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Contemplating Greatness: Learning Disabilities and the Practice of Law.

Scott Weiss

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CONTEMPLATING GREATNESS: LEARNING DISABILITIES AND THE PRACTICE OF LAW

SCOTT WEISS†

† The suthor is currently a briefing attorney with the Fourth Court of Appeals in San Antonio, Texas. He received his B.A. from Louisiana State University, his J.D. from South Texas College, and a graduate certificate in Industrial & Labor Relations from Cornell University. While in law school, he served as a member of the SOUTH TEXAS LAW REVIEW and as a managing editor of CURRENTS: THE INTERNATIONAL TRADE LAW JOURNAL OF SOUTH TEXAS.

I. Introduction

In recent years, individuals with learning disabilities have become embroiled in a tug-of-war with members of the legal profession regarding academic accommodations and what is encompassed in providing for them. Since the implementation of the American with Disabilities Act ("ADA"), record numbers have come forward claiming to suffer from a disability.[1] Law students in particular have comprised a large number of those making the assertion, and for good reason.[2]

This article provides an expanded review of what constitutes a "disability" under the ADA and what its introduction has meant for law schools, state bar examiners, and legal employers. Part II examines the evolution of the ADA, its application, and specific learning disabilities under the statute. Part III analyzes the ADA in conjunction with the study of law and accommodations given to those with a learning disability. Part IV discusses how learning disabilities are interpreted by bar examiners and what accommodations and deemed reasonable when providing for them. Finally, Part V harmonizes what learning disabilities have meant to the modern-day practice of law, the ethical implications associated with the advent of the ADA, and the hazards involved in disclosing a learning disability.

II. The ADA: Disabled but Qualified

In its attempt to provide equal opportunity to those with a disability, Congress passed sweeping legislation in 1990 that opened doors that were

1. Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 Stetson L. Rev. 119, 121 (1997).

2. *See* Donald Stone, *What Law Schools are Doing to Accommodate Students with Learning Disabilities*, 42 S. Tex. L. Rev. 19, 25 (2000) (discussing the number of law students requesting accommodations for a disability in a survey of approximately eighty law schools).

previously obstacles to certain segments of the population.[3] The goal of the Americans with Disabilities Act of 1990 was to "provide clear, strong, consistent, enforceable standards" that deal with discriminatory practices against those with a disability.[4] The ADA, as well as the Rehabilitation Act of 1973, provides a coherent and consistent framework for the elimination of discriminatory practices against individuals with a disability.[5]

The Rehabilitation Act was the first mandated statute designed to eradicate discrimination against handicapped individuals.[6] Later, with the eventual enactment of the ADA, the federal government extended the principles of non-discrimination to a wider audience.[7] The ADA does not merely incorporate the Rehabilitation Act, but expands its depth by increasing the scope of protection for disabled persons that was previously unavailable. Furthermore, the ADA not only has farther-reaching regulations, but a more comprehensive legislative history than the Rehabilitation Act itself. The ADA was a major step toward the assurance of adequate protection to the disabled.[8] The Act is divided into different segments dealing with disabled individuals in the areas of employment, public accommodations, state and local government services, and telecommunications.[9]

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3. *See* W. Ray Williams, *Annual Survey of the United States Supreme Court and Federal Law: Article Hand-up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 617-18 (2001) (explaining that prior to the enactment of the ADA, those claiming a disability in their attempt to receive special accommodations for state bar examinations did not receive statutory protection to challenge or appeal the decision of their respective state bar denying them accommodations).

4. 42 U.S.C. § 12101(1990) provides, *inter alia*:

(b) Purpose. It is the purpose of this Act—
- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals. . .;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

5. 29 U.S.C. § 701 (1973) provides, *inter alia*:

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

6. *See id.*

7. *See* 42 U.S.C. § 12101.

8. *See id.*

9. *See generally* 42 U.S.C. § 12182.

Under the ADA, a 3-part analysis is reviewed to determine if an individual has a disability. In pertinent part, it states a person is disabled if one of the following applies:

(a) a physical or mental impairment that substantially limits one or more major life activities,
(b) a record of such impairment, or
(c) a person regarded as having such impairment.[10]

Major life activities are those which the average person can perform such as: walking, seeing, hearing, speaking, breathing, learning, and working.[11] One of the primary areas of disagreement with respect to the ADA is in the area requiring the learning disabled individual to be "otherwise qualified"[12] and what accommodations should be given to those who qualify as having such an impairment. A qualified individual is defined as a person who, with or without reasonable accommodations, can perform the essential assignment.[13] Specifically, the individual must be able to complete the task regardless of their disability, so that the statute itself does not lend itself to favoritism, but provides equal ground for them.[14]

In definitional terms, the ADA must be reviewed in conjunction with the Rehabilitation Act because "otherwise qualified" has drawn a certain amount of criticism stemming from the disagreement as to the meaning of "qualified". The Rehabilitation Act requires consideration of more than just the individual's ability in meeting given requirements.[15] And, while a certain amount of leeway is afforded to entities that must provide accommodations, there is the overall obligation to do so only when reasonable.[16]

Under the statute, individuals with psychological disorders receive protection, through which impairments to learning are regarded as a disability.[17] A learning disability is statutorily defined as:

> A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and development aphasia.

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10. 42 U.S.C. § 12102(2) (2000).
11. *Id.*
12. 42 U.S.C. 12112(b)(5)(A) (2000).
13. *Id.*
14. Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397 (E.D. Tex. 1995).
15. *Id.*; Guckenberger v. Boston Univ., 974 F. Supp. 106, 115 (D. Mass. 1997).
16. Robinson v. Univ. of Akron School of Law, 307 F.3d 409, 411 (6th Cir. 2002).
17. 28 C.F.R. § 35.104(1)(i)(B) (1998).

> Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.[18]

The controversy surrounding learning disabilities, in that a certain amount of subjectivity is displayed in their diagnosis,[19] has resulted in difficulties especially for law students and those required to provide equal treatment in the opportunities afforded to them.[20] Attention Deficit Hyperactivity Disorder ("ADHD"), i.e., Attention Deficit Disorder ("ADD"), Dyslexia, and Disorder of Written Expression ("DWE") are the most frequently cited disabilities by law students.[21]

These disabilities raise a perplexing issue for purposes of the ADA. To establish protection under the statute, a law student must not only have a learning disability, but they must be otherwise qualified in comparison to their non-disabled classmates.[22]

A. *Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder*

Although both ADD and ADHD are classified separately, the difference in the disorders is primarily one of terminology.[23] Estimations reveal that between three and five percent of the general population has an attention deficit disorder, and applies to both children as well as adults.[24]

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18. 20 U.S.C. § 1401(26) (2000).

19. *See* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 422-23 (S.D.W. Va. 1997); Tami A. Earnhart, *Medicated Mental Impairments Under the ADA; Diagnosing the Problem, Prescribing the Solution*, 74 IND. L.J. 251, 267 (1998).

20. *See* Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 19 (1999) (discussing that a diagnosis may appear very late in an individual's career, and that it might be seen as an opportunistic ploy to request accommodations immediately before final exams).

21. *See generally* Guckenberger, 974 F. Supp. 106 (discussing that the number of individuals with these specific disabilities represents the increase of claims asserted).

22. *Id.* at 145-46 (discussing case interpretation of the ADA that does not require educational institutions to accommodate handicapped individuals by eliminating course requirements).

23. *See generally* Gerard A. Gioia & Peter K. Isquith, *New Perspectives on Educating Children with ADD: Contributions of the Executive Functions*, 5 HEALTH CARE L. & POL'Y 124, 128 (2002) (noting three types of Attention Deficit Hyperactivity Disorder exist: Combined Type, Predominately Inattentive Type, and Predominately Hyperactive-Impulsive Type).

24. *Id.* However, some estimates are as high as 10% to 12% would meet the criteria. The discrepancy might be linked to different methodologies across studies, which could contribute the a change in the diagnostic criteria for the disability, as well as different methods of sampling. Studies indicate that ADD/ADHD is genetic, with a 25-35% probability that if one family member has the disability than others within the same family have it as well. Likely it is the result of biological factors which influence neurotransmitter

Further, it has been noted that among individuals between 16 and 18 years of age, 40 to 50 percent of those originally diagnosed as children make substantial improvements, with an additional 30 to 40 percent improving between the ages of 18 and 20.[25] Furthermore, despite the fact that 50 to 60 percent of those diagnosed with ADD/ADHD as children still display symptoms at age 16, the percentile drops to ten percent when these individuals reach their thirties.[26] However, other studies indicate that a higher percentage of those originally diagnosed with the disability carry it into adulthood with them.[27] The general characteristics that warrant an ADD/ADHD diagnosis are distractibility, impulsivity, and hyperactivity,[28] each having possible detrimental effects in the law school setting.

More specific symptoms include failing to give attention to details, careless errors, difficulty sustaining attention for assigned tasks, not appearing to be listening when spoken to directly, failure to follow instructions or carry them out in their entirety, forgetfulness, restlessness, fidgeting, and talking excessively.[29] Given the overall effort required for law school, these characteristics can weigh heavily on the success or failure of the student with an ADD/ADHD learning disability.[30]

B. *Dyslexia*

Dyslexia is a learning disability that results from a phonological processing deficit.[31] It is best characterized as an "unexpected difficulty in learning to read despite intelligence, motivation and education."[32] The

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activity to certain parts of the brain. Further studies indicate that a link exists between an individual's attention span and the level of overall activity in the brain. *Id.*

25. *Guckenberger*, 974 F. Supp. at 131.

26. *Id.*

27. *Id.*

28. Giora & Isquith, *supra* note 23, at 139. The definition and symptoms of ADD has been reexamined over the past thirty years. There is a difference of opinion that the disorder should be viewed in terms only associated with the traditional symptoms reflected in the current criteria used. Many are also of the opinion that while the three major symptoms are needed for a diagnosis, they are not the sole characteristics of the disorder.

29. *Id.*

30. *See* Alfreda A. Sellers Diamond, *L.D. Law: The Learning Disabled Law Student as a Part of a Diverse Law School Environment*, 22 S.U. L. REV. 69, 75 (finding that the history of a learning disabled law student can cause anxiety, doubt, and isolation concerning one's mental abilities).

31. Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J. L. & EDUC. 337, 387-88 (1999).

32. Sally E. Shaywitz, *Dyslexia*, SCIENTIFIC AMERICAN, November 1996, at 99. In 1997, as described in *Guckenberger v. Boston University*, Shaywitz was the co-director of the Yale Center for the Study of Learning and Attention, as well as a professor of pediatrics at the Yale School of Medicine. She characterizes the disorder as being a neurobiologi-

disorder inhibits the individual's ability to separate written words into phonetic parts, while also results in words and letters to appear "jumbled up" or backwards.[33] Studies indicate that up to eight percent of individuals with a learning disability also suffer from dyslexia.[34]

C. *Disorder of Written Expression*

Not officially recognized until 1986,[35] the Disorder of Written Expression has been one of the most problematic learning disabilities for law students under the ADA's definition of otherwise qualified.[36] The essential characteristic of DWE is that the individual's writing skills fall substantially below expectations given their age, level of measured intelligence, and age-appropriate education.[37] DWE can significantly interfere with academic achievement, while a wide variance as to its severity fluctuates between individuals.[38]

Individuals with DWE commit spelling, punctuation, and grammatical errors on a frequent basis.[39] As of 1996, these individuals qualify as learning disabled, thus receiving protection under the ADA.[40] Despite the protection afforded to those with DWE, how much leeway can or should be given when focusing on law students to be "otherwise quali-

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cal condition that interferes with a normally intelligent person's ability to acquire speech, reading, or other cognitive skills.

33. *See* Sellers Diamond, *supra* note 30, at 73 n.13 (1994). Dyslexia also might cause a difficulty in understanding what is read to them because dyslexics process written and oral language in a different manner through sequence and organization.

34. Scott Lemond & David Mizgala, *Identifying and Accommodating the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 69, 74 (2000).

35. Phyllis Coleman et al., *Law Students and the Disorder of Written Expression,* 26 J. L. & EDUC. 1, 2 (1997) (discussing that much remains unknown about DWE, including its prevalence - experts believe that it is a defect of brain function and organization).

36. *See id.* (explaining DWE in the context of "otherwise qualified").

37. Coleman et al., *supra* note 35, at 1, n.3. The criteria reviewed for diagnosing DWE are:

A. "Writing skills, as measured by individually administered standardized tests (or functional assessments of writing skills) are substantially below those expected given the person's chronological age, measured intelligence, and age- appropriate education."

B. "The disturbance of criterion A significantly interferes with academic achievement or activities of daily living that require the composition of written tests (e.g., writing grammatically correct sentences and organized paragraphs)."

C. "If a sensory deficit is present, the difficulties in writing skills are in excess of those usually associated with it."

38. *Id.*

39. *Id.*

40. Leah Benson Lipskar, *Learning Disabilities and the ADA: A Guide for Successful Learning Disabled Students Considering a Career in the Law*, 3 U. PA. J. LAB. & EMP. L. 647, 669 (2001).

fied"? The ability to communicate in writing is an essential requirement for law students because writing is integral to the practice of law. Therefore, a student must be able to reduce their ideas into a coherent written product that transforms them into words. For students with DWE, the concern is whether they are able to produce competent written work if granted accommodations which would not deviate from the basic fundamentals of law school. If, with reasonable modifications, the student can produce an acceptable written product, accommodations must be provided so the individual will be rendered qualified.

III. Predicated on Equality: Reasonable Accommodations or Unfair Advantage?

Law school is predicated on equality. The majority of schools strive for this goal in every aspect, especially in the area of testing.[41] The rationale seems to be premised on an approach for an atmosphere focused on the work of the student, free from any bias that might develop in the interim.[42] The majority of law schools typically accomplish this through the testing of students by anonymous grading methods and implementing similar test-taking conditions.[43]

Why is it so important that everyone receive an equal advantage in law school? Opportunity. Law school admissions are based primarily on undergraduate grades and LSAT scores.[44] And just as these are the most relevant factors in the admissions process, law school grades are the most highly regarded determinant of which summer jobs will be offered to the student. In turn, the summer clerkship can, and usually does, result in a full-time offer to the student after graduation.[45] And while law school is a three-year commitment,[46] law firms traditionally extend summer clerk-

41. Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 Ark. L. Rev. 411, 437 (1977); Lorne Sossin, *An Intimate approach to Fairness, Impartiality and Reasonableness in Administrative Law*, 27 Queen's L.J. 809, 855-56 (2002) (showing that the same method of grading is used in other countries as well as in the United States).

42. Sossin, *supra* note 41, at 855-56.

43. *See generally id.*

44. Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 Akron L. Rev. 181, 232 (1999).

45. Joseph P. Tomain, *Dionysian Education: Robert Ebert Byrnes & Jaime Marquart Brush with the Law: The True Story at Harvard and Stanford,* 6 Green Bag 2d 79, 81(2002) (book review) (noting, "Bluff your way through summer clerkships and the hiring process. And know that for the elite, a scandalously lucrative job offer is yours for the taking no matter how much you screw up.").

46. This reference is to full-time students. Some schools offer part-time programs that vary as to length of time necessary to attain the degree.

ship offers for the summer based on first-year grades,[47] with full-time offers made at the end of the summer.[48] With starting salaries starting as high as $125,000 for new associates, competition among law students has become fierce.[49] Any advantage given to students, despite their disability, has been seen by some non-disabled students as taking money out of their pockets and giving to the less qualified.[50]

Other opportunities also present themselves to individuals who do well in law school. Retaining an air of exclusivity, the law review typically extends invitations to those who are in the top ten percent of their class after the first year.[51] Additionally, membership can also be attained by those outside the top ten percent through a writing competition; however, a minimum GPA is still typically required for students to participate.[52] While not always accurate, many employers use law review participation as a litmus test in reviewing the credentials of a student. Employers tend to equate law review participation with the determination of whether the student is qualified to succeed at the particular firm.[53] Moreover, it is also one of the few activities that remains a permanent fixture on a resume. Through extended-time exams, extension of deadlines, or by

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47. While the offers are made in the beginning of the second year, the student will not actually begin their clerkship until after the completion of the second year. Full time offers are usually extended at the end of the summer. Despite the fact that some firms require students to maintain the same grade point average, rarely do firms revoke offers once they are extended.

48. *See* Winstead, Sechrest & Minick, P.C. *at* http://www.winstead.com/recruiting/law-students/summercamp.html. (explaining how summer offers are generated).

49. *See* Vinson & Elkins, L.L.P., *at* http://vinson-elkins.com/recruiting/recruiting.cfm?currPK=30 (explaining 2001 first-year compensation and benefits packages).

50. Interview with three law students (anonymous), South Texas College of Law (Mar. 12, 2003). These students were assuming, though, that these firms would remain unaware that the learning disability was present, and that it did not affect their work product. It is very possible that if the disabled student did not disclose the information to the firm, their work still might reflect a problem or that deadlines might be missed when time constraints were present.

51. *See* James D. Gordon III, *How Not to Succeed in Law School,* 100 YALE L. J. 1679, 1700 (1991) (noting sarcastically, "The most elitist organization is the law review, which is generally restricted to the top ten percent of the class. These students are given this special honor so that employers will not overlook them just because they are at the top of their class. Law review editors spend their time doing meaningful educational tasks like checking the citation form of articles they don't understand. They are the big snots around the school.")

52. Nathan H. Saunders, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L. J. 1663, 1687 (2000). Writing competitions take place in different semesters depending on the law school. Though they vary in form, they usually involve a writing section and an editing section graded by editors of the review.

53. David Wilkens et al., *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Firms,* 69 U. CIN. L. REV. 1213, 1224 (2001).

changing writing requirements, some feel that accommodations for disabled students afford them a greater opportunity to do well, which in turn leads to more possibilities for success.[54] Even though the argument is made that students with learning disabilities are given more opportunities through accommodations, this does not equate to them accepting better jobs than their peers. It is probable that if a student with a learning disability does have the luxury of selecting from an array of employment options, the student will be the initial critic of their limitations and what they are capable of achieving in regards to job success.

When reviewing the scope of accommodations, coverage of the ADA lends itself to customary changes in the work or school environment that allow the disabled individual to enjoy equal opportunities.[55] In practice, a reasonable accommodation will involve a change in the status quo, but maintaining the status quo is the very element that presents difficulties that reasonable accommodations provide.[56]

Despite what "typically" occurs at law schools around the country for examination purposes, categorically, students with learning disabilities sometimes receive academic accommodations different from other students not claiming a disability.[57] Extra time for exams and note-taking services are frequent accommodations that have been offered to students with learning disabilities.[58] However, they must be reasonable as defined by the ADA, so as not to fundamentally alter the nature of the course or cause an undue burden on the school in providing the accommodations.[59] Furthermore, and most importantly, the accommodations must ensure that the student does not receive an unfair advantage when compared to others.[60]

If the fundamental nature of the legal education is found to be at risk, the school itself can lose its American Bar Association ("ABA") accreditation.[61] This in turn can result in loss of funding, as well as lowering

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54. Anonymous, *supra* note 50.

55. 42 U.S.C. § 12101 (2000).

56. *Id.*

57. The phrase "not claiming a disability" is used because students must set forth a claim for academic accommodations for their disability. *See* SOUTH TEXAS COLLEGE OF LAW, STUDENT HANDBOOK 46 (2002-2003). However, it is the author's opinion that there is a high percentage of students who could be diagnosed as having a disability but do not make requests to their respective schools for various reasons.

58. UNIVERSITY OF MICHIGAN LAW SCHOOL, *The Docket*, *available at* http://www.law.umich.edu/currentstudents/docket/archive/03-623.htm (last visited Apr. 2, 2004).

59. *Id.*

60. Donald Stone, *The Impact of the ADA on Legal Education & Academic Modification for Disabled Students: An Empirical Study*, 44 KAN. L. REV. 567, 588 (1996).

61. American Bar Association, *The American Bar Association's Role in the Accreditation Process*, *available at* http://www.abanet.org/legaled/accreditation/abarole.html (last vis-

student enrollment rates.[62] The reason being is that most, if not all, state licensing agencies only allow graduates from ABA schools to sit for their respective bar exams.[63] Therefore, schools designated as having the accreditation strictly adhere to the standards set forth by the ABA, such as classroom attendance, testing requirements, and required courses.[64] Because the ABA has created certain requirements for all students in pursuing their legal education, this has played an important part in schools' willingness to accommodate disabled students who might otherwise seek to alter the format in which they receive their legal education.

In regards to the ABA and the ADA, a school is not required to make accommodations for a disabled individual by eliminating a course requirement which is reasonably necessary for obtaining the law degree.[65] The school can ultimately refuse to modify the degree requirements that the disabled individual cannot satisfy, provided it undertakes a diligent and thorough assessment of the available options and makes a profes-

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ited Jan. 24, 2004). Law schools approved by the ABA provide a program of study which meets certain minimum criteria as promulgated by the ABA. The standards are designed, developed, and implemented by the practicing bar, judiciary, and professors for the purpose of advancing the goal of providing a sound program of legal study. From this, every jurisdiction in the United States has determined that graduates of only ABA approved law schools are entitled to sit for the bar in the given jurisdiction. Responsibility for administering the ABA's accreditation process has been given to the Council of the Section of Legal Education and Admission to the Bar, which is recognized by the United States Department of Education as the entity which is recognized as the accrediting agency for law schools. The Consultant on Legal Education to the ABA and staff assist in administering the overall process. The role the ABA plays as the accrediting body has enabled accreditation to become unified and consistent on a national level rather than fragmented, with the potential for inconsistency, among the fifty states, the District of Columbia, Puerto Rico, and other U.S. territories.

62. Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 T. MARSHALL. L. REV. 1, 24 (2001).

63. *See* Texas Board of Law Examiners, *Frequently Asked Questions, at* http://www.ble.state.tx.us/FAQ/main_faq.htm (last visited Jan. 24, 2004). The question of "Can a person from a non-ABA approved law school apply to Texas, assuming the law school is a non-correspondence law school?" provides limitations with the Board's answer. The requirements are:

(a) hold an active, valid law license in another jurisdiction, and
(b) has practiced for a three (3) year period within the previous five (5) calendar years immediately preceding filing an application with this office.

*Having these qualifications may enable the applicant to be eligible for the full bar examination. However, recent graduates of non-ABA approved law schools not based on study by correspondence are not eligible to take the Texas Bar Exam.

64. *See* American Bar Association Standards for Law Schools [Section 304] *at* http://www.abanet.org/legaled/standards/chapter3/html (last visited Jan. 24, 2004).

65. 29 U.S.C. § 794 (2000); 42 U.S.C. § 12101 (2000).

sional determination that the accommodations are not a viable option.[66] The ADA does not require a school to provide a substitution of courses if it rationally concludes that an alteration would divest the student of the academic program that has been implemented.[67] Simultaneously, regulations interpreting the Rehabilitation Act of 1973, require a school receiving federal funding to make modifications to its program that ensure that their denial of accommodations do not as an end result, discriminate on the basis of the disability.[68] Both public and private schools alike must comply with federal law in not discriminating against individuals with a specific learning disability.[69] While schools receiving federal funds are not required to make substantial or fundamental modifications to accommodate these individuals, they are however, required to make reasonable changes that reflect the intention of the ADA.[70]

A. *Difficulty in Establishing Need*

To even be considered for accommodations, the first hurdle is a diagnosis claiming a learning disability.[71] Under the ADA, the school is permitted to require the student making the request for accommodations provide documentation that is premised on a recent evaluation.[72] The testing must be comprehensive and in a detailed format to ensure accuracy in the claim.[73] Not only do most schools require an evaluation based

66. *Guckenberger*, 974 F. Supp. at 145-46.

67. *Id.*

68. *Id.* at 133.

69. *Id.*

70. 42 U.S.C.S. § 12101.

71. *See* UNIVERSITY OF MARYLAND SCHOOL OF LAW, *Disability Policy, at* http://www.law.umaryland.edu/studres.asp (last visited Jan. 23, 2004) (noting that students claiming a disability must provide the administration with professional documentation of the claimed disability in accordance with the school's policy on disabilities). Most universities require verification by a licensed physician, psychologist, audiologist, speech pathologist, rehabilitation counselor, physical therapist, or other professional who is qualified in the diagnosis of the disability.

72. *See* Kalekiristos v. CTS Hotel Mgmt. Corp., 958 F. Supp. 641, 657 (D.D.C. 1997) (noting that the ADA protects a disability for individuals that have established the existence of medical evidence as to their disability); Halasz v. Univ. of New England, 816 F. Supp. 37, 46 (D. Me. 1993) (holding that when a school operated a program for disabled students, it needs to be made aware of the disability before making changes to the program itself.); *see generally* 42 U.S.C. § 12101 (2000).

73. Evaluations to detect a learning disability and similar impairments include, but are not limited to: Child Behavior Checklist, Conners' Adult ADHD Rating Scale-Self-Report (Long Version), Conners' Adult ADHD Rating Scale-Observer-Report (Long Version), Conners' Continuous Performance Test, Conners'-Wells Adolescent Self-Report Scale-Long Version, Conners' Parent Rating Scale, Controlled Oral Word Association Test, DSM-IV Adult ADHD Semi-Structured Clinical Interview, Paced Auditory Serial Attention Test, Personality Assessment Inventory, Rey-Osterrieth Complex Figure Test, SCID-II

on a current disability, the evaluation should show its impact on the student.[74] However, they cannot impose unnecessary hardships upon the individual requesting accommodations that have a tendency to "screen out" those truly disabled.[75] They are prevented from employing overly burdensome methods of proof in relation to the disability that precludes or unnecessarily discourages the disabled from establishing their rights under federal law.[76] In the event the law school does in fact determine that the student has a disability under the ADA, usually done by conferring with the school's designated diagnostician, modifications are typically made to the academic program for the student such as providing note-takers, typists, transcribers, tape recordings of books, readers, library assistants, special research training, extensions of deadlines for written assignments, and proofreaders for written assignments.[77] Most schools afford some, but not all of these accommodations for learning disabled students. Those most commonly granted are extra time on exams, note taking assistance, and extensions on writing assignments.[78] The underlying area of debate is with the modifications themselves and their affect on the disabled student in conjunction with others not receiving accommodations. Law schools have been of the overwhelming opinion that they should determine the modifications and degree requirements, despite what suggestions are made by the individual or their respective diagnostician.[79] Recent case law has held that schools need only show that the academic integrity of the program was compromised or fundamentally altered in order to deny a student's request.[80]

In the decision to grant or deny a student's request, past accommodations play a prominent role in the reasonableness of the request itself. A prior history of a learning disability with academic accommodations serves as evidence as to the legitimacy of the claim.[81] Granting accommodations for a learning disability recognized for the first time at the

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Personality Questionnaire, Structured Clinical Interview for DSM-IV-I, Wechler Adult Intelligence Sclae-3rd Edition, Wechsler Memory Scale-3rd Edition, Wender Parent Rating Scale, Wender Utah Rating Scale, Wisconsin Card Sorting Test, Woodcock-Johnson Psychoeducational Battery-Revised, Young Adult Self-Report, and the Youth Self-Report.

74. *See Disability Policy*, *supra* note 71.

75. 42 U.S.C. § 12182 (2000).

76. 34 C.F.R. § 104.4(b)(4) (interpreting § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794). The ADA prohibits both intentional and methods used regarding administration, that have an adverse effect of discriminating on the basis of their respective disability. 42 U.S.C. § 12182(b)(1)(D) (2000).

77. Lipskar, *supra* note 40, at 659.

78. *See The Docket*, *supra* note 58.

79. *Guckenberger*, 974 F. Supp. at 114.

80. *Id.* at 146.

81. Stone, *supra* note 2, at 26.

beginning of law school likely will be approached with a particular amount of hesitation on the part of law schools. To make a thorough evaluation, the law school should have an established, elaborative process that requires a specific level of consistency before a request can be granted.[82]

However, it is possible that a student with a learning disability has sought help for the first time only upon entering law school. Given this possibility, is the student really disabled if they have made it to law school without prior academic accommodations, but now need them to compete with others? It is more credible to assume that a student truly has a learning disability if they required accommodations throughout their academic career, despite the level of competition pitted against them. At the same time, the decision to seek accommodations for the first time does not necessarily indicate that the student has just recently been diagnosed with a disability. Because of the stigma associated with disabilities, it is possible that some students have actually made a conscience effort to avoid making a request for accommodations.[83] Some students who have been discriminated against when coming forward to claim a learning disability have experienced a host of emotional problems that are directly related to the discriminatory attitudes towards them.[84] The reason behind the discrimination seems to result from learning disabilities not being considered one of the traditional disabilities, such as physical handicaps.[85] Because they are not directly observable to the layperson, the standard which they are reviewed by us different than other disabilities.[86]

In what some have long suspected as a prejudicial outlook on the matter, Boston University's Provost, Jon Westling, perpetuated the common attitude towards learning disabilities in a speech about a particular student in one of his classes:

> The letter explained that Samantha has a learning disability "in the area of auditory processing" and would need the following accommodations: time and one-half on all quizzes, test, and examinations; double-time on any mid-term or final examination; examinations in a

82. *See* J. Patrick Shannon, *Issues in Higher Education: Who is an "Otherwise Qualified" Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J. L. & PUB. POL'Y 57, 65-66 (1998) (suggesting reviewing current testing, an interview with the student, and prior accommodations at the high school and college level and for work).

83. *See* Peter D. Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER RACE & JUST. 33, 54 (1998) (arguing attitudinal biases encourage a tendency among students to keep learning disabilities a secret).

84. *Id.*

85. Lipskar, *supra* note 40, at 658-59.

86. *Id.* at 659.

> room separate from other students; copies of my lecture notes; and a seat at the front of the class. Samantha, I was also informed, might fall asleep in my class, and I should be particularly concerned to fill her in on any material she missed while dozing.[87]

The problem was that "Samantha" was a fictional character in his search to illustrate his opinion of students with learning disabilities.[88] What was an attempt to discourage educators to cater to the need of what Westling characterized as "draft dodgers,"[89] has worked both for and against the learning disabled. While the assessment shows that discrimination is blatant, it also reveals that discrimination towards the learning disabled is real and must be guarded against. At the same time, overcompensation has been attributable to accommodations based more on precaution in averting unwanted attention than on ways to help those who are truly qualified.

B. *The Options for Accommodations and Assessing Their Value*

Accommodations for a learning disability range from extended time exams, untimed exams, modified exams, private examination rooms, modified course schedules, reduced writing requirements, no writing requirements, no recitation, personal notetakers, and extensions for class assignments.[90] Despite what is typically requested or provided for, it does not always comport with what has been required by statute, meaning schools are taking on a certain degree of independence and individuality when administering accommodations for disabled students.[91]

At the center of the debate is the issue of whether the purpose of law school in preparing law students has been tainted when accommodations are provided for some. Traditional legal educators maintain that their duty is to lay a foundation through discussion of legal theories and that

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87. *Gluckenberger*, 974 F. Supp. at 118.

88. *Id.*

89. *Id.* at 119; *see also* Lipskar, *supra* note 40, at 659.

90. Shannon, *supra* note 82, at 58.

91. While the ADA is more comprehensive, the interpretation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794, provides that the modifications given to the disabled may include such changes in the length of time allowed in the completion of degree requirements and the adaptation of the manner in which specific courses are conducted. It does not require schools to disregard the individual disabilities of the individual or to make substantial modifications in their programs to allow such individuals to participate. The modification regulation does not pose the same stringent hardship on the school as would a fundamental alteration of the nature and essence of the educational program.

the practical aspects of the law are to be applied after law school.[92] Many however, believe that law schools are merely assembly lines: they should prepare law students to think, act, and imitate lawyers to a large degree. A recent study observed that overall, law schools have failed to provide the necessary tools for the profession.[93] Law schools have been producing graduates that are deficient in some of the most important areas needed for the practice of law such as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, organization and management of legal work, and the provision of competent representation.[94]

It becomes increasingly difficult to resolve competing discussions on how to best handle accommodations for a learning disability due to an already critical audience which cites present failures in overall preparation of the non-disabled. Measures afforded to the learning disabled when reviewing reasonableness should be viewed in the context of competing interests to the educational purpose and the totality of circumstances. Even with the supposed decline in quality of lawyers produced, law schools must still consider what constitutes a handout in the realm of the ADA, versus implementing a program tailored to extract the same amount of effort that the non-disabled student must exert.

1. Modified Examination Process

Traditionally, law school courses are based on one final exam at the end of the semester which accounts for approximately one-hundred percent of the final grade. As noted earlier, the implications of doing well has far-reaching consequences. Summer clerkships, invitations to law review, and immediate boosts to self-confidence are all results of academic success. Essay tests are the preferred method for testing first-year students because they require issue-spotting, a statement of the law, followed by an analysis of how the conclusion was reached by the student. When reviewing options for accommodations, law schools have considered the format of the exam as well as the allotted time in which to complete it.

One of the major problems with modifications involves the request to change the exam from essay-style to a multiple choice format.[95] Changing the format of the exam from essay to multiple choice may provide an

92. Charles J. Ogletree, Jr., *ACCESS TO JUSTICE: THE SOCIAL RESPONSIBILITY OF LAWYERS: The Challenge of Providing "Legal Representation" in the United States, South Africa, and China*, 7 WASH. U. J.L. & POL'Y. 47, 71 (2001).

93. *Id.* at 71.

94. *Id.*

95. Stone, *supra* note 2, at 43.

easier route for the student with ADD/ADHD and dyslexia. The multiple choice format is devised with shorter questions; therefore, ADD/ADHD students can focus on smaller amounts of information. Essay exams, however, involve the difficulty of reading and dissecting lengthy passages that likely attribute to accentuating the disability. Students with DWE would greatly benefit from this alternative because of the specific attributes of the disorder.[96]

In the spirit on confidentiality,[97] it seems impossible for professors to create an alternative test for some without knowing why they are doing so. Furthermore, questions have been raised as to how a professor can be indifferent in their evaluation of an exam that substantially differs in format from the one they created for the majority of the class.[98] When considering both the knowledge of why they are being asked to accommodate in combination with the reality that it does not test in the same manner, a possible bias is likely to develop.[99] Accompanying a bias, problems of grade inequalities based on a disability would substantially impair the initial purpose behind the accommodations, i.e., grades that are attributable to a disorder and not the content of the responses themselves. This option seems to be a less-than-realistic mode of testing students not only because of issues touching on confidentiality and bias, but because the essay format provides the ability to decipher between those who understand the material and those who are skilled in the art guesswork when faced with a multiple choice exam. When the design is an overwhelming deviation from the norm, the term "otherwise qualified" and "reasonable accommodations" lose their value.

Extended time on exams is the most requested accommodation for students with a learning disability.[100] Moreover, all indications show that accommodation requests are likely to be granted by law schools.[101] The general stance has been extensions of time do not threaten the bench-

96. This is due to the logical relationship between the characteristics of the disorder and the overall capabilities the individual possesses; *but see* Coleman et al., *supra* note 35, at 7.

97. Stone, *supra* note 2, at 46.

98. *Id.* at 43.

99. Stone, *supra* note 2, at 43; Kristen L Aggeler, *Is ADHD a "Handy Excuse"? Remedying Judicial Bias Against ADHD,* 68 UMKC L. REV. 459, 475 (2000); Oren R. Griffin, *Accommodating the Learning Disabled Student on Campus*, 78 U. DET. MERCY L. REV. 547, 550 (2001); Kristan S. Mayer, *Flagging Nonstandard Test Scores in Admissions to Institutions of Higher Learning,* 50 STAN. L. REV. 469, 479-80 (1998).

100. *See* Smith, *supra* note 20, at 106 (stating that it is the student who requests reasonable accommodations for a disability).

101. *See* J.J. Knauff, *Dissing Disabilities: A Student's Duty To Mitigate Maladies*, 2001 BYU EDUC. & L.J. 85, 101 (2001) (discussing different requests and overall percentages granting them).

mark of how students are judged when taking the purpose behind law school into account.[102] Time-and-a-half to complete an examination is frequently viewed as the most reasonable accommodation when granting an extension of time.[103] Its popularity might result from the viewpoint that an extension of time is the best way to put disadvantaged students on even-footing with others. Additionally, it could stem from being regarded as the least burdensome approach in comparison to the other modifications that are requested from schools. Granting an extension of time does not readily make itself known to other students, while other means might be apparent, thus creating the likelihood of complaints from other students.

Extending the allotted time for an exam however, is not without its detractors and is viewed by some as the most controversial accommodation for disabled law students.[104] The reasoning behind the argument against time extensions is that speed is one of the major components for practicing law.[105] Quickly responding to a judge's orders, providing a rapid answer to a client's complex question, working at a break-neck pace to finish more tasks in one day than most non-attorneys accomplish in one week are all representative of some of the expectations, albeit unrealistic at times, placed on those who practice law. But given that law school is geared to provide a foundation for the law, is it reasonable to assume that these traits are only possessed by a chosen few upon entering law school? It is far-fetched to assume that speed and working within a given time restraint cannot be a developed facet of learning the profession. Arguably, law school does not teach an individual how to be the most efficient attorney, but how to reach the goal of becoming an attorney.

In the article, *Learning Disabilities, Law School, and the Lowering of the Bar*,[106] Freedley Hunsicker displays the common misconception when exercising his opinion about the fundamental unfairness of extended-time exams in law school. He provides the following for his rationale as to why time as a method for accommodating the disabled is unacceptable:

> If we assume there is a substantial improvement in the exam performance of a law student with a learning disability accorded extended time to complete his examination, he will do correspondingly

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102. *See Id.*

103. *See* Smith, *supra* note 20, at 78 (stating "The student may be academically harmed if the school does not provide reasonable accommodations to the student, such as extra time on an examination . . .").

104. Freedley Hunsicker, *Learning Disabilities, Law Schools and Lowering the Bar*, 42 S. TEX. L. REV. 1, 14 (2000).

105. *Id.*

106. *Id.*

> better than his classmates who do not have this benefit. What possible rationale justifies this leg-up over students who do not have the benefit of a learning disability diagnosis or who are just, shall we say, slower, and who must complete the examinations in the time allowed? The advantage achieved by the learning disabled student, who is also slow but may have a higher I.Q. or parents who have sought psychological assistance, is simply unfair.[107]

This argument supports the conclusion that a substantial improvement will be an automatic for the student, which is more theoretical than realistic.[108] It also embraces the notion that a learning disability is an advantage and that any role it plays will be completely diminished with more time allotted for a student taking the exam. Furthermore, his reference to "slower" non-disabled students is entirely lacking in substance when contemplating his argument. Slowness for the non-disabled student is attributable to other extraneous factors not associated with a disability. Having a disability is an impairment of function, not of I.Q. Moreover, if the student is slow *in addition to having a disability*, this cannot logically translate into time being a benefit above and beyond that received by non-disabled students. As a result, the non-disabled receive a definitive advantage over those with an impairment when time constraints are not adjusted accordingly. Stated conversely, granting a *time extension* does not work against the non-disabled student in the same manner a *time restriction* operates against a student with a disability.

If a disabled student is given extra time to accommodate for a learning disability, there is not necessarily a correlation between duration and academic success. The exam layout is identical to the standard exam administered. The student is still tested on the same material as their classmates, but a nondescript adjustment has been implemented to provide for the disability. Disabled and non-disabled students alike do not automatically benefit from having the ability to write more or answer more questions because knowing the correct response is still a necessary requirement. The old adage repeated time and time again of "either you know it or you don't" is particularly fitting when considering what advantages are truly reaped by those receiving extra time for exams.

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107. *Id.*

108. In disproving the assumption of Freedley Hunsickers' theory as being an automatic, some students that I interviewed did not receive accommodations for their disability in their first semester of law school and received either the same or lower GPA in all but two semesters after being granted accommodations. This is not to imply that accommodations will not provide an overall benefit, but to suggest that a surge in a GPA is a fair assumption is misplaced.

The popularity of granting extra time suggests that educators have not been successful in achieving a steadfast answer for equaling the playing field for the learning disabled, and until then, extended-time requests will be honored without having to overburden the faculty and administration.

2. Personal Notetaking

On the surface, notetaking by another student for a disabled individual does not directly give an advantage to the disabled student when the simplicity behind it is taken into consideration. The disabled student will still be required to pass exams based on their knowledge of the material. It does however, create a potential problem when looked at it in depth.

The first problem is that the class notes will likely come from one of two sources—another student whom the school has appointed after reviewing all their qualifications,[109] or the professor teaching the class. Provided that the designated student is properly screened, the likely candidate would be a student in any given class that has achieved academic success while in school. Therefore, having access to this particular student's notes might give the disabled student an advantage because of their ability to study another's material who likely takes notes that are complete, concise, and easy to understand. This is a distinct advantage in comparison to the others in the class who are not disabled but struggle to transcribe the professor's thoughts on particular theories and cases. Moreover, they do not have the same opportunities as the disabled student because it is unlikely the notetaker will provide their notes to everyone in the class. In addition, if the exam is open-book, the disabled student likely has the best resources at their fingertips.

If the notes are provided by the professor, two scenarios are likely to reveal themselves. The first occurs when the professor does a fair amount of teaching from memory and experience. In this scenario, it is likely that the professor will have incomplete notes or briefly touch upon the subject matter in a manner that will not further the objective of why the disabled student was originally provided with the notes. If the disabled student relies on the professor's notes, this could be detrimental when it comes to taking the examination. The second scenario could overcompensate the disabled student if the professor greatly relies on their notes in teaching the class. In this situation, the professor not only sets forth the concepts, but does so in a way that reflects their personal style, allowing an edge to the disabled student for exam purposes. Some might debate the existence of this advantage, but what if a professor highlights certain material or makes special note of what could be considered a prelude to the ques-

109. No data exists as to how law schools might designate students for notetaking positions.

tions on the exam?[110] This is analogous to obtaining work product.[111] In the litigation setting, the purpose behind the work-product rule is to prevent an unfair advantage in acquiring the mental impressions of one party's attorney when conducting discovery.[112] At the same time, provided a substantial need is shown, the rule allows for discovery of the attorney's work when it is not considered "core work product". If the rule is compared to the professor providing notes with mental impressions imbedded in them, how far does "core work product" extend in its definition when used in the examination context for disabled students?

Providing class notes for those students with ADD/ADHD, dyslexia, and DWE is not in alignment with the ADA's requirement of reasonable accommodations. Law school is about preparation. Adequate preparation for law schools exams is in part reflected by in-class attention to detail. At a certain juncture, it is imperative to question how law schools are balancing overall fairness with possible charitable gifts to the otherwise qualified. Taking notes is more an exercise in preparation than in blind dictation. Naturally, students exercise a certain amount of judgment in determining what is worthy of notation, and law schools are not under an obligation to provide a disabled student with the highlights of information presented in class.[113]

Some have suggested that providing class notes is a reasonable means of assistance, but the disabled student still must pass the final exam.[114] Moreover, not all students take class notes or use their own when study-

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110. This assumes the professor does not delete these notations in their teaching materials.

111. TEX. R. CIV. P. 192.5 (1997). Rule 192.5 provides, *inter alia*:

(a) *Work product defined.* Work product comprises:
  (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents;. . .
(b) Protection of work product
  (1) *Protection of core work product- attorney mental processes.* Core-work product–the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's *mental impressions, opinions, conclusions, or legal theories* (emphasis added)–is not discoverable.
  (2) *Protection of other work product.* Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

In comparison, the "undue hardship" would be the learning disability.

112. *Id.*

113. Coleman et al., *supra* note 35, at 8.

114. Hunsicker, *supra* note 104, at 13.

ing.[115] Using this example only furthers the point that it is not imperative to provide learning disabled students with classroom notes because other means of access to the information are in existence. Supplements, treatises, and commercial outlines are not relegated to the underground black market of law schools, they are readily available in every law school bookstore. And more often than not, they are more comprehensive than most notes taken in the classroom setting.[116] When carefully orchestrated, supplements can fill in the gaps where certain points of a classroom lecture are missed or overlooked.

3. Waiver of Course Requirements

A waiver of required courses is a complex topic with respect to the learning disabled student. A common request seeks to waive writing requirements that are needed for graduation.[117] Most schools have a policy of requiring students to complete two legal research and writing courses in addition to a substantial writing requirement, typically satisfied by a research paper.[118] The reasoning behind the policy is obvious: writing is essential to the practice of law.[119] Conveyance of ideas through written forms of communication is fundamental for attorneys.[120] Suggestions have been made that writing courses should not be waived under any

115. Often, student organizations maintain outline banks for use by their members.

116. *See generally* EMANUEL'S LAW OUTLINES, EVIDENCE *at* III (informing the purchaser that the supplement is not intended as a replacement for the classroom lecture). I am not suggesting that these should be used as a substitute for classroom notes, but provide a possible alternative to other study materials such as class notes. However, most professors throughout the semester emphasize certain elements of the course that are a preview to the exam.

117. Coleman et al., *supra* note 35, at 7.

118. *See* SOUTH TEXAS COLLEGE OF LAW, STUDENT HANDBOOK 77 (2002-2003). At South Texas, one of the following is required:

1. A seminar where a research paper of not less than twenty (20) typewritten, double-spaced, letter-size pages of text (or not less than 5,000 words of text), plus appropriate footnotes for a paper of publishable quality, is the basis for a grade and the grade is received in the seminar is C or better, or:
2. Supervised Research under the direction of a full-time faculty member with the resulting research paper receiving a grade of C or better, or;
3. Satisfaction of all the requirements for academic credit for *Law Review*, including completion of all writing requirements.
4. Satisfaction of all the requirements for academic credit for *Currents: International Trade Law Journal*, including completion of all writing requirements and a minimum of two semesters' service.

119. *See generally id.* (assuming if students complete the writing requirement they should be prepared for the practice of law).

120. Michael McCormack, *Foreword*, 31 CREIGHTON L. REV. 1, 1 (1997).

circumstances, and if carried out under the guise of the ADA, the disabled law student would be rendered unqualified under the statute.[121]

When reviewing the symptoms of ADD/ADHD, a waiver of writing requirements is unnecessary.[122] ADD/ADHD is a disorder that affects an individual's attention span; not their ability to write. The disabled student might need to spend a longer amount of time in their effort to complete a writing assignment, but there have been no conclusive results showing that their overall work product would suffer if a waiver is not implemented. Any suggestion to the contrary cannot be supported with even a minimum amount of legitimacy. Though learning disabilities differ in their impairment and degree, a correlation between a student with a severe problem with ADD/ADHD and their inability to write is entirely unrealistic.[123] Students with verified records acknowledging the presence of a severe impairment in relation to ADD/ADHD have gone on to become members of their respective school's law review,[124] which refutes the notion that waivers for writing requirements are a must.[125]

Students with dyslexia face challenges with reading, not writing.[126] There is not an essential need in affording these students waivers or alternative courses. The accommodation of letting the dyslexic student forgo writing courses is again an escape that is unwarranted. Like those with ADD/ADHD, it is possible that they might have to spend more time on assignments, but there are no indications that a reasonable accommodation for them would be accomplished by alternatives to requirements set forth in achieving the minimum standards for graduating from law school.

Of the three disorders, the diagnosis of Disorder of Written Expression is the only one that warrants an extended discussion of when a waiver

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121. Hunsicker, *supra* note 104, at 16.

122. There is no correlation between the previously listed symptoms of ADD and writing skills.

123. At least two students diagnosed with ADD at South Texas College of Law have been past members of the *South Texas Law Review* (one of which attained membership through the writing competition), where advanced legal research and writing requirements of two papers combine for a total of seventy pages. If students with ADD were entirely unable to complete even the basic writing requirements, it is highly unlikely that students with ADD could attain and maintain the requirements for membership on their respective law reviews. Furthermore, both of the members at South Texas have served as assistant editors in the past, with one having received a "high pass" for the semester. The "high pass" denotes excellence in the area of editing and writing assignments and is only received by relatively few members.

124. *Id.*

125. However, it must be recognized that not all schools are of the same academic rigor in that some schools law review requirements for membership are more challenging than others. At the same time, it is a relative comparison and, for purposes of this article, should be not afforded a great of weight in that the noted schools are all ABA approved.

126. *See* Herr, *supra* note 31.

might be implemented, but still fails as being a legitimate reason for the implementation of a waiver. Because the disorder is *writing specific*, i.e., the individual is incapable of producing a coherent written product,[127] it impairs an individual's ability to accomplish the core elements of the writing assignment, not their ability to finish it as exemplified by other disorders. Despite is classification as a recognized learning disability under the ADA,[128] law schools should be leery of requests of alternative course selections instead of the requisite writing courses.

The basis of this conclusion rests on the analysis of accommodating a disability in light of defeating the purpose behind law school. High standards are placed on writing skills in law school, as they should be. But given that writing free of fundamental errors is a daunting task and that few lawyers have perfected the challenge, is it reasonable for students with DWE to be afforded a relaxed approach in the context of waivers?

Without hesitation, the answer is no. Regardless of the departure in demanding perfection of writing skills, lawyers that struggle with written expression likely did not receive course modifications in their pursuit of a legal education. Furthermore, more courses honing writing skills should be demanded as part of the curriculum of law schools for the very fact that the importance of writing has arguably been deemphasized by many in the profession.[129] Perfection is hard to come by, with even the most gifted writers make mistakes, but when expectations are overshadowed by indifference, the value of a law school education is compromised.

Possessing the ability to produce clear and concise written work is conducive to good lawyering. Practicing law to a large degree is comprised of writing letter to clients, drafting motions, and preparing memos to articulate a point in the law.[130] A waiver of writing courses would under-

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127. Coleman, *supra* note 35, at 1, n.3.

128. William M. Tarnow, *Genetic and Mental Disorders under the ADA,* 2 DEPAUL J. HEALTH CARE L. 291, 314 (1998); *see* 42 U.S.C. § 12102(2) (2000).

129. *See* Hunsicker, *supra* note 104, at 17. Having served as an editor on two law journals, I have had the opportunity to critique the written work of both students and practitioners. If the prevailing school of thought as to law review membership is that only the most qualified can participate with the end result producing talented writers, the stereotype is inherently flawed. Many students receive offers to become members by virtue of their grades. Furthermore, the inability of those students is disguised by the unwillingness or inability of senior editors to demand perfection. Regrettably, I have also spent countless hours editing basic grammatical mistakes that the same practitioners repeated throughout their work. This is not to suggest that my time served as an editor has been void of marvelous examples of written expressions from law students and practitioners alike, but to exemplify the misgivings behind scholarly journals.

130. Lucia A. Silecchia, *Legal Skills in the First Year of Law School: Research? Writing? Or More?,* 100 DICK. L. REV. 245, 249 (1996); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 19 (1992); *see* J. MYRON JACOBSTEIN ET AL., LEGAL RESEARCH ILLUSTRATED 13 (1998).

mine the intent of the purpose of law school, even if contradictory to the liberal approach of equal access, because the suggestion of course alternatives is unequivocally unjust when comparing different options for accommodations. It does not compare to other reasonable methods of accommodations such as extended time on exams because these accommodations require the disabled student to complete courses, not avoid them altogether. Sacrificing academic standards in order to better serve the principles of the ADA (or fear of litigation) violates the requirement of being "otherwise qualified", and is a step in the wrong direction for accommodating disabled law students.

IV. BAR EXAMINATIONS

Year after year, bar examiners are faced with several issues when determining a legitimate disability claimed by individuals for purposes of the exam and what is regarded as unreasonable for purposes of accommodations. The public is keenly aware that law schools graduate a number of students that perform poorly but are able to graduate with a law degree. To counter this concern, states have required that in order to practice law, individuals holding a law degree must pass a bar exam. The purpose is to eliminate applicants who are unqualified or are unable to demonstrate their competence through the examination procedure. Although the process has been scrutinized for overall fairness and the method it employs to test applicants, it represents a commitment to protecting the public from individuals that are unable to prove the minimum requirements in becoming an attorney. The typical exam is broken down into different sections, each one testing the individual's knowledge on different areas of the law. Most bar exams are a combination of essay, short answer, and multiple choice questions spreading out over a time span of two to three days.[131]

In deciding whether a request is reasonable, three sections pertaining to discrimination of disabled individuals are the focal point for a state bar's legitimate right to grant or deny a request for accommodations.[132] Title II of the Americans with Disabilities Act,[133] prohibits discrimination by a public entity on the basis of a disability.[134] Title III of the Americans

131. The July 2003 Texas Bar Examination was scheduled as follows: Day 1: 3 hours of testing with a 10 minute break; Day 2: 6 hours of testing with a 1 hour break; Day 3: 6 hours of testing with a 1 hour break.

132. 29 U.S.C. § 700 (2000); 42 U.S.C. § 12101 (2000).

133. 42 U.S.C. § 12101.

134. 42 U.S.C. § 12132 ("Subject to the provisions of this title, 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.").

with Disabilities Act,[135] requires entities that offer licensing examinations to provide reasonable accommodations to disabled individuals.[136] Finally, Section 504 of the Rehabilitation Act,[137] prohibits discrimination against disabled individuals by any program or activity receiving federal financial assistance.[138] In the interpretation the phrase "substantially limits," for purposes of determining the existence of a disability, the United States Supreme Court has rejected past arguments by bar examiners that substantially limitations do not exist unless it is impossible for an individual to perform a major life activity.[139] This leads to the conclusion that when significant limitations result from a disability, the definition is met even if the impediment is not entirely insurmountable. However, case law documents that if granting the request will compromise the integrity of the exam, bar examiners are well within their rights to deny requests for individuals that might receive accommodations in other situations.[140]

A. *Eligibility Standards*

The bar applicant's eligibility for accommodations on the examination is dependant upon the presence of either a temporary or permanent disability.[141] Submitting the proper documentation is a prerequisite in determining eligibility as to whether the requested accommodations should be granted or denied.[142] The importance of precise and thorough documentation becomes a necessity when the request is premised upon a learning disability.[143] The documentation that must be provided is similar to that required by law schools; it must be from a legitimate source capable of diagnosing a learning disability, i.e., a psychotherapist, psychologist, psy-

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135. 42 U.S.C. § 12182.

136. 42 U.S.C. § 12182 ("Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.").

137. 29 U.S.C. § 794.

138. 29 U.S.C. § 794(a) (" . . . No otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .").

139. *See* Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997).

140. *Id.*

141. Aaron J. Riber, *Learning and Mental Disabilities Protection Under the Americans with Disabilities Act in the Quest for Certification for the Practice of Law*, 10 J. & HEALTH 209, 211 (1996).

142. *Id.*

143. *Id.* at 228.

chiatrist, or other professional that specializes in learning disabilities.[144] Bar examiners also rely heavily on past accommodations that the applicant received prior to submitting their bar application.[145]

However, this method of determining eligibility is sometimes an inadequate means by which examiners can rely on because the applicant may have only recently been diagnosed as having a learning disability.[146] The issues surrounding learning disabilities center on two key questions: who meets the eligibility requirement for a learning disability, and is extra time on a bar examination reasonable for learning disabled bar applicants in light of overall fairness?

1. Dyslexic Applicants

As previously noted, Dyslexia is not a measure of innate intelligence; it occurs in individuals with average to superior intelligence.[147] Despite the recognition of what it does not measure, it still is viewed with skepticism by bar examiners.[148] Given the uncertain and sometimes lacking consensus of improperly diagnosing dyslexia, it is clear why some examiners interpret the diagnosis with a degree of hesitation, which poses problems when facing litigation by applicants who rely on a diagnosis premised on expert reports assessing the presence of dyslexia.

Dyslexic individuals appear more frequently in lawsuits than students with other learning disabilities. In *Bartlett v. New York State Board of Law Examiners*, the dyslexic bar applicant sued under Titles II and III of the ADA when denied accommodations for her disability.[149] The court held that bar exams are not designed to test an applicant's ability to work under time constraints because they are not essential functions of being a lawyer.[150] However, it is important to note that caselaw does not make a determination as to who is otherwise qualified, but makes it clear as to who is protected. This is the balancing act that courts have discovered to be the most effective working model for protecting those who are deserving of protection. Courts have been of the opinion that bar examiners

144. *Id.* at 229.

145. *Id.*

146. *Id.*

147. *Id.* at 230.

148. *Id.*

149. *See generally* Bartlett, 970 F. Supp. 1094.

150. *See id.*; *see also* D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217 (W.D.N.Y. 1993); Rosenthal v. New York State Bd. of Law Exam'rs, 92 Civ. 1100 (S.D.N.Y. 1992).

should not have the unilateral power to grant or deny qualified individuals as they see fit, rather it should be premised on sound reasoning.[151]

Moreover, *Rosenthal v. New York State Board of Law Examiners*[152] exemplifies the challenge that is commonplace when dyslexic bar applicants make a request to change exam conditions.[153] In *Rosenthal*, the Board refused to provide any extra time to a Stanford law graduate who had a well-documented case of severe dyslexia.[154] Eventually the Board granted an extension of time, but only after litigation attracted the U.S. Department of Justice.[155]

Despite the supporting caselaw, there has not been a clear answer as to what constitutes "reasonable accommodations" for the dyslexic applicant in other areas of standardized examinations because the disorder does not always qualify as a disability under the ADA.[156] In *Price v. National Board of Medical Examiners*,[157] the court noted that whether dyslexia was a disability covered by the ADA was dependent on whether the disability was so severe that it impaired the individual's ability in comparison to others.[158] It further explained that because the plaintiffs were medical students, they were not disabled under the ADA, and regardless of what their learning disabilities might be, they had displayed a higher level of academic proficiency than most individuals.[159] In other words, *because* they were medical students, the court held that they were not entitled to accommodations.[160] The reasoning should be noted given that law students are comparable to medical students because they likely performed better academically when compared to other individuals and must also pass an examination to become licensed.

2. ADD/ADHD Applicants

State bar examiners have become increasingly accustomed to requests for accommodations based on ADD/ADHD. Some of the earliest requests came from applicants in New York in the 1990's, most of which

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151. Sara O'Neill Sparboe, *Must Bar Examiners Accommodate the Disabled in the Administration of Bar Exams?*, 30 WAKE FOREST L. REV. 391, 405 (1995).

152. *See generally* Rosenthal, 92 Civ. 1100 (S.D.N.Y. 1992).

153. *Id.*

154. *Id.*

155. *Id.*

156. See Price et al. v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W. Va. 1997).

157. *Id.*

158. *Id.* at 421.

159. *Id.*

160. *Id.* at 427-28.

were granted, a trend that has not altogether transpired to other requests based on learning disabilities.

In July 1992, the Board administered the exam to 7,436 applicants.[161] Of the applicants, 152 requested accommodations; 127 were granted, seven were denied, and 18 did not take the exam.[162] Of the 152 applicants, 26 requests were based on ADD/ADHD, with 21 requests granted.[163]

In February 1993, the Board administered the exam to 2,202 applicants.[164] Among the applicants, 102 requested accommodations; 88 were granted, eight were denied, one did not qualify, four did not apply for the February 1993 exam or withdrew, and one applicant passed the previous exam on appeal.[165] Of the 102 applicants, 16 were granted accommodations on the basis of ADD/ADHD.[166]

There were 7,373 applicants who took the bar exam in July of 1993.[167] Of the applicants, 181 requested accommodations; 155 requests were granted, 16 were denied, and ten applicants did not respond to a request for additional information.[168] Of the 181 applicants, 51 requested accommodations of the basis of ADD/ADHD, with 37 of the requests granted and 14 denied accommodations.[169]

Despite the influx of accommodations requests, some ADD/ADHD applicants have pressed forward into unchartered territory by requesting score reports that are modified based on the disability itself.[170] In *Florida Board of Law Examiners Re: S.G.*,[171] the ADD/ADHD applicant requested, and was subsequently granted, an accommodation of more time on all portions of the exam itself.[172] However, even with this accommodation, she still failed the test.[173] The applicant then requested that, as a reasonable accommodation for her disability, the Board average her scores, rather than require her to achieve a specific score on each sec-

161. *See generally* Bartlett, 970 F. Supp. 1104.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. Florida Bd. of Bar Exam'rs Re S.G., 707 So. 2d 323, 323 (Fla. 1998) (reviewing a case wherein plaintiff requested that her bar examination scores be averaged to "reasonably accommodate her learning disability).
171. *Id.*
172. *Id.* at 324.
173. *Id.*

tion.[174] The court held that the Board did not have to modify the method for scoring the exam as an accommodation for an ADD/ADHD applicant in light of the ADA.[175] The court further noted that a modification in the scoring of an exam would fundamentally alter what the bar exam is intended to test, and is therefore not required by law.[176]

An obvious conclusion is that while bar examiners are reluctant to grant accommodations based on ADD/ADHD, they are hesitant to modify scores for applicants. Logically, this is a sound choice in light of what is reasonable under the ADA for ADD/ADHD applicants.

3. DWE Applicants

The Disorder of Written Expression is not a disability that has been widely explored by courts, and therefore, must be examined with flexibility when reviewing eligibility standards for bar examinations. In *Price*, the plaintiff was impaired with DWE which was diagnosed by two different clinical psychologists.[177] Foregoing expert opinion, the examiners denied his request for accommodations on the medical board examinations.[178] The court applied the earlier analysis for DWE as it did for dyslexia;[179] because the student had excelled academically, he was not disabled under the ADA and should not be granted accommodations for the examination.[180]

Similar to *Price*, the plaintiff in *Gonzales v. National Board of Medical Examiners*,[181] sought a preliminary injunction under the ADA for extended time on his medical board exams by reason of being diagnosed with DWE.[182] The court found that the plaintiff did not have an impairment that substantially limited one or more of his major life activities.[183] The request for accommodations on the basis of DWE was inconsistent with his past success on other aptitude tests, which were timed and without accommodations.[184] His scores measured in the average to superior range in comparison with the scores of others.[185] Therefore, the impairment did not meet the definition of "substantially limits," because he

174. *Id.*
175. *Id.* at 325.
176. *Id.*
177. *Price*, 966 F. Supp. at 422.
178. *Id.*
179. *See Id.*
180. *Id.*
181. *See* Gonzales v. Nat'l Bd. of Medical Exam'rs, 225 F.3d 620 (6th Cir. 2000).
182. *Id.* at 620.
183. *Id.*
184. *Id.* at 627 n.13.
185. *See id.*

could read as well as other individuals.[186] Ultimately, for regulations of state licensing agencies, the court declined to apply definitions from Title I of the ADA to Title III.[187]

Bar applicants have yet to challenge a denial of accommodations based on DWE in the courtroom. Because the disorder was recognized as late at 1986 and is the most suspect of all the learning disorders claimed by law school graduates, it is unlikely that bar examiners have been faced with many challenges claiming it. Despite its absence, courts are apt to apply the same reasoning for DWE bar applicants as they have in licensing examination scenarios.

B. *Allotment of Accommodations*

As to accommodations, bar examiners receive more applications for time-extended exams than any other accommodations request.[188] Bar examiners have been inclined to provide time-and-a-half when granting extensions.[189] However, the formal process has become one of the most trying experiences if even a slight discrepancy exists. Determining time extensions when overall fairness is desired has become the prevailing difficulty for bar examiners. Some have argued that permitting additional time for the bar has the potential for altering the construct and validity aspects of the test.[190] Specifically, granting accommodations to a candidate that lifts the requirements of time constraints from the exam not only raises questions of fairness to others for whom such an accommodation has not been given, but serves to possibly destroy the comparability of their results with non-disabled testers.

Instead of bar examiners moving towards accepting the standards set forth by the ADA, evidence indicates that accommodations are being denied at higher rates than in past years.[191] Admittedly, the surge in denials might stem from more individuals seeking accommodations than in past years. Despite the upswing, special requests for bar exams only compose three to four percent of all applications received.[192] Arguably, the most coveted ability an attorney can possess is that of persuasion, yet bar ex-

186. *Id.* at 631.

187. *Id.*

188. Samuel Heywood, *Without Lowering the Bar: Eligibility for Reasonable Accommodations on the Bar Exam for Learning Disabled Individuals Under the Americans with Disabilities Act*, 33 GA. L. REV. 603, 635 (1999).

189. Pamela Coyle, *What Sylvia Law, Jonathan Pazer and David Glass Confront When They Read or Write*, 82 A.B.A. J. 64, 66 (1996).

190. *See* Hunsicker, *supra* note 104.

191. Coyle, *supra* note 189 at 67.

192. *Id.* at 65.

aminers have not been convinced of this, especially when dealing with requests for an extension of time by applicants.[193]

Those arguing against the implementation of extra time for the learning disabled have stated that the bar tests a law school graduate's ability to work quickly, a tool of the trade for a lawyer.[194] But if speed is a necessary element to the practice of law, what argument can be made as to visually impaired lawyers?[195] Blindness has even been regarded as an asset because it promotes memory retention, sharpens hearing, and works as a shields against intimidation.[196] A similar argument can also be raised for learning disabilities. Given that the learning disabled individual is aware of their disability, they might be more careful with their work product than their counterparts because they are conscious of potential shortcomings. Furthermore, the realization of likely having to put forth a greater effort than others to excel might be an immeasurable asset when striving for motivated attorneys.

Another justification for bar examiners to modify their procedures relates to the faulty assumption that extra time invalidates integrity. Reasoning that speed is an all important component of the exam and as a result, requests for extended time should not be honored, is contrary to the information provided for applicants. Noticeably absent from bar information provided to applicants is the importance speed plays in reaching legal conclusions through recognizing, analyzing, and arguing legal principles. Moreover, arguments opposed to allowing extra time on bar exams because it fails to test speed is cause for concern because very few who raise this point focus on accuracy in the practice of law.[197] A high premium is placed on cramming and memorization at the expense of actually learning the law. Presumably, bar exams should stress the engagement of cognitive skills, such as analysis and evaluation. However, the current exams administered by bar examiners deemphasizes cognitive ability, while rewarding the individual that is apt at memorizing and speedily moving through questions. This is a major concern when failing to recognize that quality of work should determine the worth of the attorney, not the pace at which they churn it out.

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193. *Id.* at 69.

194. *See generally* Hunsicker, *supra* note 104, at 14 (noting that "[t]ime pressure is stressful; it also is unfortunately, now more than ever, an inescapable part of the practice.").

195. *Bartlett*, 970 F. Supp. at 1153 (*see* cover).

196. Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 178 (1999).

197. R. Randall Kelso, *Reflections on the Learning-disabled Lawyer: or on the Importance of Being Swift-A Modest Proposal*, 42 S. TEX. L. REV. 119, 122-23 (2000).

Still, the trend seems to be that if the impairment is not readily identifiable, it should not be given ample consideration by bar examiners. Mixed signals have been sent out to those who seek time extensions when taking the bar–notably from the Texas Board of Law Examiners.[198] Bar examiners test individuals on their grasp of the law, but in enforcing their duty, have misunderstood or chosen to ignore the law when convenient. Members of the Texas Board of Law Examiners have commented on what is required for the practice of law, with speed noticeably being absent from the list.[199] Suggestions have been made that the threat of litigation is required before the law is complied with by bar examiners.

C. *Prevailing Attitudes*

Case law has uncovered some bar examiners' attitudes towards those requesting accommodations for a disability other than ADD/ADHD. A member of the New York Board of Law Examiners represented the attitude of many when he claimed "that it was his job to protect the public from incompetent and incapable lawyers and the public would be unaware that they would be purchasing a defective product in the case of learning disabilities." Unfortunately for these individuals, bringing suit against bar examiners might be the only way to resolve the less-than-good-faith attitude towards non-compliance.

Persuasive authority in the form of how some states have been required to grant accommodations requests should be more of an influence than the weight it currently receives. Primarily, this is because the ADA is a relatively new statute and has yet to be tested in all jurisdictions. When granting extra time, case law has provided a certain amount of guidance for state bar examiners as to the fundamental question of whether quickness is an attribute demanded from everyone, regardless of disability.

A possible solution for an individual whose disability and documentation is questioned is that they be examined by an expert agreeable to both sides before accommodations are denied or granted. The requisite for bar examiners to test for minimal competence is unquestionable, yet bar examiners have failed to adhere to the mandate of accommodating individuals with learning disabilities. They must reevaluate and modify their current policies and attitudes when reviewing requests for accommodations from individuals with learning disabilities.

198. *See id.* at 119, 120.

199. *See id.* at 127.

V. Employment and Clientele

Does a duty exist in informing employers and clients when the attorney is impaired by a disability that is not readily apparent? How do attorneys manage to serve their clients when coping with a disability? These issues are perplexing when weighing possible discrimination and ostracism as opposed to the ethical responsibilities attorneys are charged with upholding.

In general, law firms should not feel at the mercy of the learning disabled when making employment decisions. The individual must be qualified to receive protection under Title I of the ADA.[200] For employment purposes, qualified individuals must be able to perform the essential functions of what is expected of attorneys at the firm in question.[201] Once a disability is determined to exist, the essential functions of the attorney's role must be identified and evaluated as to whether the learning disabled attorney can perform them.[202] If accommodations are needed to enable them to perform the functions of the job, it must next be determined whether the accommodations are reasonable.[203] Undue hardship for a firm is not reasonable, and is treated accordingly. Thus, a law firm may refuse to hire individuals because of their disability without running afoul of federal law.[204] To better understand what an essential job function is for an attorney at a particular firm, consider the following example:

An attorney has a learning disability that impairs his success in becoming an effective litigator. Undeterred, he accepts a position with a firm as a litigation associate. Although he can research more efficiently than most of the other attorneys in the firm, his disability precludes him from effectively performing tasks required at trial. Despite his assertion that trial attorneys must also be excellent researchers and that most cases are settled instead of being tried, the skills needed for performing certain tasks at trial are still essential to the job function. The firm will not be required to further employ the impaired attorney because the undue hardship for the firm outweighs the benefits they receive.[205]

As consumers search for ways to maximize returns on investments, law firms seek to differentiate themselves from the competition in search of gaining market share. Billing rates have soared and clients arguably want

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200. *See* 42 U.S.C. § 12112; *see also* 42 U.S.C. § 12111(8).
201. *See* 42 U.S.C. § 12111(8).
202. *Id.*
203. *See* 42 U.S.C. § 12111(9).
204. *See* 42 U.S.C. § 12111(10).
205. *See* 42 U.S.C. § 12111(8)-(10); *see generally* Bolstein v. Dept. of Labor, 55 M.S.P.R. 459, 462-64 (1992) (explaining that a demotion was reasonable for a Labor Department attorney after he requested to be excused from arguing appellate cases due to a disability; the court held that arguing appeals was an "essential function" of his job).

value in return for high price representation. Firms offset the costs by typically justifying that their firm retains only the highest qualified attorneys. Is the value of the pedigree lessened when a disability is present, requiring an explanation that things might not be as they appear?

A. *Different Disabilities in the Workplace*

Regardless of the applicable standard, many employers find learning disabilities to be a hindrance when trying to hire the most qualified individual for the job. Because learning disabilities are often misunderstood, stereotypes have evolved that make for an understandable uneasiness when hiring decisions are made. Some associate learning disabilities with a form of mental retardation or brain damage, restricting those who might very well be capable of outperforming their potential peers.[206] Most individuals, reluctant to inform those who are in control of their ability to earn a living, have chosen silence as the preferred approach. Newly-minted lawyers and weathered practitioners alike have taken this route, and for good reason.

1. Dyslexia

Dyslexia, unlike ADD/ADHD, is likely to become a problem for the attorney that does not disclose their impairment because of the nature of the disorder. Because there is a great deal of written work in the practice of law, dyslexia would seemingly be difficult to mask in the practice of law. However, if the dyslexic attorney is qualified for the position, the employer must determine whether they can perform the essential functions of being an attorney, with or without reasonable accommodations. The essential functions of an attorney are those that are central to legal analysis, not those that are marginally related to the outcome. In determining whether a particular duty is an essential function, employers should focus on the purpose of the function and the result to be obtained and consider whether transferring the function to another employee would fundamentally alter the nature of the job given the presence of dyslexia.

For example, although the final written products created by attorneys should be free from typographical errors, producing documents with sound legal analysis is the primary function of the job, and proofreading is not likely to qualify as essential. Accordingly, because skillful proofreading is not an essential part of being an attorney, if an attorney with dyslexia discloses their disability, the employer must consider whether

206. *See* Sch. Bd. of Nassau City v. Arline, 480 U.S. 273, 284-86 (1987) (describing restrictions based on misunderstandings of persons with contagious diseases).

shifting the proofreading functions to another person would be a reasonable accommodation.

2. ADD/ADHD

Perhaps the best suggestion for an attorney with ADD/ADHD is to specialize in an area of law that is of interest to them.[207] Specializing should enable the ADD/ADHD attorney to efficiently and effectively handle their cases.[208] One argument against specializing is that an attorney with ADD/ADHD may lose interest in their area of specialization; however, this can be thwarted if the area of specialization is litigation. Furthermore, it is noted that people suffering from ADD/ADHD sometimes go into the practice of law and become litigators.[209] The theory is premised on the rules and procedures that are required for litigation in the structure of a courtroom as external elements which tend to organize the attorney's activities for them, allowing them to be successful in their career as an attorney despite their disability.[210]

3. DWE

The issue of accommodating incoherent writing by the attorney with DWE in light of integrating the disabled into the workplace does not serve the purpose of the ADA. Even though their condition may be caused by a disability, if the attorney is unable to complete a law school writing requirement, it is unlikely they can perform the essential function of communicating as an attorney. If the DWE-disabled attorney obtains his law license, employers should not be obligated to hire and promote him notwithstanding his substandard writing skills. There is no caselaw suggesting that one of the fundamental functions of practicing law, i.e., communication through the written product of the attorney, can be trumped by the ADA.

B. *Disclosure*

Undoubtedly, making hiring decisions based on highly qualified pools of applicants is a difficult task. Should the employer or client be aware of what they are getting in return for their investment? Prejudices should not become a reaction to disclosure, but many times it has become a natural reflex despite efforts to eradicate its presence. Therefore the duty to

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207. Bruce Familant, *The Essential Functions of Being a Lawyer with a Non-Visable Disability: On the Wings of a Kiwi Bird*, 15 T.M. COOLEY L. REV. 517, 554-55 (1998).

208. *Id.* at 555.

209. William R. Friedman, *Law Office Management: If you Think Golf is a Mental Game, You Ought to Try Practicing Law*, 3 LAWYERS J. 8, 9 (2001).

210. *Id.*

disclose should not be required, although with dyslexia and DWE, it seems unrealistic that an attorney could expect longevity in their career if they chose not to do so.

Especially in the practice of law, a heightened level of uneasiness is present when emphasis on academic success is accomplished by alterations for the learning disabled.[211] In a failure to appreciate equally the accomplishments of all individuals, firms might very well be passing up an opportunity of employing the learning disabled whose successes are build on solid foundations of hard work and determination. There is no empirical evidence other than misconceptions, that prove or disprove a learning disabled attorney is not capable of success in practice. More importantly, a built-in system of checks and balances exists so that disclosure is unnecessary in the interview process.

Again, disability statutes protect only against discriminatory practices perpetuated on the basis of discrimination. A learning disabled attorney is only entitled to protection if they make their employer aware of the disability and request accommodations to minimize its presence.[212] If the ability of the learning disabled individual is not reflective of reasonable expectations, natural forces will preclude employers being forced to compromise quality. Under the federal law, employers are not expected to retain individuals who, despite their disability, cannot perform the job demanded. Furthermore, it is reasonable to assume that individuals that are learning disabled will afford their impairment ample consideration when deciding whether they are actually qualified for the position. Self-realization and ability have the potential to initially protect employers from both the disabled and non-disabled alike. And, in the event reasonable expectations fail, actions can be taken to resolve carrying the excess weight, such as taking remedial measures for failure to fulfill job requirements.

If the individual does not feel disclosure is necessary, should the law school be forthcoming that the disability was provided for via accommodations? In years past, an individual's LSAT scores were "flagged" so institutions were aware of the alternative testing conditions.[213] Due to the implications of invading privacy, testing services have considered doing away with disclosing accommodations information,[214] with law

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211. *See* David Goldstein, *Ethical Implications of the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 111, 112 (2000) (illustrating the concern of lowering standards for the profession).

212. *Id.* at 115-16.

213. Lipskar, *supra* note 40, at 661.

214. *See* LAW SCHOOL ADMISSION COUNCIL, LSAT & LSDAS REGISTRATION AND INFORMATION BOOK 7 (2003-2004 ed.). The booklet informed students:

schools following suit.[215] It has been contemplated that schools have a higher duty than an individual does because they are guaranteeing that all students have completed the necessary requirements for the degree.

The negative implications exceed the overall benefits of disclosing certain confidential information of students. First considering that the law school is initially responsible for determining what "reasonable accommodations" are, a degree earned by both disabled and non-disabled students alike should carry the same weight. Therefore, it would be highly unreasonable for schools to disclose information that could be highly prejudicial to the student.[216] The choice for disclosure should be decided by the student, not the school, based on job duties, level of impairment, and whether there is the possibility for discrimination. Career counselors should though become attuned to the needs of the learning disabled. Creating a career path that capitalizes on strengths and minimizes weaknesses only serves to lessen the liability of the school.

C. *Ethical Considerations*

The Model Rules of Professional Conduct provide an explanation as to what is acceptable conduct by attorneys in relation to disclosing specific information to clients.[217] The information must not provide false or misleading information.[218] Having a learning disability does not mean the attorneys credentials are any less than what they appear to be. The attorney should feel safe that they have not committed an ethical violation

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

Cf. Diana C. Pullin et al., *The Use of "Flagged" Test Scores in College and University Admissions: Issues and Implications under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797, 824 (1997) (noting that the Law School Admission Council's policy of using flagged scores may stigmatize students with learning disabilities as being incompetent).

215. Lipskar , *supra* note 40, at 661-62.

216. *Id.* at 661.

217. MODEL RULES OF PROF'L CONDUCT R. 7.1 (1983). 7.1 states, *inter alia*:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.
>
> (a) contains a material misrepresentation of fact or law that materially misleading;
>
> (b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules. . .or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

218. *Id.*

provided they have not misrepresented their capabilities in their ability to do the work promised. Unfortunately, questionable conduct by attorneys has been cause for concern by the public for some time now. The failure to inform a client of a handicap does not however, create questionable conduct when in light of the Model Rules intent. An excerpt from David Goldstein's article entitled, *Ethical Implications of the Learning-Disabled Lawyer* explains the rationale for non-disclosure in simple terms:

> Ask yourself this question: Would you hire a learning disabled attorney to represent you in an important matter? If the answer is no, is that dispositive? Must an attorney with learning disabilities reveal that to a client, with the probable loss of that client, and almost all others? I think the answer can be found by considering what attorneys do not need to disclose to their client. Must attorneys disclose that they are "ethically challenged" in that they have had numerous disciplinary actions brought against them? That they graduated at the bottom of their class? That they are poor writers? That all the lawyers in town, and most of the judges, think they are jerks? In all cases the answer is "no", and I do not believe that a learning disabled attorney has to reveal her status any more than these other attorneys have to reveal their hidden "disabilities". . .[219]

No amount of reliable data exists as to the number of learning disabled attorneys in practice or that quality will be compromised by their presence in the profession. In sharp contrast, evidence does show that the attorneys that have been forthcoming about their learning disability are in large part highly successful.[220]

It should be further mentioned that there are support groups in virtually every state that offer support services to attorneys with other, self-induced impairments, i.e., drug and alcohol related problems.[221] Until their behavior impairs their skills or is recognized, these impairments lay dormant unless voluntarily disclosed. With these other established programs, it seems that a state bar should have a duty in supporting learning disabled attorneys through similarly established programs. Just as afflictions with drugs and alcohol are likely hidden from employers, learning disabilities are sometimes kept private as well. Mentoring programs can play an integral role in a learning disabled individual's professional devel-

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219. Goldstein, *supra* note 211, at 113.

220. *See generally* Jeffrey H. Gallet, *The Judge Who Could Not Tell His Right From His Left and Other Tales of Learning Disabilities*, 37 BUFF. L. REV. 739 (1989) (describing one federal judge that suffers from a severe learning disability but is highly successful nonetheless).

221. Kelso, *supra* note 197, at 125.

opment,[222] yet no proactive steps have been taken in doing so. The reality is that attorneys are not perfect; the Model Rules are for the protection of the public against incompetence and negligence, and it should start with assistance from state bar associations.

D. *Minimizing the Disability*

Attention to detail cannot be ignored in its relation to having a prosperous and successful career in the practice of law. A common remedy that enhances the ability to focus and become more detail-oriented is medication. Ritalin, Dexedrine, and Adderall have all been acknowledged to improve performance and stamina in individuals with learning disabilities.[223] It is presumable that a fair number of attorneys affected by learning disabilities use them as coping mechanisms. Despite the appearance of making advancements in overcoming the disability, these medications can prove to be a detriment for an attorney. Therefore, there is cause for concern when these medications are suggested for mitigating disabilities without explaining their shortcomings.[224]

It is undeniable that when these medications are used initially, they seem to be the answer in minimizing a disability. After extended use, their perceived benefits are weakened due to an almost guaranteed tolerance.[225] Because these medications are controlled substances, their potential for addiction is well-documented.[226] The combination of these elements can make the learning disabled attorney dependant on medication that can dangerously impair their ability to function.[227]

Again, a better solution for learning disabled attorneys is to specialize in a particular area of the law. Becoming highly acquainted with one facet of the law provides a regimented routine that allows advancements through familiarity. Except for those with ADD/ADHD, trial work however, might prove to be too demanding for an attorney possessing a severe impairment.[228] Given the symptoms of other disabilities, this

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222. *See* Familant, *supra* note 207.

223. Jeanie Russell, *The Pill That Teachers Push,* GOOD HOUSEKEEPING, Dec. 1997, at 110.

224. *See* Scott Lemond et al., *Identifying and Accommodating the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 69, 74 (2000).

225. *See* Russell, *supra* note 223.

226. *Id.*

227. *See generally* Jeffrey J. Fluery, *Kicking the Habit: Diversion in Michigan-the Sensible Approach*, 73 U. DET. MERCY L. REV. 11, 11 (1995) (discussing disciplinary action taken for lawyers who abuse controlled substances).

228. Coyle, *supra* note 189, at 66.

suggestion is likely to be more beneficial to both the attorney and their employer.[229]

VI. CONCLUSION

A possible answer for individuals affected by a learning disability is guidance that starts upon entering law school. The administration should alert them to potential difficulties and what is demanded for the practice of law. Allowing the learning disabled student to become entirely dependent upon accommodations without an explanation that the impairment must not be regarded as an excuse is hazardous. Students need to be reminded that accommodations are not a replacement for intense study and preparation; likely they will have to put forth a greater effort than that of their classmates. Not only does this potential solution prepare the student for future challenges, but it can make the difference between a lawyer that views their disability as a roadblock and one that perceives it as a minor bump in the road to success.

229. *See* Familant, *supra* note 207, at 554-55 (noting that ADD individuals have the ability to focus for a considerable length of time on activities they are drawn to).