more proper preponderance of the evidence standard.

### **CONCLUSION:**

1. If the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over [ideally six, and no less than four] days.
2. The mandatory evaluator forms' reference to "exceptional need" should be rephrased to conform to the better – and more likely to be lawful – phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.
3. The proposal should be amended to clarify the limited circumstances where a "disability accommodations expert" disagreeing with (a) treating expert(s) can form a basis for denial by the State Bar, to the effect of requiring that a disability accommodations expert – or panel thereof, if the would-be-denied accommodation(s) relies on disabilities in multiple specialties – in the specialty of each disability has certified that no reasonable expert in their field could have reached the same material findings and conclusions as the applicant's expert(s), absent demonstrated fundamental alteration or undue burden. Alternatively, at a minimum the proposal should be amended to clarify that recommendations for denial by a "disability accommodations expert" who disagrees with the recommendations of the applicant's treating expert(s) cannot be treated as conclusively warranting a denial, or as determinatively satisfying either Proposed

Rule 4.82(C) or 28 C.F.R. Pt. 36 App. A at 795-96, and require specific explanations beyond that recommendation by the Director of Admissions where a denial is made.

4. The State Bar's definition of "disability accommodations expert," Proposed Rule 4.80(B), should be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); "knowledge" of ADA requirements relating to testing accommodations is too vague.
5. The State Bar's burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute "to the satisfaction of the State Bar" with the more appropriate "preponderance of the evidence" standard.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National Federation of the Blind of California



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Approach to Considering Accommodations Granted in Law School or College**

Dear State Bar of California:

The National Federation of the Blind of California (NFBCA) strongly urges the California State Bar to amend its proposed approach to considering accommodations granted in law school or college.

Contrary to Proposed Rule 4.82, the State Bar should not distinguish between timed law school or college exams and other types of prior “high-stakes examinations” an applicant may have received testing accommodations upon for purposes of whether to summarily grant any accommodation previously approved for school exams based on a permanent disability where the applicant certifies they continue to suffer the same functional limitation(s) the accommodation(s) at issue had been approved for – at least if the school itself considered and premised its approval of the predicate accommodation(s) on medical documentation from one or more qualified treating professional(s), rather than self-reporting, and the applicant submits that documentation (even if not written for the bar exam nor on the State Bar’s forms) with their documentation of prior approval. Such an added condition would weed out most approvals generated by the schools which actually rubber stamp every testing accommodation request a student alleges to be premised on disability needs, and limits the burden of producing more exacting documentation on those who have never had to bear it before, while still sparing the vast majority of disabled applicants the substantial burden of repeatedly reinventing the wheel.

The primary purpose of a summary-grant match policy is to better balance the State Bar’s interest in verifying the legitimacy of the disability functional limitations and vetting the propriety of the requested accommodations thereto against the myriad burdens – financial, time and lead time, logistical, etc. – additively imposed on disabled applicants by requiring them to obtain detailed, lengthy written reports from their doctors in each field of specialization at issue for their conditions, or duplicate those their doctors have

already written to address all other schools and testing entities once without reinventing the wheel for each one on the State Bar's forms, at a time when they are typically already facing grueling demands – either from the competing responsibilities of law school or of traditional post-graduation bar exam preparation – especially when often facing those exacting baseline conditions at the structural handicap disabilities impose across all life contexts. See Prof. Katherine Macfarlane, *Accommodation Discrimination*, 72 American University Law Review (Aug. 20, 2022), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4190587](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4190587).

Nonetheless, secondary purposes exist, not the least of which is the spared staff time, consultant time, and general administrative resources associated with processing requests for accommodations through more searching review procedures. By excluding law school and college exam approvals from the summary procedures, the State Bar is adding considerable volume to its roster of petitions and appeals to closely scrutinize, refer to reviewing experts, and then adjudicate. The size of this additive volume is significant – many disabled applicants received and then seek on the bar exam accommodations they received in law school, but had not even requested on their last taken standardized exams, because law school exams are typically more recent for the average bar applicant than past “high-stakes” standardized tests, and that recency means that law school accommodations are comparatively more likely to reflect new or worsened disability impairments that were not at issue for standardized “high-stakes” college or law school admissions exams.

The CBE's rejection of the Working Group recommendation – to not distinguish between school exam approvals and “high-stakes” exam approvals for the summary-match grant policy, – in favor of Staff's recommendation to apply that policy only to the latter, was articulated to be because of how “challenging” the CBE found “ensuring consistency and rigor across all institutions evaluating testing accommodations requests.” This concern is misplaced for at least two reasons:

(1) Uniformity of assessments into what testing accommodation requests best ensure a level playing field is not attainable under either version of the policy: not only are disability accommodations an inherently individualized analysis to the particular impairments of each applicant, regardless of who makes the determination, but the field of treating doctors (whose evaluations 28 C.F.R. Pt. 36 App. A at 795-96 provides must be entitled to controlling weight in the review that would occur without an automatic grant, absent exceptional circumstances) is even more diverse than that of school-designated evaluators, and likely no more consistent in rigor (if still much more accurate than reviewing expert consultants can generally be, due to their opportunities to meet with and personally assess their patients and their holistic situation).

Nor is the particular assumption the CBE makes here (that the consistency and rigor of the various standardized testing vendors who offer what has been labeled “high-stakes exams” is any more reliable than that employed by schools) founded on more than speculation. The proposition that colleges and law schools do not reliably take seriously the integrity of their exams or thoroughly scrutinize disability accommodation requests is

belied by the experiences of most disabled students in higher education. In fact, law school exams in particular are similarly “high-stakes”: like other standardized tests (and the bar exam), they’re graded on a curve (increasing the need to ensure a disabled student faces neither an unfair handicap nor gets an unfair advantage through overaccommodation); they typically constitute the grade for the entire course without any other coursework/homework, attendance, participation, or other performance metrics counting; and law school grades have more impact on legal employment opportunities than grades alone do in other professions. In any event, the State Bar must necessarily tolerate some degree of inevitable inconsistency in the scrutiny applied to claims of disability.

(2) Even assuming *arguendo* that there is a material difference in “consistency and rigor” applied by schools, compared to other types of evaluators in general and standardized testing organizations in particular – that is redressable by carving prior school accommodations out of the summary-matched grants policy – such uniformity is only one value criterion to be balanced against a plethora of others, most notably the *accessibility* of the exam. If achieving the CBE’s preferred degree of uniformity comes at the cost of the exam not being readily accessible to disabled applicants; makes the exam far more costly to attempt for disabled applicants than nondisabled applicants through documentation burdens, even when all requested accommodations are granted as a result; and ultimately produces a degree of error in meting out appropriate accommodations through deterrence and outright procedural inaccessibility greater than the amount of error summarily crediting decisions produced with purported inconsistency and lack of rigor introduces, then that cost is too great.

While the State Bar may have concerns that some applicants who received an accommodation in school did so under false pretenses and may not actually have the claimed disability functional limitations, and/or may believe some schools routinely rubber-stamp or unduly acquiesce to requested accommodations that put those applicants at an undue advantage rather than on equal footing, the probability that an applicant would attest such qualifying disability needs fraudulently to the State Bar *and* have succeeded in persuading a school to grant egregiously unreasonable accommodations is low enough that the degree of duplicative burden the State Bar can equitably require of *all* disabled applicants who already met that burden at least once (with their school) is substantially lower than the boundaries on how much burden the State Bar’s documentation requirements can fairly impose where an applicant asks the State Bar to grant a testing accommodation in the first instance. If overaccommodation compromises the integrity of the exam, then so too does underaccommodation, and the latter is likely to result from the State Bar’s Proposed Rules far more often than the former.

Requiring exhaustive medical documentation: treating experts’ completion of the State Bar’s forms; collection and compilation of the other third-party certifications (regarding whether and what accommodations were granted from the applicant’s law school, other testing agencies, other jurisdictions where a bar exam was attempted, etc.); detailed briefing from the applicant, etc., all to be completed many months ahead of the targeted

exam dates – twice per exam cycle if the applicant needs to appeal, and up to four times per year if they need to retake and opt to repursue denied accommodations or pursue expanded ones – places extraordinary burdens on disabled applicants, which burdens likely affirmatively prevents – or at least deters – far more disabled applicants from pursuing legitimate disability claims and thus suffering undue handicaps therefrom than sparing those burdens by extending the summary-match grant policy to accommodations received for school exams would likely enable to cheat the system. Moreover, said burdens may deprive even the most undeterred and compliance-capable disabled applicants of their right to equal opportunity even when they receive all requested accommodations and are afforded a level playing field on the exam itself, because of the costs incurred to persuade the State Bar to do so.

Finally, the State Bar should also consider the reasonable reliance applicants placed on access to at least the accommodations they received in law school continuing on the bar exam, as applicants may have only chosen to expend the years of study and typically hundreds of thousands of dollars in educational expenses to seek a career in law because their schools provided them an accessible experience that they reasonably anticipated the mandatory entrance exam to the profession to mirror.

### **Conclusion:**

For the above reasons, the State Bar should amend Proposed Rule 4.82 to permit automatic grants of accommodations the applicant documents having received in college or law school, provided that those accommodations:

- (1) were approved for a permanent disability;
- (2) were requested on a Request for Testing Accommodations form submitted with the relevant sections complete;
- (3) are evidenced by documentation of the prior approval of accommodations granted by the school;
- (4) are among the testing accommodations granted by the school;
- (5) had been approved to ameliorate functional limitations of a permanent disability that the applicant certifies they are still experiencing;
- (6) were approved by the school after considering medical documentation from one or more qualified treating professional(s), which documentation the applicant submits with their request;
- (7) are not accommodations that the State Bar demonstrates to constitute fundamental alteration or impose undue burden in the context of the California bar examination.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National Federation of the Blind of California

July 31<sup>st</sup>, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

My name is Emma Martin, and I serve as the Community Engagement Program Manager at The Center for Independent Living (CIL) in Berkeley, California. The Center for Independent Living is a cross-disability advocacy and direct services organization serving people with diverse disabilities in northern Alameda County. The Center for Independent Living was founded in 1973 out of the Disability Rights and Independent Living movements, and served as the model for the growth of 400+ independent living centers across the country and around the world.

CIL is writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.



Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30

days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed

here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC* Consent Decree, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

Emma Martin (she/hers)  
Community Engagement Program Manager  
The Center for Independent Living





LEGAL ADVOCACY UNIT  
530 B Street, Ste. 400  
San Diego, CA 92101  
Tel: (619) 239-7861  
TTY: (800) 719-5798  
Fax: (619) 239-7906  
Intake Line: (800) 776-5746  
[www.disabilityrightsca.org](http://www.disabilityrightsca.org)

July 31, 2023

Via Portal and Staff Email

Ruben Duran  
Chair

Brandon N. Stallings  
Vice-Chair

Mark Broughton  
Hailyn Chen  
José Cisneros  
Juan De La Cruz  
Gregory E. Knoll  
Melanie M. Shelby  
Arnold Sowell Jr.  
Mark W. Toney, Ph.D.  
Trustees

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: Louisa Ayrapetyan  
Board of Trustees Staff Contact  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

Devan McFarland  
Committee of Bar Examiners Staff Contact  
[Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)

**RE:** Proposed Amendments to the Rules of the State Bar, Pertaining to Testing Accommodations—**OPPOSE FOR FURTHER RESEARCH**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

**OPPOSE FOR FURTHER RESEARCH: We respectfully oppose these proposed amendments and request they be amended for further research and analysis, as their implementation has not resulted in a truly equitable change for applicants with disabilities nor help expedite the Bar’s reviewal process. We seek to provide some of this research in the resulting public comment below.**

## **I. Disability Rights California Responsibility and Jurisdiction**

We write to you on behalf of Disability Rights California (DRC), the largest disability rights group in California. DRC holds a unique position as the agency designated by both federal and state governments as California’s Protection and Advocacy Agency (P&A). (designated pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; Welfare and Institutions Code §§ 4900 *et seq.*) As the designated P&A, DRC collaborates with people with all types of disabilities to provide public information, education, coordination of collaborative disability groups and organizations, resources, and referrals, as well as litigation, regulatory, and advocacy projects under federal and state grants to redress individual and systemic disability discrimination. DRC has had this authority for over 40 years and has a long history of working on issues of accessibility for people with disabilities as well as ensuring equal access to education. DRC has worked for decades with a broad coalition of disability advocates around equal access issues. DRC serves tens of thousands of individuals with disabilities annually throughout the state. In our role, DRC can provide detailed technical assistance and discussion for rule language and implementation to aid the State Bar of California in its progress to amend its rules in accordance with California state anti-discrimination law.

## **II. Framing for Further Study**

We frame our comment upon three overarching theories for further study: (1) Legal Premise: federal and state disability rights laws mandate the rules and procedures surrounding reasonable accommodation<sup>1</sup> (2) Medical Premise: An applicant’s factual documentation submitted should take precedence, and (3) Empirical Premise: Reasonable accommodations succeed in providing diverse applicants to the legal professions, a goal of the State Bar.<sup>2</sup>

**a. Legal Premise: Re-Framing Proposed Rules to Comply with Well-Settled Anti-Discrimination Law**

The proposed rules 4.80-4.92 still lack compliance with well settled federal and California disability law. 42 U.S.C. §§ 12132, 28 C.F.R. § 35.130, 28 C.F.R. § 36.309, Cal. Gov. Code §12926 et seq. In order for the State Bar of California (*hereafter* the “Bar”) to provide due diligence in following the legal standards it upholds as a legal institution, the Bar must ensure its rules and regulations are not an exception to the widely available statutes,<sup>3</sup> case law,<sup>4</sup> best practices,<sup>5</sup> and technical assistance.<sup>6</sup> As the licensure body for all attorneys in the State of California, the Bar should seek to be an exemplar of understanding and following the rules of the jurisdiction in which it sits. The Bar has a responsibility to ensure it does not create rules which may be “in violation of any law, rule, or ruling of a tribunal.” (Ca. Rules of Prof. Responsibility Rule 1.2.1).

**b. Medical Premise: The Bar’s Qualifications Do Not Extend to “Healthcare Expert”**

---

<sup>1</sup> 42 U.S.C. § 12112(b)(5) (2012); *see also* Alex B. Long, The ADA’s Reasonable Accommodation Requirement and “Innocent Third Parties,” 68 MO. L. REV. 863, 874 (2003); Alex B. Long, A Good Walk Spoiled: Casey Martin and the ADA’s Reasonable Accommodation Requirement in Competitive Settings, 7 OR. L. REV. 1337, 1341-42 (1998).

<sup>2</sup> *Diversity of 2022 California Licensed Attorneys*, THE STATE BAR OF CALIFORNIA, <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys>.

<sup>3</sup> 42 U.S.C. §§ 12132, 28 C.F.R. § 35.130, 28 C.F.R. § 36.309, Cal. Gov. Code §12926 et seq.

<sup>4</sup> *Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal.), Consent Decree (May 29, 2014), at Injunctive Relief, ¶ 5(a), (c), (d)(ii).

<sup>5</sup> *DFEH v. LSAC Best Practices Report*, 2015 U.S. Dist. LEXIS 104751, at \*\*45, 53, (also found at <https://civildrights.ca.gov/LegalRecords/final-report-of-the-best-practicespanel/>).

<sup>6</sup> *ADA Technical Assistance Document: Testing Accommodations, ADA Requirements*, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, [https://archive.ada.gov/regs2014/testing\\_accommodations.pdf](https://archive.ada.gov/regs2014/testing_accommodations.pdf) (last visited July 30, 2023.).

The Bar does not have the medical qualifications, training, knowledge, or practice to engage in substantive analysis of whether someone is “disabled enough” to be provided a reasonable accommodation. Further, nowhere in the law does a reasonable accommodation process state this analysis is necessary. While the Bar does not have a medical license, it can use the legal framework of reviewing reasonable modification, which only requires the Bar to determine that the accommodation has a nexus to the disability.

The Bar does have the qualifications and responsibility to ensure that attorneys are competent in their practice of law, which includes having sufficient “learning and skill. If not yet competent, “associating with or . . . professionally consulting another lawyer,” “acquiring sufficient learning and skill before performance is required,” or “referring the matter to another lawyer” can provide competency. (Ca. Rules of Prof. Responsibility Rule 1.1). These same rules can be used as a framework for the Bar’s rules regarding reasonable accommodations. The Bar should “professionally consult” with disability rights organizations, as well as members of the disability community who will be most affected by the Bar’s review of reasonable accommodation requests. The Bar can also continue to research and gain evidence-based knowledge through “sufficient learning and skill” *before* reviewing requests. (Ca. Rules of Prof. Responsibility Rule 1.1). Lastly, the Bar can also “refer” the reasonable accommodations request to a non-biased third party who is knowledgeable in state and federal reasonable accommodation requirements and disability cultural competency. (Ca. Rules of Prof. Responsibility Rule 1.1). The Bar will be able to properly review a reasonable accommodation when this framework is achieved.

**c. Empirical Premise: Appealing to Empirical Data Regarding the Pipeline to the Legal Profession**

The pipeline to the legal profession for students with disabilities is fraught with barriers, as shown in part by statistical data. The Center for Disease Control approximates 7,623,839 or 25% of

adults in California have disabilities.<sup>7</sup> Although any one of these persons has the right to enter the path down towards the legal field, most individuals enter through first obtaining a college degree through a higher education institution. Thus, data can be further broken down by the variables of disability and college. Within the higher education institutions of California, there are three main systems that contain the majority of students: The California Community College system, California State University system, and the University of California system. Out of 1.8 million students, 121,560 disabled students (6.8%) are estimated within the California Community College (CCC) system.<sup>8</sup> In the California State University (CSU) system of 460,000 students, 20,318 (4.4%) have identified as disabled.<sup>9</sup> In the University of California (UC) system of 280,000 students, around 19,000 (6.8%) students have been identified as disabled.<sup>10</sup> These California post-secondary statistics are much lower than the national average of around 19% of the undergraduate population.<sup>11</sup> This may be because many students do not learn they have a disability until later in life, may not have resources to get properly diagnosed, or may feel there will be repercussions for identifying to the institution that they are disabled.<sup>12</sup>

Data shows fewer students identify themselves as disabled to post-secondary institutions.<sup>13</sup>

---

<sup>7</sup> *Disability Impacts California*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html> (last visited July 30, 2023).

<sup>8</sup> Disabled Student Programs and Services 2020 Report, CALIFORNIA COMMUNITY COLLEGES, [https://www.cccco.edu/-/media/CCCCO-Website/Reports/CCCCO\\_Report\\_DSPS\\_Final.pdf?la=en&hash=AA90D22EFB7FACD7D20B8B6198DB71EE9B790D5A](https://www.cccco.edu/-/media/CCCCO-Website/Reports/CCCCO_Report_DSPS_Final.pdf?la=en&hash=AA90D22EFB7FACD7D20B8B6198DB71EE9B790D5A) (last visited July 30, 2023).

<sup>9</sup> *Disability Impacts California*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html> (last visited July 30, 2023).

<sup>10</sup> *Supporting Students With Disabilities At The University Of California, Office of The President*, UNIVERSITY OF CALIFORNIA <https://regents.universityofcalifornia.edu/regmeet/nov20/a4.pdf> (last visited July 30, 2023).

<sup>11</sup> Table 311.10, *Number, and percentage distribution of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2015-16*, NATIONAL CENTER FOR EDUCATION STATISTICS, May 2018.

<sup>12</sup> *A Majority of College Students with Disabilities Do Not Inform School*, *New NCES Data Show*, NATIONAL CENTER FOR EDUCATION STATISTICS, (last visited July 30, 2023).

<sup>13</sup> *Accommodated Test-Taker Trends and Performance for the June 2012 Through February 2017 LSAT Administrations (TR 17-03)*, *LSAT Technical Reports*, LSAC, <https://www.lsac.org/data-research/research/accommodated-test-taker-trends-and-performance-june-2012-through-february#:~:text=The%20proportion%20of%20those%20who%20received%20an%20approved,between%2065%25%20and%2077%25%20across%20the%20study%20years> (last visited July 30, 2023); 'I Felt Afraid to Ask': Law Students With Disabilities Are Often Torn Between Trying to Fit In and Seeking Accommodations, ALM LAW. COM,



These institutions have a history of systemic ableism, racism, xenophobia, homophobia, and transphobia prevents students from seeking services they need for equal access.

Once students obtain a higher education degree, they must pass the LSAT to proceed to law school. Out of the estimated 130,000 people who take the LSAT each year, about 1,600 received accommodations (1.2%).<sup>14</sup> This drastic decrease shows how the legal profession immediately creates barriers to entry for those with disabilities through the lengthy accommodation process required by the LSAT.<sup>15</sup>

There is currently no reliable data concerning the percentage of law students with disabilities.<sup>16</sup> Statistics show that 11.9% of graduate students are estimated to be disabled, however the data is not disaggregated by degree (i.e. master, Ph.D degree) and the data does not show whether law degrees are included.<sup>17</sup> This lack of data undermines nefarious claims that “too many” law students are receiving accommodations because no evidence exists to substantiate those statements.

Finally, at the end of the legal career pipeline, the Bar remains the last step to licensure. The Bar’s most recent statistics show 6.5% of total applicants receive accommodations on the California Bar in 2022.<sup>18</sup> Overall, these statistics display fear regarding a high number of individuals requesting accommodations throughout the legal career pipeline is unfounded. Further, this fear tactic is an

---

<https://www.law.com/2022/04/26/i-felt-afraid-to-ask-law-students-with-disabilities-are-often-torn-between-trying-fit-in-and-seeking-accommodations/> (last visited July 30, 2023); *A Majority of College Students with Disabilities Do Not Inform School, New NCES Data Show*, NATIONAL CENTER FOR EDUCATION STATISTICS, (April 26, 2022), [https://nces.ed.gov/whatsnew/press\\_releases/4\\_26\\_2022.asp](https://nces.ed.gov/whatsnew/press_releases/4_26_2022.asp).

<sup>14</sup> Archive: 2017–2018 LSAT Takers by Race/Ethnicity & Sex, LSAT, <https://www.lsac.org/archive-2017-2018-lsat-takers-raceethnicity-sex> (last visited July 30, 2023).

<sup>15</sup> *Requesting Accommodations for the LSAT*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/diversity/disabilityrights/resources/lSAT\\_accom/](https://www.americanbar.org/groups/diversity/disabilityrights/resources/lSAT_accom/)

<sup>16</sup> Chris Payne-Tsoupros, *A Starting Point for Disability Justice in Legal Education*, J. Committed to Social Change on Race and Ethnicity 164 (2020), <https://ssrn.com/abstract=3653578>

<sup>17</sup> *Percentage distribution of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2015–16*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=60>.

<sup>18</sup> *Report to the Supreme Court on the July 2022 California Bar Examination*, Committee of Bar Examiners, THE STATE BAR OF CALIFORNIA (January 27, 2023), <https://board.calbar.ca.gov/Agenda.aspx?id=16728&tid=0&show=100033212>.

improper reason to deny a reasonable accommodation under State law.

Nationwide, only 1.2% of attorneys are disabled, while 18.7-26%<sup>19</sup> of the general U.S. population is estimated to have a disability. Large law firms have the most disparity in their office diversity.<sup>20</sup> Firms reported 0.6% of their attorneys in 2019, and 1.2% of their attorneys in 2021 were disabled.<sup>21</sup> California reports 6% of attorneys are disabled,<sup>22</sup> but does not disaggregate this data by firm or other employment. 1.4% of California judges are disabled.<sup>23</sup> These statistics show that the systemic barriers to education, licensure, and employment result in a lack of diversity in the legal profession, including a lack of disabled people,<sup>24</sup> LGBTQ+ individuals,<sup>25</sup> people of color,<sup>26</sup> women,<sup>27</sup> first generation attorneys<sup>28</sup> and individuals with multiple identities.

---

<sup>19</sup> Matthew W. Brault, *Americans with Disabilities: 2010--Household Economic Studies*, U.S. CENSUS BUREAU, July 2012, <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf> [<https://perma.cc/2UZ4-DRC2>]; *United States, DC & Territories Disability Estimates*, CENTER FOR DISEASE CONTROL, 2019, <https://dhs.cdc.gov/SP?LocationId=59&CategoryId=DISEST&ShowFootnotes=true&showMode=&IndicatorIds=STATTYPE,AGEIND,SEXIND,RACEIND,VETIND&pnl0=Chart,false,YR4,CAT1,BO1,,,AGEADJPREV&pnl1=Chart,false,YR4,DISSTAT,,,,PREV&pnl2=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pnl3=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pnl4=Chart,false,YR4,DISSTAT,,,,AGEADJPREV> [<https://perma.cc/RC9G-K2DC>].

<sup>20</sup> *Employment Outcomes for Graduates with Disabilities, Research & Statistics*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/1222research>.

<sup>21</sup> *NALP Report on Diversity, Research & Statistics*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/reportondiversity>; see also *2020 Vault/MCCA Law Firm Diversity Survey Report*, (0.65% of total lawyers identify as disabled in 2020).

<sup>22</sup> *Diversity of 2022 California Licensed Attorneys*, THE STATE BAR OF CALIFORNIA, <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys>.

<sup>23</sup> *Commission on Judicial Nominees Evaluation, 2021 Statewide Demographics Report, Report in Compliance with Government Code Section 12011.5(n)(B)*, THE STATE BAR OF CALIFORNIA, (March 1, 2022), <https://www.calbar.ca.gov/Portals/0/documents/reports/JNE-Demographics-Report-2021.pdf>.

<sup>24</sup> *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (1.2% of attorneys are disabled).

<sup>25</sup> *Reporting of Openly LGBT Lawyers — NALP Directory of Legal Employers*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/0118research#table1> (2.64% of attorneys are LGBTQ+).

<sup>26</sup> *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (19% of attorneys are people of color, of this conglomerated statistic, 5.5% are Asian, 5.8% are Hispanic, and 4.5% are Black. The percentage of Black lawyers went down from 4.7% in 2012 to only 4.5% 2022).

<sup>27</sup> *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (38.3% of lawyers are women).

<sup>28</sup> *NALP Reports Employment Outcomes for First-Generation College Students Fall Below Those of Their Peers, and Disparities in Outcomes by Race/Ethnicity Persist*, NATIONAL ASSOCIATION FOR LAW PLACEMENT [https://www.nalp.org/uploads/PressReleases/NALPPressReleaseJobsandJDs\\_20October2021.pdf](https://www.nalp.org/uploads/PressReleases/NALPPressReleaseJobsandJDs_20October2021.pdf).

### **III. PROPOSAL RECOMMENDED RULE CHANGES**

The proposed recommendations below are discussed in turn below:

#### **A. Definitions**

##### **1. “disability”**

Under rule 4.80(A) “disability,” the definition should be revised to be consistent with federal and California law. Cal. Gov. Code §12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code §12926.1(a), (c); 42 U.S.C. §12102. “as compared to most people in the general population” is nonexistent in any other anti-discrimination law. *Id.* The creation of additional language to define disability is (1) unnecessary and (2) shows a disregard of the current law and the long legal history of the definition of disability. This definition is also contradictory to the rules' own language housed in 4.81 “Purpose of Testing Accommodations” which states an applicant should be “afforded an equal opportunity . . . as provided *to others*.” (emphasis added). “Others” are other applicants, not members of the “general population.”

##### **2. “disability accommodations expert”**

Rule 4.80(B) “disability accommodations expert” should be revised to ensure a competent third party non-biased expert. The language can be revised to “‘a disability rights service expert’ is an individual from a disability-rights organization which possesses knowledge of state and federal disability, and knowledge of historical and current discrimination faced by the disability community, respectful language to use when referring to the community, and understanding of data-proven inequities within the disability community.” Having certified experts from the disability community itself is vital to ensuring people with disabilities are understood and receive a fair chance during the accommodation reviewing process. This requirement to have community leaders has been implemented for other classes

under California anti-discrimination law, such as for the LGBTQIA+ community under Health and Safety Code §1367.043(a)(2)(F). The code requires facilitation, oversight, and training by “TGI-serving organizations.”<sup>29</sup> Likewise, the Commission can use this language to ensure “disability-serving organizations” qualified in disability rights law and evidence-based cultural competency are making accommodation decisions. (See section F for further analysis).

### **3. “permanent disability”**

4.80(E) “permanent disability” should be revised, as permanent disabilities can often have varying symptoms throughout a day, a week, or a month. Someone with a chronic illness or autoimmune disease could be seen as “temporary” under the current definition if it is not revised, thus preventing them from receiving equal treatment under the rules, such as 4.83(A)(1), even though their disability is ongoing.

#### **B. Automatic Approval of Accommodations Previously Granted for High-Stakes Exams— Further Research is Necessary**

The California Bar has a very elaborate process for requesting reasonable accommodation. As the Committee is aware, this process creates inequality for disabled applicants who must spend large portions of their time on the accommodation application process, time that could be spent studying and preparing for the Bar. We also acknowledge that the proposed rule under 4.83 will provide a more efficient way to receive accommodations for California Bar Exam, by instituting prior approved accommodations from the First Year Law Students’ Exam, Multistate Professional Responsibility Exam (MPRE), a bar exam in another U.S. jurisdiction, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED. (*See proposed rule 4.80 Definitions*).

---

<sup>29</sup> SB 923; *Ca. Health and Saf. Code* §1367.043(a)(2)(F) (“TGI” means transgender, gender diverse, or intersex); *see also Ca. Health and Saf. Code* §1509002(a) (a TGI-serving organization is defined as a “public or nonprofit organization with a mission statement that centers around serving transgender, gender nonconforming, and intersex people, and where at least 65 percent of the clients of the organization are TGI.”)

However, the rule should also include the following changes:

4.83(A) “Prior accommodations approved for a high stakes exam, and law schools. . .” and delete subsection (D).

This is a reasonable change as the State Bar oversees ABA-accredited and California-accredited (by the State Bar's Committee of Bar Examiners (CALS)) law schools throughout California.<sup>30</sup> As the Bar itself oversees and regulates these law schools, it should also trust the institution to provide accurate accommodations. For further efficiency, the Bar can request documentation directly from the school. Requesting documentation from the institution would also decrease burdens upon applicants. Unless accommodations or disabilities have changed and the accommodations need to be updated, such accommodations should be applied directly to the California Bar without further voluminous documentation to achieve the Bar’s goal of “streamlining” the process.

Under proposed rule 4.83(A)(5), the word “certify” is not defined in section 4.80. As currently read, this word “certify” could include additional steps the Bar creates to limit accommodations. We request the process and procedure behind how an applicant would certify be clarified in the rule text, mainly that it not be an overly burdensome system to certify oneself after providing documentation of prior accommodations.

We propose 4.83(A)(7) be stricken. Singling out certain accommodations such as a private room and extended time is arbitrary and has no other purpose beside the displaying the Bar believes these accommodations are either unnecessary, unneeded, or unwarranted and therefore must go through additional processes to prove if the accommodation is justified. Time accommodations make up around 55% of approved accommodations on tests, the most common accommodation given.<sup>31</sup> Adjustments to

---

<sup>30</sup> *Law Schools*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools>.

<sup>31</sup> *Testing Companies Most Commonly Granted Extra Time to Accommodate Individuals with Disabilities*, **G, AO-22-104430**, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/gao-22-104430> (last visited July 30, 2023).

the testing environments such as a private room come in as the second most common accommodation at 22%.<sup>32</sup> Thus, by singling out both accommodations, the Bar effectively negates any helpful effects coming from 4.83's automatic approval process. This will negate any helpful benefits for applicants, as the majority will still need to provide copious amounts of documentation because the prior accommodations they receive will not be allowed the automatic approval process under 4.83. Further, 4.83(A)(7) will cause trickle down affects to Bar's claim that 4.83 will "result in the ability to process requests more expeditiously."<sup>33</sup> This will not be the case if the majority of the accommodation requests (estimated to be around 77%)<sup>34</sup> will still need to go through the full submission process, which in turn will place burden upon the Bar process as it currently stands.

Preventing certain accommodations also singles out certain types of disabilities, a problematic practice. Singling out a subset of disabilities as shown in (7) is unlawful under federal and state case law. *See Olmstead v. L.C.*, 527 U.S. at 598 n. 10.; e.g., *C.O. v. Portland Public Schools*, 679 F.3d 1162, 1169 (9th Cir.2012); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir.2003); *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1053–54 (11th Cir. 2001). This is unduly burdensome to applicants with certain disabilities who need these accommodations. If the rules truly strive to approve prior accommodations when an applicant has already jumped through the hoops of another institution, this should apply to all accommodations.

### **C. Documentation-Further Research is Necessary**

DRC acknowledges deference to healthcare providers is needed to ensure applicants receiving decisions of whether they have a "disability." This is because the Bar is not a qualified healthcare

---

<sup>32</sup> *Testing Companies Most Commonly Granted Extra Time to Accommodate Individuals with Disabilities*, **G, AO-22-104430**, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/gao-22-104430> (last visited July 30, 2023).

<sup>33</sup> *Proposed Amendments to Admissions Rules Related to Testing Accommodations (Rules 4.80-4.92): Request to Circulate for Second Public Comment Period, Open Session Agenda Item 706 May 2023*, STATE BAR OF CALIFORNIA, <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030745.pdf> (last visited July 30, 2023).

<sup>34</sup> *Testing Companies Most Commonly Granted Extra Time to Accommodate Individuals with Disabilities*, **G, AO-22-104430**, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/gao-22-104430> (last visited July 30, 2023).

provider. We support the proposed rules for deference to the applicant's qualified healthcare professional on whether the accommodation is appropriate. However, this deference is undermined by the language in 4.81, as the fact that an applicant "has a disability" and "needs" accommodations will be at the whim of the Bar's expert, not established by an applicant's healthcare provider that has worked and seen them. It is good sense to defer to a healthcare provider that has specific medical knowledge concerning the specific disability. There are hundreds of thousands of disabilities, and as currently defined, an "expert" need not have any medical expertise. Deference to the medical experts and healthcare providers is of vital need.

A healthcare professional can provide a thorough analysis of the nexus between the accommodation and the disability and why it is needed. Without the proposed deference, an applicant will provide an overinclusion of documentation that has no nexus to the accommodation because they are unsure what the Bar is looking for as an entity who is unqualified to review medical documentation.

It is vital for this Committee to address that applicants with disabilities may not receive accommodations or diagnoses until they are older. This can be attributed to a number of factors, including acquiring a disability later in life, lack of access to medical care, or having parents that are not knowledgeable of their child's right to have accommodations. Further, "a system that requires extensive medical documentation may eliminate applicants who cannot obtain the documentation for a myriad of practical reasons that bear no relation to disability."<sup>35</sup>

The State Bar seeks to "advance diversity, equity, and inclusion (DEI) in the legal profession by focusing on key areas of influence, specifically the pipeline into the legal profession, retention and career advancement, and judicial diversity." Because of systemic inequity, the Bar should endeavor to advance diversity, equity, and inclusion by conducting further research surrounding systemic

---

<sup>35</sup> Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021).

discrimination that may cause an applicant to have certain types of documentation, as well as review their internal institution's inequitable systems for changes that can be made to provide greater diversity for disabled and multi-marginalized applicants. One of *many* necessary procedures to ensure equity in the profession includes an evidence-based undertaking to the reasonable accommodations process.

#### **D. Timelines for Processing Initial Requests- Further Research is Necessary**

The proposed rules allow the Bar to have up to sixty (60) business days to respond to a request for accommodation. For the most recent July 2022 CBX, this equates to a March 4 submission deadline to provide the Bar with sixty business days to respond, about seven weeks before the exam. Further, we know that applicants have spent months preparing to submit the application before this March 4 deadline. Nondisabled applicants need not worry about any filing or applications until the April 1 timely filing of the Bar application. Thus, the current rules do not address the ADA's provisions that testing entities "should not impose earlier registration deadlines on those seeking testing accommodations."

Deadlines for accommodation submission have not changed under 4.84(B). The deadline is the first day of the month before the exam (i.e. June 1 for the July CBX, and January 1 for the February CBX). However, this date continues to be misleading, as an applicant may not receive the knowledge their application was incomplete, or could appeal, if they understand this to be the deadline for submission. Too many applicants may assume this deadline will afford them their rights when it will not under the current deadlines. Under the proposed rules, the Bar must ensure transparency and create a date that applicants will know they will receive their full rights to appeal or provide a complete application.

There is written evidence from the most recent CMB that the Bar does not adhere to the deadlines placed upon them, including going at least 8 days over their proposed deadline for reply. If these deadlines are simply recommendations for the Bar, then the deadlines for applicants should also be



recommendations. This is not the case in the proposed rules which has not changed the short appeal process, only allowing applicants to appeal if “within 14 days,” and regardless, the appeal cannot be made after the deadline to submit accommodations (i.e. June 1 for the July CBX) (Rule 4.88).

Potential efficiency issues on how the Bar processes the accommodations should be found and addressed to allow for the Bar to institute a timeline turnaround similar to that of the appeals process given to applicants, 14 days. 14 days for review is a reasonable timeframe for a large State body and is also already instituted within the rules as the timeline for applicant appeal.

#### **E. Denial of Requests- Further Research is Necessary**

Under proposed rule 4.81, an applicant must “establish *to the satisfaction of the State Bar* that the applicant has a disability and needs the requested testing accommodations.” This language succeeds in perpetuating the denials we have seen, as the language surrounding *who* decides denial of requests will continue to perpetuate inequality. Through analyzing written denial letters from the bar’s expert, the letter’s language betrays the Bar’s stance to deny accommodations at all costs.<sup>36</sup> The Bar’s “reasonable accommodations expert” has the same mindset as the Bar, mainly “fear that people are faking their disabilities” which results in “creating systems in which individuals who seek legal protection must go to great lengths to demonstrate that they are worthy of it.”<sup>37</sup> This is a “demonstration” that non-disabled applicants do not have to provide to be licensed.

We recommend the Commission conduct further analysis into their proposed revisions for denial of requests. This section should also contain the documentation requirements regarding deference to the qualified healthcare professional that has the knowledge to determine a disability and the need for an accommodation (*see Section C*).

---

<sup>36</sup> See vendors for 2022 here: <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000029923.pdf>; *see* John Hosterman, PhD, <https://www.linkedin.com/in/johnhosterman/recent-activity/> “So many special snowflakes posing as people with disabilities.”

<sup>37</sup> Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021).

First, the expert qualifications, as defined by the proposed rule, are no different from the current qualifications the Bar's contracted expert already has, meaning this rule will lead to no more additional analysis than if the Bar itself denied the accommodation. Client denials during the most recent July 2023 CBX, show the Bar's expert retained by the Committee, continues to perpetuate denial reasons with no legal or factual basis.

For example, one "expert" denial letter stated that the decades of medical records the client submitted were "outdated. However, in a hypocritical turn of events, expert letters also state there is "not enough" documentation given if historical medical records were not given. If the documentation spans several years, it will be labeled as "outdated." But if an applicant instead gives only the most up-to-date documentation, it will be labeled "unsubstantiated." This example shows that regardless of whether the applicant gives many years of documentation or just the most current documentation, the Bar's expert can find a reason to deny.

Further, as currently written, the Bar accommodation application insinuates that decades of documentation are required to ensure that an application is complete, asking for disability documentation from elementary school, middle school, and high school.<sup>38</sup> Thus, applicants rightfully assume prior history of disability is required, the denial reason cited in the expert's letter.

Another example is a denial letter's claim that the Bar cannot use any medical records when portions are redacted. In this fact pattern, the redacted records portions pertained to confidential medical information that did not affect the disability. All relevant information pertaining to the diagnosis and need for accommodations was provided. The "expert's" written requirement that an applicant give all medical documentation is against federal and state law disability and privacy law. (Health Insurance

---

<sup>38</sup> *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

Portability and Accountability Act of 1996. Pub. L. 104-191; Cal. Civil Code § 1798.198 et seq.). The fact that after-visit physician summaries often contain additional medical information irrelevant to the accommodation is well within the applicant's right to redact.

These attempts show that the goal of the Bar, through their expert agent, is to deny as many people their accommodations as possible, through whatever means necessary. This mindset must be systematically addressed with the application of empirically based evidence on the validity of accommodations to provide the framework necessary to create additional proposals.

Finally, the failure of the current "expert" hired by the Bar shows that the definition within the proposed rules must be changed. For example, after the Bar received knowledge another high stakes testing entity did approve the accommodations for an applicant, the "experts" denial findings were ignored, and the accommodations were granted. If, in fact, the Bar had hired a true expert on accommodations, their opinion would not have been at odds with other experts. Instead, the "experts" blatant attempts to deny at any cost was clear to even the Bar itself once it was provided the knowledge that the National Bar Examiners Office had approved.

Futile attempts to deny, without any medical or legal basis to do so, are so common that the California Bar is known for this within the medical and legal community.<sup>39</sup> This reputation can change for the better if the Bar decides to instead use knowledgeable experts within the disability community who are experienced in disability rights law and evidence-based cultural competency. (*See* Section A in this Comment).

#### **F. Appeal/Review Process- Further Research is Necessary**

Proposed Rule 4.88 states that appeals processes will go through the Director of Admissions and then the Subcommittee on Examinations. Both bodies are biased entities which control admissions,

---

<sup>39</sup> Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021); *DREDF and DRA Joint Civil Rights Complainants v. State Bar of California*, United States Department of Justice, (May 18, 2023); *Kara Gordon, et al., v. State Bar of California, et al.*, Case No. 20-cv-06442-LB, (N.D. Cal. Sep. 30, 2020).

rules, and their implementation, and do not have the expertise required to analyze such an appeal. We propose “a disability rights service expert,” as discussed in 4.80(B) to review appeals. This definition can include disability rights organizations such as, but not limited to, Disability Rights Advocates (DRA), The Coelho Center for Disability Law Policy and Innovation, Mental Health Advocacy Services (MHAS), the California Federation of the Blind, or any of the twenty-eight Independent Living Centers in California. The Bar should also ensure that a different individual or organization must review the denial made by the first individual or organization decision to ensure a non-biased review system.

#### **G. Need for Updated Communication Process for an Interactive Process**

As stated in our prior comment, the proposed edits lack an update to ensure feasible communication between the Bar and the applicant. DRC recommends a viable system of accessible ways to contact and participate in the accommodation process. Software solutions to the prior convoluted system will assist with effectively communicating with applicants and ensure both parties can engage in the interactive process under state and federal law. 2 Cal Code Regs. § 11065; 2 Cal. Code Regs. § 12177; 42 U.S.C.A. § 12112. DRC recommends the Bar engage with the interactive process, including creating feasible ways to provide updates on when the Bar is reviewing the application, when the application has been sent to an outside expert to review, and multiple ways to communicate back and forth with the applicant. The Bar should respond within three business days to messages from applicants to ensure the applicant is notified and informed of the process. The Bar can lower response times by implementing a helpdesk with live chat, SMS, or other live support channels, and building out a robust self-help webpage with common Q & A’s. Lastly, the Bar also must implement a call-back number. It is readily feasible that the Bar has dedicated lines to call specifically for reasonable accommodations as well as an email system that does not delete messages and is responded to in a timely manner.

#### **H. Required Forms and Online Petition Under Proposed Rule 4.85 Are Ambiguous**

The rules as proposed do not address the required “Online Petition” and Forms A-H on the Bar website and applicant portal.<sup>40</sup> Without knowledge of whether the old forms will continue to be used in part, substantially, or in full, we cannot ascertain whether some of the concerning and excessive asks will be resolved. In the *Presentation on Proposed Amendments* presented at the Bar’s public meeting on May 18-19, 2023, it was inferred that new forms have already been created.<sup>41</sup> However, no forms are present in the public comment package.<sup>42</sup> The current forms located on the Bar website have overinclusive and invasive questions, requiring capture of every medical and disability-related item possible from each applicant. (See full analysis in January 31, 2023, DRC Public Comment). The proposed rule 4.85 states that an applicant must submit the required “State Bar’s form” as well as “supplemental documentation.” This proposed language is too vague on its face to understand what new forms will be instituted, and how they will or will not be changed. We propose the Bar provide rule revisions which specifically state the forms that will be used and provide redlined revisions to the current online forms and online petition for public comment as well.

### **I. The Proposed Rules Lack Training and Implementation Information**

The proposed rules do not take into consideration the need to provide training and knowledge to all State Bar staff to which a disabled applicant encounters. First, employees must be better trained to understand each policy and procedure that will occur with the specific accommodation. Second, employees must also be trained for the day of testing implementation. Training can include an online course set up by a disability rights-serving organization, yearly refresher training required for staff, and written practical guidance that staff can look to answer questions regarding implementation of

---

<sup>40</sup> *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

<sup>41</sup> *Presentation on Proposed Amendments to Admissions Rules Related to Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030779.pdf>

<sup>42</sup> *Proposed Amendments to Admissions Rules Related to Testing Accommodations (Rules 4.80-4.92): Request to Circulate for Second Public Comment Period, Open Session Agenda Item 706 May 2023*, STATE BAR OF CALIFORNIA, <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030745.pdf> (last visited July 30, 2023).

accommodations on the day of the exam. The need for implementation documents is vital as currently no such document exists, giving each disabled student a different experience to that of their non-disabled peers. Third, practical guidance and Q & A document formats will also better assist applicants in determining the accommodations they should ask for in the first place. The current practical guidance for nondisabled and disabled bar applicants is not released until after the deadline to submit reasonable accommodations. This lack of transparency leads to a lack of knowledge concerning what the exam room looks like, what rules are instituted, and what items are prohibited. (See January 31, 2023, DRC Public Comment for further examples and discussion).<sup>43</sup> The specific procedural rules and practice guidance for the exam should be included on the Bar's public facing website at all times of the year.<sup>44</sup>

## II. CONCLUSION

For the forestated reasons stated in this letter, Disability Rights California **OPPOSES** the rule changes as the current proposal does little to create sincere change in the efficiency and effectiveness of the process. The fact these rules have been instituted for the July 2023 CBX, but disabled applicants continued to show unlawful reasons for denial, and arduously long processes show that the rules must be further reviewed.

The State of California has the opportunity to improve the inequality gap by more closely examining current biases of their Board, Commission, employees, staff, and subcontracted entities. The current belief that reasonable accommodation requests must be closely scrutinized because most of them

---

<sup>43</sup> *July 2022 Bar Exam Admittance Ticket Bulletin*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/July-2022-Bar-Exam-Admittance-Ticket-Bulletin.pdf>; *February 2023 Bar Exam Admittance Ticket Bulletin*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February-2023-Bar-Exam-Admittance-Ticket-Bulletin.pdf>

<sup>44</sup> *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

are not “truly” disabled do not pass muster when looking at the low percentage of applicants who receive accommodation, compared to the percentage of California that has a disability.

Sincerely,

A handwritten signature in black ink, appearing to read 'KJ Muller', with a stylized flourish at the end.

Kendra J. Muller, Esq.

Staff Attorney

Civil Rights Practice Group

Disability Rights California

[Kendra.muller@disabilityrightsca.org](mailto:Kendra.muller@disabilityrightsca.org)

(619) 814-8546



July 31, 2023

State Bar of California  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Proposed Automatic Approval of Accommodations Previously Granted for High- Stakes Exams**

Dear State Bar of California:

The National Federation of the Blind of California (NFBCA) disagrees with the proposed automatic approval of accommodations previously granted for high-stakes exams unless modified.

**Introduction:**

While the State Bar should amend the Admission Rules to deem approvals on other high-stakes exams for same requested accommodations, predicated on permanent disabilities – coupled with an applicant’s certification that the functional limitation(s) that the accommodation was intended to ameliorate remains present – as sufficient evidence to summarily grant those requests without further scrutiny, 28 C.F.R. 36.309(b)(1)(v), the present Proposed Rule 4.83(A) subsections (6)-(7) still would impose improper exclusions upon applicants seeking the benefit of this amendment. Worse still, while pertaining directly only to the Summary-Matched Grant Policy, Proposed Rule 4.83(A)(6) is inseparably intertwined with and predicated on (and thus indirectly enumerates into the Rules) an egregiously unlawful policy (see 28 C.F.R. 35.160(b), 35.164) – generally applicable to all accommodation requests, even those complying with the ordinary petition documentation requirements rather than a matched grant to prior exams – to never provide individualized consideration of certain disfavored accommodation requests and deem those accommodations as “not offered by the State Bar,” without the required boundary that such accommodations had been demonstrated by the State Bar to constitute fundamental alteration or impose undue burden. The Rules Revision should clarify that the State Bar must provide individualized consideration on the merits to all accommodation requests by the applicant that it has not demonstrated would cause such fundamental alteration or undue burden.



While the State Bar's elimination of the redundant and prejudicial originally proposed Summary-Matched Grant Policy requirements that the approvals had been decided within the last 5 years and been unanimously made by all prior testing agencies from which the applicant had ever taken a high stakes examination (responsive to the first iteration of public comment on the previous Rules Revision proposal) was appropriate and appreciated, the State Bar should still strike subsections (6)-(7), or at a minimum replace them with a sixth requirement that the accommodations granted on the previous high-stakes exam(s) eligible for a summary-matched grant not constitute any fundamental alteration or impose any undue burden in the context of the bar exam.

The language of Proposed Rule 4.85(B) conforms to Proposed Rule 4.83, so the corrective amendments thereto recommended herein would also address Proposed Rule 4.85(B). In contrast, while Proposed Rule 4.85(C) is largely reasonable other than the scope of accommodations for which it raises the detail of explanation by the applicant and their experts to provide the State Bar requires for the applicant to seek those accommodations – because Proposed Rule 4.85(C) properly does not mandate or use the “exceptional need” language on the evaluator forms that implement it, which goes beyond the text of the Proposed Rule – due to that improper language of the forms, rephrasing those forms to match Proposed Rule 4.85(C) and remove the attestation of “exceptional need” for accommodations requiring more detailed explanation of bases is necessary for that requirement to be consistent with the governing “best ensures level playing field to nondisabled applicants” ADA legal standard.

Further, the State Bar should amend its proposal to narrow the set of accommodations that trigger the requirements of Proposed Rule 4.85(C) (for ordinary petition process) and fall into the exclusion from the summary-matched grant policy for approvals on prior high-stakes exam(s) provided under Proposed Rule 4.83(A)(7) (to the extent that exclusion is retained at all, which it should not be). To the extent that Proposed Rules 4.83(A)(7) and 4.85(C) are retained, only accommodations that require the bar exam to be administered over more than six days (or at minimum, more than four days) should require more detailed explanations of the predicate disability basis from the applicant and ineligibility for the summary-matched grant policy. Requests for a private room and/or accommodations requiring testing over four days (and ideally also accommodations requiring testing over five to six days) should fall under the same procedures as any other accommodation requests.

Only if such further modifications were made would this component of the proposal be ready to advance for adoption.

#### **Proposed Rule 4.83(A)(6)**

Proposed Rule 4.83(A)(6) provides that, to be eligible for the summary-matched grant policy, the accommodations granted on prior high-stakes exams must be among those for which “[t]he State Bar offers the same or equivalent testing accommodations,” which conversely suggests there are accommodations that the State Bar has chosen to never offer, whether through this policy or the regular petition process, even if previously

granted on (an)other high-stakes exam(s). This exclusion – and particularly the underlying, more broadly applicable policy on which it is predicated and would codify into the Admission Rules seemingly beyond the Summary-Matched Grant Policy exclusion – are improper because, as discussed below, the State Bar cannot and should not deem any particular accommodation as categorically “not offered” for individualized consideration in at least the regular petition process that subsection (6) expressly incorporates the exclusion from, and effectively codifies into the Admission Rules for, – absent fundamental alteration or undue burden – and the proposed rule not only enumerates no such boundary on that exclusion, but both it and the predicate limitations on accommodations available to request through any procedure must be read in the context that the State Bar has designated stop-the-clock breaks and remote testing as examples of accommodations categorically “not offered” when neither of those examples would constitute such fundamental alteration or undue burden. Accordingly, Proposed Rule 4.83(A)(6) should either be stricken or narrowed to require only that the accommodations previously approved not be ones that the State Bar demonstrates to constitute fundamental alteration or impose undue burden, and the “not offered” policy on which the exclusion is based should be similarly constrained by express provision within the Amended Rules.

#### 1. Neither Stop-the-Clock Breaks nor Remote Testing Constitute Fundamental Alteration or Impose Undue Burden:

In response to the first public comment submissions, the Working Group addressed its refusal to ever consider stop-the-clock breaks or remote testing accommodation requests as follows: “While the State Bar does not offer ‘stop the clock’ breaks, the State Bar offers the equivalent by granting additional time but the clock continues to run. Additionally, the multiple-choice exam (MBE) owned and scored by the National Conference of Bar Examiners is not offered as a remote exam.”

This response fails to explain why substituting extra time is a necessarily equivalent accommodation to stop-the-clock breaks, nor how the NCBE’s alleged refusal to offer the MBE as a remote exam generally makes such an accommodation constitute a fundamental alteration or impose undue burden when 28 C.F.R. 35.130(b) clarifies that Title II’s requirements extend to refraining from contracting with other entities or entering licensing agreements that would prevent it from otherwise reasonably accommodating disabled applicants – or else somehow otherwise permits the State Bar to contract on terms that deny applicants individualized consideration of their requests on the merits as required by 28 C.F.R. 35.160(b).

For granting additional time to effectively substitute for stop-the-clock breaks, the amount of extra time equivalent to the duration of the on-clock breaks used as a substitute must be considered additive to extra time requested and approved to address a different disability functional limitation from the requested breaks. The Working Group neither confirmed that the Rules do so nor amended the proposal to the effect that they will do so, nor did they explain why – as a blanket policy with no individualized analysis – the State Bar may reject a requested accommodation that is not demonstrated to be a

fundamental alteration or undue burden merely because it granted equal or greater extra time to ameliorate some other disability need.

Moreover, even additive equivalent extra time to the duration of any additional stop-the-clock breaks requested would only equivalently address certain disability needs to the extent that the distribution of that extra time was fixed to the same unit of time (i.e., test day) as the breaks were requested for, rather than uniformly divided and apportioned to specific test session subparts, so that timing and distribution of usage of the extra time as a break could be equally flexible around symptoms and effects of disability, and so be effective at ameliorating those predicate functional limitations – and also that the applicant would be at liberty to do everything during their exam time (i.e. use the restroom freely, eat or drink, take medicine, etc.) that they would have been allowed to do during break time when they lack access to test materials. The LSAC consent decree on which the Rules Revision purports to be based treats stop-the-clock breaks as common and reasonable accommodations that should be summarily approved for a large variety of disabilities, and most other testing entities routinely approve them, and so while Admissions Staff might find them operationally inconvenient to administer, any suggestion that they constitute fundamental alteration or undue burden would be meritless.

Similarly, to the extent that, as alleged in exam FAQs for the February 2022, July 2022, February 2023, and July 2023 exams, the NCBE is conditioning its license of the MBE on the State Bar refusing to individually consider accommodation requests for remote testing (which the NCBE has denied requiring, and the State Bar has claimed no records of such a contract exist in response to CPRA requests for records reflecting such agreements), such a fact would not bring the State Bar's stated policy into compliance with 28 C.F.R. sections 35.130(b) and 35.160(b)(2), the former of which expressly prohibits such contractual or licensing agreements and the latter of which mandates individualized consideration of every accommodation request rather than blanket policies about which types of accommodations that are not established to constitute fundamental alteration or undue burden are or are not "offered by the State Bar."

Nonetheless, for its part the NCBE has posited that it does *not* necessarily oppose the State Bar granting *Remote MBE testing to individual applicants as a disability-based testing accommodation*. What it has declined to do is offer the State Bar a license to *blanketly administer the MBE as a remote exam under the standard testing conditions of the California Bar Exam* "in the current environment," based on a strong *policy preference* for "uniformity" and "security."

The State Bar has already proven beyond peradventure that remote testing is *not* a fundamental alteration or undue burden by administering three bar exams in that modality as a standard condition, and by maintaining its preparedness to do so again prospectively – but only should circumstances be deemed to justify its return for nondisabled applicants too and not just disabled applicants. These facts expose that the State Bar's (and NCBE's, even if the State Bar's allegations are credited) true objection to this accommodation is not its feasibility to implement or the capability of the State Bar

to assess through the exam what it purports the exam to test. Rather, where the availability of remote testing turns determinatively on the needs of nondisabled applicants and cannot be considered on an individualized basis, the primary objection seems to be to the proposition that there would be substantial “deviations in testing conditions” between nondisabled and disabled applicants if circumstances were found to warrant remote testing for some disabled applicants, but not the majority of all applicants, rather than the State Bar’s and NCBE’s mutual policy preference for “uniformity” in such conditions. Yet, a fundamental purpose of the ADA and related laws is to mandate the degree of modifications to standard conditions that, for each individual disabled applicant, best ameliorates the handicapping effects of their disabilities, to the maximum extent possible. Framing an inability to maintain a desired level of uniformity in conditions between all applicants and/or perceived fairness to nondisabled applicants by doing otherwise as itself a basis for fundamental alteration or undue burden is nothing less than impermissibly substituting the policy judgments of Congress for those of the State Bar. Congress properly weighed the equity considerations in disabled persons’ interest in equal access to public life participation generally and governmental services and programs particularly against the need to sometimes impose disparate treatment between disabled and nondisabled individuals to do so and all ancillary fairness concerns therewith, along with the significant economic resources public entities would be required to expend in order to comply, and enacted appropriate disability rights legislation, which it has strengthened over time (in part, to clarify that standardized testing entities were not doing enough to make exams equally accessible). Congress further authorized the DOJ to promulgate standards and regulations that further expand the requirements of the ADA beyond that enumerated in the statutory text – and it has. The California Legislature, too, has weighed these policy considerations, and generally has concluded that even the Federal law provisions do not go far enough in securing the rights of disabled persons, and thus provided even more expansive standards and remedies under California law. Mere political disagreements with the policy wisdom of the statutory and regulatory schemes’ fundamental requirements and purpose in this regard, at least in the context of licensing exams – whether held by the State Bar staff, CBE, Board, and/or one or more of its preferred vendors – cannot form the basis of a fundamental alteration or undue burden claim. State Bar staff and officials need to learn to better recognize where their administrative decision-making duties involve impartially applying the laws and judgment calls handed down from the elected branches of the federal and state governments to the individual facts of each applicant’s situation – and find those facts based on objective weight of the evidence analysis rather than whether a staff member or consultant identified an omission they perceive to render the applicant’s showing imperfect – not to weigh in and apply personal political views and/or the agency’s logistical and budgetary preferences on whether and how a particular medical situation should be addressed.

In an environment where the State Bar could no longer claim sovereign immunity, blustering a summary demurrer (devoid of citations or legal analysis) that the proposal complies with “all applicable laws and regulations,” is unlikely to be persuasive to most judges when an aggrieved February 2022 and after applicant with disability-based elevated COVID risk – who had requested and been refused remote testing as an

accommodation – subsequently brings a judicial challenge, nor will assertions that compliance with the NCBE’s alleged preferences was the reason for doing so. Notably, Ninth Circuit Judge Callahan has already expressed her disagreement at oral argument in App. No. 20-17316 with the State Bar’s position that its handling of disability accommodations is complying with “all applicable laws and regulations.”

2. Absent such Fundamental Alteration or Undue Burden, the State Bar  
Cannot Lawfully Refuse Individualized Consideration of  
an Applicant’s Requested Testing Accommodations:

ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what “best ensures a level playing field” to nondisabled applicants, which where met creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9<sup>th</sup> Cir. 2011); see also 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9<sup>th</sup> Cir. 2013). The State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III’s “not readily achievable” standard).

While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations they request meets the best ensures level playing field standard, which threshold burden submission of proof that the request(s) had been granted on (a) previous high-stakes exam(s) accomplishes, 28 C.F.R. 36.309(b)(1)(v), once they have done so the applicant’s requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9<sup>th</sup> Cir. 1999), it cannot categorically designate certain accommodations as “not offered” as proposed in subsection (6) of Proposed Rule 4.83(A).

Accordingly, any categorical exclusions of particular accommodations that do not inherently constitute fundamental alteration or impose undue burden facially violates these authorities, at least as applied to accommodation requests under ordinary petition procedures. While Proposed Rule 4.83(A)(6) concerns the summary-matched grant policy, not ordinary petition review, correction of the policy under ordinary petition review

nonetheless deprives Proposed Rule 4.83(A)(6) of any purpose or operational effect, as it only excludes accommodations that would be ineligible for consideration under the ordinary petition procedures too. Further, amending Proposed Rule 4.83(A)(6) to enumerate specific accommodations as ineligible for the summary match procedure, but still offered under the regular procedures, would render Proposed Rule 4.83(A)(7) (doing just that) either superfluous or expanded to a degree that would unduly undermine the burden sparing effect of the Summary-Matched Grant Policy, and so would lack merit for the same reasons that Proposed Rule 4.83(A)(7) should be stricken (see below)).

**Proposed Rules 4.83(A)(7), 4.85(B)-(C):**

Proposed Rule 4.83(A)(7), as implemented by Proposed Rule 4.85(B)-(C), excludes from the summary-matched grant policy (if not individualized merits consideration through the ordinary petition procedures) private room accommodations and any accommodations that would require the exam to be administered over more than three days, though unlike the accommodations “not offered” by the State Bar would still allow consideration of such requests under the regular petition procedures, which for this set of accommodations require applicants to both provide greater detail in their explanations of the bases for such requests, Proposed Rule 4.85(C), and submit treating expert recommendations that, under the new mandatory evaluator forms, impermissibly require treating experts to attest the applicant has “exceptional need” for these accommodations to recommend them. In fact, even applicants seeking such accommodations under the regular petition procedures would, under the revised forms, need their treating expert(s) to attest to exceptional need in order to recommend those accommodations in a manner that is required for the applicant to have their petition deemed as “complete” and thus be considered by the State Bar at all.

As discussed above, the governing threshold legal standard the State Bar must use is what best ensures a level playing field to nondisabled applicants. Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly insurmountable for the disabled applicant, as opposed to whether an unnecessary disability-based handicap remains without the sought accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor (per LSAC guidelines) to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all. In addition to amending Proposed Rules 4.83(A)(7) and 4.85(C), the new evaluator forms will require corrective amendments so that treating experts may recommend what accommodations they see fit without indicating any “exceptional need” or other form of “necessity.”

Moreover, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. While theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert's recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don't just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant's expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert's otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support.

For all of these reasons, the State Bar cannot require attestation of exceptional need for any accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden on its evaluator forms or as a substantive standard in evaluating requests under the ordinary petition procedures. It admittedly is permitted to set higher requirements for the summary-matched grant policy, where unlike subsection (6), subsection (7) does not incorporate by reference impermissible general standards from regular petition review, but subsection (7) should nonetheless be stricken; both because the same policy justifications (eliminating unnecessary burdens on disabled applicants when they present what should already be sufficiently probative evidence) apply to private rooms and greater than 50% extra time as to other accommodations, and especially where the LSAC consent decree best practice guidelines set the criteria for accommodations that should be eligible for summary-matched grants on prior high-stakes exams more expansively than Proposed Rule 4.83(A)(7). The LSAC/DOJ panel

included private rooms, additional breaks, up to 50% extra time for applicants with only one (non-visual) disability impairment, and up to double time for applicants with multiple distinct disability impairments or a visual impairment, in its summary matched grant requirements. Not only would even 50% extra time potentially require more than three days to administer for the bar exam if the applicant also needed shorter than standard test days and/or extra breaks – both accommodations eligible for simultaneous summary match if previously approved on any high-stakes exam under the LSAC guidelines, – but the LSAC guidelines prescribe summarily matched grants of as much extra time as double time for applicants with multiple distinct disability impairments and/or a visual impairment, which is more expansive eligibility for extra time of between 51% and 100% additional time than proposed by the State Bar here. Equally important, while the LSAC guidelines do not mandate a summary-match grant of more extra time than double time, they explicitly state that accommodations of 150% to 200% (triple time) extra time should generally be considered reasonable and ordinary accommodations for applicants with both visual and non-visual disability impairments.

Accordingly, even if the State Bar does limit the summary match policy- eligible accommodations to an extent greater than accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden, the number of days that triggers the exclusion should be higher than three and a private room should be eligible for a summary-match grant if it had been an approved accommodation (rather than a standard condition or operational policy for implementing other accommodations) on any of the prior high-stakes exam(s) documented.

### **CONCLUSION:**

1. The policy to “not offer” individualized consideration of certain accommodations that have not been established to constitute fundamental alteration or impose undue burden is unlawful, and is against public policy even if it were lawful. The Rules Revision should make clear that all accommodation requests will receive individualized consideration on their merits, absent demonstrated fundamental alteration or undue burden.
2. Proposed Rule 4.83(A)(6) should be stricken, or at least replaced with an alternative exclusion from the Summary-Matched Grant Policy for accommodations that the State Bar demonstrates – at least in the context of the bar exam’s differing conditions from the prior high-stakes exam – constitute fundamental alteration or impose undue burden.
3. Proposed Rules 4.83(A)(7) and 4.85(C) should either be stricken or at least narrowed to only apply to accommodations that cannot be administered over a particular number of days that is greater than the presently proposed litmus of three days.

///



4. The new treating expert evaluator forms should be revised to rephrase the term “exceptional need” that applicants’ experts must attest to recommend certain accommodations on those forms to – at most – ask for more specific details on why those accommodations better ensure a level playing field for the applicant than lesser accommodations that could be administered over fewer days.

Sincerely,

A handwritten signature in black ink that reads "Tim Elder". The script is cursive and fluid, with the first letters of "Tim" and "Elder" being capitalized and prominent.

Tim Elder, President  
National federation of the Blind of California

## Commenter 14

Use of forms can be useful, and when use of the form works for the professional to explain the applicant's need that is great. However, I can imagine a few problems. One is that some professionals like doctors and psychologists are asked to complete forms by a lot of patients and that can delay their ability to timely complete the forms in accord with Bar timelines. Further, some just are not willing.

Overall, I think the problem is that the proposed rules are overly rigid. Delineating a process can be useful. Taking an overly rigid approach to accommodations requests will unnecessarily cause a lot of stress and hassle and likely end up leaving out some applicants who who successfully completed law school, which is no mean feat, and are fully worthy of bar membership. Why would the State Bar want to put up barriers to people who have the requisite background education and will add to the diversity of the bar, in turn helping the bar reflect the society we represent.

I am confused about the appeal limitations. It seems to make request for accommodations some kind of competition for a zero sum game. I think it's fine to have some kind of process and timeline to encourage early requests, but it seems unwarranted to punish people who are forced to make a few tries. Some are asking for accommodations addressing issues they may not have ever faced before. That was my situation for me needing to worry about hearing the proctor in the hangar size room. In any case, if a denial is for good reason and the applicant can use an alternative accommodation that does not implicate that problem, why shouldn't the applicant have the opportunity to ask for an alternative accommodation. In my case I somehow found out the exam in Oakland would be in a hangar size room, and I realized I might not hear the proctor. I asked for individual notice about the test start and end times. While I cannot recall details of the request and feedback, I ended up with the accommodation requested. What if I had asked for something like being seated next to the proctor. Maybe that would have been denied as too difficult to implement. Should I then have been denied the opportunity to think of a simpler request?



July 31, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
 Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

We are writing on behalf of The Coelho Center for Disability Law, Policy and Innovation (“The Coelho Center”). The Coelho Center was founded in 2018 by the Honorable Anthony “Tony” Coelho, the primary author and sponsor of the Americans with Disabilities Act. Our mission is to collaborate with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. A primary goal of The Coelho Center is to increase representation of legal professionals with disabilities. Our cornerstone project is The Coelho Law Fellowship Program, which targets and supports college students and recent graduates with disabilities who have an interest in the law.<sup>1</sup>

We oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.”<sup>2</sup> The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law.<sup>3</sup> But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

<sup>1</sup> The Coelho Law Fellowship is a 10-month program in which fellows receive training, academic support, and mentorship. For more information, visit <https://www.lis.edu/coelhocenter/lawfellowsprogram/>.

<sup>2</sup> Proposed Rule 4.80(a)

<sup>3</sup> See Cal. Gov. Code 12926(j), (m)



A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult.<sup>4</sup> This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. **The new language requiring a comparison to “most people in the general population” should be deleted.**

#### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test.<sup>5</sup> Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests.<sup>6</sup> This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, The Coelho Center’s [Law Fellowship Program](#) is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like the Coelho Law Fellowship – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

---

<sup>4</sup> Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c)

<sup>5</sup> Proposed Rule 4.83

<sup>6</sup> Proposed Rule 4.80(C)



Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process.<sup>7</sup> It also excludes the accommodation of a private room.<sup>8</sup> There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree.<sup>9</sup> The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials.<sup>10</sup> Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers.<sup>11</sup>

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further

---

<sup>7</sup> Proposed Rule 4.83(A)(7)

<sup>8</sup> *Id*

<sup>9</sup> *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1

<sup>10</sup> Proposed Rule 4.84(E)

<sup>11</sup> See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam)



steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam.<sup>12</sup> Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree.<sup>13</sup> However, there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants.<sup>14</sup>

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified.<sup>15</sup>

---

<sup>12</sup> Proposed Rule 4.88(A), (B)

<sup>13</sup> *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6

<sup>14</sup> Proposed Rule 4.80(B)

<sup>15</sup> See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015)



**Loyola Law School**  
**Loyola Marymount University**  
The Coelho Center for  
Disability Law, Policy and Innovation

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

*Anthony “Tony” Coelho*

Founder

The Coelho Center for Disability Law, Policy and Innovation

*Katherine Perez*

Director

The Coelho Center for Disability Law, Policy and Innovation

*Chris Vu*

Mental Health Equity Fellow

The Coelho Center for Disability Law, Policy and Innovation

Loyola Law School Anti-Racism Center

## Commenter 15

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Such streamlined and automatic grants are appropriate and consistent with the standards established through the DFEH v. LSAC litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. It also excludes the accommodation of a private room. There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. The automatic process should include these modifications.

First, the proposal excludes timed law school exams from the definition of high-stakes tests.<sup>6</sup> This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in



other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers.

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

July 31, 2023

Committee of Bar Examiners

RE: action on revisions to Testing Accommodation Rules

To whom it may concern:

As a prior applicant and eligible to take California Bar Exam since 2015 I have personal experience what Macular Degeneration means. It is like using only one eye to read. As a result of my experience during that year I went to the Veterans Administration and provided an eye examination by Dr. George Bertolucci of the California Eye Institute.

The results of the eye examination revealed that I have Macular Degeneration as a result of significant bleeding in the back of my right eye. When I inquired of Dr. Bertolucci whether the diagnosis was a permanent condition he answered affirmatively and that with treatment I may prevent further damage but that I would not recover from the damage caused. So I am permanently disabled in my right eye. Dr. Bertolucci gave an incredible look to me when I informed him that Calbar required a diagnosis or re-evaluation every 5 years.

My comment is two fold in that I believe a permanent physical disability such as Macular Degeneration requires no further examinations and that language such as written letter from Judge Robert Brody et al Committee of Bar Examiners letter

dated March 24, 2023 allows for elimination of the 5 year \*  
“broadening the scope of automatic approvals by eliminating  
the 5 year time frame and automatically approving the same  
testing accommodations received on other high stakes exams—  
regardless of date of testing approval—upon proof of testing  
accommodations received and certification that the applicant is  
experiencing the same functional limitations.”

I draw your attention to the last half of above statement-and  
“certification that the applicant is receiving the same functional  
limitations”

That certification is a requirement of a testing accommodation  
examination and approval because whether its called an  
approval or certification it’s the same examination required by a  
Professional such as Dr. Bertolucci to provide to Calbar. This  
back door requirement goes to the heart of why I am frustrated  
with this whole Calbar attempt to have a transparent look of  
inclusivity when nothing has really changed. My eye is still  
damaged whether 5 years from now or 10 years from now and  
may only get worse, and all I am asking is for Calbar to admit  
that their opinion does not supercede that of a professional eye  
doctor and to stop all back door attempts to.

Thomas Walker-128636



July 31, 2023

Via Portal and Staff Email

Ruben Duran  
Chair

Brandon N. Stallings  
Vice-Chair

Mark Broughton  
Hailyn Chen  
José Cisneros  
Juan De La Cruz  
Gregory E. Knoll  
Melanie M. Shelby  
Arnold Sowell Jr.  
Mark W. Toney, Ph.D.  
Trustees

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining  
to Testing Accommodations – **OPPOSE**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De  
La Cruz, Knoll, Shelby, Sowell, and Toney:

Disability Rights Education and Defense Fund (DREDF) and Disability Rights  
Advocates (DRA) write to **OPPOSE** the Revised Proposed Amendments to the rules of  
the State Bar pertaining to testing accommodations. The revised proposal fails to  
comply with state and federal laws and will not support a fair and effective testing  
accommodations program.

DREDF and DRA are nonprofit law and public policy organizations committed to  
promoting diversity in the legal profession, and to eliminating unnecessary bias and  
barriers that exclude qualified individuals with disabilities. We have extensive  
experience representing disabled individuals who need accommodations to access the  
legal profession, including disabled law graduates who need testing accommodations to  
take the California bar exam on an equal basis as nondisabled graduates.

As DREDF and DRA have stated previously,<sup>1</sup> the minimum standards for a fair, effective, and lawful approach to testing accommodations have been developed and articulated by the U.S. Department of Justice (DOJ) and by the judicial process through litigation by California's Department of Fair Employment and Housing (DFEH, now Civil Rights Department) against the Law School Admissions Council (LSAC).<sup>2</sup>

The revised proposed amendments fail to meet these minimum standards in numerous respects and will not effectively further the goals of elimination of bias and professional diversity. As described below, the proposal:

- uses the wrong definition of disability;
- fails to automatically grant or defer to prior testing accommodations granted by law schools and colleges for timed, high-stakes exams, and imposes arbitrary limitations on testing accommodations that are automatically granted;
- fails to incorporate the "best ensure" standard;
- fails to ensure prompt responses to accommodation requests or a timely and effective appeals process to ensure that disabled candidates may seek accommodations, appeal, and then participate in the same exam cycle as their nondisabled peers;
- fails to discuss replacing or diversifying the disability consultants who have contributed to the unlawful system, and instead imposes new seniority requirements for these consultants; and
- fails to include a plan for the training, supervision, and leadership changes needed to achieve the cultural sea-change that appropriate new standards will require.

### **Importance of Disability Access to the Legal Profession**

A diverse bar with lawyers of all backgrounds and statuses facilitates access to justice, improves legal services, offers role models, and promotes public confidence. A legal profession that includes, welcomes, and licenses qualified lawyers with disabilities

---

<sup>1</sup> Comments of DREDF, Legal Aid at Work, and DRA on Proposed Amendments (Jan. 31, 2023), <https://dredf.org/wp-content/uploads/2023/01/2023.01.31-DREDF-LAAW-DRA-Comments-w-Exhs-A-and-B.pdf>.

<sup>2</sup> See U.S. Dep't of Justice, ADA Requirements: Testing Accommodations (2014), [https://www.ada.gov/regs2014/testing\\_accommodations.html](https://www.ada.gov/regs2014/testing_accommodations.html); Consent Decree in *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal., May 29, 2014); <https://civillights.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/>, and <https://clearinghouse.net/doc/69024/>; Best Practices Panel Report, <https://civillights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>; *DFEH v. LSAC*, 2015 U.S. Dist. LEXIS 104751 (N.D. Cal. Aug. 7, 2015) (deciding challenges to Best Practices Report); see also 42 U.S.C. § 12189; 28 C.F.R. § 36.309; *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011); 28 C.F.R. Part 35, App. A, Other Issues (section 36.309 "is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations").

including disabled people of color is better equipped to serve the varied people and communities who live and work in California, including indigent people.

Despite the critical importance of a diverse and inclusive legal profession, unnecessary barriers continue to exclude disabled people from becoming licensed California attorneys. As the State Bar itself has reported, only six percent of California attorneys report having a disability,<sup>3</sup> a fraction of the proportion of disabled people in the state population (about one in five). This mismatch ultimately leads to disparities in the California judiciary: only 18 state court judges (two percent of all California judges) identify as having a disability.<sup>4</sup>

Disability representation throughout the profession promotes an equal and fair legal system and helps ensure that laws are enforced with an understanding of the experiences of disabled people – a group comprising millions of Californians. Lawyers with disabilities disproportionately serve in legal aid and government roles that support the fair treatment of diverse litigants and court users. Disabled lawyers and judges provide role models for children and young adults with disabilities. Judges with disabilities send the message that disabled people can serve in positions of authority at the highest levels.

Many people with disabilities require reasonable accommodations, such as extended time, to take high-stakes exams. Testing accommodations allow the individual to demonstrate the knowledge and abilities measured by the exam. Without such accommodations, the resulting scores reflect the effects of disability and are not a valid reflection of aptitude, knowledge, or abilities. Testing accommodations do not confer an unfair advantage but instead provide an equal opportunity. Today, decades after the enactment of the Americans with Disabilities Act and other disability rights laws, testing accommodations are a regular, recognized, and accepted part of our educational and professional systems, including in K-12 education through IEPs and Section 504 plans, college, the LSAT, and law school.

The ready provision of testing accommodations on the LSAT, achieved through the protracted *DFEH v. LSAC* litigation, systemically reformed the pipeline for the legal profession nationwide and opened the doors to law school for candidates who now need accommodations to take the California Bar Exam on an equal playing field.

---

<sup>3</sup> State Bar of California, 2022 Report Card on the Diversity of California's Legal Profession, Diversity of 2022 California Licensed Attorneys, Fig. 7, <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys>.

<sup>4</sup> Demographic data on gender, race/ethnicity, sexual orientation, gender identity, and veteran and disability status of California State Justices and Judges (2022) at 14-18, <https://www.courts.ca.gov/documents/2022-JO-Demographic-Data.pdf>.

## **Problems with the State Bar's Latest Proposal**

Law graduates with disabilities across the state routinely report that their requests for testing accommodations on the California bar exam are denied in whole or in part without a legitimate basis. Denials occur even when candidates submit proof that they have received similar testing accommodations in the past, such as on the LSAT, in college, in law school, on the MPRE, and in other similar settings. Denials occur even when candidates submit detailed and expensive neuropsychological, psychoeducational, and other medical testing and assessment required by the State Bar. Denials often occur shortly before the scheduled exam, with no opportunity for reconsideration.<sup>5</sup> The denial letters are often inaccurate, incomplete, poorly reasoned, and offensive. The resulting exclusion and disrespect of qualified candidates is harmful not only to the affected individuals but also to the legal profession and communities served by the profession across the state.

It is in this historical and present context of extensive and embedded disability discrimination and exclusion that the State Bar makes its latest rules proposal, and DREDF and DRA register their opposition.

### **Wrong and Overly Narrow Definition of "Disability."**

The proposal states that, "A 'disability' is a physical or mental impairment that limits one or more of an applicant's major life activities as compared to most people in the general population." Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase of the proposed rule – "as compared to most people in the general population" – diverges from California law and reflects a favorite form of reasoning used by the disability consultants employed by the State Bar. A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population.

A requirement that a person seeking accommodations be compared to "most people in the general population" can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California's definition of disability, which includes anyone with a physical or mental condition that "makes the achievement of the major life activity difficult." Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see *also* Cal. Gov. Code

---

<sup>5</sup> Civil Rights Complaint Filed Against State Bar of California for Failing to Provide an Accessible Bar Exam (May 18, 2023), <https://dredf.org/2023/05/18/civil-rights-complaint-filed-against-state-bar-of-california-for-failing-to-provide-an-accessible-bar-exam/>; Chris Williams, "California's Bar Exam Is Hard Enough Without Dealing With Its Accommodation Process Let people take the darn test," Above the Law (June 13, 2023), <https://abovethelaw.com/2023/06/californias-bar-exam-is-hard-enough-without-dealing-with-its-accommodation-process/>.



12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

Further, California’s definition of disability includes anyone who previously received special education services. Cal. Gov. Code 12926(j)(2), (3), (m)(2), (3). This category of disability is particularly salient in the context of testing accommodations. Yet the proposed rules do not include people with a history of special education in the definition of disability.

*Arbitrary Limitations in Automatic Approval Process.*

If a candidate requests the same testing accommodations that they previously received on a similar standardized exam or high-stakes test, and documents their prior receipt, “then a testing entity should generally grant the same testing accommodations without requesting further documentation.” U.S. Dep’t of Justice, ADA Requirements: Testing Accommodations (Testing Accommodations Guidance);<sup>6</sup> *accord Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal.), Consent Decree (May 29, 2014), at Injunctive Relief, ¶ 5(a), (c), (d)(ii);<sup>7</sup> *DFEH v. LSAC*, Best Practices Report;<sup>8</sup> 28 C.F.R. § 36.309(b)(1)(v).

Here, the proposed rules purport to follow this principle by creating a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

---

<sup>6</sup> Testing Accommodations Guidance, [https://www.ada.gov/regs2014/testing\\_accommodations.html](https://www.ada.gov/regs2014/testing_accommodations.html).

<sup>7</sup> *DFEH v. LSAC* Consent Decree (N.D. Cal. May 29, 2014), <https://civillibertyrights.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/>; <https://clearinghouse.net/doc/69024/>.

<sup>8</sup> *DFEH v. LSAC* Best Practices Report, <https://civillibertyrights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>, 2015 U.S. Dist. LEXIS 104751, at \*\*45, 53 (N.D. Cal. Aug. 7, 2015, deciding challenges).

- Exclusion of Timed Law School Exams From Definition of “High-Stakes Tests”

The Testing Accommodation Guidance states that the receipt of such prior accommodations in school is generally sufficient to support testing accommodations on a current high-stakes exam. Similarly, the Best Practices Report in the *DFEH v. LSAC* litigation states that a candidate who can demonstrate that they received more than 50 percent extended time on college examinations should receive more than 50 percent extended time on the LSAT. And, as documented in this public comment process, the members of the LSAC Best Practices Panel unanimously endorse the inclusion of timed law school exams within the automatic approval process. Yet many candidates report to DREDF and DRA that they are denied accommodations by the State Bar that they have been granted on timed, law school exams.

Given these authorities and experiences, the State Bar should adopt rules that automatically grant candidates the same testing accommodations that they previously received on prior high-stakes test in college or law school, such as on timed in-class exams in college or law school. Instead, the latest proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who were diagnosed later in life, are older, lack personal or family resources and instead faced adversity, grew up and were educated in other countries, and/or attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s Legal Education Opportunity Program (LEOP) program<sup>9</sup> is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

The proposed rules state that “considerable weight” will be given to documentation of past testing accommodations approved for timed exams administered in college or law school, but that these prior accommodations do not trigger an automatic approval on the bar exam. Proposed Rule 4.82(D). Given the need for systemic reform of standards, leadership, and personnel, a discretionary standard here is insufficient and must be rejected.

---

<sup>9</sup> Legal Education Opportunity Program, <https://uclawsf.edu/academics/academic-success/legal-education-opportunity-program/>.

- Arbitrary Limitations on Accommodations Automatically Granted

The proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. The LSAT consent decree negotiated by the U.S. Department of Justice and California’s Civil Rights Department provides automatic grants of extended time up to double time, together with additional automatic grants for a separate room and other accommodations that typically require a private room. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

No “Best Ensure” Standard.

The proposed rules state that “[t]esting accommodations are provided to ensure that an applicant who has a disability can access the examination and is afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” Proposed Rule 4.81(A).

While this is a step forward, the proposed rules should also state that the State Bar should be administered so as to “best ensure that ... the examination results accurately reflect the individual’s aptitude or achievement level” rather than their disability. See 28 C.F.R. Part 35, App. A, Other Issues (the provisions of 28 C.F.R. § 36.309, implementing 42 U.S.C. § 12189, are “useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations”); 28 C.F.R. § 36.309 (examinations must be “selected and administered so as to best ensure that ... the examination results accurately reflect the individual’s aptitude or achievement level” rather than their disability. See also *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011) (upholding “best ensure” standard).

No Resolution of Chronic Timeline Problems.

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). In other words, there is no commitment to timely responses and prompt effective appeals that will allow the candidate to participate in the same exam cycle as their nondisabled peers.

Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### *Additional Problems with the Rules.*

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which are included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

*No Replacement or Diversification of Disability Consultants.*

The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

Leadership and personnel matter as much as written rules and procedures. For many years, the State Bar has relied upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here.

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years.

*No Plan for the Training, Supervision, and Leadership Review Needed to Achieve Systemic Reform.*

The proposed rules include some good standards, including one that limits required documentation to that which is reasonable, limited and narrowly tailored to the information needed, Proposed Rule 4.85(B), and a second that requires deference to the assessment of candidate's qualified professional over that of the disability consultant, Proposed Rule 4.82(C).

Other portions of the proposed rules – the definition of disability, the elements of the automatic approval process, timelines, and so on – could be amended to comply with applicable standards.

But whatever is written down on paper, the State Bar needs a comprehensive plan of training, supervision, and personnel change to achieve the cultural sea-change that is needed to reform its testing accommodation program.

For example, State Bar staff and consultant reviewers must be trained and directed to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

The State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

### **Conclusion**

Our profession has many vacancies, particularly in the legal services sector. We need more qualified lawyers. Preventing candidates from becoming licensed by denying them necessary and accepted testing accommodations is unlawful and harmful. The State Bar should end its “zero sum game” mindset and commit to the swift and ready grant of all requests for commonly used testing accommodations that are supported by reasonable documentation.

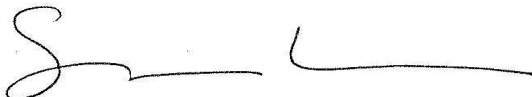
Sincerely,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

A handwritten signature in cursive script, appearing to read "Claudia Center".

Claudia Center  
Legal Director

DISABILITY RIGHTS ADVOCATES

A handwritten signature in cursive script, appearing to read "Jinny Kim".

Jinny Kim  
Managing Attorney

Amelia Evard  
Wolinsky Fellowship Attorney



Chelsea D. Yuan  
Director of Student Services,  
Accessible Education  
cdyuan@berkeley.edu

July 31, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: Devan.McFarland@calbar.ca.gov  
Louisa.Ayrapetyan@calbar.ca.gov

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz,  
Knoll, Shelby, Sowell, and Toney:

I am writing on behalf of the UC Berkeley School of Law to share comments on the Revised  
Proposed Amendments to the Rules of the State Bar pertaining to testing accommodations for the  
California Bar Exam.

I am writing to oppose the revised proposed amendments to the State Bar rules regarding testing  
accommodations. While the proposal includes a few helpful principles, it still fails to include the  
necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or  
more of an applicant’s major life activities as compared to most people in the general  
population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule,  
Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the  
last phrase – “as compared to most people in the general population” – is new language which  
diverges sharply from California law.

University of California, Berkeley  
School of Law  
365 Law Building  
Berkeley, CA 94720-7200  
[law.berkeley.edu](http://law.berkeley.edu)

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the DFEH v. LSAC litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal



community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

## Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing

accommodations to ensure equal opportunity for individuals with disabilities. *See*, [https://archive.ada.gov/regs2014/testing\\_accommodations.html](https://archive.ada.gov/regs2014/testing_accommodations.html). This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small

group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,



Chelsea D. Yuan  
Director of Student Services, Accessible Education

CATHERINE J. BLAKEMORE, Chair,  
Sacramento

HON. GAIL RUDERMAN FEUER,  
Vice-Chair  
Court of Appeal, Second District

JANIS R. HIROHAMA, Treasurer  
League of Women Voters

HON. LISA R. JASKOL, Secretary  
Los Angeles County Superior Court

HON. MARIA L. ARMENDARIZ  
Los Angeles County Superior Court

DIEGO CARTAGENA  
Bet Tzedek, Los Angeles

DAVID R. DANIELS  
Public Counsel

HON. TIMOTHY P. DILLON  
Los Angeles County Superior Court

HON. KELLI EVANS  
California Supreme Court

ERIKA C. FRANK  
California Chamber of Commerce

HON. ROSA M. FREGOSO  
Los Angeles County Superior Court

JUAN JOSE GUTIERREZ  
One Stop Immigration and  
Educational Center

AMOS E. HARTSTON  
California Department of Justice

HON. MARK A. JUHAS,  
Immediate Past Chair,  
Los Angeles County Superior Court

ANDREW F. KIRTLEY  
Cotchett, Pitre & McCarthy

HON. VICTORIA S. KOLAKOWSKI  
Alameda County Superior Court

SANDRA LEVIN  
Los Angeles County Law Library

MICHAEL J. LEVY  
Travis Credit Union

JONATHAN LIBBY  
Los Angeles

JAMES W. MEEKER  
University of California, Irvine

ANGÉLICA MILLÁN  
Northern. Cal. Legal Services

CRYSTAL MILLER-O'BRIEN  
Glaser Weil, LLP

PANIDA M. RZONCA  
Thai Community Development Ctr.

JOHANNA VALLE SOBALVARRO  
Interpreters Guild of America

HON. JON A. STREETER  
First District Court of Appeal

ELICA VAFAIE  
Lawyers' Comm. for Civil Rights

EMILIO VARANINI  
California Department of Justice

HON. MONICA WILEY  
San Francisco County Superior  
Court

HON. ERICA R. YEW  
Santa Clara County Superior Court

JACK W. LONDEN  
Executive Director

JASMINE KADDOURA  
Communications and Program  
Manager

KOLEEN BIEGACKI  
Director of Administration



*Mailing:* PO Box 645, Carmichael, CA 95609

*Phone:* (510) 629-1264

*Email:* [info@CalATJ.org](mailto:info@CalATJ.org)

*Website:* [www.CalATJ.org](http://www.CalATJ.org)

July 31, 2023

Board of Trustees

State Bar of California

180 Howard St.

San Francisco, CA 94105

Submitted Via Online Portal, <https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**Re: Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
Accommodations 4.80-4.92 and Proposal for Changing Testing Locations  
Beginning February 2024**

Dear Trustees:

The California Access to Justice Commission, CalATJ, appreciates the opportunity to provide additional comments to the proposed revisions to the Testing Accommodation Rules. Our previous comment letter was dated January 31, 2023. These rules are an important way to help ensure that candidates with disabilities have a fair and equal opportunity to practice law in California and address the Bar's goals of increasing the profession's diversity, including increasing the number of attorneys with disabilities. As discussed below, we have additional comments and recommendations.

We also comment in this letter on the proposed reduction in the number of testing sites and the impact this rule will have on applicants with disabilities.

**Comments Regarding Proposed Rules 4.80-4.92 - Testing Accommodations**

We are pleased that the proposed revised rules include changes previously recommended by CalATJ and others who commented. These include:

- Incorporating the prior framework into the revised Rules, thereby increasing transparency;
- Increased deference to the opinions of a qualified professional who has made an individualized assessment of the applicant that supports the need for accommodations compared to the opinions of the Bar's consultant. Because this rule allows the consultant to review the opinion and determine if the qualified professional demonstrated that the accommodations are necessary to allow equal access to the exam and an equal opportunity to achieve the same result, training of Bar consultants about this new standard will be important to its success.

- Automatic approval of some prior high-stakes testing accommodations and eliminating the requirement that the requested accommodation was provided within the past five years are good steps forward and ensure consistency with the federal DOJ testing accommodations guidance and regulations and the recent *DFEH v. LSAC Consent Decree*. (See comments below for recommended further revisions to this automatic approval process.)

We encourage the Bar to make the following further revisions:

**1. High-stakes testing automatic approvals.** The proposed rule excludes certain accommodations from automatic approval. Consistent with the federal DOJ guidance that "[p]roof of past testing accommodations in similar test settings is generally sufficient to support a request for the same testing accommodations for other high-stakes testing," we encourage the Bar to do the following:

- Include timed law school exams within those that are automatically approved, as these tests are closely analogous to the bar exam and, in some circumstances, designed to help students prepare for the Bar exam.
- Include all prior high-stakes testing accommodations within those that are automatically approved, including requests for a private room and extending time beyond a half (or double time for someone with a "severe visual impairment"), as these are common testing accommodations some candidates need and are included in the LSAC Consent Decree.

**2. Revise the timeline components of the Rules to ensure consistency with the DOJ guidelines.** Those guidelines require that "Testing entities should ensure that their process for reviewing and approving testing accommodations responds in time for applicants to register and prepare for the test. In addition, the process should provide applicants with a reasonable opportunity to respond to requests for additional information from the testing entity and still be able to take the test in the same testing cycle." It does not appear that the 60-day period to grant or deny the accommodation following the Bar's determination that the request is complete (up to 30 days) is sufficient to allow the applicant to request and complete a review in the same exam cycle.

## **Comments on the Proposal to Reduce the Number of Testing Locations Beginning February 2024**

CalATJ is concerned with the Bar's proposal to reduce the number of exam locations from the current 16 sites in California to three "supersites" and three accommodation sites. This decision does not appear to consider the disproportionate impact this reduction in the test sites will have on individuals on applicants with disabilities, particularly those with mobility disabilities.

For example, many individuals with mobility impairments, including those who are blind or have other significant visual impairments and those who use wheelchairs, depend on public transit. Unfortunately, public transit, when it is accessible, often does not cross city or county lines, making it nearly impossible for an applicant to use public transit to a testing site that is much further from their home. Similarly, for many individuals with significant physical disabilities, it is easier to return home each day to a living arrangement with the adaptive

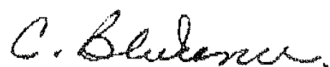
devices they need to care for their personal care needs and sleep. While there may be hotel options near the testing sites, it is unclear if the Bar has evaluated how many of those sites have accessible accommodations that meet required ADA standards.

Before approving a reduction in the number of testing locations, CalATJ encourages the Bar to consider barriers that applicants with disabilities may face in accessing the small number of sites and the availability of accommodations near the site to meet applicants' disability-related accommodation needs.

The Access Commission notes that the Disability Rights Education Defense Fund (DREDF) and other legal services organizations have submitted more detailed comments about the testing accommodations rules. We encourage the thoughtful review and consideration of these comments in addition to the ones provided above.

Thank you for the opportunity to review and provide additional comments. We would be pleased to answer any questions you have about these comments.

Sincerely,

A handwritten signature in black ink that reads "C. Blakemore".

Catherine Blakemore  
Chair

July 30, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
 Accommodations – **OPPOSITION STATEMENT**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I, **Kathleen Becket**, an Associate Attorney at the civil rights firm of Schonbrun Seplow Harris Hoffman & Zeldes, LLP —and a former special education teacher with a master’s degree in that subject—am writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, fair and inclusive testing accommodations program.

### **Improper Characterization of “Disability”**

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities, and people such as myself who have been self-accommodating their entire lives. I graduated law school without ever even knowing I qualified for accommodations. Certain persons, with or without disabilities, typically perform certain academic tasks better than the average person. A comparison to “most people in the general population” is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity **difficult**. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii)(emphasis added); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and sometimes hidden disabilities—such I was the monocularly that I suffer from— which nonetheless require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the

proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted. It is irrelevant.

### **Problems with Automatic Approval Process**

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. This is absurd. Proposed Rule 4.80(C). Timed law school exams are most closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school, due to its unique testing schema. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams *unnecessarily compromises the very candidates that the State Bar should be supporting*.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### **Problems with Timelines**

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say



whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

**The State Bar should adopt new timelines that comply with the Department of Justice guidelines.**

Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

**Additional Problems with the Rules**

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

**I also suggest that the State Bar publish a list of pro bono attorneys willing to assist candidates with bar exam accommodation requests, as again, certain populations of law school students may not have previously had the resources to receive disability supports such as testing accommodations. I am happy to be on that list, and do not care if I am the only person so named, though I seriously doubt that will be the case.**

///  
///

### **Problems with Implementation**

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

**For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.**

Sincerely,



Kathleen J. Becket  
Attorney

Schonbrun Seplow Harris Hoffman & Zeldes, LLP

## **Commenter 22**

Please allow extra time for elderly bar takers without having to get certified again by their primary care doctors - the elderly bar takers who are currently on testing accommodation for extra time. With age comes other difficulties such as hearing, vision, fatigue, slow in typing, high blood sugar, bone fragility etc. These are natural handicap with age and should not require proving them..For elderly bar takers most physical conditions go worse - not better, and therefore need more time to finish the exams.

Please exempt elderly test takers with accommodation from taking online essay exams from July 2024 exams onward, as it is much harder for them to tackle all the inconveniences that come with online reading of essays and PTs (voluminous docs). It becomes even more difficult for them to deal with computer crash, talking to examsoft etc.

Thus, please allow additional extra time for each essay in February 2024. The MBEs could remain the same, as MBEs do not require typing.

## **Commenter 23**

I agree with the proposed rules changes regarding automatic approval of accommodations except the position on granting a private room. If a private room was approved and granted previously based on the submitted information regarding the disability then it should be automatically granted based on the new rule. After all, there was a reason for requesting and granting the private room previously based on the disability. Since the proposed rules allow for automatic approval for the same or lesser accommodation as those previously granted for high-stakes exam, then the approval for the private room should be brought forward as well.

## Commenter 24

No accommodation requests, such as private room, should categorically be “not offered” for individualized consideration or require attestation of “exceptional need” rather than what best ensures equal access, unless the State Bar has demonstrated such accommodations to constitute fundamental alteration or undue hardship. In addition, if an individual is using certain accommodations such as a screen reader, a human reader, or a Braille Writer, it appears the new policy is inconsistent, e.g. they can have their technology/human accommodations but have to seek special approval to use them in a private room which is typical for privacy and to limit interfering with other test taker needs.

The timeframes are problematic because they severely disadvantage individuals with disabilities due to administrative inefficiencies on the part of the State. Two weeks initial petition decision turnaround is more appropriate rather than 60+ days. Individuals need to know if their accommodations are approved, and if not, have sufficient time to challenge them with the attendant time and resource allocations to do so. Otherwise, the timeframe for challenges and appeals will correspondingly be delayed with the impact of shutting some out of the exam for that particular cycle. Doing so results in discrimination - others without disabilities will get to move forward with their legal careers while those with disabilities must wait due to reasons not in their control.

Applicants should get multiple opportunities to seek review or appeal of a decision in the same cycle, as the history of improper denials demonstrates that the State Bar doesn't always get it right on the first time and the second time. If an individual applies early enough in the cycle, they should have the ability to have a denial appealed or reviewed until it would no longer be practicable for that review/appeal, if found in favor of the applicant, to effectively implement the accommodations. That time period should be short, e.g. three business days, for most accommodations.

Applicants should get at least 30 days to appeal if they petition at least 2 months before the exam.

No accommodation requests, such as private room, should categorically be “not offered” for individualized consideration or require attestation of “exceptional need” rather than what best ensures equal access, unless the State Bar has demonstrated such accommodations to constitute fundamental alteration or undue hardship. In addition, if an individual is using certain accommodations such as a screen reader, a human reader, or a Braille Writer, it appears the new policy is inconsistent, e.g. they can have their technology/human accommodations but

have to seek special approval to use them in a private room which is typical for privacy and to limit interfering with other test taker needs.

Applicants should have the right to a hearing on denied requests if they appeal and document-based appeals solely are problematic for complex challenges. This method should be treated the same as applicants where a denial is contemplated on moral character findings, because both impact the liberty interest in pursuing a chosen profession.

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

**Introduction:**

While the State Bar should amend the Admission Rules to deem approvals on other high-stakes exams for same requested accommodations, predicated on permanent disabilities – coupled with an applicant’s certification that the functional limitation(s) that the accommodation was intended to ameliorate remains present – as sufficient evidence to summarily grant those requests without further scrutiny, 28 C.F.R. 36.309(b)(1)(v), the present Proposed Rule 4.83(A) subsections (6)-(7) still would impose improper exclusions upon applicants seeking the benefit of this amendment. Worse still, while pertaining directly only to the Summary-Matched Grant Policy, Proposed Rule 4.83(A)(6) is inseparably intertwined with and predicated on (and thus indirectly enumerates into the Rules) an egregiously unlawful policy (*see* 28 C.F.R. 35.160(b), 35.164) – generally applicable to all accommodation requests, even those complying with the ordinary petition documentation requirements rather than a matched grant to prior exams – to never provide individualized consideration of certain disfavored accommodation requests and deem those accommodations as “not offered by the State Bar,” without the required boundary that such accommodations had been demonstrated by the State Bar to constitute fundamental alteration or impose undue burden. The Rules Revision should clarify that the State Bar must provide individualized consideration on the merits to all accommodation requests by the applicant that it has not demonstrated would cause such fundamental alteration or undue burden.

While the State Bar’s elimination of the redundant and prejudicial originally proposed Summary-Matched Grant Policy requirements that the approvals had been decided within the last 5 years and been unanimously made by all prior testing agencies from which the applicant had ever taken a high stakes examination (responsive to the first iteration of public comment on the previous Rules Revision

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

proposal) was appropriate and appreciated, the State Bar should still strike subsections (6)-(7), or at a minimum replace them with a sixth requirement that the accommodations granted on the previous high-stakes exam(s) eligible for a summary-matched grant not constitute any fundamental alteration or impose any undue burden in the context of the bar exam.

The language of Proposed Rule 4.85(B) conforms to Proposed Rule 4.83, so the corrective amendments thereto recommended herein would also address Proposed Rule 4.85(B). In contrast, while Proposed Rule 4.85(C) is largely reasonable other than the scope of accommodations for which it raises the detail of explanation by the applicant and their experts to provide the State Bar requires for the applicant to seek those accommodations – because Proposed Rule 4.85(C) properly does not mandate or use the “exceptional need” language on the evaluator forms that implement it, which goes beyond the text of the Proposed Rule – due to that improper language of the forms, rephrasing those forms to match Proposed Rule 4.85(C) and remove the attestation of “exceptional need” for accommodations requiring more detailed explanation of bases is necessary for that requirement to be consistent with the governing “best ensures level playing field to nondisabled applicants” ADA legal standard.

Further, the State Bar should amend its proposal to narrow the set of accommodations that trigger the requirements of Proposed Rule 4.85(C) (for ordinary petition process) and fall into the exclusion from the summary-matched grant policy for approvals on prior high-stakes exam(s) provided under Proposed Rule 4.83(A)(7) (to the extent that exclusion is retained at all, which it should not be). To the extent that Proposed Rules 4.83(A)(7) and 4.85(C) are retained, only accommodations that require the bar exam to be administered over more than six days (or at minimum, more than four days) should require more detailed



**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

explanations of the predicate disability basis from the applicant and ineligibility for the summary-matched grant policy. Requests for a private room and/or accommodations requiring testing over four days (and ideally also accommodations requiring testing over five to six days) should fall under the same procedures as any other accommodation requests.

Only if such further modifications were made would this component of the proposal be ready to advance for adoption.

**Proposed Rule 4.83(A)(6)**

Proposed Rule 4.83(A)(6) provides that, to be eligible for the summary-matched grant policy, the accommodations granted on prior high-stakes exams must be among those for which “[t]he State Bar offers the same or equivalent testing accommodations,” which conversely suggests there are accommodations that the State Bar has chosen to never offer, whether through this policy or the regular petition process, even if previously granted on (an)other high-stakes exam(s). This exclusion – and particularly the underlying, more broadly applicable policy on which it is predicated and would codify into the Admission Rules seemingly beyond the Summary-Matched Grant Policy exclusion – are improper because, as discussed below, the State Bar cannot and should not deem any particular accommodation as categorically “not offered” for individualized consideration in at least the regular petition process that subsection (6) expressly incorporates the exclusion from, and effectively codifies into the Admission Rules for, – absent fundamental alteration or undue burden – and the proposed rule not only enumerates no such boundary on that exclusion, but both it and the predicate limitations on accommodations available to request through any procedure must be read in the context that the State Bar has designated stop-the-clock breaks and remote testing as examples of

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

accommodations categorically “not offered” when neither of those examples would constitute such fundamental alteration or undue burden. Accordingly, Proposed Rule 4.83(A)(6) should either be stricken or narrowed to require only that the accommodations previously approved not be ones that the State Bar demonstrates to constitute fundamental alteration or impose undue burden, and the “not offered” policy on which the exclusion is based should be similarly constrained by express provision within the Amended Rules.

**1. Neither Stop-the-Clock Breaks nor Remote Testing Constitute Fundamental Alteration or Impose Undue Burden:**

In response to the first public comment submissions, the Working Group addressed its refusal to ever consider stop-the-clock breaks or remote testing accommodation requests as follows: “While the State Bar does not offer ‘stop the clock’ breaks, the State Bar offers the equivalent by granting additional time but the clock continues to run. Additionally, the multiple-choice exam (MBE) owned and scored by the National Conference of Bar Examiners is not offered as a remote exam.”

This response fails to explain why substituting extra time is a necessarily equivalent accommodation to stop-the-clock breaks, nor how the NCBE’s alleged refusal to offer the MBE as a remote exam generally makes such an accommodation constitute a fundamental alteration or impose undue burden when 28 C.F.R. 35.130(b) clarifies that Title II’s requirements extend to refraining from contracting with other entities or entering licensing agreements that would prevent it from otherwise reasonably accommodating disabled applicants – or else somehow otherwise permits the State Bar to contract on terms that deny applicants

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

individualized consideration of their requests on the merits as required by 28 C.F.R. 35.160(b).

For granting additional time to effectively substitute for stop-the-clock breaks, the amount of extra time equivalent to the duration of the on-clock breaks used as a substitute must be considered additive to extra time requested and approved to address a different disability functional limitation from the requested breaks. The Working Group neither confirmed that the Rules do so nor amended the proposal to the effect that they will do so, nor did they explain why – as a blanket policy with no individualized analysis – the State Bar may reject a requested accommodation that is not demonstrated to be a fundamental alteration or undue burden merely because it granted equal or greater extra time to ameliorate some other disability need.

Moreover, even additive equivalent extra time to the duration of any additional stop-the-clock breaks requested would only equivalently address certain disability needs to the extent that the distribution of that extra time was fixed to the same unit of time (i.e., test day) as the breaks were requested for, rather than uniformly divided and apportioned to specific test session subparts, so that timing and distribution of usage of the extra time as a break could be equally flexible around symptoms and effects of disability, and so be effective at ameliorating those predicate functional limitations – and also that the applicant would be at liberty to do everything during their exam time (i.e. use the restroom freely, eat or drink, take medicine, etc.) that they would have been allowed to do during break time when they lack access to test materials. The LSAC consent decree on which the Rules Revision purports to be based treats stop-the-clock breaks as common and reasonable accommodations that should be summarily approved for a large variety of disabilities, and most other testing entities routinely approve them, and so while

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

Admissions Staff might find them operationally inconvenient to administer, any suggestion that they constitute fundamental alteration or undue burden would be meritless.

Similarly, to the extent that, as alleged in exam FAQs for the February 2022, July 2022, February 2023, and July 2023 exams, the NCBE is conditioning its license of the MBE on the State Bar refusing to individually consider accommodation requests for remote testing (which the NCBE has denied requiring, and the State Bar has claimed no records of such a contract exist in response to CPRA requests for records reflecting such agreements), such a fact would not bring the State Bar’s stated policy into compliance with 28 C.F.R. sections 35.130(b) and 35.160(b)(2), the former of which expressly prohibits such contractual or licensing agreements and the latter of which mandates individualized consideration of every accommodation request rather than blanket policies about which types of accommodations that are not established to constitute fundamental alteration or undue burden are or are not “offered by the State Bar.”

Nonetheless, for its part the NCBE has posited that it does *not* necessarily oppose the State Bar granting Remote MBE testing to individual applicants as a disability-based testing accommodation. What it has declined to do is offer the State Bar a license to *blanketly administer the MBE as a remote exam under the standard testing conditions of the California Bar Exam* “in the current environment,” based on a strong *policy preference* for “uniformity” and “security.”

The State Bar has already proven beyond peradventure that remote testing is *not* a fundamental alteration or undue burden by administering three bar exams in that modality as a standard condition, and by maintaining its preparedness to do so again prospectively – but only should circumstances be deemed to justify its return for nondisabled applicants too and not just disabled applicants. These facts expose

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

that the State Bar’s (and NCBE’s, even if the State Bar’s allegations are credited) true objection to this accommodation is not its feasibility to implement or the capability of the State Bar to assess through the exam what it purports the exam to test. Rather, where the availability of remote testing turns determinatively on the needs of nondisabled applicants and cannot be considered on an individualized basis, the primary objection seems to be to the proposition that there would be substantial “deviations in testing conditions” between nondisabled and disabled applicants if circumstances were found to warrant remote testing for some disabled applicants, but not the majority of all applicants, rather than the State Bar’s and NCBE’s mutual policy preference for “uniformity” in such conditions. Yet, a fundamental purpose of the ADA and related laws is to mandate the degree of modifications to standard conditions that, for each individual disabled applicant, best ameliorates the handicapping effects of their disabilities, to the maximum extent possible. Framing an inability to maintain a desired level of uniformity in conditions between all applicants and/or perceived fairness to nondisabled applicants by doing otherwise as itself a basis for fundamental alteration or undue burden is nothing less than impermissibly substituting the policy judgments of Congress for those of the State Bar. Congress properly weighed the equity considerations in disabled persons’ interest in equal access to public life participation generally and governmental services and programs particularly against the need to sometimes impose disparate treatment between disabled and nondisabled individuals to do so and all ancillary fairness concerns therewith, along with the significant economic resources public entities would be required to expend in order to comply, and enacted appropriate disability rights legislation, which it has strengthened over time (in part, to clarify that standardized testing entities were not doing enough to make exams equally accessible). Congress further authorized the

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

DOJ to promulgate standards and regulations that further expand the requirements of the ADA beyond that enumerated in the statutory text – and it has. The California Legislature, too, has weighed these policy considerations, and generally has concluded that even the Federal law provisions do not go far enough in securing the rights of disabled persons, and thus provided even more expansive standards and remedies under California law. Mere political disagreements with the policy wisdom of the statutory and regulatory schemes’ fundamental requirements and purpose in this regard, at least in the context of licensing exams – whether held by the State Bar staff, CBE, Board, and/or one or more of its preferred vendors – cannot form the basis of a fundamental alteration or undue burden claim. State Bar staff and officials need to learn to better recognize where their administrative decision-making duties involve impartially applying the laws and judgment calls handed down from the elected branches of the federal and state governments to the individual facts of each applicant’s situation – and find those facts based on objective weight of the evidence analysis rather than whether a staff member or consultant identified an omission they perceive to render the applicant’s showing imperfect – not to weigh in and apply personal political views and/or the agency’s logistical and budgetary preferences on whether and how a particular medical situation should be addressed.

In an environment where the State Bar could no longer claim sovereign immunity, blustering a summary demurrer (devoid of citations or legal analysis) that the proposal complies with “all applicable laws and regulations,” is unlikely to be persuasive to most judges when an aggrieved February 2022 and after applicant with disability-based elevated COVID risk – who had requested and been refused remote testing as an accommodation – subsequently brings a judicial challenge, nor will assertions that compliance with the NCBE’s alleged preferences was the reason

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

for doing so. Notably, Ninth Circuit Judge Callahan has already expressed her disagreement at oral argument in App. No. 20-17316 with the State Bar’s position that its handling of disability accommodations is complying with “all applicable laws and regulations.”

**2. Absent such Fundamental Alteration or Undue Burden, the State Bar Cannot Lawfully Refuse Individualized Consideration of an Applicant’s Requested Testing Accommodations:**

ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what “best ensures a level playing field” to nondisabled applicants, which where met creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9<sup>th</sup> Cir. 2011); *see also* 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9<sup>th</sup> Cir. 2013). The State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III’s “not readily achievable” standard).

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations they request meets the best ensures level playing field standard, which threshold burden submission of proof that the request(s) had been granted on (a) previous high-stakes exam(s) accomplishes, 28 C.F.R. 36.309(b)(1)(v), once they have done so the applicant’s requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9<sup>th</sup> Cir. 1999), it cannot categorically designate certain accommodations as “not offered” as proposed in subsection (6) of Proposed Rule 4.83(A).

Accordingly, any categorical exclusions of particular accommodations that do not inherently constitute fundamental alteration or impose undue burden facially violates these authorities, at least as applied to accommodation requests under ordinary petition procedures. While Proposed Rule 4.83(A)(6) concerns the summary-matched grant policy, not ordinary petition review, correction of the policy under ordinary petition review nonetheless deprives Proposed Rule 4.83(A)(6) of any purpose or operational effect, as it only excludes accommodations that would be ineligible for consideration under the ordinary petition procedures too. Further, amending Proposed Rule 4.83(A)(6) to enumerate specific accommodations as ineligible for the summary match procedure, but still offered under the regular procedures, would render Proposed Rule 4.83(A)(7) (doing just that) either superfluous or expanded to a degree that would unduly undermine the burden sparing effect of the Summary-Matched Grant Policy, and so



**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

would lack merit for the same reasons that Proposed Rule 4.83(A)(7) should be stricken (see below)).

**Proposed Rules 4.83(A)(7), 4.85(B)-(C):**

Proposed Rule 4.83(A)(7), as implemented by Proposed Rule 4.85(B)-(C), excludes from the summary-matched grant policy (if not individualized merits consideration through the ordinary petition procedures) private room accommodations and any accommodations that would require the exam to be administered over more than three days, though unlike the accommodations “not offered” by the State Bar would still allow consideration of such requests under the regular petition procedures, which for this set of accommodations require applicants to both provide greater detail in their explanations of the bases for such requests, Proposed Rule 4.85(C), and submit treating expert recommendations that, under the new mandatory evaluator forms, impermissibly require treating experts to attest the applicant has “exceptional need” for these accommodations to recommend them. In fact, even applicants seeking such accommodations under the regular petition procedures would, under the revised forms, need their treating expert(s) to attest to exceptional need in order to recommend those accommodations in a manner that is required for the applicant to have their petition deemed as “complete” and thus be considered by the State Bar at all.

As discussed above, the governing threshold legal standard the State Bar must use is what best ensures a level playing field to nondisabled applicants. Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly insurmountable for the disabled applicant, as opposed to whether an unnecessary disability-based handicap remains without the sought

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor (per LSAC guidelines) to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all. In addition to amending Proposed Rules 4.83(A)(7) and 4.85(C), the new evaluator forms will require corrective amendments so that treating experts may recommend what accommodations they see fit without indicating any “exceptional need” or other form of “necessity.”

Moreover, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. While theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support.

For all of these reasons, the State Bar cannot require attestation of exceptional need for any accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden on its evaluator forms or as a substantive standard in evaluating requests under the ordinary petition procedures. It admittedly is permitted to set higher requirements for the summary-matched grant

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

policy, where unlike subsection (6), subsection (7) does not incorporate by reference impermissible general standards from regular petition review, but subsection (7) should nonetheless be stricken; both because the same policy justifications (eliminating unnecessary burdens on disabled applicants when they present what should already be sufficiently probative evidence) apply to private rooms and greater than 50% extra time as to other accommodations, and especially where the LSAC consent decree best practice guidelines set the criteria for accommodations that should be eligible for summary-matched grants on prior high-stakes exams more expansively than Proposed Rule 4.83(A)(7). The LSAC/DOJ panel included private rooms, additional breaks, up to 50% extra time for applicants with only one (non-visual) disability impairment, and up to double time for applicants with multiple distinct disability impairments or a visual impairment, in its summary matched grant requirements. Not only would even 50% extra time potentially require more than three days to administer for the bar exam if the applicant also needed shorter than standard test days and/or extra breaks – both accommodations eligible for simultaneous summary match if previously approved on any high-stakes exam under the LSAC guidelines, – but the LSAC guidelines prescribe summarily matched grants of as much extra time as double time for applicants with multiple distinct disability impairments and/or a visual impairment, which is more expansive eligibility for extra time of between 51% and 100% additional time than proposed by the State Bar here. Equally important, while the LSAC guidelines do not mandate a summary-match grant of more extra time than double time, they explicitly state that accommodations of 150% to 200% (triple time) extra time should generally be considered reasonable and ordinary accommodations for applicants with both visual and non-visual disability impairments.

**“Position on Proposed Rules on Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

Accordingly, even if the State Bar does limit the summary match policy-eligible accommodations to an extent greater than accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden, the number of days that triggers the exclusion should be higher than three and a private room should be eligible for a summary-match grant if it had been an approved accommodation (rather than a standard condition or operational policy for implementing other accommodations) on any of the prior high-stakes exam(s) documented.

**CONCLUSION:**

1. The policy to “not offer” individualized consideration of certain accommodations that have not been established to constitute fundamental alteration or impose undue burden is unlawful, and is against public policy even if it were lawful. The Rules Revision should make clear that all accommodation requests will receive individualized consideration on their merits, absent demonstrated fundamental alteration or undue burden.
2. Proposed Rule 4.83(A)(6) should be stricken, or at least replaced with an alternative exclusion from the Summary-Matched Grant Policy for accommodations that the State Bar demonstrates – at least in the context of the bar exam’s differing conditions from the prior high-stakes exam – constitute fundamental alteration or impose undue burden.
3. Proposed Rules 4.83(A)(7) and 4.85(C) should either be stricken or at least narrowed to only apply to accommodations that cannot be administered over a particular number of days that is greater than the presently proposed litmus of three days.

**“Position on Proposed Rules on Automatic Approval of Accommodations  
Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:**

4. The new treating expert evaluator forms should be revised to rephrase the term “exceptional need” that applicants’ experts must attest to recommend certain accommodations on those forms to – at most – ask for more specific details on why those accommodations better ensure a level playing field for the applicant than lesser accommodations that could be administered over fewer days.

**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

Contrary to Proposed Rule 4.82, the State Bar should not distinguish between timed law school or college exams and other types of prior “high-stakes examinations” an applicant may have received testing accommodations upon for purposes of whether to summarily grant any accommodation previously approved for school exams based on a permanent disability where the applicant certifies they continue to suffer the same functional limitation(s) the accommodation(s) at issue had been approved for – at least if the school itself considered and premised its approval of the predicate accommodation(s) on medical documentation from one or more qualified treating professional(s), rather than self-reporting, and the applicant submits that documentation (even if not written for the bar exam nor on the State Bar’s forms) with their documentation of prior approval. Such an added condition would weed out most approvals generated by the schools which actually rubber stamp every testing accommodation request a student alleges to be premised on disability needs, and limits the burden of producing more exacting documentation on those who have never had to bear it before, while still sparing the vast majority of disabled applicants the substantial burden of repeatedly reinventing the wheel.

The primary purpose of a summary-grant match policy is to better balance the State Bar’s interest in verifying the legitimacy of the disability functional limitations and vetting the propriety of the requested accommodations thereto against the myriad burdens – financial, time and lead time, logistical, etc. – additively imposed on disabled applicants by requiring them to obtain detailed, lengthy written reports from their doctors in each field of specialization at issue for their conditions, or duplicate those their doctors have already written to address all other schools and testing entities once without reinventing the wheel for each one on the State Bar’s forms, at a time when they are typically already facing grueling

**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

demands – either from the competing responsibilities of law school or of traditional post-graduation bar exam preparation – especially when often facing those exacting baseline conditions at the structural handicap disabilities impose across all life contexts. See Prof. Katherine Macfarlane, *Accommodation Discrimination*, 72 American University Law Review (Aug. 20, 2022), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4190587](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4190587).

Nonetheless, secondary purposes exist, not the least of which is the spared staff time, consultant time, and general administrative resources associated with processing requests for accommodations through more searching review procedures. By excluding law school and college exam approvals from the summary procedures, the State Bar is adding considerable volume to its roster of petitions and appeals to closely scrutinize, refer to reviewing experts, and then adjudicate. The size of this additive volume is significant – many disabled applicants received and then seek on the bar exam accommodations they received in law school, but had not even requested on their last taken standardized exams, because law school exams are typically more recent for the average bar applicant than past “high-stakes” standardized tests, and that recency means that law school accommodations are comparatively more likely to reflect new or worsened disability impairments that were not at issue for standardized “high-stakes” college or law school admissions exams.

The CBE’s rejection of the Working Group recommendation – to not distinguish between school exam approvals and “high-stakes” exam approvals for the summary-match grant policy, – in favor of Staff’s recommendation to apply that policy only to the latter, was articulated to be because of how “challenging” the CBE found “ensuring consistency and rigor across all institutions evaluating testing accommodations requests.” This concern is misplaced for at least two reasons:



**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

(1) Uniformity of assessments into what testing accommodation requests best ensure a level playing field is not attainable under either version of the policy: not only are disability accommodations an inherently individualized analysis to the particular impairments of each applicant, regardless of who makes the determination, but the field of treating doctors (whose evaluations 28 C.F.R. Pt. 36 App. A at 795-96 provides must be entitled to controlling weight in the review that would occur without an automatic grant, absent exceptional circumstances) is even more diverse than that of school-designated evaluators, and likely no more consistent in rigor (if still much more accurate than reviewing expert consultants can generally be, due to their opportunities to meet with and personally assess their patients and their holistic situation).

Nor is the particular assumption the CBE makes here (that the consistency and rigor of the various standardized testing vendors who offer what has been labeled “high-stakes exams” is any more reliable than that employed by schools) founded on more than speculation. The proposition that colleges and law schools do not reliably take seriously the integrity of their exams or thoroughly scrutinize disability accommodation requests is belied by the experiences of most disabled students in higher education. In fact, law school exams in particular are similarly “high-stakes”: like other standardized tests (and the bar exam), they’re graded on a curve (increasing the need to ensure a disabled student faces neither an unfair handicap nor gets an unfair advantage through overaccommodation); they typically constitute the grade for the entire course without any other coursework/homework, attendance, participation, or other performance metrics counting; and law school grades have more impact on legal employment opportunities than grades alone do in other professions. In any event, the State Bar must necessarily tolerate some degree of inevitable inconsistency in the scrutiny applied to claims of disability.

**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

(2) Even assuming *arguendo* that there is a material difference in “consistency and rigor” applied by schools, compared to other types of evaluators in general and standardized testing organizations in particular – that is redressable by carving prior school accommodations out of the summary-matched grants policy – such uniformity is only one value criterion to be balanced against a plethora of others, most notably the *accessibility* of the exam. If achieving the CBE’s preferred degree of uniformity comes at the cost of the exam not being readily accessible to disabled applicants; makes the exam far more costly to attempt for disabled applicants than nondisabled applicants through documentation burdens, even when all requested accommodations are granted as a result; and ultimately produces a degree of error in meting out appropriate accommodations through deterrence and outright procedural inaccessibility greater than the amount of error summarily crediting decisions produced with purported inconsistency and lack of rigor introduces, then that cost is too great.

While the State Bar may have concerns that some applicants who received an accommodation in school did so under false pretenses and may not actually have the claimed disability functional limitations, and/or may believe some schools routinely rubber-stamp or unduly acquiesce to requested accommodations that put those applicants at an undue advantage rather than on equal footing, the probability that an applicant would attest such qualifying disability needs fraudulently to the State Bar *and* have succeeded in persuading a school to grant egregiously unreasonable accommodations is low enough that the degree of duplicative burden the State Bar can equitably require of *all* disabled applicants who already met that burden at least once (with their school) is substantially lower than the boundaries on how much burden the State Bar’s documentation requirements can fairly impose where an applicant asks the State Bar to grant a testing accommodation in the first instance. If overaccommodation compromises the integrity of the exam,

**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

then so too does underaccommodation, and the latter is likely to result from the State Bar’s Proposed Rules far more often than the former.

Requiring exhaustive medical documentation: treating experts’ completion of the State Bar’s forms; collection and compilation of the other third-party certifications (regarding whether and what accommodations were granted from the applicant’s law school, other testing agencies, other jurisdictions where a bar exam was attempted, etc.); detailed briefing from the applicant, etc., all to be completed many months ahead of the targeted exam dates – twice per exam cycle if the applicant needs to appeal, and up to four times per year if they need to retake and opt to repursue denied accommodations or pursue expanded ones – places extraordinary burdens on disabled applicants, which burdens likely affirmatively prevents – or at least deters – far more disabled applicants from pursuing legitimate disability claims and thus suffering undue handicaps therefrom than sparing those burdens by extending the summary-match grant policy to accommodations received for school exams would likely enable to cheat the system. Moreover, said burdens may deprive even the most undeterred and compliance-capable disabled applicants of their right to equal opportunity even when they receive all requested accommodations and are afforded a level playing field on the exam itself, because of the costs incurred to persuade the State Bar to do so.

Finally, the State Bar should also consider the reasonable reliance applicants placed on access to at least the accommodations they received in law school continuing on the bar exam, as applicants may have only chosen to expend the years of study and typically hundreds of thousands of dollars in educational expenses to seek a career in law because their schools provided them an accessible experience that they reasonably anticipated the mandatory entrance exam to the profession to mirror.

**“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:**

**Conclusion:**

For the above reasons, the State Bar should amend Proposed Rule 4.82 to permit automatic grants of accommodations the applicant documents having received in college or law school, provided that those accommodations:

- (1) were approved for a permanent disability;
- (2) were requested on a Request for Testing Accommodations form submitted with the relevant sections complete;
- (3) are evidenced by documentation of the prior approval of accommodations granted by the school;
- (4) are among the testing accommodations granted by the school;
- (5) had been approved to ameliorate functional limitations of a permanent disability that the applicant certifies they are still experiencing;
- (6) were approved by the school after considering medical documentation from one or more qualified treating professional(s), which documentation the applicant submits with their request;
- (7) are not accommodations that the State Bar demonstrates to constitute fundamental alteration or impose undue burden in the context of the California bar examination.

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

The State Bar has, to its credit, made a number of significant and appreciated positive reforms to the Proposed Rules in this iteration of the Rules Revision, responsive to the overwhelming public comments received on the original proposal. *E.g.*, Proposed Rules 4.81(A); 4.82(C), (E), (F); 4.83(A)(1)-(5), (B)-(D); 4.85(B); 4.86(C). The bulk of these favorable amendments have been in the area of documentation standards.

Nonetheless, fatal flaws remain that prevent even this domain of the proposal from achieving readiness to advance for adoption.

*First*, Proposed Rule 4.85(C) improperly heightens the detail of explanation required to make a procedurally complete request for accommodations that require administration over more than three days (and of a private room). The substance of the additional explanations the State Bar requires within the rules does – for requests that actually would be outside the norms of what adequately ameliorates most disability impairments – seem acceptable, if not optimal due to the likelihood the increased time and complexity it adds to the treating doctors’ task (relative to the kind of doctor’s letters they’re used to writing in an insurance-accepting clinical, not expert opinion witness practice) causes more applicants to have difficulties persuading their doctors to provide documentation that would satisfy the State Bar even if they do in fact have functional limitations justifying that degree of accommodation.

Unfortunately, the State Bar has not drawn the line at the appropriate boundary with its choice of three days as the boundary past which accommodations would trigger these additional requirements, even accepting the addition of such a boundary, nor by including private rooms as among those that do so. The Rules Revision purports to be guided by the LSAC/DOJ consent decree panel’s best practices report, which expressly defines accommodations up to

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

double time as routine (even if only 50% is eligible for summary match absent multiple disability functional limitations or a visual impairment), and up to triple time as reasonable in certain contexts (e.g., both visual impairment and non-visual disability impairment). Extra time may also require more than the proportionate number of additional days (and thus more than three days even with as little as 50% extra time) if the applicant needs to test fewer hours per test day due to their disability and/or needs additional breaks for unrelated functional impairments than those on which they request extra time. The LSAC report also designates such breaks as common accommodations that must be presumed reasonable. Therefore, if the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over (ideally six, and no less than four) days.

Second, the new mandatory evaluator forms impermissibly require treating experts to attest the applicant has “exceptional need” for these accommodations to recommend them. Otherwise, the State Bar will designate the applicant’s entire petition as not “complete” and refuse to consider it. ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what “best ensures a level playing field” to nondisabled applicants, which – where met – creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9<sup>th</sup> Cir. 2011); *see also* 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9<sup>th</sup> Cir. 2013). Designating accommodations that have not been

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

demonstrated to constitute fundamental alteration or impose undue burden as requiring “exceptional need” to be individually considered facially conflicts with the above standard.

Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly *insurmountable* for the disabled applicant, as opposed to whether an unnecessary *residual* disability-based handicap remains without the sought accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor – per LSAC guidelines – to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all.

Moreover, the State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III’s “not readily achievable” standard).

While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

they request meets the best ensures level playing field standard, once they have done so the applicant’s requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9<sup>th</sup> Cir. 1999), it cannot categorically designate certain accommodations as requiring attestation of “exceptional need” as on the new evaluator forms. Those forms should be rephrased to conform to the better phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.

*Third*, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing



**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support. For this reason, the proposal should be amended to clarify the limited circumstances where “disability accommodations experts” disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

*Fourth and finally*, Proposed Rule 4.81(B)(3) improperly sets the applicant’s burden of proof at “to the satisfaction of the State Bar” rather than a more proper preponderance of the evidence standard.

**CONCLUSION:**

1. If the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over [ideally six, and no less than four] days.
2. The mandatory evaluator forms’ reference to “exceptional need” should be rephrased to conform to the better – and more likely to be lawful – phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.
3. The proposal should be amended to clarify the limited circumstances where a “disability accommodations expert” disagreeing with (a) treating expert(s) can form a basis for denial by the State Bar, to the effect of requiring that a disability accommodations expert – or panel thereof, if the would-be-denied accommodation(s) relies on disabilities in multiple specialties – in the specialty of each disability has certified that no reasonable expert in their field could have reached the same material findings and conclusions as the applicant’s expert(s), absent demonstrated fundamental alteration or undue burden. Alternatively, at a minimum the proposal should be amended to clarify that recommendations for denial by a “disability accommodations expert” who disagrees with the recommendations of the applicant’s treating expert(s) cannot be treated as conclusively warranting a denial, or as determinatively satisfying either Proposed Rule 4.82(C) or 28 C.F.R. Pt. 36

**“Position on Proposed Rules Re: Documentation Standards” –  
AGREE ONLY IF MODIFIED**

App. A at 795-96, and require specific explanations beyond that recommendation by the Director of Admissions where a denial is made.

4. The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.
5. The State Bar’s burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute “to the satisfaction of the State Bar” with the more appropriate “preponderance of the evidence” standard.

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

**THE URGENT NEED FOR ADMISSION RULES TO CAP  
REVIEW/PROCESSING TIMES OF INITIAL REQUESTS  
TO NO MORE THAN TWO WEEKS:**

Proposed Rule 4.86(A)-(B) – especially coupled with Proposed Rule 4.84(E), which codifies what, in practical effect, the former necessitates – unacceptably maintains the facially discriminatory and unlawful status quo: up to 30 days to confirm threshold eligibility for consideration (“completeness”), Proposed Rule 4.86(A), followed by an aspirational<sup>1</sup> target period of sixty days of non-collaborative review to resolve the petition to an initial decision, Proposed Rule 4.86(B).

This timeline – self-servingly created and consistently insisted upon by admissions staff to maintain their desired workload and margin for slippage – consumes nearly all of the available time between administrations of the bar exam, and in so doing imposes extraordinary burdens on disabled applicants at best and procedural inaccessibility of due testing accommodations at worst in order to achieve this maximization of convenience and leeway for staff to the opposite effect for disabled applicants. Not only do the prejudicial effects of such a timeline facially violate DOJ guidelines interpreting the requirements of various binding ADA regulations, such as 28 C.F.R. 35.130(b) and 28 C.F.R. 36.309(b)(1)(vi), and unduly burden and disparately impact disabled applicants in violation of the ADA,<sup>2</sup>

---

<sup>1</sup> This timeline, consistent with current rules, is aspirational, as although State Bar examinations program manager Christina Doell suggested to the Board that sixty days represents the “outer limits” of processing time to reach an initial decision on testing accommodations petitions, that allegation is belied by the experiences of many disabled applicants, who often receive their initial decisions considerably after sixty days from complete submission and rarely receive them significantly sooner than sixty days. In practice, sixty days is closer to a floor than a ceiling.

<sup>2</sup> See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9th Cir. 2004); *Townsend v. Quasim*, 328 F.3d 511, 518 n.2 (9th Cir. 2003); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144; *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999).

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

but they present such an unfair mismatch between the interests of admissions staff versus those of disabled applicants as to effect grave miscarriages of justice.

This mismatch is exacerbated by the considerably asymmetric capacities of admissions staff to absorb such logistical burdens compared to disabled applicants, who face the laborious task of drafting and seeking from third-parties extensive documentation and assembling those materials into a “complete” petition (and then, for many, an appeal) on their own time and coordinated around all other life responsibilities and typically substantial health care needs. In contrast, State Bar staff in turn process the petitions as part of their full-time job duties. As such, apportioning admissions staff nearly all of the available time between exam cycles for their side of the process while simultaneously requiring disabled applicants to, at best, scramble in order to assemble in days what admissions staff insist requires months to evaluate, represents grave miscarriages of justice.

Examples of the prejudicial effects of this timeline on disabled applicants include, but are not limited to:

- (1) Improperly requiring (in effect) even disabled applicants who are not immediate repeaters to petition at least six months before the exam to expect any opportunity to appeal denials, which at best effectively imposes an earlier registration deadline for disabled applicants than for nondisabled applicants;
- (2) Leaving even the most diligent disabled immediate repeater applicants (e.g., those who begin expeditious work on their petition to repursue denied accommodations or pursue expanded accommodations for worsened impairment as soon as their previous taken exam ends) inherently insufficient time to have equal opportunity to competitively prepare for the exam without bearing undue and disproportionate financial risks, or to seek judicial review (by the California Supreme Court or otherwise) after

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

exhausting administrative remedies, even to the extent they receive an administrative appeal remedy within the State Bar (if one subject to at most 14 days turnaround for completed submission, Proposed Rule 4.88(A), and without the benefit of a hearing);

- (3) Leaving those immediate repeater disabled applicants who wait for confirmation of failure on their last taken exam, yet still petition timely (or even slightly – if not months – early), without even the opportunity to administratively appeal denials under Proposed Rule 4.88(B); *e.g., see also* Proposed Rule 4.84(E); let alone sufficient time to prepare for the exam with equal opportunity, which is destroyed by the Hobbesian Choice of either unequal financial risks or insufficient lead time to participate in competitive exam preparation, even in instances where all requested accommodations are eventually granted by the State Bar.

DOJ guidelines require that testing entities respond to requests for testing accommodations in a timely manner, such that examinees can register with their nondisabled peers, respond to any request for any additional information requested, and complete any review procedures needed, in time to take the test in the same testing cycle with equal opportunity to prepare for the exam. With about seven weeks between the registration deadline and the bar exam, an initial decision from State Bar staff within two weeks of receipt is necessary to accomplish this.

A two-week response window leaves five weeks between the initial decision and the bar exam for applicants who petition on or around the State Bar’s deadline, a period which is necessary for the applicant to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal. Such an amendment – combined with the effect of Proposed Rule 4.88(B) – would facilitate the feasibility of amending Proposed Rule 4.88(A) to provide for 30 days instead of the insufficient 14 days,

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

and would thus enable the State Bar to permit at least those disabled applicants who submit their petition at least two months before the start of the bar exam to receive at least 30 days from the decision to appeal, a difference critical to obtaining responsive medical documentation from treating doctors and allowing applicants a *meaningful* opportunity to be heard in their appeal.

A two-week response window also would allow applicants who request their accommodations early (weeks or months before the registration deadline) an opportunity to exhaust all administrative review options and know their final approved testing accommodations prior to embarking on test preparation, typically an eight-to-ten-week endeavor (as well as have a meaningful opportunity for judicial review, if needed), and to do so even if they are an immediate repeater seeking expanded accommodations on the next exam cycle as long as they begin working on their petition as soon as their last taken bar exam has been administered. This knowledge allows candidates to make informed plans about test preparation, which might include taking time off from work, hiring a tutor, enrolling in a preparation class, and taking timed practice exams.

For an exam that most applicants (disabled or not) fail despite most graduates studying full-time for months and spending many thousands of dollars on preparation that does not remain fresh until the following exam cycle, applicants with disabilities cannot be fairly expected to commit this degree of resources prior to confirmation that the attempt those resources go towards will be meaningful and provide them equal footing, at risk of waste most disabled applicants cannot financially afford and that would likely deprive them of the financial resources to repeat those arrangements if and when they do secure sufficient testing accommodations for a meaningful retake. For that reason, a later final administrative decision (e.g., a decision on appeal) than eight weeks before the next exam – in theory even one granting all requested accommodations – has

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” – STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**  
already inherently deprived the applicant of equal opportunity to their nondisabled peers.

Moreover, exhaustion of all administrative remedies with the State Bar later than 120 days before the exam renders any purported opportunity for judicial review in the form of a petition for discretionary review to the California Supreme Court pursuant to Cal. Rules of Ct. rule 9.13(d) under the timeline therein (at least 65 days not counting the time to draft the petition after the decision or the turnaround time needed by the Court following completed briefing either for threshold decision to review or deciding the merits) as not a meaningful means to be heard by that Court.

**ADDRESSING THIS ISSUE SHOULD NOT BE TABLED FOR YEARS  
UNTIL A SUBSEQUENT RULES REVISION TO BE INITIATED AFTER  
THE PRESENT RULES REVISION HAS BEEN IN EFFECT  
FOR TWO BAR EXAM CYCLES:**

The Working Group’s reasoning for rejecting the opinions of most commenters on the original proposal requesting this two-week processing time limit – that the merits of that proposal turn on the results from an experiment that would be years away – had been premised on State Bar Staff’s expectations that this rules revision and its other reforms (like summarily granting accommodations granted on certain prior exams) would increase their capacity at present headcount to process accommodations requests faster, if by an unknown degree. They therefore propose leaving the status quo intact until they have been able to experiment with the degree of staff resource-sparing effect the rest of the rules-revision accomplishes, and then revisit a new rules revision after the amended rules have been in effect for two exam cycles.



**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

Even if the present Rules Revision did not result in other much-needed amendments on return from the second public comment period, it would realistically take effect no sooner than for the July 2024 exam, as it would need to be approved at the CBE’s August 2023 meeting and the Board’s November 2023 meeting before it could go on motion to the California Supreme Court, which Court would likely then take until 2024 to approve it – too late to govern petitions made for the February 2024 exam. The soonest Staff’s timeline on a new rules-revision could allow for it to be initiated, then, would be at the August 2025 CBE meeting. Even if public comment was authorized for late 2025-early 2026, and was reapproved as-is by the CBE and Board on return therefrom, this would delay reforming processing timelines at least until the February 2027 exam, an unacceptably long delay to remedy a defect that facially deprives disabled applicants of equal opportunity. And of course, as both this rules revision and that one could plausibly be sent out for more public comment periods, each one needing to be separately authorized by both the CBE and Board, the wait could be far longer than February 2027.

More importantly, the information State Bar Staff hope to gain from this proposed experiment not only fails to justify the delay, but is irrelevant to the merits of the two-weeks processing time cap. Taking action to shorten the present months of non-collaborative processing time to two weeks should not be tabled for years merely to collect data on the extent to which the currently proposed reforms would allow such changes without expanding staff capacity, when even a finding that more staff capacity would be required would not absolve the necessity of implementing such a two-week processing time limit to providing disabled applicants with equal opportunity, and so change the policy outcome.

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –  
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

**CONCLUSION:**

For the above reasons, and as even a finding that – alongside the other proposed reforms – more staff capacity would still be required to process testing accommodations requests to an initial decision within two weeks, such a finding would not absolve the necessity of implementing that time limit to providing disabled applicants with equal opportunity, and so change the policy outcome: Proposed Rule 4.84(E) should be stricken and Proposed Rule 4.86(A)-(B) should be replaced by a requirement that complete testing accommodations requests be decided in two weeks or less from receipt. These amendments should be made as part of *this* rules-revision, and not delayed until a future one.

**“Position on Proposed Rules Re: Review by Disability Accommodation Expert  
Procedural Requirement to Deny Requests for Testing Accommodations” –  
AGREE ONLY IF MODIFIED**

While speciously framed as adding a new safeguard against improper denials of testing accommodations requests, the provisions within Proposed Rule 4.82(G) merely continues an existing component of the State Bar’s testing accommodation request review practices and procedures. The recommendation of a reviewing expert cannot and should not – as implied by this framework and reflected in current State Bar practices – in and of itself form a sufficient basis or explanation for the denial and/or modification of the applicant’s requested accommodation(s), particularly if those requests are supported by the recommendations of an applicant’s treating expert(s). Accordingly, greater specificity as to whether and where the State Bar can rebut the presumption of reasonableness treating expert recommendations confers upon an applicant’s requests should be enumerated into the rules revision to provide State Bar Staff implementing these rules clarity that they may not rely determinatively solely on a *reviewing* expert’s *mere disagreement* with the *treating* expert recommendations.

Rather, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better

**“Position on Proposed Rules Re: Review by Disability Accommodation Expert  
Procedural Requirement to Deny Requests for Testing Accommodations” –  
AGREE ONLY IF MODIFIED**

job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support. For this reason, the proposal should be amended to expand Proposed Rule 4.82(G) consistent with the above in

**“Position on Proposed Rules Re: Review by Disability Accommodation Expert  
Procedural Requirement to Deny Requests for Testing Accommodations” –**

**AGREE ONLY IF MODIFIED**

order to clarify the limited circumstances where “disability accommodations experts” disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), be further defined as someone in the particular specialty of the disability they are reviewing (or a panel with disability accommodations experts from each such medical specialty if there are multiple disabilities across multiple medical specialties), trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

**Deadlines to Appeal:**

Like current rules, Proposed Rule 4.88 sets forth two deadlines that operate on an earlier-of relationship (once either one lapses, the applicant’s appeal would be untimely). Proposed Rule 4.88(A) requires the appeal to be submitted within 14 days of the initial decision, a slight extension from the 10 days under current rules, while Proposed Rule 4.88(B) requires the appeal to be submitted by the first business day of the month of the exam. If an initial decision comes after that date – as Admissions Staff are expressly, yet improperly authorized to do by Proposed Rule 4.84(E) even for timely petitions – the State Bar does not afford the applicant any opportunity to appeal for that exam cycle.

While Proposed Rule 4.88(B)’s deadline of the first business day of the exam month could be reasonable under normal circumstances if appropriate other reforms were implemented to facilitate the feasibility of that deadline for applicants,<sup>1</sup> applicants who petition early enough that the initial decision is rendered more than two weeks before the Proposed Rule 4.88(B) deadline should not have to nevertheless turnaround complete appellate briefing and responsive treating expert documentation within the mere 14-day time limit that Proposed Rule 4.88(A) independently imposes from the date of decision. They should instead get until the sooner-of the 4.88(B) deadline or thirty days from decision.

---

<sup>1</sup> E.g.: (1) imposition of the two-week cap on initial decision turnaround time from complete petition submission; (2) the elimination of Proposed Rule 4.84(E); and (3) provisions to toll deadlines for initial petition submission and that in Proposed Rule 4.88(B) where – as with the October 2020 exam – the State Bar fails to disclose the standard conditions of the exam at least two months in advance of the final petition deadline. Without these safeguards, the amount of time Proposed Rule 4.88(A) provides from the initial decision holds little relevance even if extended to 30 days or more, as staff may withhold initial decisions until just before the Proposed Rule 4.88(B) cutoff at best and just after it at worst to evade review of unwarranted denials they wish to make or the added work of processing an appeal, or otherwise create situations where through no fault of the disabled applicant, they are unable to petition timely to receive their decision in time to have the opportunity to appeal.

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

Such amendments to Proposed Rule 4.88(A) and the other interacting rules discussed in footnote 1, *supra*, would ensure that disabled applicants who submit their petitions at least two months before the exam starts should receive at least thirty days from the initial decision to complete their appeal submission. The difference between fourteen and thirty days is profound in effect upon the availability of obtaining medical documentation from treating doctors that is responsive to any explanations of the State Bar’s reasoning for denials or substitutions, access to legal advice, and the fundamental effectiveness of the appeal submissions made. Just as importantly, thirty days is necessary to avoid timely completing the extremely time-consuming logistical requirements of compiling an effective appeal from unduly burdening the applicant, such as by requiring them to pull all-nighters and/or to reschedule and/or sacrifice other important medical, professional, and personal commitments on short notice to clear their schedules once the accommodations decision is communicated. Particularly where admissions staff have routinely dropped initial decisions for the February exam on the decision-making staff members’ way out the doors to their own December holidays – and consequently put disabled applicants in a position of canceling their own participation in their own annual holiday gatherings with their friends and families to work around the clock to turnaround their appeals within the requisite ten days from the decision – that ten day period must be extended to at least thirty days rather than fourteen days as now proposed by staff for the incremental extension to meaningfully alleviate the undue burden this deadline has imposed on disabled applicants. See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9<sup>th</sup> Cir. 2004) (concerning Title II’s prohibition on policies and procedures that unduly burden disabled applicants, even when consistently enforced to all similarly situated applicants); *Payan v. L.A. Cmty. Coll.*

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

*Dist.*, 11 F.4th 729 (9th Cir. 2021) (policies and procedures that systemically cause adverse disparate impact among the disabled not allowed under Title II); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144 (discussing the degree of burden imposed on disabled applicants by a subject entity in their procedural requirements to seek accommodations that would or would not be permissible under the ADA).

The Working Group remarked in its responses to the first round of public comment on the original proposal that – even assuming the proposal were amended to require initial decisions within two weeks – allowing an extension of the appeal deadline in Proposed Rule 4.88(A) to thirty days instead of fourteen days from the present ten days would not be feasible, because if the petition was submitted on the petition final filing deadline it could allow appeals to be submitted as late as a few days before the exam would start. That hypothetical is foreclosed by Proposed Rule 4.88(B)’s provision that all appeals must be received by the first business day of the month of the exam. While its true that applicants could not both wait all the way to the deadline and receive the full thirty days to complete their appeal, applicants who petition even a couple of weeks before the deadline would be able to with this amendment, while deciding initial petitions within two weeks of receipt would still ensure those who submit on the deadline will receive their decision in time to submit an appeal if they can turn it around in roughly sixteen days.

Notwithstanding the above, the State Bar could fairly impose an earlier deadline – such as fourteen days from the decision – for the applicant to provide notice that they intend to appeal, as long as the proposal is amended to clarify that deadline as only for such notice, and to provide that any additional materials to be considered in deciding the appeal are expressly considered as a matter of right up



**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

until thirty days from the decision or the Proposed Rule 4.88(B) cutoff of the first business day of the month of the exam, whichever comes first.

Examinations program manager Christina Doell represented to Trustee Mark Toney at the May 2023 Board of Trustees meeting that the fourteen days deadline in Proposed Rule 4.88(A) was already only intended to be for a notice of appeal, and not for a completed appeal submission. Yet, her statement is not only absent from – and in considerable tension with – the text of the operative proposal that has been circulated for public comment, but would irreconcilably contradict the boilerplate admonitions and instructions regarding appeal contained in the decision letters sent to disabled applicants, which expressly mandate all materials to be considered as of right be received by the sooner deadline. Such a policy as Ms. Doell identified – if clearly enumerated into the Rules by amendment to the proposal – could in any event be an acceptable resolution to the defects of Proposed Rule 4.88(A) if implemented alongside the other reforms described at footnote 1 above.

**Processing Time of Appeals:**

Credit should be given where it’s due, and here, the Working Group’s amendments to the proposal following the first public comment period largely *do* accomplish an appropriate processing time for appeals. *See* Proposed Rule 4.88(C) (requiring the Director of Admissions to complete their initial review of the appeal by the sooner of fourteen days or what the exam schedule would require given the potential need for CBE consideration). Still, the “as soon as is practicable” language in Proposed Rule 4.88(D) for consideration by the Subcommittee on Examinations is unduly vague and that lack of a concrete timeframe has in the past been abused to permit months of delay, which prevents disabled applicants from

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

obtaining adequate lead time to prepare for the exam with equal opportunity and without bearing unequal financial risks to arrange such preparation aids (i.e., classes and tutoring regime) adequately in advance of the exam. The rule should adduce that applicants receive the Examinations Subcommittee’s decision on the appeal “as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.” (Emphasis added).

**The Rules Should Provide the Right to a Hearing:**

The CBE offers all applicants whom staff consider at risk of being denied a positive moral character determination a hearing by the Moral Character Subcommittee before any such denial can be made, but does not offer any such similar hearing by the Examinations Subcommittee to applicants to whom staff recommend partly or wholly denying requested testing accommodations. This distinction is illogical: would-be testing accommodation denials – for applicants with disabilities – implicate the same liberty interest in a meaningful opportunity to practice a chosen profession and therefore deserve similar protections – even if only upon an appeal that cannot be granted on the papers. Consideration of written submissions by the Subcommittee does not substitute for a live, interactive dialogue where the applicant and their supporting professionals (e.g., treating experts and/or legal counsel) can respond to the State Bar’s various concerns in real-time and clear up far more areas of confusion than can be done by 1-2 exchanges of written correspondence within the time constraints of the process. Even public comment does not compare, both due to the three-minute time limit per speaker and the one-sided monologue nature of the format.

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

**Cap on Number of Administrative Appeals:**

The cap on number of appeals an applicant can make, Proposed Rule 4.88(F), seems largely a solution in search of a problem, because an applicant receiving a decision on a first appeal in time to complete and submit a subsequent appeal by the first business day of the exam month, as required by Proposed Rule 4.88(B), would be exceptionally rare and require an applicant to petition extremely early. Under the excessive timelines as currently provided by the operative proposal, an applicant would have to petition several months earlier than the petition deadline to plausibly have time for even two appeals, which inherently would only be an option for applicants who are not immediate repeaters and start their petition during an exam cycle prior to the one on which they seek accommodations. In that instance, of course, the staff time expended on that applicant in reviewing a petition followed by multiple appeals would be spread over at least two exam cycles, just as with applicants who need to retake and are permitted a new petition and appeal for the next exam cycle (in terms of staff time expended; the latter, unlike the former, requires the applicant to endure unnecessary and costly retake(s), and its resulting adverse collateral effects on the applicant’s lifelong employment opportunities).

Even assuming the absence of a cap was implemented with the two-weeks petition processing time limit requested, given that unsuccessful appeals capable of forming the subject of another appeal would need to be reviewed by the Subcommittee following the Director decision, applicants would still need to at a minimum petition over a month early to have the opportunity to assert two appeals, and several months early to submit three appeals, which is the maximum number that could conceivably fit into a single exam cycle in any event.

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

If anything, allowing more than one appeal subject to the deadlines provided would encourage applicants to petition as early as possible, and allow for the most interactive process possible. Like with offering applicants two-weeks processing time, if the demands on staff capacity would prejudice other applicants and create an “unfair situation,” that means the Office of Admissions is improperly understaffed to fulfill its duty to provide equal opportunity, not that disabled applicants’ needs should be played against each other in a zero-sum game for the State Bar’s preferred, yet insufficient level of staffing. Rather, the State Bar is obligated to provide staff resources dynamically to the extent needed to ensure disabled applicants receive equal opportunity to nondisabled applicants, including an interactive process to resolving testing accommodation requests that – time allowing – ideally would include more than two iterations if there was a dispute that would require months of adjudication to resolve. If multiple reviews by the Subcommittee is genuinely impracticable, applicants should still be permitted to submit subsequent requests for reconsideration of denial to the Director of Admissions only, up until the first business day of the month of the exam as provided under Proposed Rule 4.88(B).

**California Supreme Court Review:**

To the extent that the State Bar prefers the California Supreme Court to Federal Court as the forum for applicants wishing to exercise their right to judicial review of the State Bar’s administrative determinations on their disability-related rights secured by federal and state laws, it should add to the rules revision initiative a recommendation to the California Supreme Court for amendments to the California Rules of Court, rule 9.13(d) to: (1) make that judicial review procedure more compatible with the timelines for exhaustion of administrative review on a

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

given exam cycle specified within the State Bar Admission Rules; and (2) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review) in stark contrast to the present treatment of discretionary review granted only to extraordinary cases, and it should do so on a *de novo* standard of review with no greater deference to administrative findings than would be given in a Federal lawsuit.

California Rules of Court, rule 9.13(d) presently provides for a briefing schedule that would require at least 65 days from the filing of the petition to completed briefing, plus any backend adjudication time for the Court to decide whether to grant review on the merits. This would also not include the time from the Subcommittee’s decision on administrative appeal required by the applicant to obtain counsel and allow said counsel (or the applicant, if representing themselves) a meaningful opportunity to draft an effective petition, nor the additional time required by the California Supreme Court to decide the merits of the applicant’s petition once merits briefing is complete.

Accordingly, absent amendment to Cal. Rules Ct. 9.13(d), realistically an applicant would need to obtain the Subcommittee’s decision on appeal at least 120 days before the start of the exam in order to have a meaningful opportunity to be heard by the California Supreme Court. This means that, under the State Bar’s presently operative proposal, the applicant would need to first petition the State Bar nearly a full year in advance of the bar exam they intend to take, and hope that subsequent medical developments or changes in State Bar standard conditions does not require any updates between then and the exam. This is too early to provide equal opportunity and satisfy Federal law under DOJ guidelines.

Even if the State Bar amended the proposal so that the Admission Rules would reflect the reforms to the procedural timeline requested in these comments,

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

the applicant would still have to petition at least six months in advance of the exam to have a meaningful opportunity to be heard by the California Supreme Court under the present textual provisions of Cal. Rules Ct. 9.13(d) – and thus amendment to that rule too is still necessary to both comply with DOJ guidelines on equal opportunity requirements under federal law and allow the California Supreme Court, rather than Federal Court, to be a forum where applicants will receive a meaningful opportunity to be heard. Yet, the California Supreme Court has the authority to amend the California Rules of Court just as readily as it can amend the State Bar’s Rules. The State Bar may thus simultaneously move that Court for both kinds of amendments. For these reasons, the State Bar should recommend that the briefing schedule be streamlined so that applicants who petition the Court within two weeks of the Subcommittee’s decision can be provided a decision from the California Supreme Court in time for the next administration of the bar exam.

The State Bar should further recommend that the California Supreme Court amend Cal. Rules of Ct. 9.13(d) to provide for mandatory – not discretionary – review on the merits, at least where the CBE decision the petitioner seeks review of is a denial or substitution of requested testing accommodations, for at least two reasons.

*First*, eliminating the initial round of briefing on whether the case at hand is a worthy candidate for the Supreme Court’s time/judicial economy, so that the applicant and State Bar may focus only on briefing the merits of whether the CBE’s decision should or should not be overturned by the Court, would streamline the adjudication timeframe and in so doing improve the feasibility of fitting both administrative review by the State Bar and judicial review by the California Supreme Court into one exam cycle.

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

*Second*, the review by the California Supreme Court in this context being mandatory is further warranted by the fundamental tradition that parties with redressable legal claims in judicial forums receive at least two opportunities to have their disputes addressed on their merits under mandatory review by the tribunal: the court of original jurisdiction, and for at least one appeal as of right, typically to an intermediate appellate court. Discretionary review is typically justified only for where a court of last resort would be hearing a second round of appeal from an intermediate appellate court, and the parties afforded at least that much prior process, or for where a party seeks to appeal a preliminary determination early (e.g., interlocutory appeals) before the lower court has made a final determination that would then be subject to appeal as of right.

In contrast, applicants who petition the California Supreme Court have not received any prior judicial review, and by even *petitioning* for such discretionary review – that they can expect to rarely be granted, no less – they must forfeit any future opportunities for mandatory judicial review they may otherwise have had for even Federal law claims arising out of the challenged testing accommodations decision. This is because, under the U.S. Supreme Court’s Feldman-Rooker Doctrine,<sup>2</sup> only the U.S. Supreme Court has subject matter jurisdiction to review state court decisions, and that Court too would offer only discretionary review. That jurisdictional bar to adjudication in lower Federal Courts attaches upon the petition to the California Supreme Court, even if the petition for review is denied and the merits never reached.

Accordingly, as by seeking discretionary review to the California Supreme Court would require applicants to sacrifice all rights to have their disability law

---

<sup>2</sup> See, e.g., *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

claims considered on their legal and factual merits by any other Court even if discretionary review is denied; and even if granted, would also limit any *first* judicial appeal to similarly discretionary review by the U.S. Supreme Court, in order to uphold fundamental fairness and due process of law principles, Rule 9.13(d) should be amended to change the type of review from discretionary to mandatory. Even putting the fairness dimension aside, this is precisely what applicants who bring their challenges in Federal Court forum are entitled, and thus what the California Supreme Court must compete with if it and the State Bar wish it to be the forum in which this kind of challenge is heard.

**Conclusion:**

Wherefore, for the above reasons:

1. Proposed Rule 4.84(E) should be stricken;
2. Proposed Rule 4.88(A) should be amended to provide for thirty days from the decision instead of fourteen days; or alternatively to specify that a notice of appeal must be submitted within fourteen days, but that appeal statements and new evidence may be submitted up until thirty days from the decision or the cutoff in Proposed Rule 4.88(B), whichever comes first. Either way, it should further provide that applicants who submit their petitions at least two months before the start of the exam must receive at least thirty days to submit their completed appeal and still receive a decision thereon before the next administration of the exam.
3. Proposed Rules 4.84(B) and 4.88(B) should both be amended to provide for tolling of the deadlines therein where the State Bar changes the standard conditions of the bar exam less than two months before the Proposed Rule 4.84(B) deadline (or after that deadline).



**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

4. The unduly vague phrase “as soon as is practicable” in Proposed Rule 4.88(D) should be amended to adduce it to: “...as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.”
5. Proposed Rule 4.88(E) should be amended to provide applicants whose appeals cannot be fully granted by the Director of Admissions according to Proposed Rule 4.88(C)-(D) with a teleconference hearing by the Examinations Subcommittee similar to that provided to applicants at risk of being denied a positive moral character determination by the Moral Character Subcommittee; in which hearing the applicant, their treating expert(s) if available, their legal counsel if applicable, all “disability accommodations [reviewing] experts” relied on by the State Bar, and the Director of Admissions participate collaboratively.
6. Proposed Rule 4.88(F) should ideally be stricken, but alternatively should be narrowed to apply only to the CBE/Subcommittee review portion of the appellate remedy, and otherwise allow subsequent reconsideration by the Director of Admissions within the same exam cycle to the extent applicants submit those subsequent reconsideration requests by the deadline in Proposed Rule 4.88(B).
7. The State Bar should move the California Supreme Court to simultaneously amend Cal. Rules of Court, rule 9.13(d) to, at least in testing accommodations cases: (a) streamline and expedite the briefing schedule provisions enough to make that judicial review procedure compatible with the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules, to the extent that applicants who petition the California Supreme Court within two weeks of the

**“Position on Proposed Rules Re: Appeals/Review Process” –  
DISAGREE WITH THE PROPOSED MODIFICATIONS,  
BUT URGE DIFFERENT REFORMS**

Subcommittee’s decision on their administrative appeal will receive a ruling from the Court in time for the next scheduled administration of the exam; and (b) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review, not the present discretionary review), on a *de novo* standard of review, and with no greater deference to administrative findings than would be given in a Federal lawsuit.



July 28, 2023

Submitted Via Online Portal: <https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

cc: Devan.McFarland@calbar.ca.gov  
Louisa.Ayrapetyan@calbar.ca.gov

**RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations – OPPOSE**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

The Alliance for Children's Rights advocates for thousands of clients each year—including abused, neglected, and vulnerable children and teens in the foster care system, runaway and emancipating youth, children who need guardians, and the families who step up to care for them. The Alliance for Children's Rights believes that all persons are entitled to equal employment opportunity and does not discriminate against its employees or applicants because of race, color, religion, sex, pregnancy, national origin, ancestry, age, marital status, sexual orientation, disability, medical condition or any other classification recognized by state or federal law. Equal employment opportunity will be extended to all persons in all aspects of the employer-employee relationship, including recruitment, hiring, upgrading, training, promotion, transfer, discipline, layoff, recall and termination.

The Alliance is committed to promoting diversity in the legal profession with particular emphasis on recruitment and retention in public interest law, and to eliminating unnecessary bias and barriers that exclude qualified individuals with disabilities. A diverse bar with lawyers of all backgrounds and statuses facilitates access to justice, improves legal services, offers role models, and promotes public confidence. A legal profession that includes, welcomes, and licenses qualified lawyers with disabilities including disabled people of color is better equipped to serve the varied people and communities who live and work in California, including indigent people.

***Problems with Definition of Disability***

The proposed rules state that a "disability" is "a physical or mental impairment that limits one or more of an applicant's major life activities as compared to most people in the general population." Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately

tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### ***Problems with Automatic Approval Process***

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the DFEH v. LSAC litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### ***Problems with Timelines***

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be "deemed complete"), (B) (once request is "deemed complete" by State Bar, it then has 60 days to say whether the request is granted, denied, or "pending."), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

### ***Additional Problems with the Rules***

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

### ***Problems with Implementation***

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

A handwritten signature in cursive script that reads "Kristin Power". The signature is written in dark ink and is positioned below the word "Sincerely,".

Kristin Power  
Vice President, Policy & Advocacy



July 27, 2023

Submitted via online portal

Board of Trustees  
State Bar of Calif.  
180 Howard St.  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

Re: Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
Accommodations on the State Bar – Oppose Unless Amended

Dear Chair Duran, Vice-Chair Stalling, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am a Distinguished University Professor at the Moritz College of Law at The Ohio State University, and a member of the Ohio bar. I am writing to provide comments on your proposed amendments to the State Bar Rules with respect to the testing accommodation process. I am joined in this letter by two of the co-authors of the [Best Practices Panel Report](#) created by the consent decree between The Department of Fair Employing and Housing, the U.S. Department of Justice and LSAC. We sent you a letter on January 23, 2023, suggesting substantial changes to the proposed rules. We appreciate the careful consideration you gave to that feedback and have further feedback to offer at this time.

#### Definition of Disability

The proposed rules state that a disability is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80 (a). The last phrase – “as compared to most people in the general population” – was not in the previous draft that we reviewed and conflicts with California law.

As we stated in our Best Practices Report, that kind of language can be very harmful to individuals with ADHD or learning disabilities. As we explained:

In making this determination [of whether someone has a disability], it is appropriate to consider the condition, manner or duration under which an individual performs a major life activity. For example, someone with a learning disability may achieve a high level of academic success, but may, nevertheless, be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As Congress emphasized in passing the ADA Amendments Act, “[w]hen considering the condition, manner, or duration in which an

individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Thus, an individual may receive average scores on a reading test, but his or her history may reveal special education placement in first grade and several years of individualized tutoring. Even as an adult, the individual may have trouble reading for long periods of time and the act of reading may still be difficult and effortful for this person as compared to most people. It is the recommendation of the Panel that such a person be considered to have a disability and be granted testing accommodations.

### Automatic Approval Process

We are pleased to see increased attention to an automatic approval process because such a process furthers equity interests, but we believe the process needs to go even further.

First, the proposed rules give no weight to a decision by a university or law school to accommodate a test taker. By contrast, the Best Practices Report gave conclusive weight to an accommodation decision under a student’s IEP or Section 504 plan, which would be comparable to an accommodation decision at a university or law school. Because many professors give exams that seek to mimic the kinds of questions asked on the Bar Exam, it seems especially odd to not honor accommodation decisions made by a law school. Accommodations offered for law school exams seems far more comparable to the Bar Exam than accommodations offered for a standardized test. Unlike a consultant who reviews testing documentation and has never met the individual, universities have first-hand knowledge of a student’s abilities and disabilities and have determined that the provision of accommodations is both justified and fair.

Second, the proposed rules do not provide automatic approval for extended time beyond 1.5 or for private exam rooms. Clearly, some students with slow reading rates require double-time to have fair access to the exam. If double-time was provided in the past or a private exam room was provided, these accommodations should be automatically approved. There is no reason to consider these kinds of accommodations as different from the many other kinds of accommodations that will be automatically approved. And, oddly, the proposed rules refuse to offer stop-the-clock breaks even if a candidate has a documented history of needing to use that accommodation. No kind of accommodation should be rejected without an individualized determination.

### Timelines

Because the proposed rules do not provide automatic approval to accommodations provided in law school and do not provide automatic approval for extended time beyond 1.5 and private exam rooms, one can imagine that many candidates will need to appeal a denial of requests for accommodations. They should be able to do so, without sacrificing the ability to take the exam at the next scheduled date. The proposed rules, however, require candidates to submit requests several months earlier than the registration deadline if they want to preserve their right to appeal. The Best Practices Report emphasized the importance of a streamlined appeal process so that applicants can finish the appeal process in time to take the LSAT on a timely basis. Because the Bar exam is offered only twice a year, it is especially critical that the appeals process be streamlined and efficient. Increased use of automatic approval process could help solve that problem that the state has created for itself.



## Qualifications of Disability Consultants

The Best Practices Panel emphasized the importance of having a diverse pool of expert consultants to review accommodation requests. This remains a critically important recommendation since professional training programs for those who might be exposed to disabilities and the corresponding limitations (e.g., school psychologists, educational psychologists, clinical psychologists, therapists, and medical professionals such as psychiatrists), may not have been exposed to the wide variety of disorders that impact learning or how the ones they are exposed to in training, impact learning and test taking. On the contrary, special education teachers, learning disability specialists, reading specialists, educational therapists, and researchers in these fields can be highly skilled at understanding the impact of a specific disability on learning and test taking but may not be licensed. To complicate matters, training programs differ widely throughout the state and country. Specialized knowledge that is needed to understand many of the diagnoses that are the basis for requested accommodations and the nature of accommodations depend on the quality of individual's training program and/or the professional's post graduate training. The new rules should maintain the emphasis the Best Practices Panel placed on the diversity of consultants. However, rather than emphasize the importance of diversity, the new rules require that consultants have a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure. Given the wide range of practices in various educational programs that prepare people to be professionals and disability consultants, this arbitrary five-year rule serves no purpose and detracts from an effort to attain more diversity in the profession.

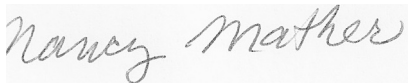
## Conclusion

We are pleased to see that the proposed rules give greater weight to an automatic approval process and eliminate some of the onerous documentation requirements. Nonetheless, those changes will be inadequate without consideration of the further revisions we recommend in this letter.

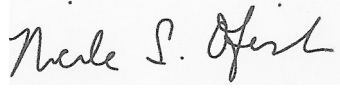
Sincerely yours,



Ruth Colker  
Distinguished University Professor &  
Heck-Faust Memorial Chair in Constitutional Law Moritz College of Law  
The Ohio State University



Nancy Mather, Ph.D.  
Professor Emerita  
Department of Disability and Psychoeducational Studies College  
of Education  
University of Arizona

A handwritten signature in black ink on a light gray rectangular background. The signature reads "Nicole S. Ofiesh" in a cursive script.

Nicole Ofiesh, Ph.D.

Nicole S. Ofiesh, Ph.D., LLC

**PETER N. MADURO, J.D., Psy.D., Psy.D.**

Clinical & Forensic Psychology  
CA Psychology Lic. No. PSY 19531  
CA SBN # 171525 (Inactive)  
3201 Wilshire Boulevard, Suite 310  
Santa Monica, California 90403  
310.453.2064 Office tel  
310.453.6565 Office fax  
[maduropsyd@gmail.com](mailto:maduropsyd@gmail.com)

July 27, 2023

To Be Submitted via Web Portal: <https://fs22.formsite.com/sbcta/fwdav5flxh/index>

The State Bar of California  
845 South Figueroa Street  
Los Angeles, CA 90017

Dear State Bar of California:

Relevant to my submissions today and advocacy for adequate and responsive test-taking accommodations, I am (1) an attorney licensed in California, Massachusetts, and New York (currently “inactive” and in good standing in each such jurisdiction) who took 4 bar exams, including the Massachusetts bar exam (successful passage on one attempt in 1988), the New York bar exam (successful passage on one attempt in 1988), and the California bar exam (1 x failed attempt, 1993; 1 x successful passage, 1994); additionally, I am (2) a clinical and forensic psychologist (licensed in California in 2004) who has worked in a psychotherapy capacity with disabled patients, more than one of whom has been a law student who attempted to take the California bar exam, required test-taking accommodations responsive to his/her disabilities, and encountered insufficiencies in the accommodations provided that resulted in a traumatic experience.

I have reason to generally endorse the positions advocated by certain attorneys in the disability rights community, including specifically Benjamin Kohn and Claudia Center. Based in their due diligence, judgement, and positions on the issues at hand --which I have considered and trust-- and drawing on their language, I submit the following suggestions in respect of the named issue:

**Part 1: “Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” (“Summary-Matched Grant Policy”) – AGREE ONLY IF MODIFIED:**

1. The policy to “not offer” individualized consideration of certain accommodations that have not been established to constitute fundamental alteration or impose undue burden is unlawful, 28 C.F.R. 35.160(b), 35.164, and is against public policy even if it were lawful. The Rules Revision should make clear that all accommodation requests will receive individualized consideration on their merits, absent demonstrated fundamental alteration or undue burden.
2. Proposed Rule 4.83(A)(6) should be stricken, or at least replaced with an alternative exclusion from the Summary-Matched Grant Policy for accommodations that the State Bar demonstrates – at least in the context of the bar exam’s differing conditions from the prior high-stakes exam – constitute fundamental alteration or impose undue burden.
3. Proposed Rules 4.83(A)(7) and 4.85(C) should either be stricken or at least narrowed to only apply to accommodations that cannot be administered over a particular number of days that is greater than the presently proposed litmus of three days.

**Part 2: “Considering Accommodations Granted in Law School or College – AGREE ONLY IF MODIFIED:**

The State Bar should amend Proposed Rule 4.82 to permit automatic grants of accommodations the applicant documents having received in college or law school, provided that those accommodations:

- (1) were approved for a permanent disability, to ameliorate functional limitations of such disability that the applicant certifies they are still experiencing;
- (2) were requested on a Request for Testing Accommodations form submitted with the relevant sections complete;
- (3) are evidenced by documentation of the prior approval of accommodations granted by the school and are among the testing accommodations granted by the school;
- (4) were approved by the school after considering medical documentation from one or more qualified treating professional(s), which documentation the applicant submits with their request;
- (5) are not accommodations that the State Bar demonstrates to constitute fundamental alteration or impose undue burden in the context of the California bar examination.

If the school itself considered and premised its accommodations approvals on medical documentation from qualified treating professional(s), and the applicant submits that documentation (even if not written for the bar exam nor on the State Bar’s forms) with their documentation of prior approval, that would weed out most approvals generated by the schools which actually rubber stamp every testing accommodation request a student alleges to be premised on disability needs, and limits the burden of producing more exacting documentation on those

who have never had to bear it before, while still sparing the vast majority of disabled applicants the substantial burden of repeatedly reinventing the wheel.

**Part 3: “Documentation Standards” – AGREE ONLY IF MODIFIED:**

1. If the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over [ideally six, and no less than four] days.
2. The mandatory evaluator forms’ reference to “exceptional need” should be rephrased to conform to the better – and more likely to be lawful – phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.
3. The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.
4. The State Bar’s burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute “to the satisfaction of the State Bar” with the more appropriate “preponderance of the evidence” standard.

**Part 4: “Timelines for Processing Initial Requests” – DISAGREE:**

The urgent need for Admission Rules to cap review/processing times of initial requests to no more than two weeks:

Proposed Rule 4.86(A)-(B) unacceptably maintains the facially discriminatory and unlawful status quo: up to 30 days to confirm threshold

eligibility for consideration (“completeness”), Proposed Rule 4.86(A), followed by an aspirational<sup>1</sup> target period of sixty days of non-collaborative review to resolve the petition to an initial decision, Proposed Rule 4.86(B).

This timeline – demanded by admissions staff to maintain their desired workload and margin for slippage – consumes nearly all of the available time between administrations of the bar exam, and in so doing imposes extraordinary burdens on disabled applicants at best and procedural inaccessibility of due testing accommodations at worst.

Not only do the prejudicial effects of such a timeline facially violate DOJ guidelines interpreting the requirements of various binding ADA regulations, such as 28 C.F.R. 35.130(b) and 28 C.F.R. 36.309(b)(1)(vi), but they also unduly burden and disparately impact disabled applicants, and present an unfair mismatch between the interests of admissions staff versus those of disabled applicants. This mismatch is exacerbated by the considerably asymmetric capacities of admissions staff to absorb such logistical burdens compared to disabled applicants, who face the laborious task of drafting and seeking from third-parties extensive documentation and assembling those materials into “complete” petitions, and often appeals, on their own time and coordinated around all other life responsibilities and typically substantial health care needs. In contrast, State Bar staff in turn process the petitions as part of their full-time job duties. As such, apportioning admissions staff nearly all of the available time between exam cycles for their side of the process while simultaneously requiring disabled applicants to, at best, scramble in

---

<sup>1</sup> This timeline, consistent with current rules, is aspirational, as although State Bar examinations program manager Christina Doell suggested to the Board that sixty days represents the “outer limits” of processing time to reach an initial decision on testing accommodations petitions, that allegation is belied by the experiences of many disabled applicants, who often receive their initial decisions considerably after sixty days from complete submission and rarely receive them significantly sooner than sixty days. In practice, sixty days is closer to a floor than a ceiling.

order to assemble in days what admissions staff insist requires months to evaluate, represents grave miscarriages of justice.

Examples of the prejudicial effects of this timeline on disabled applicants include, but are not limited to:

- (1) Improperly requiring (in effect) even disabled applicants who are not immediate repeaters to petition at least six months before the exam to expect any opportunity to appeal denials, which at best effectively imposes an earlier registration deadline for disabled applicants than for nondisabled applicants;
- (2) Leaving even the most diligent disabled immediate repeater applicants (e.g., those who begin expeditious work on their petition to repursue denied accommodations or pursue expanded accommodations for worsened impairment as soon as their previous taken exam ends) inherently insufficient time to have equal opportunity to competitively prepare for the exam without bearing undue and disproportionate financial risks, or to seek judicial review (by the California Supreme Court or otherwise) after exhausting administrative remedies, even to the extent they receive an administrative appeal remedy within the State Bar (if one subject to at most 14 days turnaround for completed submission, Proposed Rule 4.88(A), and without the benefit of a hearing);
- (3) Leaving those immediate repeater disabled applicants who wait for confirmation of failure on their last taken exam, yet still petition timely (or even slightly – if not months – early), without even the opportunity to administratively appeal denials under Proposed Rule 4.88(B); *e.g., see also* Proposed Rule 4.84(E); let alone sufficient time to prepare for the exam with equal opportunity, which is destroyed by the Hobbesian Choice of either unequal financial risks or insufficient lead time to participate in competitive



exam preparation, even in instances where all requested accommodations are eventually granted by the State Bar.

DOJ guidelines require that testing entities respond to requests for testing accommodations in a timely manner, such that examinees can register with their nondisabled peers, respond to any request for any additional information requested, and complete any review procedures needed, in time to take the test in the same testing cycle with equal opportunity to prepare for the exam. With about seven weeks between the registration deadline and the bar exam, an initial decision from State Bar staff within two weeks of receipt is necessary to accomplish this.

A two-week response window leaves five weeks between the initial decision and the bar exam for applicants who petition on or around the State Bar's deadline, a period which is necessary for the applicant to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal. Such an amendment – combined with the effect of Proposed Rule 4.88(B) – would facilitate the feasibility of amending Proposed Rule 4.88(A) to provide for 30 days instead of the insufficient 14 days, and would thus enable the State Bar to permit at least those disabled applicants who submit their petition at least two months before the start of the bar exam to receive at least 30 days from the decision to appeal, a difference critical to obtaining responsive medical documentation from treating doctors and allowing applicants a *meaningful* opportunity to be heard in their appeal.

A two-week response window also would allow applicants who request their accommodations early (weeks or months before the registration deadline) an opportunity to exhaust all administrative review options and know their final approved testing accommodations prior to embarking on test preparation, typically an eight-to-ten-week endeavor (as well as have a meaningful opportunity for judicial review, if needed), and to do so even if they are an immediate repeater

seeking expanded accommodations on the next exam cycle as long as they begin working on their petition as soon as their last taken bar exam has been administered. This knowledge allows candidates to make informed plans about test preparation, which might include taking time off from work, hiring a tutor, enrolling in a preparation class, and taking timed practice exams.

For an exam that most applicants (disabled or not) fail despite most graduates studying full-time for months and spending many thousands of dollars on preparation that does not remain fresh until the following exam cycle, applicants with disabilities cannot be fairly expected to commit this degree of resources prior to confirmation that the attempt those resources go towards will be meaningful and provide them equal footing, at risk of waste most disabled applicants cannot financially afford and that would likely deprive them of the financial resources to repeat those arrangements if and when they do secure sufficient testing accommodations for a meaningful retake. For that reason, a later final administrative decision (e.g., a decision on appeal) than eight weeks before the next exam – in theory even one granting all requested accommodations – has already inherently deprived the applicant of equal opportunity to their nondisabled peers.

Finally, exhaustion of all administrative remedies with the State Bar later than 120 days before the exam renders any purported opportunity for judicial review in the form of a petition for discretionary review to the California Supreme Court pursuant to Cal. Rules of Ct. rule 9.13(d) under the timeline therein (at least 65 days not counting the time to draft the petition after the decision or the turnaround time needed by the Court following completed briefing either for threshold decision to review or deciding the merits) as not a meaningful means to be heard by that Court.

Addressing this issue should not be tabled for years until a subsequent rules revision to be initiated after the present rules-revision has been in effect for two bar exam cycles:

The Working Group's reasoning for rejecting the opinions of most commenters on the original proposal requesting this two-week processing time limit – that the merits of that proposal turn on the results from an experiment that would be years away – had been premised on State Bar staff's expectations that this rules revision and its other reforms (like summarily granting accommodations granted on certain prior exams) would increase their capacity at present headcount to process accommodations requests faster, if by an unknown degree. They therefore propose leaving the status quo intact until they have been able to experiment with the degree of staff resource-sparing effect the rest of the rules-revision accomplishes, and then revisit a new rules revision after the amended rules have been in effect for two exam cycles.

Even if the present Rules Revision did not result in other much-needed amendments on return from the second public comment period, it would realistically take effect no sooner than for the July 2024 exam, as it would need to be approved at the CBE's August 2023 meeting and the Board's November 2023 meeting before it could go on motion to the California Supreme Court, which Court would likely then take until 2024 to approve it – too late to govern petitions made for the February 2024 exam. The soonest Staff's timeline on a new rules-revision could allow for it to be initiated, then, would be at the August 2025 CBE meeting. Even if public comment was authorized for late 2025-early 2026, and was reapproved as-is by the CBE and Board on return therefrom, this would delay reforming processing timelines at least until the February 2027 exam, an unacceptably long delay to remedy a defect that facially deprives disabled applicants of equal opportunity. And of course, as both this rules revision and that

one could plausibly be sent out for more public comment periods, each one needing to be separately authorized by both the CBE and Board, the wait could be far longer than February 2027.

More importantly, the information State Bar Staff hope to gain from this proposed experiment not only fails to justify the delay, but is irrelevant to the merits of the two-weeks processing time cap. Taking action to shorten the present months of non-collaborative processing time to two weeks should not be tabled for years merely to collect data on the extent to which the currently proposed reforms would allow such changes without expanding staff capacity, when even a finding that more staff capacity would be required would not absolve the necessity of implementing such a two-week processing time limit to providing disabled applicants with equal opportunity, and so change the policy outcome.

Therefore, Proposed Rule 4.84(E) should be stricken and Proposed Rule 4.86(A)-(B) should be replaced by a requirement that complete testing accommodations requests be decided in two weeks or less from receipt. These amendments should be made as part of *this* rules-revision, and not delayed until a future one.

**Part 5: “Review by Disability Accommodation Expert Procedural Requirement to Deny Requests” – AGREE ONLY IF MODIFIED:**

The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should further require said reviewing expert be someone in the particular specialty of the disability they are reviewing (or a panel of disability accommodations experts from each such medical specialty if there are multiple disabilities across multiple medical specialties), trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF);

“knowledge” of ADA requirements relating to testing accommodations is too vague.

Proposed Rule 4.82(G) should be amended to clarify that recommendations for denial by a “disability accommodation [reviewing] expert” cannot by itself satisfy the State Bar’s duties under Proposed Rule 4.82(C) or 28 C.F.R. Pt. 36 App. A at 795-96, and to provide guidance to executing staff that rejecting treating expert recommendations on the credibility of their premises, rather than by demonstrating fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s).

#### **Part 6: “Appeals/Review Process” – DISAGREE:**

1. Proposed Rule 4.84(E) should be stricken;
2. Proposed Rule 4.88(A) should be amended to provide for thirty days from the decision instead of fourteen days; or alternatively to specify that a notice of appeal must be submitted within fourteen days, but that appeal statements and new evidence may be submitted up until thirty days from the decision or the cutoff in Proposed Rule 4.88(B), whichever comes first. Either way, it should further provide that applicants who submit their petitions at least two months before the start of the exam must receive at least thirty days to submit their completed appeal and still receive a decision thereon before the next administration of the exam.

3. Proposed Rules 4.84(B) and 4.88(B) should both be amended to provide for tolling of the deadlines therein where the State Bar changes the standard conditions of the bar exam less than two months before the Proposed Rule 4.84(B) deadline (or after that deadline).
4. The unduly vague phrase “as soon as is practicable” in Proposed Rule 4.88(D) should be amended to adduce it to: “...as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.”
5. Proposed Rule 4.88(E) should be amended to provide applicants whose appeals cannot be fully granted by the Director of Admissions according to Proposed Rule 4.88(C)-(D) with a teleconference hearing by the Examinations Subcommittee similar to that provided to applicants at risk of being denied a positive moral character determination by the Moral Character Subcommittee; in which hearing the applicant, their treating expert(s) if available, their legal counsel if applicable, all “disability accommodations [reviewing] experts” relied on by the State Bar, and the Director of Admissions participate collaboratively.
6. Proposed Rule 4.88(F) should ideally be stricken, but alternatively should be narrowed to apply only to the CBE/Subcommittee review portion of the appellate remedy, and otherwise allow subsequent reconsideration by the Director of Admissions within the same exam cycle to the extent applicants submit those subsequent reconsideration requests by the deadline in Proposed Rule 4.88(B).
7. The State Bar should move the California Supreme Court to simultaneously amend Cal. Rules of Court, rule 9.13(d) to, at least in testing accommodations cases: (a) streamline and expedite the briefing schedule provisions enough to make that judicial review procedure compatible with

the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules, to the extent that applicants who petition the California Supreme Court within two weeks of the Subcommittee's decision on their administrative appeal will receive a ruling from the Court in time for the next scheduled administration of the exam; and (b) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review, not the present discretionary review), on a *de novo* standard of review, and with no greater deference to administrative findings than would be given in a federal lawsuit.

Thank you for your consideration of this comment and these issues important to us all.

Very truly yours,

/s/ Dr. Peter N. Maduro, Psy.D, Psy.D, J.D.



July 27, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Legal Clinics  
Community Legal Services  
3200 Fifth Avenue  
Sacramento, CA 95817  
[www.mcgeorge.edu](http://www.mcgeorge.edu)

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining  
to Testing Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen,  
Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

Through its Community Legal Services (CLS), McGeorge School of Law has provided pro bono legal services to our community for more than 50 years. As the Director of CLS, I, along with my colleagues at McGeorge, are deeply invested in ensuring that all of our students successfully pass the California Bar exam. As attorneys, our students will carry forth the ideals, skills, and commitment to social justice they learned and practiced as student attorneys in our 7 specialized legal clinics. Success in passing the bar exam, however, rests on appropriate testing accommodations for those who need them.

While the proposed accommodation amendments include some helpful principles, the amendments still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program. Accordingly, I am writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.



A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

#### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability support such as testing accommodations. The exclusion of timed, law school exams from the definition of “high stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. *See* Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps,

such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

A handwritten signature in blue ink, appearing to read "Melissa C. Brown", with a large checkmark to the right.

Melissa C. Brown, Esq.  
Clinical Professor of Law  
Legal Clinics Director





July 27, 2023

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105  
 Submitted Via Online Portal, <https://fs22.formsite.com/sbcta/fwdav5flxh/index>

**RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations – OPPOSE**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

OneJustice writes to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

OneJustice works to ensure a thriving, effective legal services sector that advances a just and equitable society. We advance justice and equity by equipping the sector with skills and tools to maximize impact, championing robust and reliable legal service resources, convening the sector to harness its wisdom and power; and sharing analyses and insights about systemic trends and challenges. OneJustice works with legal services organizations across California that employ lawyers with disabilities, as well as serve individuals with disabilities by providing them with access to free legal assistance. Ensuring that Californians living with disabilities have access to appropriate and effective accommodations is essential to the functioning of our legal system.

Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school

graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal



explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a



revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC* Consent Decree, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,  
ONEJUSTICE

*Dana Richardson*  
Dana Marquez Richardson  
Senior Staff Attorney

*Leigh E. Ferrin*  
Leigh E. Ferrin  
Program Director

July 26, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
 Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am writing to you today to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations on behalf of my organization, the Dayle McIntosh Center for the Disabled. Established in 1977, the DMC is a 501(c)(3) nonprofit organization that provides services to people with disabilities and facilitates equal access and inclusion within the community. As a peer-led organization, we partner with people with disabilities to achieve personal goals for maximum independence. We advocate for equity and accessibility in all walks of life and professions.

While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major

bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say

whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the

LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

A handwritten signature in cursive script that reads "Brittany Zazueta".

Brittany Zazueta  
Executive Director  
Dayle McIntosh Center

July 26, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
 Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

The Association on Higher Education and Disability (AHEAD) is a national nonprofit association representing over 5,000 members who are actively engaged in service provision, consultation and training, and policy development to create just and equitable higher education experiences for disabled individuals on college campuses throughout the country. AHEAD promotes disability accessibility across the field of higher education and beyond by developing and sharing relevant knowledge; strategically engaging in actions that enhance higher educational professionals' effectiveness; and advocating on behalf of its membership, their institutions, their work, and those they serve ensuring full, effective participation by individuals with disabilities in every aspect of the postsecondary experience. AHEAD affirms that the enforcement of federal and state disability rights laws is fundamental to meaningful and full education and advancement for people with disabilities.

We are writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This

definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

#### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

#### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have

the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation



The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

Stephan Smith  
Executive Director

Elisa Laird, JD  
Associate Executive Director

Association on Higher Education and Disability (AHEAD)

*Legal Aid Fights for Justice. We Fight for Them.*



**July 26, 2023**

Submitted Via Online Portal: <https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

**RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations – OPPOSE**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

**LAAC is the statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California.** LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California’s unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level for funding and access to justice.

We are writing to **oppose** the revised proposed amendments to the State Bar rules regarding testing accommodations. **While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.**

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability,

which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be "deemed complete"), (B) (once request is "deemed complete" by State Bar, it then has 60 days to say whether the request is granted, denied, or "pending."), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal

statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

### Problems with Implementation

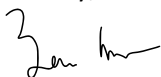
The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,



Zach Newman, Directing Attorney

July 26, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
 State Bar of California  
 180 Howard Street  
 San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrpetyan@calbar.ca.gov](mailto:Louisa.Ayrpetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing  
 Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am a member of the State Bar of California (inactive) and the State Bar of New York (active). I attended Loyola Law School, Los Angeles. As a law student, I received the California Bar Foundation Service Scholarship. Following graduation, I served as a law clerk to the Honorable Frederick Martone, United States District Court for the District of Arizona, and the Honorable Arthur Alarcón, U.S. Court of Appeals for the Ninth Circuit. I worked as an associate in Quinn Emanuel's Los Angeles office before moving to New York.

During the 2022-2023 academic year, I served as Special Counsel for Disability Rights in the U.S. Department of Education's Office for Civil Rights. There, I worked on amendments to regulations implementing Section 504 of the Rehabilitation Act, focusing on issues affecting students with disabilities in higher education. I am now an associate professor of law and the incoming director of the Syracuse University College of Law Disability Law and Policy Program. I have also served as Chair of the Association of American Law Schools (AALS) Section on Disability Law. I am one of only a few U.S. law professors who openly identify as a person with disabilities who receives accommodations. As a result, law students from all over the country turn to me for help when applying for accommodations in law school and in connection with the bar exam.

I am disabled as a result of rheumatoid arthritis, which causes joint damage, chronic pain, and fatigue, as well as eye inflammation. I was diagnosed when I was 13 months old and have never experienced remission. I received testing accommodations in law school and in connection with the California and New York bar exams. The California accommodations process was time-consuming and humiliating.

At the time I applied for accommodations, I had suffered from rheumatoid arthritis for over two decades and had reams of records to support my request. Nevertheless, the bar rejected my initial request for accommodations, citing the fact that two different handwritings appeared on my accommodations form. While I should have been studying, I was forced to return to my rheumatologist's office, explain the problem, and recommence the process. Both of us were frustrated. Concern over whether I would obtain accommodations caused me to experience

tremendous anxiety. I offer this example as it is typical of the disregard with which applicants with disabilities are treated.

I write today to oppose the revised proposed amendments to the rules regarding testing accommodations. While the proposal includes some helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program. My objections are included below.

The proposed rules create a process for the “automatic” approval of certain accommodations that the candidate has previously received on timed, high-stakes test. But the proposed rules also undermine the significant benefits of automatic approval in two key respects.

*First*, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical; timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions. It also excludes students whose disabilities are exacerbated by high-stress experiences like law school, so much so that they require accommodations for the first time.

I received accommodations for the first time in law school. I have an invisible disability, and originally worried that if I sought accommodations I would be disbelieved and retaliated against. I also received no guidance about accommodations until law school, likely because I went to great lengths to keep my disability under wraps. In law school, my legal education helped me understand that I should seek accommodations, and that I deserved them.

Law school tests, much like the bar exam, impose a significant mental and physical toll on students with disabilities that other tests do not. Until law school, I never sat for an academic exam that was longer than two hours. In law school, many of my exams were four hours long. While I could sit through a two-hour exam relatively comfortably, a four-hour exam caused me to experience pain in my joints, including my wrists. The pain slowed down my typing. As a result, my law school and bar accommodations provided me with off-the-clock stretching breaks away from my laptop.

*Second*, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7).

Students who previously received those accommodations will need to re-certify their disability. I wish to emphasize how demanding the requirement of “submission of certification by a qualified professional as set forth in Rule 4.85” is.

The forms required by the State Bar are complex. The “qualified professional” alone must complete a six-page form. An applicant likely needs to speak to their health care provider in person to review the form and answer any questions the provider may have. Because the form does not constitute a medical emergency, it will take time to obtain an appointment. I typically must schedule my specialist appointments for two to three months out. Moreover, to the extent an applicant obtained their medical documentation for law school from a provider in their hometown, and they attend law school in a different city, they may need to make a first-time

appointment to obtain the certification, which can take up to six months. Assuming that an applicant can obtain a timely appointment, they must also be able to take time off for the appointment itself. Most specialists work during business hours. The appointment may conflict with a student's bar prep course, also held during business hours.

Many physicians will not complete accommodations-related forms for free, as the time spent completing them cannot be billed to insurance, forcing an applicant to pay for the form out-of-pocket. No physician is delighted to fill out such a form. Some may simply refuse to complete the form, due to confusion regarding the form's purpose or their own bias. Health care is a notoriously inhospitable place for people with disabilities.

Even if you believe the above steps are reasonable to impose on an individual who received the very accommodations they are now seeking in law school, please consider the disadvantage at which you place applicants with disabilities when you force them to endure this process. While disabled applicants are completing the above steps, their nondisabled peers are studying, exercising, or resting. Disabled applicants already deal with burdens that their nondisabled peers do not experience, especially those disabled applicants with underlying health conditions that require a great deal of time to manage and cause a great deal of pain. Applicants with disabilities have no time to spare.

The California State Bar's accommodation process has caused reputational harm to the bar and its members and the unnecessary exclusion of members of an underrepresented group. It is time for reasonable, and humane, reform.

Sincerely,

A handwritten signature in black ink, appearing to read 'KAMacfarlane'.

Katherine A. Macfarlane<sup>1</sup>

---

<sup>1</sup> I write in my personal capacity.



blank

July 25, 2023

*Submitted Via Online Portal*

<https://fs22.forms.site.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: Louisa Ayrpetyan  
[Louisa.Ayrpetyan@calbar.ca.gov](mailto:Louisa.Ayrpetyan@calbar.ca.gov)

Devan McFarland  
[Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations – **OPPOSE**

To Whom It May Concern:

Last month, I had brain surgery in hopes of no longer needing to take three anti-seizure medications. These drugs control my seizures but make me drowsy and sluggish, including when I took the California bar exam in July 2021. As described below, despite my well-documented condition and my prior accommodations on the LSAT and law school exams, the State Bar rejected my request on ridiculous grounds. What's worse, although I filed my accommodations request well ahead of the deadline, the State Bar denied my accommodation without allowing me a realistic timeframe to prepare an appeal.

As a recent examinee who was denied accommodations despite extensive documentation of disability, I am writing to **OPPOSE** certain of the proposed amendments to the rules of the State Bar.

### **My accommodations request experience for the July 2021 exam<sup>1</sup>**

I enrolled at Stanford Law School in 2018 and took the California bar exam in July 2021. Years earlier, immediately after graduating from college, I began experiencing seizures, and I was diagnosed with epilepsy in 2013. It took multiple medications to get my seizures under control, each of which had common side effects that impair test-taking, such as drowsiness.<sup>2</sup>

---

<sup>1</sup> I would be happy to provide the Trustees with documentation of my experience if it would be helpful to their evaluation of proposed reforms.

<sup>2</sup> See *Oxcarbazepine*, <https://medlineplus.gov/druginfo/meds/a601245.html> (“[Y]ou should know that this medication may make you drowsy”); *Levetiracetam*, <https://www.epilepsy.com/tools-resources/seizure-medication-list/levetiracetam> (“What are the most common side effects of Levetiracetam? [. . .] Sleepiness”); *Lacosamide*, <https://medlineplus.gov/druginfo/meds/a609028.html> (“[Y]ou should know that lacosamide may make you dizzy or drowsy”).

When I began studying for the LSAT, I quickly noted that how much these side effects were affecting my performance compared to before I started taking anti-seizure medication. My thinking was considerably slower than it had been in undergrad, and I struggled to complete sections within the standard time. Based on my combination of medications, my neurologist was not surprised that I was struggling. Based on a neuropsychologist evaluation, my neurologist wrote a letter endorsing my time accommodations request, which LSAC granted. Stanford gave me similar time accommodations on exams throughout law school based on the same documentation from my neurologist.

When I began preparing for the California bar exam, I was warned to expect a significantly more burdensome accommodations process than for requesting accommodations on the LSAT or law school exams. One recent examinee advised me not to count on receiving accommodations, even with the proper paperwork and a documented history of accommodations. I was also warned that the process would take significantly longer than it reasonably should.

With these warnings in mind, I submitted my accommodations request in mid-March 2021, well before the deadline. I submitted a recent letter of support from my neurologist along with all the necessary paperwork, including my doctor's notes from a recent visit and proof of the accommodations I received from LSAC and Stanford. As I was warned to expect, weeks went by without any word on my application. And as the exam date crept closer, I requested status updates numerous times by phone, email, and portal messages. In these messages, I pointed out that, in the event I needed to appeal, it would be difficult for me to coordinate with my neurologist on short notice. In the interim, I continued to prepare for the bar exam as if my accommodation petition would be denied.

The State Bar denied my accommodation request on June 24, 2021, a week before the deadline to appeal the determination and approximately a month before the first day of the bar exam. Rather than credit my neurologist's explicit recommendation that I receive accommodations based on his familiarity with my symptoms and medication side effects—not to mention the fact that both LSAC and Stanford Law granted accommodations based on prior clinician's advice—the State Bar's reviewer cherrypicked minutia in my neurologist's visit notes. Given this bad faith second-guessing of my neurologist's stated conclusion, I was convinced at the time that an appeal would be fruitless, even if I could coordinate with my neurologist on short notice to prepare additional supporting documentation in between taking practice exams. With exam day looming, I decided not to appeal and simply accepted that I would take the test with a handicap compared to other examinees.

Thankfully, I passed the July 2021 bar exam — even without the timing accommodation that was clearly supported by nearly a decade of documentation. I am entirely confident that there were other examinees who were inappropriately denied accommodations, who took the exam under standard conditions, and did not pass as a result.

Mine is not a success story, however. Instead, my experience shows how the current accommodations vetting system is utterly broken. The current process is a bureaucratic gauntlet designed to impose unnecessary barriers, even on examinees who are well-prepared and timely submit the proper documentation. In my case, the State Bar denied a demonstrably adequate petition on specious grounds. Despite having received my application long before the deadline, the State Bar denied my request without affording me sufficient time to challenge the ridiculous denial. Had the State Bar answered any of my update requests or indicated that my extensive

documentation was still inadequate to support my petition, I absolutely would have appealed to vindicate my rights. Instead, the State Bar utterly failed to support me and other examinees seeking accommodations so that they could enter the legal field on even footing.

### **Needed reforms to the State Bar's accommodations process**

The State Bar should meaningfully address the flaws in the current accommodations process that lead to inappropriate denials such as mine. Among other reforms, the State Bar should:

- Require that examinees receive a determination on a concrete timeline, e.g., within two weeks or another reasonable timeframe, so that they have a meaningful opportunity to appeal inappropriate denials. Requiring such a determination “as far in advance of the exam as practicable” is vague and useless to an examinee who may need to arrange additional medical consultation or other time-intensive matters in the thick of studying for the bar exam. Notably, the proposed rules still give the examinee a hard deadline to appeal, but they impose no actual deadline on the committee to issue a determination for the examinee to appeal.
- Automatically grant candidates the same testing accommodations that candidates previously received on standardized tests OR in college or law school. I see no reason to automatically grant an accommodation to someone whose disability manifested at the time of the LSAT while requiring heightened proof from someone whose disability manifested only during law school.

The State Bar should take this opportunity to meaningfully address the numerous shortcomings in the accommodations process.

Accordingly, I **OPPOSE** the proposed rules changes to the extent they conflict with the above proposals. I urge the Board of Trustees instead to adopt an alternative proposal that adequately serves examinees in need of accommodations. The State Bar should not continue failing candidates as it failed me and so many others.

Sincerely,

Shawn Musgrave

CA Bar No. 341359

## **Commenter 38**

There shouldn't be additional hurdles for private rooms, stop-the-clock breaks, and more than 50% time.



**Service Center for Independent Life**  
909-621-6722 ~ [www.scil-ilc.org](http://www.scil-ilc.org) ~ 909-445-0727 FAX

~~~~~  
**Talking Fingers ~ Cards with a Special Touch**

~~~~~  
[talkingfingers.scil-ilc.org](http://talkingfingers.scil-ilc.org) ~ [cardswithaspecialtouch.org](http://cardswithaspecialtouch.org)

July 25, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

Service Center for Independent Life

I am writing to oppose the revised proposed amendments to the State Bar rules regarding testing accommodations. While the proposal includes a few helpful principles, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

#### Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

**Advocating for Inclusion, Access, and Self-Determination, on behalf of People with Disabilities**

**Proceeds from Cards with a Special Touch by SCIL benefit people with disabilities.**

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF’s [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California’s legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. It excludes extended time beyond time and a half (or double time for someone with a “severe visual impairment”) from the process. Proposed Rule 4.83(A)(7). It also excludes the accommodation of a private room. *Id.* There is no basis for capping extended time at 1.5 and excluding private rooms from the automatic approval process. Double time and private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

### Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar’s responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations at the same time that their nondisabled peers register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

#### Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

#### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

**[Advocating for Inclusion, Access, and Self-Determination, on behalf of People with Disabilities](#)**



For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,

Larry Grable  
Executive Director  
Service Center for Independent Life

## **Service Center for Independent Life**

107 Spring Street  
Claremont, CA 91711  
909-621-6722  
909-445-0727 FAX

[www.scil-ilc.org](http://www.scil-ilc.org)  
[talkingfingers.scil-ilc.org](http://talkingfingers.scil-ilc.org)  
[cardswithaspecialtouch.org](http://cardswithaspecialtouch.org)

## **Commenter 40**

It is not clear who the individual is that is making the ultimate decisions on Accomodations. Does this person have a medical license or some other kind of medical degree? I am not confident that this individual has had exposure to all type of disabilities, especially invisible disabilities. The person making the ultimate decision should consider access to healthcare as well. Not everyone is diagnosed early with a disability. Healthcare inequality is real. This individual needs to understand the disparities in healthcare treatment which could delay diagnosis of a disability.

Who is the individual making a review of a denied request? Does the State Bar employ experts on various medical specialties? What about novel diseases, like Superbugs or C-Diff? Thousands of people die of superbugs a year, but it goes unnoticed and unmentioned. It is an invisible disability.

Is age considered? What about female issues? Who is qualified to speak on these matters? Not enough is known about the process or who is behind the process of evaluating individuals.

## **Commenter 41**

I agree with the proposed automatic approval of accommodations previously granted for high-stakes exams. Permanent disability does not disappear between bar exams or other high-stakes exams. In the rules, there is room for temporary disability; however, when such disability is a permanent nature requiring recertification and resubmission of documents from a qualified health care provider attesting to a permanent existing disability is costly to the applicant and the Bar. Currently, this requires additional people hours to reach the same's logical conclusion that there is a permanent disability. This is a waste of resources.

## Commenter 42

I write with regard to Proposed Rule 4.82(F), which provides accommodations "solely" based on the applicant's average or above average IQ score and/or history of academic success. I recommend that the rules be revised so that such criteria not be considered at all as part of an accommodations request determination.

IQ score and history of academic success are not relevant to whether an applicant requires accommodations. In fact, academic success may have only been possible with the reasonable accommodations provided. Allowing these factors to be considered risks being discriminatory.

I write to recommend that the Rules be revised to provide for automatically approving accommodations previously granted in law school, provided that the law school is approved by the American Bar Association (ABA).

The State Bar states in its reasoning that it "cannot ensure the consistency and rigor with which every college, university, or law school evaluates testing accommodation requests." While that may be true of colleges, universities, or non-ABA approved State Bar-registered, fixed-facility law school, this reasoning does not apply to to ABA-approved law schools.

The ABAs standards require the provision of reasonable accommodations on the basis of disability (Standards 205 and 207). The State Bar already relies on ABA approval for determining whether an applicant to the bar has sufficient education experience, and should not cease to rely on the ABA

### **Commenter 43**

If accommodations are denied, student needs a full refund, or in the alternative, no fee should be collected unless approval is granted. CalBar must articulate a reason for keeping any portion of a payment.

In my case, several qualified Psychology professionals determined that accommodations were warranted. The documentation included a Psychological Evaluation.

However, my request was denied with one of the denial reasons being "...This is not about his being diagnosed..., this is about the claim of associated disability, which has yet to be established." Contradicting the findings of three other professionals, a contradiction from an individual that never personally interviewed me in-person, by phone or video...." As part of the review process, your petition was referred to an expert consultant retained by the Committee of Bar Examiners (Committee)."

There is no indication of this expert's field(s) of study, and three other professionals conclusively established disability.

Additionally, the committee expert states:

No expert offers much in the way of history, one presenting the applicant as realizing but a 1.78 GPA in HS, but, he did graduate. Later in college, his GPA there? No one speaks of this. In law school now, yes, but his GPA . . no one speaks of this either.

The committee expert further points out areas that, in his opinion, needed clarification. However, the information from several other professionals agrees, absent the information upon which the committee expert based his denial, were able to conclude accommodations were necessarily based upon interviews and documentation, when applied to ADA standards, that resulted in their combined request for accommodations.

It appears either (a) the committee expert was unqualified to render an opinion, (b) was acting contrary to ADA guidelines, or (c) determined it was not necessary to request clarification from me or the time to make such a request was not provided to him. Lastly, he could have minimally provided an alternative to more time and a private room, such as suggesting a verbal exam.

A person with Social Anxiety and an auditory disorder such as Misophonia, though of high intellect, is still challenged when engaging that intellect for exams when outside triggers must first be overcome.

I offer that Asperger's Syndrome, now included in the Autism spectrum, has, among other symptoms, **Hypersensitivity to** lights, **sounds**, and textures, in many cases, is also noted to manifest in **very high intelligence**, almost Idiot Savant level: GPA is not an indicator of mental disorder.

In some cases, their IQ may be very high, even in the genius range...Your IQ can be through the stratosphere, and you **can still have an impaired ability** to read the social world, so much so that you struggle to navigate the social complexities in school, workplace, or community...It is also a major benefit as the person copes with his disability, giving him more to work with as he tries to find ways to compensate for areas of weakness.

It can be a double-edged sword, however, both gift *and* curse. When someone is aware he is different, when, **for all his intelligence, he is having a difficult time making friends, or getting a date, or keeping a job, he may end up far more prone to depression and despair** than a less aware person with a lower IQ. It has indeed been found that children with both high-functioning autism and Asperger's suffer from **depression and anxiety more than their typical peers**.<sup>3</sup> ([https://www.kennedykrieger.org/stories/interactive-autism-network-ian/aspergers\\_syndrome\\_normal\\_iq](https://www.kennedykrieger.org/stories/interactive-autism-network-ian/aspergers_syndrome_normal_iq)).

And Misophonia:

"Reactivity to aversive sounds includes heightened autonomic nervous system and negative emotional arousal. Pattern based auditory stimuli often cluster around noises that are generated by others (e.g., other people's chewing, smacking lips, or tapping fingers). However, aversive noises reported have also included mechanical noises (e.g. air-conditioners, refrigerator humming, and noises emanating by pets). In addition, some individuals with Misophonia report autonomic arousal with the accompanying physical and emotional correlates upon presentation of repetitive visual stimuli (e.g. seeing another person shaking their leg.)."

(<https://differentbrains.org/resources/misophonia/>).

Misophonia is a complex neurophysiological and behavioral syndrome characterized by heightened physiological responsivity and a high magnitude of emotional reactivity resulting from intolerance to specific auditory stimuli (Jastreboff and Jastreboff, 2001, 2014; Møller, 2011; Wu et al., 2014). Originally described by Jastreboff and Jastreboff (2001), individuals with misophonia are believed to demonstrate increased sympathetic nervous system arousal, accompanied by emotional distress in response to specific pattern-based sounds, irrespective of decibel level (Jastreboff and Jastreboff, 2001; Edelstein et al., 2013). Examples of these sounds include other people chewing, throat clearing, slurping, finger tapping, foot shuffling, keyboard tapping, and pen clicking (Jastreboff and Jastreboff, 2001; Edelstein et al., 2013; Schröder et al., 2013; Wu et al., 2014). The acoustic pattern of these sounds and their elicited response vary across individuals. Both sounds and reactions appear to take on idiosyncratic forms, suggesting that individual differences, learning and context may play a role in aversive responding.

(<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5808324/>).

People with Misophonia are affected emotionally by common sounds — usually those made by others, and usually ones that other people don't pay attention to. The examples above (breathing, yawning, or chewing) create a fight-or-flight response that triggers anger and a desire to escape. Misophonia is little studied and we don't know how common it is. It affects some worse than others and can lead to isolation, as people suffering from this condition try to avoid these trigger sounds. People who have Misophonia often feel embarrassed and don't mention it to healthcare providers — and often healthcare providers haven't heard of it anyway. Nonetheless, Misophonia is a real disorder and one that seriously compromises functioning, socializing, and ultimately mental health. Misophonia usually appears around age 12, and likely affects more people than we realize.

(<https://www.health.harvard.edu/blog/misophonia-sounds-really-make-crazy-2017042111534#:~:text=What%20is%20misophonia%3F,and%20a%20desire%20to%20escape.>).

I have Social Anxiety and Misophonia. However, neither was found in me before the **age of 23!**

#### RECOMMENDATIONS:

1. The State Bar of California should either seek to create a joint position within the Bar or hire an ADA-qualified Evaluation Officer "EO," or the Governor of California should appoint an ADA-qualified and approved ADA Evaluation Officer to oversee all future requests for accommodations.
2. The EO should be authorized to secure a team of qualified staff to work in conjunction with and under the supervision of the EO and ADA in evaluating accommodation requests.
3. The EO should have the final determination of approval or denial of an accommodation request.
4. All findings must be automatically forwarded post haste to the student's school and made a part of their academic record to ensure the student is provided accommodations and reduce or eliminate the need for repeated evaluations.
5. Those previously denied accommodations resulting in a failing score for the "Baby-Bar," or who have been Administratively Dismissed from an accredited school shall be allowed to retake the failed exam at no charge. If the test-taker passes, they should be readmitted to that school and allowed to continue their enrollment, i.e., a student that was dismissed after semester one for failing the "Baby-Bar" or "Final Exam" that was denied requested accommodation should be readmitted and placed in their 2<sup>nd</sup> year.
6. A provision should include a refund for those negatively impacted through an erroneous denial of accommodations. The revised requirement should consist of words that convey a case-by-case basis. A review of Accommodation requests that were denied for "additional documentation."
7. The Academic Dismissal should be permanently removed from the student's record.
8. A review of previous denials needs to be conducted. The ADA guidelines should be applied, and a determination of the amount, if any, the refund should be made for those that paid for and took with FYLX without accommodations. Any request for accommodations should only be approved or denied via the rules established by the Americans with Disabilities Act (ADA). Any equivocation in the initial review should be settled using those rules.

Individuals with Disabilities Education Act (IDEA)

(<https://www.pacer.org/transition/resource-library/publications/NPC-42.pdf>)

Q. Are postsecondary programs required to make testing accommodations for students with disabilities?

A. Yes. Postsecondary programs must establish a process for making their tests accessible to people with disabilities. They can do this by providing appropriate accommodations to students with disabilities. Remember, each student's needs are individual. Examples of accommodations include: allowing a student extended time to complete a test or providing a



distraction-free space, sign language interpreters, readers, or alternative test formats. Testing accommodations are also required of agencies which administer college entrance exams, and the agencies, organizations, or businesses that administer licensure and certification.

## Commenter 45

I agree with this proposal, but only if the expectation is not that the accommodation must have been granted in all past exams. For example, my own experience is that I have an illness where I need to drink water fairly constantly. I did not need any accommodation to do this during most exams in all my years, because bringing a water bottle to most exams was allowed or even encouraged. It was only when I took a bar exam that this became an issue. Therefore, I would like the new rule to include a notation that states that accommodations might be needed where they never were before if the bar exam puts onerous restrictions on simple behaviors, such as having a water bottle and drinking water during an exam.

I also propose that the Bar be required to inform test takers well in advance of any such restrictions. For example, there may be restrictions on food, or using the washroom, or on clothing, or on type of writing instrument, etc. that may require an accommodation where none was needed before because this is an unexpected restriction. Therefore, test takers should be informed before they sign up for an exam of the full list of restrictions.

I agree with this provision, but also think that the Bar should not pry into the nature of illnesses that require an accommodation. People with illnesses that require an accommodation may want to maintain privacy and dignity. Having such an illness can be stressful and heartbreaking and very emotionally trying. The level of prying should be based on what must be known in order to enact the accommodation and nothing more. It can be a very emotional and rattling experience having to discuss and share such personal information with strangers. The amount of information sought should be commensurate with the accommodation sought, but only to enable the accommodation to be properly enacted.

Please keep in mind, an accommodation can be very simple. For example, I have an illness where I needed to have a bottle of water with me during the CA Bar exam. This is an accommodation that costs the Bar no money, takes no time, requires no work, etc. The CA Bar acted as if I were trying to bring a herd of elephants into the exam with me. Please let simple accommodations be as simple as they are.

I disagree with this provision and think the Bar should respond immediately, in under a week, to those seeking accommodations who have had accommodations in the past. Since these communications can be done by email, they should be done by email, which gives faster response times. I think the turnaround time and resolution time on other requests should be completed in less than two weeks.

I can explain from my own experience why a fast response time is most fair. When I signed up to take the CA Bar, I paid the high price for the exam and also bought plane tickets and a hotel room for a week. I was also planning for my meals, ground transportation, and other expenses for the exam. I arranged to be absent from my classes in graduate school for a week. I was studying the specific law that was to be tested on the CA Bar. I found it difficult to concentrate on studying for the CA Bar while the Bar was screwing around with me, demanding more documentation from my doctor who had already filled out the forms, denying my simple accommodation, etc.

A person planning to take a Bar exam needs to concentrate on preparing for the exam. Their time and emotional outlay should not be spent on trying to get the accommodations they need. In my situation, I knew I simply would be unable to take the Bar exam if my accommodations were denied. I was kept waiting till very close to the test date before I finally got the incredibly simple accommodation that I needed. This was unfair. Others should not experience what I went through.

I also think that if the CA Bar does not respond to and grant accommodations in a timely way, that the CA Bar should refund the test money, the airfare, hotel, and other expenses paid by the would-be test taker.

I disagree with this proposal because a person's medical doctor or other specialist who has been working with the person should trump the decision of any alleged "disability accommodations expert." When I took the CA bar, my doctor wrote a letter and filled out a form stating that I needed to have a bottle of water with me during the exam. That had been my doctor for about two years, was a university doctor, and was familiar with students, tests, accommodations, and was very familiar with me. The CA Bar denied my accommodation based on the word of what they called a disability expert, but as I recall, this was a person who was either a nurse or someone with no medical credentials. The person who was saying I needed the accommodation was a medical doctor who had been licensed and in practice for decades, was working at a university, and had seen me numerous times over two years. The person that CA Bar hired to deny my accommodations was a person with barely any medical credentials who had never met me and was certainly not in any way qualified to assess what I needed. The CA Bar "expert" also seemed to not understand anything about taking a Bar exam. For example, the "expert" stated that I could use the drinking fountain during the exam, apparently unaware that Bar exam takers are not allowed to run around the room during an exam, that exams are timed and every second may be precious. And as it turned out, the place where the exam had water fountains that were not working and that appeared to have been not working for years.

There is no reason to have an alleged underqualified "expert" second-guess the decisions made by an actually qualified medical doctor who has seen and treated a patient.

I would agree IF the CA Bar will agree, if it denies the accommodations for any person who has signed up for the exam, that the CA Bar would promptly refund to that person the test fee, the cost of their airfare and hotel and any other amounts that have been paid and cannot be refunded. That person's appeal should be continued to the next test cycle, if the person elects not to take the exam without the accommodation or if the accommodation is denied or granted at a date the test-taker thinks is too late for the person to be able to properly study and prepare for the exam.

As a person who NEEDED to have a simple accommodation (a bottle of water with me) to be able to take the exam, I can tell you I could not fully concentrate on studying and preparing for the exam until I knew my accommodation was granted. How could a person devote their full mind to studying for the exam when they do not yet know if they are going to be able to take the exam? This is why speed in resolving any issues is so important.

## **Commenter 46**

It's vague and ambiguous as presently written and, therefore, subject to legal challenges.

## Hernandez, Alfredo

---

**From:** Hernandez, Alfredo  
**Sent:** Friday, August 4, 2023 1:03 PM  
**To:** Hernandez, Alfredo  
**Subject:** FW: Public Comments on Amended Testing Accommodations

---

**From:** Deborah Meyer-Morris <[dmeyermorris@kdeklaw.com](mailto:dmeyermorris@kdeklaw.com)>  
**Sent:** Monday, July 31, 2023 5:53 PM  
**To:** McFarland, Devan <[Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)>; Ayrapetyan, Louisa <[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)>  
**Cc:** Deborah Meyer-Morris <[dmeyermorris@kdeklaw.com](mailto:dmeyermorris@kdeklaw.com)>  
**Subject:** Public Comments on Amended Testing Accommodations

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

July 31, 2023

Submitted Via Online Portal,  
<https://fs22.formsite.com/sbcta/fwdav5flxh/index>

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

CC: [Devan.McFarland@calbar.ca.gov](mailto:Devan.McFarland@calbar.ca.gov)  
[Louisa.Ayrapetyan@calbar.ca.gov](mailto:Louisa.Ayrapetyan@calbar.ca.gov)

Ruben Duran  
Chair

Brandon N. Stallings  
Vice-Chair

Mark Broughton  
Trustee

Hailyn Chen  
Trustee

José Cisneros

Trustee

Juan De La Cruz  
Trustee

Gregory E. Knoll  
Trustee

Melanie M. Shelby  
Trustee

Arnold Sowell Jr.  
Trustee

Mark W. Toney, Ph.D.  
Trustee

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to  
Testing Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am an attorney licensed by the California State Bar since 1992 and am an adjunct professor at an accredited local California law school. I am writing in my individual capacity as a long-time equity in education advocate and as a attorney with disabilities.

Earlier this year I submitted public comments in response to the initial proposed Testing Accommodations on the State Bar. In reviewing the earlier comments of the Committee in response to my comments, it appears that the committee did not appreciate the context of my comments or perhaps thought I was describing a mythical student, rather than an actual older student with disabilities who would not have completed high stakes testing within the last five years, but who has received disability related accommodations during law school. Ironically, shortly after my initial comments one of the Deans of the law school contacted me to ask me if I could help one of their older adult students appeal the denial of their reasonable accommodations on the July 2023 bar exam.

When I graduated from Loyola Law School Los Angeles as an evening student in 1991 it was before the ADA was enacted. There were no obviously disabled students in our cohort as we all had to pass through a very fine sieve to gain admittance to Loyola and successfully complete the LSAT. Thereafter, we had to successfully navigate the licensing requirements of CalBar without any reasonable accommodations. These facial neutral admission requirements worked to screen out bar applicants with disabilities and other marginalized groups of law students from being admitted to ABA law schools and later the CalBar extremely well. Perhaps today that is why 27% of the adult population has a disability, whereas only 5% of California attorneys have a disability, and only 2% of California judges. Gatekeeping of this profession has been a long standing problem, and the proposed changes to the Test Accommodations process and criteria will not address the root issue of gatekeeping and exclusion of disabled people from the California Bar and this fine profession.

Problems with Definition of Disability



The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be roughly compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

### Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years’ experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

For many years, the State Bar has relied upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years.

Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at \*45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected.

Sincerely,  
Deborah Meyer-Morris, M.A.  
Attorney/Advocate/Adjunct Professor  
SBN: 158876  
Ventura, California  
[dmeyermorris@kdeklaw.com](mailto:dmeyermorris@kdeklaw.com)

## Chapter 7. Testing Accommodations

Current Rules 4.80 through 4.92 are repealed. New Rules 4.80 through 4.92 are adopted to read as follows:

### 4.80 Definitions

These definitions apply to the rules on and requests for testing accommodations.

- (A) A “disability” is a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.
- (B) A “disability accommodations expert” is a qualified professional designated by the State Bar to make recommendations regarding an applicant’s testing accommodations request. A disability accommodations expert shall have a doctoral degree or Ph.D., possess knowledge of testing accommodations practices and procedures in exam settings and the Americans with Disabilities Act requirements relating to testing accommodations, and have a minimum of five years of experience in reviewing requests for testing accommodations for certification or licensure.
- (C) A “high stakes exam” refers to any of the following: California Bar Exam, First-Year Law Students’ Exam, Multistate Professional Responsibility Exam (MPRE), a bar exam in another U.S. jurisdiction, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED.
- (D) A “mental impairment” is a mental or psychological disorder or condition or an anatomical loss affecting one or more of the body’s systems, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.
- (E) A “permanent disability” is a disability that is long-lasting and non-temporary in nature.
- (F) A “physical impairment” is a physiological disorder or condition or an anatomical loss affecting one or more of the body’s systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. Physical or “mental impairment” includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
- (G) A “qualified professional” is a person who is licensed or otherwise properly credentialed and possesses expertise in the disability for which modifications or accommodations are sought.
- (H) An “individualized assessment” is an assessment by a qualified professional who has personal familiarity with the applicant.
- (I) A “reasonable testing accommodation” is an adjustment to or modification of standard testing conditions that addresses the functional limitations related to an applicant’s

disability by modifications to rules, policies, or practices; removal of architectural, communication, or transportation barriers; or provision of auxiliary aids and services, provided it does not:

- (1) compromise the security or validity of an examination or the integrity of the examination process;
- (2) impose an undue burden on the State Bar; or
- (3) fundamentally alter the nature of an examination or the Committee's ability to assess through the examination whether the applicant:
  - (a) possesses the knowledge, skills, and abilities tested on an examination; and
  - (b) meets the essential eligibility requirements for admission.

#### **4.81 Purpose of Testing Accommodations**

- (A) Testing accommodations are provided to ensure that an applicant who has a disability can access the examination and is afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.
- (B) Applicants with disabilities are granted reasonable testing accommodations if they are otherwise eligible to take an examination and, in accordance with these rules, they:
  - (1) have an approved Application for Registration;
  - (2) submit a request for testing accommodations on the State Bar's forms with the required documentation; and
  - (3) establish to the satisfaction of the State Bar that the applicant has a disability and needs the requested testing accommodations in order to meet the purposes set forth in subsection (A).
- (C) Approval of testing accommodations does not entitle an applicant to sit for a particular exam. An applicant must separately apply for any examination for which they intend to sit.

#### **4.82 Processing of Requests for Testing Accommodations – General Rules**

- (A) Requests for Testing Accommodations are processed on a case-by-case basis consistent with these rules.
- (B) The State Bar will render a determination on any complete request received by the final filing deadline, and will endeavor to render the determination as far in advance of the exam as practicable.
- (C) The State Bar shall defer to documentation from a qualified professional who has made an individualized assessment of the applicant that supports the need for the requested testing accommodation(s) as compared to the opinions of a disability accommodations expert who has not assessed the applicant for diagnosis and treatment. The applicant and their qualified professional shall have flexibility in the type and source of supporting documentation that may be provided, in addition to the required forms, to demonstrate the applicant's disability-related functional limitations, their specific access needs, and how those needs relate to the testing accommodations requested.

- (D) Although not eligible under the automatic approval process described in Rule 4.83, considerable weight shall be given to documentation of past testing accommodations approved for timed exams administered in college or law school upon submission of proof of the accommodations approved.
- (E) The State Bar shall not deny an applicant's request for a particular testing accommodation solely because the applicant has no formal history of receiving that testing accommodation.
- (F) The State Bar shall not deny an applicant's request for testing accommodations solely based on the applicant's average or above average IQ score and/or history of academic success.
- (G) The State Bar shall neither deny a request for testing accommodations nor approve it with modifications without elevation to the State Bar's disability accommodations expect.
- (H) An examination application fee is not refunded if a request for testing accommodations is withdrawn, denied, or abandoned.

#### **4.83 Automatic Approval Process: Approval of Previously Granted Testing Accommodations on High Stakes Exams**

- (A) Prior accommodations approved for a high stakes exam, as defined, will be approved by the State Bar without the need for any further documentation if all of the following are satisfied:
  - (1) The prior accommodations were approved for a permanent disability;
  - (2) The applicant submits the Request for Testing Accommodations form with the relevant sections completed;
  - (3) The applicant submits proof of the prior approval of accommodations granted by the testing entity;
  - (4) The applicant is requesting the same testing accommodations granted on the high stakes exam;
  - (5) The applicant certifies they are still experiencing the same functional limitations caused by the permanent disability for which the prior accommodations were approved;
  - (6) The State Bar offers the same or equivalent testing accommodations; and
  - (7) **[IF THE WORKING GROUP RECOMMENDATION IS ADOPTED BY THE CBE]** The request does not include more than 50 percent extra time for applicants without severe visual impairments, more than 100 percent extra time for applicants with severe visual impairments, and/or a private room. If the requested testing accommodations are for more than 50 percent extra time for applicants without severe visual impairments, more than 100 percent extra time for applicants with severe visual impairments, and/or a private room, the request will be evaluated in the same manner as those requiring submission of certification by a qualified professional as set forth in Rule 4.85.
  - (7) **[IF THE STAFF RECOMMENDATION IS ADOPTED IN LIEU OF THE WORKING GROUP RECOMMENDATION]** The request does not include more than 100 percent extra time for applicants and/or a private room. If the requested testing accommodations are for more than 100 percent extra time and/or a private room, the request will be evaluated

in the same manner as those requiring submission of certification by a qualified professional as set forth in Rule 4.85.

- (B) An applicant who meets the requirements of subsection (A) need not submit the report of a qualified professional who has made an individualized assessment of the applicant.
- (C) If an applicant requests greater testing accommodations than previously approved for a high stakes exam, the State Bar shall, using the automatic approval process outlined in subsection (A), approve the same accommodations as previously granted, and shall only require submission of certification by a qualified professional to support the greater accommodations requested.
- (D) **[IF THE WORKING GROUP RECOMMENDATION IS ADOPTED BY THE CBE]** The automatic approval process shall also apply to testing accommodations approved in a U.S. law school for timed examinations.

#### **4.84 Request for Testing Accommodations – Timing of Submission**

- (A) Applicants are encouraged to submit a request for testing accommodations as far in advance as practicable. A Request for Testing Accommodations may be submitted before an application to sit for a particular exam is available.
- (B) A Request for Testing Accommodations must be complete and received no later than
  - (1) January 1 for the February California Bar Examination;
  - (2) June 1 for the July California Bar Examination;
  - (3) May 15 for the June First-Year Law Students' Examination; or
  - (4) September 15 for the October First-Year Law Students' Examination.

If a deadline falls on a non-business day, the deadline will be the next business day. Deadlines are not extended or waived for any reason except as permitted in Rule 4.87.

- (C) If a Request for Testing Accommodations is incomplete, and the request is submitted on the final application deadline for a particular examination, the applicant will not have the opportunity to remedy the lack of completeness.
- (D) A Request for Testing Accommodations that is incomplete as of the final filing deadline will be withdrawn.
- (E) If a Request for Testing Accommodations is submitted on the final application deadline for a particular exam, it is possible that there will be insufficient time for the applicant to request or for the State Bar to process a request for review pursuant to Rule 4.88 prior to the administration of the examination.
- (F) Notwithstanding subsection (A), if an applicant's request for testing accommodations is based on a temporary disability, the State Bar may require that the applicant submit a new request closer to the examination date or that a decision regarding the request be deferred until closer to the examination date.

**4.85 Request for Testing Accommodations – Content of Submissions**

- (A) An applicant with a disability seeking testing accommodations must submit a request for testing accommodations on the State Bar’s form.
- (B) If a request does not qualify for the automatic approval process described in Rule 4.83, in addition to the Request for Testing Accommodations form, the applicant must also submit by the application filing deadline, on the State Bar’s form, certification by a qualified professional, and submit any supplemental documentation needed to determine the applicant’s disability-related functional limitations, their specific access needs, and how those needs relate to the testing accommodations requested. Supporting documentation shall be limited to that which is reasonable, limited and narrowly tailored to the information needed.
- (C) **[IF WORKING GROUP RECOMMENDATION IS ADOPTED BY THE CBE]** If an applicant is requesting the same testing accommodations as previously granted on another high stakes exam which includes more than 50 percent extra time for applicants without severe visual impairments, more than 100 percent extra time for applicants with severe visual impairments, and/or a private room, the certification by a qualified professional described in subsection (B) shall include an explanation of why accommodations that allow for 50 percent extra time for applicants without severe visual impairments or 100 percent extra time for applicants with severe visual impairments or testing in a semi-private room or distraction-reduced, are insufficient to meet the purposes set forth in Rule 4.81(A).
- (C) **[IF STAFF RECOMMENDATION IS ADOPTED IN LIEU OF THE WORKING GROUP RECOMMENDATION]** If an applicant is requesting the same testing accommodations as previously granted on another high stakes exam which includes more than 100 percent extra time for applicants and/or a private room, the certification by a qualified professional described in subsection (B) shall include an explanation of why accommodations that allow for 100 percent extra time for applicants or testing in a semi-private room or distraction-reduced, are insufficient to meet the purposes set forth in Rule 4.81(A).
- (D) A request for testing accommodations is considered complete upon the State Bar’s receipt of all required forms and any supporting documentation. A request may be deemed incomplete if the required forms are incomplete, or if the applicant or qualified professional does not respond in full to the required questions. A request that is incomplete by the final examination application deadline shall not be processed for that examination.

**Rule 4.86 State Bar Response to Request for Testing Accommodations**

- (A) An applicant who has submitted a request for testing accommodations in accordance with these rules shall be notified in writing within thirty (30) days of receipt of the request when additional information is required to complete the request. The request for testing accommodations is deemed incomplete if the applicant fails to provide the information requested by the deadlines set forth in Rule 4.84(B).
- (B) In addition to the provisions of Rule 4.82(B), within sixty (60) days of a request for testing accommodations having been deemed complete, the State Bar will notify the applicant in

writing if the request is approved, approved with modifications, denied, or action is pending.

- (C) A notice of denial of a request for testing accommodations or a notice of approval with modifications shall state the basis or bases for the denial or modifications. The notice will include a report from a disability accommodations expert explaining why the requested testing accommodations were modified or denied, and advising the applicant of the right to request a review. The report will be sufficiently detailed to provide the applicant fair notice of the State Bar's reasoning.

#### **Rule 4.87 Emergency Requests for Testing Accommodations**

- (A) An applicant who becomes disabled after a final examination application filing deadline may submit a Request for Testing Accommodations, which must include the forms required by Rule 4.85, with a request that it be considered as an emergency request. Documentation explaining the nature, date, and circumstances of the emergency must be submitted with the request.
- (B) The State Bar must receive the request and supporting documentation at least ten (10) days before the first day of the examination through the Applicant Portal or by physical delivery to the State Bar during regular business hours. Emergency requests received later than this deadline will not be processed.

#### **Rule 4.88 Request for Review of Denial or Approval with Modifications**

- (A) **IF THE WORKING GROUP RECOMMENDATION IS ADOPTED BY THE CBEI** An applicant notified that a Request for Testing Accommodations has been denied or granted with modifications may request a review by the Committee. **Applicants requesting review by the timely filing deadline for the exam have 30 days from the date of the denial or modified grant to submit their request. All other requests for review** must be submitted within fourteen (14) days of the date of the denial or modified grant unless an examination schedule requires a shorter time for Committee review. The applicant may submit additional supporting documentation in support of their request for review.
- (B) Notwithstanding the ~~fourteen (14) day~~ deadlines described in subsection (A), requests for review filed in connection with a particular administration of an examination must be filed no later than the first business day of the month in which the examination is to be administered. Requests received after that date will be considered in connection with a future administration of the examination.
- (C) After reviewing the request for review and supporting documentation, the Director of Admissions may withdraw the prior decision and grant the accommodations requested. The Director must make a determination within fourteen (14) days unless an examination schedule requires a shorter time.
- (D) If the Director of Admissions does not grant the request, the Committee must consider it as soon as practicable. The review shall be based on the original request and supporting



documentation and any supplemental documentation provided by the applicant in connection with the request for review.

- (E) To ensure the Committee is able to act timely, consideration of all requests for review under this section shall be delegated to a **subcommittee**. To assist the subcommittee, to the extent practicable, the subcommittee shall be presented with a recommendation from a disability accommodations expert to inform its decision. This shall be a different expert than the disability accommodations expert who recommended the initial denial or approval with modifications.
- (F) The decision on a request for review is final and shall not be subject to further review by the State Bar or the Committee during the same exam cycle. The applicant may submit a new request for testing accommodations for a different exam cycle.
- (G) After exhausting the review process described in this rule, an applicant may appeal a denial or approval with modifications of testing accommodations to the California Supreme Court in accordance with the California Rules of Court 9.13(d).

#### **Rule 4.89 Subsequent Request for Testing Accommodations**

- (A) Testing accommodations are not automatically applied to subsequent exams upon withdrawal from or failure of an examination. The applicant must submit a new Request for Testing Accommodations before the subsequent, applicable examination application deadline. **The request will be automatically granted if the applicant requests** the same testing accommodation previously granted by the State Bar simply by certifying that **they have** the same disability-related functional limitations that qualified them for the same accommodations for a prior exam.
- (B) If an applicant is seeking different testing accommodations than previously approved by the State Bar, and the applicant has a permanent disability, they may incorporate prior supporting documentation into the new request.
- (C) An applicant with a temporary disability must submit a new Request for Testing Accommodations with all supporting documentation before the examination application deadline.

#### **Rule 4.90 Confidentiality of Requests for Testing Accommodations**

Requests for testing accommodations, documentation submitted in support, and evaluations of requests are confidential.

#### **Rule 4.91 False or misleading information in requests for testing accommodations**

False or misleading information in a request for testing accommodations is considered in determining an applicant's moral character and may result in a negative determination of moral character.

#### **Rule 4.92 Committee of Bar Examiners Oversight**

The Committee of Bar Examiners shall provide oversight to ensure consistent application of standards and processes and to monitor trends in testing accommodations requests, processing, and decisions.