A Brave New World: The Rights of the Disabled to an Even Playing Field in High Stakes Testing

Melanie Lea Proctor, Assistant U.S. Attorney, Northern District of California, US

**The views expressed herein are those of the author, and do not necessarily reflect the views of the Office of the United States Attorney, the Department of Justice, or the United States.*

ABSTRACT

Twenty-five years ago, the United States enacted the Americans with Disabilities Act, designed to provide equal opportunities to people with disabilities. Sixteen years later, the United Nations Convention on the Rights of Persons with Disabilities came into force. This paper will explore the intersection of the A.D.A. and the Convention as they apply to high-stakes standardized testing.

In the first section, the paper will explore the development of American law since the implementation of the A.D.A., with a particular focus on the insertion of a reasonableness requirement into testing accommodations. The second section of the paper will discuss how a selection of member states have implemented the Convention, and whether those countries' laws provide the same rights their citizens. Finally, the third section will discuss arguments against the broad provision of testing accommodations, and counter those criticisms. One of the common refrains is that heightened standards for providing testing accommodations are necessary to protect the interests of the fully abled. The paper will question the validity of that interest, and contend that liberal provision of testing accommodations benefits not just disabled candidates, but society as a whole.

INTRODUCTION

In 1990, the United States enacted the Americans with Disabilities Act ("A.D.A.").[1] In passing the A.D.A., the United States Congress found that "discrimination against individuals with disabilities persist[ed] in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Congress specifically included section 12189 to address a gap between existing law and the A.D.A. The section was designed to "assure that persons with disabilities are not foreclosed from educational, professional, or trade opportunities because an examination or course is conducted in an inaccessible site or without an accommodation (H.R. Rep. No. 101-485(III) 1990)." In 2006, the United Nations adopted the Convention on the Rights of

[1] Americans with Disabilities Act, P.L. 101-336 (July 26, 1990).

Persons with Disabilities, which came into force within two years. The Convention similarly recognizes the right to education, calling upon State Parties to "ensure an inclusive education system at all levels (Convention 2006)." These provisions should not be taken lightly because empirical evidence demonstrates that education serves as the gateway to full participation in economic opportunities. While great strides have been made in many aspects of life, others perceive such advances as unfairly skewed towards those with disabilities. This misperception is perhaps most evident in high stakes testing, where the accommodation of extended time is particularly controversial.

I American Disability Rights in High Stakes Testing

Disabled test takers who seek to vindicate their rights under the A.D.A. may pursue their claims under three different statutes. For those who seek testing accommodations for exams administered by public universities or state certification boards, they may have claims under section 12132, which applies to public entities.[2] Some have pursued their rights under section 12182 of the A.D.A., which applies to places of public accommodation.[3] Others have sought relief under section 12189, which specifically applies to testing entities.[4] This section will discuss the structure of the A.D.A. as it applies to educational institutions and testing entities, and a selection of case law.

A. The A.D.A.

1. Title II: Public Entities

Section 12132, Chapter 42 of the United States Code states "[s]ubject to the provisions of this subchapter, 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 any such entity."[5] Public entities are defined as including state or local governments; their departments' agencies, or instrumentalities; and certain rail authorities.[6] Accordingly, this provision applies to

[2] 42 U.S.C. § 12132.
[3] 42 U.S.C. § 12182.
[4] 42 U.S.C. § 12189.
[5] 42 U.S.C. § 12132.
[6] 28 C.F.R. § 35.104.

entities such as public educational institutions and state licensing entities.[7] For the purposes of Title II, a "qualified individual with a disability" is defined as a person who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[8]

2. Title III: Places of Public Accommodation and Testing Entities

a) Title III contains two provisions applicable to examinations. The first applies to places of public accommodation; the second is specific to testing entities. Unlike Title II, this subchapter does not contain a statutory definition of a "person with a disability."

Places of Public Accommodation

The A.D.A. prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[9] Some courts have restricted the definition of public accommodation to physical structures; others have extended the definition to the internet.[10]

Places of public accommodation are required to provide "reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities[.]"[11] However if the entity can demonstrate that "making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations," the failure to accommodate might be excused.[12] The A.D.A. also forbids "a failure to take

[7] *Id.*
[8] 42 U.S.C. § 12131(2).
[9] 42 U.S.C. § 12182(a).
[10] *Compare Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000) *with Doe v. Mutual of Omaha Ins. Co*., 179 F.3d 557, 558 (7th Cir. 1999).
[11] 42 U.S.C. §12182(b) (2) (A) (ii).
[12] 42 U.S.C. § 12181(b) (2) (A) (ii).

such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[13] The entity must offer a reasonable modification "unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[14]

b) The A.D.A.'s Testing Clause

The A.D.A. also contains a section specific to testing entities that offer "examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional or trade purposes [.]"[15] This section mandates that such an entity "shall offer such examinations or courses in a place or manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."[16] The subsection was not in the original draft of the A.D.A.; rather, it was added specifically to "fill a gap which [was] created when licensing certification and other testing authorities [were] not covered by Section 504 of the Rehabilitation Act or title II of the A.D.A."[17]

When including this section, the Committee on the Judiciary acknowledged "that many licensing, certification and testing authorities are not covered by either Section 504 of the Rehabilitation Act, because no federal money is received, or by title II of the A.D.A. because they are not state agencies (H.R. Rep. No. 101-485(III) 1990)." The Committee noted that many state agencies required tests administered by the uncovered entities, and adopted the provision to "assure that persons with disabilities are not foreclosed from educational, professional or trade opportunities because an examination or course is conducted in an inaccessible site or without an

[13] 42 U.S.C. § 12181(b) (2) (A) (iii).
[14] 42 U.S.C. § 12181(b) (2) (A) (iii).
[15] 42 U.S.C. § 12189.
[16] *Id*. The ADA Amendments Act of 2008, 122 Stat. 3555, did not change this section.
[17] H.R. Rep. No. 101-485(III), at 68-69 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 491-92.

accommodation (H.R. Rep. No. 101-485(III) 1990)."

The implementing regulation specifies that section 12189 covers private entities, and that examinations covered by the section must be "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 disability, "except where those skills are the factors that the examination purports to measure[.]"[18] The regulation's history reflects that the Department received comments from test administrators, agreed that it would be permissible for test administrators to require those seeking testing accommodations "to provide advance notice and appropriate documentation,"… provided such requirements were "not unreasonable."[19]

3. Remedies

In the United States, a candidate who believes she was wrongly denied testing accommodations may pursue certain remedies.[20] While the candidate may first attempt to resolve the conflict with the testing entity through a formal or private administrative process, if an agreeable resolution is not reached, the candidate may file a complaint with the U.S. Department of Justice or her applicable state agency, which may choose to act on her behalf. Alternatively, the candidate may proceed to court. If her claim is found under 42 U.S.C. § 12132, her remedies are found in the Rehabilitation Act, at 29 U.S.C. § 794a, which in turn refers the candidate to 42 U.S.C. § 200e-5(f) through (k).[21] A variety of monetary and non-monetary relief is available under Title II. In contrast, under Title III of the A.D.A., private litigants may not recover compensatory damages. 42 U.S.C. § 12188.

[18] 28 C.F.R. § 36.309(b) (1) (i).
[19] 56 Fed. Reg. 35544-01, 35573.
[20] It is also important to note that in the United States, the documentation required by testing entities to prove the necessity of the requested accommodations is obtained through expensive private testing. Accordingly, there may be serious socioeconomic discrepancies in the availability of testing accommodations.
[21] 42 U.S.C. § 12133.

B. Case Law

Federal courts have interpreted the A.D.A. in the test taking context with a variety of results. Notably, litigants, courts, and scholars have historically read a "reasonable" requirement into the testing clause that does not exist. The confusion is perhaps attributable to the choice of some litigants to bring their claims under section 12181, rather than section 12189, of the A.D.A. In addition, legislators have mistakenly injected the word into the statute, contending that "[i]t is vital that standardized testing organizations not be required to fundamentally alter key performance measurements when providing reasonable accommodations to students with disabilities."[22] Table 1 contains a survey of cases involving testing accommodations for a variety of examinations; this paper will discuss five in detail here.

1. D'Amico v. New York State Board of Law Examiners

In 1992, Marie D'Amico attempted to take the New York bar exam with testing accommodations for her severe visual disability.[23] When she did not pass on the first try, she consulted with a physician who recommended that (in addition to other accommodations) she be allowed to take the exam over a period of four days, rather than the customary two, to rest her eyes.[24] The New York State Board of Law Examiners ("Board") did not allow her additional request, instead offering her the ability to specify the actual exam times desired.[25]

D'Amico sought a preliminary injunction compelling the Board to allow her to take the test over four days.[26] The court examined both sections 12132 and 12189, and determined that to succeed, D'Amico had to demonstrate that she was disabled, her requests were "reasonable," and that the Board denied those requests.[27] Without distinguishing between the two sections, the district court found that she met those

[22] 154 Cong. Rec. S8342, S8355 (Statement of Senator John Barrasso), Sept. 11, 2008.
[23] *D'Amico v. New York State Board of Law Examiners*, 813 F. Supp. 217, 218 (W.D.N.Y. 1993).
[24] *Id.* at 219.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 221.

requirements and granted the preliminary injunction.[28]

In reaching its decision, the court rejected the Board's argument that D'Amico's request would give her an advantage over other test-takers, finding that the purpose of the A.D.A. is to place disabled test-takers on "equal footing."[29] The court also rejected the Board's contention that its opinion of the appropriate accommodations should take precedence over that of D'Amico's physician.[30] Thus, this early case addressed two issues that have risen repeatedly throughout the past twenty-five years: whether the provision of testing accommodations gives the disabled test-taker an unfair advantage, and the proper weight of a test-taker's own documentation when determining which testing accommodations should be granted.

2. Florida Board of Bar Examiners re. S.G.

Five years after Rubenstein, a Florida candidate received twenty-five percent extra time on the Florida Bar Exam but failed the test.[31] The Florida bar exam was normally administered in two parts; when a candidate took the parts together, her score on each part would be averaged.[32] However, if the candidate took the parts in separate administrations, her score on each part had to be a passing score.[33] The candidate asked that, as a "reasonable accommodation," she be allowed to take both parts of the exam in separate administrations, but still receive an averaged score.[34] The Florida Supreme Court examined her request solely under section 12189, and determined that her request was "for an accommodation in the scoring," not the administration of the exam, and as such "was not a reasonable accommodation."[35] The state supreme court found that her request would not place her on "equal footing," but would instead give her an advantage.[36]

Here, it does not appear that the state supreme court considered the effect of its

[28] *Id.* at 223.
[29] *Id.* at 221.
[30] *Id.* at 222.
[31] *Florida Board of Bar Examiners re. S.G.,* 707 So. 2d 323, 324 (Fla. S. Ct. 1998).
[32] *Id.* at 324.
[33] *Id.*
[34] *Id.* at 324.
[35] *Id.* at 325.
[36] *Id.*

decision: to force a Hobson's choice upon the disabled test taker. If the appropriate testing accommodation is separate administrations of each section, then the test taker is forced to choose between taking the test with the recommended testing accommodation and suffering a split score; or taking the test without the testing accommodation and suffering the effects of her disability. This does not appear to best ensure the accessibility of the examination.

3. Jones v. Nat'l Conference of Board Examiners

In 2011, Deanna Jones sought an injunction requiring the National Conference of Bar Examiners ("N.C.B.E.") to allow her to take the Multistate Professional Responsibility Exam ("M.P.R.E.") using a computer equipped with screen access software and other accommodations.[37] Jones suffered from visual and learning disabilities.[38] The N.C.B.E. advocated for a finding that the "best ensure" standard employed the "'reasonable accommodation' standard" found "in the Rehabilitation Act of 1973 and Title II of the A.D.A."[39] The N.C.B.E. argued that Jones's requested accommodations were unreasonable because they would involve "a significant time demand and distraction from what [the N.C.B.E.] staff would ordinarily be doing."[40]

The district court rejected the N.C.B.E.'s misplaced standard.[41] The district court observed that "[u]nlike in the employment sector where a 'reasonable accommodation' may be adjusted over time, a professional examination is generally a one-time event wherein the accommodations either ensure equality or do not."[42] The district court ultimately found that regardless of the standard used, the N.C.B.E. had to offer "an even playing field" for the exam.[43] Jones won her preliminary injunction and was able to take the exam with testing accommodation.[44]

4. Enyart v. National Conference of Bar Examiners

[37] *Jones v. Nat'l Conference of Bar Examiners*, 801 F. Supp. 2d 270, 272 (D. Vermont 2011).
[38] *Id.* at 273-74.
[39] *Id.* at 283.
[40] *Id.* at 281.
[41] *Id.* at 283-84.
[42] *Id.* at 284.
[43] *Id.* at 285.
[44] *Id.* at 291.

In 2009, Stephanie Enyart sought a number of testing accommodations on the California Bar Exam, including the ability to take the Multistate Professional Responsibility Exam, the Multistate Bar Exam, and the California Bar Exam using assistive technology software.[45] The testing entities granted her non-software related requests, but denied her request to use assistive technology software; thus, she filed suit and sought a preliminary injunction.[46] The district court granted her the injunction, finding that the offered accommodations would result in Enyart's disability limiting her performance on the exam, something that was "clearly forbidden both by the statute [42 U.S.C. § 12189] and the corresponding regulation [28 C.F.R. § 36.309]."[47]

The N.C.B.E. argued on appeal that the district court used the wrong standard and that instead, the court should have used a "reasonableness standard."[48] The Ninth Circuit rejected the argument, holding that the "'reasonable accommodation' standard" for which the N.C.B.E. advocated originated in Department of Health and Human Services regulations implementing the Rehabilitation Act of 1973.[49] The Ninth Circuit noted that Congress did not incorporate that standard into section 12189 and held that the Department of Justice's regulation implementing section 12189 was a permissible construction of the statute.[50] The Ninth Circuit Court of Appeals affirmed a lower court's entry of a preliminary injunction, holding that Enyart was likely to succeed on the merits of her claim that the limited testing accommodations offered by the N.C.B.E. would put her at a disadvantage from comprehending the test material.[51]

5. Rawdin v. American Board of Pediatrics

David Rawdin was diagnosed with a brain tumor while in college.[52] He graduated both college and medical school.[53] However, he struggled to pass Step III of the United States

[45] *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153, 1167 (9th Cir. 2011).
[46] *Id.* at 1157.
[47] *Id.* at 1158.
[48] *Id.* at 1161.
[49] *Id.* at 1162 (citing 45 C.F.R. § 84.12(a)).
[50] *Id.*
[51] *Id.* at 1167.
[52] *Rawdin v. American Board of Pediatrics*, 582 Fed. Appx. 114, 115 (3d Cir. Sept. 3, 2014).
[53] *Id.*

Medical Licensing Exam, which was in multiple choice format.[54] After failing the exam twice, he was diagnosed with a cognitive disability, likely as a result of the treatment he received for the brain tumor.[55] With the accommodations of extended time, an individual testing room, and off the clock breaks, he passed the Step III of the United States Medical Licensing Exam.[56]

However, Rawdin was required by his residency also to pass the General Pediatrics Certifying Examination.[57] He sat for the exam five times and failed each time.[58] After a reevaluation by a neuropsychologist, he sought a number of accommodations to take the fourth step of the board certification examination, including extended time, a quiet setting, advance knowledge of the subjects covered in the exam, access to reference materials, short breaks, and an essay format.[59] The American Board of Pediatrics granted three of his requests but denied his requests for advance knowledge of the exam, access to reference materials, and an essay format.[60] Rawdin filed suit and sought a preliminary injunction.[61] The district court found that Rawdin was not disabled, that the requested accommodations were unreasonable, and would fundamentally alter the exam or impose an undue burden on the ABP.[62]

The United States Court of Appeals for the Third Circuit applied section 12189 and held that because the test did not require an examinee to recall information out of context, Rawdin was not entitled to the accommodation of advance knowledge of the exam.[63] The appellate court held that the ABP had shown that the test "best ensured" it would measure Rawdin's aptitude, rather than any impairment.[64] Accordingly, the

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 117.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 119.
[64] *Id.*

Third Circuit affirmed the lower court.[65]

C. Reasonable v. Best Ensure

The statutory choices in the cases surveyed should not have significant implications for the candidate because the defenses to each claim are essentially the same: that providing the requested testing accommodation would fundamentally alter the nature of the exam, test, or certification, or otherwise constitute an undue burden on the test provider.[66] However, placing the term "reasonable" before the word "accommodations" suggests that the burden is on the candidate to *be* reasonable. As discussed above, although other sections of the A.D.A. describe "reasonable accommodations," the A.D.A.'s testing clause does not.[67] Rather, the sole use of the word "reasonable" as it applies to the testing clause appears in the regulation, and then only to describe the limitation on requests for documentation.[68] This distinction is important because Congress is presumed to have understood its word choice when drafting a statute.[69] When, in 1990, Congress did not write a reasonableness limitation into the testing clause, and instead chose to require that testing entity "best ensure" it is testing a person's skill rather than measuring the person's disability, we must give that distinction the weight it is due.

II. INTERNATIONAL DISABILITY RIGHTS LAWS

Since 1990, over 180 countries have enacted disability rights laws. In 2006, the United Nations adopted the United Nations Convention on the Rights of Persons with Disabilities, which opened for signature on March 30, 2007. The Convention calls upon state parties to ensure that "reasonable accommodation" is provided to persons with disabilities (Convention, Art. 24). It also requires state parties to ensure that "[p]ersons with disabilities receive the support required, within the general education system, to facilitate their effective education. (Convention, Art. 24)."

The Convention requires regular reports from state parties (Convention, Art.

[65] *Id.*
[66] 28 C.F.R. §§ 35.130(b) (7), 36.303(a), 36.309(b) (3).
[67] 42 U.S.C. §12131(2).
[68] 28 C.F.R. § 36.309(b) (1) (IV).
[69] *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

35). Upon receipt of the report, the Committee on the Rights of Persons with Disabilities ("Committee") may ask clarifying questions (Convention, Art. 36). After receipt of the responses, the Committee will issue concluding observations, which may include recommendations. Over two hundred countries have ratified the Convention; Table 2 contains a survey of some of those countries.[70] Due to time and space constraints, Table 2 concentrates on countries which have submitted initial reports to the C.R.P.D., and indicates the year in which each country enacted a disability rights law that addresses education; the date the state party ratified the convention; the date the state party submitted its initial report; and whether and what date the Committee issues concluding observations. In this section, the paper will explore the laws of the United Kingdom and Australia.[71]

A. Disability Rights in the United Kingdom and Australia

1. The United Kingdom

The United Kingdom first passed a disability rights law in 1995; that law was later subsumed by the Equality Act of 2010 ("Equality Act").[72] It ratified the Convention in 2009. In its first report to the Committee, the United Kingdom noted that it prohibits discrimination against persons with disabilities by the Equality Act of 2010 (U.K. Initial Report, 2011). This law requires education providers to make "reasonable adjustments" for persons with disabilities.[73] The United Kingdom also reported it was committed "to enabling disabled people to continue their education to university level (U.K. Initial Report 2011)."

[70] A complete list of signatories and state parties is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (last visited August 20, 2015). The United States has signed the Convention, but has not yet ratified it.

[71] A comparison of the different requirements for entry into higher education and for various professions could be a paper in itself. Accordingly, this paper will not attempt to detail each of the various tests administered in the countries discussed here. Both the United Kingdom and Australia employ some form of high stakes testing, whether it is during qualification for university studies, licensing for professions in the medical or legal field, or both.

[72] Disability Discrimination Act of 1995; Equality Act of 2010. In Northern Ireland, disabled students are protected by the Special Educational Needs and Disability (Northern Ireland) Order 2005.

[73] Equality Act, Part 6, Ch. 4.

Testing accommodations are sometimes referred to as "access arrangements (Burge, B. & Twist, L. 2008)." The Joint Council for Qualifications ("Council"), comprised "of the seven largest national awarding bodies offering qualifications in the U.K.," receives requests for such arrangements. The Council notes that the Equality Act requires "reasonable adjustments" if a "candidate would be at a substantial disadvantage in comparison to someone who is not disabled." In England and Wales, a student who seeks to vindicate his rights under the Equality Act should first attempt to resolve the matter through his educational institution. If those efforts fail, he may then complain to the appropriate administrative body, such as the Office of the Independent Adjudicator ("O.I.A.") for Higher Education, the professional or trade organization which designed the qualification test, or the Employment Appeal Tribunal.[74]

The O.I.A. examines complaints and determines whether an education provider followed its procedures. In 2011, the O.I.A. published a review of its practices as they affected disability rights (Ashtiany Report 2011). The report noted that although only six percent of the student population sampled was disabled, 23% of the O.I.A. complainants were disabled. The report also noted a high percentage of dissatisfaction with the outcomes and suggested that might be the result of misunderstanding of the O.I.A.'s role.

If the O.I.A. does not find the candidate's complaint justified, or the candidate is otherwise dissatisfied with its finding, the candidate may turn to the courts. In 2011, in a case of some precedence, a student tested the limits of the O.I.A.'s authority when she challenged a favorable decision by the O.I.A., believing that it did not go far enough because, although the O.I.A. found her complaint justified, it did not find she had been discriminated against on the basis of her disability.[75] A finding of disability discrimination would have eased future requests for accommodations. There, the Lord Justice presiding over the case noted that litigation "for more favourable outcomes than

[74] Higher Education Act 2004.
[75] R (Shelley Maxwell) v. The Office of The Independent Adjudicator For Higher Education, [2011] EWCA Civ. 1236.

those obtained in the special internal and external complaints procedures is not, except in very special circumstances, a course that anyone fortunate enough to be accepted for a course of higher education should be encouraged to take up."[76] Ultimately, the court of appeal determined that the O.I.A. reached a decision in accordance with the law and the procedure it was required to follow, which did not include reaching a finding of discrimination.[77]

In 2012, a decision was rendered in another case where a student challenged the adjustments offered for the Legal Practice Course.[78] There, the student was offered a number of adjustments, including lodging closer to the examination site, and extended time.[79] The student, who suffered from multiple sclerosis, was not fully satisfied, and pursued the matter further. The case considered whether the Employment Appeal Tribunal erred in its findings that the College of Law and Solicitors Regulation Authority had made reasonable adjustments to their examination conditions for the Legal Practice Course.[80] There, the student was offered a number of adjustments, including some additional time and lodging closer to the examination site. The court of appeal analyzed language from the Disability Discrimination Act of 1995, examined each of the adjustments sought by the candidate, and ultimately dismissed the appeal, holding that the tribunal had fully considered the reasonableness of the adjustments offered.

2. Australia

Australia enacted its Disability Discrimination Act ("D.D.A.") in 1992. Prior to 2000, the Australian Human Rights Commission held hearings and reached decisions on D.D.A. complaints referred to it by the Disability Discrimination Commissioner.[81] In 2000, that function transferred to the Federal Court or Federal Magistrates Service.

In 2002, a government committee issued a report on Australia's law, noting that

[76] *Id.*
[77] *Id.*
[78] Justin Burke v. The College of Law, [2012] ECWA Civ. 37.
[79] *Id.*, para. 3.
[80] *Id.*
[81] Human Rights Legislation Amendment Act (No. 1) 1999.

the law imposed an obligation not to discriminate against persons with disabilities (The Disability Discrimination A.C.T., 2002). The report observed that "[i]n the case of indirect discrimination, an educational authority is only required to make reasonable adjustments to allow the student with disability to participate, but it is not unlawful for an educational authority to refuse an enrollment that would impose an unjustifiable hardship upon the authority."

In August 2004, two decisions testing the boundaries of Australia's Disability Discrimination Act were issued. Although neither involved testing conditions, both are instructive. In the first, a deaf student challenged a limited offer of enrollment as a high school student to Mackillop Catholic College.[82] The school stated it would provide teacher assistants trained in note-taking "where possible," and only offered Australian Sign Language ("Auslan") signing support if a staff member happened to have the skills and be available.[83] The Federal Court of Australia held that the primary judge had properly found that the college had discriminated against the student when it offered him a place "subject to a term or condition that [he] participate in and receive classroom instruction without an interpreter."[84]

Later in August 2004, a second decision tested the limits of the country's 1992 law. There, the Federal Magistrates Court of Australia considered the case of a visually impaired student who challenged her university's failure to provide her with course material in a form most accessible to her: natural voice audio tapes, or in written form, in 24 point Ariel font on light green paper.[85] Although there was considerable evidence that the university did not readily provide assistance, the court concluded that the student bore the burden of reformatting her course material and that because the materials were capable of being reformatted, she could not establish indirect disability discrimination.

In 2005, Australia's Attorney General issued Disability Standards for

[82] *Catholic Education Office v. Clarke*, [2004] FCAFC 197 (August 6, 2004).
[83] *Id.* at ¶ 42.
[84] *Id.* at ¶ 131.
[85] *Hinchliffe v. University of Sydney*, [2004] FMCA 85 (August 17, 2004).

Education to make the law's requirements more explicit (Australia's Disability Standards, 2005). Part 3 of the Standards addresses "reasonable adjustments" for students. The Standards provide that an adjustment is "reasonable" if it "balances the interests of all parties affected." It also sets forth a non-exclusive list for evaluating the reasonableness of an adjustment.

Australia signed the Convention in 2007 and ratified it sixteen months later. In December 2010, Australia submitted its initial report under the Convention. Australia reported that the Higher Education Disability Support Program "provides funding to eligible higher education providers to undertake activities that assist in removing barriers to access for domestic students with disabilities." In 2013, the Committee expressed concern that disabled students continued to be placed in special schools, or if enrolled in regular schools, were segregated in special classes. The Committee also expressed concern that those in regular schools received a "substandard education" because they did not receive "reasonable accommodations." In addition, the Committee noted that secondary school completion rates for those with disabilities were about half of those without disabilities.

B. The Struggle to Level the Playing Field

The state parties discussed above and surveyed in Table 2 have, for the most part, implemented laws that require "reasonable" accommodations or adjustments. However, it is clear that it remains a global struggle for persons with disabilities to obtain education—at any level—on equal ground as their non-disabled counterparts. As suggested above, the Committee's observations on the initial reports submitted by state parties are revealing.

For example, the Committee commended Spain for its inclusive education program, but expressed concern about implementation of the program (Concluding Observations on Spain, 2011). Similarly, while Tunisia also has an inclusive education program, the Committee noted that, in practice, the inclusion strategy is not fully implemented (Concluding Observations on Tunisia, 2011). The Committee also expressed concern that Tunisia lacked "clarity on the concept of reasonable accommodation." In some instances, the Committee found that the state party had not

yet implemented an inclusive education program, even though it is a requirement of the Convention (Concluding Observations on China, 2012; Concluding Observations on El Salvador, 2014). Thus, the work of the Committee, advocacy groups, and individuals is far from complete.

III. CONTROVERSY

The arguments against testing accommodations range from allegations that candidates seek false diagnoses or that clinicians misunderstand disability law, to protests that students are over-accommodated, to the more common refrain that providing extended time to some test-takers is unfair to the non-disabled test takers. This section of the paper will explore these issues.

D. Malingering and Clinician Over-Diagnosis

The debate over testing accommodations reaches a broad range of professions, including legal, academic, and clinicians. Some express concern that people will falsely claim to be disabled to benefit from the accommodations provided to those who legitimately fit the definition. But this is a false paradigm. The stigma of being labeled disabled, particularly when it comes to cognitive disabilities, remains (Shirfer 2012; Eagan & Guiliano 2009). Moreover, as court cases demonstrate, there are legitimate, non-discriminatory ways to determine who has legitimate needs (Toward Reasonable Equality, 1998).

Others posit that the rise in diagnoses reveals clinician misunderstanding of disability law (Weis, Dean, & Osborne 2014). These authors deride the importance the law places on the clinician's diagnosis and suggest that it is less than objective. What the critics miss is the importance of a personal examination of the candidate. It is common sense that opinion of the expert clinician who examined the candidate should be given far greater weight than the testing entity's in-house expert or employee who simply reads the submitted paperwork.[86] As noted by others, "decisions are based on the expertise of a [learning disabilities] specialist who attempts to make practical connections between tests and service delivery options, while adhering to policy and

[86] *D'Amico*, 813 F. Supp. at 223.

legal guidelines (Ofiesh & McAfee 2000)."

Moreover, the criticism that clinicians misunderstand disability law appears to rely on an interpretation of phrases in clinician reports to support the argument (Weis, Osborne, & Dean 2014). The authors argue that phrases such as the candidate "would greatly benefit from" accommodations, or recommending accommodations to "make sure he achieves his highest potential" indicate that the clinician believes the purpose of accommodations is to ensure a student receives the highest test scores possible. However, those same phrases could be interpreted to mean that the clinician is on target and understands that accommodations are designed to level the playing field.

E. The Myth of Over-Accommodations

Others fear the effects of offering more accommodations than the candidate actually requires (Weis, Dean, & Osborne 2014; Kettler 2012). An effective accommodation "address[es] the barriers created by the interaction between the student's disability and the test item format (Cawthon, et al. 2009)." Accordingly, accommodations should be targeted to address the precise issue at hand. A progression of studies of the effects of extended time "present[] mixed findings on the overall effect of extended time as an accommodation for testing. (Cawthon, et al. 2009)."

However, if a person receives more accommodations than necessary, the additional accommodations will likely be of little benefit. In addition, if the provision of too much time is a concern, that issue could be addressed by extending the time for all test takers on non-speeded tests.[87] Studies have shown that while all test takers benefit from more generous time allowances, students with learning disabilities benefit the most (Parkyn 2008). Thus, if tests are administered with ample time for test completion, the concern that some students receive more time would be eliminated. Even without this adjustment, the risk is small, and far outweighed by the benefit of ensuring that those who require accommodations receive them. Finally, as further research is developed, the ability to accurately target accommodations will be

[87] Speeded tests measure how many questions the test taker can answer in a fixed amount of time (Ofeish 2000).

increased (Ofeish & McAfee 2000).

F. Balancing the Equities

Multiple sources criticize the provision of testing accommodations—particularly extended time—as unfair to those who do not receive them. Some even suggest that should be a factor when deciding whether to grant the request (Weis, Dean & Osborne 2014). These criticisms miss the social value placed on accommodations by disability rights laws: To allow those who are differently abled to fully participate in society, we must adjust the measurements to account for the difference. Doing so broadens and enriches the experience of all participants (Miller 2011).

Statistics bear witness to the simple fact that individuals with higher education are more likely to be employed. In 2013, the unemployment rate for individuals without a high school diploma was eleven percent (U.S. Bureau of Labor Statistics 2014). For those with some college, but no degree, that rate dropped to seven percent; for those with a bachelor's degree, the unemployment rate fell to four percent. Notably, each group also had a corresponding increase in weekly earnings: those without a high school diploma earned a median of $472 per week; some college, $727; a bachelor's degree, $1,108. Other studies bear this out: according to the National Center for Education Statistics, "higher education attainment was associated with higher median earnings; the pattern was consistent for 1995, 2000, 2002, and 2005 through 2012." For example, the median income for those without a high school diploma in was just over $20,000; in contrast, those with a bachelor's degree earned over twice that amount, at $46,900.

These statistics are not unique to the United States. In a paper published two years ago, the United Kingdom's Department for Business Innovation & Skills found that "there are very substantial effects of a degree on the net present value of the lifecycle of incomes (BIS Research Paper No. 112, 2013)[.]" Thus, to those who argue that testing accommodations amount to a "wealth transfer" (Lerner 2004), one might answer that the value in leveling the playing field transfers that wealth back to the

public at large in terms of a more productive society.

CONCLUSION

This review of disability rights laws makes clear that while great strides have been made in the field of disability rights, there is a long way to go before disabled individuals will be fully included in the higher education, and thus, the full range of options for employment. Ensuring that all person, regardless of disability status, are able to participate in education, training, and employment not only benefits the individuals, but society as a whole.

*****

REFERENCES

Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans With Disabilities Act, 111 Harvard L. Rev. 1560, 1568 (1998)

Ashtiany, S. Disability Advice Note for the Independent Auditor, 2-5 (September 2011)

Australia, Disability Standards for Education (2005), 13-14, available from http://docs.education.gov.au/system/files/doc/other/disability_standards_for_education_2005_plus_guidance_notes.pdf (last visited September 6, 2015)

Australia, Chapter 7: The Disability discrimination A.C.T. and the role of the Commonwealth, available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2002-04/ed_students_withdisabilities/report/c07 (last visited June 2, 2015)

Burge, B. & Twist, L *Equality of opportunity for all? Accommodations in national assessments in England*, National Foundation for Education Research, available from http://www.iaea.info/documents/paper_2b71212f2.pdf (last visited May 25, 2015) (2008)

Cawthon, S. W., Ho, E., Patel, P. G., Potvin, D. C., & Trundt, K. M. Multiple Constructs and Effects of Accommodations on Accommodated Test Scores for Students with Disabilities, Practical Assessment, Research & Evaluation, 1-9 (October 2009)

College Board, "College Board guidance on eligibility for accommodations," available from https://www.collegeboard.org/students-with-disabilities/documentation-guidelines (last visited August 20, 2015)

Convention on the Rights of Persons with Disabilities, 13 December 2006, United Nations Treaty Series, vol. 2515, No. 44910, p. 3, Arts. 24, 35, 36, available from https://treaties.un.org/doc/Publication/UNTS/Volume%202515/v2515.pdf (last visited September 9, 2015).

Eagan, P.M. & Guiliano, T.A. (2009) Unaccommodating Attitudes: Perceptions of Students as a Function of Academic Accommodation use and Test Performance, North American Journal of Psychology, Vol 11, No. 3, 489-490, 487-500

House Judiciary Committee, Report on the Americans with Disabilities Act, U.S. House of Representatives, 101st Congress, H.R. Rep. No. 101-485(III), at 492, 493 (1990)

Kettler, R. J. (2012) Testing Accommodations: Theory and research to inform practice, Int'l Journal of Disability, Development and Education, vol. 59, No. 1, March 2012 53-66

Lerner, C. (2004) 'Accommodations' for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites? 57 Vand. L. Rev. 1041, 1051

Miller, D. (2011) The Dyslexic Researcher: A Call to Broaden Our Portals, Academy of Management Learning & Education, Vol. 10, No. 2, 341, 340-350

Ofeish, N.S. (2000 Using Processing Speed Tests to Predict the Benefit of Extended Time for University Students with Learning Disabilities, Journal of Postsecondary Education and Disability, Volume 14, No. 1

Ofeish, N.S. & McAfee, J.K. (2000) Evaluation Practices for College Students with L.D., Journal of Learning Disabilities, Volume 33, No. 1, 14, 21-22, 14-25

Office of the Independent Adjudicator, available from http://oiahe.org.uk/ (last visited August 23, 2015)

Parkyn, K. (2008 Extended Time in Examinations for Students with Disability: Results of a Literature Review, available at http://www.adcet.edu.au/resource/8841/extended-time-in-examinations-lit-review/ (last visited August 25, 2015)

Shirfer, D. (2013) Stigma of a Label: Educational Expectations for High School Students Labeled with Learning Disabilities, Journal of Health and Social Behavior 54(4) 462-480, 463-464

UNCRPD Implementation of the U.N. Convention on the Rights of Persons with Disabilities,

Initial reports submitted by States parties under Article 35 of the Convention, Australia, (June 7, 2012) U.N. Doc CRPD/C/AUS/1, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2f1&Lang=en (last visited September 6, 2015)

U.N.C.R.P.D., Concluding observations on the initial report of Australia (October 21, 2013) U.N. Doc CRPD/C/AUS/CO/1, at 6, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en (last visited September 6, 2015)

U.N.C.R.P.D., Concluding observations on the initial report of Spain (October 19, 2011)

U.N. Doc CRPD/C/ESP/CO/1 at 6-7 available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en (last visited September 6, 2015)

U.N.C.R.P.D., Concluding observations on the initial report of Tunisia (May 13, 2011)

U.N. Doc CRPD/C/TUN/CO/1, at 2-3, 5, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUN%2fCO%2f1&Lang=en (last visited September 6, 2015)

U.N.C.R.P.D., Consideration of reports submitted by States parties under article 35 of the Convention, Initial reports of State parties due in 2011, United Kingdom (July 3, 2013) CRPD/C/GBR/1, 39-41, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGBR%2f1&Lang=en (last visited September 6, 2015)

United Kingdom, Department for Business Innovation & Skills, BIS Research Paper No. 112, The Impact of University Degrees on the Lifecycle of Earnings: Some Further Analysis, August 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229498/bis-13-899-the-impact-of-university-degrees-on-the-lifecycle-of-earnings-further-analysis.pdf (last visited September 6, 2015).

United States Bureau of Labor Statistics, Employment Projections, Data Table published March 24, 2014, available from http://data.bls.gov/cgi-bin/print.pl/emp/ep_chart_001.htm (last visited September 6, 2015)

United States Department of Education, National Center for Education Statistics, Fast Facts, Income of Young Adults, available from http://nces.ed.gov/fastfacts/display.asp?id=77 (last visited September 6, 2015)

United Kingdom, "Access Arrangements and Reasonable Adjustments 2014-2015," available from http://www.jcq.org.uk/exams-office/access-arrangements-and-special-consideration/regulations-and-guidance (last visited ay 25, 2015)

Weis, R., Dean, E., Osborne, K. (2014) Accommodation Decision Making for Postsecondary Students With Learning Disabilities: Individually Tailored or One Size Fits All?, Journal of Learning Disabilities, 3, 11, 13, 1-15

APPENDIX

Table 1 American Case Law Applying the A.D.A. to High Stakes Tests

Case Name	Disability	Statute(s) Analyzed	Relief Sought	Decision
D'Amico v. New York State Board of Bar Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993)	Severe visual disability	42 U.S.C. §§ 12132, 12189	Ability to take bar exam over the course of four days	Plaintiff's request was reasonable.
In re Rubenstein, 637 A.2d 1131 (Del. S. Ct. 1994)	Learning disability	42 U.S.C. §§ 12132, 12189	Admission to state bar notwithstanding two point deficiency in score	State bar examiners' failure to provide extended time was discriminatory; request granted.
Ware v. Wyoming Board of Law Examiners, 973 F. Supp. 1339 (D. Wyo. 1997)	Multiple Sclerosis	42 U.S.C. §§ 12132, 12189	Extended time on bar exam; change in venue	Defendant followed professional's recommendation, which was indefinite. Change in venue request was untimely.
Jacobsen v. Tillman, 17 F. Supp. 2d 1018 (D. Minn. 1998)	Dyslexia and dyscalculia	42 U.S.C. § 12132	Waiver of, or substitution for, math portion of teacher certification exam	Waiver of the math portion would fundamentally alter the nature of the certification of qualified individuals to teach children in the state.
Florida Board of Bar Examiners re. S.G., 707 So. 2d 323 (Fla. S. Ct. 1998)	Attention-deficit disorder	42 U.S.C. § 12189	Averaged score on both parts of the exam, as if the parts were taken in one administration	Request was for a change in scoring not test administration, and was therefore not a "reasonable" accommodation.
Rothberg v. Law School Admission Council, 300 F. Supp. 2d 1093 (D. Colo. 2004), reversed on other grounds, 102 Fed. Appx. 122 (10th Cir. 2004).	Learning disability	42 U.S.C. § 12189	Fifty percent additional time	Injunctive relief granted
Jones v. National Conference of Bar Examiners, 801 F. Supp. 2d 270 (D. Vermont 2011)	Severe visual impairment; reading disability	42 U.S.C. § 12189	Exam offered on computer equipped with screen access software	Plaintiff's request would best ensure the accessibility of the exam; even if analyzed under the "reasonable accommodation" standard, she would prevail.

Enyart v. National Conference of Bar Examiners, 630 F.3d 1153, 1167 (9th Cir. 2011)	Visual impairment	42 U.S.C. § 12189	Assistive technology software	Use of the software would best ensure that the exams were accessible to the plaintiff.
Rawdin v. American Board of Pediatrics, 582 Fed. Appx. 114, 115 (3d Cir. Sept. 3, 2014)	Cognitive impairments as a result of a brain tumor	42 U.S.C. § 12189	Advance knowledge of the exam, access to reference materials, and an essay format	Exam did not require a candidate to recall information out of context; thus, request was not reasonable.

Given the scope of this paper, this table references only national laws which specifically include a right to education.

Table 2 State Parties to the C.R.P.D**.**

Nation	**Year Disability Rights Law(s) First Enacted**[88]	**Ratification of the C.R.P.D.**	**Initial Report Distributed**	**Concluding Observations from the C.R.P.D.**
Australia	1995 (amended 2005)	July 17, 2008	June 7, 2012	October 21, 2013
Bosnia and Herzegovina	2010	December 3, 2010	April 15, 2015	
Brazil	1989	August 29, 2009	July 14, 2014	
Canada	No federal law	April 12, 2010	July 7, 2015	
China	1990	January 8, 2008	February 8, 2011	October 15, 2012
El Salvador	2001	December 14, 2007	October 10, 2011	October 8, 2013
Germany	2002	February 2, 2009	May 7, 2013	May 13, 2015
Italy	1992	May 15, 2009	Draft report only	
Kenya	2003	May 19, 2008	July 28, 2014	September 4, 2015
Latvia	2013	January 3, 2010	Draft report only	
Lithuania	2011	August 18, 2010	December 2, 2014	
Malta	1993	October 10, 2012	November 10, 2014	
Nepal	1982	May 7, 2010	Draft only	
Norway	1998	June 3, 2013	Draft only	
Oman	None	January 6, 2009	Submitted; not yet accessible	
Philippines	1992	April 15, 2008	Draft only	
Qatar	2004	May 13, 2008	July 9, 2014	
Russian Federation	1993	September 25, 2012	Draft only	
South Africa	1996	November 30, 2007	Draft only	
Spain	2003	December 3, 2007	October 5, 2010	October 19, 2011
Tunisia	2002	April 2, 2008	July 14, 2010	May 13, 2011
United Kingdom	1995	August 6, 2009	July 3, 2013	