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2017

Test Accommodations: Legal Update, Hot Topics, and Trends

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Disclosure John Hosterman

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Disclosure Michelle Goldberg
Salaried Employee of the National Board of Medical Examiners
AGENDA

• Welcome & Introduction
• Legal update & trends (John, who is NOT a lawyer!)
  
  Thanks to Patricia Latham, JD for help with the legal slides

• Accommodations topics & trends (Michelle)
• Q & A
ADA as Amended (2008) Disability definition

An individual with a disability is a person who has:

A physical or mental impairment that substantially limits one or more major life activities, compared to most people in the general population.
ADAAA: Key Definitions: *Impairment*

- An **impairment** is considered when a person has been properly diagnosed with a valid condition that is defined by the DSM-5 or ICD-9 (10).
- Not all **impairments** and diagnoses will rise to the level of a disability.
  - Just because a person has a valid diagnosis of a particular condition does not mean that they will be found to be “disabled” within the meaning of the ADAAA.
  - Many psychologists (incorrectly) believe that simply diagnosing someone with a DSM-5 condition automatically entitles the person to accommodations.

**Diagnosis does not = disability**
ADAAA: Key Definitions: *Major Life Activities*

- MLAs are activities that are *central to daily life*, such as seeing, hearing, walking, breathing, reading, learning, concentrating, and working.
- ADA (2008) has expanded to include more MLAs:
  - Chronic health conditions
  - Major bodily functions
  - Reading & Concentration
- “Test-taking” is not a major life activity.
- Learning *in general* is a major life activity, but discrete learning tasks are NOT MLAs.
  - E.g., spelling and “math fluency” are not MLAs.
ADAAA Key Concept: Most people in the general population

• Courts as well as the DoJ have continued to acknowledge that the appropriate reference group when determining disability is “most people,” NOT one’s own IQ or one’s medical school classmates.

• Psychologists may use a “discrepancy model” to help determine diagnosis (e.g., IQ vs. reading skill), but this discrepancy is irrelevant when determining disability.

• Remember, diagnosis does not = disability
Case Law Update: *Most People*: Healy v. NBOME (2012)

The “most people” reference group has repeatedly been upheld:

- Healy is a medical student with a stellar academic record, without any history of accommodations or special services.
- Diagnosis of a reading disorder, using a simple “discrepancy model”.
- Even his lowest reading scores were average to above-average.
- Court determined that his condition was not disabling, when his skills were compared to most people in the general population.
Case Law Update: *Most People*: Bibber v. NBOME (2016)

- Bibber scored above-average on the MCAT Verbal Reasoning test *without accommodations* (compared to other MCAT candidates - a *highly select sample*).
- Scored at the 71\textsuperscript{st} percentile on the GRE *without accommodations*.
- Received accommodations in medical school for a reading disorder.
- Passed the medical pre-licensing test *without accommodations*, finishing 15 minutes early.
- Requested extra time for the medical licensing exam and was denied.
- Court determined that her condition was not disabling, when her skills were compared against those of *most people in the general population*.
- “The record contains a mountain of evidence suggesting that Bibber’s reading and processing abilities are average when compared to the general population.”
ADAAA Key Concept: *Fundamental Alteration*

Courts and the DoJ have held that an accommodation need not be granted if it would *fundamentally alter* the test’s purpose.

For example:

- Using a calculator on a test that specifically measures calculation skills
- Providing a reader/audio format on a test specifically measuring reading comprehension skills
- Waiving a portion of the exam
- Making content substitutions
- Changing the format (written vs. oral)
Case Law Update: *Fundamental Alteration*


- Dr. Rawdin previously had a brain tumor that subsequently resulted in *relative weaknesses* in memory/retrieval of information *out of context* (but scores on memory tests were still average to above-average)
- The exam format was *clinical vignettes*, and did not require recall of information “out of context”
- Petitioned the ABP for accommodations on the Board exam, including waiving the exam altogether, or allowing him to take the exam in “open book” format
- Court held that Rawdin’s request was unreasonable and amounted to a *fundamental alteration*
2017 Overall Legal Trends

“Guidance” is coming from multiple sources, but there is inconsistency in this guidance.

• DOJ Guidance (Sept. 2016)
• Case law:
  • 2\textsuperscript{nd} Circuit case (Noll v. IBM, 2015)
  • ED PA case (Rawdin v. Am Bd Pediatrics, 2014)
  • Bibber v. NBOME (April 2016)
• OCR guidance to individual organizations
• LSAC settlement decree
• AHEAD guidance
• “Guidance” is not law, not legally binding.

• Pay attention to all sources of guidance, but don’t give excessive weight to any one of them.

• Consider avoiding an “extreme” position at either end of the spectrum—stake out a reasonable middle-ground position.

• Ensure that you have a fair, transparent process, document it carefully, and implement it consistently (avoid lots of one-off exceptions).
ADAAA-based accommodations: Key Points

ADAAA-based accommodations:

• Should mitigate the effect of the disability so the test can measure what it purports to measure, rather than the negative effects of the disability.

• Should enhance access.

• Are granted on the basis of disability, not whether the student will do better on a test with more time, earn a certain score, or “demonstrate one’s true potential”. The ADA is outcome neutral.

Remember, Access does not guarantee Success.
2017 Test Accommodations: Topics & Trends
Accommodations: First, know your construct

What is your test measuring?
Accommodations: Consider **setting and task**

Accommodations that might be appropriate in an **classroom** may not be appropriate in a **lab** or clinical setting, or on some **job**-related performance tasks:

- Extra time on the Clinical Performance Exam (CPX)?
- Unscheduled breaks during a resident’s surgical rotation?
- Personal care attendant to help a wheelchair-using candidate perform essential job functions during a practical skills exam, such as lifting or rolling a patient?
- Human reader on a medical board exam?
- Private room for a person taking the performance (psychomotor) portion of the exam to be a registered EMT?
Accommodations: Consider test validity

- 6X standard time
- “Unlimited time”
- Use of notes/books
- Use of a dictionary
- Waive a portion of the test
- Use of a scribe to “discuss” essay before typing it
- Translating the test on the fly into another language (including ASL)
Accommodations: Unreasonable requests

• “Provide clarification”
• “Check for understanding”
• “Discuss the essay instead of writing it”
• “Provide praise and encouragement”
• “Reduce the number of possible answer-choices”
• “Let her use her notes and study guides during the test”
• “Let him take as much time as he needs in order to finish the test”
Accommodations: Consider test security

- Going to a “nursing mothers’ room” at the Hilton Hotel across the street
- Bringing in a smartphone
- Having Mom be the Reader
- Testing at home
- Testing on one’s personal lap
- Using one’s own dictionary
Any Questions?

Questions, and possibly, Answers
Thank you for your time!
About the Presenters…

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