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

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

Amanda M. Foster¹

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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.² The misconception that accommodations provide an unfair advantage³ may stem from the fact that not all students understand the Americans with Disabilities Act (“ADA”), its purpose, and reasons why individuals receive such accommodations.⁴ 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.”⁵

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.⁶ Part One of this article will discuss the background of the ADA, the Amendments and

2. See Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students With Mental Illness and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 124 (2010); Donald Stone, *The Impact of The American With Disabilities Act on Legal Education and Academic Modifications for Disabled Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 568 (1996) [hereinafter Stone, *The Impact of the American With Disabilities Act*] (describing the desire to avoid the backlash from nondisabled students). Extra time on an examination is an example of a typical reasonable accommodation under the ADA. Scott Weiss, *Contemplating Greatness: Learning Disabilities and The Practice of Law*, 6 SCHOLAR 219, 231 (2004); Stone, *The Impact of the American With Disabilities Act*, *supra* note 2, at 571 fig. 3. 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 education programs.” Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19, 27 (2000); 42 U.S.C. § 12132 (2006) [hereinafter Stone, *What Law Schools Are Doing*].

3. See *D’Amico v. New York 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.”).

4. See 42 U.S.C. §§ 12101–213 (2006); see also Stone, *What Law Schools Are Doing*, *supra* note 2, at 36 (describing society’s lack of acceptance of persons with disabilities and its impact on disabled students); Stone, *The Impact of the American With Disabilities Act*, *supra* note 2, at 583 (describing society’s difficulty in understanding mental illness and its impact on disabled students).

5. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 856 (2010).

6. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101, 122 Stat. 3553.

how the various state bar examinations must understand and follow these laws.⁷ The New York State Bar Examination, whose treatment of accommodation requests typifies state bar examination practices, will be a principal focus. In Part Two, this article will analyze how courts have decided ADA cases where law graduates were either not considered to be disabled or were denied the accommodations they sought before and after the 2008 Amendments.⁸ These cases bring to the forefront the difference between how courts were interpreting 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 Two considers whether there will be future litigation in the ADA, higher-education, bar examination setting and how courts should handle such litigation.⁹

II. A BRIEF HISTORY OF THE ADA AND ADAAA

A. The Americans With Disabilities Act of 1990

In 1990, Congress enacted the Americans with Disabilities Act “to establish a clear and comprehensive prohibition of discrimination on the basis of disability.”¹⁰ On the day that President George H.W. Bush signed the Americans with Disabilities Act into law¹¹ 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.”¹² The Act includes various congressional findings.¹³ 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

7. *See infra* Part II.A–C.

8. *See infra* Part III.A–C.

9. *See infra* Part III.C.

10. 42 U.S.C. § 12101(b)(1) (2006).

11. George H. W. Bush, Remarks at the Signing of the American with Disabilities Act (July 26, 1990), http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

12. *Id.*

13. *See* 42 U.S.C. §§ 12101–213.

older.”¹⁴ The U.S. Department of Health and Human Services reports that “[t]oday, 54 million people in the United States are living in the community with a disability.”¹⁵

The Act 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 Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹⁶

The Act defines “disability” as: “(i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment.”¹⁷ Congress adopted this definition of disability from the definition of “handicap” used in the Rehabilitation Act of 1973.¹⁸ Because courts had broadly interpreted this definition to cover a number of varied physical and mental impairments,¹⁹ it seemed logical to predict that courts would broadly interpret this definition when faced with cases brought under the ADA.²⁰ However, that was not the case.²¹

14. 42 U.S.C. § 12101(a)(1).

15. *Office On Disability*, U.S. DEP’T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/od/about/fact_sheets/whatisdisability.html (last visited July 11, 2013).

16. 42 U.S.C. § 12101(b).

17. *Id.* at § 12102(2).

18. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101(a)(3), 122 Stat. 3553. The Rehabilitation Act definition is now codified. *See* 29 U.S.C. § 705(20)(A) (2006). In 1992, the term “disability” replaced “handicap” in the Rehabilitation Act. *See* Pub. L. No. 102-569, § 102, 106 Stat. 4344, 4355–56 (1992).

19. Georgetown Law Federal Legislation Clinic, *Fact Sheet on People Covered Under Section 504 of the Rehabilitation Act and People Not Covered by the ADA*, available at 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 prior to 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.* All of these impairments had been considered by the courts prior to 1990 to be disabilities under the Rehabilitation Act. *Id.*

20. *See id.*

Although the enactment of the ADA was a victory over discrimination against individuals with disabilities, the Supreme Court’s interpretation of the Act and its provisions did not proceed as anticipated.²² 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.”²³ Further, the Supreme Court, in 1999, heard three cases labeled the “*Sutton* trilogy,”²⁴ 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 other treatment” must be considered.²⁵ The *Sutton* trilogy cases deal with the ADA in the employment law context.²⁶ Nonetheless, whenever courts are faced with issues dealing with the term “disability” in the employment context, those cases will also apply to the ADA’s application of the term “disability” in the higher education context as well.²⁷

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

In *Sutton*, plaintiffs were twin sisters with severe myopia.²⁸ 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

21. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

22. See *Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 518–19; *Albertson’s*, 527 U.S. at 558.

23. Georgetown Law Federal Legislation 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*, 1, <http://www.law.georgetown.edu/archiveada/documents/DifferencesbetweenADAandADAAA.pdf>.

24. See *Sutton*, 527 U.S. at 471; *Murphy*, 527 U.S. at 516; *Albertson’s*, 527 U.S. at 555.

25. 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 (Sept. 2006), http://www.c-c-d.org/task_forces/rights/ada/ADA%20cases%20memo-Fulfilling%20the%20Promise.pdf.

26. See *Sutton*, 527 U.S. at 471; *Murphy*, 527 U.S. at 516; *Albertson’s*, 527 U.S. at 555.

27. See, e.g., *Bartlett v. New York Bd. of Law Exam’rs*, 226 F.3d 69 (2d Cir. 1998) (stating the U.S. Supreme Court granted certiorari and vacated and remanded in light of *Sutton*, 527 U.S. at 471, *Murphy* 527 U.S. at 516, and *Albertson’s*, 527 U.S. at 555); See *Bartlett*, 527 U.S. 1031-32 (1999).

28. *Sutton*, 527 U.S. at 475.

with the use of corrective lenses, each . . . has vision that is 20/20 or better.”²⁹ As a result, when the plaintiffs are not wearing their corrective lenses, neither one of them could see effectively enough to conduct normal day tasks such as “driving a vehicle, watching television or shopping in public stores.”³⁰ With the aid of corrective measures, such as contact lenses or eyeglasses, both were essentially able to “function identically to individuals without similar impairment.”³¹ The sisters applied for positions as commercial airline pilots.³² 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.”³³

Subsequent to receiving a right to sue letter from the Equal Employment Opportunity Commission, the sisters filed suit in the United States 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.”³⁴ The District Court dismissed the complaint on the basis of failure to state a claim upon which relief could be granted.³⁵ Specifically, the court focused on the fact that the sisters’ vision could be corrected.³⁶ 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.”³⁷ On appeal, the Tenth Circuit affirmed the District Court’s judgment.³⁸

29. *Id.* (internal citations omitted).

30. *Id.*

31. *Id.* (internal quotations and citations omitted).

32. *Id.*

33. *Sutton*, 527 U.S. at 476.

34. *Id.* (internal quotations and citations omitted).

35. *Id.*

36. *Id.*

37. *Sutton*, 527 U.S. at 476.

38. *Id.* at 477.

Various Courts of Appeal had heard similar cases prior to the *Sutton* decision.³⁹ Many of these courts held that mitigating measures should not be considered when determining a disability.⁴⁰ Therefore, because of the split among the courts, the Supreme Court granted certiorari.⁴¹ Upon hearing the case, the Supreme Court affirmed the Tenth Circuit’s decision.⁴² The Court held that the corrective and mitigating measures that an individual takes and the effects of such measures—both positive and negative effects—must be considered in determining whether the individual “is ‘substantially limited’ in a major life activity and thus ‘disabled’” under the ADA.⁴³ 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 limit’ a major life activity.”⁴⁴

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.⁴⁵ In *Murphy*, a mechanic for United Parcel Service, Inc. (“UPS”) was required to drive a commercial motor vehicle as part of his position.⁴⁶ As part of this requirement, a “driver of a commercial motor vehicle in interstate commerce” could not have been clinically diagnosed with “high blood

39. See *Bartlett v. New York State Bd. Of Law Exam’r*, 156 F.3d 321 (2d Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998).

40. See, e.g., *Bartlett*, 156 F.3d at 329; *Baert*, 149 F.3d at 629–30; *Matczak*, 136 F.3d at 937–38; *Arnold*, 136 F.3d at 859–66.

41. *Sutton*, 527 U.S. at 477.

42. *Id.*

43. *Id.* at 482.

44. *Id.* at 482–83.

45. See *Sutton*, 527 U.S. at 471; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

46. *Murphy*, 527 U.S. at 518–19.

pressure likely to interfere with his/her ability to operate a commercial vehicle safely.”⁴⁷ At the age of ten, the mechanic had been diagnosed with high blood pressure.⁴⁸ 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.”⁴⁹

The mechanic was fired from his job at UPS because of his high blood pressure.⁵⁰ Subsequently, he filed suit under the ADA against UPS in Federal District Court.⁵¹ The District Court granted summary judgment to UPS and the Court of Appeals for the Tenth Circuit affirmed.⁵² The Supreme Court granted certiorari.⁵³ 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 [did] not substantially limit one or more of his major life activities and whether it correctly determined that [he] is not regarded as disabled.”⁵⁴ The Supreme Court concluded that the Court of Appeals “correctly affirmed the grant of summary judgment in [the airline’s] favor on the claim that [the mechanic] is substantially limited in one or more major life activities and thus disabled under the ADA.”⁵⁵ The Court added that the mechanic was only able to show that he was unable to perform his job only as to the requirement of driving a commercial motor vehicle.⁵⁶ He still had the ability to be generally employed as a mechanic.⁵⁷ Therefore, he was not regarded as disabled within the meaning of the ADA.⁵⁸

47. *Id.* at 519.

48. *Id.*

49. *Id.* (internal quotations omitted).

50. *Id.* at 518.

51. *Murphy*, 527 U.S. at 518.

52. *Id.*

53. *Id.*

54. *Id.* (internal quotations omitted).

55. *Id.* at 521.

56. *Murphy*, 527 U.S. at 524.

57. *Id.*

58. *Id.* at 525.

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.⁵⁹ This case involved a truckdriver hired by Albertson's, a grocery-store chain.⁶⁰ The truckdriver suffered from amblyopia, "an uncorrectable condition that [left] him with 20/200 vision in his left eye and monocular vision in effect."⁶¹ Although he suffered from amblyopia, because the Department of Transportation ("DOT") certified that the truckdriver met the DOT's basic vision standards, Albertson's hired him.⁶² In time, the truckdriver was injured at work, took a leave of absence, got a physical, was found to have been mistakenly certified for the position, and in turn fired from his position at Albertson's.⁶³ After receiving a waiver of the DOT vision standard, the truckdriver reapplied for his job, but was not rehired.⁶⁴

The truckdriver sued Albertson's in Federal District Court claiming that Albertson's violated the ADA when it fired him.⁶⁵ Albertson's filed a motion for summary judgment stating that the truckdriver was "not otherwise qualified to perform the job of truck driver with or without reasonable accommodation."⁶⁶ The court granted Albertson's motion because the truckdriver could not meet the DOT vision standards.⁶⁷ The Court of Appeals for the Ninth Circuit reversed the decision.⁶⁸ The court stated that the DOT's waiver program was "lawful and

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

60. *Id.* at 558.

61. *Id.* at 559.

62. *Id.*

63. *Id.* at 559–60.

64. *Albertson's*, 527 U.S. at 560.

65. *Id.*

66. *Id.* at 560–61 (internal quotations omitted).

67. *Id.* at 561.

68. *Id.*

legitimate” and *Albertson’s* could not disregard it.⁶⁹ The Supreme Court granted certiorari and reversed the Ninth Circuit’s decision.⁷⁰

In reversing the Ninth Circuit, the Supreme Court first looked at the ADA’s definition of disability.⁷¹ The Court stated that the truckdriver’s amblyopia is “a physical impairment within the meaning of the [ADA].”⁷² The Court added that “seeing is one of his major life activities.”⁷³ The issue became whether “his monocular vision alone ‘substantially limits’ [his] seeing.”⁷⁴ The Ninth Circuit addressed the fact that the truckdriver could only see with one eye, not two, like most individuals.⁷⁵ Although the truckdriver 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.⁷⁶ 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.”⁷⁷ 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.”⁷⁸

The *Sutton*, *Murphy*, and *Albertson’s* decisions clearly narrowed the ADA’s reach.⁷⁹ This narrowing led Congress to enact the ADA Amendments of 2008.⁸⁰

69. *Albertson’s*, 527 U.S. at 562.

70. *Id.* at 562, 578.

71. *See id.* at 562–63.

72. *Id.* at 563.

73. *Id.*

74. *Albertson’s*, 527 U.S. at 563.

75. *Id.* at 564.

76. *Id.* at 565.

77. *Id.* (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999)).

78. *Id.* at 567.

79. *See Sutton*, 527 U.S. at 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

80. *Id.*

B. The ADA Amendments Act of 2008

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008.⁸¹ The ADAAA “clarifies and broadens the definition of disability and expands the population eligible for protections under the Americans with Disabilities Act of 1990.”⁸² The Act was written to “restore the intent and protections of the Americans with Disabilities Act of 1990.”⁸³ Specifically, within the Act, Congress provided findings that set forth the courts’ deficiencies in interpreting and applying the ADA and the need for the Amendments.⁸⁴ Congress’ purposes for the ADAAA included overruling the Supreme Court cases⁸⁵ 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.”⁸⁶

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.⁸⁷ The ADA defined “disability” as discussed *supra*.⁸⁸ The first part of the definition uses the term “major life activities.”⁸⁹ The ADAAA specifically added a section that defined “major life activities.”⁹⁰ This definition addresses what are major life activities “in general”⁹¹ and what are

81. Press Release, The White House, Office of The Press Secretary, President Bush Signs S. 3406 Into Law (Sept. 25, 2008) [hereinafter White House Press Release], *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080925-8.html>; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

82. White House Press Release, *supra* note 81.

83. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

84. *See id.* at § 12101(a).

85. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

86. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101(a)(4), 122 Stat. 3553.

87. *See id.* at §§ 12102–103.

88. *See id.* at § 12102(1).

89. *Id.* at § 12102(2).

90. *Id.*

to be considered “major bodily functions.”⁹² By including these new paragraphs, Congress allowed more individuals who may not have been considered to be disabled in the past, due to the narrow interpretation of the law, to now be considered disabled under the ADAAA.⁹³

Further, with the addition of a section regarding “auxiliary aids and services,” these terms were given meaning even though the list is not exhaustive.⁹⁴ Congress’ addition of descriptive paragraphs will provide courts with increasingly more guidance as to its intent.⁹⁵

C. The ADA, the ADAAA and the Bar Examination

Thousands of people take the bar examination every year.⁹⁶ In 2012, more than 82,000 individuals sat for bar examinations in the United States and its territories.⁹⁷ More individuals sat for the New York State Bar Examination than any other state bar examination, with a total of 15,745.⁹⁸ California had the second most individuals sit for the California State Bar

91. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12102(2)(A), 122 Stat. 3553. The definition of 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.*

92. *Id.* at § 12102(2)(B). The definition of major bodily functions states: “A major life activity also includes the operation of 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.*

93. See Emily A. Benfer, *The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, 4 (Sept. 2009), www.law.georgetown.edu/archiveada/documents/BenferADAAA.pdf; 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); Jolly-Ryan, *supra* note 2, at 143, 150. Specifically, as noted by Professor of Law and noted Scholar Laura Rothstein, with Congress’ 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 5, at 869.

94. 42 U.S.C. § 12103(1); *Bonnette v. Dist. of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 181 (D.C.C. 2011); *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011).

95. Rothstein, *supra* note 5, at 870 (describing how due to the amount of time it takes for a case to navigate through the judicial system, “there has not been substantial guidance about how the courts will treat new cases under the amended definition of “disability” in the higher-education setting”).

96. 2012 *Statistics*, 82:1 B. EXAMINER 22 (2013).

97. *Id.* at 9.

98. *Id.* at 8.

Examination, with a total of 13,119.⁹⁹ Florida, with 4,719 individuals sitting for the Florida State Bar Examination, had the third highest number of test takers.¹⁰⁰

Very clearly, bar examiners across the country must abide by the ADA and provide reasonable accommodations.¹⁰¹ Specifically, Title III 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.”¹⁰² Further, private entities offering examinations must guarantee that “[w]hen 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).”¹⁰³ Nonetheless, not all requests must be granted.¹⁰⁴ 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.¹⁰⁵

99. *Id.*

100. *Id.*

101. 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 (1995-1996); See 42 U.S.C. § 12189 (2006). Title II of the ADA, including section 12189 which pertains to examinations, applies to all public entities. McKinney, *supra* note 101, 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 local government; and (C) the National Railroad Passenger Corporation, and any commuter authority.” 42 U.S.C. § 12131(1)(A)–(C). Since the State Board of Bar Examiners “govern the admission to practice law in each state,” with some boards actually being appointed by the state’s highest courts, it follows logically that the bar examiners fall within the umbrella of Title II. McKinney, *supra* note 101, at 674.

102. 42 U.S.C. § 12189 (2006).

103. 28 C.F.R. § 36.309 (b)(1)(v) (2011).

104. See *id.* at § 36.309(b)(3).

105. *Id.*

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.¹⁰⁶ 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, which this article will focus on 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.¹⁰⁷

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 learning disabilities, transcribers for individuals with manual impairments, and other similar services and action.¹⁰⁸

106. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12103(1)(D), 122 Stat. 3553. The language “other similar services and actions” is indicative of Congress’ intent that the list of auxiliary aids be illustrative and not exhaustive. *See id.* In fact, the court in *Enyart v. National Conference of Bar Examiners, Inc.* recently reiterated that the list of auxiliary aids in both the ADA and the Code of Federal Regulation are not exhaustive. *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011).

107. See, *e.g.*, *Argen v. New York State Bd. of Bar Exam’rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994); *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1156 (9th Cir. 2011).

108. 28 C.F.R. § 36.309(b)(3) (2011).

The New York Board of Bar Examiners Application for Test Accommodations instructions includes a list of reasonable test accommodations, but state that this list is not exhaustive.¹⁰⁹ Specifically, the accommodations included are:

- 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.*¹¹⁰

Although the Bar allows for a request for extra time, applicants are not allowed to request unlimited time.¹¹¹

Interestingly, the Bar also provides that there are certain individuals who do not need to complete an Application for Test Accommodations.¹¹² For example, all test takers are permitted

109. N.Y. STATE BD. OF LAW EXAMINERS, TEST ACCOMMODATIONS HANDBOOK: APPLICATIONS, INSTRUCTIONS AND GUIDELINES A8 (2013), *available at* <http://www.nybarexam.org/Docs/ADAHandBook1813.pdf> [hereinafter HANDBOOK].

110. *Id.*

111. *Id.*

112. *Id.* at 1–2.

to have “quiet snacks and one beverage/drink” with them.¹¹³ In addition, all applicants are permitted to have “necessary over-the-counter and legally prescribed medications during the examination.”¹¹⁴ 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.¹¹⁵ A simplified written request is needed by applicants who merely want to bring in an assistive device such as a lumbar cushion, diabetic supplies or lactation pump.¹¹⁶ 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.¹¹⁷ Because of the specificity created by the New York Bar Testing Accommodations Handbook, applicants for the New York Bar 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.¹¹⁸ Every state has a process that must be followed and the

113. *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's 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).

114. HANDBOOK, *supra* note 109, at 1.

115. *Id.* at 2.

116. *Id.*

117. *Id.*

118. See, e.g., *Argen v. New York State Bd. of Bar Exam'rs*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994).

applicant bears the burden of making sure that he or she understands and follows the procedures associated with that process.¹¹⁹

The New York State Board of Law Examiners created a Test Accommodations Handbook which clearly identifies and describes the request process.¹²⁰ The New York 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 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.¹²¹

119. See, e.g., HANDBOOK, *supra* note 109.

120. *Id.* at 1–RA4. 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 THE STATE BAR OF CAL., COMMITTEE OF BAR EXAM’RS, GENERAL INSTRUCTIONS FOR REQUESTING TEST ACCOMMODATIONS 1–4 (2012), available at <http://admissions.calbar.ca.gov/Portals/4/documents/gbx/TAInstructions.pdf> [hereinafter CALIFORNIA ACCOMMODATIONS INSTRUCTIONS]. The instructions sheet even provides the test applicant with a step-by-step guide for requesting test accommodations; one which 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 state of California Bar Examiner’s website clearly labels and provides the applicable forms necessary for accommodations requests. See *Testing Accommodations*, THE STATE BAR OR CAL., <http://admissions.calbar.ca.gov/Examinations/TestingAccommodations.aspx> (last visited Aug. 6, 2013). The instructions sheet also provides the applicant with specific instructions regarding filing deadlines, retaking the exam with the same previously granted accommodations, and appeals. CALIFORNIA ACCOMMODATIONS INSTRUCTIONS, *supra* note 120, 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 FL. 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) [hereinafter FLORIDA ACCOMMODATIONS INSTRUCTIONS]. 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*, FLORIDA BD. OF BAR EXAM’RS, <http://www.floridabarexam.org/public/main.nsf/checklistap.html?OpenPage> (last visited Aug. 6, 2013). 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 HANDBOOK, *supra* note 109; CALIFORNIA ACCOMMODATIONS INSTRUCTIONS, *supra* note 120; FLORIDA ACCOMMODATIONS INSTRUCTIONS, *supra* note 120.

121. N.Y.Ct.R. § 6000.4(a).

Requests are handled on a case by case basis.¹²² The New York Bar has a separate Application for Test Accommodations that test takers seeking such accommodations must fill out.¹²³ In this Application, the applicant must designate which category his or her disability fits under.¹²⁴ Further, the applicant must provide a professional diagnosis and dates associated with that diagnosis.¹²⁵ In reference to the accommodation itself, the applicant must list the accommodation(s) sought.¹²⁶ The application specifically lists a question about seeking additional time.¹²⁷ An applicant's request for extra time has two parts he or she must designate: the sessions that will be affected and (2) the actual amount of extra time that is being sought.¹²⁸

The New York Application asks the applicant to provide information about past accommodations.¹²⁹ 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.¹³⁰ In addition, the Bar takes into account whether an applicant received, did not receive, or was denied accommodations for standardized examinations including: LSAT, SAT, ACT, GRE, GMAT, MCAT, MPRE, and

122. HANDBOOK, *supra* note 109, at 1.

123. N.Y. STATE BD. OF LAW EXAMINERS, APPLICATION FOR TEST ACCOMMODATIONS, *available at* www.nybarexam.org/Docs/ADA%20Application%20Form.pdf [hereinafter ACCOMMODATIONS APPLICATION]. 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.

124. *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.*

125. *Id.* at A2.

126. ACCOMMODATIONS APPLICATION, *supra* note 123, at A2.

127. *Id.*

128. *Id.*

129. *Id.* at A2–3.

130. *Id.*

TOEFL.¹³¹ Supporting documentation must be provided with a test taker's Application,¹³² which must be timely submitted to the Bar.¹³³

It is safe to assume that the New York Bar does not grant all requests for accommodations as they are decided on a case by case basis.¹³⁴ The issue concerning data collection regarding the number of requests made for accommodations versus the number of requests granted is discussed in the next section of this article.¹³⁵ If a request is denied, then an applicant must follow the Appeals Process as set forth by the New York Bar.¹³⁶ 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 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 its decision prior to the date of the examination for which the accommodations were requested.¹³⁷

131. ACCOMMODATIONS APPLICATION, *supra* note 123, 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 101, at 679.

132. ACCOMMODATIONS APPLICATION, *supra* note 123, at A3–4. The Application provides that the applicant must provide recent documentation, historical documentation, a personal statement describing the impairment/disability, the initial diagnosis, how the disability "impacts [his/her] daily life activities including [his/her] educational and testing functioning, and how [his/her] disability affects [his/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 101, at 678.

133. ACCOMMODATIONS APPLICATION, *supra* note 123, at A4. The New York 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/her as an applicant seeking an accommodation. See ACCOMMODATIONS APPLICATION, *supra* note 123, at A4, A6.

134. See HANDBOOK, *supra* note 109, at 1.

135. See *infra* Part II.C.3.

136. See N.Y.C.T.R. § 6000.4(e).

137. *Id.*

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 New York Bar for 1992¹³⁸, 1993¹³⁹, and 1998.¹⁴⁰ Despite these findings, uncovering more recent accommodations data has proved to be an arduous task. This information is not online or easily obtained when calling various state bar examiners' offices.¹⁴¹

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.”¹⁴² Nonetheless, she noted that “the change in the law does not guarantee plaintiffs [a] victory in

138. See *Bartlett v. New York Bd. of Law Exam'rs* [Bartlett I], 970 F. Supp. 1094, 1104 (S.D.N.Y. 1997). Specifically, in 1992 the New York State Board Law Examiners administered the bar examination to a total of 9,667 applicants—2,231 applicants during the February exam and 7,436 applicants during the July exam. *Id.* 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.*

139. *Id.* Specifically, in 1993 the New York State Board of Law Examiners administered the bar examination to 9,575 applicants—2,202 applicants during the February exam and 7,373 during the July exam. *Id.* Among the applicants, 283 requested accommodations, 243 were granted, 24 were denied, and the rest of the requests were never completed for various reasons. *Bartlett I*, 970 F. Supp. at 1104.

140. Tamar Lewin, *U.S. Court Upholds Aid for the Disabled On State Bar Exams*, N.Y. TIMES, Sept. 16, 1998, at A1, available at <http://www.nytimes.com/1998/09/16/nyregion/us-court-upholds-aid-for-the-disabled-on-state-bar-exams.html?pagewanted=all&src=pm>. Specifically, in July of 1998 the New York State Board of Law Examiners administered the bar examination to 8,791 applicants. *Id.* Among the applicants, 402 requested accommodations with 332 of these requests being granted. *Id.*

141. 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 information, not 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, their race, and gender.

142. Hensel, *supra* note 93, at 643, 667.

court.”¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ Nonetheless, it remains quite possible that we will still see an increase in litigation in the future. Because of this possibility, it seems worthwhile to compare cases in this area that were heard prior to the ADAAA¹⁴⁶ with cases that were heard post-ADAAA.¹⁴⁷

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.¹⁴⁸ These cases, most of which concern visual impairments¹⁴⁹ and learning disabilities,¹⁵⁰ demonstrate a pattern of the court’s application of the ADA and how that application may have been different had the cases been decided post-ADAAA.

143. *Id.* at 668.

144. *See id.*

145. *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.

146. *See infra* Part III.A.

147. *See infra* Part III.B.

148. *See* D’Amico v. New York State Bd. of Bar Exam’rs, 813 F. Supp. 217 (W.D.N.Y. 1993); Argen v. New York State Bd. of Bar Exam’rs, 860 F. Supp. 84 (W.D.N.Y. 1994); Bartlett I, 970 F. Supp. 1094 (S.D.N.Y. 1997), *cert. granted, judgment vacated by* 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff’d in part, vacated in part by*, 156 F.3d 321 (2d Cir. 1998), *vacated by, and remanded by* New York State Bd. of Law Exam’rs v. Bartlett, 527 U.S. 1031 (1999), *aff’d in part, vacated in part by* Bartlett v. New York State Bd. of Law Exam’rs [Bartlett II], 226 F.3d 69 (2d Cir. 2000), *injunction granted by* [Bartlett III] No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

149. *See* D’Amico, 813 F. Supp. at 218; Enyart, 630 F.3d at 1156; Bonnette v. Dist. of Columbia Court of Appeals, 796 F. Supp. 2d 164, 167 (D.C. Cir. 2011).

150. *See* Argen v. New York State Bd. of Bar Exam’rs, 860 F. Supp. 84, 85 (W.D.N.Y. 1994); Bartlett I, 970 F. Supp. at 1098.

1. *D'Amico v. New York State Board of Bar 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.”¹⁵¹ Her condition caused her to have an extremely difficult time reading, an inability to read normal size print, a lazy eye which causes dimness of vision, and severe blurring, tearing, and burning sensations in the plaintiff’s eyes after reading for an extended time.¹⁵²

As a graduate of the State University of New York at Buffalo Law School, the plaintiff planned to sit for the New York Bar Examination.¹⁵³ In preparation for taking the bar examination, she requested certain accommodations pursuant to 20 N.Y.C.R.R. section 6000.4.¹⁵⁴ Subsequently, the plaintiff took the July 1992 bar examination, for which she received several accommodations: she was provided with a large print exam, allowed to bring in her own lamp and ruler, given an additional 3 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.¹⁵⁵ 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 examination taking time.¹⁵⁶ Her additional accommodation request was denied¹⁵⁷ and the plaintiff filed suit, pursuant to the ADA, to compel the New York Bar to allow her, as a reasonable accommodation,

151. *D'Amico*, 813 F. Supp. at 218.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 218–19.

156. *D'Amico*, 813 F. Supp. at 219.

157. *Id.*

to take the bar examination over four days rather than two days.¹⁵⁸ The plaintiff's eligibility under the ADA for a "bona fide" disability was not at issue.¹⁵⁹

In *D'Amico*, the court held that the requested additional accommodation was reasonable under the circumstances.¹⁶⁰ 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 [P]laintiff's disability."¹⁶¹ Plaintiff had been under the care of her doctor, an eminent ophthalmologist, for this severe disability for over twenty years.¹⁶² Her doctor had provided his opinion as to the accommodation that would assist plaintiff in not exacerbating her condition while taking the bar examination.¹⁶³ The court found no medical reason to not agree 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 spirit of the ADA and cannot stand."¹⁶⁴

Handed down only three years after the enactment of the ADA,¹⁶⁵ the *D'Amico* decision appeared to be soundly decided. The court focused on Congress' intent to end discrimination against disabled individuals.¹⁶⁶ The court found that Plaintiff was being discriminated against by not allowing her to take the bar examination over a period of four days instead of two as recommended by her treating physician.¹⁶⁷ While a treating physician's opinion is not necessarily the "final word,"¹⁶⁸ the court has a duty to interpret the reasonableness of the

158. *Id.*

159. *Id.*

160. *See id.* at 221–22.

161. *D'Amico*, 813 F. Supp. at 221.

162. *Id.*

163. *Id.* at 222–23.

164. *Id.* at 223; *see* 42 U.S.C. § 12101(b) (2006).

165. *See* 42 U.S.C. §§ 12101–213.

166. *See D'Amico*, 813 F. Supp. at 223; 42 U.S.C. § 12101(a)–(b).

167. *D'Amico*, 813 F. Supp. at 220.

168. *Id.* at 221.

accommodation and whether the accommodation would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test.”¹⁶⁹ That duty was carried out in *D’Amico*.

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

In *Argen*, Plaintiff had graduated from the State University of New York at Buffalo Law School in 1993.¹⁷⁰ Prior to law school, he had been diagnosed with “language processing problems.”¹⁷¹ Because of this diagnosis, the plaintiff had received certain accommodations such as receiving double time and a separate room for the LSAT,¹⁷² 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.¹⁷³ The plaintiff requested the same accommodation—double time—for the July 1993 New York Bar Examination.¹⁷⁴ Initially, the plaintiff’s requested accommodation was denied.¹⁷⁵ Subsequently, he filed suit pursuant to Title II of the ADA.¹⁷⁶

By stipulation of the parties, the plaintiff was granted the accommodation he requested for the July 1993 Bar Examination.¹⁷⁷ If plaintiff passed the examination, however, it was agreed that his test results would be certified to the Appellate Division only if his lawsuit against the New York Bar was successful.¹⁷⁸ The plaintiff sat for the bar exam examination, received

169. 28 C.F.R. § 36.309 (b)(3) (2011).

170. *Argen v. New York State Bd. of Bar Examiners*, 860 F. Supp. 84, 85 (W.D.N.Y. 1994).

171. *Id.*

172. *Id.* Plaintiff had taken the LSAT on three separate occasions 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, placing him in the 71st percentile. *Argen*, 860 F. Supp. at 85.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Argen*, 860 F. Supp. at 85.

178. *Id.*

the accommodation, and successfully passed the exam examination.¹⁷⁹ Nonetheless, the court eventually dismissed the suit stating that the plaintiff was not a “qualified person with a disability” under the ADA because he did not prove that he suffered from a “specific learning disability.”¹⁸⁰

The *Argen* case demonstrates how courts became more narrow in their determination of whether an applicant was actually a “qualified person with a disability” under the ADA.¹⁸¹ If this case had been decided post-2008 ADA Amendments, the plaintiff may have been successful in this lawsuit.¹⁸² He provided historical information about his condition including testifying about his learning problems in high school and undergrad.¹⁸³ The ADAAA’s addition of the definition for “major life activities” which includes the ability to read, think, and communicate 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.¹⁸⁴ 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.¹⁸⁵ If the ADA was enacted because Congress intended to stop

179. *Id.*

180. *Id.* at 87–88. The *Argen* case can be distinguished from *Pazer v. New York State Bd. of Bar 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. *Pazer*, 849 F. Supp. at 285–86; *Argen v. New York State Bd. of Bar Examiners*, 860 F. Supp. 84, 85, 89 (W.D.N.Y. 1994). The accommodations in both cases were all denied. *Pazer*, 849 F. Supp. at 285; *Argen*, 860 F. Supp. at 85. Unlike *Argen*, however, the Plaintiff in *Pazer* did not have a long documented history of accommodations. *See Pazer*, 849 F. Supp. at 285; *Argen*, 860 F. Supp. at 85–86. 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. *Pazer*, 849 F. Supp. at 287; *Argen*, 860 F. Supp. at 85. Thus, the court may have been correct to deny accommodations in *Pazer*, but it erred in denying those accommodations in *Argen*. *See Pazer*, 849 F. Supp. at 288; *Argen*, 860 F. Supp. at 91.

181. *See id.* at 91.

182. *See ADA Amendments Act of 2008*, Pub. L. No. 110-325, § 12102, 122 Stat. 3553.

183. *Argen*, 860 F. Supp. at 85–86.

184. *See ADA Amendments Act of 2008*, Pub. L. No. 110-325, § 12102(2)(A), 122 Stat. 3553.

185. *Argen*, 860 F. Supp. at 88–89, 91.

the discrimination of disabled individuals,¹⁸⁶ including those individuals seeking to sit for the bar examination, then the *Argen* decision appears inconsistent with Congress' intent.

3. *Bartlett v. New York Board of Law Examiners*, 2001 WL 930792 (S.D.N.Y. 2001); 226 F.3d 69 (2d Cir. 1998); 2 F. Supp. 2d 388 (S.D.N.Y. 1997).

A final example of pre-ADAAA is the *Bartlett* case, which was appealed and remanded numerous times.¹⁸⁷ In *Bartlett*, the plaintiff was diagnosed with dyslexia which caused her to be substantially limited with respect to reading.¹⁸⁸ The plaintiff sat for the New York Bar Examination without accommodations a total of four times.¹⁸⁹ She requested accommodations as a reading impaired student for at least three of those times and was denied accommodations each time.¹⁹⁰ 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.”¹⁹¹ The Board of Bar Examiners contended that the plaintiff's documentation did not support a diagnosis of dyslexia.¹⁹²

The plaintiff was finally provided accommodations when she took the bar examination for the fifth time.¹⁹³ Nonetheless, there was a stipulation between the parties that the plaintiff's score, should she pass, would only be certified if she is successful in her lawsuit.¹⁹⁴ The plaintiff

186. 42 U.S.C. § 12101(a)–(b).

187. See *Bartlett v. New York Bd. of Law Exam'rs* [Bartlett I], 970 F. Supp. 1094 (S.D.N.Y. 1997), *cert. granted, judgment vacated* by 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part* by, 156 F.3d 321 (2d Cir. 1998), *vacated by, and remanded by* *New York State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031 (1999), *aff'd in part, vacated in part* by *Bartlett v. New York State Bd. of Law Exam'rs* [Bartlett II], 226 F.3d 69 (2d Cir. 2000), *injunction granted by* [Bartlett III] No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

188. *Bartlett II*, 226 F.3d at 74.

189. *Id.* at 75.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 75–76.

194. *Bartlett II*, 226 F.3d at 76.

failed the examination for the fifth time despite the accommodations.¹⁹⁵ The District Court then reasoned that the plaintiff was not substantially limited in the major life activities of reading or 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.”¹⁹⁶ 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.¹⁹⁷ Nonetheless, the court did take the plaintiff’s self-accommodating measures into account in making its decision.¹⁹⁸

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.¹⁹⁹ Clearly, had the ADAAA been enacted prior to the start of this line of cases, a decision could have been made from the start.²⁰⁰ The ADAAA specifically prohibits the courts from factoring in the “mitigating measures” of the plaintiff’s self-accommodations in determining whether an impairment substantially limits a major life activity.²⁰¹ Thus, the plaintiff would have prevailed from the outset and this case would presumably not have lingered in the court system for over four years with all of these appeals and remands.

195. *Id.* Plaintiff received the following accommodations: Time-and-a-half for the New York portion of the Bar 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.

196. *See Bartlett I*, 970 F. Supp. 1094, 1109 (S.D.N.Y. 1997).

197. *See Bartlett III*, No. 93 CIV. 4986(SS), 2001 WL 930792 *34–37 (S.D.N.Y. Aug. 15, 2001).

198. *Id.*

199. *See id.*

200. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12102(4)(E), 122 Stat. 3553.

201. *Id.*

B. Cases Post-ADAAA

Although the pre-ADAAA cases were primarily decided in the federal courts in New York,²⁰² a search for cases post-ADAAA uncovered case law in federal courts sitting in California²⁰³ and the District of Columbia.²⁰⁴ 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.²⁰⁵ In resolving these cases, the courts appear to be taking the broad approach in their application of the ADA, as Congress intended,²⁰⁶ and finding that these particular test takers should be accommodated as requested.²⁰⁷

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

In *Enyart*, a post-ADAAA case, the plaintiff was a legally blind graduate of UCLA School of Law.²⁰⁸ Specifically, the plaintiff suffered from “Stargardt’s Disease” which is a type of juvenile macular degeneration.²⁰⁹ This disease caused the plaintiff to “experience a large blind spot in the center of her visual field and extreme sensitivity to light.”²¹⁰ She relied on assistive technology in order to be able to read.²¹¹

Plaintiff sought accommodations for both the MPRE and the Multistate portion of the Bar Examination.²¹² Both examinations consist of multiple-choice questions only.²¹³ Plaintiff requested the use of a computer “equipped with assistive technology software known as JAWS

202. *See supra* Part III.A.

203. *See Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011).

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

205. *See Enyart*, 630 F.3d at 1156; *Bonnette*, 796 F. Supp. at 167.

206. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101, 122 Stat. 3553.

207. *See Enyart*, 630 F.3d at 1163–64, 1167; *Bonnette*, 796 F. Supp. at 181.

208. *Enyart*, 630 F.3d at 1156.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Enyart*, 630 F.3d at 1156.

and ZoomText.”²¹⁴ JAWS is a screen-reader program while ZoomText is a screen-magnification program.²¹⁵ Although the California Bar agreed to this request for accommodations, the National Conference of Bar Examiners (“NCBE”) did not.²¹⁶ Subsequently, plaintiff sued the NCBE under the ADA,²¹⁷ seeking injunctive relief.²¹⁸

The NCBE offered the plaintiff a variety of accommodations.²¹⁹ 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.”²²⁰ The court noted, “[t]his would result in [plaintiff’s] disability severely limiting her performance on the examination, which is clearly forbidden both by the statute . . . and the corresponding regulation.”²²¹

Focusing on the term “accessible,” the court found that “the accommodations offered by NCBE did not make the MBE and MPRE accessible to” plaintiff.²²² The court looked to the statute and stated that the list of auxiliary aids enumerated in the statute was not exhaustive.²²³ Further, the court stated: “To hold that, as a matter of law, an entity fulfills its obligation to administer an examination 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”²²⁴ The legislative history suggests that Congress explicitly contemplated that the auxiliary aids and services provided to individuals with disabilities would “keep pace with the

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Enyart*, 630 F.3d at 1156.

219. *Id.* at 1157. The NCBE refused to offer the MBE in electronic format. *Id.* It did, however, offer to provide 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 black background.” *Id.*

220. *Id.* at 1158.

221. *Enyart*, 630 F.3d at 1158; *see* 42 U.S.C. § 12189 (2006); 28 C.F.R. § 36.309.

222. *Enyart*, 630 F.3d at 1163.

223. *Id.*; *see* 42 U.S.C. § 12103(1) (2006); 28 C.F.R. § 36.309(c)(3).

224. *Enyart*, 630 F.3d at 1163–64.

rapidly changing technology of the times.”²²⁵ 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.”²²⁶

2. *Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164 (D.C. Cir. 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.²²⁷ In this July 2011 case, the court noted that the D.C. Bar had received approximately 125 requests for accommodations in the past five years stemming from a variety of disabilities, one of which being visual impairment.²²⁸ Past accommodations offered to visually impaired individuals have 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.”²²⁹ Similar to the plaintiffs in *Enyart* and *Elder*, visually impaired individuals sitting for the D.C. Bar Examination had not been allowed to use a computer-based test for the MBE portion of the examination.²³⁰

In granting the plaintiff’s motion for injunctive relief, here, the *Bonnette* court looked at the list of auxiliary aids in the statute.²³¹ The court specifically stated that “these lists are

225. *Id.* at 1164.

226. *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. *Elder v. Nat’l Conference of Bar Exam’rs*, 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.* Plaintiff used JAWS as his primary reading method as he is legally blind. *Id.* The court followed the *Enyart* decision and granted Plaintiff’s motion for a preliminary injunction. *Id.* at *6–12.

227. *Bonnette v. Dist. of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 167 (D.C. Cir. 2011).

228. *Id.* at 169.

229. *Id.*

230. *Id.*; see *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1156 (9th Cir. 2011); *Elder*, No. C 11-00199 SI., 2011 WL 672662, at *1.

231. *Bonnette*, 796 F. Supp. 2d at 167, 181–82; see ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12103(1), 122 Stat. 3553.

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.”²³²

This view indicates that courts are not limiting themselves to the auxiliary aids enumerated in the ADA and CFR.²³³ Therefore, courts are being broader in their application of ADA accommodations.²³⁴

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.”²³⁵ This too shows how the courts are straying away from their former narrow application of the ADA requirements and how they are increasingly more focused on providing applicants with accommodations that will truly place them on an even playing-field.²³⁶

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

Because of the enactment of the ADA, courts are now tasked with accepting these new definitions and descriptive language, and appropriately interpreting it all. It is up to the bar examiners and litigants to clarify the ADA’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 fifty states, the D.C., plus the territories. Further, consistency in the case law has implications on clients. Both the test taker and the test maker

232. *Bonnette*, 796 F. Supp. 2d at 181.

233. *See id.*

234. *See id.*

235. *Id.* at 184.

236. *See id.*

need to be on notice as to what the court has 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?²³⁷ 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,²³⁸ then the process gets started on the right foot. If an applicant's request for an accommodation is denied, then the applicant should participate in the appeals process of that state bar in order 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' intent under the ADA and ADAAA, then litigation may be the last resort.

The courts should handle future litigation with an eye on Congress' intent to expand the population of eligible individuals.²³⁹ Analyzing the few cases that have come down since the enactment of the ADAAA indicates that courts may be more willing to take a broad approach when faced with these types of cases.²⁴⁰ 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.²⁴¹ Because of the lack of case law, it is

237. See Rothstein, *supra* note 5, 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 on the bar exam).

238. See HANDBOOK, *supra* note 109; ACCOMMODATIONS APPLICATION, *supra* note 123.

239. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101(a)–(b), 122 Stat. 3553.

240. See *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011); *Bonnette v. Dist. of Columbia Court of Appeals*, 796 F. Supp. 2d 164 (D.C. Cir. 2011); *Elder v. Nat'l Conference of Bar Exam'rs*, No. C 11-00199 SL, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011).

241. See Rothstein, *supra* note 5, at 870.

imperative that courts do not create case law that narrows the scope of the statutory language as in *Sutton, Murphy, and Albertson's*.²⁴²

Very clearly, legally blind persons, or blind persons for that matter, are disabled as defined by the ADA.²⁴³ 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.”²⁴⁴ Now, however, coverage under the ADA and ADAAA also extends to people who suffer from non-apparent “invisible disabilities.”²⁴⁵ These individuals may have learning disabilities or suffer from diseases such as Epilepsy, Diabetes, or Multiple Sclerosis.²⁴⁶ Their symptoms may include “debilitating pain, fatigue, dizziness, weakness, cognitive dysfunctions, learning differences and mental disorders, as well as hearing and vision impairments.”²⁴⁷ Because of the ADAAA, individuals who suffer from these disabilities now find themselves with more protection under the ADA.²⁴⁸ In future litigation involving reasonable accommodation of bar examinees, courts must recognize the fact that Congress has taken affirmative steps to include these kinds of individuals under the umbrella of the ADA.²⁴⁹

242. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

243. See 42 U.S.C. §§ 12102(1) (2006).

244. See White House Press Release, *supra* note 81.

245. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12102, 122 Stat. 3553; *What is an Invisible Disability?*, INVISIBLE DISABILITIES ASSOCIATION, <http://www.invisibledisabilities.org/what-is-an-invisible-disability/> (last visited Aug. 1, 2013).

246. *Id.*

247. *Id.*

248. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12102, 122 Stat. 3553; see Rothstein, *supra* note 5, at 873 (explaining how the broader coverage of the ADAAA “may mean that students with learning and related disabilities and some mental health conditions (such as depression) may at least be considered “disabled” under the ADA).

249. See *id.* at §§ 1210–103.

IV. Conclusion

Analysis of the statutes,²⁵⁰ regulations,²⁵¹ and case law,²⁵² makes clear that the ADA seeks to level the playing field for individuals with disabilities. There is no true unfair advantage to 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 to them.

From 1990 to 2008, judicial interpretations of the ADA in the context of bar examination takers lost sight of Congress' intentions.²⁵³ With the passage of the ADAAA, Congress' 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 ADAAA²⁵⁴ 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.²⁵⁵

250. See 42 U.S.C. §§ 12101–213 (2006); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

251. See 28 C.F.R. § 36 (2011).

252. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *D'Amico v. New York State Bd. of Bar Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993); *Argen v. New York State Bd. of Bar Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994); *Bartlett I*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *cert. granted, judgment vacated by* 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part by*, 156 F.3d 321 (2d. Cir. 1998), *vacated by, and remanded by* New York State Bd. of Law Exam'rs v. Bartlett , 527 U.S. 1031 (1999), *aff'd in part, vacated in part by* Bartlett II, 226 F.3d 69 (2d. Cir. 2000), *injunction granted by* Bartlett III, No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001); *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011); *Bonnette v. Dist. of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 167 (D.C. Cir. 2011).

253. See *supra* Part II.A, Part III.A–B.

254. See ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 12101–103, 122 Stat. 3553.

255. See *supra* Part III.B.