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## Reasonable Accommodations on the Bar Exam: Leveling the Playing Field or Providing an Unfair Advantage?

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# Articles

## REASONABLE ACCOMMODATIONS ON THE BAR EXAM: LEVELING THE PLAYING FIELD OR PROVIDING AN UNFAIR ADVANTAGE?

Amanda M. Foster<sup>\*</sup>

### I. INTRODUCTION

If you ask law students what they think about examination accommodations provided to students with disabilities, including learning disabilities, most students will tell you that it is unfair that some students get more time to take an examination.<sup>1</sup> The misconception that accommodations provide an unfair advantage<sup>2</sup> may stem from the fact

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<sup>\*</sup> Assistant Professor of Law, Nova Southeastern University, Shepard Broad Law Center. B.A., Loyola University Maryland; J.D., Roger Williams University School of Law. I am grateful to the organizers and participants of the 11th Circuit Legal Scholarship Forum for the opportunity to present this article. Many thanks to Melanie Dunkiel, Brittany Henderson, and Jeffrey Widelitz for their research assistance and hard work, and thank you to Andrew Dunkiel, Jamile Moraes, and Danyelle Shapiro for their work on the preliminary research. I also extend thanks to Dean Elizabeth Pendo, St. Louis University School of Law, for her guidance and expertise and Professors Olympia Duhart, Joe Hnylka, Joel Mintz, Hugh Mundy, and Kate Webber for their comments and advice on earlier drafts. Special thanks to Professor Kathy Cerminara for her mentorship as the Director of Faculty Development at NSU Law. Further, I would like to thank my husband, Richard, and twin daughters, Isabella and Giuliana, for their constant love and support. Finally, I dedicate this article to all individuals with a disability and the advocates who serve them.

<sup>1</sup> See Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 124 (2010) (discussing the stigma students with mental health issues experience in applying for the bar examination); Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 568 (1996) [hereinafter Stone, *The Impact of the Americans with Disabilities Act*] (describing the desire to avoid backlash from nondisabled students). Extra time on an examination is an example of a typical, reasonable accommodation under the ADA. *Id.* at 571 fig.3; Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 231 (2004). In fact, “[t]he provision of additional time on . . . law school exam[s] is a reasonable accommodation, mandated by the ADA, to prevent the exclusion of disabled individuals from participation in educational programs.” Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19, 27 (2000) [hereinafter Stone, *What Law Schools Are Doing*]; see 42 U.S.C. § 12132 (2006) (prohibiting discrimination against disabled individuals).

<sup>2</sup> See *D’Amico v. N.Y. State Bd. of Law Exam’rs*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) (“[T]he Court recognizes that the ADA was not meant to give the disabled advantages over other applicants.”). In fact, the ABA reported that, in 2011, “of 157,598 law students in ABA-accredited law schools (both J.D. and LL.M students), [only] 5,292 (3.4%) were

that not all students understand the Americans with Disabilities Act (“ADA”), its purpose, and the reasons why individuals receive such accommodations.<sup>3</sup> In fact, the ADA has applications beyond the employment context. Specifically, the ADA ensures that students with disabilities who graduate “from medical school, law school, and other professional programs” cannot be discriminated against in their educational programs and are entitled to “nondiscrimination and reasonable accommodation in the licensing process.”<sup>4</sup>

This Article suggests, because of the ADA Amendments Act of 2008 (“ADAAA”), more students should now be able to qualify for reasonable accommodations in the bar examination setting.<sup>5</sup> Part II of this Article discusses the background of the ADA; the ADAAA and how the various state bar examinations must understand and follow these laws; and the New York State Bar Examination, whose treatment of accommodation requests typifies state bar examination practices, will be a principal focus.<sup>6</sup> In Part III, this Article analyzes how courts have decided ADA cases where law school graduates were either not considered to be disabled or were denied the accommodations they sought before and after the 2008 amendments.<sup>7</sup> These cases bring to the forefront the difference between how courts interpreted the ADA pre-ADAAA and post-ADAAA in order to understand the direction courts should now be headed in their judicial decision making in this context. Part III also considers whether there will be future litigation in the ADA, higher

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provided accommodations.” AM. BAR ASS’N COMM’N ON MENTAL & PHYSICAL DISABILITY LAW, ABA DISABILITY STATISTICS REPORT (2011), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314\\_aba\\_disability\\_statistics\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf). This was a slight increase from 3.2% in 2010. *Id.* Whether it is 3.2% or 3.4%, these numbers are small compared to the average law student’s misconception that everyone is accommodated.

<sup>3</sup> See 42 U.S.C. §§ 12101–213 (setting forth the ADA, including the purpose and reasons for the Act); see also Stone, *The Impact of the Americans with Disabilities Act*, *supra* note 1, at 583 (describing society’s difficulty in understanding mental illness and its impact on disabled students); Stone, *What Law Schools Are Doing*, *supra* note 1, at 36 (describing society’s lack of acceptance of persons with disabilities and its impact on disabled students).

<sup>4</sup> Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 856 (2010); see 42 U.S.C. § 12189 (“Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education . . . 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.”).

<sup>5</sup> See generally ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (amending the ADA)

<sup>6</sup> See *infra* Part II (providing background information to the ADA and ADAAA).

<sup>7</sup> See *infra* Parts III.A–B (analyzing pre- and post-ADAAA cases).

education, and bar examination settings, as well as how courts should handle such litigation.<sup>8</sup>

## II. A BRIEF HISTORY OF THE ADA AND ADA AAA

First, this section discusses the ADA.<sup>9</sup> Second, it explains the ADA AAA.<sup>10</sup> Last, it provides context for those with disabilities who want to take the bar exam in light of both the original ADA and after the 2008 amendments.<sup>11</sup>

### A. *The Americans with Disabilities Act of 1990*

In 1990, Congress enacted the ADA “to establish a clear and comprehensive prohibition of discrimination on the basis of disability.”<sup>12</sup> On the day that President George H.W. Bush signed the ADA into law,<sup>13</sup> he remarked that “[w]ith today’s signing of the landmark Americans [with] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>14</sup> The ADA includes various Congressional findings.<sup>15</sup> Specifically, Congress found that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”<sup>16</sup> The U.S. Department of Health and Human Services reports

<sup>8</sup> See *infra* Part III.C (predicting the future of ADA litigation).

<sup>9</sup> See *infra* Part II.A (explaining pertinent parts of the ADA).

<sup>10</sup> See *infra* Part II.B (discussing applicable sections of the ADA AAA).

<sup>11</sup> See *infra* Part II.C (discussing the effects of the ADA and the ADA AAA on those taking the bar exam).

<sup>12</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–213 (2006)). Congress, in enacting the ADA, specifically “used its power under the Commerce Clause and the Fourteenth Amendment.” Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1178 (2002). While the ADA is both structurally and substantively based on Title VII of the Civil Rights Act of 1964, Title I of the ADA added an additional form of discrimination: “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A) (emphasis added); see Pendo, *supra*, at 1178, 1180 (comparing Title VII of the Civil Rights Act of 1964 and Title I of the ADA).

<sup>13</sup> President George H. W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990) (transcript available at [http://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html)).

<sup>14</sup> President George H. W. Bush, *supra* note 13.

<sup>15</sup> 42 U.S.C. § 12101(a).

<sup>16</sup> Americans with Disabilities Act of 1990 § 2(a)(1).

that “[t]oday, 54 million people in the United States are living in the community with a disability.”<sup>17</sup>

The ADA sets out as its purposes:

- (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 with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter 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.<sup>18</sup>

The ADA defines “disability” as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>19</sup> Congress adopted this definition of disability from the definition of “handicapped” used in the Rehabilitation Act of 1973.<sup>20</sup> Because courts broadly interpreted this definition to cover a number of varied physical and mental impairments,<sup>21</sup> it seemed logical to predict that courts would also

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<sup>17</sup> *Office on Disability*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, [http://www.hhs.gov/od/about/fact\\_sheets/whatisdisability.html](http://www.hhs.gov/od/about/fact_sheets/whatisdisability.html) (last visited Jan. 8, 2014).

<sup>18</sup> 42 U.S.C. § 12101(b).

<sup>19</sup> *Id.* § 12102(1).

<sup>20</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(a)(3), 122 Stat. 3553, 3553. The Rehabilitation Act definition is now codified. 29 U.S.C. § 705(20)(A) (2006). In 1992, the term “disabilities” replaced “handicaps” in the Rehabilitation Act. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 101, 106 Stat. 4344, 4355-56.

<sup>21</sup> GEORGETOWN LAW FED. LEGISLATION CLINIC, FACT SHEET ON PEOPLE COVERED UNDER SECTION 504 OF THE REHABILITATION ACT AND PEOPLE NOT COVERED BY THE ADA 1 (2007), available at [http://www.law.georgetown.edu/archiveada/documents/Appendix\\_A\\_000.pdf](http://www.law.georgetown.edu/archiveada/documents/Appendix_A_000.pdf). By way of example, the chart lists the following as not covered under the ADA before 2008: epilepsy, diabetes, intellectual and developmental disabilities, bipolar disorder, multiple sclerosis, hard of hearing, vision in only one eye, post-traumatic stress disorder, heart disease, depression, HIV infection, asthma, asbestosis, and back injury. *Id.* at 2. All of these impairments had been considered by the courts before 1990 to be disabilities under the Rehabilitation Act. *Id.* at 1.

broadly interpret this definition when faced with cases brought under the ADA.<sup>22</sup> However, this was not the case.<sup>23</sup>

Although the enactment of the ADA was a victory over discrimination against individuals with disabilities, the Supreme Court's interpretation of the ADA and its provisions did not proceed as anticipated.<sup>24</sup> In several cases, the Supreme Court narrowly construed the definition of disability "in a way that . . . led lower courts to exclude a range of individuals from coverage, including individuals with diabetes, epilepsy, cancer, muscular dystrophy, and artificial limbs."<sup>25</sup> Further, the Supreme Court, in 1999, heard three cases labeled the "Sutton trilogy,"<sup>26</sup> in which the Court held that in determining whether an individual has a disability under the ADA, mitigating measures such as "medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise or any other treatment" must be considered.<sup>27</sup> The Sutton trilogy deals with the ADA in the employment law context.<sup>28</sup> Nonetheless, whenever courts are faced with issues dealing with the term "disability" in the employment context, those cases will apply to the ADA's application of the term "disability" in the higher education context as well.<sup>29</sup>

<sup>22</sup> See *id.* at 2 (stating that Congress expected the disability definition to be defined the way it had been under the Rehabilitation Act).

<sup>23</sup> *Id.*; see, e.g., *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999) (finding the plaintiff failed to show that monocular vision constituted a disability under the ADA); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518-19 (1999) (holding plaintiff's high blood pressure did not substantially limit his major life activities), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 488-89 (1999) (ruling that plaintiffs' myopia did not constitute a disability under the ADA), *overruled by statute*, ADA Amendments Act of 2008.

<sup>24</sup> See cases cited *supra* note 23 (providing examples of the Supreme Court failing to interpret the ADA in the same manner).

<sup>25</sup> GEORGETOWN LAW FED. LEGISLATION & ADMIN. CLINIC, COMPARISON OF THE ADA (AS CONSTRUED BY THE COURTS) AND THE ADA AMENDMENTS ACT IN THE HOUSE (H.R. 3195) AND AS PASSED BY THE SENATE (S. 3406) 1, available at <http://www.law.georgetown.edu/archiveada/documents/ComparisonofADAandADAAA.pdf>.

<sup>26</sup> See cases cited *supra* note 23 (providing the cases that make up the "Sutton trilogy").

<sup>27</sup> CONSORTIUM FOR CITIZENS WITH DISABILITIES, FAILING TO FULFILL THE ADA'S PROMISE AND INTENT: THE WORK OF THE COURTS IN NARROWING PROTECTION AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY 2 (2006), available at <http://web.diabetes.org/Advocacy/Employment/10ADACases.pdf>.

<sup>28</sup> See *Albertson's, Inc.*, 527 U.S. at 558 (considering an employment issue under the ADA); *Murphy*, 527 U.S. at 518-19 (considering the plaintiff's medical condition in his employment claim under the ADA); *Sutton*, 527 U.S. at 475-76 (considering the plaintiff's ADA employment claim).

<sup>29</sup> See, e.g., *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031, 1031 (1999) (granting certiorari and vacating and remanding the case in light of *Sutton*, 527 U.S. 471, *Murphy*, 527 U.S. 516, and *Albertson's, Inc.*, 527 U.S. 555), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000); *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74-75 (2d Cir. 2000).

1. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)

In *Sutton*, plaintiffs were twin sisters with severe myopia.<sup>30</sup> Their uncorrected visual acuity was "20/200 or worse in [their] right eye[s] and 20/400 or worse in [their] left eye[s], but [w]ith the use of corrective lenses, each . . . ha[d] vision that [wa]s 20/20 or better."<sup>31</sup> As a result, when the plaintiffs were not wearing their corrective lenses, neither one of them could see effectively enough to conduct normal daily tasks such as "driving a vehicle, watching television or shopping in public stores."<sup>32</sup> With the aid of corrective measures, such as contact lenses or eyeglasses, both were essentially able to "function identically to individuals without a similar impairment."<sup>33</sup> The sisters applied for positions as commercial airline pilots.<sup>34</sup> After being invited for interviews, they were told that they did not qualify for the position because they did not meet the airline's minimum vision requirement of "uncorrected visual acuity of 20/100 or better."<sup>35</sup>

After receiving a right to sue letter from the Equal Employment Opportunity Commission, the sisters filed suit in the U.S. District Court for the District of Colorado alleging that the airline "had discriminated against them on the basis of their disability, or because [the airline] regarded [them] as having a disability in violation of the ADA."<sup>36</sup> The district court dismissed the complaint on the basis of "failure to state a claim upon which relief could be granted."<sup>37</sup> Specifically, the court focused on the fact that the sisters' vision could be corrected.<sup>38</sup> The court held that the sisters were not "actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA."<sup>39</sup> On appeal, the Tenth Circuit affirmed the district court's judgment.<sup>40</sup>

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(remanding the case on plaintiff's ADA claim regarding testing accommodations for the bar examination in light of the *Sutton* trilogy).

<sup>30</sup> *Sutton*, 527 U.S. at 475.

<sup>31</sup> *Id.* (internal quotation marks omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (internal quotation marks omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 476.

<sup>36</sup> *Id.* (internal quotation marks omitted).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 477.



Various courts of appeals heard similar cases prior to the *Sutton* decision.<sup>41</sup> Many of these courts held that mitigating measures should not be considered when determining a disability.<sup>42</sup> Therefore, because of the split among the courts, the Supreme Court granted certiorari.<sup>43</sup> Upon hearing the case, the Supreme Court affirmed the Tenth Circuit's decision.<sup>44</sup> The Court held that the corrective and mitigating measures that an individual takes and "the effects of those measures—both positive and negative"—must be considered in determining whether the individual "is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."<sup>45</sup> The court specifically reasoned that:

[b]ecause the phrase "substantially limits" appears in the [ADA] in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. . . . A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity.<sup>46</sup>

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<sup>41</sup> See, e.g., *Bartlett v. N.Y. State Bd. Of Law Exam'rs*, 156 F.3d 321, 322 (2d Cir. 1998) (holding failure to accommodate a bar examination applicant for cognitive disorder impairing her ability to read was in violation of the ADA), *vacated*, 527 U.S. 1031 (1999), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 634 (7th Cir. 1998) (holding that on remand the "trier of fact must determine whether [plaintiff] is disabled . . . without regard to ameliorating medication"); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 866 (1st Cir. 1998) (holding the ADA protected plaintiff "from discrimination if he is disabled based on his underlying medical condition, without regard to whether some of his limitations are ameliorated through medication or other treatment"); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 935, 940 (3d Cir. 1997) (remanding the plaintiff's claim under the ADA where he suffered from epilepsy and was subsequently terminated).

<sup>42</sup> See, e.g., *Bartlett*, 156 F.3d at 329 (holding mitigating factors should not be considered when determining a disability); *Baert*, 149 F.3d at 629 ("We determine whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, without regard to the availability of mitigating measures such as medicines, or assistive or prosthetic devices." (citing *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995)); *Arnold*, 136 F.3d at 859–66 (discussing various sources holding that mitigating factors should not be considered when determining a disability and rejecting defendant's argument that they should be factored into the disability determination); *Matczak*, 136 F.3d at 937 (discussing Congress's intent that mitigating factors not be considered when making assessments of disability).

<sup>43</sup> *Sutton*, 527 U.S. at 477.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 482.

<sup>46</sup> *Id.* at 482–83.

2. *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999)

The Supreme Court decided the *Murphy* case on the same day as the *Sutton* case.<sup>47</sup> In *Murphy*, a mechanic for United Parcel Service, Inc. ("UPS") was required to drive a commercial motor vehicle as part of his position.<sup>48</sup> As part of this requirement, a "driver of a commercial motor vehicle in interstate commerce" could not have been clinically diagnosed with "high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."<sup>49</sup> At the age of ten, the mechanic had been diagnosed with high blood pressure.<sup>50</sup> As long as he took his medication, his high blood pressure did not affect his ability to "function normally and . . . engage in activities that other persons normally do."<sup>51</sup>

The mechanic was fired from his job at UPS because of his high blood pressure.<sup>52</sup> Subsequently, he filed suit under the ADA against UPS in federal district court.<sup>53</sup> The district court granted summary judgment to UPS, and the Tenth Circuit affirmed.<sup>54</sup> The Supreme Court granted certiorari.<sup>55</sup> Specifically, the question to be considered was whether the Tenth Circuit "correctly considered [the mechanic] in his medicated state when it held that [his] impairment d[id] not substantially limi[t] one or more of his major life activities and whether it correctly determined that [he] [wa]s not regarded as disabled."<sup>56</sup> The Supreme Court concluded that the court of appeals "correctly affirmed the grant of summary judgment in [UPS]'s favor on the claim that [the mechanic] is substantially limited in one or more major life activities and thus disabled under the ADA."<sup>57</sup> The Court added that the mechanic was able to show that he was unable to perform his job only as to the requirement of driving a commercial motor vehicle.<sup>58</sup> He still had the

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<sup>47</sup> Compare *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 516 (1999) (reporting the case was decided on June 22, 1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, with *Sutton*, 527 U.S. at 471 (reporting the case was decided on June 22, 1999).

<sup>48</sup> *Murphy*, 527 U.S. at 519.

<sup>49</sup> *Id.* (quoting 49 C.F.R. § 391.41(b)(6) (1998)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (internal quotation marks omitted).

<sup>52</sup> *Id.* at 518.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 518-19.

<sup>56</sup> *Id.* (internal quotation marks omitted).

<sup>57</sup> *Id.* at 521.

<sup>58</sup> *Id.* at 524.

ability to be generally employed as a mechanic.<sup>59</sup> Therefore, he was not regarded as disabled within the meaning of the ADA.<sup>60</sup>

3. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)

The final case that makes up the *Sutton* trilogy is the *Albertson's* case.<sup>61</sup> This case involved a truck driver hired by Albertson's, a grocery-store chain.<sup>62</sup> The truck driver suffered "from amblyopia, an uncorrectable condition that le[ft] him with 20/200 vision in his left eye and monocular vision in effect."<sup>63</sup> Although he suffered from amblyopia, his "doctor erroneously certified that [the truck driver] met the [Department of Transportation's ("DOT's")] basic vision standards, and Albertson's hired him."<sup>64</sup> In time, the truck driver was injured at work, took a leave of absence, obtained a physical, was found to have been mistakenly certified for the position, and was fired from his position at Albertson's.<sup>65</sup> After receiving a waiver of the DOT vision standard, the truck driver reapplied for his job but was not rehired.<sup>66</sup>

The truck driver sued Albertson's in federal district court claiming that Albertson's violated the ADA when it fired him.<sup>67</sup> Albertson's filed a motion for summary judgment stating that the truck driver was "not otherwise qualified to perform the job of truck driver with or without reasonable accommodation."<sup>68</sup> The court granted Albertson's motion because the truck driver could not meet the DOT vision standards.<sup>69</sup> The Ninth Circuit reversed the decision.<sup>70</sup> The court stated that the DOT's waiver program was "lawful and legitimate" and Albertson's could not disregard it.<sup>71</sup> The Supreme Court granted certiorari and reversed the Ninth Circuit's decision.<sup>72</sup>

In reversing, the Supreme Court first looked at the ADA's definition of disability.<sup>73</sup> The Court stated that the truck driver's amblyopia is "a

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 525.

<sup>61</sup> *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

<sup>62</sup> *Id.* at 558.

<sup>63</sup> *Id.* at 559.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 559–60.

<sup>66</sup> *Id.* at 560.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 560–61 (internal quotation marks omitted).

<sup>69</sup> *Id.* at 561.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 562 (internal quotation marks omitted).

<sup>72</sup> *Id.* at 578.

<sup>73</sup> *Id.* at 562–63.

physical impairment within the meaning of the [ADA]."<sup>74</sup> The Court added that "seeing is one of his major life activities."<sup>75</sup> The issue became "whether his monocular vision alone 'substantially limit[ed]' [his] seeing."<sup>76</sup> The Ninth Circuit addressed the fact that the truck driver could only see with one eye, not two, like most individuals.<sup>77</sup> Although the truck driver had the ability to compensate for his condition, the Ninth Circuit noted that it did not need to take into consideration the ameliorative effects of this coping mechanism.<sup>78</sup> The Supreme Court, however, noted that it had recently ruled in *Sutton* that "mitigating measures must be taken into account in judging whether an individual possesses a disability."<sup>79</sup> Here, the Court determined that "people with monocular vision 'ordinarily' will meet the Act's definition of disability" but that "the Act requires monocular individuals . . . to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."<sup>80</sup>

The *Sutton*, *Murphy*, and *Albertson's* decisions clearly narrowed the ADA's reach.<sup>81</sup> This narrowing led Congress to enact the ADAAA.<sup>82</sup>

#### B. *The ADA Amendments Act of 2008*

On September 25, 2008, President George W. Bush signed into law the ADAAA.<sup>83</sup> The ADAAA "clarifies and broadens the definition of disability and expands the population eligible for protections under the Americans with Disabilities Act of 1990."<sup>84</sup> The Act was written "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990."<sup>85</sup> Specifically, within the ADAAA, Congress provided findings that set forth the courts' deficiencies in interpreting and applying the

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<sup>74</sup> *Id.* at 563.

<sup>75</sup> *Id.* (citing 29 C.F.R. § 1630.2(h)(1) (1998)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 564.

<sup>78</sup> *Id.* at 565.

<sup>79</sup> *Id.* (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999), *overruled by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553).

<sup>80</sup> *Id.* at 567.

<sup>81</sup> See *supra* text accompanying notes 30–80 (discussing the *Sutton* trilogy cases).

<sup>82</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; see *infra* Part II.B (explaining the ADAAA).

<sup>83</sup> Press Release, The White House, Office of the Press Sec'y, President Bush Signs S. 3406 into Law (Sept. 25, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080925-8.html>. See generally ADA Amendments Act of 2008 (appearing as a session law enacted on September 25, 2008).

<sup>84</sup> Press Release, The White House, Office of the Press Sec'y, *supra* note 83.

<sup>85</sup> ADA Amendments Act of 2008.

ADA and the need for the amendments.<sup>86</sup> Congress's purposes for the ADAAA included overruling the Supreme Court cases and lower court cases that "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."<sup>87</sup>

In an effort to restore the original intent of the ADA and encompass all disabled individuals under its umbrella of coverage, certain provisions were written into the ADAAA.<sup>88</sup> The ADA initially defined "[d]isability."<sup>89</sup> The first part of the definition uses the term "major life activities."<sup>90</sup> The ADAAA specifically added a section that defined "[m]ajor life activities."<sup>91</sup> This definition addresses what are major life activities "[i]n general"<sup>92</sup> and what functions are to be considered "[m]ajor bodily functions."<sup>93</sup> By including these new paragraphs, Congress allowed more individuals, who may not have been considered disabled in the past, due to the narrow interpretation of the law, to now be considered disabled under the ADAAA.<sup>94</sup>

<sup>86</sup> See *id.* § 2 (explaining the reasons for the amendments).

<sup>87</sup> *Id.* § 2(a)(4). The ADAAA specifically refers to and rejects the holdings and reasoning in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). *Id.* § 2(b)(2)-(4). For other examples of courts' narrow application of the ADA before the 2008 amendments, see generally *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), and *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), *superseded by statute*, ADA Amendments Act of 2008.

<sup>88</sup> See ADA Amendments Act of 2008, sec. 4(a), § 3-4 (expanding on definitions used in the statute).

<sup>89</sup> See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (setting forth the definition for disability).

<sup>90</sup> See *id.* (including the term "major life activities").

<sup>91</sup> ADA Amendments Act of 2008, sec 4(a), § 3(2).

<sup>92</sup> *Id.* § 3(2)(A). The provision defining major life activities in general states: "For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.*

<sup>93</sup> *Id.* § 3(2)(B). The provision defining major bodily functions states: "[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.*

<sup>94</sup> See EMILY A. BENFER, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT 4 (2009), available at <https://www.law.georgetown.edu/archivada/documents/BenferADAAA.pdf> (discussing differences between the ADA and the ADAAA); Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 688-89 (2009) (discussing the impact of the ADAAA on universities); Jolly-Ryan, *supra* note 1, at 143, 150 (noting that the "ADAAA . . . broadens the definition of disability," such that "more mental impairments will most likely qualify as protected disabilities" and recognizing that more law students and bar applicants will likely qualify under the ADA as well). Specifically, as noted by

Further, with the addition of a section regarding “[a]uxiliary aids and services,” these terms were given meaning even though the list is not exhaustive.<sup>95</sup> Congress’s addition of descriptive paragraphs will provide courts with increasingly more guidance as to its intent.<sup>96</sup>

### C. *The ADA, the ADAAA, and the Bar Examination*

Thousands of people take the bar examination every year.<sup>97</sup> In 2012, more than 82,000 individuals sat for bar examinations in the United States and its territories.<sup>98</sup> More individuals sat for the New York State Bar Examination than any other state bar examination, with a total of 15,745 taking that examination.<sup>99</sup> California had the second most individuals sitting for a state bar examination, with a total of 13,119 taking the California State Bar Examination.<sup>100</sup> Florida, with 4719 individuals sitting for the Florida State Bar Examination, had the third highest number of test takers.<sup>101</sup>

Very clearly, bar examiners across the country must abide by the ADA and provide reasonable accommodations.<sup>102</sup> Specifically, Title III

Professor of Law and noted scholar Laura Rothstein, with Congress’s addition of section 12102(2) clarifying the term “major life activities,” “[f]or the student with a learning disability affecting learning, reading, concentrating, thinking, or communicating, these clarifications may mean a greater assurance of being covered by the definition.” Rothstein, *supra* note 4, at 869.

<sup>95</sup> See ADA Amendments Act of 2008, sec. 4(b), § 4(1) (providing a non-exhaustive definition of “auxiliary aids and services”). This section has been cited to in cases involving blind law students needing some computer aid to take the bar exam. *E.g.*, *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 181 (D.D.C. 2011).

<sup>96</sup> See Rothstein, *supra* note 4, at 870 (describing how, due to the amount of time it takes for a case to navigate through the judicial system, “there has not yet been substantial guidance about how the courts will treat new cases under the amended definition of ‘disability’ in the higher-education setting”).

<sup>97</sup> See, *e.g.*, *2012 Statistics*, B. EXAMINER, Mar. 2013, at 6, 8–11 (providing statistics from the 2012 bar examination).

<sup>98</sup> *Id.* at 9.

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Michael K. McKinney, Comment, *The Impact of the Americans with Disabilities Act on the Bar Examination Process: The Applicability of Title II and Title III to the Learning Disabled*, 26 CUMB. L. REV. 669, 673–74 (1996) (stating that bar examiners are state instrumentalities and must comply with Title II of the ADA); see also 42 U.S.C. § 12189 (2006) (explaining who must offer examinations that are accessible to persons with disabilities). Title II of the ADA, including section 12189 pertaining to examinations, applies to all public entities. McKinney, *supra*, at 673. The ADA specifically defines a “public entity” as: “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority.” 42 U.S.C. § 12131(1). Since the state

of the ADA states: “Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional . . . purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”<sup>103</sup> Further, private entities offering examinations must guarantee that:

(v) When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP).<sup>104</sup>

Nonetheless, not all requests must be granted.<sup>105</sup> Where the test provider demonstrates that providing a particular requested accommodation would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test” the request will be denied.<sup>106</sup> This section first describes those accommodations considered reasonable for test takers during the bar examination.<sup>107</sup> Second, it discusses how a bar examination applicant requests or qualifies for a reasonable accommodation.<sup>108</sup> Last, this section explains how many test takers actually receive accommodations while sitting for the bar examination.<sup>109</sup>

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board of bar examiners “govern[] the admission to the practice law in each state,” with some boards actually being appointed by the state’s highest courts, it follows logically “that the bar examiners come within the umbrella of Title II.” McKinney, *supra*, at 674.

<sup>103</sup> 42 U.S.C. § 12189.

<sup>104</sup> 28 C.F.R. § 36.309 (b)(1)(v) (2011).

<sup>105</sup> See *id.* § 36.309(b)(3) (stating that appropriate auxiliary aids need not be provided if a “private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden”).

<sup>106</sup> *Id.*

<sup>107</sup> See *infra* Part II.C.1 (explaining the types of accommodations available for bar exam takers).

<sup>108</sup> See *infra* Part II.C.2 (describing how to apply or qualify for an accommodation).

<sup>109</sup> See *infra* Part II.C.3 (discussing the number of people who actually receive accommodations).

1. What Kinds of Accommodations Are Considered Reasonable Accommodations for Test Takers During the Bar Examination?

The statute contains no exhaustive list of reasonable accommodations for test takers sitting for the bar examination.<sup>110</sup> Thus, the scope of reasonable accommodations for bar examinees is determined by the Code of Federal Regulations and various state bar examination handbooks, including the one in use in New York State, upon which this Article will focus for illustrative purposes.

Generally, the most controversial accommodations, i.e., the ones that have led to litigation, include: requests for additional time; requests to take the bar examination over the course of more than two days, as it is traditionally tested; and requests to take the multiple-choice portion of the examination using an electronic format.<sup>111</sup>

The Code of Federal Regulations provides in relevant part:

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or

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<sup>110</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(b), § 4(1), 122 Stat. 3553, 3556 (defining auxiliary aids and services as “other similar services and actions” but failing to provide an exhaustive list). The language “other similar services and actions” is indicative of Congress’s intent that the list of auxiliary aids be illustrative and not exhaustive. *Id.* In fact, the court in *Enyart v. National Conference of Bar Examiners, Inc.* recently reiterated that the lists of auxiliary aids in both the ADA and the Code of Federal Regulations are not exhaustive. 630 F.3d 1153, 1163 (9th Cir. 2011).

<sup>111</sup> See, e.g., *Enyart*, 630 F.3d at 1156 (requesting multiple choice questions in electronic format); *Argen v. N.Y. State Bd. of Law Exam’rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994) (requesting double time to take the bar exam).



learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.<sup>112</sup>

The New York Board of Bar Examiners Application for Test Accommodations instructions includes a list of reasonable test accommodations but states that this list is not exhaustive.<sup>113</sup> Specifically, the accommodations include:

- Additional testing time. Please note that if additional testing time is granted, the exam may begin as early as Monday and conclude as late as Thursday.
- Amanuensis (scribe to write essays).
- Assistive devices provided by candidate (i.e., tens unit, pillow, brace, heating pad, etc.)
- Audiotape version of exam.
- Braille examination materials.
- Examination questions in electronic format to be read by screen reader software program such as Text Aloud.
- Large print materials (not available for scantron answer sheets).
- Reader (proctor who will read the examination out loud to the candidate).
- Waiver of scantron answer sheet and permission to mark or circle answers in the question booklet with answers transferred to the scantron sheet by the Board after the examination at the Board's office.
- Off-the-clock breaks. NOTE: *When additional testing time is awarded, off-the-clock breaks are not also awarded. The additional testing time awarded should be used for testing and/or breaks, as deemed necessary by the candidate.*<sup>114</sup>

Although the New York State Bar ("the Bar") allows for a request for extra time, applicants are not allowed to request unlimited time.<sup>115</sup>

Interestingly, the Bar also provides that there are certain individuals who do not need to complete an Application for Test

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<sup>112</sup> 28 C.F.R. § 36.309(b)(2)–(3) (2011).

<sup>113</sup> N.Y. STATE BD. OF LAW EXAM'RS, TEST ACCOMMODATIONS HANDBOOK: APPLICATIONS, INSTRUCTIONS AND GUIDELINES A8 (2013), available at <http://www.nybarexam.org/Docs/ADAHandBook.pdf>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Accommodations.<sup>116</sup> For example, all test takers are permitted to have “quiet snacks and one beverage/drink” with them.<sup>117</sup> In addition, “[a]ll applicants are permitted to have necessary over-the-counter and legally prescribed medications during the examination.”<sup>118</sup> All applicants are permitted to take the bar examination using a laptop computer, but those individuals who are requesting to use a laptop in conjunction with another accommodation must fill out the application for test accommodations.<sup>119</sup> Applicants who merely want to bring in “an assistive device, such as a lumbar cushion, diabetic supplies or a lactation pump,” must file a simplified written request.<sup>120</sup> Finally, seating requests for medical reasons can be made by written request in order for an applicant to sit near a restroom or near the examination door.<sup>121</sup> Because of the specificity created by the New York Bar Testing Accommodations Handbook, applicants for the New York Bar Examination have an easier time determining if they will be successful in seeking a reasonable accommodation for the bar examination.

## 2. How Does a Bar Examination Applicant Request/Qualify for a Reasonable Accommodation?

If a bar examination applicant has qualified for testing accommodations in the past, then he or she should already have in mind the type of accommodations he or she is seeking for the bar examination. Nonetheless, an applicant should never assume that because he or she received an accommodation in the past, that he or she will receive that same or any accommodation when sitting for the bar examination.<sup>122</sup> Every state has a process that must be followed, and the applicant bears the burden of ensuring that he or she understands and follows the

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<sup>116</sup> *Id.* at 1-2.

<sup>117</sup> *Id.* at 1. This provision, however, was not always in effect. See Sherry F. Colb, *Redefining the Status Quo to Include the Disabled: Reflections on the Martin Case and ETS' Old Policy of "Flagging" Disabled Students' Exam Scores*, FINDLAW (Feb. 14, 2001), <http://writ.lp.findlaw.com/colb/20010214.html> (describing how in 1991, while preparing to take the New York State Bar Examination, an applicant with hypoglycemia—a condition that causes one's blood sugar levels to drop when too much time elapses without the ingestion of carbohydrates—had to petition the Bar in order to bring apple juice in the exam room).

<sup>118</sup> N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113, at 1.

<sup>119</sup> *Id.* at 2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See, e.g., *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994) (stating a plaintiff who received double time to take the Multi-state Professional Responsibility Exam (“MPRE”) was denied a similar accommodation for taking the New York Bar Examination).

procedures associated with that process.<sup>123</sup> The New York State Board of Law Examiners created a test accommodations handbook, which clearly identifies and describes the request process.<sup>124</sup> The Bar states the purpose of test accommodations as:

(a) Purpose. The bar examination is intended to test qualified applicants for knowledge and skills relevant to the practice of law. In accordance with the Americans with Disabilities Act of 1990 as amended (42 U.S.C.S. § 12101 et seq.) (ADA) and applicable regulations and case law, it is the policy of the New York State Board of Law Examiners to provide accommodations in testing

<sup>123</sup> E.g., N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113, at 1.

<sup>124</sup> *Id.* at 1–4. California—the state with the second largest amount of test takers—provides its applicants with a test accommodations instructions sheet, which clearly identifies and describes the request process. See generally COMM. OF BAR EXAM'RS/OFFICE OF ADMISSIONS, STATE BAR OF CAL., GENERAL INSTRUCTIONS FOR REQUESTING TEST ACCOMMODATIONS, available at <http://admissions.calbar.ca.gov/Portals/4/documents/gbx/TAInstructions.pdf> (setting forth such instructions). The instructions sheet even provides the test applicant with a step-by-step guide for requesting test accommodations; one that clearly instructs the applicant to list their applicable disability or disabilities and to provide documentation from a professional showing that the applicant has been diagnosed with the stated disability along with any documentation evidencing the applicant's prior accommodations. *Id.* at 3–4. Further, the California Bar Examiner's website clearly labels and provides the applicable forms necessary for accommodations requests. See *Testing Accommodations*, STATE B. CAL., <http://admissions.calbar.ca.gov/Examinations/TestingAccommodations.aspx> (last visited Jan. 25, 2014) (providing links to forms, state bar rules, instructions for requesting accommodations, and guidelines for evaluating petitions). The instructions sheet also provides the applicant with specific instructions regarding filing deadlines, retaking the exam with the same previously granted accommodations, and appeals. COMM. OF BAR EXAM'RS/OFFICE OF ADMISSIONS, STATE BAR OF CAL., *supra*, at 2–3. Similarly, Florida—the state with the third largest amount of test takers—also provides its applicants with an almost identical test accommodations instructions sheet. See generally FLA. BD. OF BAR EXAM'RS, GENERAL INSTRUCTIONS FOR REQUESTING TEST ACCOMMODATIONS, available at [http://www.floridabarexam.org/public/main.nsf/TAPGdlns.PDF/\\$file/TAPGdlns.PDF](http://www.floridabarexam.org/public/main.nsf/TAPGdlns.PDF/$file/TAPGdlns.PDF) (providing instructions substantially similar to those provided by the State Bar of California). Further, the Florida Board of Bar Examiner's website also clearly labels and provides the applicable forms—in a step-by-step format—necessary for accommodations requests. See *Instructions for Submitting a Test Accommodations Petition*, FLA. BOARD B. EXAMINERS, <http://www.floridabarexam.org/public/main.nsf/checklisttap.html?OpenPage> (last visited Jan. 25, 2013) (providing a seven-step checklist for submitting an accommodations petition). Therefore, it appears that there is a positive trend amongst these three leading states—New York, California, and Florida—of providing increasingly more guidance to applicants requesting exam accommodations. See generally COMM. OF BAR EXAM'RS/OFFICE OF ADMISSIONS, STATE BAR OF CAL., *supra* (providing application instructions for testing accommodations in California); FLA. BD. OF BAR EXAM'RS, *supra* (providing application instructions for testing accommodations in Florida); N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113 (containing rules and guidelines concerning testing accommodations applications in New York).

conditions to applicants with disabilities who are qualified candidates for the bar examination, to the extent such accommodations are timely requested, reasonable, not unduly burdensome, consistent with the nature and purpose of the examination and necessitated by the applicant's disability.<sup>125</sup>

Requests are handled on a case-by-case basis.<sup>126</sup> The Bar has a separate application for test accommodations that test takers seeking such accommodations must fill out.<sup>127</sup> In this application, the applicant must designate under which category his or her disability fits.<sup>128</sup> Further, the applicant must provide a professional diagnosis and dates associated with that diagnosis.<sup>129</sup> In reference to the accommodation itself, the applicant must list the accommodation(s) sought.<sup>130</sup> The application specifically lists a question about seeking additional time.<sup>131</sup> An applicant's request for extra time has two parts he or she must designate: (1) the sessions that will be affected; and (2) the actual amount of extra time that is being sought.<sup>132</sup>

The New York application asks the applicant to provide information about past accommodations.<sup>133</sup> The Bar considers information about accommodations provided to him or her in law school, as well as any accommodations the applicant received in undergraduate studies, secondary education, and elementary education.<sup>134</sup> In addition, the Bar takes into account whether an applicant received, did not receive, or was

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<sup>125</sup> N.Y. Ct. R. § 6000.4(a) (McKinney, WestlawNext current with amendments received through 9/15/13).

<sup>126</sup> N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113, at 1.

<sup>127</sup> N.Y. STATE BD. OF LAW EXAM'RS, APPLICATION FOR TEST ACCOMMODATIONS (2014), available at <http://www.nybarexam.org/Docs/ADAApplication.pdf>. Specifically, the application is used by:

applicants requesting test accommodations on the bar examination for the first time; applicants who were denied accommodations on a prior examination; applicants for re-examination who did not previously request accommodations; and applicants who were granted accommodations in the past but who have not taken the examination in the last three (3) years.

*Id.* at A1.

<sup>128</sup> *Id.* The categories provided include: "ADHD/ADD," "Learning Disability (i.e. reading, writing)," "Physical Disability," "Psychiatric Disability," "Vision Disability," "Hearing Disability," or "Other (specify)." *Id.*

<sup>129</sup> *Id.* at A2.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at A2-A3.

<sup>134</sup> *Id.*

denied accommodations for standardized examinations including: LSAT, SAT, ACT, GRE, GMAT, MCAT, MPRE, and TOEFL.<sup>135</sup> Supporting documentation must be provided with a test taker's application,<sup>136</sup> which must be timely submitted to the Bar.<sup>137</sup>

It is safe to assume that the Bar does not grant all requests for accommodations, as they are decided on a case-by-case basis.<sup>138</sup> If a request is denied, then an applicant must follow the appeals process as set forth by the Bar.<sup>139</sup> Specifically, the New York Court Rules provide:

(e) Appeals. Any applicant whose application is denied in whole or in part may appeal the determination by filing a verified petition responding to the Board's stated reason(s) for denial. The petition must attest to the truth and accuracy of the statements made therein, be made

<sup>135</sup> *Id.* at A3. This means of determining eligibility based on prior accommodations on other exams, however, is particularly inadequate and problematic in situations where the applicant "may have only recently been injured or diagnosed as having a disability." McKinney, *supra* note 102, at 679.

<sup>136</sup> N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 127, at A3–A4. The application provides that the applicant must provide recent documentation; historical documentation; a personal statement describing the impairment or disability, the initial diagnosis, how the disability "impacts [the applicant's] daily life activities including [his or her] educational and testing functioning, and how [the] disability affects [his or her] ability to take the bar examination under standard testing conditions." *Id.* Documentation becomes even more crucial when the disability being alleged is less obvious, for instance as with learning disabilities. McKinney, *supra* note 102, at 678. Unfortunately, the less obvious the disability the less likely it will be diagnosed early on, therefore resulting in little historical documentation. See Neha M. Sampat & Esmé V. Grant, *The Aspiring Attorney with ADHD: Bar Accommodations or a Bar to Practice?*, 9 HASTINGS RACE & POVERTY L.J. 291, 292 (2012) (recounting one individual's denial of testing accommodations because she could not show that her ADHD existed since childhood). Factors such as cultural background, "race or ethnicity, socioeconomic status, age, gender, and location" all play a role in the detection, diagnosis, and treatment of learning disabilities—especially in regards to ADHD. *Id.* at 292–93. Unfortunately, often this "legitimate lack of childhood history documentation results in a disadvantage [to such individuals not diagnosed early on] in taking the bar examination and thereby [creates] a potential bar to entry in the legal profession." *Id.* at 292.

<sup>137</sup> N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 127, at A4. The Bar is very specific about the timing aspect of the application. *Id.* It provides a certification that the applicant must sign, stating that everything has been timely submitted and a checklist to ensure that the applicant has included all necessary information. *Id.* at A4, A6. Because of the specificity of the New York application, it would appear to be difficult to argue that one did not understand the process or know what was expected of him or her as an applicant seeking an accommodation. See *id.* (requiring extreme specificity).

<sup>138</sup> See N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113, at 1 (granting requests on a case-by-case basis).

<sup>139</sup> See N.Y. CT. R. § 6000.4(e) (McKinney, WestlawNext current with amendments received through 9/15/13) (setting forth the appeals process).

under penalty of perjury and be notarized. The petition may be supported by a report from the applicant's examiner clarifying facts and identifying documentation, if any, which the Board allegedly overlooked or misapprehended. The appeal may not present any new diagnosis or disability that was not discussed in the applicant's application, nor may any additional documentation that was not originally provided with the application be offered on the appeal. Original signed and notarized appeals must be received at the Board's office no later than 14 days from the date of the Board's determination. The Board shall decide such appeal and shall notify the applicant of such decision prior to the date of the examination for which the accommodations were requested.<sup>140</sup>

The next section of this Article discusses the issue concerning data collection regarding the number of requests made for accommodations versus the number of requests granted.<sup>141</sup>

### 3. How Many Test Takers Receive Accommodations While Sitting for the Bar Examination?

It was surprisingly difficult to obtain any recent statistics associated with test takers requesting reasonable accommodations for the bar examination. When initially researching the topic of this Article, the author easily found statistical information regarding accommodations requests made to the Bar for 1992,<sup>142</sup> 1993,<sup>143</sup> and 1998.<sup>144</sup> Despite these

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<sup>140</sup> *Id.*

<sup>141</sup> See *infra* Part II.C.3 (explaining how many test takers actually receive accommodations).

<sup>142</sup> See *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1104 (S.D.N.Y. 1997) (reporting that in 1992 the New York State Board of Law Examiners administered the bar examination to a total of 9667 applicants—2231 applicants during the February exam and 7436 applicants during the July exam), *reconsideration denied*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 156 F.3d 321 (2d Cir. 1998), *vacated* 527 U.S. 1031 (1999), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000). Among the applicants, 223 requested accommodations, 192 were granted, 11 were denied, and the rest of the requests were never completed for various reasons. *Id.*

<sup>143</sup> See *id.* (stating that in 1993 the New York State Board of Law Examiners administered the bar examination to 9575 applicants—2202 applicants during the February exam and 7373 during the July exam). Among the applicants, 283 requested accommodations, 243 were granted, 24 were denied, and the rest of the requests were never completed for various reasons. *Id.*

findings, uncovering more recent accommodations data has proved to be an arduous task. This information is not online or easily obtained when contacting various state bar examiners' offices.<sup>145</sup>

### III. PRE- AND POST-ADAAA CASE LAW: A COMPARATIVE ANALYSIS

In her 2009 law review article entitled *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, Professor Wendy Hensel predicted that because of the ADAAA, there would be a "rise in disability litigation" in the "employment arena."<sup>146</sup> Nonetheless, she noted that "the change in the law does not guarantee plaintiffs [a] victory in court."<sup>147</sup> Four years later, when researching the ADAAA in the higher education arena, specifically the bar examination setting, the author expected to find an array of bar examination-related ADA cases.<sup>148</sup> Instead, the author discovered that most accommodation denials by state bar examiners go through an administrative process run by the bar examiners themselves and never reach the courts.<sup>149</sup> Nonetheless, it remains quite possible that we will still see an increase in litigation in the future. Because of this possibility, it seems worthwhile

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<sup>144</sup> See Tamar Lewin, *U.S. Court Upholds Aid for the Disabled on State Bar Exams*, N.Y. TIMES (Sept. 16, 1998), <http://www.nytimes.com/1998/09/16/nyregion/us-court-upholds-aid-for-the-disabled-on-state-bar-exams.html?pagewanted=all&src=pm> (reporting that in July of 1998 the New York State Board of Law Examiners administered the bar examination to 8791 applicants). Among the applicants, 402 requested accommodations with 332 of these requests being granted. *Id.*

<sup>145</sup> The author called three jurisdictions—New York, California, and Florida—to try to obtain recent data on bar examinees requesting accommodations. The information sought included data as to the number of accommodation requests made annually, the number of requests granted, and the number of requests denied. The bar employees each indicated that this information was private rather than public information, and that they do not release statistics about accommodation requests. If disability advocates need or want to track the number of test takers requesting accommodations and the statistics associated with those endeavors, then there should be a way for them to obtain this information. There is no reason for these statistics to be a secret. The author did not ask for names or medical records of the individuals making the requests. She did not ask to speak with these individuals, although that would be helpful in other respects. This information should be just as readily available as the number of individuals sitting for the bar, as well as their race and gender.

<sup>146</sup> Hensel, *supra* note 94, at 667, 669.

<sup>147</sup> *Id.* at 668.

<sup>148</sup> See *id.* (indicating that litigation regarding the ADAAA may increase in the future).

<sup>149</sup> See, e.g., *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1156–57 (9th Cir. 2011) (describing how the first step in the plaintiff's attempt to get accommodations was the requirement that she submit a test accommodation request to the California Committee of Bar Examiners). It is only once the accommodations were denied and the plaintiff filed legal action that this case reached a court of law. *Id.* at 1157.

to compare cases in this area that were heard prior to the ADAAA<sup>150</sup> with cases heard post-ADAAA.<sup>151</sup> Following this comparison, this Article predicts the extent to which the ADAAA will impact future bar exam accommodation litigation.<sup>152</sup>

#### A. Cases Pre-ADAAA

Most judicial decisions dealing with bar examination test takers requesting reasonable accommodations pre-ADAAA were handed down in federal courts sitting in New York.<sup>153</sup> These cases, most of which concern visual impairments<sup>154</sup> and learning disabilities,<sup>155</sup> demonstrate a pattern of the courts' application of the ADA and how that application may have been different had the cases been decided post-ADAAA.

1. *D'Amico v. New York State Board of Law Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993)

In *D'Amico*, the plaintiff suffered from a visual impairment called "marked myopia" or "nearsightedness" and "bilateral partial amblyopia."<sup>156</sup> Her condition caused her to have an extremely difficult time reading; an inability to read normal size print; a lazy eye which caused dimness of vision; and severe blurring, tearing, and burning sensations in the plaintiff's eyes after reading for an extended period of time.<sup>157</sup>

As a graduate of the State University of New York at Buffalo School of Law, the plaintiff planned to sit for the New York Bar Examination.<sup>158</sup> In preparation for taking the bar examination, she requested certain

<sup>150</sup> See *infra* Part III.A (reporting cases decided before the ADAAA was passed).

<sup>151</sup> See *infra* Part III.B (exploring cases decided after the ADAAA's passage).

<sup>152</sup> See *infra* Part III.C (predicting that future litigation will increase).

<sup>153</sup> See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1098 (S.D.N.Y. 1997) (involving a plaintiff suing for injunctive relief after being denied accommodations during the bar exam), *reconsideration denied*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 156 F.3d 321 (2d Cir. 1998), *vacated* 527 U.S. 1031 (1999), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000); *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994) (involving a plaintiff denied accommodations for language processing problems); *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 218 (W.D.N.Y. 1993) (involving a plaintiff who sought accommodations for a visual disability).

<sup>154</sup> See, e.g., *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 167, 169 (D.D.C. 2011) (involving a legally blind plaintiff who suffered from retinopathy); *D'Amico*, 813 F. Supp. at 218 (involving a plaintiff with a severe myopia).

<sup>155</sup> See, e.g., *Bartlett*, 970 F. Supp. at 1098 (explaining plaintiff's learning disability claims); *Argen*, 860 F. Supp. at 85 (involving a plaintiff with alleged learning disabilities).

<sup>156</sup> *D'Amico*, 813 F. Supp. at 218.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



accommodations pursuant to 20 N.Y.C.R.R. section 6000.4.<sup>159</sup> Subsequently, the plaintiff took the July 1992 bar examination, for which she received several accommodations: she was provided with a large print examination, allowed to bring in her own lamp and ruler, given an additional three hours per day to complete the examination, and allowed to write down her multiple choice answers on paper rather than on a computer answer sheet.<sup>160</sup> The plaintiff failed the examination and signed up for the February bar examination, requesting all the same accommodations along with an additional two days of test taking time.<sup>161</sup> Her additional accommodation request was denied,<sup>162</sup> and the plaintiff filed suit, pursuant to the ADA, to compel the Bar to allow her as “‘reasonable accommodations’ to take the bar exam over four days rather than two days.”<sup>163</sup> The plaintiff’s eligibility under the ADA for a “‘bona fide’” disability was not at issue.<sup>164</sup>

In *D’Amico*, the court held that the requested additional accommodation was reasonable under the circumstances.<sup>165</sup> The court stated: “the most important fact that the Court must consider in determining the reasonableness of the Board’s accommodations is the nature and extent of plaintiff’s disability.”<sup>166</sup> Plaintiff had been under the care of her doctor, an eminent ophthalmologist, for this severe disability for over twenty years.<sup>167</sup> Her doctor had provided his opinion regarding the accommodation that would assist the plaintiff in not exacerbating her condition while taking the bar examination.<sup>168</sup> The court found no medical reason to disagree with the doctor’s recommendation, stating: “I fail to see what is so sacrosanct about a two-day test. Under the particular circumstances of this case, the Board’s decision is contrary to the letter and the spirit of the ADA and cannot stand.”<sup>169</sup>

Handed down only three years after the enactment of the ADA,<sup>170</sup> the *D’Amico* decision appeared to be soundly decided. The court focused

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 218–19 & n.1.

<sup>161</sup> *Id.* at 219.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 221–22.

<sup>166</sup> *Id.* at 221.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 222–23.

<sup>169</sup> *Id.* at 223 (citing 42 U.S.C. § 12101(b)); *see* 42 U.S.C. § 12101(b) (2006) (discussing the purpose of this section of the ADA).

<sup>170</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–213 (2006)).

on Congress's intent to end discrimination against a disabled individual.<sup>171</sup> The court found that the plaintiff was being discriminated against by not allowing her to take the bar examination over a period of four days as recommended by her treating physician.<sup>172</sup> While a treating physician's opinion is not necessarily the "final say,"<sup>173</sup> the court has a duty to interpret the reasonableness of the accommodation and whether the accommodation would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test."<sup>174</sup> That duty was carried out in *D'Amico*.

2. *Argen v. New York State Board of Law Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994)

In *Argen*, the plaintiff had graduated from the State University of New York at Buffalo Law School in 1993.<sup>175</sup> Prior to law school, he had been diagnosed with "language processing problems."<sup>176</sup> Because of this diagnosis, the plaintiff had received certain accommodations such as receiving double time and a separate room for the LSAT,<sup>177</sup> double time on all of his law school examinations, the use of "a computer to write out essay questions," and double time for the Multi-State Professional Responsibility Examination ("MPRE").<sup>178</sup> The plaintiff requested the same accommodation—double time—for the July 1993 New York Bar Examination.<sup>179</sup> Initially, the plaintiff's requested accommodation was denied.<sup>180</sup> Subsequently, he filed suit under Title II of the ADA.<sup>181</sup>

By stipulation of the parties, the plaintiff received the accommodation he requested for the July 1993 examination.<sup>182</sup> If plaintiff passed the examination, however, it was agreed that "his test

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<sup>171</sup> See *D'Amico*, 813 F. Supp. at 223 ("Under the particular circumstances of this case, the Board's decision is contrary to the letter and spirit of the ADA and cannot stand." (citing 42 U.S.C. § 12101(b)); see also 42 U.S.C. § 12101 (2006 & Supp. 2012) (providing some of the Congressional findings and purposes behind the statute's enactment).

<sup>172</sup> *D'Amico*, 813 F. Supp. at 220.

<sup>173</sup> *Id.* at 221.

<sup>174</sup> 28 C.F.R. § 36.309(b)(3) (2011).

<sup>175</sup> *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* Plaintiff had taken the LSAT three separate times without accommodations. *Id.* His highest score had been a 22, placing him in the 18th percentile. *Id.* When Plaintiff received the accommodation of double-time on the LSAT, he scored a 35, which placed him in the 71st percentile. *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

results would be certified to the Appellate Division” only if his lawsuit against the Bar was successful.<sup>183</sup> The plaintiff sat for the bar exam examination, received the accommodation, and successfully passed the examination.<sup>184</sup> Nonetheless, the court eventually dismissed the suit stating that the plaintiff was not a “qualified individual with a disability” under the ADA because he did not prove that he suffered from a “specific learning disability.”<sup>185</sup>

The *Argen* case demonstrates how courts became narrower in their determination of whether an applicant was actually “a qualified individual with a disability under the ADA.”<sup>186</sup> If this case had been decided post-ADAAA, the plaintiff may have been successful in this lawsuit.<sup>187</sup> He provided historical information about his condition, including testifying about his learning problems in high school and undergraduate school.<sup>188</sup> The ADAAA’s addition of the definition for “[m]ajor life activities” — which includes the ability to read, think, and communicate<sup>189</sup> — presumably would allow for an individual with a learning process problem to be covered under the ADA umbrella as a qualified individual with a disability. The court’s finding that because the doctor did not specifically identify a certain learning disability may not be enough to withhold ADA coverage today.<sup>190</sup> If the ADA was

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 87–88. The *Argen* case can be distinguished from *Pazer v. New York State Board of Law Examiners*, 849 F. Supp. 284 (S.D.N.Y. 1994). The facts in *Pazer* are similar to *Argen* in that both plaintiffs claimed to suffer from a visual processing disability and requested to be given additional time on the exam—four days to be exact—as well as a room designed to minimize distractions when taking the exam. *Argen*, 860 F. Supp. at 85; *Pazer*, 849 F. Supp. at 285–86. The accommodations in both cases were all denied. *Argen*, 860 F. Supp. at 85; *Pazer*, 849 F. Supp. at 285. Unlike *Argen*, however, the plaintiff in *Pazer* did not have a long documented history of accommodations. See *Argen*, 860 F. Supp. at 85–86 (recounting the plaintiff’s history of accommodations); *Pazer*, 849 F. Supp. at 287 (recounting the plaintiff’s successful testing history without accommodations). Further, when the plaintiff in *Pazer* was provided accommodations during two of his four years of undergraduate studies, he still maintained about the same grade point average and there was no real difference in test scores, unlike the plaintiff in *Argen* whose LSAT scores increased substantially after being provided accommodations. *Argen*, 860 F. Supp. at 85; *Pazer*, 849 F. Supp. at 287. Thus, the court may have been correct to deny accommodations in *Pazer*, but it erred in denying those accommodations in *Argen*.

<sup>186</sup> *Argen*, 860 F. Supp. at 91.

<sup>187</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1), 122 Stat. 3553, 3555 (amending the definition of “disability” under the ADA).

<sup>188</sup> *Argen*, 860 F. Supp. at 85–86.

<sup>189</sup> ADA Amendments Act of 2008, sec. 4(a), §3(2).

<sup>190</sup> See *Argen*, 860 F. Supp. at 88–89, 91 (dismissing the plaintiff’s complaint concerning accommodations because he “failed to demonstrated that he suffere[d] from a ‘specific learning disability’”).

enacted because Congress intended to stop the discrimination of disabled individuals,<sup>191</sup> including those individuals seeking to sit for the bar examination, then the *Argen* decision appears inconsistent with Congress's intent.

3. *Bartlett v. New York Board of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997)

A final example of pre-ADAAA is the *Bartlett* case, which was appealed and remanded numerous times.<sup>192</sup> In *Bartlett*, the plaintiff was diagnosed with dyslexia, which caused her to be substantially limited with respect to reading.<sup>193</sup> The plaintiff sat for the New York Bar Examination without accommodations a total of four times.<sup>194</sup> She requested accommodations as a reading impaired student for at least three of those times and was denied accommodations each time.<sup>195</sup> Specifically, the plaintiff requested "unlimited or extended time to take the test and permission to tape record her essays and to circle her multiple choice answers in the test booklet rather than completing the answer sheet."<sup>196</sup> The New York Board of Bar Examiners contended that the plaintiff's documentation did not support a diagnosis of dyslexia.<sup>197</sup>

The plaintiff was finally provided accommodations when she took the bar examination for the fifth time.<sup>198</sup> Nonetheless, there was a stipulation between the parties that the plaintiff's score, should she pass, would only be certified if she was successful in her lawsuit.<sup>199</sup> The plaintiff failed the examination for the fifth time despite the accommodations.<sup>200</sup> The district court then reasoned that the plaintiff was not substantially limited in the major life activities of reading or

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<sup>191</sup> See 42 U.S.C. § 12101 (2006 & Supp. 2012) (setting forth Congress's findings and purpose regarding the ADA).

<sup>192</sup> *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *reconsideration denied*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000), *remanded*, No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

<sup>193</sup> *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74 (2d Cir. 2000).

<sup>194</sup> *Id.* at 75.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 75-76.

<sup>199</sup> *Id.* at 76.

<sup>200</sup> *Id.* Plaintiff received the following accommodations: "time-and-a-half for the New York portion of the [bar exam]" only, the use of another person "to read the test questions and to record her responses," and permission "to mark the answers to the multiple choice portion of the examination in the test booklet rather than on a computerized answer sheet." *Id.* at 75-76.

learning because the plaintiff's "history of self-accommodation has allowed her to achieve...roughly average reading skills (on some measures) when compared to the general population."<sup>201</sup> When the district court heard this case for the last time, in 2001, it ultimately held that the plaintiff was indeed reading disabled despite her self-accommodation.<sup>202</sup> Nonetheless, the court took the plaintiff's self-accommodating measures into account in making its decision.<sup>203</sup>

The issue of "self-accommodating" is an interesting one. Here, one can see how the court struggled with its decision as to whether or not a person who can self-accommodate should be considered disabled and receive accommodations under the ADA.<sup>204</sup> Clearly, had the ADAAA been enacted prior to the start of this line of cases, a decision could have been made from the start.<sup>205</sup> The ADAAA specifically prohibits courts from factoring in the "mitigating measures" of the plaintiff's self-accommodations in determining whether an impairment substantially limits a major life activity.<sup>206</sup> Thus, the plaintiff would have prevailed from the outset and this case presumably would not have lingered in the court system for over four years.

#### B. *Cases Post-ADAAA*

Although the pre-ADAAA cases were primarily decided in federal courts in New York,<sup>207</sup> a search for cases post-ADAAA uncovered case law in federal courts sitting in California and the District of Columbia.<sup>208</sup> These post-ADAAA cases all involved test takers with visual impairments seeking to take either or both the multiple-choice portion of the bar examination or the MPRE using an electronic format.<sup>209</sup> In

<sup>201</sup> *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1120 (S.D.N.Y. 1997), *reconsideration denied*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 156 F.3d 321 (2d Cir. 1998), *vacated* 527 U.S. 1031 (1999), *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000).

<sup>202</sup> *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792 at \*37 (S.D.N.Y. Aug. 15, 2001).

<sup>203</sup> *Id.* at \*35-37

<sup>204</sup> *See id.* (considering how the plaintiff's self-accommodations should factor into the disability analysis).

<sup>205</sup> *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(4)(E), 122 Stat. 3553, 3556 (providing that mitigating measures should not be considered when determining if the individual has an impairment).

<sup>206</sup> *Id.*

<sup>207</sup> *See supra* Part III.A. (providing a comparative analysis of pre-ADAAA cases).

<sup>208</sup> *E.g.*, *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011).

<sup>209</sup> *See Enyart*, 630 F.3d at 1156 (seeking to take the MPRE on a laptop); *Bonnette*, 796 F. Supp. 2d at 167 (seeking to take the bar exam's multiple choice section on a computer).

resolving these cases, the courts appear to take the broad approach in their application of the ADA, as Congress intended,<sup>210</sup> finding that these particular test takers should be accommodated as requested.<sup>211</sup>

1. *Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153 (9th Cir. 2011)

In *Enyart*, the plaintiff was a legally blind graduate of UCLA School of Law.<sup>212</sup> Specifically, the plaintiff suffered from “Stargardt’s Disease,” which is a type of juvenile macular degeneration.<sup>213</sup> This disease caused the plaintiff to “experience a large blind spot in the center of her visual field and extreme sensitivity to light.”<sup>214</sup> She relied on assistive technology in order to read.<sup>215</sup>

Plaintiff sought accommodations for both the MPRE and the multi-state portion of the bar examination.<sup>216</sup> Both examinations consist of multiple-choice questions only.<sup>217</sup> Plaintiff requested the use of “a computer equipped with assistive technology software known as JAWS and ZoomText.”<sup>218</sup> JAWS is a screen-reader program, while ZoomText is a screen-magnification program.<sup>219</sup> Although the California Bar agreed to this request for accommodations, the National Conference of Bar Examiners (“NCBE”) did not.<sup>220</sup> Subsequently, the plaintiff sued the NCBE under the ADA, seeking injunctive relief.<sup>221</sup>

The NCBE offered the plaintiff a variety of accommodations.<sup>222</sup> The plaintiff argued, and the court agreed, that the accommodations offered by the NCBE would “either result in extreme discomfort and nausea, or would not permit [the plaintiff] to sufficiently comprehend and retain the language used on the test.”<sup>223</sup> The court noted that “[t]his would

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<sup>210</sup> See ADA Amendments Act of 2008, sec. 2(a) (providing broad coverage under the ADAAA).

<sup>211</sup> *Enyart*, 630 F.3d at 1163–64, 1167; *Bonnette*, 796 F. Supp. 2d at 181, 188.

<sup>212</sup> *Enyart*, 630 F.3d at 1156.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1156–57. The NCBE refused to offer the MBE in electronic format. *Id.* at 1157. It did, however, offer to provide the plaintiff with “a human reader, an audio CD of the test questions, a braille version of the test, and/or a CCTV with a hard-copy version in large font with white letters printed on a black background.” *Id.*

<sup>223</sup> *Id.* at 1158.

result in [plaintiff]’s disability severely limiting her performance on the exam, which is clearly forbidden both by the statute... and the corresponding regulation.”<sup>224</sup>

Focusing on the term “accessible,” the court found that “the accommodations offered by [the] NCBE did not make the M[ultistate] B[ar] E[xamination] [(“MBE”)] and MPRE accessible to [the plaintiff].”<sup>225</sup> The court looked to the statute and stated that the list of auxiliary aids enumerated therein was not exhaustive.<sup>226</sup> Further, the court stated: “To hold that, as a matter of law, an entity fulfills its obligation to administer an exam in an accessible manner so long as it offers some or all of the auxiliary aids enumerated in the statute or regulation would be inconsistent with Congressional intent.”<sup>227</sup> The legislative history suggests that Congress explicitly contemplated that the auxiliary aids and services provided to individuals with disabilities would “keep pace with the rapidly changing technology of the times.”<sup>228</sup> Therefore, the court affirmed the district court’s orders “issuing preliminary injunctions requiring [the] NCBE to permit [the plaintiff] to take the MBE and MPRE using a laptop equipped with JAWS and ZoomText.”<sup>229</sup>

2. *Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011)

In *Bonnette*, once again a court was faced with a legally blind law school graduate seeking to use the JAWS assistive device program when taking the MBE portion of the District of Columbia (“D.C.”) Bar Examination.<sup>230</sup> In this July 2011 case, the court noted that the D.C. Bar

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<sup>224</sup> *Id.*; see 42 U.S.C. § 12189 (2006) (“Any person that offers examinations... related to... licensing... for... professional... purposes shall offer such examinations... in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”); 28 C.F.R. § 36.309(b) (2011) (setting out the requirements to accommodate disabled individuals during examinations).

<sup>225</sup> *Enyart*, 630 F.3d at 1163.

<sup>226</sup> *Id.*; see 42 U.S.C. § 12103(1) (Supp. 2011) (listing auxiliary devices); 28 C.F.R. § 36.309(c)(3) (providing more detail about permissive auxiliary devices).

<sup>227</sup> *Enyart*, 630 F.3d at 1163–64.

<sup>228</sup> *Id.* at 1164 (quoting H.R. REP. NO. 101-485(II), at 108 (1990)).

<sup>229</sup> *Id.* at 1167. Similar to *Enyart*, in the case of *Elder v. National Conference of Bar Examiners*, the court dealt with a bar exam applicant seeking to use the JAWS assistive device for the MBE portion of the California Bar Exam. No. C 11-00199 SI, 2011 WL 672662, at \*1 (N.D. Cal. Feb. 16, 2011). After the NCBE denied the applicant’s accommodation request because it does not “provide an electronic version of the MBE,” he filed suit for injunctive relief. *Id.* The plaintiff used JAWS as his primary reading method as he is legally blind. *Id.* The court followed the *Enyart* decision and granted the plaintiff’s motion for a preliminary injunction. *Id.* at \*6–12.

<sup>230</sup> *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 167 (D.D.C. 2011).

Examination had received approximately 125 requests for accommodations in the past five years stemming from a variety of disabilities, one of which was visual impairment.<sup>231</sup> Past accommodations offered to visually impaired individuals included: "Brailled and large print examinations, audio cassettes/CDs, double time, reader assistance, extra lighting, and . . . permission to use a dictating device and laptop computer."<sup>232</sup> Similar to the plaintiffs in *Enyart* and *Elder*, visually impaired individuals sitting for the D.C. Bar Examination were not allowed to use a computer-based test for the MBE portion of the examination.<sup>233</sup>

In granting the plaintiff's motion for injunctive relief, the *Bonnette* court looked at the list of auxiliary aids in the statute.<sup>234</sup> The court specifically stated that "these lists are illustrative, not exhaustive, and the fact that other qualified individuals with visual impairments may have used them does not mean that they are accessible to Plaintiff as a matter of law."<sup>235</sup> This view indicates that courts are not limiting themselves to the auxiliary aids enumerated in the ADA and Code of Federal Regulations.<sup>236</sup> Therefore, courts are applying ADA accommodations more broadly.<sup>237</sup>

In addition, the court in *Bonnette* reasoned that if the plaintiff:

can establish that the alternative accommodations offered to her by [the NCBE] do not make the MBE accessible to her in the same way that JAWS does, then [the NCBE] must provide her with JAWS unless they can establish that doing so would fundamentally alter the nature of the examination or constitute an undue burden.<sup>238</sup>

This too shows how courts are straying away from their former, narrow application of the ADA requirements and how they are increasingly

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<sup>231</sup> *Id.* at 169.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; see *Enyart*, 630 F.3d at 1156–57 (reporting the NCBE's refusal to allow plaintiff visual aid with a computer for the MBE); *Elder*, 2011 WL 672662, at \*1 (reporting the NCBE's refusal to allow the plaintiff's visual aid with a computer for the MBE).

<sup>234</sup> *Bonnette*, 796 F. Supp. 2d at 181–82; see ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(b), § 4(1), 122 Stat. 3553, 3556 (setting forth a list of auxiliary aids and services).

<sup>235</sup> *Bonnette*, 796 F. Supp. 2d at 181.

<sup>236</sup> See, e.g., *id.* (reasoning that the lists of auxiliary aids are not exhaustive.)

<sup>237</sup> See, e.g., *id.* (describing the legislative history of the ADA amendments to support a broad application of the law).

<sup>238</sup> *Id.* at 183.



more focused on providing applicants with accommodations that will truly place them on an even playing field.<sup>239</sup>

C. *Future Litigation: Will It Increase and How Should It Be Handled?*

Because of the enactment of the ADAAA, courts are now tasked with accepting and appropriately interpreting these new definitions and descriptive language. It is up to the bar examiners and litigants to clarify the ADAAA's meanings in this context. It is a court's responsibility to pay attention to how other courts are handling these cases as they arise. Only then will there be consistency in the case law, which is imperative when one is dealing with bar examinations being administered in the fifty states, the District of Columbia, and the territories. Further, consistency in the case law has implications on clients. Both the test taker and the test maker need to be on notice as to what courts have found to be a reasonable accommodation under the ADAAA.

Will there actually be an increase in litigation regarding the ADAAA and applicants seeking reasonable accommodations for the bar examination?<sup>240</sup> One would hope that the answer is no. If state bars, such as New York, provide their applicants with clear instructions and applications as to who qualifies for accommodations and how to request them,<sup>241</sup> then the process will begin on the right foot. If the state bar denies an applicant's request for an accommodation, then the applicant should participate in the appeals process of that state bar to ensure that all the correct information was provided and considered in making the determination. If the applicant makes his or her way through the state bar process and is left with a denial that does not appear to be consistent with Congress's intent under the ADA and ADAAA, then litigation may be the last resort.

The courts should handle future litigation with an eye on Congress's intent to expand the population of eligible individuals.<sup>242</sup> Analyzing the few cases that have come down since the ADAAA's enactment indicates that courts may be more willing to take a broad approach when faced

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<sup>239</sup> See, e.g., *id.* at 183–84 (allowing additional means for accessing the examination).

<sup>240</sup> See Rothstein, *supra* note 4, at 872 (describing how while it may be difficult to predict the future increase or decrease in litigation regarding ADA accommodations, factors such as the economy and the high stakes associated with professional education may indeed "drive more individuals to pursue legal remedies when they seek accommodations on licensing exams," such as the bar exam).

<sup>241</sup> See generally N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 127 (listing the requirements of the New York Bar Exam application); N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 113 (providing clear guidelines for bar applicants).

<sup>242</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2, 122 Stat. 3553, 3553–54 (providing Congress's findings and purpose behind the ADAAA).

with these types of cases.<sup>243</sup> Nonetheless, courts have not necessarily been faced with cases dealing with the definition of “disability” or qualified person with a disability as defined by the ADA and expanded by the ADAAA.<sup>244</sup> Because of the lack of case law, it is imperative that courts do not create case law that narrows the scope of the statutory language as in *Sutton, Murphy, and Albertson’s*.<sup>245</sup>

Very clearly, legally blind persons, or blind persons for that matter, are disabled as defined by the ADA.<sup>246</sup> The ADAAA was written to clarify and broaden “the definition of disability and expand[] the population eligible for protections under the Americans with Disabilities Act of 1990.”<sup>247</sup> Now, however, coverage under the ADA and ADAAA also extends to people who suffer from non-apparent “invisible disabilities.”<sup>248</sup> These individuals may have learning disabilities or suffer from diseases such as epilepsy, diabetes, or multiple sclerosis.<sup>249</sup> Their symptoms may include “debilitating pain, fatigue, dizziness, weakness, cognitive dysfunctions, learning differences and mental disorders, as well as hearing and vision impairments.”<sup>250</sup> Because of the ADAAA, individuals who suffer from these disabilities now find themselves with more protection under the ADA.<sup>251</sup> In future litigation

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<sup>243</sup> See generally *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011) (permitting a legally blind examinee to have special accommodations during the MBE and MPRE); *Bonnette*, 796 F. Supp. 2d 164 (allowing a legally blind examinee to take the MBE with special accommodations); *Elder v. Nat’l Conference of Bar Exam’rs*, No. C 11-00199 SI, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011) (requiring examiners provide a legally blind examinee accommodations for the California MBE).

<sup>244</sup> See Rothstein, *supra* note 4, at 870 (reasoning that courts have not yet given substantial guidance regarding their treatment of the amended definition of disability.).

<sup>245</sup> See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999) (finding the plaintiff’s monocular vision did not fall within the definition of disability); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518–19 (1999) (holding plaintiff’s high blood pressure did not substantially limit his major life activities), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999) (ruling that plaintiff’s myopia was not a disability under the ADA), *overruled by statute*, ADA Amendments Act of 2008.

<sup>246</sup> See 42 U.S.C. § 12102(1)(B) (2006) (establishing that auxiliary aids include those for individuals with visual impairments).

<sup>247</sup> Press Release, The White House, Office of the Press Sec’y, *supra* note 83.

<sup>248</sup> See ADA Amendments Act of 2008, sec. 3–4, §§ 2(a), 3 (providing that individuals with mental impairments are included in the definition of disability); *What is an Invisible Disability?*, INVISIBLE DISABILITIES ASS’N, <http://www.invisibledisabilities.org/what-is-an-invisible-disability/> (last visited Jan. 11, 2014) (discussing the term “invisible disability”).

<sup>249</sup> See *What is an Invisible Disability?*, *supra* note 248 (providing symptoms and conditions associated with invisible disabilities).

<sup>250</sup> *Id.*

<sup>251</sup> See ADA Amendments Act of 2008, sec. 4(a), § 3(1)(A) (including mental impairments as a disability); see also Rothstein, *supra* note 4, at 873 (explaining how the broader coverage of the ADAAA “may mean that students with learning and related disabilities and some

involving reasonable accommodation of bar examinees, courts must recognize that Congress has taken affirmative steps to include these kinds of individuals under the ADA's umbrella.<sup>252</sup>

#### IV. CONCLUSION

Analysis of the statutes,<sup>253</sup> regulations,<sup>254</sup> and case law,<sup>255</sup> makes clear that the ADA seeks to level the playing field for individuals with disabilities. No true unfair advantage exists in allowing these individuals to receive accommodations while sitting for the bar examination. Receiving testing assistance simply puts these individuals in the same position as those individuals without disabilities. It provides no unfair advantage.

From 1990 to 2008, judicial interpretations of the ADA in the context of bar examination takers lost sight of Congress's intentions.<sup>256</sup> With the passage of the ADAAA, Congress's intent and the spirit of the ADA have been renewed. One could say that the ADAAA has saved the ADA from a legacy of judicial misinterpretation. The clarifications made in the ADAAA have the potential to allow for the proper group of individuals to receive coverage under the ADA, and for the playing field to truly be equal in the administration of the bar examinations. Thus far, the court decisions in this area have made an auspicious start towards that congressionally mandated goal.<sup>257</sup>

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mental health conditions (such as depression) may at least be considered 'disabled' under the ADA).

<sup>252</sup> See ADA Amendments Act of 2008, sec. 4(a), § 3(1)(A) (including mental impairments under the definition of disability).

<sup>253</sup> See 42 U.S.C. §§ 12101-213 (2006 & Supp. 2012).

<sup>254</sup> 28 C.F.R. § 36.101-.607 (2011).

<sup>255</sup> See *supra* Parts II.A, III.A-B (discussing case law regarding the ADA and ADAAA).

<sup>256</sup> See *supra* Parts II.A, III.A (describing the ADA of 1990 and pre-ADAAA case law).

<sup>257</sup> See *supra* Part III.B (describing how courts have promoted Congress's goals in post-ADAAA decisions).

