



Certification Testing and the Americans with Disabilities Act: Cases and Judicial Decisions

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WHAT EXACTLY IS GOING ON WITH APPLICANTS?

Are they disabled and legitimate?

Do they just have "test anxiety"?

Are they attempting to obtain an advantage?

How far are entities supposed to go?



Objectives

- Recognize an overview of the Americans with Disabilities Act as they relate to reasonable accommodation for certification testing.
- Discuss exemptions to the Americans with Disabilities Act.
- Discuss recent legal principles and decisions that relate to certification testing to accommodate test takers with disabilities.

“In the past, demands for **unnecessary** or redundant documentation, **burdensome** and expensive repeated professional evaluations, or **irrelevant** evaluative testing unrelated to the ability to demonstrate one’s knowledge or skills on an examination **prevented individuals with appropriately documented disabilities** from pursuing their chosen professions.”

-Thomas E. Perez, Assistant Attorney General for the Civil Rights Division

Agenda

- Overview of the ADA Requirements
 - Disability Definition
- The Testing Entity and Applicable ADA Titles
- Title III
 - Prohibitions
 - Examinations and Courses
- Exemptions from Reasonable Accommodations
- Cases and Judicial Decisions
- Summary

Agenda

Overview of the ADA Requirements
The Testing Entity and Applicable ADA Titles
Title III - Prohibition
Title III – Examinations and Courses
Exemptions from Reasonable Accommodations
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The Americans with Disabilities Act | Overview

1. Is a civil rights law that prohibits disabilities discrimination

2. Gives Individuals with disabilities (IWDs) the same rights and opportunities

3. Was enacted in 1990, amended in 2008

4. Has five titles

The ADA as a Civil Rights Law

Civil rights laws differ from other types of laws & regulations

- Individualized, fact-specific
- Applied to specific individual in a particular situation.
- Terms mean nothing except in context.



Americans with Disabilities Act Amendments Act of 2008 (ADAAA): Purpose

- Reject severely narrow SCOTUS decisions
- Restore intent and protections of the ADA of 1990
- Change language in regulations for wider protection

The Americans with Disabilities Act- Titles

- **Title I:** Employment
- **Title II:** Public Entities
 - States and local governments
- **Title III:** Private Accommodations
 - private businesses, a.k.a. places of public accommodation
- **Title IV:** Telecommunications
- **Title V:** Miscellaneous including protection against retaliation, etc.

What is an ADAAA Disability?

ADAAA's Definitions of Disability

- A physical or mental impairment
 - substantially limits one or more of the major life activities
- A record of such an impairment
- Being regarded as having such an impairment

Physical Impairments

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems:
 - Neurological, Musculoskeletal, Special sense organs
 - Respiratory, Cardiovascular, Reproductive
 - Digestive, Genitourinary, Immune
 - Circulatory, Hemic, Lymphatic, Skin, Endocrine

Mental Impairments

- Any mental or psychological disorder
 - intellectual disability
 - organic brain syndrome,
 - emotional or mental illness, and
 - specific learning disability

Major Life Activities & Major Bodily Functions

Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing, Hearing, eating, sleeping
- Walking, standing, sitting
- Reaching, lifting, bending,
- Speaking, breathing, learning,
- Reading, concentrating, thinking,
- Writing, communicating,
- Interacting with others, working

Major Bodily Function

- Functions of the immune system,
- Special sense organs and skin,
- Normal cell growth, digestive, genitourinary, bowel, bladder,
- Neurological, brain, respiratory, circulatory, cardiovascular, endocrine,
- Hemic, lymphatic, musculoskeletal, and reproductive systems.
- The operation of a major bodily function includes the operation of an individual organ within a body system.

What is Substantial Limitation?

- Broad interpretation maximum extent permitted the ADA
- Individualized, compared to general population
- No extensive analysis
 - Focus is not extent of impairment's substantial limitation
- Could be episodic or in remission, if substantially limiting when active

Determining Substantial Limitation (2)

- Consider condition, manner, or duration to perform major life activity
 - Difficulty, effort, time required, pain experienced
- Focus on limitation, not outcomes or results.
 - Learning disability + effort = high academic success
- Consider non-ameliorative effects of mitigating measures
 - Negative side effects/burdens associated with treatment regimen

Disregard Mitigating Measures

Mitigating measures do not remove disability status- meds & appliances

Use of assistive technology

Reasonable modifications or auxiliary aids or services

Learned behavioral or adaptive neurological modifications

Psychotherapy, behavioral therapy, or physical therapy

What is NOT a Disability

- Transvestism, transsexualism
- Pedophilia, exhibitionism, voyeurism,
- Gender identity disorders not resulting from physical impairments,
- Other sexual behavior disorders
- Compulsive gambling, kleptomania, or pyromania
- Psychoactive substance use disorders d/t current illegal drug use

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The Testing Entity and Applicable ADA Titles

Title I: Employment

- Applies to employers with 15 or more employees
- Provide same employment opportunities to all
- Provide reasonable accommodations to qualified applicants/ employees
- Regulated and enforced by the U.S. EEOC

Title II - Public Services: State and Local Govt.

- Prohibits discrimination by "public entities"
 - state and local government agencies
- Make their programs, services & activities accessible to IWDs
- Regulated and enforced by the U.S. Department of Justice.

Title II: Licensing and Certification

- Prohibits discrimination against qualified IWDs
 - Licensing (law, medicine, nursing), certification (teaching)
- A qualified IWD meets the essential eligibility requirements
- Administer exams in accessible manner
 - Location and auxiliary aids & services
- Not required to eliminate or lower essential* licensing standards

Is a Testing Agency a Title II or Title III Entity?

- Title II entities if:
- Authorized by state governments to
 - control who may practice in a particular professional field.
 - to provide benefits, services, & programs.
- Charged with a duty to protect the public (law, medicine, nursing)
- Note: General non-discrimination requirements cut across the ADA
- Courts indicate the requirements are the same
 - Cases cited are both Title II and III

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Title III: Public Accommodations

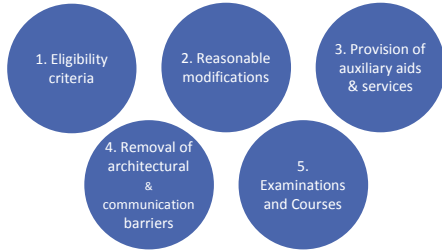
Title III: General Provision

- Prohibits discrimination on the basis of disability in full and equal enjoyment of:
 - Goods
 - Services
 - Facilities
 - Privileges
 - Advantages
 - Accommodations

Title III: General Prohibitions

- Denial of participation
- Participation in unequal benefit
- Separate benefit ...unless necessary ... as effective
- Integrated settings ...as appropriate to IWD
- Opportunity to participate: programs not separate or different
- Administrative methods, standards, or criteria
 - With discriminatory effect or perpetuation

Title III: Specific Prohibitions Categories



1. Eligibility Criteria Requirements

- **General Principle:** No criteria that screen out or tend to screen out
 - from full & equal enjoyment of goods, etc
 - unless necessary for the provision of the services being offered.
- **Safety:** Legitimate safety requirements
 - Necessary for safe operation.
 - Based on actual risks, not on speculation, stereotypes, or generalizations
- **Charges:** No surcharge to cover costs of compliance

2. Reasonable Modifications

- **Make necessary reasonable modifications**
 - Policies, practices, or procedures
 - When necessary to afford goods, services, facilities, privileges, advantages, or accommodations to IWD.
- ...unless demonstrable that it would fundamentally alter the nature of what is offered.

3. Provision of Auxiliary Aids & services

- Take necessary steps to ensure that no IWD experiences
 - Exclusion
 - Denial
 - Segregation or
 - Disparate treatment
- Due to absence of auxiliary aids & services unless it
 - fundamentally alters the nature of the goods, services... or
 - results in an undue burden

3. Auxiliary Aids and Services- Examples Hearing Impairment

- Qualified interpreters on-site or remote
- Notetakers; real-time transcription services
- Written materials; exchange of written notes
- Telephonic materials and devices
- Closed captioning
- Video-based devices
- other effective methods of making information available to the deaf or hard of hearing

3. Auxiliary Aids and Services Visual Impairment

- Qualified readers; taped texts; audio recordings
- Brailled materials and displays; screen reader software
- Magnification software and optical readers
- Large print materials
- Accessible electronic and information technology
- Other effective methods of making visually delivered materials available to individuals who are blind or have low vision

4. Removal of Architectural & Communication Barriers

- Remove architectural barriers in existing facilities
- Communication barriers that are structural in nature
 - where removal is readily achievable
 - easily accomplishable and without much difficulty or expense

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5. Examinations & Courses

Examinations: General Requirements

- Best ensure that results accurately reflect
 - Individual's aptitude or achievement level
 - Whatever factor is being measured
 - Not the individual's limitations

Examinations: Auxiliary Aids & Services

- Provide appropriate auxiliary aids for persons with impaired
 - sensory,
 - manual, or
 - speaking skills
- ...unless ...
 - demonstrable that offering a particular auxiliary aid would
 - would result in an undue burden
 - fundamentally alter measurement of skills or knowledge the exam is intended to test

Examinations: Timeliness

- Timely Response to Requests
- Timely Review and Reply
- Time For Applicant's Response
- Non-disparate Examination Timeline and Frequency

Examination-Documentation Requests

Must be reasonable and limited to the need for the requested testing accommodations.

Narrowly tailored to the information needed

Depends on	Nature of the disability
	Specific accommodation requested

Examinations-Appropriate Documentation

- Recommendations of qualified professional
 - Is licensed or otherwise properly credentialed
 - Expertise in area of specific disability
 - Made an individualized assessment of candidate
 - Generally accepted without further inquiry.
- Proof of past testing accommodations
- Results of psycho-educational or other professional evaluations
- History of diagnosis
- Statement of his or her history regarding testing accommodations

Qualified Professionals & Past Accommodations

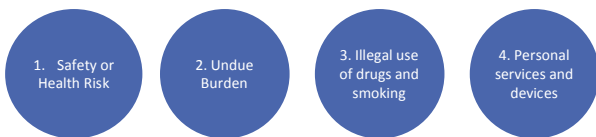
- Qualified professional
 - Is licensed or otherwise properly credentialed
 - Expertise in area of specific disability
 - Made an individualized assessment of candidate
 - Generally accepted without further inquiry.
- Past Testing Accommodations
 - Similar test
 - Certify current need for same accommodations due to disability
 - Generally, no further documentation requested from the candidate

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Exemptions From/Extent of Accommodation

Exemptions to Reasonable Accommodation



Exemption: Safety/Direct Threat

- Reason: If a direct threat to the health or safety of others
- Method: Individualized assessment, based on reasonable judgment, best available objective evidence
 - Ascertain the nature, duration, and severity of the risk
 - Probability of potential injury
 - Possibility of mitigating risk
- Note: If individual appears to pose direct threat because of a disability
 - Eliminate or reduce the risk to acceptable level
 - Reasonable accommodation or reasonable modification of policies, practices and procedures

Exemption: Undue Hardship/Burden

- What constitutes undue burden?
 - Significant difficulty or expense to provide the accommodation
 - Fundamental alterations to a program or service
- Relevant Factors
 - Nature and cost of the accommodation
 - Financial resources of the facility/entity
 - Type of operation
- Does not necessarily relieve an entity of obligation

Exemption: Current Illegal Use of Drugs/Smoking

- Current use removes ADA protection
- If individual has a Hx, but
 - Has no current illegal use of drugs
 - Has successfully completed a supervised drug rehabilitation program or
 - Has otherwise been rehabilitated successfully
 - Is participating in a supervised rehabilitation program
- Then
 - No Discrimination Permitted
- Health and drug rehabilitation services not included

Exemption: Personal Services and Devices

- Public accommodations not required to provide personal services or personal devices.
 - Wheelchairs, prescription eyeglasses, hearing aids.
- Unless typically provided by the entity

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Cases and Judicial
Decisions



“Credentialing examinations... are increasingly the gateway to educational and employment opportunities, and the ADA demands that each individual with a disability have the opportunity to fairly demonstrate their abilities so they can pursue their dreams... the Justice Department’s participation in this action is critical to protecting the public interest in the important issues raised in this case.”

Judicial Decisions about Mental Health Eligibility Question

- **Ellen S. v. Florida Board of Bar Examiners (1994)**
 - Did candidate seek treatment for a nervous, mental, or emotional disorder or had been diagnosed as having such a condition?
 - To violate ADA, defendant need not have knowledge of plaintiff’s disability
- **Clark v. Virginia Board of Bar Examiners (1994)**
 - Have you been treated for mental illness or obtained counseling in past 5 years?
 - Unless applicant would pose a direct threat to her clients, failure to answer open-ended mental health inquiry did not prevent her from becoming a member of the bar.

Mental Health Questions-Medical

- **Kirbens v. Wyoming State Board of Medicine (1999)**
 - Physician diagnosed with bipolar affective disorder, narcissistic personality disorder
 - License revoked
 - Claimed misconduct resulted from his disabilities
 - Sought judicial review of the revocation of his license²⁹
 - Supreme Court of Wyoming ruled:
 - Physician who poses a risk to the health or safety of patients was not a “qualified individual” with a disability within the meaning of the ADA
- Can risk be mitigated?

Principles re Mental Health Eligibility Questions

- Broad questions about mental illness not allowed
- Specifically address presently occurring illness.
- Question must seek demonstrate current impairments
- Reasonable measure to protect the public

Romberg v. National Board of Medical Examiners (NBME) (2011)

- Plaintiff Romberg: Dyslexia
- NBME: denial of reasonable accommodation
- DOJ Intervention
- Settlement Agreement: 4 parts
 - Substantial limitation: carefully consider all evidence
 - Reasonable testing accommodation: dbl. time, separate testing area
 - Limit of documentation request re impairment
 - The NBME will carefully consider recommendations of qualified professionals

Department of Fair Employment & Housing v. LSAC Inc. et al (2014)

- Widespread and systemic deficiencies in the way LSAC requests by IWD
- Routine denial of requests even with thorough documentation
- “Flagging” test scores obtained with certain testing accommodations
- Using “mitigating measures” to deny accommodation
- One Plaintiff:
 - LSAC refused her requested testing accommodations on three separate occasions.
- Violation of Title V

Denials & Reporting Test Scores

- Affirmative steps to ensure the LSAT is accessible to IWD
- Pay \$7.73 million in penalties & damages
 - Report accommodated students' scores in same way as others.
 - Ends flagging
 - Pay \$55,000 in civil penalties to the DOJ, \$7,675,000 in damages, and \$1,000,000 in attorneys' fees
- Further information at
 - <https://www.lsac.org/lsat/lsac-policy-accommodations-test-takers-disabilities>

BONNETTE v. DISTRICT OF
COLUMBIA COURT OF APPEALS,
796 F.Supp.2d 164 (2011)

Plaintiff: Bonnette Background

- B.A. , M.Div., Joint J.D. and M.A.
- Retinopathy, vision progressively deteriorated over 30 years
- Total visual impairment in right eye since childhood
- Currently no light perception in either eye, is totally blind, cannot read standard print
- Began using JAWS in early 1990s to supplement deteriorating vision

Defendant: National Conference of Bar Examiners

NCBE develops standardized examinations for sale

The MBE: secure, standardized, paper& pencil, owned by NCBE

Previously used questions often repeated for performance comparison (Equating)

Security critical to prevent compromise/unauthorized disclosure
5300,000 and hundreds of hours/single form of an MBE exam

High security procedures during test administration

NCBE's Many Accommodations for V.I. Examinees

- Large print paper version
 - Text up to 72-point font
 - Also available in reverse white-on-black contrast
- Paper version with closed circuit television magnification
- Braille version
- Audio CD with two available speeds
 - Each question & answer choices on a separate track for easy replay
- A human reader

Standard Accommodations Provided for DC Bar

- Brailled and large print examinations
- Audio cassettes/CDs
- Double time
- Reader assistance
- Extra lighting
- Permission to use a dictating device and laptop computer
- No visually impaired person ever allowed computer-based test on MBE

Feb. 2011, Bar Exam: Plaintiff's Accommodation Requests

- Use of computer with JAWS
- Double time
- Separate testing room
- A scribe to fill out paper work or computerized answer sheets
- Stopped bottles of drinking water at arms length

Defendant's Response

- All requests granted for MEE & MPT portions, but not MBE
- Denied request for use of JAWS for the MBE
 - Disallowed by NCBE
- Offered use of an audio CD or
- A human reader who is an attorney

Accommodation Request for MBE-July 2011

- Requested use of a computer with JAWS
- After negotiations, Committee offered
 - Audio CD, live reader
 - Brailled or large print versions
 - A sample CD in advance
 - Meet with attorney/reader in advance
 - Additional testing time beyond double time requested
 - Additional rest breaks.
- NCBE denied JAWS for MBE. Bonnette filed suit for injunctive relief

Limitations of Offered Accommodations

- Not competent in Braille for complex/academic text in exam setting
- Not familiar with reading with CD. Never used audio CD for exam
- Cannot read by character, word, phrase, line, sentence, paragraph, & page w/ CD
- Been using JAWS for vast majority of work-related reading
- Only used human readers to fill forms, read small amounts of hand-written material

Limitations of Human Readers

Human readers

- Often misunderstood what, where, how she wanted them to read
- Mispronounced or misread words
- Halted speech when unfamiliar technical legal term.
- Performance deteriorated over long hours of reading in bar exam
- Had difficulty reading consecutive sentences in reverse order
- Ultimately caused Bonnette to break concentration & shift attention from material to reader performance

Why JAWS?

Plaintiff can:

- Read aloud text on computer screen
- Use key commands to quickly & easily navigate document independently
- Skim text
- Jump to particular sections or passages
- Repeat a word or sentence
- Spell words
- Control reading speed
- Have independent, non-visual access to reading, similar to before vision loss

NCBE: We're Not the Right Defendant

- An entity is required to "offer" the examination
- NCBE only sold the testing materials
- NCBE not involved
 - In processing or evaluating applications
 - Deciding individuals requests for accommodations
 - In interactions with Bonnette in connection with any request for accommodation

Court's Response: Exercise Control

- NCBE exercises control over the manner in which the examination is given
- Unlike "merely reviewing"
 - Binno v. American Bar Association

NCBE: Accommodations Offered Complied with ADA List

- The accommodations offered to plaintiff meet the legal requirements
- Is included on lists of auxiliary aids described in the ADA and its regs
 - —NCBE also offered using a human reader or an audio CD with extra time.

Court's Response: ADA List not Exhaustive

- Lists are illustrative, not exhaustive
- That others have used them does mean they are accessible to the Plaintiff
- Obligation not fulfilled just by offering some or all the auxiliary aids in statute or regs.
- Congress explicitly contemplated:
 - Auxiliary aids & services "keep pace with rapidly changing technology of the times."

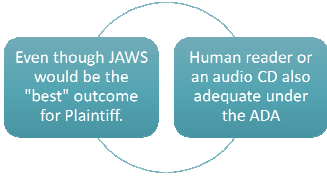
NCBE: No ADA Mandate

- The ADA does not require entities to give an examinee her requested accommodation.

The Court: Yes, but Effectiveness is Key

- Nothing dictates that an entity *must* provide type of auxiliary aid or service requested
- Only to "give primary consideration to the requests of the IWD"
- Request "need not be honored"
 - If "another effective means of communication exists."
- "Effectiveness" not judged on an absolute scale, but contextual
- Other factors
 - the method of communication used by IWD
 - the nature, length, and complexity of the communication involved

NCBE:
Accommodations
Offered are
Adequate



Court:
For Some, but not this Plaintiff

- Plaintiff has documented hx of difficulties with human readers
- Unnatural method of reading
 - Distraction
 - Significant disadvantage
- Offer of Attorney/reader, & opportunity to meet reader before exam
 - Difficulties of learning, adjusting to speech patterns of reader during exam
- Reading by human reader is less automatic
 - May disrupt critical reasoning skills, essential for taking the MBE

NCBE:
Plaintiff Previously Used Same Accommodations

- Plaintiff has history of using human readers on the
 - LSAT
 - Law school, and
 - The California bar exam
- Demonstrates appropriateness of accommodation

Court: Past Option not Necessarily Best Option

- That Plaintiff was required to rely on or *could* use human readers does not mean
 - Human readers would make the MBE accessible to her
 - It would best ensure that score reflected achievement level
 - Rather than her visual impairment
- Auxiliary aids should
 - Allow performance at achievement level, not just to pass
 - Be provided to protect privacy & independence of IWD
- JAWS offers more control & independence than a human reader, CD
- Plaintiff not experienced w/ audio CD, can use JAWS almost like sighted reader
- Unfamiliar reading method diverts mental processing power from content

NCBE: Plaintiff Cannot be Certain JAWS is Better

- Plaintiff cannot be certain that JAWS will be better than audio CD or a human reader
 - Social science research suggests blind individuals' preferences for a particular testing format do not always align with their performance

Court: Plaintiff's Expert Opinions Differ

- Studies cited not conclusive, do not address present circumstances
- Plaintiff's experts persuasive & credible
 - Evaluated her personally.
 - Concluded she would be disadvantaged
 - If required to use human reader or audio CD for the MBE
- NCBE presented no expert testimony rebutting the findings

NCBE:
It Will Never End!

- What if plaintiff fails the July 2011 administration
 - Seeks to retake MBE later with a different version of software

Court's Response:
Not so!

- ADA does not require entities to offer requested accommodation in every instance
- Plaintiff's request is limited
 - Wants to take MBE using a laptop equipped with JAWS
 - In addition to other accommodations previously granted
- Once Defendants comply, NCBE will have satisfied ADA obligations

NCBE:
Implementing JAWS is an Undue Burden

- Undue cost administrative burden of administering exam securely
- Significant risks in moving secure, paper/pencil exams to laptops
 - Questions being copied onto examinees' hard drive after exams
 - Inability to tell if exam was copied electronically from NCBE laptops
- \$5000 per examinee, + cost of hardware, software, shipping & time
- Fiscal 2010, income approx. \$12.3 mil., & expenses approx. \$12.1 mil.

The Court:
Not Really

- Valid security concerns about MBE in computer-based format
- However, NCBE capable of ensuring same security
- \$5000 not undue burden for org with budget > \$12 million
- Court of Appeals also offered to cover costs
- Court of Appeals' operations budget = \$185,660,000 in 2011
- NCBE also acknowledged possible risks with paper versions

Final Ruling

- The balance of the equities tips in Plaintiff's favor
- The public interest supports the issuance of a preliminary injunction
- Ordered NCBE to offer plaintiff opportunity to take MBE using JAWS

What Do We Now Know?

- The ADA is a civil rights law, and therefore highly specific
- Designed to even the playing field
- Give exams in a place and manner that is accessible
- Some exceptions exist, but do not completely absolve of responsibility
- Defer to the opinions of qualified experts
- Establish policies that ensure timeliness and consistencies

So, Did The
Plaintiffs Pass?



Questions?
