



# Tests and Testing Accommodations Under the Americans with Disabilities Act

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## Summary

Tests and examinations are widely used to decide whether a person is qualified to take up a particular occupation, advance professionally, or attend a certain educational institution. These tests can pose unique challenges to individuals with disabilities. Under the Americans with Disabilities Act (ADA), an entity that offers an exam without providing accommodations to examinees with disabilities may be liable for disability-based discrimination.

The ADA applies to both public and private educational and employment-related testing, and Section 309 of the ADA requires persons offering certain examinations to do so “in a place and manner accessible to persons with disabilities.” The Department of Justice (DOJ) is responsible for implementing this provision, and a series of federal court decisions have held that the DOJ’s current interpretation of Section 309 is entitled to judicial deference. Under the DOJ regulations, private testing entities must provide individuals with disabilities with accommodations that “best ensure” that the test accurately assesses the individual’s aptitude “or whatever other factor the examination purports to measure.” Factors that may be relevant to this analysis include the accommodations’ capacity to help the plaintiff overcome the limitations created by her disability, their utility given the requirements and rigorousness of the particular exam at issue, and current technology.

However, not every test-taker with a disability is entitled to accommodations under the ADA. The ADA’s protections only apply to test-takers who establish that their impairments fall within the ADA’s definition of a “disability.” In the past, courts had narrowly interpreted the term “disability.” In the field of educational and professional testing, this often meant that people with learning disabilities, attention deficit disorders, other health impairments, and cognitive disorders could not establish that they had a “disability” for the purposes of the ADA if they had developed methods of coping with their impairments.

Concerned that narrow judicial interpretations of the term “disability” prevented individuals with disabilities from receiving necessary accommodations under the ADA, Congress enacted the ADA Amendments Act (ADAAA), P.L. 110-325, in 2008. The primary purpose of the ADAAA was to ensure that the courts and executive agencies adopted a more expansive interpretation of “disability.” The ADAAA is widely viewed as shifting the focus in an ADA case from whether the plaintiff is entitled to the ADA’s protection to whether the defendant has complied with the ADA. For example, the ADAAA prevents courts from taking into account a test-taker’s coping mechanisms when determining whether that test-taker is entitled to the ADA’s protections. Accordingly, people with learning disabilities, attention deficit disorders, other health impairments, and cognitive disorders are more likely now to qualify for testing accommodations.

This report discusses recent federal court cases determining who is entitled to testing accommodations under the ADA and whether a particular testing accommodation is ADA-compliant. It emphasizes areas where the ADAAA has affected the analysis or outcome in a case. It also identifies new legal questions being raised in federal court about standardized tests and individuals with disabilities. Although the ADA does not require defendants to provide accommodations when doing so would impose an undue hardship, this report does not discuss the “undue burden” defense at length. It also does not discuss testing accommodations required under the Individuals with Disabilities Education Act (IDEA).

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## Introduction

Tests and examinations can pose unique challenges to individuals with disabilities and, if accommodations are not made, prevent these individuals from advancing professionally or academically. To ameliorate these challenges, the Americans with Disabilities Act (ADA)<sup>1</sup> prohibits the administration of tests in a manner that discriminates against people with disabilities. This prohibition applies to most educational and employment testing or assessment programs, regardless of whether the programs are public or private. In general, to comply with the ADA, entities offering examinations must provide testing accommodations to those examinees who have disabilities and need accommodations in order to demonstrate their skill or aptitude in the area tested.<sup>2</sup>

However, examinees are entitled to accommodations under the ADA only if they have a “disability” for the purposes of the statute. In the past, courts interpreted the term “disability” rather narrowly.<sup>3</sup> Concerned that this construction diminished the reach of the ADA’s protections, Congress enacted the ADA Amendments Act (ADAAA), P.L. 110-325, in 2008. The ADAAA sought to expand judicial and agency interpretations of the ADA’s definition of disability so as to ensure that the ADA provided broad antidiscrimination protection.<sup>4</sup> The ADAAA effectively shifted the focus in many ADA cases from whether the plaintiff is entitled to the ADA’s protection to whether the defendant has complied with the ADA.<sup>5</sup> This shift is expected to improve the likelihood that individuals with learning disabilities, attention deficit disorders, and other health impairments are entitled to testing accommodations under the ADA.<sup>6</sup>

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<sup>1</sup> 42 U.S.C. §§12101 et seq. The ADA was intended to eliminate discrimination against individuals with disabilities, and, more specifically, to assure “equality of opportunity, full participation, independent living, and economic self-sufficiency” for these individuals. 42 U.S.C. §12101 (a)-(b). As a result, it is often characterized as a broad civil rights act prohibiting discrimination against individuals with disabilities.

<sup>2</sup> The ADA does not, however, require defendants to provide an individual with a disability with accommodations when doing so would impose an undue hardship. 42 U.S.C. §12111(10). An undue hardship may exist where, *inter alia*, the accommodations fundamentally alter the nature of the test, the significant lowering or modification of the standards, or the imposition of a substantial financial and administrative burden on the defendant. *See id.*; *Southeastern Comm’y Coll. v. Davis*, 442 U.S. 397, 413 (1979); *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987). If a defendant successfully raises the “undue burden” defense, it is treated as an “affirmative defense”—that is, it shields a defendant found in violation of the ADA from liability.

<sup>3</sup> *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Kirkingburg v. Albertson’s Inc.*, 527 U.S. 555 (1999); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002).

<sup>4</sup> For a more detailed discussion of the ADA Amendments Act, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Emily C. Barbour and James V. DeBergh.

<sup>5</sup> *See Jenkins v. Nat’l Bd. of Med. Examiners*, 2009 Fed. App. 0117N, at \*10-11 (6th Cir. 2009) (predicting that the ADAAA’s enactment “heightens the importance of the district courts’ responsibility to fashion appropriate accommodations”); Judith A. Gundersen, “The ADAAA and the Bar Exam,” 78 THE BAR EXAMINER 40, 43 (May 2009) [http://www.ncbex.org/uploads/user\\_docrepos/780209\\_Gundersen.pdf](http://www.ncbex.org/uploads/user_docrepos/780209_Gundersen.pdf) (predicting that the ADAAA shifted the focus “from whether an applicant has a disability within the meaning of the ADAAA to whether an applicant with a qualifying disability is entitled to accommodations and, if so, which accommodations are appropriate”).

<sup>6</sup> *See John P. Heekin, ADHD and the New Americans with Disabilities Act: Expanded Legal Recognition for Cognitive Disorders*, 2 WM. & MARY POL’Y REV. 171, 172 (2010); NATIONAL CENTER FOR LEARNING DISABILITIES, AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (ADAAA), <http://www.nclld.org/on-capitol-hill/federal-laws-aamp-ld/adaaa-a-section-504/americans-with-disabilities-act-amendments-act-adaaa> (Mar. 12, 2009).

Because the ADAAA lowers the initial “disability” hurdle in ADA cases, some expect that the ADAAA will increase the judiciary’s role in determining the adequacy of—or outright prescribing—testing accommodations.<sup>7</sup> Section 309 of the ADA prescribes the general standard by which the sufficiency of particular testing accommodations are assessed.<sup>8</sup> Section 309 requires persons and entities that offer examinations or courses “related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes” to offer them “in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements.”<sup>9</sup> The Department of Justice (DOJ), which is charged with implementing Section 309, has promulgated regulations stating that private testing entities must provide individuals with disabilities with accommodations that “best ensure” that the test accurately assesses the individual’s aptitude “or whatever other factor the examination purports to measure.”<sup>10</sup> In a series of recent decisions, federal courts have deferred to this interpretation of Section 309, but a petition to review one of these decisions is now pending with the U.S. Supreme Court.<sup>11</sup>

This report discusses the recent federal court cases determining who is entitled to testing accommodations under the ADA and whether a particular testing accommodation is ADA-compliant. It emphasizes areas where the ADAAA has affected the analysis or outcome in a case. It also identifies new questions about the liability of an entity that requires, but does not administer, a test that purportedly discriminates against disabled examinees. Although the ADA does not require defendants to provide accommodations when doing so would impose an undue hardship, this report does not discuss the “undue burden” defense.<sup>12</sup> It also does not discuss testing accommodations required under the Individuals with Disabilities Education Act (IDEA).<sup>13</sup>

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<sup>7</sup> See *Jenkins v. Nat’l Bd of Medical Examiners*, 2009 U.S. App. LEXIS 2660, at \*10 (6th Cir. February 11, 2009).

<sup>8</sup> 28 U.S.C. §12189. See also *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. at 56, 236 (Sept. 15, 2010) (stating that although the Department of Justice has issued regulations implementing Section 309 in the context of *private* testing entities, Section 309 applies to both public and private entities and therefore the regulations are “useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations”).

<sup>9</sup> 28 U.S.C. §12189.

<sup>10</sup> 28 C.F.R. §36.309(b)(i).

<sup>11</sup> *Nat’l Conf. of Bar Examiners v. Enyart*, Petition for Writ of Certiorari, No. 10-1304 (Apr. 25, 2011). The status of this petition can be monitored at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1304.htm>.

<sup>12</sup> See *supra* footnote 2.

<sup>13</sup> Unlike the ADA, the Individuals with Disabilities Education Act is a federal Spending Clause statute specifically designed to ensure that “a free appropriate public education” is available to children with disabilities between the ages of 3 and 21. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1). Under IDEA, school districts receiving federal funds under the statute must create an “individualized education program” (IEP) for each child with a disability. *Id.* at §1414(d). The IEP must include “a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and districtwide assessments.” *Id.* at §1414(d)(1)(A)(i)(VI). As a result, school districts receiving federal funds under IDEA must provide a child with an IEP with the precise accommodations identified in that program. However, unlike the ADA, IDEA only applies to tests administered in a school setting to children under the age of 21. For more on IDEA, see CRS Report R40690, *The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues*, by Emily C. Barbour.

## Who is Entitled to Testing Accommodations?

An individual falls within the scope of the ADA's protection if he has a "disability" for the purposes of the ADA. The ADA defines the term "disability" as:

- A "physical or mental impairment" that "substantially limits" one or more of the "major life activities" of such individual;
- A record of such an impairment; or
- The state of being regarded as having such an impairment.<sup>14</sup>

### Pre-ADAAA Decisions

Before the ADAAA, courts interpreting the ADA viewed the phrases "*substantially* limits" and "*major* life activities" as sharply confining the term "disability."<sup>15</sup> This meant that people with disabilities often struggled to establish in court that their disability entitled them to protection from discrimination under the ADA. In cases alleging discrimination in the administration of tests and examinations, plaintiffs with learning disabilities and attention deficit disorders frequently had their claims under the ADA dismissed because they failed to establish that their impairments "substantially limited" one of their "major life activities." Courts viewed a plaintiff's record of academic achievement or methods of coping with a disability as evidence that the plaintiff's impairment was not *substantially* limiting.

For example, in *Gonzales v. National Board of Medical Examiners*,<sup>16</sup> the U.S. Court of Appeals for the Sixth Circuit held that a medical student's learning disabilities did not "substantially limit" one or more of his major life activities. The student, the Sixth Circuit reasoned, was not entitled to testing accommodations under the ADA because he was able to get good grades and achieve average standardized test scores *despite* his learning disabilities—that is, his impairments did not "substantially limit" one of his major life activities.<sup>17</sup> Similarly, in *Price v. National Board of Medical Examiners*,<sup>18</sup> the U.S. District Court for the Southern District of West Virginia determined that medical students with learning disabilities did not have a disability under the ADA because the students' histories of "significant scholastic achievement" proved that they had a capacity to learn "at least as well as the average person."<sup>19</sup>

Moreover, even when a plaintiff did not have a strong academic history, it might still be difficult to sufficiently link the plaintiff's academic difficulties with a "substantially limiting" impairment.

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<sup>14</sup> P.L. 101-336, §3 (1990).

<sup>15</sup> *See, e.g.,* *Sutton v. United Air Lines*, 527 U.S. 471, 481 (1999) (holding that an individual has a disability within the meaning of the ADA only if the individual is substantially impaired in one or more major life activities when that individual is benefitting from the use of corrective measures); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). *See also* *Gonzales v. Nat'l Bd. of Med'l Examiners*, 225 F.3d 620, 630 (6th Cir. 2000) (describing *Sutton* as requiring courts to determine whether individuals are disabled under the ADA by assessing those individuals "in their corrected state").

<sup>16</sup> *Gonzales v. Nat'l Bd. of Med'l Examiners*, 225 F.3d 620 (6th Cir. 2000).

<sup>17</sup> *See id.* at 626-27, 630.

<sup>18</sup> 966 F.Supp. 419 (S.D. W. Va. 1997).

<sup>19</sup> *Id.* at 427-428.

For example, in *Gonzalez v. Supreme Court of Texas*,<sup>20</sup> the U.S. District Court for the Western District of Texas rejected the argument that the plaintiff's Attention Deficit Hyperactivity Disorder (ADHD) "substantially limited" him in a major life activity because, it found, his ADHD caused problems that were not meaningfully distinguishable—in type or degree—from the problems that face the majority of people coping with work and academic life.<sup>21</sup>

Nevertheless, a few plaintiffs in the pre-ADAAA era were able to establish that their learning disabilities substantially limited them in one or more major life activities. In *Bartlett v. New York State Board of Bar Examiners*, for example, the U.S. District Court for the Southern District of New York found that the ADA protected a law student with dyslexia who was seeking testing accommodations on the New York State Bar Examination.<sup>22</sup> In that case, the court held that the plaintiff's dyslexia substantially limited her in the major life activity of reading even though the plaintiff had developed mechanisms for coping with her dyslexia so that she could function academically and obtain both a Ph.D. and a law degree.<sup>23</sup>

## Post-ADAAA Judicial Decisions

Concerned that narrow judicial interpretations of the term "disability" prevented individuals with disabilities from receiving necessary accommodations under the ADA, Congress enacted the ADAAA in 2008. The primary purpose of the ADAAA was to ensure that the courts and executive agencies defined "disability" more expansively so that the ADA provided a "broad scope of protection."<sup>24</sup> According to the ADAAA, a more inclusive interpretation comported with Congress's intent when it enacted the ADA.

To achieve its goal, the ADAAA preserved the ADA's three-part definition of "disability" but defined "major life activities"<sup>25</sup> and articulated new rules for the construction of the term "substantially limits."<sup>26</sup> Because of these changes, a person with an impairment that substantially limits, *inter alia*, learning, reading, concentrating, and thinking is a person with a disability for the purposes of the ADA.<sup>27</sup> Moreover, courts must assess whether an impairment is "substantially limiting" without regard to the ameliorative effects of mitigating measures, including learned behavioral or adaptive neurological modifications.<sup>28</sup> The ADAAA also states that:

- The definition of disability must be construed in favor of broad coverage to the maximum extent permitted by the terms of the act; and

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<sup>20</sup> No. A-04-CA-750-SS, 2006 U.S. Dist. LEXIS 100348 (W.D. Tex. Jan. 31, 2006)

<sup>21</sup> *Id.* at \* 23.

<sup>22</sup> *Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001).

<sup>23</sup> *See id.*

<sup>24</sup> P.L. 110-325, §2(a). The findings of the ADA Amendments Act state that certain Supreme Court decisions had articulated too narrow a definition of "disability." These decisions, *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), had effectively limited the impairments encompassed by the term "disability" to those that "prevent[ed] or severely restrict[ed]" the affected individuals from doing activities "of central importance to most people's lives" and were not adequately ameliorated by mitigating measures (such as coping mechanisms).

<sup>25</sup> 42 U.S.C. §12102.

<sup>26</sup> *Id.* at §12201.

<sup>27</sup> *Id.* at §12102.

<sup>28</sup> *Id.* at §12102(4).

- The term “substantially limits” must be interpreted consistently with the findings and purposes of the ADA Amendments Act.<sup>29</sup>

During the House debate, Representative Pete Stark stated that people with specific learning disabilities, such as dyslexia, have disabilities for the purposes of the ADA. The ADAAA, he said, “will reestablish coverage for these individuals” and ensure that the ADA’s definition of disability “is broadly construed and the determination does not consider the use of mitigating measures.”<sup>30</sup> Similarly, Representative George Miller described the ADAAA as supporting the finding in *Bartlett v. New York State Board of Bar Examiners*,<sup>31</sup> that an individual should not be penalized due to adaptive strategies that may lessen the impact of the disability.

The ADAAA went into effect January 1, 2009. Because the courts do not generally apply a new statute to cases already pending,<sup>32</sup> few federal cases have interpreted the scope of the ADA’s protection in light of the ADAAA’s amendments. However, when the plaintiff is bringing a claim under the ADAAA solely for injunctive relief, at least one court has held that the ADAAA does apply retroactively.<sup>33</sup> In that case, *Jenkins v. National Board of Medical Examiners*,<sup>34</sup> the Sixth Circuit reasoned that because the plaintiff was only seeking accommodations for an examination in the future, he was seeking *prospective* relief, and, therefore, the retrospective application of the ADAAA would not work an injustice to the defendant.<sup>35</sup> Having found that the ADAAA’s standards applied in *Jenkins*, the Sixth Circuit remanded the case to the district court to determine whether the plaintiff—a medical student with a reading disorder—was a person with a disability under the ADA as amended.<sup>36</sup>

Despite its infancy, the ADAAA is expected to shift the analysis in an ADA case from whether the plaintiff is entitled to the ADA’s protection to whether the defendant has complied with the ADA. In practice, this shift may delay the disposition of these cases from the summary judgment stage to the merits. Many commentators also predict that people with learning disabilities, attention deficit disorders, other health impairments, and cognitive disorders are more likely to qualify for testing accommodations because of the ADAAA.<sup>37</sup> This view draws support from both the plain

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<sup>29</sup> *Id.* at §12102(4).

<sup>30</sup> 154 CONG. REC. H. 8291 (daily ed. September 17, 2008).

<sup>31</sup> *Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001). *See also supra* notes 22-23 and accompanying text (discussing the holding in *Bartlett* as one of the relatively rare decisions supporting a learning disabled student’s claim for testing accommodations under the ADA).

<sup>32</sup> *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (stating that the law does not favor retroactivity).

<sup>33</sup> *Jenkins v. Nat’l Bd of Medical Examiners*, 2009 U.S. App. LEXIS 2660 (6th Cir. February 11, 2009).

<sup>34</sup> 2009 U.S. App. LEXIS 2660 (6th Cir. February 11, 2009) (finding that the ADAAA applied to a suit for injunctive relief in which the plaintiff challenged the National Board of Medical Examiners’ denial of his request for testing accommodations on the U.S. Medical Licensing Examination). *See also Villanti v. Cold Harbor Cent. Sch. Dist.*, 733 F. Supp.2d 371, 377 (E.D.N.Y. 2010) (distinguishing the Sixth Circuit’s decision in *Jenkins* from suits for monetary damages); *Dave v. Lanier*, 681 F. Supp.2d 68, 72-73, n.3 (D.D.C. 2010) (distinguishing the holding in *Jenkins* from suits for injunctive relief when the injunction would effectively remedy an act that occurred prior to the ADAAA’s enactment).

<sup>35</sup> *Jenkins*, 2009 U.S. App. LEXIS at \*1.

<sup>36</sup> *Id.* at \* 11.

<sup>37</sup> *See, e.g.,* John P. Heekin, *ADHD and the New Americans with Disabilities Act: Expanded Legal Recognition for Cognitive Disorders*, 2 WM. & MARY POL’Y REV. 171, 172 (2010) (“Given the significantly broader scope of protection afforded by the ADA Amendments Act of 2008, requests for better accommodations made by students... diagnosed with ADHD may be more likely to receive judicial support.”); NATIONAL CENTER FOR LEARNING DISABILITIES, AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (ADAAA), [http://www.nclld.org/on-capitol-hill/federal-laws-\(continued...\)](http://www.nclld.org/on-capitol-hill/federal-laws-(continued...))



language of the statute and its legislative history, but few federal courts have had an opportunity to consider this demographic's eligibility for testing accommodations under the ADAAA.

## What Testing Accommodations Are Required?

In addition to questions about whether a test-taker has a disability under the ADA, courts are also asked to assess the adequacy of the testing accommodations being provided. In particular, by broadening the ADA's coverage, the ADAAA may have heightened the role of district courts in determining what accommodations are necessary to satisfy the requirement in Section 309 of the ADA that examinations be "accessible" to people with disabilities.<sup>38</sup>

Section 309 of the ADA requires persons, such as testing companies, that offer examinations or courses "related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."<sup>39</sup> This requirement was intended to assure that people with disabilities were not foreclosed from educational or professional opportunities on the basis of exams that failed to measure their skill or aptitude in the area being tested.<sup>40</sup> Department of Justice regulations implement Section 309.<sup>41</sup> These regulations require private entities offering examinations to assure, *inter alia*, that:

The examination is selected and administered so as to *best ensure* that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure...)<sup>42</sup>

The DOJ specifies that required modifications to a test "may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is provided."<sup>43</sup> Moreover, a private entity administering a test may be required to provide "appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden."<sup>44</sup> These aids and services may include:

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(...continued)

aamp-ld/adaaa-a-section-504/americans-with-disabilities-act-amendments-act-adaaa (Mar. 12, 2009) ("Under the law, learning, reading, thinking and concentrating are all considered major life activities among others listed in the law. The ADAAA requires a broader interpretation of disability by schools, testing agencies and employers than the original law. As a result, individuals with LD should have an easier time qualifying for accommodations...").

<sup>38</sup> See *Jenkins*, 2009 U.S. App. LEXIS at \*10.

<sup>39</sup> 42 U.S.C. §12189.

<sup>40</sup> H.R. Rep. No. 101-485, pt. 3, at 68-69 (1990).

<sup>41</sup> 28 C.F.R. §36.309.

<sup>42</sup> *Id.* at §36.309(b)(i) (emphasis added).

<sup>43</sup> *Id.* at §36.309(b)(vii).

<sup>44</sup> *Id.* at §36.309(b)(viii).

- Taped examinations, interpreters, or other effective methods of making orally delivered materials available to individuals with hearing impairments;
- Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities;
- Transcribers for individuals with manual impairments; and
- Other similar services and actions.<sup>45</sup>

A private testing entity may request documentation regarding a test-taker's disability, but that request must be "reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested."<sup>46</sup> Entities administering examinations must give considerable weight in their consideration of a request for accommodations to accommodations that were provided in testing situations under an Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act or a plan adopted pursuant to section 504 of the Rehabilitation Act of 1973 (often referred to as a Section 504 Plan).<sup>47</sup> Thirdly, the DOJ requires entities administering examinations to respond to requests for accommodations in a "timely manner ... to ensure equal opportunity for individuals with disabilities."<sup>48</sup>

In 2011, a petition for writ of certiorari was filed with the U.S. Supreme Court in the case of *National Conference of Bar Examiners v. Enyart*.<sup>49</sup> That petition, filed by the National Conference of Bar Examiners (NCBE), seeks review of a Ninth Circuit decision upholding an injunction that required the NCBE to permit Stephanie Enyart—a legally blind law student—to take the Multistate Professional Responsibility Exam and the Multistate Bar Exam with the aid of technology that would read aloud the text and adjust its size, font, and color.<sup>50</sup> While the State Bar had no problem with these accommodations, the National Conference of Bar Examiners (NCBE) refused to permit them. Instead, NCBE offered to provide one or more of the following accommodations: a human reader; an audio CD of the test questions; a braille version of the test; and a CCTV with a hard-copy version in large font with white letters printed on a black background.<sup>51</sup> In district court, NCBE argued that the accommodations it offered would make the exams accessible to Enyart. It contended that similar accommodations had helped Enyart take exams in college and on the LSAT.<sup>52</sup> However, Enyart persuaded the court that NCBE's proposed accommodations would not be effective on these exams: (1) her blindness was progressive, necessitating increasingly substantial accommodations over time; (2) the bar exam was a longer and more rigorous exam and therefore required different accommodations; and (3) the accommodations NCBE proposed would cause her "extreme discomfort and disability-related disadvantage."<sup>53</sup>

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

<sup>46</sup> 28 C.F.R. §36.309(b)(iv).

<sup>47</sup> *Id.* at §36.309(b)(v).

<sup>48</sup> *Id.* at §36.309(b)(vi).

<sup>49</sup> Petition for Writ of Certiorari, No. 10-1304 (Apr. 25, 2011). The status of this petition can be monitored at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1304.htm>.

<sup>50</sup> 630 F.3d 1153 (9th Cir. 2011).

<sup>51</sup> *Id.* at 1157.

<sup>52</sup> *Id.* at 1157.

<sup>53</sup> *Id.* at 1157.

On its appeal to the Ninth Circuit, the NCBE argued that the DOJ regulation implementing Section 309 of the ADA was invalid because it interpreted NCBE's statutory obligation to make its exams "accessible" as an obligation to provide accommodations that "best ensure" that the examinee's results reflected her aptitude.<sup>54</sup> NCBE contended that DOJ should have interpreted Section 309 as imposing a less onerous obligation: to provide "reasonable" accommodations. However, the Ninth Circuit found that the use of the word "accessible" in Section 309 of the ADA was ambiguous and the DOJ's interpretation was a "permissible construction" of Section 309's entitled to judicial deference.<sup>55</sup> The fact that other sections of the statute used the word "reasonable" rather than "accessible" suggested to the court that DOJ was within its authority in interpreting Section 309 of the ADA as imposing a higher burden on test administrators than the burden that would be imposed under a "reasonable" accommodations standard.<sup>56</sup>

The Ninth Circuit then affirmed the lower court's findings that the accommodations NCBE had offered Enyart were not sufficient. The court stated that the sufficiency of testing accommodations should be determined in an individualized inquiry of whether they "best ensure" that the examinee's results are determined by her aptitude rather than her disability. In conducting its inquiry, the court evaluated NCBE's proposed accommodations' capacity to help the plaintiff overcome the limitations created by her disability as well as their utility given the requirements and rigorosity of the particular exam at issue and the current state of technology. Pointing specifically to NCBE's arguments that the accommodations it offered would make the bar exam accessible to Enyart because they had made her prior tests accessible, the court stated that "assistive technology is not frozen in time; as technology advances, testing accommodations should advance as well."<sup>57</sup>

A series of federal district courts have followed the Ninth Circuit's approach in *Enyart*.<sup>58</sup> In *Jones v. National Conference of Bar Examiners*,<sup>59</sup> for example, a federal district court in Vermont refused to uphold the NCBE's proposed accommodations for the plaintiff based solely on the fact that "Congress, the U.S. Department of Justice, other courts, and advocacy groups for the blind have indicated [they] are reasonable and appropriate in other cases."<sup>60</sup> In an "individualized inquiry," the court wrote,<sup>61</sup> accommodations "deemed appropriate many years ago, or for different individuals with different needs [are] an inappropriate benchmark."<sup>62</sup> Similarly, in

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<sup>54</sup> *Id.* at 1161.

<sup>55</sup> *Enyart*, 630 F.3d at 1161, 1162. *See also* *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (stating that the administering agency's interpretation of a statute is entitled to deference if the statute "is silent or ambiguous with respect to the specific issue" and the agency's interpretation is "based on a permissible construction of the statute").

<sup>56</sup> *Enyart*, 630 F.3d at 1162.

<sup>57</sup> *Id.* at 1163. The Ninth Circuit quoted the House Committee on Education and Labor's report on the ADA for support: "the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times." *Id.* at 1164 (quoting H.R. Rep. No. 101-485 pt. 2, at 108 (1990)).

<sup>58</sup> *See e.g.*, *Jones v. Nat'l Conf. of Bar Examiners*, No. 5:11-cv-174, 2011 U.S. Dist. LEXIS 85137 (D. Vt. Aug. 2, 2011); *Bonnette v. D.C. Court of Appeals*, 2011 U.S. Dist. LEXIS 75076 (D.D.C. Jul. 13, 2011); *Elder v. Nat'l Conf. of Bar Examiners*, 2011 U.S. Dist. LEXIS 15787 (N.D. Cal. Feb. 16, 2011).

<sup>59</sup> No. 5:11-cv-174, 2011 U.S. Dist. LEXIS 85137 (D. Vt. Aug. 2, 2011).

<sup>60</sup> *Id.* at \*36.

<sup>61</sup> *Id.* at \*36.

<sup>62</sup> *Id.* at \*49, n.6.

*Bonnette v. D.C. Court of Appeals*,<sup>63</sup> the U.S. District Court in Washington, DC, rejected the defendant's contention that the testing accommodations it had offered to the plaintiff were sufficient as a matter of law because, *inter alia*, they had been approved by the DOJ in settlement agreements with other testing entities and the plaintiff had used them successfully on exams in the past.<sup>64</sup>

## Legal Questions Raised by *Binno v. American Bar Association*

In addition to cases alleging that the accommodations provided on various exams are insufficient, at least one federal court case is pending over the ADA consistency of policies that purportedly jeopardize the accreditation of educational institutions that exempt applicants with disabilities from discriminatory entrance exams.<sup>65</sup> According to the complaint in *Binno v. American Bar Association*, the American Bar Association (ABA) conditions the accreditation of law schools on their adherence to a policy under which students who have not completed the LSAT (or a "valid and reliable" admission test) may not be admitted. The plaintiff alleges that law schools that waive or exempt students with disabilities from completing the LSAT risk remedial action, sanctions, probation, or full removal from the ABA's list of accredited law schools.<sup>66</sup> If *Binno* is not resolved on the basis of standing,<sup>67</sup> it should clarify the breadth of Section 309's applicability—does it only apply to entities that physically administer the exams, or, as the plaintiff alleges, does it apply to other entities that mandate its administration?<sup>68</sup> *Binno* also has the potential to address whether it is legally possible for a test to be inaccessible to a particular individual with a disability *regardless* of the testing accommodations made available.

## Conclusion

The ADA's general prohibitions on disability-based discrimination protect only those people who have a "disability" for the purposes of the statute. In the past, courts interpreted the term

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<sup>63</sup> *Bonnette v. D.C. Court of Appeals*, No. 11-1053 (CKK), 2011 U.S. Dist. LEXIS 75076 (D.D.C. Jul. 13, 2011).

<sup>64</sup> *Id.* at \*44-45, 54.

<sup>65</sup> Complaint, *Binno v. American Bar Association*, No. 11-CV-12247 (E.D. Mich. 2011), available at [http://www.callsam.com/images/stories/news\\_docs\\_pics/Complaint\\_Benno-vs-ABA\\_5-24-11.pdf](http://www.callsam.com/images/stories/news_docs_pics/Complaint_Benno-vs-ABA_5-24-11.pdf). See also Quinn Klinefelter, *Blind Would-Be Law Student Says Test Discriminates*, N.Y. TIMES (June 15, 2011); Nathan Koppel, *Federal Suit Claims LSAT Discriminatory*, WALL STREET JOURNAL (May 24, 2011).

<sup>66</sup> Notably, the ABA has contended that it does not take any of these actions with respect to schools that sought a variance from its standards. Response to Complaint, *Binno v. American Bar Association*, No. 11-CV-12247, at 3, 5 (E.D. Mich. 2011), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1313703314answertocomplaint\\_081611.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1313703314answertocomplaint_081611.pdf).

<sup>67</sup> Motion for Summary Judgment, *Binno v. American Bar Association*, No. 11-CV-12247, at 1 (E.D. Mich. 2011), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1313703451motionforsj\\_081511.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1313703451motionforsj_081511.pdf) ("Plaintiff lacks standing to bring his claim against the ABA because he cannot establish that his alleged inability to gain admission to law school is 'fairly traceable' to the ABA's accreditation standard...").

<sup>68</sup> See *id.* at 11-12 (E.D. Mich. 2011) ("The ABA does not 'offer' the LSAT because it in no way can be said 'to make the LSAT available' to applicants."). See also Complaint, *Binno v. American Bar Association*, No. 11-CV-12247, at ¶ 44 (E.D. Mich. 2011) (alleging that the ABA "effectively" requires law school applicants to take the LSAT).

“disability” narrowly, often creating legal obstacles to test-takers with cognitive disorders who sought testing accommodations under Section 309 of the ADA.

The enactment of the ADA Amendments Act in 2008 was intended to broaden the definition courts and executive agencies used in administering the ADA. The ADAAA’s passage is expected to improve the likelihood that students with learning disabilities and other health impairments will be deemed entitled to testing accommodations under the ADA. The lowering of the “disability” hurdle also means more test-taking cases under the ADA will proceed to consideration of the adequacy of proposed accommodations. Accordingly, the federal district courts are expected to play a heightened role in evaluating the sufficiency of testing accommodations under Section 309 of the ADA.<sup>69</sup>

A series of recent federal court cases suggests testing accommodations are sufficient if, after an individualized inquiry, they are deemed to “best ensure” that the test accurately assesses the individual's aptitude. Factors that may be relevant to this analysis include their capacity to help the plaintiff overcome the limitations created by her disability, their utility given the requirements and rigorosity of the particular exam at issue, and current technology.

In addition to questions about who is entitled to testing accommodations under the ADAAA and what testing accommodations must be provided, at least one pending federal court case raises the question: what role must an entity play in mandating or administering an examination in order for it to have “offered” the exam for the purposes of Section 309 of the ADA? This case, *Binno v. American Bar Association*, also has the potential to address whether it is legally possible for a test to be inaccessible to a particular individual with a disability *regardless* of the testing accommodations made available.

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## **Acknowledgments**

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<sup>69</sup> *Jenkins v. Nat’l Bd. of Med. Examiners*, 2009 Fed. App. 0117N, at \*10-11 (6th Cir. 2009).