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POST SECONDARY EDUCATION AND LICENSING UNDER THE ADA

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I. Introduction

The Americans with Disabilities Act ("ADA") provides far-reaching protections for people with disabilities. Colleges and universities, as well as professional licensing entities, are covered by Titles II and III of the ADA. Questions frequently arise about the types of accommodations and modifications required by the ADA in these settings. Individuals who are applying to or enrolled in post-secondary educational institutions (schools attended after high school) may encounter ADA issues involving reasonable accommodations, required disclosure of medical information on applications, and suspension or expulsion due to the effects of a disability. This legal brief addresses these three issues by examining the text of the ADA, relevant federal regulations, applicable case law, and includes suggestions for best practices in this area.

One "purpose of the ADA is to guarantee that those with disabilities are not disadvantaged and to

II. Accommodations in Post-Secondary Education and Licensing

'place those with disabilities on an equal footing' with others." That purpose often is overlooked in the context of accommodating persons with disabilities in higher education and professional licensing. Many private and public colleges, universities, and graduate schools are included in this mandate, as are private professional licensing entities. Nonetheless, these entities do not always grant reasonable modification or accommodation requests, and the implications may be that people with disabilities are denied equal opportunities to pursue degrees in higher education and professionally licensed careers.

A. Relevant Statutory Provisions and Regulations

Many colleges and universities are public rather than private, meaning they are owned and operated by or are an instrumentality of a state or local government. Students with disabilities have accommodation needs in both public and private educational settings, with public places of higher education being covered under Title II of the ADA. Public licensing agencies are also covered by Title II. This distinction is important when a student wants to bring a claim that a university failed to accommodate his or her disability, because a Title II plaintiff will have to prove that the public university or college is not immune from suit under the Eleventh Amendment of the United States Constitution in cases seeking money damages.
Private entities, in the context of higher education and when providing licensing, must comply with the general prohibition against discrimination in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" under Section 12182 of Title III. Failing to make reasonable modifications in policies, practices, or procedures to accommodate a person's disability-related accommodation request is discrimination, unless the entity can show that making the changes would cause undue hardship or "fundamentally alter the nature of [its] services." The most contested provision of Title III in higher education and licensing accommodation litigation is Section 12189: "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." The Department of Justice's ("DOJ") Title III regulations further direct private entities to offer examinations and courses in a manner that "accurately reflects the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's [impairment]." Additionally, the regulations specifically apply the ADA anti-discrimination requirements to: (1) administrative methods; (2) eligibility requirements; (3) modifications to policies, practices and procedures, and (4) auxiliary aids and services. Schools, whether private or public, may also be covered under the Rehabilitation Act of 1973 if they are recipients of federal funding.

B. Disability Coverage under the ADA

The cases discussed in this section arose prior to the ADA being amended by the ADA Amendments Act ("ADAAA"), which became effective on January 1, 2009. The ADAAA makes it easier for plaintiffs to show that they have a disability covered by the ADA. The significance of the ADAAA is illustrated in a case called *Jenkins*, discussed below in Section II.G., Licensing Exam Accommodations.

Many students with learning disabilities or other disabilities need accommodations when taking tests. Frequently, when seeking to enforce their ADA rights, students allege that they are substantially limited in the major life activity of learning. However, a number of courts have been hostile to claims made by students who have succeeded in the past despite having a learning disability that may or may not have been diagnosed. Because of the hostility by some courts to these kinds of claims, plaintiffs may want to try to identify a major life activity other than learning in which they are substantially limited, such as speaking, thinking, concentrating, and communicating. However, the ADAAA may make it easier for plaintiffs with learning disabilities to prove that they are substantially limited in a major life activity and therefore have an ADA disability. For example, under the ADAAA an individual with a learning disability may be able to claim that they are substantially limited in the major bodily function of cognitive processing.

Prior to the ADAAA, the ADA's employment regulations defined "substantially limits" as: "significantly restricts as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." The ADA's regulations then stated that an individual must be substantially limited compared to the "average person," rather than, for example, compared to the *average student* in that individual's university. The latter construction would be more favorable to most of plaintiffs in post-secondary education and licensing accommodation litigation, who tend to have impairments that materially limit them in a very specific major life activity related to education, but who have also reached academic milestones beyond that of the "average" person in most other areas of life. When passing the ADAAA, Congress found that the prior interpretation of "substantially limits" was overly restrictive. New regulations are expected later this year from the EEOC and DOJ, which should provide clarification on this issue and broader protection for students with disabilities.

A pre-ADAAA example of the hostility of courts toward students seeking testing accommodations is *Love v. Law School Admission Council, Inc.,* in which a plaintiff with ADHD and a learning disability sought additional time on the Law School Admission Test. The court held that the fact that plaintiff was clinically diagnosed as having a learning impairment did not automatically mean that he was entitled to an accommodation under the ADA. The court held that in light of plaintiff's past test scores, educational history, and his reported ability to function in both academic and professional environments, he was not substantially limited in the major life activity of learning, He therefore did not have a disability as defined under the ADA. *Love* demonstrates how courts may look for predictable or typical limitations that should have manifested at certain grade levels based on the plaintiff's impairment and often dismiss claims where a person has only anecdotal or patchy evidence of limitations

Another pre-ADAAA interpretation of substantial limitation in learning is found in *Wong v. Regents of the University of California*. In *Wong*, the Ninth Circuit held that a former medical student with a learning disability was not substantially limited in the major life activity of learning because the student had achieved academic success beyond that achieved by the average person. The question was not whether the plaintiff's "learning impairment makes it impossible for him to keep up with a rigorous medical school curriculum," but "whether his impairment substantially limited his ability to learn as a whole, for the purposes of daily living, as compared to most people." In concluding that the plaintiff was not substantially limited, the court stressed that despite being diagnosed with a learning disability at a young age, the plaintiff had achieved academic success without accommodations; he did not request accommodations for his learning disability until his second year of medical school. The court cautioned that it was not holding that successful students can never meet the ADA's definition of disability based on a learning impairment. For example, the court observed that such students may be substantially limited in learning if their academic success was achieved only with accommodations.

In *Singh v. George Washington University School*

of Medicine & Health Sciences, a medical student failed several courses that required multiple-choice tests and was dismissed from the program. She was later diagnosed with a learning disability. When the dean was provided this information, he did not reinstate her and the student sued under Title III of the ADA. The court found in favor of the school, holding that the student's inability to perform well on one aspect of an extremely competitive elite academic program did not demonstrate a substantial limitation in the major life activity of learning because the student had otherwise excelled in school and was fully able to function in other aspects of her life. The court cautioned the school that refusing to reassess a termination decision after a student presents medical documentation could be problematic in other cases, although this student was ultimately deemed not to have an ADA disability.

Similarly, in *Brief v. Albert Einstein College of Medicine*, the court held that a medical school student with anxiety and learning disorders was not disabled under the ADA. In finding that the plaintiff was not substantially limited in learning, the court relied on the plaintiff's past academic success, which he had achieved without accommodations. Further, the plaintiff had not been denied a reasonable accommodation. He had already failed several medical school examinations before confirming his diagnoses and requesting accommodations from the school. When the plaintiff requested more time on examinations, the school granted this accommodation but later dismissed him because of his prior failures, which the court found to be a legitimate nondiscriminatory reason because the school reasonably concluded that no accommodations would remedy the plaintiff's prior failures.

A case that took a different approach to the issue of poor academic performance predating a disability diagnosis is *Steere v. George Washington University*. A medical school committee recommended that the plaintiff be dismissed for poor academic performance. After the committee submitted its recommendation to the dean, but before the dean adopted the recommendation, the plaintiff submitted medical documentation of his learning disability and requested accommodations. The dean adopted the committee's recommendation of dismissal and testified that his decision was based solely on the plaintiff's prior failures. The court rejected the school's argument that the plaintiff's later request for accommodations amounted to asking for a "second chance" and was therefore unreasonable. The court distinguished the plaintiff, who had not been provided with accommodations during a past period of poor performance, from students who perform poorly despite being provided with accommodations and who then ask for a "second chance." The court stated: "The second chance doctrine, in so far as it is a doctrine, works to deny already accommodated and at-fault plaintiffs from winning an endless string of new accommodations after each failure. The doctrine does not apply to plaintiffs who, through no fault of their own, have not yet had a chance to get the modifications they need." Here, the plaintiff was not seeking a second chance but a "first chance to successfully handle his disability."

Toledo v. University of Puerto Rico provides another example of a student successfully using ADA litigation to obtain accommodations. The student, who had schizoaffective disorder, notified the school of his disability and requested a number of accommodations, including additional time on tests. Instead of providing this accommodation, the student's professor ridiculed him in front of his fellow students, denied his request, and advised him to consider another career. Similar results occurred each time the student requested an accommodation. When he asked for permission to arrive to class late due to his medication's side effects, his professor ignored him, advised him to stop taking his medication, and warned that she would not grant time extensions. The student sued under the ADA and the court found factual disputes regarding whether the university satisfied its duty to accommodate under the ADA.

Often, students with ADHD or processing speed conditions must produce medical records demonstrating how the impairment affected their educational performance from elementary school to high school, and, if applicable, college or graduate school. Schools usually require that the record include evidence that is objective and verifiable rather than just self-reported. Courts have noted when the record lacks evidence of substantial limitations. For instance, the court might comment on the fact that a plaintiff was never held back in school, or that the plaintiff did not have a history of requested or requesting or requiring tutoring or

other extra assistance. Critics of this approach note that defining disability solely based on academic outcomes excludes students who have achieved success by compensating for some of the limitations caused by their impairments.

Finally, students who are unable to meet the substantially limited definition of disabled may still qualify for the ADA and Rehabilitation Act's protections by showing that a school "regarded" the student as disabled. In *Betts v. Rector & Visitors*, the Fourth Circuit Court of Appeals agreed with the district court that a college student with a minor learning disability and a high IQ was not substantially limited in learning. However, the court of appeals held that the school regarded the plaintiff as disabled. As a condition of the plaintiff's academic probation, the school required him to undergo testing at an evaluation center to determine if he had a learning disability. Because the university had delegated authority to the center to conduct evaluations and recommend accommodations, and because the center had a policy of recommending accommodations only for students believed to have disabilities, the school regarded the plaintiff as disabled. Additionally, the court emphasized that the plaintiff's professors adopted the evaluation center's recommendations and treated the plaintiff as if he had an ADA disability.

C. Qualified Issues Under Title III of the ADA

Once students overcome the hurdle of showing that they have an ADA disability, they must also demonstrate that they are qualified for the program. While this requirement is not stated explicitly in Title III, the Rehabilitation Act contains language regarding an "otherwise qualified individual with a disability," and Title II of the ADA provides that it protects "a qualified individual with a disability," defined as "[a] disabled person who, with or without reasonable modifications, … [barrier removal, or auxiliary aids or services], meets the essential eligibility requirements for the… services or the participation in programs or activities." Courts have applied these standards to educational institutions covered under Title III. A student who cannot meet eligibility standards even with accommodations is therefore not "qualified."

Generally, an educational institution is not required by the Rehabilitation Act or the ADA to lower its academic standards for a professional degree because "[i]t … would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program." The Eighth Circuit Court of Appeals has stated the general position of courts regarding the interplay of ADA and Rehabilitation Act: "We will … consider cases dealing with each Act as 'applicable and interchangeable.'"

D. Program Requirement Accommodations and Fundamental Alterations

Courts give colleges and universities a fair amount of leeway to establish program requirements with which admitted students must comply. The most difficult accommodations for post-secondary students to secure are modifications to a course requirement, elimination of a program requirement, and exemption from a school's standard academic policies. The general rule is that a faculty or administrative assessment of a student's qualifications is given deference. Courts will often rule in favor of the school where a student is dismissed for repeatedly failing to meet academic standards, and the student's requested accommodation would entail fundamentally altering the school's policies or program design.

In *Powell v. National Board of Medical Examiners*, a second-year medical student sued to be readmitted to the University of Connecticut Medical School ("UConn") and to receive accommodations to retake the United States Medical Licensing Examination ("USMLE"). The student failed the USMLE twice after receiving free tutoring and accommodations from the medical school for two years. UConn initiated the dismissal process after the student failed the test a third time. The court noted that the school had provided her with accommodations for two years before denying her accommodations to take the NBME a fourth time. The student argued that UConn should change its policy of conditioning promotion to the third year of the program on passing the USMLE when a student performed poorly on the second-year courses. The court disagreed, holding that the requested modification was unreasonable and an undue hardship on the medical school.

However, in *Fialka-Feldman v. Oakland University Board of Trustees*, a district court rejected a

school's argument that allowing a student enrolled in a non-degree program to live on-campus would fundamentally alter the nature of the program. The plaintiff had cognitive impairments and enrolled a special program offered by the university for students with disabilities, a program which did not result in a degree. Because the school limited its on-campus housing to students in degree programs, the plaintiff was not allowed to live in a campus dormitory. The plaintiff sued under the Rehabilitation Act and the ADA, arguing that the school should have granted him an exemption from the housing policy as a reasonable accommodation. The court held that although the school denied the plaintiff on-campus housing because of a neutral rule, the plaintiff's disability prevented him from enrolling in a degree program. Therefore, the Rehabilitation Act's protections were necessary to provide him with equal access to on-campus housing. The court rejected the school's fundamental alteration defense. A school official testified that the purpose of on-campus housing was to move students towards degrees, and that allowing non-degree students to live on campus would impede this purpose and change the "culture" of on-campus housing. The court rejected these assertions as overbroad and not grounded in the "individualized inquiry" that the ADA and Rehabilitation Acts require. The plaintiff sought on-campus housing only for himself, not for all students in non-degree programs. Further, the plaintiff contributed to the academic purpose of the school through his active engagement with his professors and fellow students. Therefore, the court found that the school's fundamental alteration defense was grounded in "prejudice, stereotypes, and unfounded fear."

E. Effective Accommodations

The accommodation provided by an educational institution must be effective. In *Di Lella v. University of D.C. David A. Clarke School of Law*, a law student was suspended from school for poor performance. The school had already provided reasonable accommodations including: double time for examinations; a separate, quiet testing room; extended time on written projects, and a note-taker, which the school later unilaterally replaced with transcriptions. The court held that there was factual dispute regarding whether the transcriptions were effective. The transcriptions were often late or not produced. These problems contributed to the student's poor performance. The school had the duty to provide an accommodation that "address[ed] the limitation arising from the individual's disability." Whether the accommodations were reasonable and effective was a factual question that survived the school's motion to dismiss. In *Hayden v. Redwoods Community College*, the court found in favor of a student who was deaf and seeking live interpreters. The plaintiff, who was deaf, received interpreting services but complained about the quality of the interpreters provided by the college and the sporadic availability of interpreters. The college tried to find other live interpreters and explored the option of video interpreting and transcribed lectures. The plaintiff felt that live interpreters were the only effective accommodation. The court found a factual dispute on whether the other auxiliary aids offered by the college were effective. Although the plaintiff had rejected these other aids without trying them, it was the college's burden to prove that these aids would have been effective. Although the plaintiff had some lip-reading ability and may have benefitted from note-takers, it was for the fact-finder to determine whether other auxiliary aids met the ADA's "equally effective communication" standard. The court also found a factual dispute on whether allowing the plaintiff to give input on the interpreters selected would be an undue hardship for the school. Because interpreting for students who are deaf requires special skills, having the student's input may have been required to render the auxiliary aid effective.

In *Huezo v. Los Angeles Community College*, a court considered the self-evaluation regulations of Title II of the ADA. The plaintiff, who used a wheelchair and other mobility devices, sued the college under Title II and the Rehabilitation Act. He alleged that the school lacked accessible parking, sidewalks, desks, classrooms, and gym facilities. The plaintiff sought summary judgment on the issue of whether the school complied with the self-evaluation regulations of Title II, which state: "A public entity shall . . . evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [Title II] and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications." Additionally, the regulations require public entities with more than fifty employees to create

reports, available for public inspection, on the self-evaluation and modification process. The court noted that the law is unclear on whether the self-evaluation regulations of Title II are enforceable through a private right of action. Here, it was unnecessary to decide because the court considered the school's failure to comply with the self-evaluation regulations as just one of the factors relevant to whether the school's programs, services, and facilities were readily accessible. The court held that the school did not comply with the self-evaluation regulations and that the school denied the plaintiff meaningful access to its educational services. The court emphasized that the school failed to take affirmative steps to ensure accessibility; the plaintiff had to make several complaints in order to gain access.

An effective accommodation need not be the specific accommodation requested by a student. In *Hoffman v. Contra Costa College*, the plaintiff, who had multiple sclerosis ("MS"), was given accommodations of extra time on exams and a quiet space for taking exams. Additionally, because MS impaired the plaintiff's ability to memorize mathematical formulas, the college allowed her to use formula sheets in her math courses. However, the college denied her request to use personal notes and other materials during closed-book exams. The Ninth Circuit Court of Appeals agreed with the district court that the college did not violate the ADA or Rehabilitation Act. The undisputed evidence demonstrated that the college had provided reasonable accommodations to the plaintiff.

F. Entrance Exam Accommodations

Most accredited post-secondary education programs require applicants to submit scores from a standardized test as an objective measure of comparison to other applicants. These standardized instruments may be biased against persons whose impairments substantially limit them in basic learning or test-taking skills. Enlarged print or other alternative formats and accessible test-taking sites and seating are seen as moderate accommodations requests. Requests for a separate test setting or extended time are seen as being more extensive accommodations. Before the test date, a person with a disability must formally apply for accommodations from the private company that owns and/or administers the exam. The company assesses how the person's impairment relates to the skills and functions involved in the particular test. The company then grants or denies the accommodation based on its own assessment of whether the person is disabled under the ADA and whether the accommodation is necessary. In most cases, testing entities will require documentation of both the disability and the need for the requested accommodation.

A number of cases have arisen with respect to accommodations for the Law School Admissions Test ("LSAT"), which is owned and administered by the Law School Admissions Council. ("LSAC"), and the Medical College Admission Test ("MCAT"), owned and administered by the Association of American Medical Colleges ("AAMC"). There may be ADA implications when test-takers who are granted accommodations have their test "flagged" to alert admissions committees that the test-taker received accommodations. Whether this flagging violates the ADA is not settled among courts. However, the recent discontinuance of flagging by the College Board, the American College Testing Program ("ACT") the Scholastic Aptitude Test ("SAT"), and the Graduate Management Admission Test ("GMAT") may signal more widespread discontinuance of flagging.

For example, in *Rothberg v. LSAC,* the district court held that a law school applicant with a learning disability was disabled under the ADA and entitled to extended time on the LSAT. Unlike the applicant in *Love,* discussed above, the applicant in *Rothberg* was diagnosed with a learning disability at an early age and received special education services. She continued to receive special education services through high school and received extended time on all in-class tests and written assignments. She had been granted extra time to take the ACT. In college, she was granted extended test time and note-taking services. Unlike the applicant in *Love*, who only requested extended time for his second taking of the LSAT, the applicant in *Rothberg* was denied extended time on her first LSAT attempt. LSAC stated that her documentation was incomplete and not up-to-date. After scoring in the low-average range on the first LSAT, she was reevaluated and submitted the new results in her second accommodation application to LSAC. The applicant was diagnosed with Developmental Expressive Writing Disorder and Developmental Arithmetic Disorder. Despite these diagnoses, the LSAC again denied the request,

triggering a lawsuit. The court found that she was disabled and that LSAC violated the ADA by not providing extra time.

G. Licensing Exam Accommodations

The National Board of Medical Examiners ("NBME") is a private non-profit corporation that develops and administers the United States Medical Licensing Examination ("USMLE"). The exam is administered in three steps, and a number of cases have been litigated regarding the denial of accommodations for the first step, which comes after the second year of medical school. A second-year medical student usually cannot move on to the third year unless he or she passes USMLE Step 1. In other medical school programs, the student's score is one factor in determining the student's placement in residency and other specialty programs. The test measures the student's mastery of basic medical sciences and the ability to apply this knowledge. Additional time for persons with reading and processing disabilities could mean the difference between passing and failing the test. The issue is whether the person is qualified with a disability under the ADA and entitled to an accommodation from the NBME.

In *Rush v. NBME*, a second-year medical student with reading and visual processing skills impairments requested and was denied extended time on USMLE Step 1. The court found that the student was substantially limited in his ability to read and process information compared to most people. The court also ruled that the student would suffer an irreparable injury if the requested injunction for additional time was denied.

In a recent NBME case involving licensing testing accommodations, *Jenkins v. National Board of Medical Examiners,* the court applied the ADA Amendments Act ("ADAAA") retroactively to reverse the district court's finding that the student did not have a disability. The plaintiff had a reading disorder and sought an accommodation of additional time on a medical licensing examination. Relying on Supreme Court precedent that took a narrow view of the definition of disability, the trial court found that the plaintiff did not have an ADA disability. On an appeal taken after the ADAAA was enacted, the Sixth Circuit Court of Appeals reversed and held that the ADAAA should be applied retroactively where the only remedy sought is prospective injunctive relief, *i.e.*, a request for future accommodations rather than money damages for past acts. Jenkins was diagnosed with a reading disability at a young age, had received accommodations at each stage of his education, and had received extra time to take the ACT and MCAT examinations. NBME denied his request for accommodations. The Sixth Circuit advised the district court that if, on remand, the district court found that Jenkins had an ADA disability:

> The court must still determine specifically what NBME must do to comply with the requirement that a professional licensing board offer its examination "in a place and manner accessible to persons with disabilities. 42 U.S.C. § 12189. This nuanced determination is not governed by previous, voluntarily provided accommodations that Jenkins has received, nor necessarily by what accommodations were required under the narrower previous definition of disability.

The NBME accommodation process should become simplified as the result of a recent settlement announced by the DOJ on February 22, 2011. The case arose under Title III of the ADA and involved the extensive documentation required by the NBME from applicants seeking testing accommodations. Under the terms of the settlement, a Yale Medical School student with dyslexia will receive the accommodations of double testing time and a separate testing area to take the USMLE. In addition, the NBME will be required to:

- Only request documentation about (a) the existence of a physical or mental impairment; (b) whether the applicant's impairment substantially limits one or more major life activities within the meaning of the ADA; and (c) whether and how the impairment limits the applicant's ability to take the USMLE under standard conditions;
- Carefully consider the recommendations of qualified professionals who have personally observed the applicant in a clinical setting and recommended accommodations; and
- Carefully consider all evidence indicating whether an individual's ability to read is substantially limited within the meaning of the ADA.

Law students face a different set of issues when applying for accommodations to take a state bar examination. Title III covers the administration of bar exams. Unlike the NBME, which is a nationally administered test, bar exams differ by state, as do the administrators. But in every state the exam demands intensive reading and writing. As with other tests, extended time requests are the most common issue in this area of litigation. Requests for changes to the scoring of the exam have been denied by courts as unreasonable.

In *Enyart v. National Conference of Bar Examiners*, the Ninth Circuit Court of Appeals upheld a district court's injunction ordering the NCBE to allow the plaintiff, a law school graduate who was legally blind, to use assistive technology on her laptop computer to take the bar exam. The state bar association had agreed to let the plaintiff use the laptop technology, but the national bar organization refused. The plaintiff had been granted some testing accommodations, including extra time, hourly breaks, and a private room. Concluding that these accommodations did not make the exam accessible to the plaintiff, the Ninth Circuit relied on a Title III regulation that provides: "Any private entity offering an examination covered by this section must assure that . . . [t]he examination is selected and administered so as to *best ensure* that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure." Applying this "best ensure" standard, the Ninth Circuit agreed with the district court that the accommodations offered to the plaintiff would not make the exam accessible because she would still suffer eye fatigue, disorientation, and nausea. The court rejected NCBE's argument that the plaintiff's success on other standardized tests without the same technology she requested for the bar exam demonstrated that the bar exam was accessible. The court noted that the plaintiff's disability was progressive and that testing accommodations should advance as technology progresses.

A district court in *Bartlett v. NYSBLE*, on remand from the Second Circuit Court of Appeals, ruled in favor of a bar exam applicant by holding that she was entitled to extended time, the use of a computer, large print, and permission to circle her multiple choice answers in the exam booklet. The court held that the NYSBLE illegally discriminated against the plaintiff when it failed to accommodate her dyslexia on five separate and unsuccessful exam attempts. The court found that the plaintiff was substantially limited in the major life activities of reading and working, even though she had employed coping strategies to overcome some of her reading and processing problems.

It should be noted that attorney fees may not be recoverable even if the testing entity agrees to provide the accommodations only after a lawsuit is filed. In one such case, the district court held:

> Although it remains my personal opinion that the plaintiff did indeed prevail in this litigation, I have reluctantly concluded that the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 U.S. 598 (2001), compels the conclusion that plaintiff does not indeed qualify as the prevailing party. His application for fees will therefore be denied.

Another issue arises in post-secondary institutions are occasions when students are expelled due to

III. Student Expulsions Based on Disability

their disabilities, even though that they are qualified to participate safely in school activities. School concerns over liability stemming from students causing harm to themselves or others have frequently led to restrictive policies regarding students with mental illness. These policies have manifested in codes of conduct prohibiting violence or dangerous behavior, including harm to self; requiring a leave of absence; and housing policies prohibiting acts of violence, including self-injurious behaviors. Schools often take disciplinary action against a student while the student is still receiving treatment after engaging in self-injurious behavior. Students are sometimes subjected to adverse action simply for expressing mental health needs or seeking mental health treatment. Several lawsuits challenging such action have been filed, but because the lawsuits have been settled, no reported

decisions on this issue are available. There have been cases involving students who exhibited no inappropriate conduct and yet were expelled for disclosing a mental illness or seeking treatment. While no one disputes the need for safe campuses, the cases discussed below show that myths, stereotypes, and fears regarding people with mental illness play a role in school decisions.

These policies may have negative effects by discouraging students from getting help out of fear of negative consequences, isolating students from friends and support when support is most needed, and sending a message that students have done something wrong.

The ADA provides a framework for analyzing whether a student poses a "direct threat" to the safety of others. The school must conduct an individualized assessment that considers:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

Schools must also show that no reasonable accommodation would help alleviate or eliminate the direct threat.

The only lawful reasons for suspending or expelling a student for reasons related to his/her disability under Titles II and III of the ADA are: the student is unqualified and no reasonable accommodation would allow her to become qualified; the student poses a direct threat to the health or safety of others that cannot be eliminated or reduced by providing a reasonable accommodation; the student's attendance fundamentally alters the school's programs or services; or the accommodations necessary for the student to become qualified pose an undue burden. It is worth emphasizing that in cases involving suicide attempts, there is no threat-to-self defense specifically recognized in the regulations or statutory language under Titles II or III of the ADA, a fact recognized by most courts addressing this issue.

A. Situations Involving Student Expulsions Due to Disability

Three representative cases are discussed below. The student in the first case discussed was represented by Equip for Equality ("EFE"), author of this legal brief. The students in the other two cases were represented by the Bazelon Center for Mental Health Law ("Bazelon").

In a case at Millikin University in Decatur, Illinois, a freshman on a music scholarship had Obsessive Compulsive Disorder ("OCD"). He sought help from an associate dean following a panic attack. As a result, he was administratively withdrawn by the school with just seven weeks remaining in the semester. The student filed a lawsuit under the ADA and Rehabilitation Act. The court granted a temporary restraining order permitting the student to return to school. During a hearing on the student's request for permanent reinstatement, Millikin agreed to settle the case and reinstate the student following testimony from the student's parents. Millikin also agreed to expunge all references of the incident from the student's school records. The case demonstrated an alarming lack of awareness among school administrators regarding the rights of students under the ADA, and how irrational fears about mental illness affected Millikin's actions. This case is especially troubling because the student did not engage in any unsafe behaviors; he merely expressed his mental health needs to school officials.

Another case, *Nott v. George Washington University*, is also a troubling example of a university suspending a student solely for seeking mental health treatment. Here are the basic facts, quoted from Bazelon's press release:

> Jordan Nott was a straight-A sophomore at George Washington University (GWU) in the fall of 2004 when he sought emergency psychiatric care for depression. When they learned of Nott's hospitalization, university officials charged him with violating the school code of conduct, suspended him, evicted him from his dorm and threatened him with arrest for trespassing if he set foot on university property.
>
> Jordan Nott had become depressed after a close friend committed suicide, so he went to the university's counseling center, which prescribed antidepressants. But he felt worse and began to worry about a potentially negative drug reaction. At 2:00 am one

Saturday morning, he voluntarily admitted himself to the university hospital.
Within hours, Nott got a letter saying that he could not return to his dorm without receiving clearance from the university counseling center and the "community living and learning center" (his dorm). The following day, while he was still in the hospital, another letter came, charging him with "endangering behavior" in violation of the school's code of conduct.

Nott faced expulsion and filed a lawsuit. The case involved issues of wrongful suspension and violations of confidentiality. Nott challenged the school's decision to punish a student with mental illness for doing exactly what he was supposed to do: seek treatment. The case also demonstrated the problems that arise when university health centers share medical information with administrators, violating a student's confidentiality. By cutting off a student from friends and other supports at school at a time of heightened mental stress, a school's action can exacerbate the student's condition. This case was later settled under confidential terms.
A In a case involving a student who was barred from her dormitory after attempting suicide, City University of New York agreed to pay a monetary settlement to the student after she filed suit under the ADA, Rehabilitation Act, and Fair Housing Act. The student had admitted herself to Cabrini Medical Center after taking a large number of pills. She returned from the hospital to find that the locks on her dorm room had been changed. As a result of the lawsuit, CUNY agreed to review and revise its policies addressing these situations in addition to paying damages.

B. Policy Suggestions for Addressing Safety Concerns

Schools are able to provide safe campuses without violating students' ADA rights. Bazelon has a model policy that contains the following suggestions:

- Acknowledge but do not stigmatize mental health problems;
- Make suicide prevention a priority;
- Encourage students to seek help or treatment that they may need;
- Ensure that personal information is kept confidential;
- Allow students to continue their education as normally as possible by making reasonable accommodations; and
- Refrain from discrimination against students with mental illnesses, including punitive actions toward those in crisis.

Some additional suggestions for schools dealing with these issues include:

- Avoid using disciplinary rules to address mental health issues;
- Address mental health issues through medical policies and procedures;
- Do not implement blanket policies requiring withdrawal following mental illness disclosure or treatment;
- Conduct an individualized assessment in each situation;
- Maintain and protect confidentiality

Students challenging these policies can seek relief in federal court or with the Department of Education's Office of Civil Rights. The Department of Education's Office of Civil Rights has determined that requiring a mandatory leave of absence for self-injurious thoughts or behavior violates Section 504.

IV. ADA Licensing Issues

Professional licensing also implicates the ADA. This issue may arise in instances where applicants are required to disclose medical conditions in order to apply for a professional license, or where disabilities come into play during an effort to suspend or revoke an individual's professional license.

A. Disclosure on Licensing Applications

The license applications for many professions, including law, medicine, social work, and finance, request information on mental or physical health conditions.ADA issues arise when licensing organizations conduct investigations or impose discipline solely because of a diagnosis or treatment history, not conduct. The DOJ's position, with which courts generally agree, is that state licensing boards are covered by Title II of the ADA.
To support their disability-related investigations and disciplinary action, licensing boards assert the

need to safeguard the public from professionals with mental conditions that may affect their performance, and that these professionals may not be detected if a conduct violation is required to take action. Additionally, license application questions may ask about the ability to perform the profession's job duties without specifically defining the specific job duties. Because people in many licensed professions may have many different duties, this lack of specificity can be problematic.

1. Some Questions Found on Professional Applications

The ADA may be violated when a licensing board demands invasive medical information based solely on a diagnosis or treatment history, rather than misconduct. The possibility of punishment for disclosing a mental illness discourages treatment. Answering dishonestly can also lead to punishment and therefore is not advised. In addition, disclosure-seeking questions do not detect potentially incompetent professionals. The inquiry is underinclusive, because many people with mental illness have not obtained a diagnosis or treatment, and it is overinclusive, because half of all individuals treated by mental health professionals have no mental illness. Below are examples of licensing application questions that require disclosure of mental illness.

1. "Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use?"
2. "Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem?"
3. "Have you ever been prescribed psychotropic medication?"
4. "In the past 5 years, have you been diagnosed with or treated or hospitalized for schizophrenia or other psychotic disorder, bipolar disorder, paranoid personality disorder, antisocial personality disorder, or borderline personality disorder?"
5. "Have you, within the last ten (10) years, abused or been addicted to, or treated for the use or abuse of alcohol or any other substance…?"
6. "Within the last ten (10) years, have you been diagnosed with, or have you been treated for, bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"
7. "Have you, since attaining the age of eighteen or within the last ten (10) years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"
8. "Has the applicant ever been addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages within the past ten years?"
9. "Do you have a medical condition which in any way impairs or limits your ability to practice your profession with reasonable skill and safety?"
10. "Do you currently . . . have a mental health condition . . . which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner?"
11. "Have you had or do you now have any disease or condition that interferes with your ability to perform the essential functions of your profession, including any disease or condition generally regarded as chronic by the medical community, i.e., (1) mental or emotional disease or condition; (2) alcohol or other substance abuse; (3) physical disease or condition, that presently interferes with your ability to practice your profession? If yes, attach a detailed statement, including an explanation whether or not you are currently under treatment."

In almost all cases, if the answer is yes to any of the above questions, applicants are asked to provide information regarding treatment and to allow the licensing entity to access past medical records.

2. Legal Issues Surrounding Professional Application Questions

The application questions above are possibly discriminatory under ADA Titles II (state licensing entities) and III (private licensing entities) and the Rehabilitation Act. The questions seem to go to the heart of the "stereotypic assumptions" the ADA was designed to prevent. Some of the problems include:

A. These questions require disclosure of medical conditions unrelated to any indi-

vidualized assessment or showing of a correlation between the information requested and the ability to fulfill the obligations of being a licensed professional. The U.S. Supreme Court has consistently held that the ADA requires an "individualized assessment" of a person's medical condition. Imposing discipline without making such an "individualized assessment" on a "case-by-case basis" may therefore violate the ADA.

B. The questions do not consider the possibility of reasonable accommodations, a fundamental statutory requirement under the ADA.
C. Applications often ask whether applicants with certain medical conditions can perform the "essential functions" of the profession, but do not ask the same questions of applicants without a history of medical conditions or substance abuse. Factors unrelated to a health condition may affect an individual's ability to practice his or her profession. Asking this question only of people with disabilities may violate the ADA, as it constitutes disparate treatment of individuals with disabilities.
D. Many terms in applications are vague or undefined. Terms such as "medical condition," "nervous condition," and "chronic" are often not defined. Additionally, many licensing boards assume that all applicants know the essential functions of a profession, and therefore do not list these functions in the application. The confusion is compounded by the fact that ADA uses the term "essential functions" to refer to job requirements, not professional requirements. It may not be possible to list the essential job functions of a doctor, attorney, nurse, social worker, or other professional; the job duties may vary greatly across the profession. Because essential functions relate to particular jobs, not professions, asking about the applicant's ability to perform the essential functions is inappropriate at the licensing stage.
E. Some questions appear to assume that the applicant's condition will go untreated. This is problematic because the licensing boards must do a proper "individualized assessment," and may not rely on stereotypes and myths when deciding if a professional applicant with a medical condition is fit to practice.
F. Requiring disclosure of a mental or physical condition may discourage people from seeking necessary medical treatment.
G. In addition to legal concerns, there are practical problems when licensing boards seek information regarding mental health treatment. The questions often focus on diagnosis rather than conduct. This is contrary to the position taken by the American Psychiatric Association that "psychiatric history is not an accurate predictor of fitness except in the context of understanding current functioning." The American Bar Association recommends limiting job-related questions to specific behaviors, conduct, or conditions that significantly impair the ability to handle the responsibilities of being an attorney.

Another problem is that many of these professions provide services to people with disabilities. It is important to have individuals with personal experience involved in providing services to people with mental, emotional, and physical conditions.

3. Cases Addressing Professional Application Questions

Several cases have addressed disclosure of medical conditions and/or treatment on licensing examinations; most of the cases involve admission to the legal bar. Courts have generally held that questions and disciplinary actions based on a diagnosis alone violate the ADA. One or two court decisions have upheld these types of questions, but it should be noted that no court has held these questions permissible in the past ten years.

One of the early leading cases involved Ellen S. and the Florida Bar Application. The first three questions listed in Section IV.A. above are from the *Ellen S.* case. Answering "yes" to any of the questions triggered a requirement that the applicant provide contact information for all medical

providers who treated the applicant's condition and to allow the board to speak with the providers. The court noted that Title II of the ADA states that "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." DOJ regulations further prohibit public entities from administering "a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability." The regulations also restrict a public entity from imposing or applying "eligibility criteria that screen out an individual with a disability ... from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."

The court in *Ellen S.* held that the board was covered by Title II of the ADA and that the "inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."

Another early case, *Clark v. Virginia Board of Bar Examiners* involved the application for the Virginia bar exam. In *Clark,* the plaintiff refused to answer two bar application questions about treatment or counseling for "any mental, emotional or nervous disorders," asserting that the questions violated Title II of the ADA.

The litigation in *Clark* revealed that of the 10,000 Virginia bar applicants screened over five years, only 47 (less than 1%) admitted to receiving mental health treatment. None of the 47 individuals were barred from practicing law. This 1% figure is considerably lower than the national average of persons diagnosed with mental illness. At the time of the decision, the applications of thirty-two state bar associations asked about mental health treatment.

The court in *Clark* required the bar examiners to show that the questions were necessary and held that the examiners did not make such a showing. The court found no evidence of a correlation between mental health treatment and fitness to practice. The questions were overbroad and were not proven effective for weeding out unfit individuals. The court noted that there was "considerable evidence of the stigmatizing and inhibiting effect of broad mental health questions," and that the questions would deter individuals from seeking treatment. The court admonished the bar examiners' failure to do an "individualized assessment" and ordered the questions to "be rewritten to achieve the Board's objective of protecting the public."

In a Rhode Island case, the court compared licensing to the employment provisions of Title I and concluded that "the bar committee operates as the equivalent of an employer when it screens applicants." The court held that mental health inquiries must determine an attorney is competent while "protecting the individual applicant from unnecessary intrusions into his zone of privacy." The court put the burden on the bar examiners to "show an actual prove that the "admission process has effectively protected the public" and that the questions reliably identified attorneys who posed a "danger to the public."

The questions at issue in the case sought information about drug or alcohol use during the past five years, or whether the applicant had received a diagnosis or treatment for an "emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law." The application defined the phrase "ability to practice law." The court appointed a special master to compile a report addressing the issues raised by these questions. The court relied upon the special master's report in making the following findings:

- "Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace…"
- "There is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by any other regulatory body in comparison with those who have not had such treatment…"
- "[M]ost disciplinary problems and grievance issues arise after an attorney has been in practice for a number of years, and in nearly all such cases no indicators of future diffi-

culty manifested themselves at the time of original licensure…"

- "[A]lmost half of all Americans who seek mental-health treatment do not have a diagnosable mental health problem."

The court noted that the initial bar application screening is usually performed by lay individuals with no mental-health training. Further, "even mental-health practitioners would experience difficulty in predicting with accuracy the future threat posed during a lifetime of practicing law." The court also noted that the American Bar Association "has recommended that bar examiners 'tailor questions concerning mental health and treatment narrowly' and 'take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.'" The court found the questions unduly intrusive and ordered that the wording of the application be changed to:

> "Are you currently using narcotics, drugs, or intoxicating liquors to such an extent that your ability to practice law would be impaired?" (The court also required a more detailed definition of the phrase "ability to practice law");
>
> "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?"

The *Clark* court refused to follow a Texas case most often relied upon by courts to uphold mental health inquiries. In *Applicants v. Texas State Board of Bar Examiners*, the court upheld a bar application question that asked about treatment within the past ten years for "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder." In upholding the question, the court broadly stated that "[b]ipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person's ability to practice law." The court admitted that a diagnosis of one of these conditions "will not necessarily predict the applicant's future behavior," and that a current absence of symptoms "does not mean that the person will not experience another episode in the future or that the person is currently fit to practice law." The court did not support its conclusions with any medical authority, but nonetheless felt that information about "severe mental illness [was] necessary" for the bar examiners to assess applicants. Other courts have not followed this stereotypical approach.

B. Licensing Inquiries Based on Conduct

A case that involved a conduct-based licensing inquiry is *Humenansky v. Minnesota Board of Medical Examiners*. In *Humenansky*, a Minnesota court upheld a state statute that authorized the state medical board to order a physician who had received several disciplinary complaints to submit to a mental and physical examination. State law prohibited physicians from practicing if they "demonstrate[d] an inability to practice with reasonable skill and safety to patients." Complaints against the physician alleged "disorganized rambling discharge summaries, … inconsistency with patient care, …[and] repeated significant and dangerous boundary problems that pose serious threats to respectful, consistent, noninjurious patient care." This case differs from the legal-context cases discussed above in that the investigation was in response to conduct by the individual, not merely disclosure of medical conditions. In denying the physician's motion for injunctive relief, the court held that the statute was not unconstitutionally vague and did not violate the physician's privacy interest.

C. ADA and Sovereign Immunity

The issue of sovereign immunity may arise under Title II and involves whether the Eleventh Amendment of the U.S. Constitution grants state entities immunity from suits seeking money damages. A brief discussion of two cases reaching different conclusions regarding the sovereign immunity issue may be beneficial. In a case involving medical board licensure, *Hason v. Medical Board of California*, the Ninth Circuit Court of Appeals held that providing licensing is a "service, program or activity" under Title II of the ADA, and that the Eleventh Amendment did not bar Hason's suit against the medical board for refusing him a medical license. Therefore, Hason was allowed to proceed with his lawsuit. Dr. Hason was a physician who sued the

California Medical Board, alleging that its denial of a medical license due to his poor performance on an oral clinical examination violated the ADA. Holding that the state board was not immune from suit, the court noted that ADA must be construed broadly "to effectively implement the ADA's fundamental purpose of 'providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"

The Seventh Circuit Court of Appeals reached an opposite conclusion regarding state sovereign immunity in *Brewer v. Wisconsin Board of Bar Examiners*. The court held that the plaintiff's ADA claim for money damages against the Wisconsin Board of Bar Examiners was barred by the Eleventh Amendment. The bar examiners had required the plaintiff to undergo further scrutiny when she disclosed in her bar application that she received Social Security disability benefits. The plaintiff refused to submit to an invasive psychological evaluation demanded by the bar examiners. Because the court held that the bar examiners were immune from suit, the plaintiff did not receive her law license with her class.

In between the *Hason* and *Brewer* decisions, the U.S. Supreme Court issued its decision in *Tennessee v. Lane*, holding that the Eleventh Amendment does not bar ADA suits against public entities for courtroom access. The Seventh Circuit in *Brewer* found that *Lane* required plaintiffs to show "a history and pattern of unconstitutional discrimination against the disabled in the administration of attorney-licensing schemes."

D. Practical Tips for Licensing Boards and Licensing Applicants

For licensing boards, a conduct-based approach is preferable to a diagnosis or treatment-based approach. Requiring disclosure of medical treatment does not prevent professional misconduct, is unduly intrusive, and may violate the ADA. For these reasons, some organizations, including the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), have removed questions requiring disclosure of medical treatment or conditions from the bar applications. Instead, the ARDC uses a conduct-based approach.
For applicants who have to answer disclosure questions, it is important not to provide false information. In *Clark* case, the court upheld the plaintiff's refusal to answer invasive questions. If the question is clear, it should be answered directly. However, if a question vaguely asks about medical conditions that interfere with the ability to perform job functions, an applicant need not list any health conditions if the condition will not interfere with the applicant's ability to do the job. It is imperative to be truthful when answering; providing false information may be grounds for disciplinary action.

Notes:

- This legal brief was written by Barry C. Taylor, Legal Advocacy Director at Equip for Equality, Alan M. Goldstein, Senior Attorney with Equip for Equality, and Lauren Lowe, Equip for Equality Staff Attorney. Equip for Equality is the Illinois Protection and Advocacy Agency (P&A) for people with disabilities. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

1. *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F.Supp. 2d 1093, 1105 (D. Colo. 2004).
2. *Id.*
3. 42 U.S.C. § 12132.
4. This is a very complicated area of law and is briefly discussed in Section IV. B. below, but a full discussion is beyond the scope of this brief. *See e.g.*, *Robinson v. Univ. of Akron School of Law*, 307 F.3d 409 (6th Cir. 2002), and *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005).
5. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. 35.130(b)(7).
6. 28 C.F.R. § 36.309.
7. 42 U.S.C. § 12189.
8. *Id.*
9. 28 C.F.R. §§ 36.204; 36.301; 36.302; 36.303; 36.307.
10. 29 U.S.C. § 794, *et seq*.
11. 29 C.F.R. § 1630.2(j)(1)(ii).
12. 28 C.F.R. § 35.104.
13. *Love v. Law Sch. Admissions Council, Inc.*, 513 F.Supp.2d 206 (E.D. Pa. 2007).
14. 410 F.3d 1052 (9th Cir. 2005).
15. *Id.* at 1065.
16. *Id.*
17. *Id.*
18. *Singh v. George Washington Univ. Sch. of Med.*, 597 F. Supp 2d. 89 (D.D.C. 2009).
19. *Id.* This case also stated that being a medical student was a "benefit" offered by a school.
20. No. 07 CV8331, 2010 WL 2271438, at *12-13 (S.D.N.Y. June 2, 2010).
21. *Id.* at *14.
22. *Id.* at *16-18.
23. 368 F. Supp. 2d 52 (D.D.C. 2005).
24. *Id.* at 55.
25. *Id.*
26. *Id.* at 56.
27. *Id.* at 57.
28. *Id.*
29. *Id.*
30. *Toledo v. Univ. of P.R.*, No. 01-1980, 2008 WL 189561 (D.P.R. Jan. 18, 2008).
31. *Id.* at *12-14.
32. *Love v. Law Sch. Admissions Council, Inc.*, 513 F.Supp.2d 206, 214 (E.D. Pa. 2007).
33. *See, e.g.*, *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1068 (9th Cir. 2005) (Judge Thomas in his dissent stated, "To do so places the ADA plaintiff in an untenable situation where"[s]uccess negates the existence of the disability, whereas failure justifies dismissal for incompetency," citing Andrew Weiss, *Jumping to Conclusions in "Jumping the Queue,"* 51 Stan. L.Rev. 183, 205 (1998) (J. Thomas, dissenting).
34. 18 Fed. Appx. 114, 118 (4th Cir. 2001).
35. *Id.* at 120.
36. *Id.* at 118-19.
37. *Id.* at 119.
38. 29 U.S.C. § 794(a).
39. 42 U.S.C. § 12131(2); *See also*, *Powell v. Nat'l Bd. of Med. Exam'rs*,, 364 F.3d 79 (2d Cir. 2004).
40. *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076 (8th Cir. 2006); *See also Millington v. Temple Univ.*, 261 Fed.Appx. 363 (3d Cir. 2008).
41. *Mershon*, 442 F.3d at 1076 (early registration may be a reasonable accommodation for a student who needs to receive his disability benefits check early to pay tuition.
42. *Id.*
43. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79 (2d Cir. 2004).
44. *Id.* at 82-84.
45. *Id.*
46. *Id.*
47. 678 F. Supp. 2d 576, 584-85 (E.D. Mich. 2010).
48. *Id.* at 580.
49. *Id.*
50. *Id.* at 584.
51. *Id.* at 585.

52. *Id.* at 586.
53. *Id.* at 587.
54. *Di Lella v. Univ. of D.C. David A. Clarke Sch. of Law*, 570 F.Supp.2d 1 (D.D.C. 2008).
55. *Id.*
56. See *Rush v. Nat'l Bd. of Med. Exam'rs*, 268 F.Supp.2d 673, 677 (N.D. Tex. 2003).
57. No. 05-01785, 2007 WL 61886 (N.D. Cal. Jan. 8, 2007).
58. *Id.* at *11.
59. *Id.* at *16.
60. *Id.* at *17.
61. *Id.* at *27.
62. *Id.*
63. *Id.* at *30, 34.
64. *Id.* at *37.
65. No. 04-9772, 2007 WL 7289347 (C.D. Cal. Feb. 27, 2007).
66. *Id.* at *4.
67. 28 C.F.R. § 35.105(a).
68. *Id.* § 35.105(c).
69. *Huezo*, No. 04-9772, 2007 WL 7289347, at *43 (C.D. Cal. Feb. 27, 2007).
70. *Id.* at *51.
71. *Id.*at *59.
72. 21 Fed. Appx. 748, 749 (9th Cir. 2001).
73. *Id.* at 749.
74. *Id.* at 750.
75. *See generally Love*, *supra* note 13; *Rothberg*, *supra* note 1; *Agranoff v. Law Sch. Admission Council, Inc.*, 97 F.Supp.2d 86 (D. Mass. 1999).
76. *See* Ali A. Aalaei, *The Americans with Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 Suffolk U. L. Rev. 419 (2007); Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 Cumb. L. Rev. 33 (2007); Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. Rev. 811 (2004).
77. *See, e.g.*, *Doe v. Nat'l Bd. Med. Exam'rs*, No. 05-2254, 2006 WL 3697230 (3d Cir. Dec. 11, 2006) (finding that plaintiff did not have standing to raise the flagging issue as he passed the examination).
78. Jolly-Ryan, *The Fable of the Timed and Flagged LSAT*, *supra* note 76 at 33.
79. *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F.Supp.2d 1093, 1105 (D. Colo. 2004).
80. *Id.* at 1095.
81. *Id*. at 1104-06.
82. *Id.*
83. *Id.*
84. Compare with *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79 (2d Cir. 2004), where the issue centered on the medical school's promotion policy.
85. *Rush*, 268 F.Supp.2d 673, 678 (N.D. TX 2003).
86. *Jenkins v. Nat'l Bd. of Med. Exam'rs*, No. 08-5731, 2009 WL 331638 (6th Cir. Feb. 11, 2009).
87. *Jenkins*, 2009 WL 331638 at *1.
88. The settlement can be found at: http://www.ada.gov/nbme.htm.
89. *See generally In re Petition of Kara B. Rubenstein*, 637 A.2d 1131 (Del. 1994); *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 Civ. 4986, 2001 WL 930792 (S.D. N.Y. Aug. 15, 2001).
90. *See Fla. Bd. of Bar Exam'rs re S.G.*, 707 So.2d 323 (Fla. 1998) (holding that accommodations would result in preferential treatment)
91. No. 10-15286, 2011 WL 9735 (9th Cir. Jan. 4, 2011).
92. *Id.* at *6 (emphasis in original); 28 C.F.R. § 36.309(b)(1)(i).
93. *Id.* at *9.
94. *Id.* at *8.
95. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 Civ. 4986, 2001 WL 930792, at *46 (S.D. N.Y. Aug. 15, 2001).
96. *Id.*
97. *Grinbaum v. Law Sch. Admission Council, Inc.*, No. 08-cv-03908, 2010 WL 444788 (E.D. Pa. Feb. 8, 2010).
98. See 29 C.F.R. §1630.2(r); Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987) (setting out the requirements for direct threat in a case arising under the Rehabilitation Act).
99. *See generally* 42 U.S.C. § 12132 (Title II); 28 C.F.R. Part 35 (Title II); 42 U.S.C. § 12182 (Title III); 28 C.F.R. Part 36 (Title III).
100. *But see Knapp v. Nw. Univ.*, 101 F.3d 473, 484 (7th Cir. 1996) (seeming to acknowledge a direct threat to self defense).
101. *Nott v. George Washington Univ.*, No. 05-8503, (Superior Court D.C. filed Oct. 2005).
102. *See* Bazelon press release at: http://www.bazelon.org/In-Court/Closed-Cases/Nott-

v.-George-Washington-University.aspx.

103. *See* Bazelon press releases at: http://www.bazelon.org/In-Court/Closed-Cases/Nott-v.-George-Washington-University.aspx and http://www.bazelon.org/In-Court/Closed-Cases/Jane-Doe-v.-Hunter-College.aspx.
104. See Bazelon Model Policy available at: http://www.bazelon.org/LinkClick.aspx?fileticket=2sA8atOxLT0%3D&tabid=225.
105. See National Disablity Rights Network Fact Sheet available at: <http://www.napas.org/images/Documents/Issues/Community_integration/NDRN_QA_Challlenges_to_Mental_Health.pdf >, referencing OCR Complaint #15-04-2042 and OCR Docket # 03-04-2041.
106. 28 C.F.R. § 35.130(b)(6) - (7); Title III of the ADA and § 504 may also apply if the licensing entity is private.
107. *See, e.g.*, Texas Board of Law Examiners Application found at: http://www.ble.state.tx.us/applications/declaration/ble-1%20_10-2010_.pdf for questions 5-8.
108. *See* Alkan Mariam, *ADA is Narrowing Mental Health Inquiries on Bar Applications: Looking to the Medical Profession to Decide Where to Go From Here*, Geo. J. Legal Ethics (2000).
109. The first three questions were challenged in the case of *Ellen S. v. Florida Board of Bar Examiners*, 859 F. Supp. 1489, 1491 (S.D. Fla. 1994), discussed further below.
110. *See, e.g.*, Texas Board of Nursing Application found at: http://www.bne.state.tx.us/olv/pdfs/RNover90.pdf.
111. *See, e.g.*, Texas Board of Law Examiners Application found at: http://www.ble.state.tx.us/applications/declaration/ble-1%20_10-2010_.pdf for questions 5-8.
112. *See, e.g.*, Washington Pharmacist Application, available at: *http://www.seamar.org/images/PharmAsstApp.pdf* for question 9.
113. *See, e.g., Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995) for question 10.
114. For question 11, see the Illinois Department of Financial and Professional Regulation (IDFPR) Website for the Licensing Application, http://www.idfpr.com/dpr/apply/forms/sw.pdf, Page 14, Question 4. *See also* "Does the Social Worker Licensing Application and Process violate the Americans with Disabilities Act (ADA)?" appeared in the quarterly Social Worker Newsletter, *Social Work Networker* published by the Illinois Chapter of the National Association of Social Workers, available at: http://naswil.org/news/networker/featured/does-the-social-worker-licensing-application-and-process-violate-the-americans-with-disabilities-act/
115. The cases discussed in this brief mostly arise under Title II of the ADA.
116. *See* 42 U.S.C. § 12101.
117. *See, e.g., Bragdon* v. *Abbott, 524 U.S. 624, 641-42; Sutton* v. *United Air Lines, Inc., 527 U.S. 471, 483; Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 199 (2002).
118. *See EEOC Enforcement Guidance on Reasonable Accommodation, supra,* Questions 1 and 2.
119. The ADA covers people who currently use alcohol or have a history of alcohol abuse and covers people with a history of drug use but does not protect current users of illegal drugs. *See* 42 U.S.C. §§ 12111(6), 12114.
120. *See* 42 U.S.C. § 12132.
121. *See id.* § 12111(8).
122. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F.Supp. 430, 435 (1995); *see also* Mariam, *ADA is Narrowing Mental Health Inquiries on Bar Applications*, *supra* note 108.
123. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1335 (R.I. 1996).
124. *See*, e.g., Zipple, A., Drouin, M., Armstrong, J., Brooks, M., Flynn, J., & Buckley, W. (1997) *Consumers as Colleagues: Moving Beyond ADA Compliance*; C. Mowbray & D. Moxley (eds.), *Consumers and Providers in Psychiatric Rehabilitation*. Columbia, MD: International Association of Psychosocial Rehabilitation Services.
125. *See, e.g.*, *Clark*, 880 F. Supp. 430; *Doe v. Judicial Nominating Commission for the Fifteenth Judicial Circuit of Fla.*, 906 F.Supp. 1534 (Fla.1995); *In re Underwood.*, 1993 WL 649283, (Me. 1993).). For a good discussion of this issue as it relates to bar applications and the ability to practice law, see *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333 (R.I. 1996), discussed *infra* p. 23.
126. *See, e.g.*, A*pplicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740, 1994 WL 776693 (W.D. Tex. 1994) (upholding limited inquiry into whether applicant has been diagnosed with or

treated for "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder"); *McCready v. Ill. Bd. of Admissions to the Bar*, No. 94 C 3582,1995 WL 29609 (N.D. Ill. Jan. 24, 1995) (holding that an indirect form of mental health questioning was not unduly coercive, or burdensome, although the Illinois Bar Application was later modified to remove medical questions); *see also Brewer*, 270 Fed. App. at 421 (finding the state was immune under the 11th Amendment from suits under the ADA). *But see Hason v. Med. Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002) (finding no 11th Amendment immunity from suit).

127. *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994).
128. *Id*. at 1491 (The questions are: 1. Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use?; 2. Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem?; and 3. Have you ever been prescribed psychotropic medication?)
129. *Ellen S.*, 859 F. Supp. at 1492-1493; 42 U.S.C. § 12132.
130. *Ellen S.*, 859 F. Supp. at 1493; 28 C.F.R. § 35130(b)(6).
131. *Ellen S.*, 859 F. Supp. at 1493; 28 C.F.R. § 35130(b)(8).
132. *Ellen S.*, 859 F. Supp. at 1493-1494. It should be noted that DOJ filed an *Amicus Curiae* Brief in support of Ellen S., which can be found at: http://www.ada.gov/briefs/ellensbr.doc.
133. 880 F.Supp. 430 (1995). The 1995 case was decided after reconsideration of a 1994 decision by the court that found against plaintiff on summary judgment for not having proper standing, *Clark v. Va. Bd. of Bar Exam'rs*, 861 F.Supp. 512 (1994). The 1995 decision replaced the 1994 decision.
134. *Clark*, 880 F. Supp at 436 n.8.
135. *Id*. at 434-40.
136. *Id*. at 442-46.
137. *Id*. at 446.
138. *Id*. at 442-46.
139. *Id*. at 442, 446.
140. *In re Petition and Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333 (R.I. 1996).
141. *Id*. at 1336.
142. *Id*. at 1337.
143. *Id*. at 1336.
144. *Id*. at 1334.
145. *Id*. at 1336 (internal citations omitted).
146. *Id*.
147. *Id*. at 1335.
148. *Id*. at 1337.
149. *Clark,* 880 F.Supp. at 444; *Applicants v. Tex. State Bd. of Bar Exam'rs,* No. 93 CA 740SS, 1994 WL 776693 (W.D. Tex. Oct. 10, 1994).
150. A*pplicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740, 1994 WL 776693, at *3 (W.D. Tex. 1994).
151. *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559 (Minn. Ct. App. 1994).
152. *Id.* at 556.
153. *Id.* at 562.
154. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). This legal brief will not address abstention issues that may lead a court to refuse to act under the Rooker-Feldman doctrine, *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); or under the *Younger* Abstention doctrine, *Younger v. Harris*, 401 U.S. 37 (1971). *See e.g.*, *Dean v. Miss. Bd. of Bar Admissions*, 394 Fed. Appx. 172 (5th Cir. 2010).
155. *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, (9th Cir. 2002), reh'g *en banc* denied 294 F.3d 1166 (9th Cir. 2002).
156. *Brewer v. Wisc. Bd. of Bar Exam'rs*, 270 Fed. Appx. 418 (7th Cir. 2008)
157. *Brewer*, 270 Fed. Appx. at 420.
158. *Tennessee v. Lane,* 541 U.S. 509 (2004).
159. *Brewer*, 270 Fed. Appx. at 420.
160. *See* Mariam, *ADA is Narrowing Mental Health Inquiries on Bar Applications*, *supra* note 108.
161. *See, e.g.*, 20 Ill. Comp. Stat. 20/19(1)(a), (d).

POST SECONDARY EDUCATION AND LICENSING UNDER THE ADA