

Spring 3-1-2001

## Dissing Disabilities: A Student's Duty to Mitigate Maladies

J.J. Knauff

Follow this and additional works at: <http://digitalcommons.law.byu.edu/elj>



Part of the [Disability and Equity in Education Commons](#), and the [Disability Law Commons](#)

---

### Recommended Citation

J. J. Knauff, *Dissing Disabilities: A Student's Duty to Mitigate Maladies*, 2001 BYU Educ. & L.J. 85 (2001)

Available at: <http://digitalcommons.law.byu.edu/elj/vol2001/iss1/5>

.

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Education and Law Journal by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## DISSING DISABILITIES: A STUDENT'S DUTY TO MITIGATE MALADIES

*J. J. Knauff\**

Di Sabled, a law student, requests accommodation under the Americans with Disabilities Act (ADA). Di suffers from a minor case of carpal tunnel syndrome (CTS)<sup>1</sup> and lazy-graphia<sup>2</sup>—the combination of which make her handwriting almost illegible. Throughout her undergraduate career, Di took mitigating measures to help keep her up in class. She wore corrective splints to alleviate the symptoms of CTS, and she developed study habits that allowed her to overcome her writing difficulties. Di took her Law School Aptitude Test (LSAT) without accommodations, scored a 150, and was accepted to Aco Modate U. School of Law. After her first semester at Aco Modate U., Di scored poorly on her exams and feared that she might fail out of school. She talked to her dean and presented a letter from her personal doctor attesting to her disabilities and requesting the accommodation of extra time on her second semester exams. The dean approved her accommodation, and Di received an extra two hours per exam. With the extra time, Di excelled on her tests. In fact, her high second semester scores raised her cumulative grade-point-average (GPA) to the top 15% of her class, thereby meeting the grade-on requirements of Aco Modate U. School of Law Law Review. Was the ADA enacted to give average students the opportunity to excel beyond their aptitude levels? How can schools combat the misuse of the ADA by students with correctable impairments?

---

\* B.A.S., Texas Tech University; J.D., Texas Wesleyan University. I would like to thank Professors Stephen Alton, Lynn Rambo and Joe Spurlock II, as well as my parents, Jerry and Phyllis Knauff.

1. See *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 323 (18<sup>th</sup> ed. 1997) (stating carpal tunnel syndrome causes a numbness or pain in the wrist or hand and that resting the wrist, using a splint, and the use of nonsteroidal anti-inflammatory drugs can eliminate the symptoms) [hereinafter *TABER'S*].

2. Sloppy handwriting (a term coined by the author).

## I. INTRODUCTION

In 1990, Congress enacted the Americans with Disabilities Act (ADA) to level the playing field for the more than forty-three million Americans with physical or mental disabilities.<sup>3</sup> The ADA prohibits discrimination by covered entities, including post-graduate schools, from discriminating against qualified disabled individuals.<sup>4</sup>

In the last few years, individuals seeking accommodation for more time on admissions exams has more than doubled.<sup>5</sup> For example, between 1990 and 1993, the number of learning disabled individuals taking the LSAT under special conditions increased from 261 to 553.<sup>6</sup> Also, the learning disabled accounted for approximately 60% of the total number of accommodated LSAT test takers.<sup>7</sup> Correlatively, law schools' disabled student accommodations have also increased.

An Association of American Law Schools (AALS) survey<sup>8</sup> indicated that among the categories of handicapping conditions, learning disabilities<sup>9</sup> contained the largest number of students.<sup>10</sup> Further, a 1992 American Council on Education study revealed that one in eleven college freshmen reported

---

3. See 42 U.S.C. § 12101(a) (1999) (showing Congress' findings regarding the disabled and stating Congress' purposes in passing the ADA). See also Timothy Stewart Bland, *The Determination of Disability Under The ADA: Should Mitigating Factors Such As Medications Be Considered?*, 35 IDAHO L. REV. 265, 267 (1999) (noting that Congress was concerned with the unequal treatment of persons with disabilities).

4. See 42 U.S.C. § 12181 (7)(j) (1999) and 42 U.S.C. § 12132 (1999).

5. See Lisa Eichorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31 (1997).

6. See Linda F. Wightman, *Test Takers with Disabilities: A Summary of Data From Special Administrations of the LSAT*, in LAS School Admission Council Research Report 93-03 (Dec. 1993) at 12 (available from Law Service, Newtown, Pennsylvania). See also Eichorn, *supra* note 5, at 31.

7. See Wightman, *supra* note 6.

8. See M. Kay Runyan and Joseph F. Smith, Jr., *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317, 340 (1991) (noting that 86.3% of 147 law schools responded to the survey with information about types of student disabilities, types of accommodations, and guidelines regarding accommodations).

9. See TABER'S, *supra* note 1, at 560 (defining learning disability as a disorder of academic functioning that is marked by difficulties in learning that are far greater than would be expected for the person's age and measured intelligence).

10. See Runyan, *supra* note 8, at 320 (referring to the 1989-1990 AALS survey of 175 ABA-approved law schools which found that 235 of the 725 identified disabled students were learning disabled).

having a disability compared with one in thirty-eight in 1978.<sup>11</sup> This study also showed that disabled enrollment has more than tripled during that same period of time.<sup>12</sup> In addition, learning disabled adults reportedly are the fastest growing group of college and university students today.<sup>13</sup> Law school accommodation incidences will likely increase as these university students graduate and seek post-secondary education. Thus, law schools should review their learning disability policies to prevent students having medical or physical "disabilities" that can be mitigated<sup>14</sup> without invoking the ADA to acquire special accommodations.

After discussing the statutory background and legislative history, key terms, and mitigating cases concerning the ADA, this article will show that the ADA guidelines need to be changed as they pertain to certain "disabilities" that can be corrected, including, but not limited to, Attention Deficit Disorder (ADD),<sup>15</sup> Attention Deficit Hyperactivity Disorder (ADHD),<sup>16</sup> Carpal Tunnel Syndrome (CTS),<sup>17</sup> Disorder of Written Expression (DWE),<sup>18</sup> Dysgraphia,<sup>19</sup> and Dyslogia.<sup>20</sup> Next,

11. See Diana C. Pullin and Kevin J. Heaney, *The Use of "Flagged" Test Scores in College and University Admissions: Issues and Implications under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797 (1997).

12. See Claire E. McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 620 (stating that 2.6% of college freshman reported a disability in 1978, whereas 8.8% of college freshman reported a disability in 1991).

13. See Pullin, *supra* note 11, at 797.

14. See, e.g., BLACK'S LAW DICTIONARY 1002 (6th ed. 1990) (stating that mitigation means "to make [something] less severe"); WEBSTER'S NEW WORLD DICTIONARY 911 (2d ed. 1986) (defining mitigation as making something less severe, less rigorous, or less painful).

15. See Maria L. Chang, *Feeling Blue? Chemicals in Our Brains, and Controversial New Drugs, Can Change Our Moods and Emotions*, SCI. WORLD, October 6, 1997, at 12 (showing that the drug Ritalin is used to treat ADD). See also TABER'S, *supra* note 1, at 1205 (stating methylphenidate hydrochloride [Ritalin] is used in treating ADD).

16. See, e.g., Price v. National Bd. of Med. Exam'rs, 966 F.Supp. 419, 422 (stating the essential feature of ADHD is a persistent pattern of inattention and/or hyperactivity-impulsivity); TABER'S, *supra* note 1, at 172-73 (describing ADHD as a disorder marked by inattention, hyperactivity, and/or impulsivity).

17. See TABER'S, *supra* note 1, at 323 (defining carpal tunnel syndrome and discussing treatment).

18. See Phyllis G. Coleman et al., *Law Students and the Disorder of Written Expression*, 26 J.L. & EDUC. 1 (1997) (stating that the essential feature of DWE is writing skills that fall substantially below those expected given the individual's chronological age, measured intelligence, and age-appropriate education).

this article will explore the Tenth Circuit's recent decision in *McGuinness v. University of New Mexico School of Medicine*<sup>21</sup> as it relates to the United States Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*,<sup>22</sup> *Murphy v. United Parcel Service, Inc.*,<sup>23</sup> and *New York State Board of Law Examiners v. Bartlett*.<sup>24</sup> Finally, this article will propose different remedies that schools should implement to allow parity between the learning disabled and non-accommodated students.

## II. STATUTORY BACKGROUND AND LEGISLATIVE HISTORY

Like prior civil rights legislation, the ADA marshals Congressional authority, executive branch agency resources, and judiciary power to eliminate discrimination against disabled individuals.<sup>25</sup> Furthermore, Congress passed the ADA to give the disabled "equality of opportunity, full participation, independent living, and economic self-sufficiency."<sup>26</sup> The ADA provides sweeping civil rights protection to disabled individuals. The three major ADA titles apply to employment (Title I), state and local public services (Title II), and public accommodations provided by private entities (Title III).<sup>27</sup> Title II's reference to state public services makes it applicable to public schools, and Title III's reference to private entities makes it applicable to private schools.

Three government agencies share the authority to implement the ADA. The Supreme Court, in a recent case, defined this division of authority:

---

19. Bad handwriting. See e.g., Ruth Shalit, *Defining Disability Down: Why Johnny Can't Read, Write, or Sit Still*, NEW REPUBLIC at 8, August 25, 1997 (describing dysgraphia as a disorder of written expression); TABER'S, *supra* note 1, at 587 (likening dysgraphia to writer's cramp).

20. See TABER'S, *supra* note 1, at 588 (describing dyslogia as a difficulty in expressing ideas).

21. 170 F.3d 974 (10<sup>th</sup> Cir. 1998) *cert. denied*, 119 S. Ct. 1357 (1999).

22. 119 S.Ct. 2139 (1999).

23. *Id.* at 2133.

24. 156 F.3d 321, 329 (2d Cir. 1998).

25. See, e.g., 42 U.S.C. § 12101(b)(1) (1999); Mark D. Laponsky, *Defining "Disability": A Look at the Term Within the Context of the Americans with Disabilities Act*, 39 FED. B. NEWS & J. 44 (1992).

26. 42 U.S.C. § 12101(a)(8) (1999).

27. See Laura F. Rothstein, *Bar Admissions and the Americans with Disabilities Act*, HOUS. LAW., Sept.-Oct. 1994, at 34, 36 (discussing general issues as related to accommodations on the bar exam).

The Equal Employment Opportunity Commission (EEOC) has the authority to issue regulations to carry out the employment provisions in Title I of the ADA. . .[t]he Attorney General is granted authority to issue regulations with respect to Title II, subtitle A, which relates to public services. . .[and] the Secretary of Transportation has authority to issue regulations pertaining to the transportation provisions of Titles II and III.<sup>28</sup>

Previous civil rights legislation extended protection against discrimination on the basis of readily identifiable characteristics, such as race and sex.<sup>29</sup> Unfortunately, individuals with disabilities, especially those who are learning disabled,<sup>30</sup> are not easily identifiable.<sup>31</sup> Also, although the ADA seems to set forth a comprehensive scheme for determining if an individual is disabled, it fails to define the major phrases critical to understand the nature of an ADA disability.<sup>32</sup>

### III. KEY TERMS

Any discussion of the ADA requires an understanding of the key terminology used in the Act. The threshold issue in every ADA case is whether the individual bringing the suit is "disabled" within the meaning of the statute.<sup>33</sup> The ADA defines the term "disability" as, "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>34</sup> According to Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by

28. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2144-45 (1999).

29. Laponsky, *supra* note 12, at 45.

30. *See McCusker, supra* note 25, at 621 (stating that learning disabilities are known as invisible disabilities).

31. *See Laponsky, supra* note 25, at 45.

32. *See Price v. National Bd. of Med. Exam'rs*, 966 F.Supp. 419, 424 (S.D.W.V. 1997) (stating the ADA does not define the phrases "physical or mental impairment," "substantially limits," and "major life activities"). *See also Laponsky, supra* note 25, at 45 (noting that the meaning of disability is unclear).

33. *See 42 U.S.C. § 12112* (1999). *See also Bland, supra* note 3, at 268 (noting the threshold issue for bringing an ADA case is being "disabled").

34. 42 U.S.C. § 12102(2) (1999).

any such entity.”<sup>35</sup>

### A. A Physical or Mental Impairment

When Congress passed the ADA, it neither defined nor enumerated the phrase “a physical or mental impairment.”<sup>36</sup> However, the EEOC issued regulations to provide guidance regarding the proper interpretation of this term. Under the regulations, a “physical impairment” includes

any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine, . . . or any mental or psychological disorder, . . . emotional or mental illness, and specific learning disabilities.<sup>37</sup>

Unfortunately, the ADA does not define the term “specific learning disability.” However, Congress considered the issue of learning disabilities when it passed the Individuals with Disabilities Education Act (IDEA).<sup>38</sup> Thus, IDEA offers guidance as to the general legal boundaries of learning disabilities and should be used to interpret the term.<sup>39</sup> This act states that a learning disability is “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.”<sup>40</sup>

### B. Substantially Limits

The term “substantially limits” is ambiguous,<sup>41</sup> but the

35. See, e.g., 42 U.S.C. § 12132 (1999); *McGuinness v. University of New Mexico Sch. of Med.*, 170 F.3d 974, 978 (10th Cir. 1998), cert. denied, 119 S.Ct. 1357 (1999).

36. See, e.g., *Price*, 966 F.Supp. at 424; *Bartlett v. New York Bd. of Law Exam'rs*, 156 F.3d 321, 327 (2d Cir. 1998), vacated by, 119 S.Ct. 2388 (1999); Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 42 (1999).

37. *Sutton*, 119 S. Ct. at 2145. See also 29 C.F.R. § 1630.2(h) (1999).

38. See 20 U.S.C.A. § 1400(a) (1999). See also Eichhorn, *supra* note 5, at 40.

39. See Eichorn, *supra* note 5, at 40.

40. 34 C.F.R. § 300.7(a)(10) (2000).

41. See, e.g., *Price*, 966 F.Supp. at 424 (finding that the ADA does not define the critical term “substantially limits,” and thus it is open to judicial interpretation); Adam A. Milani, *Disabled Students in Higher Education: Administrative and Judicial En-*

regulations promulgated by the EEOC under the ADA provide significant guidance. The regulations state that “substantially limits” means “unable to perform a major life activity that the average person in the general population can perform.”<sup>42</sup> Also, the determination of whether an impairment is substantially limiting accounts for, “(1) the nature and severity of the impairment, (2) the duration or expected duration of their impairment, and (3) the permanent or long term impact or expected impact or long term impact of or resulting from the impairment.”<sup>43</sup>

In light of the EEOC guidelines, the Supreme Court held that the term “substantially limits” should be read “as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.”<sup>44</sup> Furthermore, the Court stated that a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity.<sup>45</sup> A person with an impairment who has been corrected by mitigating measures, such as eyeglasses or medication, still has an impairment; however, the impairment is hypothetical<sup>46</sup> because it does not *presently* affect that person, thus she is not to be regarded as being “substantially limited” in a major life activity.<sup>47</sup>

*forcement of Disability Law*, 22 J.C. & U.L. 989, 989 (1996) (stating that the imprecision of ADA phrases is a source of frustration for both administrators and students).

42. See, e.g., 29 C.F.R. § 1630.2(j)(1)(i) (2000) (defining “substantially limits”); *Sutton*, 119 S. Ct. at 2146-47; *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997) (holding that an impairment is to be measured against what the average person does); *Gonzalez v. National Bd. of Med. Exam'rs*, 60 F. Supp. 2d 703, 705 (E.D. Mich. 1999) (finding that average, or even slightly below average, is not disabled for purposes of the ADA).

43. 29 C.F.R. § 1630.2(j)(2) (2000). See also *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1024 (5th Cir. 1999).

44. *Sutton*, 119 S. Ct. at 2146.

45. *Id.* at 2146-47.

46. See, e.g., 29 C.F.R. § 1630.2(j)(2)(iii) (2000); *Sutton*, 119 S. Ct. at 2146; *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (stating the ADA requires permanent or long-term impairments); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997) (finding “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities”); Rothstein, *supra* note 27, at 36 (stating that individuals with certain emotional problems, such as stress, chronic lateness, and test phobia often have been treated as not being covered by discrimination statutes because their impairments do not substantially interfere with major life activities).

47. *Sutton*, 119 S. Ct. at 2147.



### C. Major Life Activity

The term "major life activity" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>48</sup> Major life activities are to be viewed narrowly.<sup>49</sup> For example, plaintiffs must allege that they are unable to work in a broad class of jobs when they claim to be limited in the major life activity of working.<sup>50</sup> The EEOC requirements state that "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."<sup>51</sup> The EEOC regulation's definition of substantial limitation on "working" is similar to the deciding principles of employment discrimination cases. By analogy, the EEOC regulations can apply to ADA claims in the educational context.<sup>52</sup> Therefore, a student must demonstrate that her learning disability impedes her performance in a wide variety of disciplines.<sup>53</sup>

### D. Qualified Individual

Under the ADA, a student with a disability does not automatically qualify for an accommodation on an examination, special consideration during the admissions process, or accommodations in programs or services after admission.<sup>54</sup> Rather, a student must show that she is a "qualified individual with a disability."<sup>55</sup> Thus, under Title II, a "qualified individual" is someone with a disability who, with or without reasonable modification, meets the essential eligibility requirements to receive public services or participate in a public program.<sup>56</sup> In other words, a "qualified individual with a disability" is some-

---

48. See also 29 C.F.R. § 1630.2(i) (1999).

49. See *Sutton*, 199 S. Ct. at 2149.

50. See 29 C.F.R. § 1630.2(j)(3)(i) (1999) (stating the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working). See also *Sutton*, 119 S. Ct. at 2151 (holding that if a host of different types of jobs are available then one is not precluded from a broad range of jobs).

51. *Sutton*, 119 S. Ct. at 2151.

52. *McGuinness*, 170 F.3d at 978.

53. See *id.* See also *Betts v. University of Virginia*, No. 97-1850, slip op. at 13 (4th Cir. Sept. 22, 1999) (stating that plaintiff may have a learning disorder that "substantially limits" his ability to attend medical school, but that attending medical school is not a "major life activity").

54. See *Pullin*, *supra* note 11, at 804.

55. *Id.*

56. *McGuinness*, 170 F.3d at 978.

one who meets all program requirements in spite of her handicap.<sup>57</sup>

### *E. Reasonable Accommodations*

A "reasonable accommodation" makes existing facilities readily accessible to and usable by individuals with disabilities.<sup>58</sup> Title III of the ADA explicitly outlines examples of accommodations that must be given. Reasonable accommodations include changes in the length of time for completion of the examination and adaptation of the manner in which the examination is given.<sup>59</sup> Furthermore, Title III requires taped examinations, interpreters, or other effective methods of making orally delivered material available to individuals with hearing impairments. For individuals with visual impairments or learning disabilities, Title III also requires the availability of Braille or large print examinations and answer sheets, or qualified readers.<sup>60</sup> Other accommodations for physical disabilities include wheel chair access, table height adaptations, and extra time for rest breaks.<sup>61</sup>

Title III regulations discuss examinations and provide that any private entity who offers an examination must ensure 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>62</sup>

57. See Pullin, *supra* note 11, at 804.

58. See 29 C.F.R. § 1630.2(o)(2)(i) (2000). See also James F. Carr, *Effects of the ADA On Licensing and Regulation of Professionals*, 23 COLO. LAW 343 (1994) (discussing the ADA's key terms and the effects of the ADA on professional licensing and regulation).

59. See 29 C.F.R. § 1630.2(o)(ii) (2000). See also Deborah Piltch et al., *The Americans With Disabilities Act and Professional Licensing*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556, 557 (1993) (stating that the ADA was implemented to give the disabled the ability to compete with the non-disabled).

60. See 29 C.F.R. § 1630.2(o) (2000). See also Piltch, *supra* note 59, at 557.

61. See S. E. Phillips, *Testing Condition Accommodations for Disabled Students*, 80 EDUC. L. REP. 9, 22 (1993).

62. 28 C.F.R. § 36.309(b)(i) (2000).

However, an accommodation is not reasonable if it constitutes an undue burden of hardship to provide it,<sup>63</sup> or if it requires a fundamental alteration to the institution's program.<sup>64</sup>

As stated, many of the phrases in the ADA are imprecise or ill-defined; these vague phrases have led to various interpretations by different courts.<sup>65</sup> However, the Supreme Court has recently given guidance by interpreting the ambiguous phrases and shedding light on the hazy definitions.<sup>66</sup>

#### IV. MITIGATION CASES

The primary issue concerning students and the ADA is whether corrective and mitigating measures should be considered in determining a student's disabled status. The Supreme Court analogized the principles of employment disability to disabilities in the education setting in *New York State Board of Law Examiners v. Bartlett*.<sup>67</sup> However, the Court did not discuss the facts of the case. Thus, it is likely that the Tenth Circuit's decision in *McGuinness v. University of New Mexico School of Medicine*<sup>68</sup> represents how the Supreme Court would apply their holdings in *Sutton* and *Murphy* to disabilities in the educational setting.<sup>69</sup> In both *Sutton* and *Murphy*, the Court

---

63. See, e.g., 28 C.F.R. § 36.303 (f) (2000); Bonnie Poitras Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1, 14-15 (1996).

64. See, e.g., 28 C.F.R. § 36.302(a) (2000); Tucker, *supra* note 63, at 15.

65. See, e.g., *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (holding that the ADA provides no protection for individuals whose impairment is fully mitigated); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) (finding the determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual). *But see* *Arnold v. United Parcel Serv. Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (stating a disability should be assessed without regard to the availability of mitigating measures); *Bartlett*, 156 F.3d at 329 (2d Cir. 1998) (holding that mitigating measures should not be taken into account when determining if a person is substantially limited in a major life activity).

66. See, e.g., *New York State Bd. of Law Exam'rs v. Bartlett*, 119 S. Ct. 2388 (1999); *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2136 (1999); *Sutton*, 119 S. Ct. at 2139.

67. 119 S. Ct. 2388 (1999).

68. 170 F.3d 974, *cert. denied*, 119 S. Ct. 1357 (1999).

69. See, e.g., *Zukle v. University of California*, 166 F.3d 1041, 1046-47 (9th Cir. 1999) (analogizing employment discrimination with discrimination in the school context); *McGuinness*, 170 F.3d at 978 (holding that the deciding principles of employment discrimination cases can be applied in the educational context); *McPherson v. Michigan*

found that disability in the employment context is gauged by the corrective measures taken by the disabled.<sup>70</sup> Similarly, the *McGuinness* Court found that disability in the educational context is measured against the corrective actions taken by the disabled.

A. *Sutton v. United Air Lines, Inc.*

In *Sutton v. United Air Lines, Inc.*,<sup>71</sup> the United States Supreme Court held that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses.<sup>72</sup> The *Sutton* case involved myopic twin sisters who, without corrective lenses, could not see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public stores.<sup>73</sup> However, with corrective measures, such as glasses or contact lenses, both sisters function identically to individuals without a similar impairment.<sup>74</sup> The Court held that if the impairment is corrected it does not "substantially limit" a major life activity.

The Court proffered several reasons for judging a person's disability based on their corrected or mitigated state. First, the Court worried that to view people in their uncorrected or unmitigated state would directly counter the ADA's requirement that each person be evaluated individually and not as a group.<sup>75</sup> Neither the medical name nor the diagnosis of the impairment should determine whether an individual has a disability; rather, the effect of the impairment on the life of the individual should be the sole criterion when determining if that individual is disabled.<sup>76</sup> To allow otherwise would cause speculation about a person's condition, which would lead to generalizations about an uncorrected impairment.<sup>77</sup> This grouping by

---

High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 460 (6th Cir. 1997) (finding that the decisional principles of employment discrimination can be applied to ADA cases arising in education).

70. See, e.g., *Sutton*, 119 S. Ct. at 2143; *Murphy*, 119 S. Ct. at 2137.

71. 119 S. Ct. 2139 (1999).

72. *Id.* at 2143.

73. *Id.*

74. *Id.*

75. *Id.* at 2147. See also 29 C.F.R. pt. 1630, app. § 1630.2(j)(2) (2000) (requiring a case-by-case analysis to determine if an individual is "substantially limit[ed]").

76. *Sutton*, 119 S. Ct. at 2147.

77. *Id.*

generalization would create a system in which a person would be treated as a member of a group of people with similar impairments rather than as an individual with a distinct disability. In turn, this grouping by generalizations would contradict the ADA's requirement of individualized inquiry.<sup>78</sup> Further, broad generalizations would cause speculation about a person's condition, which would be contrary to both the letter and the spirit of the ADA.<sup>79</sup>

Second, to allow a laundry list of generalized disabilities could lead to an anomalous result, where negative side effects suffered by an individual who takes mitigating measures could not be considered.<sup>80</sup> Again, such generalizations go against the ADA's mandate that the determination of a disability be reviewed on a case-by-case basis.<sup>81</sup> In addition, the use of corrective devices does not, in and of itself, relieve a person's disability.<sup>82</sup> Rather, the determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.<sup>83</sup>

Finally, the Court found that viewing a disability in its uncorrected or unmitigated state would be over-inclusive and go against the intent of Congress.<sup>84</sup> Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."<sup>85</sup> If Congress wanted the ADA to include uncorrected or unmitigated disabilities, it would have incorporated the report from the National Council on Disability. This report estimated that over 160 million disabled people live in America.<sup>86</sup> This number accounted for all conditions that impair the health or normal functional abilities of an individual.<sup>87</sup> Included in this number were: 100 million people who need corrective lenses to see properly, 28 million hearing-impaired Americans, and approximately 50 million people with high

---

78. *Id.*

79. *Id.*

80. *Id.*

81. *Sutton*, 119 S. Ct. at 2147. *See also* 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (stating that the determination of disability must be made on a case-by-case basis).

82. *Sutton*, 119 S.Ct. at 2149.

83. *Id.*

84. *Id.* at 2147.

85. *Id.*

86. *Sutton*, 119 S. Ct. at 2149.

87. *Id.* at 2148.

blood pressure.<sup>88</sup> Because Congress did not mention such a high number of people in passing the statute, it seems evident that Congress intended to restrict ADA coverage to those whose impairments could not be mitigated by corrective measures.<sup>89</sup>

The *Sutton* Court determined that the petitioners were not disabled because with corrective lenses their visual acuity was 20/20. Thus, the Court found that the petitioners functioned identically to individuals without a similar impairment.<sup>90</sup> The Court held that to be regarded as substantially limited in the major life activity of working:

one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills. . . are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.<sup>91</sup>

Thus, the court stated that a person's inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.<sup>92</sup> After *Sutton*, the Court ruled similarly in the following case where an employer fired an employee with high blood pressure.

#### B. *Murphy v. United Parcel Service, Inc.*

In *Murphy v. United Parcel Service, Inc.*,<sup>93</sup> the Supreme Court held that the decision of whether a person has a disability is made with reference to the mitigating measures employed by that person.<sup>94</sup> In *Murphy*, a truck mechanic alleged that his employer discharged him because of his high blood pressure.<sup>95</sup> In an unmedicated state, Murphy's blood pressure measured approximately 250/160.<sup>96</sup> With medication, however, Murphy's hypertension did not significantly restrict his activities and, in general, he functioned normally and engaged in ac-

---

88. *Id.* at 2149.

89. *Id.*

90. *Id.*

91. *Sutton*, 119 S. Ct. at 2151.

92. *Id.* See also 29 C.F.R. § 1630.2(j)(3)(i) (2000).

93. 119 S. Ct. 2133 (1999).

94. *Id.* at 2137.

95. *Id.* at 2136.

96. *Id.*

tivities that other persons normally do.<sup>97</sup> Murphy alleged his hypertension limited him in the major life activities of “running, eating, exercising, breathing, hearing, and seeing.”<sup>98</sup>

In determining whether Murphy was disabled under the ADA, the Supreme Court held that it must consider his hypertension in a medicated state. The Court found that Murphy was not substantially limited in any major life activity.<sup>99</sup> Citing its decision in *Sutton*, the Supreme Court held that Murphy’s high blood pressure did not substantially limit him in any major life activity<sup>100</sup> because, when medicated, Murphy “functions normally doing everyday activity that an everyday person does.”<sup>101</sup> The Court also reiterated its holding in *Sutton* by finding that Murphy was not “substantially limited” in the major life activity of working because Murphy was only precluded from being a mechanic in a particular field and was not precluded from a broad class of jobs.<sup>102</sup> The Court’s requirement that a person be precluded from a broad class of jobs also carries over to the area of education.

### C. *Bartlett v. New York State Board of Law Examiners*

In *Bartlett v. New York State Board of Law Examiners*,<sup>103</sup> the Second Circuit determined that, “disability should be assessed without regard to the availability of mitigating measures.”<sup>104</sup> In this case, Dr. Marilyn Bartlett alleged that the New York State Board of Law Examiners (Board) discriminated against her by not allowing her reasonable bar exam accommodations.<sup>105</sup> Dr. Bartlett suffered from a cognitive disorder that impaired her ability to read.<sup>106</sup> Without accommodations, Bartlett failed the bar examination on four separate occasions.<sup>107</sup> Also, after receiving the accommodation of extra time on her

---

97. *Id.*

98. *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 875 (D. Kan. 1996) (discussing testimony of petitioner’s physician as taken from the trial court’s record).

99. *Murphy*, 119 S. Ct. at 2136.

100. *Id.* at 2139.

101. *Id.* at 2137.

102. *Id.* at 2139.

103. 156 F.3d 321, 329 (2d Cir. 1998).

104. *Id.*

105. *Id.*

106. *Id.* at 324.

107. *Id.*

fifth examination she still failed to pass.<sup>108</sup> Bartlett brought suit against the Board demanding that she be given reasonable accommodations (i.e., no time limitation) on the bar examination.<sup>109</sup>

Although she had a history of self-accommodation that allowed her to achieve average reading skills, the Second Circuit found Bartlett was limited in the major life activity of reading and learning as compared to the average person.<sup>110</sup> In its finding, the Court determined mitigating measures should not be considered when determining whether a person is disabled.<sup>111</sup> However, the United States Supreme Court vacated the Second Circuit's holding and remanded the case to be determined in light of its rulings in *Sutton* and *Murphy*.<sup>112</sup> Unfortunately, the Court did not analyze the facts in *Bartlett*. Nevertheless, in *McGuinness v. University of New Mexico School of Medicine*,<sup>113</sup> the Tenth Circuit followed the Supreme Court's holdings. The case illustrates how the definition of "substantially limited" applies to ADA claims in an educational setting.<sup>114</sup>

#### D. McGuinness v. University of New Mexico School of Medicine

In *McGuinness v. University of New Mexico School of Medicine*,<sup>115</sup> the Tenth Circuit held that impairments that are limited to certain academic subjects are not disabilities under the ADA.<sup>116</sup> In *McGuinness*, a first-year medical student was required to take a course in biochemistry.<sup>117</sup> The student suffered from anxiety attacks when taking tests related to chemistry or math.<sup>118</sup> The student notified his professor about his anxiety, but insisted that he needed no test-taking accommodations.<sup>119</sup>

108. *Bartlett*, 156 F.3d at 325.

109. *Id.*

110. *Id.* at 329.

111. *Id.*

112. *New York State Bd. of Law Exam'rs v. Bartlett*, 119 S. Ct. 2388 (1999) (vacating lower court's holding and remanding the case).

113. 170 F.3d 974 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1357 (1999).

114. *Id.*

115. *Id.*

116. *Id.* (holding that an anxiety disorder that manifests itself in limited circumstances does not constitute a disability under the ADA).

117. *Id.* at 976.

118. *Id.* at 977.

119. *Id.*



Unfortunately, the student did not receive a passing grade and refused to take the required make-up exam. Instead, he filed suit in federal district court against the University of New Mexico School of Medicine (UNM), alleging violations of the ADA for failure to reasonably accommodate his test anxiety.<sup>120</sup> The district court granted summary judgement in favor of UNM because the student did not prove that he was disabled under the ADA.<sup>121</sup> The student appealed and the Tenth Circuit affirmed the district court's holding.<sup>122</sup>

The Tenth Circuit's holding was similar to those proffered by the Supreme Court in *Sutton* and *Murphy*. The Tenth Circuit held that an anxiety disorder that manifests itself only during chemistry and mathematics tests is limited and does not constitute a disability under the ADA.<sup>123</sup> That Court found the ADA's definition of substantial limitations on "working" should not control the outcome of the case, rather, the Court posited that the "deciding principles of employment discrimination cases can be applied to ADA claims in the educational context."<sup>124</sup> Like the Supreme Court decisions in *Sutton* and *Murphy*, the Tenth Circuit held that an individual did not have an impairment if his disability did not prevent him from performing a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.<sup>125</sup> By analogy, the student in *McGuinness* needed to demonstrate that his anxiety impeded his performance in a wide variety of disciplines.<sup>126</sup> He did not do this. The Court held that the student did not meet the threshold for disability because, "[a]n impairment limited to specific stressful situations. . . is not a disability."<sup>127</sup>

The cases of *Sutton*, *Murphy*, *Bartlett*, and *McGuinness* all stand for the principle that a person is not "substantially limited" if a disability can be mitigated and if the disability does not limit a person in a "major life activity." Thus, it is neces-

---

120. *McGuinness*, 183 F.3d at 1173 (discussing claim preclusion and the proceedings of the original *McGuinness* case).

121. *Id.* at 1174.

122. *Id.*

123. *McGuinness*, 170 F.3d at 977.

124. *Id.* at 978.

125. *Id.*

126. *Id.*

127. *Id.* at 980.

sary for schools to incorporate these holdings into their policies toward accommodating the learning disabled.

## V. THE ADA'S APPLICATION TO LAW SCHOOLS

Post-graduate schools should set forth policies that preclude students from claiming an ADA learning disability if such a disability can be mitigated through medication or other corrective measures. In order to fulfill the ADA's individual inquiry requirement and to avoid generalizations about the learning disabled, schools should tailor accommodations to the specific needs of the learning disabled individual.

The apprehensions that the Supreme Court posited in *Sutton* are extremely prevalent today. Individuals with grave physical handicaps comprise only a small portion of the people who claim special privilege under the federal disability laws.<sup>128</sup> Between 1990 and 1993, the number of non-accommodated students taking the LSAT steadily declined, whereas the number of students requesting accommodations increased by approximately 19.5%.<sup>129</sup> Further, the American Council on Education reported that the percentage of students with learning disabilities has grown the fastest, increasing from about 15% to 25% of all students with disabilities.<sup>130</sup> Also, the learning disabled law student is a member of the largest growing group of handicapped students in post-secondary education.<sup>131</sup> According to 1996 EEOC figures, only 14% of the disabled—the deaf, blind, and paraplegic—filed complaints.<sup>132</sup> Additionally, a survey of eighty law schools discovered that accommodation requests were granted 98% of the time.<sup>133</sup> Furthermore, only 41% of the requests for accommodations came from the traditionally disabled, whereas 53.6% of the requests were from the learning

---

128. See Shalit, *supra* note 19.

129. See Wightman, *supra* note 6, at 12 (showing that from 1990 to 1993 the number of non-accommodated test takers decreased approximately 4.35% while the number of accommodated test takers increased approximately 19.5%).

130. See McCusker, *supra* note 12, at 622.

131. See Alfreda A. Sellers Diamond, *L.D. Law: The Learning Disabled Law Student as Part of a Diverse Law School Environment*, 22 S.U. L. REV. 69, 72 (stating it is estimated that 6% of the law school population is learning disabled).

132. See Shalit, *supra* note 19.

133. See Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 569 (1996).

disabled.<sup>134</sup> Of these requests, 82% of the schools allowed learning disabled students time-and-a-half to double time on exams.<sup>135</sup> The only proof that the learning disabled were required to provide for accommodations were recent letters<sup>136</sup> from a family doctor, a psychologist, a psychiatrist, an independent examiner, or a school examiner, stating the student's disability and the accommodations requested.<sup>137</sup>

## VI. PROPOSED REMEDIES

Many law students spend hundreds, if not thousands, of dollars preparing for the LSAT, the first year of law school, and the bar exam. If a student is willing to expend such resources on getting into school, passing classes, and passing the bar, what stops a student from using the ADA as a further supplement to succeed? Schools can prevent students from using the ADA as a learning supplement by incorporating measures such as flagging of scores, professorial input, and independent testing into their ADA policies so that the potential for abuse will be virtually eliminated.

### A. *Flagging Scores*

Students who receive extra time on their examinations should have a notation put on their transcripts indicating that the examination was taken with accommodations. In a world where honors organizations (i.e., Law Review, Moot Court, Honors Fraternity, etc.) and GPA can be the difference between working for the best firms and being self-employed, it is necessary that students with correctable maladies have a disincentive to use the ADA as a tool for advancement.

Law Services, the agency that administers the LSAT, regularly grants accommodations, usually in the form of extra time, to learning disabled takers of the LSAT.<sup>138</sup> Although they allow learning disabled students the accommodation of extra time,

---

134. *Id.* (finding that only 25 of 1145 student requests for reasonable accommodations were denied).

135. *Id.* at 598.

136. *Id.* at 600 (stating that "recent" meant three years on average).

137. *Id.*

138. See, e.g., Wightman, *supra* note 6, at 43; Eichhorn, *supra* note 5, at 46; LAW SCHOOL ADMISSION COUNCIL, 1999-2000 LSAT & LSDAS REGISTRATION AND INFORMATION BOOK 5 (1999).

Law Services advises candidates that scores will be flagged.<sup>139</sup>

In particular, Law Services advises candidates:

[I]f you receive additional test time as an accommodation for your disability, we [Law Services] will send a statement with your LSDAS Law School Reports advising that your score(s) should be interpreted with great sensitivity and flexibility. Scores earned with additional test time are reported individually and will not be averaged with standard-time scores or other nonstandard-time scores. Percentile ranks of non-standard-time scores are not available and will not be reported.<sup>140</sup>

The reason Law Services flags the scores of those who receive extra time is to inform admitting schools that the accommodated LSAT score cannot be relied upon to provide indications of first-year performance in law school.<sup>141</sup>

A 1993 study by Law Services showed a tendency toward over-prediction of law school success for learning disabled LSAT-takers who had received testing accommodations because the speeded nature of the LSAT may give accommodated test takers a several point advantage over non-accommodated test takers.<sup>142</sup> This advantage can be seen when comparing test scores of the accommodated against those of the non-accommodated. For example, 30% of learning disabled test takers earned LSAT scores of 160 or higher, whereas 18% of the non-accommodated test takers scored 160 or higher.<sup>143</sup> Further, the accommodated student had an average LSAT score of 154 versus the non-accommodated student who averaged a 150 on the LSAT.<sup>144</sup> Dr. Warren Willingham, a psychometrician<sup>145</sup> with

139. See LAW SCHOOL ADMISSION COUNCIL, 1999-2000 LSAT & LSDAS REGISTRATION AND INFORMATION BOOK 6 (1999). *But see* Pullin, *supra* note 11, at 816 (stating that the use of flagged scores by the testing industry may be a tenuous professional practice).

140. See LAW SCHOOL ADMISSION COUNCIL, 1999-2000 LSAT & LSDAS REGISTRATION AND INFORMATION BOOK 6 (1999).

141. See, e.g., Wightman, *supra* note 6, at 52; Eichorn, *supra* note 5, at 49; Pullin, *supra* note 11, at 826 (arguing that the testing industry uses flags because of its inability to demonstrate the validity and accuracy of test scores for all the different types of accommodations offered to students with disabilities).

142. See Wightman, *supra* note 6, at 44-45, 52. *But see* Eichhorn, *supra* note 5, at 47 (stating that the validity of the study has been called into question because it failed to track whether the test takers later received accommodations in law school).

143. See Wightman, *supra* note 6, at 21.

144. *Id.* at 20.

145. See TABER'S, *supra* note 1, at 1592 (stating a psychometrician is a person who

the Educational Testing Service, found similar results when comparing Scholastic Assessment Test (SAT)<sup>146</sup> scores of the learning disabled and the non-learning disabled. Dr. Willingham's study found the college grades of learning disabled students were substantially over-predicted when these students were allowed to take the SAT in an untimed or extended-time basis.<sup>147</sup> Another study undertaken jointly by the College Board, Education Testing Services (ETS), and the Graduate Record Examination Board (GRE) found the same results.<sup>148</sup> This four-year study of the SAT and GRE tests found clear evidence that future educational performance was over-predicted for students who received extra time on their tests.<sup>149</sup> These studies suggest that, "providing longer amounts of time may raise scores beyond the level appropriate to compensate for the disability."<sup>150</sup>

In light of these findings, schools should flag transcripts and tests of those students who receive extra time on their exams to inform honors organizations that the student did not participate in the traditional end-of-semester timed examination.<sup>151</sup> Like the LSAT guidelines, such a system would allow honors organizations the ability to interpret the scores with sensitivity and flexibility toward the learning disabled. However, no organization should use the information to deny membership to a disabled student because such use of the information would be discriminatory and would violate the ADA guidelines.<sup>152</sup>

---

is skilled in psychometry which is the measurement of psychological variables, such as intelligence, aptitude, behavior, and emotional variables). See also Michael K. McKinney, *The Impact of the Americans with Disabilities Act on the Bar Examination Process: The Applicability of Title II and Title III to the Learning Disabled*, 26 CUMB. L. REV. 669, 682-83 (1995-1996) (stating that psychometricians believe that permitting additional amounts of time on exams could alter the construct and predictive validity of the test).

146. See Shalit, *supra* note 19 (noting the SAT is a standardized test that estimates how well a particular applicant will perform in college).

147. *Id.* See also Phillips, *supra* note 61, at 10.

148. See Pullin, *supra* note 11, at 817.

149. *Id.*

150. See Phillips, *supra* note 61, at 10.

151. *Univ. of Michigan*, 2 NAT'L DISAB. L. REP. 302 (Oct. 18, 1991) (stating the mere fact that a school has notice that a student's test scores were achieved under non-standard conditions is not discriminatory).

152. See *State Univ. of N.Y. Health Science Ctr. at Brooklyn-College of Medicine (NY)*, 5 NAT'L DISABILITY L. REP. 77 (Aug. 18, 1993) (holding that universities may not devalue scores of individuals who take the MCAT under non-standard conditions). See

Schools should allow professors the opportunity to incorporate a balancing test when grading accommodated scores against non-accommodated scores. After grading all the tests together, the professor should be informed which exams were accommodated and the professor should be given the opportunity to compare the different works. If the accommodated test is on par with those scores of the non-accommodated exams then the grade should stand without a flag. However, if it would be unfair to compare the accommodated tests with the examinations of those who participated in the stressful, time constrained group then the transcript should be flagged. To determine whether a grade should be flagged, the professor should consider some of the following questions:

- 1) Will the test score of the accommodated student have a different interpretation from that of other students tested without the accommodations? Are the scores comparable?
- 2) Are the format of the test questions or the conditions being altered a part of the skill or knowledge being tested?
- 3) Would allowing the accommodations for all students help them achieve higher scores and alter the inference made from their test scores?
- 4) Can valid and reliable procedures and appeals be established for determining which students will be given the requested accommodation?
- 5) Should the disabled student be given any responsibility for adaptation to existing testing conditions?<sup>153</sup>

Accommodated students with flagged transcripts should be required to write-on, rather than grade-on to organizations that require a minimum GPA, such as Law Review. To be fair, the write-on requirements would take into account the student's disability, thereby allowing the student the same accommodations that were received on the examination. This would further the ADA's goal of placing those with disabilities on an equal footing with those who are not disabled, instead of

---

*also* Milani, *supra* note 41, at 998 (showing that universities violate the ADA when they place lower weight on standardized test scores achieved under conditions designed to accommodate disabilities). *But see* Pullin, *supra* note 11, at 824 (stating that the practice of flagging may unfairly stigmatize disabled students).

153. Phillips, *supra* note 61, at 27. *See also* McKinney, *supra* note 145, at 684.

giving the learning disabled advantages over others.<sup>154</sup> This balancing test is equitable, not punitive, since it would meet the ADA requirement of individual inquiry by being implemented on an exam-by-exam basis, thereby rejecting blanket policies and eliminating generalizations about those with learning disabilities. Also, the balancing test would allow those students who truly are learning disabled to get the help they need without being stigmatized for receiving assistance. Furthermore, the professor's comparison of examinations would not jeopardize the hallowed anonymous grading system of most schools, since the professor would only be informed that the exam was accommodated and not who the accommodated student was. Thus, flagging of scores would lead to parity and fairness since students would be less inclined to claim suspect disabilities.

### B. *Professorial Input*

Law school is an environment where professors teach and construct exams geared toward providing students with the tools necessary for the practice of law. Therefore, it is of paramount importance that professors be allowed to voice an opinion as to the kinds of accommodations provided to learning disabled students. Unfortunately, the majority of law schools do not consult professors for input into the types of accommodations that should be given to students with learning disabilities.<sup>155</sup> In fact, a survey of eighty law schools showed that 69% of the time professors have no input about accommodations.<sup>156</sup>

Compared to professional diagnosticians, the law faculty may lack the training and expertise for determining the extent of a person's disability. However, professors are qualified to determine the reasonable accommodations that should be provided to ensure fair and equitable treatment.<sup>157</sup> Traditionally, a law student's grade depends almost entirely on one examina-

---

154. *D'Amico v. New York Bd. of Law Exam'rs*, 813 F.Supp. 217, 221 (W.D.N.Y. 1993) (holding that plaintiff's serious visual disability required a reasonable accommodation and that such accommodation would not be an unfair advantage because it would allow plaintiff to read at a normal rate).

155. See *Stone*, *supra* note 133, at 598.

156. *Id.* (showing that, when it comes to accommodations, professors make the final decision in 3% of cases, get consulted in 28% of cases, and have no input in 69% of cases).

157. *Id.* at 576.

tion where the student exhibits the qualities thought to be important to succeed in the legal profession.<sup>158</sup> The professor is best situated to evaluate and establish the methods (i.e., case study, problems, hypotheticals, etc.) most suited to developing the knowledge and skills that the professor feels must be acquired by the student, both for the purpose of the course and for the purpose of practicing law.<sup>159</sup> By logical inference, it would seem that the facilitator of knowledge and the creator of the exam would also be one of the best resources for ascertaining what accommodations could be implemented without devaluing the course objectives. Furthermore, input from professors would not threaten the anonymity of students because the professor would only give insight into how different accommodations could affect the curriculum; therefore, the professor would have no first-hand knowledge of who the accommodated student is. Since they provide students with the knowledge and experience needed for practice, the law faculty should be consulted for input on the appropriateness of accommodations as they pertain to exams. Also, professorial input would not be violative of the ADA's guidelines since the consultation would be done generally and anonymously.

### C. *Independent Testing*

To ensure uniformity and fairness and to prevent students from shopping for favorable evaluators of disabilities,<sup>160</sup> schools should require disabled students to submit to school-administered psychological or medical examinations to document any disabilities. If a school-administered examination is cost-prohibitive then schools should require independent testing to document disabilities.

Currently, the majority of law schools require some form of documentation from the student's *own* psychologist, psychiatrist, or doctor.<sup>161</sup> On average, the documentation must have been obtained within the last three years and it must request specific accommodations.<sup>162</sup> There are a great variety of people who have taken on the role of diagnostician, and these diagnos-

---

158. See Eichhorn, *supra* note 5, at 57.

159. See Smith, *supra* note 36, at 72-73.

160. See Stone, *supra* note 133, at 576.

161. *Id.* at 600.

162. *Id.* at 578.



ticians use a wide variety of definitions, testing techniques, and reporting methods.<sup>163</sup> Thus, schools should refer students to school administered psychological or medical examinations to prevent biased results and to establish uniform criteria that are based on specific, identified tests. Rarely, if ever, should a student's hand-picked evaluator be the sole judge for granting accommodations since some students may shop for favorable evaluations,<sup>164</sup> and because "some diagnosticians may, consciously or unconsciously, skew their testing in order to achieve particular results."<sup>165</sup> Further, schools should refrain from having blanket policies dictating particular accommodations for any individuals with particular disabilities (i.e., where disability "X" is given accommodation "Y").<sup>166</sup> Since blanket policies violate the ADA's requirement of individual inquiry,<sup>167</sup> schools should do an individualized assessment to determine if an examinee with a learning disability needs an accommodation, and if so, which accommodation(s) would best meet the individual's needs.<sup>168</sup>

For determining independent testing guidelines, schools could look to the criteria set forth by the Texas Board of Law Examiners (TBLE). The TBLE provides non-standard testing accommodations to those individuals who have a *permanent* disability which substantially limits a major life activity.<sup>169</sup> Further, the TBLE requires a comprehensive psycho-educational or neuro-psychological assessment that demonstrates the impact of the impairment of an examinee's ability to

---

163. See Eichorn, *supra* note 5, at 36 (quoting Dean Arthur Frakt of Widener University School of Law, who reported seeing declines of 20%-25% in I.Q. scores when a student was tested by a privately retained diagnostician and then by a neutral or disinterested professional). See also Phillips, *supra* note 61, at 22 (showing that whether a student is classified as learning disabled depends to a large extent on the method used to identify the disability and that the term learning disability has become a catchall category that makes it difficult to differentiate the learning disabled from students who are merely low achievers).

164. See Rothstein, *supra* note 27, at 39 (stating that some admissions professionals are concerned that everyone can find someone who will verify the existence of a learning disability).

165. See Eichorn, *supra* note 5, at 36.

166. See Piltch, *supra* note 59, at 557.

167. See, e.g., 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (requiring analysis of disability on a case-by-case basis); Sutton, 119 S. Ct. at 2147 (determining that individual inquiry is required where disabilities are concerned).

168. Sutton, 119 S. Ct. at 2147.

169. TEXAS BOARD OF LAW EXAMINERS, *Rules Governing Admission to the Bar of Texas*, at 33 (Dec. 21, 1998).

perform on all testing components of the Texas exam under standard time conditions.<sup>170</sup> Also, the independent documentation must include both diagnostic information and an explanation of the current manifestations or functional limitations of the condition.<sup>171</sup> The assessment should be thorough enough to demonstrate whether or not a major life activity is substantially limited (i.e., the extent, duration, and impact of the condition).<sup>172</sup> Whether a law school uses an in-house evaluator or an independent evaluator, the school should always take into account a student's history of testing accommodation and any mitigating factors that may have effectuated a change in a student's disability classification. By using independent tests and reviewing a student's history of accommodation, schools can set standards that are applicable to the learning disabled and in line with the mandate of the ADA. Also, the use of independent testing would allow schools to tailor accommodations to the specific needs of the student, thereby meeting the ADA's requirement of individual inquiry.

## VII. CONCLUSION

The ADA is not designed "to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred . . . from entering."<sup>173</sup> Unfortunately, schools are allowing people to advance through the proverbial back door by granting accommodations to those whose conditions can be mitigated or corrected. Therefore, it is of great import for law schools to review their policies toward the learning disabled. In light of the Supreme Court's holdings in *Sutton*, *Murphy* and *Bartlett*, students who have medical or physical "disabilities" that can be mitigated should not be allowed to invoke the Americans with Disabilities Act (ADA) to acquire special accommodations. Furthermore, if a student does invoke the ADA, she should be required to call upon an independent testing center to verify the disability, her scores should be subject to flagging, and her

---

170. *Id.* at 34.

171. *Id.*

172. *Id.* at 35.

173. *Price*, 966 F. Supp. at 421-22.

scores should be subject to professorial review. If schools would implement such remedies, stories like those of Di Sabled could be averted, and the prejudices and stereotypes about the disabled will be assuaged.