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## Accommodating Students With Disabilities: Testing Them on What They Know

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# Accommodating Students with Disabilities: Testing Them on What They Know

## I. PURPOSE

This note will evaluate what accommodations are provided, and what accommodations are required for people with disabilities when in examination settings. After evaluating the statutes involved, it will examine testing applications, documentation requirements, confidentiality of disability information, and the cost of accommodations. It will then discuss specific accommodations, the case law and ramifications for admissions policies, and will conclude by scrutinizing plans for the future.<sup>1</sup>

## II. EVALUATING THE STATUTES

The Rehabilitation Act of 1973<sup>2</sup> specifies that testing and evaluation in post-secondary settings may not include tests which have a disproportionate, adverse effect on people with disabilities.<sup>3</sup> Tests which have been validated as predictors of success in the program are exceptions to that rule.<sup>4</sup> Likewise, when the director of a program can show that alternate tests with a less disproportionate, adverse effect on people with disabilities are not available, she can get an exception.<sup>5</sup>

The Americans With Disabilities Act<sup>6</sup> test section went into effect on January 26, 1992.<sup>7</sup> It was intended to impact groups that were neither covered by section 504 of the Rehabilitation Act,<sup>8</sup> nor Title II of the ADA. The legislative history illustrates a congressional intent to ensure that persons with disabilities were not foreclosed from educational, professional,

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1. Special thanks to my husband Steven A. Jones, my family, my professor J. Stephen Mikita, and my new friend Michele Ryals who inspires me.

2. The Rehabilitation Act of 1973, 45 C.F.R. §84.42(b)(2).

3. *Id.*

4. 45 C.F.R. § 84.42(b)(2)(i) (1973).

5. 45 C.F.R. § 84.42(b)(2)(ii)(1973). The 45 C.F.R. § 84 App. A (29) (1989) amendment shifts the burden of persuasion from the schools to the Office of Civil Rights. *Id.*

6. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) [hereinafter ADA].

7. 56 C.F.R. § 36.309, 114 at 35598 (1992).

8. Nor the implementing regulations as they apply to higher education, 34 C.F.R. § 104 (1980).

or trade opportunities because examinations were conducted at inaccessible sites or without accommodations.<sup>9</sup>

The ADA requires examiners to guarantee that exams will be held in an accessible place and manner, or that alternative accessible arrangements are made.<sup>10</sup> Even when the examination is not directly administered by the covered entity, it must ensure that the examiner is in compliance with ADA guidelines.<sup>11</sup> Consequently, there is now no doubt that agencies like The Educational Testing Service<sup>12</sup> and The National Assessment Institute<sup>13</sup> must comply.

### III. THE REGULATIONS

The pertinent statutes clearly establish that examinations are one stage of a licensing or certification process, and that an individual should not be barred from attempting to pass that stage because she might be unable to meet other requirements of the process.<sup>14</sup> Likewise, an individual may not be denied admission to an examination on the basis of doubts about her ability to meet requirements that the examination is not designed to test.<sup>15</sup>

### IV. TEST APPLICATIONS

Each of the graduate schools' examination instructions suggest that a student with disabilities request a standardized exam waiver from the institution(s) to which she is applying.<sup>16</sup>

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9. ADA, *supra* note 6 at 68; House Report No. 101-485(III) at 69.

10. *Id.*

11. Association on Higher Education and Disability (AHEAD), *Testing Accommodations for Persons with Disabilities under the Americans with Disabilities Act: The Impact on Licensure, Certification and Credentialing*. (Pamphlet) (1992) [hereinafter AHEAD pamphlet].

12. The Educational Testing Service provides most of the standardized examinations for higher education in the United States. They proctor, among other things, the Graduate Management Application Test (GMAT), the Graduate Record Exam (GRE), the Scholastic Achievement Test (SAT), and the Law School Admission Test (LSAT).

13. The National Assessment Institute [hereinafter NAI] is a private company that has a contract with the Department of Commerce to test persons interested in receiving occupational and Professional licensing within a state. NAI is headquartered in Florida and has 12 branch offices around the country.

14. 56 Fed. Reg. 144, Friday, July 26, 1991 at 35573; *See also*, Association on Higher Education and Disability [hereinafter AHEAD], *Testing Accommodations for Persons with Disabilities: A Guide for Licensure, Certification, and Credentialing*, 3 (year unknown).

15. AHEAD, *supra* note 14, at 4.

16. GRE at 12; GMAT at 12; LSAT at 13; and TOEFL/TSE at 29.

The Law School Admission Test issues its results with a statement to law schools stressing that students be considered for admission, without prejudice, on the basis of other information available<sup>17</sup> because some students are unable to take the LSAT, or take it under conditions that make their scores incomparable<sup>18</sup> with others.<sup>19</sup>

A testing agency is required to establish a simple process for making accommodations available to persons with disabilities.<sup>20</sup> Likewise, an applicant with disabilities is entitled to, and responsible for meeting, the same application deadlines as her able-bodied colleagues, including preregistration requirements for submission of documentation regarding her disability.<sup>21</sup>

A student must follow whichever procedures are specified at her institution or in an examination's registration materials to ensure accommodation on the test day. Examiners are required to provide adequate notice to test registrants of available accommodations, and to provide those accommodations when requested and deemed appropriate.<sup>22</sup>

When a student fails to do her part by not notifying the proper authorities in a timely fashion, an examiner/institution is not responsible for seeking her out.<sup>23</sup> In one case,<sup>24</sup> the Office of Civil Rights (OCR) determined that the student's allegations of inadequate accommodations were unfounded.

17. Laura F. Rothstein, *Section 504 of the Rehabilitation Act: Emerging Issues for College and Universities*, 13 J.C. & U.L. 229, 245 (1986) (Schools are still allowed to require standardized exams, but must use criteria in addition to those scores when determining admissibility).

18. This point is debated. Some argue that once students with disabilities are accommodated, their scores should be comparable to their able-bodied associates. See, e.g., 2 NDLR ¶302, University of Michigan, October 18, 1991. Others, like the ETS, encourage schools not to misapply LSAT scores, as they may not be fully comparable. Law School Admissions Council/Law School Admission Services, *The Law School Admission Test: Sources, Contents, Uses* 27 (1991).

19. See Rothstein, *supra* note 17, at 245. "Because of good faith concerns with their comparability, predictability, and validity, test scores are currently being reported by most, if not all organizations, with a notation about the conditions under which the test was administered."

20. AHEAD, *supra* note 14, at 5.

21. *Id.*

22. AHEAD, *supra* note 14, at 10. Because most personnel are not trained to evaluate appropriateness of accommodation, the testing entity should consult with the person requesting accommodation, agree on an accommodation, but not assume the responsibility for determining what accommodations are appropriate. *Id.*

23. 2 NDLR ¶74, City of New York (NY), April 25, 1991.

24. *Id.*

The OCR found that each time the student had requested an accommodation, she had received it. The OCR concluded that because the student did not follow the procedures established at her school, the school was unaware of all of her needs, and consequently was not liable for its alleged inaction.<sup>25</sup>

According to the GRE and GMAT test information brochures, examiners will provide special testing arrangements and materials for people with currently documented disabilities if these special arrangements are requested in writing by the registration deadline.<sup>26</sup> Standby registration<sup>27</sup> is not available for those with special needs.<sup>28</sup> Consequently, testing center supervisors will not honor any requests for accommodations that were not made in advance.<sup>29</sup>

The Test Of English as a Foreign Language/Test of Standard English (TOEFL/TSE) strongly recommends that one notify them in writing at least three months before the anticipated testing date. At that point TOEFL/TSE will discuss with an applicant the special accommodations needed and prescribe the required documentation.<sup>30</sup> LSAT registration is expected "well in advance of regular registration deadlines,"<sup>31</sup> but is accepted<sup>32</sup> if postmarked by the deadline. The LSAT test booklet reminds students that when they register early, their chances increase that special testing facilities will be available.<sup>33</sup>

The case law has forced test administering organizations to instill their policies. In 1991,<sup>34</sup> OCR found that a complainant with blindness, who alleged that she had been discriminated against on the basis of her disability, had not registered before the established deadline and instead had demanded standby registration.<sup>35</sup> OCR found that because the complainant did not provide adequate notice, the Educational Testing Service (ETS) did not violate section 504 or any of its regulations even

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25. *Id.*

26. GRE Test Administration Booklet 1992-93, at 12-13 and GMAT Booklet 1992-93, at 12.

27. Standby registration permits test takers not requesting accommodations to register for an exam on the day of the exam, at the site of the exam.

28. *Id.*

29. *Id.*

30. TOEFL/TSE 1992-93 Information Booklet, at 29.

31. *Id.*

32. 56 C.F.R. § 36.309(b) (1992).

33. Law Services Test Administration 1992-93 Information Booklet, at 13.

34. 2 NDLR ¶227, Educational Testing Service (NJ), October 11, 1991.

35. *Id.*

though it did not have adequate auxiliary services available at the test site.<sup>36</sup>

## V. DOCUMENTATION OF DISABILITY

Documentation of disability is generally requested to assist a test-giver in accommodating an applicant most effectively, and to validate her need for such a request.<sup>37</sup> Applicants may be required to bear the cost of any required documentation.<sup>38</sup> Examples of required documentation include: documentation of disability; history of accommodation; reason for requested accommodation; and an actual request for future accommodation.<sup>39</sup>

The GRE specifically requires a letter from an applicant that describes the nature of her disability, and the requested special testing arrangements desired, including her requests for extra time.<sup>40</sup> Applicants should describe any past accommodations made during her educational experience and specify details regarding any past assistance.<sup>41</sup> Finally, an applicant is required to obtain and submit a letter on official letterhead with a signature from the applicant's physician or certified specialist which documents the disability.<sup>42</sup> Because certain disabilities change with time, recent documentation is appropriate in most cases.<sup>43</sup>

## VI. CONFIDENTIALITY OF DISABILITY INFORMATION

All disability-related information is confidential.<sup>44</sup> Access should be provided only on a "need-to-know" basis to ensure appropriate accommodation.<sup>45</sup> AHEAD informs us:

36. *Id.*

37. AHEAD, *supra* note 14, at 6.

38. *Id.*

39. G.R. Overton, *Accommodation of Disabled Persons*, *The Bar Examiner*, Feb. 1991, at 8.

40. *Supra* note 15 and accompanying text.

41. *Id.*

42. GRE Test Administration 1992-93 Information Booklet at 12-13.

43. One exception is permanent disability. AHEAD, *supra* note 14, at 7 emphatically remind test takers that "a permanent disability is a permanent disability! Therefore, even if the diagnosis is old, that does not alter the fact that the individual has a disability."

44. 45 C.F.R. § 84.41(c)(2) (1977).

45. See AHEAD, *supra* note 14, at 7; National Assessment Institute, *National Assessment Institute Policies and Procedures for Testing Accommodations for Persons with Disabilities Draft*, at 3.

It is legally prohibited for the agency to release to any outside entity any information or documentation provided by the applicant in requesting accommodation. Verification of disability-related accommodations provided by the testing agency can be released only upon express written request of the individual.<sup>46</sup>

Diagnostic information related to an individual's disability is also highly confidential. All disability related information should be stored separately from test results, usually in a separate folder<sup>47</sup> even though the Department of Education allows standardized testing services to report any special modifications that test takers receive.<sup>48</sup> Informing score recipients that an applicant was provided accommodation on an exam,<sup>49</sup> and then explaining the reason for the accommodation, introduces information about a disability before admission, on a non-voluntary basis. Although most pre-admission inquiries are prohibited by statute,<sup>50</sup> schools are able to indirectly discover disabilities. Consequently, the intent of the law is not being satisfied.

## VII. COST OF ACCOMMODATIONS

Testing agencies are required to pay for any necessary modifications, accommodations, or auxiliary aids.<sup>51</sup> There may be no additional cost assessed to the test-taker for accommodations.<sup>52</sup> However, because most accommodations are inexpensive, agencies should not be unduly burdened by costs.

The courts have required schools to provide interpreters.<sup>53</sup>

46. *Id.*

47. AHEAD pamphlet, *supra* note 11.

48. Rothstein, *supra* note 17, at 245 n 105, 253 *construed in* Brigid Hurley, *Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act*, 32 Boston College L. Rev. 1051, 1061 (1991) *citing* HEATH Resource Center, *Recruitment, Admissions and Handicapped Students: A Guide for Compliance with Section 504 of the Rehabilitation Act of 1973*, 20 (1985).

49. Rothstein, *supra* note 17, at 237.

50. 45 C.F.R. § 84.42(b)(4) (1977).

51. ADA, Title II, Subpart B—General requirements, § 35.130(f):

A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide the individual or group with the nondiscriminatory treatment required by the Act or this part.

52. National Assessment Institute, *supra* note 45, 52 at 2.

53. *United States v. Board of Trustees of the Univ. of Ala.*, 908 F.2d 740

The OCR, in 1989, found that a college discriminated against a student who was deaf by denying payment for a sign-language interpreter.<sup>54</sup> OCR also found that the college had no policy or procedure regarding auxiliary aids to students with disabilities. The regulation<sup>55</sup> requires that an institution provide auxiliary aids, like interpreters, that make orally delivered material available to students with hearing impairments. In 1989, one Federal District Court went so far as to enjoin the holding of classes at a law school unless transcripts of the lectures and discussion were provided to a deaf student the day following the class.<sup>56</sup>

In some cases, it will be possible for testing agencies to get assistance from agencies that work with people with disabilities.<sup>57</sup> Agencies that train individuals with disabilities to use adaptive equipment will, in many cases, loan their equipment out for an exam.<sup>58</sup> Likewise, organizations that provide media in accessible form can be approached about producing alternate versions of examinations.<sup>59</sup>

In some cases, a test-taker will want to provide her own accommodations.<sup>60</sup> Agencies would be wise to inquire whether test takers can supply their own accommodations, while keeping in mind that they cannot be required to provide such equipment.<sup>61</sup> A more long-term approach is to form an alliance of testing agencies or universities that will share the costs of

(11th Cir. 1990); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1986), *vacated and remanded on other grounds*, 451 U.S. 390 (1981); *Crawford v. University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F.Supp. 635 (D.S.C. 1977).

Courts have also required departments of vocational rehabilitation to provide interpreters where post-secondary students in classroom settings are eligible for rehabilitation services. Sy DuBow, Sarah Geer, Karen Peltz Strauss, *Legal Rights: The Guide for Deaf and Hard of Hearing People*, 90-91 (1992).

54. 2 NDLR ¶36, Southeast College of Technology (AL), April 19, 1991. Several additional violations were discovered: the college failed to appoint a Section 504 coordinator, failed to develop grievance procedures, and failed to disseminate an appropriate public notice of nondiscrimination on the basis of disability. *Id.*

55. 34 C.F.R. § 104.3(k)(2) (1977).

56. *Prince v. Rutgers School of Law-Camden*, (D.N.J. Nov. 27, 1989) (Temporary Order).

57. 45 C.F.R. § 84.44(a) app. A (33) (1990).

58. AHEAD, *supra* note 14, at 9.

59. *Id.*

60. Examples include: personal assistants, word processors, "talking" calculators, and other personalized, special equipment she has access to.

61. 45 C.F.R. § 84.44(d) (1977).



accommodating equipment.<sup>62</sup> In so doing, all students who take such examinations will share the costs of accommodations. No longer will there be such an adverse financial disadvantage for individuals with disabilities.<sup>63</sup>

When balancing the needs of the test taker and the costs to the tester, the following test is applied by the courts: "Whether an accommodation can be provided that will not fundamentally alter the nature of the program, that will not result in a safety risk to the individual or others, and that will not impose an undue administrative or financial burden on the institution."<sup>64</sup>

The Department of Education has interpreted the section 504 regulations in such a way as to prohibit schools from denying accommodations to those who cannot demonstrate financial need.<sup>65</sup> The Eleventh Circuit has upheld this standard and acknowledged that undue financial or administrative burdens are legitimate defenses.<sup>66</sup>

#### VIII. ACCOMMODATIONS<sup>67</sup>

"The same accommodations may be used by individuals with different disabilities, and individuals with the same disability may use different accommodations."<sup>68</sup> The idea is to allow students as much independence as possible; to provide them with accommodations that allow them to be tested according to their abilities just as their able-bodied counterparts are. Students with disabilities who have taken tests with modifica-

62. AHEAD, *supra* note 14, at 9.

63. Before the Americans with Disabilities Act, test-takers often incurred not only costs such as interpreters and translating machinery, but also physical and psychological trauma in order to take examinations that are required to gain admission to higher education institutions.

64. *See, e.g., Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981) (denial of mentally ill student's admission to medical school not a violation of § 504 because of legitimate concerns about safety).

65. *United States v. Board of Trustees for the Univ. of Ala.*, 908 F.2d 740 (11th Cir. 1990).

66. *Id.*

67. Problems remain with accommodations because the transition time between passage of the ADA and implementation of its requirements has been poorly used. Public accommodations and government offices were on notice 18 months before the exam section of the ADA went into effect but were not prepared. Likewise, the Rehabilitation Act of 1973 is still not being fully complied with though it has been in effect for nearly 20 years. Many of the people who I interviewed said that they felt that their organizations provide reasonable accommodations, but that they are waiting to be sued before they expend any additional resources.

68. AHEAD, *supra* note 14, at 10.

tions in the past can serve as an excellent resource for determining which kinds of modifications are useful and/or necessary for other students who one may be in their place one day.<sup>69</sup>

The general rule is that all life-style accommodations which have been used to compensate for one's disability and which have become accepted practice for an individual in prior educational programs should be considered the most appropriate accommodations for testing.<sup>70</sup>

Because many of the students who are now entering college, professional and graduate schools, have been accommodated in public education, they expect that they will be accommodated as well during their post secondary educations, as well, if not better than they were under the Education for All Handicapped Children Act.<sup>71</sup>

To expect accommodation in post-secondary settings, a student is responsible for identifying her disability to her school in advance of an exam or admission evaluation. In 1985, a court found that a school will not be held to violate the Rehabilitation Act of 1973 if it did not accommodate for a disability because it did not know about an individual's disability.<sup>72</sup>

Consequently, students with poor undergraduate grades and/or low unaccommodated standardized test scores who do not tell anyone in their admissions department that they have a disability requiring consideration will have a difficult time proving discrimination.<sup>73</sup> This is because the laws require that recipients only accommodate those disabilities they are made aware of.

When students are dissatisfied with provided services, they must inform the provider that there is a problem, and that they are requesting a remedy. The OCR found for a university when one of its students alleged that she was not accommodated adequately, but in fact had never expressed her dissatisfaction

69. Rothstein, *supra* note 17, at 254.

70. Jane Peterson Smith, *NCBE Guidelines for Testing Disabled Applicants*, The Bar Examiner, Feb. 1991, at 28.

71. 20 U.S.C. § 1401-1461 (1988) *cited in* Laura F. Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J.C. & U.L. 471 (1991).

72. *See, e.g.,* Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd*, 800 F.2d 97 (7th Cir. 1986) (learning disability), *cited in* Rothstein, *supra* note 71, at 476.

73. Rothstein, *supra* note 71, at 476.

through appropriate channels.<sup>74</sup> In that case, a student with dyslexia complained that she was not provided with a quiet room for an examination, but OCR found that she indeed had never requested one.<sup>75</sup> The OCR likewise found for the university<sup>76</sup> when a student alleged that the school failed to provide him an adequate interpreter, a note-taker service, and enlarged hand-outs and take-home examinations, because the college had indeed accommodated all but the enlarged take-home examinations.<sup>77</sup> The OCR determined that the school had reasonably assumed that the exams could be enlarged in the complainant's home with his existing equipment.<sup>78</sup>

#### A. *Complaint Procedure & "Flagged" Accommodations*

When a student feels that she has been wronged, she files a complaint with the OCR. The OCR then analyzes each case by the following standards: whether the student provided adequate notice that academic adjustments and auxiliary aids were required; whether the auxiliary aids were necessary; whether appropriate academic adjustments and auxiliary aids were provided; and whether academic adjustments and auxiliary aids were of adequate quality and effectiveness.<sup>79</sup>

Even when certain accommodations are made available, policies resulting from those accommodations may still be unfair to people with disabilities. One example is "flagging".<sup>80</sup> Flagging exams occurs when testing is done under anything but standard conditions.<sup>81</sup> By flagging standardized exams, testing agencies inform the recipient of the scores that the conditions under which the test was taken were adapted to accommodate a disability.<sup>82</sup>

Inadequate guidance is provided as to how admissions departments should interpret flagged scores earned under abnormal conditions. Some institutions assume that a flagged score can not be fairly compared to other test scores, while

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74. 2 NDLR ¶74, City University of New York, April 25, 1991.

75. *Id.*

76. 2 NDLR ¶38, Seattle Central Community College (WA), April 26, 1991.

77. *Id.*

78. *Id.*

79. 2 NDLR ¶102, State University of New York, Alfred State College, June 28, 1991.

80. Hurley, *supra* note 48, at 1060.

81. *Supra* note 48, and accompanying text.

82. 45 C.F.R. § 84.42(b)(4) (1977).

others decide that the advantages of an accommodated test balance out the disadvantage of the applicant's disability, making it comparable to others' scores.

Because accommodations are made for classroom exams<sup>83</sup> as well as for standardized examinations, the question arises of whether a student's transcripts should also be flagged when nonstandard conditions were either required or permitted.<sup>84</sup> When able-bodied students seek accommodations for their crises, including extensions for papers, there traditionally have not been any special notations on their records. Since students with disabilities are not alone in their requests for accommodations, their transcripts alone should not reflect nonstandard conditions.<sup>85</sup>

### B. Architecturally Accessible Testing Site

Being able to "get in the door" is the first concern for public accommodations;<sup>86</sup> then, getting to the testing room, restrooms, and break rooms are also concerns. Examiners are learning to be proactive about informing applicants where parking is located, which entrance to use, and/or giving instructions about elevators.<sup>87</sup> Test administrators are also asking

83. "With regard to classroom testing, faculty members who refuse to allow reasonable accommodations may find themselves or their institutions under attack for violating section 504." Rothstein, *supra* note 17, at 255.

84. *Id.* at 254.

85. *Id.*

86. National Assessment Institute, *supra* note 45, 52, at 1.

87. When I visited the National Assessment Institute in Salt Lake City, I was surprised to read a sign hanging between the two elevators in the lobby that read:

NOTICE

*Handicapped Access to 6th Floor*

*Handicapped persons needing access to 6th floor, National Assessment Institute, may call 485-6013 and some one will come down to escort you by way of the rear service elevator.*

After walking up a flight of stairs (after getting off the elevator where it stopped at the 5th floor), I reached the 6th floor, and walked toward the office. Before I entered the office I noticed that none of the doorways were wheelchair accessible because they were too narrow.

The administrator that answered my questions immediately apologized for the inaccessible facility and informed me that NAI, after requesting that their landlord work with them to make the facility accessible, and being denied, contracted with another building and will soon relocate. As I was leaving, I met one of the Vice-Presidents of the company who was embarrassed when he conceded that their facility was not accommodating but assured me that they are moving as soon as possible.

applicants to remind them about special accommodations on the day of the exam so that all provisions are assured.<sup>88</sup>

### C. *Modified Test Presentation/Response Format*

Visually disabled and print disabled<sup>89</sup> test-takers have obvious needs in a testing situation. Learning disabled students present a more challenging problem for testers because of their varied needs and ability levels. Personal assistance with reading questions<sup>90</sup> and recording answers are accommodations for each of these groups of people, particularly with objective tests.<sup>91</sup> Because students are entitled to have assistants who are qualified to perform the task at hand, testers should ensure that assistants for technical or otherwise specialized exams are able to represent the exam questions competently.<sup>92</sup> The National Assessment Institute requires only that an assistant be neither a relative nor a specialist in the field of the examination.<sup>93</sup>

AHEAD suggests that in today's world, there are technical options available that will provide adequate accommodation for test takers, which will use less of the tester's time, and fewer human resources. One such suggestion is to audio tape<sup>94</sup> an examination in advance so that the test-taker with disabilities has the option of listening and replaying, just as able-bodied test-takers re-read.<sup>95</sup>

Similarly, scribes can be replaced with dictaphones, reading machines or word processors. For objective tests, some learning disabled students are requesting more independence by being allowed to mark their answers on their test sheets

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88. National Assessment Institute, *supra* note 45, 52, at 3.

89. The term "print disabled" refers to people who are incapable of reading ordinary printed materials because of their disabilities. These people include those who are blind, dyslexic, or otherwise learning disabled, or those who, because of muscular or other motor impairment, cannot use printed text or turn pages. M. David Lepofsky, *Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School*, 644, note 5 (1991).

90. 45 C.F.R. § 84.44(d)(2) (1977).

91. Vogel and Sattler, *The College Student with a Learning Disability: A Handbook for College and University Admissions Officers, Faculty, and Administration*, cited in Vogel, *On Developing Learning Disability College Programs*, J. LEARNING DISAB. 518, 527 (1982).

92. Sy DuBow *et al.*, *supra* note 53 at 88.

93. NAI, *supra* note 45, 52, at 2.

94. 45 C.F.R. § 84.44(d)(2) (1977).

95. AHEAD, *supra* note 14, at 12-13.

rather than the bewildering "bubble sheets." The tester or proctor then transfers those answers to a computer sheet.<sup>96</sup>

Sign language interpreters for people with hearing-impairments<sup>97</sup> are frequently requested accommodations. Because some testers may be leery about having people "talking" during an exam, AHEAD reminds organizations "that qualified sign language interpreters function under a strict code of ethics regarding their role and their participation does not pose a threat to test integrity."<sup>98</sup> Any discussion about possible unfair assistance/advantage for people with sign interpreters should take this ethical duty under consideration.

In most cases, allowing students to clarify questions and rephrase them in their own words as a comprehension check before answering exam questions is beneficial without undue advantage.<sup>99</sup> Likewise, avoiding double negatives, unduly complicated sentence structures, and questions embedded within questions when composing examinations helps all students, but particularly those with disabilities.<sup>100</sup>

In many cases, by providing scratch paper and lined paper, students with handwriting challenges may feel less uncomfortable. Evaluating the scratch paper and analyzing the student's process of analysis as well as giving credit for such work, accommodates students who are able to answer the problems, but less able to communicate their answers.<sup>101</sup>

#### D. Assistive Devices<sup>102</sup>

Examples of assistive devices are a dictaphone for a burn survivor taking a bar exam, a "talking" calculator for a person with impaired vision taking a graduate school admission test, and a word processor with spell-check for a learning disabled law student.<sup>103</sup> Most students benefit from being able to use a multiplication table, simple calculator, and other desk referenc-

96. Vogel, *supra* note 91, at 527; *See also*, AHEAD, *supra* note 14, at 14.

97. 45 C.F.R. § 84.44(d)(2) (1977).

98. AHEAD, *supra* note 14, at 12.

99. Vogel, *supra* note 91, at 527.

100. *Id.*

101. *Id.*

102. Lepofsky, *supra* note 89, at 645.

103. Marjorie Rogasta, *Testing Bar Applicants with Learning Disabilities*, *The Bar Examiner*, Feb. 1991, at 14.

es during an examination,<sup>104</sup> when these devices do not perform the tasks for which the student is being tested.

### *E. Extended time to complete examinations*

In *Dinsmore v. University of California*,<sup>105</sup> a student with dyslexia sued his university alleging that a math professor's refusal to allow the student extra time for a math exam violated the Rehabilitation Act of 1973.<sup>106</sup> The professor claimed that his academic freedom allowed him to refuse extra time for students with disabilities to take examinations.<sup>107</sup> Several of the aforementioned accommodations are complemented by extra time allowances on an exam.<sup>108</sup> The National Counsel of Bar Examiners (NCBE), in their report from the meetings of the NCBE Task Force on Disabled Students, studied this accommodation and validated its effectiveness.<sup>109</sup> They have established a set of standards for determining, based on documentation of degree of disability and prior accommodation, how much time will be allotted to each examinee.<sup>110</sup>

Many examinees have found that to use their additional time in the same session is too exhausting, so they have been further accommodated in the ability to choose to spread the total number of hours allowed over an additional number of days.<sup>111</sup> For some people, simply having a time constraint on an exam makes its results unreliable.<sup>112</sup> In one case, a student with a learning disability was deemed adequately accommodated when he received untimed tests.<sup>113</sup>

### *F. Alternate Location*

There are times when accommodations can best be provided somewhere other than at a standard location. One such instance is where specific adaptive equipment is available only

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104. Vogel, *supra* note 91, at 527.

105. (Not reported at the time of first publication; litigation was pending; should have been decided by now) *cited in* Rothstein, *supra* note 71, at 473 n.10, and accompanying text.

106. *Id.*

107. *Id.*

108. NAI, *supra* note 45, 52, at 2.

109. Rogasta, *supra* note 103, at 14.

110. *Id.*

111. *Id.*

112. Vogel, *supra* note 91, at 527.

113. 2 NDLR ¶198, Fort Lewis College (CO), October 2, 1991.

at a certain site. The law provides that such an accommodation be provided and is comparably convenient to the original location.<sup>114</sup> Another reason to provide for testing at an alternate location is to aid people with psychological disabilities who are distracted by extraneous noise, for example, and people with dyslexia who need to concentrate "more," can benefit from a "distraction free space."<sup>115</sup> Visual and noise distraction can be minimized by sequestering a test-taker in her own separate room without phones, street noise, windows, other test-takers, or movement.<sup>116</sup>

Others who benefit from having their own testing room are those who speak words aloud, or are being read to. Some learning disabled students best process information when they can speak it aloud. Still, others who have Tourette's Syndrome may be unable to simultaneously restrain audible outbursts or body tics. Rather than requiring applicants to control these manifestations at the expense of energy and concentration on the exam, these people can also be accommodated by having their own testing space. Another group of people who are accommodated with a separate room are those who receive extra time to take exams. When extra time is given to a number of examinees, they can be put in a separate room from those taking the exam in the standard allotted time.<sup>117</sup> Finally, testing may be provided in one's home or hospital room if no other location is accessible.<sup>118</sup>

### G. Test Schedule Variation

Some examinees can document that because of medication or metabolism there are only certain hours of the day during which they can be tested accurately. These test takers can be accommodated by simply shifting the time of the exam and allowing for some flexibility.

### H. Reduced Course Loads

In order to allow students adequate class and exam preparation time, many schools permit students with disabilities to

114. AHEAD, *supra* note 14, at 11.

115. *Id.* at 10.

116. *Id.*

117. Unless, of course, one of the test takers is disabled by one of the aforementioned problems, at which time she would be separately accommodated.

118. ADA Title III Regulation 36.309(b)(4). *Examinations and Courses.*



take reduced course loads. The AALS sees this as a potential concern. When a student requests a waiver from a traditional full-load program, attendance policy, or class participation, so as to accommodate for her disability, schools that are challenged will need to prove that the requirements are fundamental aspects of the program in order to maintain them.<sup>119</sup>

### I. *Alternate Versions of an Exam*

Because the Rehabilitation Act forbids admission tests that have a disproportionate, adverse effect on "handicapped people," schools must modify their requirements to ensure nondiscrimination.<sup>120</sup> In order to avoid testing and admissions criteria that have a disproportionate, adverse impact on people with disabilities, testers must ensure that test results reflect abilities, not disabilities and then validate the testing procedure.<sup>121</sup>

Alternative test versions can solve these problems. The alternatives include: braille,<sup>122</sup> large print, audio tape, oral rather than written, written rather than oral, typed, essay rather than "objective" multiple guess,<sup>123</sup> and multiple guess rather than oral or essay. As is obvious, making accommodations is potentially troubling for examiners who are concerned about maintaining the integrity of their exams.

Questions remain as to who determines what is "fair."<sup>124</sup> Thus far, the courts have been sympathetic to faculty concerns regarding their qualification to determine when an evaluation has lost its integrity. Similarly, judicial deference regarding academic standards is common.<sup>125</sup> When there is judicial concern, and a consequent request for justification, schools must prove that their requirements are either fundamental aspects of, or essential to their exams, or that to do otherwise would

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119. Association of American Law Schools, *Final Report of the Special Committee on Disability Issues for the Association of American Law Schools*, 11 (1991).

120. 45 C.F.R. § 84.44(a) (1977).

121. Rothstein, *supra* note 17, at 253 n 155. See, 34 C.F.R. § 104.42 (1985).

122. The most cited unavailable version, because of its cost.

123. My studies in Educational Leadership, in addition to my years of guessing on "Multiple Choice" exams have lead me to adopt the term "Multiple Guess."

124. Should it be the professional who documented the disability? The testing agency beforehand? On that day? An allied association, i.e. The American Bar Association? Finally, what kind of appeal process should be in place?

125. Elizabeth R. Smith, *Anderson v. University of Wisconsin: Handicap and Race Discrimination in Readmission Procedures*, 15 J.C. & U.L. 431, 437 (1989).

fundamentally alter their examinations, if they hope to maintain them in their original form.<sup>126</sup>

## IX. AREA OF SPECIAL CONCERN: ADMISSIONS PROCESS

### A. *The Case Law*

#### 1. *Thomas M. Cooley Law School*<sup>127</sup>

In 1991, The Cooley Law School lost its fight to keep a student out of their law program because of her history of depression and dyslexia. Based on the premise that admission tests should accurately reflect an applicant's actual aptitude or achievement, and not the effects of her disability, the applicant had taken the LSAT under special conditions. When the admissions officer at the law school asked her why the applicant's test was flagged, the complainant revealed that she had a history of dyslexia.

The Office of Civil Rights's investigation showed that the applicant's paperwork had been placed into a special category and subjected to heightened scrutiny because she answered "yes" to an application form question which asked whether she had a history of mental illness.<sup>128</sup>

The court held that it is legal to ask on a law school application about an applicant's disability status, so long as the answer is voluntary, and it is clearly stated as such, and if the purpose of the question is to correct past discrimination.<sup>129</sup> The OCR found that Cooley had conducted an improper pre-admission inquiry.<sup>130</sup>

The OCR found the applicant to be "otherwise qualified" because the law school had an admission policy that admitted students who had an "index" score over 50,<sup>131</sup> which was surpassed by the student's index score of 55.<sup>132</sup> The student had also submitted documentation from her psychiatrist indicating that she had the character to handle the rigors of law school. Instead of admitting her the day the application was received,

126. 45 C.F.R. § 84.44(a) (1977). I anticipate that this is how law schools will maintain their hold on the "Socratic Method" and traditional law school examinations. See AALS, *supra* note 119, at 11.

127. 2 NDLR ¶130, Thomas M. Cooley Law School (MI), August 9, 1991.

128. *Supra* note 126.

129. 34 C.F.R. § 104.42(b)(4) (1985); See also, AALS, *supra* note 119 at 6.

130. *Id.*

131. *Id.*

132. *Id.*

as is customary for applicants with an index score over 50, her application was set aside pending the receipt of additional information from the complainant's psychiatrist regarding her diagnosis, treatment, prognosis and a committee review.<sup>133</sup>

The OCR determined that the law school had improperly attempted to "screen out" people with disabilities by asking on their application whether applicants had a history of mental illness. In so doing, the OCR concluded that the law school had violated section 504 and its implementing regulations.<sup>134</sup>

When the admissions personnel conceded that the complainant would have been admitted, absent her response to the mental illness question, the OCR determined that the law school had improperly used information requested on its application as a screening device during the admission process.<sup>135</sup>

## 2. *Koepfel v. Wachtler*

In May 1992, the NY Supreme Court affirmed<sup>136</sup> the lower court decision that a bar applicant with dyslexia could not have waived the examination requirement that was a prerequisite to his admission to the New York State Bar.<sup>137</sup> Though the plaintiff was convinced that there was no way that he could take the exam such that it would accurately reflect his abilities, the applicant requested and received accommodations during the test.

After failing the bar exam, the applicant applied to the Court of Appeals, pursuant to 22 NYCRR section 520.12, for a waiver of the examination requirement as a prerequisite to the practice of law in the state.<sup>138</sup> The plaintiff argued that by requiring successful completion of the bar examination before certification for admission to the bar, his rights to equal protection of the laws under the Federal and State Constitutions were violated. The case was dismissed.<sup>139</sup>

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Koepfel v. Wachtler*, 583 N.Y.S.2d 977 (1992).

137. *Koepfel v. Wachtler*, 141 A.2d 613 (1988).

138. *Id.*

139. *Id.*

### 3. *University of Wisconsin-Madison*<sup>140</sup>

A former medical student with a learning disability alleged that a medical school denied him admission based solely on his disability.<sup>141</sup>

In order to be eligible for admission as a transfer student, one must be currently enrolled in classes and in good standing at another medical school in the U.S. or Canada.<sup>142</sup> Here, the complainant was no longer a student at his previous medical school. At the time of his application for transfer to Wisconsin in 1990, he had not been enrolled in classes since he was dismissed in 1988. His dean readmitted him to allow him to work on his learning disability and attempt to transfer.<sup>143</sup>

The OCR found that the school's "good standing" test<sup>144</sup> for transfer students had been applied uniformly,<sup>145</sup> without regard to disability. During the school year in question, the school had only two openings for transfer students. Seven students applied. The successful applicants were admitted based on the fact that they were in good standing at their former medical schools, were enrolled, and were taking classes at the time of their applications.

The OCR found that the only other applicant who was not enrolled at the time of his application was also denied admission. Thus, the complainant's application was not even considered because he was not in good standing.<sup>146</sup> Had he been in good standing, incidentally, he likely would not have been selected because his qualifications paled in comparison to the two admittees.<sup>147</sup>

### 4. *Southeastern Community College*<sup>148</sup>

The United States Supreme Court extended schools' ability to discriminate on the basis of disability to include "reasonable physical qualifications for admission to a clinical training program." The *Davis* court allowed a nursing program to test

140. 2 NDLR ¶57, *University of Wisconsin-Madison*, May 16, 1991.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

applicants' physical abilities, and then to reject a student whose disability would have required substantial accommodations to permit her to participate in the program.<sup>149</sup>

5. *University of Colorado*<sup>150</sup>

In this case, the court held that the criteria on which the state agencies had originally considered, and subsequently denied the plaintiff doctor admission to a psychiatric residency were improper.<sup>151</sup> The accurate test was to establish what the qualifications for residence were, and then determine whether the plaintiff qualified.<sup>152</sup>

Pushkin met his burden of persuading the court that the proper qualifications were intelligence, emotional stability and physical stamina, ability to empathize, to avoid over-identification with patients and to deal reasonably with patients' reactions to him.<sup>153</sup> He also showed that the qualifications were determined in a subjective manner, and that he was qualified with his disability. He was able to show that the only reason for his disqualification for admission to the program was his disability.<sup>154</sup>

6. *University of Michigan*<sup>155</sup>

When a law school applicant alleged that the university had denied him solely on the basis of his learning disability, the OCR held for the University. Their investigation concluded that Michigan rejected the applicant based on nondiscriminatory factors such as grade point average and LSAT score.<sup>156</sup>

The OCR determined that so long as a flagged LSAT was not used alone in determining admission/denial, a school will not be held to have discriminated against an applicant. In this case, the OCR found that the school evaluated the files based

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149. *Id.*

150. *Pushkin v. Regents of University of Colorado*, 504 F.Supp. 1292 (D.C. Colo. 1981), *aff'd* 658 F.2d. 1372 (C.A. 10 Colo.).

151. *Id.*

152. *Id.*

153. *Id.*

154. Dr. Pushkin has multiple sclerosis.

155. 2 NDLR ¶302, University of Michigan, October 18, 1991.

156. The AALS Special Committee on Disability Issues, *supra* note 119, at 4, reported that overall, students are substantially satisfied with present LSAT accommodations.

on a combination of grades, test scores, work history, graduate work, in-state status, and letters of recommendation.

Michigan does not evaluate the applications of disabled students differently from how it evaluates others. The University acts on the presumption that the LSAT administrators can "determine the test conditions appropriate for any applicant," so consequently, they use the flagged LSAT score correctly, without discriminating.<sup>157</sup> When Michigan denies an applicant whose file informs them that she has a disability, their committee reviews the file to determine if any special consideration should be given to the student.<sup>158</sup>

### 7. *New York University*<sup>159</sup>

An emotionally unstable medical school applicant with serious violent disturbances was regarded as having an impairment. Consequently she was found to have a handicap, but the court determined that she presented an appreciable risk of recurrent violence toward herself and others, so she was deemed "properly excluded."<sup>160</sup>

## X. THE RAMIFICATIONS

The Final Report of the Special Committee on Disability Issues for the Association of American Law Schools<sup>161</sup> emphatically recommends:

The director of admissions should be aware of the implications of disability status of law school candidates, and each year should educate faculty admissions committee members about issues relating to evaluating disabled applicants, such as accommodated LSATs and the implications of different disabilities. This is essential so that applicants with disabilities can be fairly evaluated and considered. It violates federal law to refuse to admit a qualified disabled applicant simply because the school fears it might be too expensive to accommodate the student.<sup>162</sup>

157. *Id.*

158. *Id.*

159. *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981).

160. *Id.* at 775.

161. *Supra* note 119.

162. *Id.* at 6.

Hopefully, as schools become more aware of the needs of all of their students, they will make a concerted effort to ensure that their admissions policies do not "contain any unintended barriers to equality of access for disabled students."<sup>163</sup> Once that occurs, attitudes will begin to change and the cycle of ignorance and discrimination will be broken.

When these institutions move beyond their typical set of predetermined criteria for admissions, into a modified set of admissions requirements, they can assist students who have not had the same educational opportunities as other students, but who have the potential to succeed in higher education.<sup>164</sup>

Eventually, all post-secondary institutions can have a mechanism in place that helps them adequately accommodate applicants with disabilities for whom traditional admission standards would be discriminatory.<sup>165</sup> Schools that ensure disabled applicants full and equal access to facilities will entitle those students to learn and demonstrate their academic achievements free from unnecessary barriers.<sup>166</sup>

At that point, all people—even Jim Post<sup>167</sup>—will be able to reach their potential. Mr. Post graduated at the top of his class, Summa Cum Laude, with a 3.9 grade point average and a 28 on his Medical College Admission Test (MCAT). One colleague, who had the same MCAT score but only a 3.7 grade point average, *was* admitted to medical school. Mr. Post was rejected by all ten of the medical schools to which he applied.<sup>168</sup>

The reason? Mr. Post believes that he was denied solely on the basis of his disability. He is a quadriplegic who can move his wrists, write, type, feed himself, and operate his electric wheelchair. He considers himself semi-independent when he has adaptive equipment to assist him.<sup>169</sup>

Before generic rejection letters came in the mail, Mr. Post received phone calls from people at several of the schools informing him that they had rejected him because he didn't meet

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163. Lepofsky, *supra* note 89, at 643.

164. Connie Logan Dalke, *Support Programs in Higher Education for Students with Disabilities*, 25 (1991).

165. *Id.*

166. Lepofsky, *supra* note 89, at 642-43.

167. Post was a guest on NBC's *A Closer Look*. October 6, 1992, 11-11:30 a.m. Burrelle's Television Transcripts.

168. *Id.* at 6.

169. *Id.* at 1.

their “technical standards.”<sup>170</sup> Currently, medical schools have technical standards that tend to screen out people with mobility disabilities.<sup>171</sup> Many schools cite national standards as their reason for rejecting applicants. In Mr. Post’s case, Temple University indicated that because of their CPR requirement, Mr. Post was denied admission.<sup>172</sup>

Dr. Shane Vervoot, a quadriplegic physician, who appeared with Jim Post on *A Closer Look*, spoke to the issue of technical standards:

There’s not a single technical standard examination that a physician has to take to become licensed. All we take is [sic] written examinations. Essentially, what we’re required to do is successfully complete medical training in an internship program. Now the question is, does the school allow for accommodations? And if it allows for accommodation, then a person can still successfully complete school.

And that’s what I did. I never completed [sic.], or delivered a baby. I’ve never done CPR by myself, but to pass a certification I was able to describe to somebody else how to perform that procedure[;] that might have just been a passer-by. And they allowed me to have my certification based on that. That’s an accommodation.

It doesn’t make me less of a skilled problem-solving physician; doesn’t mean I can’t diagnose disease and illness . . . [or] prescribe medications just because I can’t do CPR.

And that’s essentially what Jim [Post] is facing—the attitude—a “good old boy” attitude that, [“if] you can’t do what I used to do then you can’t be as good[”], and that doesn’t stand true nowadays.<sup>173</sup>

Dr. Vervoot implies that the problem is in the medical schools—not the applicants. One example is that ironically, once someone is licensed to practice medicine, she may stay a doctor regardless of any disability she may later get. Even if she is overtaken by multiple sclerosis, or becomes blind, or is

170. *Id.* at 2.

171. *Id.*

172. *Id.* at 4.

173. *Id.*



paralyzed she may still practice because the current system requires only one license for one's entire career.<sup>174</sup> Advocates for students with disabilities point out the absurdity of allowing doctors to remain in practice after becoming disabled, but not allowing people who are presently disabled to try to become doctors.

Another surprising example of how medical schools are failing is the fact that technology, instead of advancing the opportunities of people with disabilities, has been used to limit them. Dr. Stanley Wineapple, who completed medical school though he is legally blind pointed out:

Technology is—is—is almost a *sine qua non* of modern medicine. and in fact, if—if the microsurgons were not allowed to use their telescopes and their special lenses, they wouldn't be able to do microsurgery. And additionally, physician's assistants are ideal people to be able to help meet the technical standards that a person with a disability has.<sup>175</sup>

Clearly, without accommodations, no one can perform the medical tasks that modern medicine has introduced to us. Without lasers, X-ray machines, and stethoscopes, *inter alia*, able-bodied doctors would be unable to perform the majority of their duties. Why is it so challenging for medical schools to recognize that all people require, and can succeed with, accommodation?

Since Mr. Post learned that other physicians have been accommodated in the past at medical schools, he will try the application process again.<sup>176</sup> A new possibility is the Albert Einstein College of Medicine, where Dr. Hubert Shumberg is a professor and chair of the Urology Department. Dr. Shumberg stated: "We just graduated a paraplegic girl [sic] who—has done very, very well, and is out. We have a young man who was rendered quadriplegic while in medical school, identical to Jim [Post]. We're going to get him through."<sup>177</sup>

## XI. PLANS FOR THE FUTURE

The National Conference of Bar Examiners (NCBE) has examined the testing situation, as it relates to people with

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174. *Id.*

175. *Id.* at 7.

176. *Id.* at 8.

177. *Id.* at 7.

disabilities, under new federal standards. Their printed guidelines are now being implemented by their members.<sup>178</sup>

NCBE policy (adopted in 1979) now states:

Without impairing the integrity of the examination process, the bar examining authority should adopt procedures allowing physically handicapped applicants to have assistance, equipment or additional time as it determines to be reasonably necessary under the circumstances to assure their fair and equal opportunity to perform on the examination.<sup>179</sup>

Their Board of Managers has proposed a 1993 revision that would read:

Without impairing the integrity of the examination process, the bar examining authority should adopt and publish procedures allowing applicants with documented disabilities to have assistance, equipment, or additional time as is reasonably necessary under the circumstances to assure their fair and equal opportunity to perform on the examinations.<sup>180</sup>

The NCBE is making an effort to reach out to students with learning disabilities who have been ignored in the past because of their recent realization that there is a stark disparity in services available to people with various disabilities: "While few people would argue with allowing a blind student an alternative to an art appreciation class, or a physically handicapped student an alternative to a physical education activity, such tolerance in making exceptions for the learning disabled is not as readily achieved."<sup>181</sup>

The NCBE is also working to equalize the system for all examinees. The AALS has also sought to eliminate discrimination in their admissions policies. The AALS' special committee on disability issues presented its findings at the AALS conference in 1991.<sup>182</sup> The report specifically discusses hiring, retention and promotion of disabled faculty members; politics and general issues of providing accommodations to students; en-

178. The February, 1991 edition of their publication, *The Bar Examiner*, dealt almost exclusively with disability issues.

179. Francis D. Morrissey, *President's Page*, *The Bar Examiner*, Feb. 1991, at 4.

180. *Id.* at 5.

181. James D. Sears, *Learning Disabilities, Post-secondary Education, and Section 504 of the Rehabilitation Act of 1973*, 12 L. & PSYCH. REV. 61, 78 (1988).

182. *Supra* note 119.

forcement of Section 504 with respect to colleges and universities; and identifying, evaluating and accommodating learning disabled law students.<sup>183</sup>

This committee reported that when one considers learning disabilities, visual and hearing impairments, orthopedic impairments, speech disabilities, health impairments, mental impairments, and drug and alcohol addiction, almost 9% of students and a significant number of faculty in law schools are disabled and in need of accommodation.<sup>184</sup>

Like NCBE, the NAI is beginning to better accommodate students, and is formulating new policies. The Salt Lake City, Utah office was the first to write up a policy and procedure guide for their organization that dealt with testing accommodations for persons with disabilities. That document is currently being expanded to meet the needs of the 12 branch offices of the organization across the United States.

In order to serve its constituents, colleges and universities' legal counsel must stay up to date on the case law regarding higher education disability discrimination claims.<sup>185</sup> Maintaining a good working relationship with the university's disabled student service office is one way to accomplish this.<sup>186</sup> These two offices, working in tandem, can ensure that faculty and staff on the campus are aware of necessary accommodations for students<sup>187</sup> with disabilities. Training sessions, workshops, and other informational networks<sup>188</sup> are critical to insuring that all involved are kept abreast of their rights and responsibilities.

Universities would be well advised to create an accessibility committee that involves students, faculty and administration in developing programs for people with disabilities in all aspects of university life.<sup>189</sup> That committee could also implement strategies for guaranteeing adequate accommodations in all university settings.

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183. *Id.*

184. *Id.*

185. Rothstein, *supra* note 17, at 262.

186. *Id.*

187. Recognizing, of course, that students are not the only covered class; that § 504 of the Rehab Act also protects faculty and staff members, but that those groups are outside the scope of this paper.

188. Rothstein, *supra* note 17, at 262.

189. *Id.* at 262-63.

While good faith does not preclude litigation, it will prevent a significant amount. Consequently, campus officials need no longer fear the mandates of the Rehabilitation Act and the Americans with Disabilities Act,<sup>190</sup> because compliance with Section 504 and the ADA only requires creativity, flexibility, and sensitivity to the particular needs of faculty, students and staff.

The publicity surrounding the ADA's passage will likely notify students that they have rights they never knew about. Students with disabilities will realize that they can have their "new" rights enforced in court.<sup>191</sup> Consequently, having an accessibility committee could benefit a college or university in countless ways.

But the question remains: Must a student's request for a format change be honored?<sup>192</sup> In the future, all covered entities will need to better budget for accommodations, form alliances with other schools and agencies to provide more accommodations, at a lower cost, and become more proactive regarding information and assistance.

## XII. CONCLUSION

In the intervening years since the passage of the Americans with Disabilities Act, many changes have actually come about. Even institutions which are not required to comply are making grand efforts to accommodate people with disabilities.<sup>193</sup> There is increased hope for the future of Americans with Disabilities. No longer will test givers be allowed to act as though they had no duty to ensure that fair testing take place.

*Lisa Stamps-Jones*

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190. *Id.* at 263.

191. Rothstein, *supra* note 71, at 478.

192. *Id.* at 473.

193. Brigham Young University, as a religious institution is exempt, but has made astounding efforts to ensure accessibility for faculty and students with disabilities.