LEARNING DISABILITIES AND THE ADA: A GUIDE FOR SUCCESSFUL LEARNING DISABLED STUDENTS CONSIDERING A CAREER IN THE LAW

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I. INTRODUCTION

This article focuses on the issues facing an individual of above average intelligence with a learning disability when deciding to apply to law school and enter the legal profession, in light of the Americans with Disabilities Act ("ADA").¹ There are many obstacles that the learning disabled student must overcome at every stage of the process, and the treatment of the student can vary greatly depending on the choices the student makes at each stage of the process. Many believe that learning disabilities are not legitimate reasons to provide special treatment, and these individuals battle to reduce the accommodations for such students; others feel that it is important to allow individuals to live up to their full potential and advocate "leveling the playing field" as much as possible.

An increasing number of individuals are reporting learning disabilities. With respect to college freshmen, three percent reported learning disabilities in 1978, while more than nine percent did in 1994.² "[A] 'learning disability' does not always qualify as a disability under the ADA. In order to be a person with a disability covered under the ADA, the individual must have a physical or mental impairment and that impairment must substantially limit a major life activity."³ Much has been written about how the ADA applies to accommodations of students and lawyers.

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However, the more successful the individual, and the greater his or her intelligence, the less protection he or she is entitled to. Substantially less has been written about individuals who perform well without the aid of accommodations, yet suffer from a disability and need accommodations to perform up to their full potential, which may be far beyond what they can accomplish without accommodations. These individuals would benefit greatly from the reasonable accommodation provision of the ADA, but have a more difficult time gaining access to accommodations.

II. BACKGROUND

A. The Americans with Disabilities Act

President George Bush signed the ADA into law on July 26, 1990. It became effective on January 26, 1992. Prior to the ADA, the Rehabilitation Act of 1973 was passed to protect disabled individuals from discrimination by federally-funded entities. The ADA was designed to extend the “non-discrimination principles required of institutions receiving federal funds by the Rehabilitation Act to a much wider array of institutions and business” and “to provide a coherent framework and consistent and enforceable standards for the elimination of discrimination against persons with disabilities.”

While the ADA is designed to prevent discrimination, it was not intended to provide disabled individuals with more opportunities than those afforded to the average person. “The purpose of the ADA ‘is to place those with disabilities on an equal footing and not to give them an unfair advantage.’” It therefore requires that, in order to receive accommodations, a disabled individual must be able to perform the essential functions of a job once provided with the accommodations. The district court in Price v. National Board of Medical Examiners stated that, “[t]he ADA is not designed ‘to allow individuals to advance to professional

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10. 29 C.F.R. § 1630.2(n) (1999).
positions through a back door. Rather it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door.'”

1. To Whom Does the ADA Apply?

The ADA has five titles. Three of the titles apply to three different types of entities. Title I applies to employment,13 Title II applies to public entities,14 and Title III applies to certain private entities.15

Title I applies to all aspects of employment, including applications, examinations, work conditions, and terminations.16 “Congress designed ADA, Title I to prevent employers from discriminating against qualified employees with disabilities. This Title provides, in part, that no covered entity shall discriminate against a qualified individual with a disability because of that disability.”17

Title II of the ADA applies to “any State or local government . . . [or] any department, agency . . . or other instrumentality of a State or States or local government.”18 Title II provides that “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”19

Title III of the ADA, entitled “Public Accommodations and Services Operated by Private Entities,”20 provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”21

12. Id. at 421-22 (quoting Jamie Katz & Janine Valles, The Americans with Disabilities Act and Professional Licensing, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556, 561 (1993)).
14. Id. § 12131.
15. Id. § 12181(6).
17. Id. (citation omitted).
19. Id. at 34-35 (quoting 42 U.S.C.A. § 12132 (West 1998)).
21. Smith, supra note 18, at 36 (quoting 42 U.S.C.A. §§ 12182(a), 12181(7)(1) (West
By defining public accommodations to include "postgraduate private schools," Title III makes private law schools subject to ADA requirements.

2. What Is a Disability Under the ADA?

The same definition of disability applies to all three titles of the ADA. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." In order to be entitled to any kind of accommodations under the ADA, an individual must demonstrate that he or she has a disability under the statute. Not all impairments are considered to be disabilities. They must be found to "substantially limit[]" (an undefined and vague term) a "major life activity." In order to determine whether an impairment constitutes a disability, the meaning of the term "substantially limits" must first be determined. While not entirely clear, "major life activity" is the more easily understood of the two terms. Although the term "major life activity" is not defined in the ADA, the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ"), agencies charged with promulgating the regulations to implement the ADA, have given several examples of what constitute major life activities.

a. "Major Life Activity"

Runnebaum v. Nationsbank of Maryland stated that "an activity qualifies under the statutory definition as one of the major life activities contemplated by the ADA if it is relatively more significant or important than other life activities." According to the EEOC and the DOJ, "major life activities" include breathing, walking, speaking, seeing, hearing, learning, completing manual tasks, caring for oneself, and working. Based on these examples, as stated by the court in Betts v. Rector, "[l]earning . . . is considered one of the major life activities."

1998).

25. Id. at *6.
28. Id. at 170.
31. Id. at *6.
b. "Substantially Limits"

"Substantially limits" has been defined slightly differently by the EEOC for the purposes of employment in Title I as opposed to the way it has been defined by the DOJ for the purposes of Titles II and III (under which we must evaluate the award of academic accommodations). This distinction stems from the debate over what "leveling the playing field" entails. Some believe that a person should only be considered disabled if his or her performance is so limited that he or she cannot perform as well as the average person. Others believe that individuals should be compared to those with the same education and training as they have. For the purposes of Title I and employment, the phrase "substantially limits" means that:

an individual is: significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

This will prove to be of major consequence to the learning disabled graduate of a premier law school. It is likely that he or she will be able to function generally as an attorney, but not likely that he or she will be able to succeed in the fast-paced, high-pressure, and lucrative environment of a large law firm without accommodations. It is probable that this is just the narrow type of job to which the EEOC is referring.

The DOJ has defined "substantially impairs" more in comparison to the average person: "[a]n impairment substantially limits a person’s major life activity when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people in the general population."

The Price

32. 29 C.F.R. § 1630.2(j)(1)(i) (1999); 29 C.F.R. § 1630.2(j)(3)(i) (1999). But see Bartlett v. N.Y. Bd. of Law Exam’rs, 2 F. Supp. 2d 388, 389-90 (S.D.N.Y. 1997) (finding that the two regulations are consistent with one another and that the stricter standard should apply, as the only actual difference between the two is that “the EEOC goes to much greater lengths to explore the concept of substantial limitation”).


34. Bartlett, 2 F. Supp. 2d at 394 (explaining that measuring a person against individuals that do not have the same educational qualifications automatically skews the results in favor of no a no disability finding).


court, in determining whether learning disabled medical students should receive accommodation on their board examinations, stated that "[a]n individual is not substantially limited in a major life activity if the limitation does not amount to a significant restriction when compared with the abilities of the average person."

In Price, the court held that whether the individual's dyslexia was so severe that it prevented him from functioning as well as most people was important with regard to whether the ADA applied to him. The three plaintiffs in Price, all of whom were medical students, were held not to be disabled according to the definition of the ADA because, no matter what their learning disabilities might be, they had functioned academically better than most individuals. In other words, because they were medical students, they were not entitled to accommodations. Under Price, a learning-disabled student who performs better than most people on examinations would not be granted accommodations on his exams no matter how great his disability.

Advocates of the "average person" standard have not only argued that it is both theoretically accurate and consistent with the intention of the legislators, but also that it is more practical:

The "comparison to most people" approach has practical advantages as well. Courts are ill-suited for determining whether a particular medical diagnosis is accurate. Courts are better able to determine whether a disability limits an individual's ability in comparison to most people. Additionally, this functional approach is manageable and, over time, will promote a uniform and predictable application of the ADA.

The court in Price provides an interesting illustration of the "average person" standard when applied to students with learning disabilities for determining whether they can be considered disabled under the ADA:

Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not

37. Id. at 425 (quoting 29 C.F.R. § 1630, app. (1999)).
38. Id. at 427; see also Suzanne Abram, Reasonable Accommodations for Learning-Disabled University Students Under the ADA, 28 J.L. & Educ. 121, 125 (1999).
39. Abram, supra note 38, at 125.
substantially limit the major life function of learning, because it
does not restrict her ability to learn as compared with most
people. Therefore, Student B is not a person with a disability for
purposes of the ADA.41

*Price*, however, does not represent the only view held by the courts.
In a similar case, involving accommodations for an individual taking the
bar exam, the district court for the Southern District of New York said that
an evaluation would be made as to whether the person’s “impairment
substantially limited her ability to work.”42 This case disagrees with the
blanket use of the “average person” standard employed in *Price*, arguing
that in *Price* the court:

fail[ed] to recognize . . . the impact of measuring applicants’
impairments against inappropriate reference characteristics and
how that practice would systematically result in persons with
legitimate impairments being found not disabled under the Act,
thereby seriously compromising the purpose of the Act, which is
to employ disabled individuals to their fullest potential.43

The court also stated that “[b]y measuring a disability for purposes of
a professional examination against a reference population that would
otherwise be totally unprepared and unqualified to take such an
examination, the findings of such applicants’ disability is automatically
skewed against a finding of disability.”44 The court continued:

Hence, by failing to measure an applicant’s disability against the
appropriate reference group—those engaging in that particular
activity, or, in the words of the EEOC, those with “comparable
training, skills and abilities”—applicants are placed in a horrific
Catch 22. If an applicant strives hard enough to prove him or
herself a “qualified individual” who has completed the
prerequisites for sitting for an examination and who is otherwise
capable of performing within the profession, he or she is—almost
by definition and by the very nature of his or her
accomplishments in graduate work—”average” when compared
to the general population.

The bar and medical licensing examinations are not “average”
tests geared to “average” persons, however. These sophisticated,
professional tests are designed to challenge the analytical abilities
generally above-average achievers. Hence, by failing to

41. *Id.* (footnote omitted).
43. *Id.* at 394.
44. *Id.* (describing why it would be wrong to compare the impairments of law school
graduates taking the bar examination to the average person in the population, rather than
other law students with the same education and training).
employ the major life activity of working standard when a person's entrance into a profession is at stake, courts deny applicants the opportunity to compete on a level playing field when there is no doubt that once the applicants were employed within the profession their disabilities would have to be recognized and accommodated under Title I.\textsuperscript{45}

While most academic institutions have been shown to be more than likely to accommodate the reasonable needs of learning disabled students, and therefore not as much of a concern to the above average applicant to law school, the ability to receive accommodations in order to pass the bar examination becomes crucial. Many courts would likely find that someone who is able to perform comparably to the average member of the population is not entitled to accommodations. A local bar association, in anticipation of such a decision, especially based on the growing stigma associated with learning disabled students, may be able to avoid providing accommodations for the examination.

B. Learning Disabilities

"The term ‘learning disability’ is used to refer to a discrepancy in behavior or skills that is not caused by vision, hearing or motor impairments."\textsuperscript{46} The ADA and the Rehabilitation Act do not define the term “learning disability.” Another federal statute—The Individuals with Disabilities Education Act\textsuperscript{47}—defines a learning disability as:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include a learning problem that is primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.\textsuperscript{48}

Dyslexia, Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder are the most common disabilities of students

\textsuperscript{45} Id. at 394-95 (footnote omitted).
\textsuperscript{46} Buhai, supra note 16, at 155 (citing 20 U.S.C. § 1401(a)(15) (1994)).
\textsuperscript{48} Id.
requesting academic accommodations. They are also likely to be the disabilities afflicting individuals entering the legal profession. It is therefore worthwhile to discuss them both briefly, in terms of their diagnoses and the limitations and impairments they create. Other common learning disabilities like dyscalcula are less relevant in this situation because law school requires a great deal of reading, long hours of prolonged concentration, and analytical reasoning. Mathematical calculations and other quantitative skills are less necessary for success in law school.

1. **Dyslexia**

"Dyslexia has been traditionally defined as an 'unexpected difficulty learning to read despite intelligence, motivation, and education.'"\(^5\) The District Court of Massachusetts in a recent influential ADA case involving the provision of academic accommodations for learning disabled students stated:

Dyslexia, the most common learning disorder, is a reading disability that is the result of a phonological processing deficit, or "decoding" problem. A dyslexic's ability to break down written words into their basic linguistic units is impaired. However, her higher-level cognitive comprehension abilities—vocabulary, reasoning, concept formation, and general intelligence—may remain intact despite the deficit in phonological processing. About 80 percent of people with learning disabilities have dyslexia.\(^5\)

2. **Attention Deficit Disorder ("ADD") and Attention Deficit Hyperactivity Disorder ("ADHD")**

"ADD and ADHD are learning disabilities\(^5\) marked by 'a persistent pattern of inattention and/or hyperactivity—impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development.'\(^5\) The problem, therefore, is not as

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49. See Guckenberger v. Boston Univ., 974 F. Supp. 106, 130-31 (D. Mass 1997) (stating that dyslexia is the most common learning disorder and that "approximately three percent of the young adult population demonstrates symptoms of ADD or ADHD").


51. *Id.* at 130-31 (footnote omitted).

52. *But see id.* at 131 (stating that ADD and ADHD "are not technically learning disabilities, in that the person's ability to acquire basic academic skills is not compromised").

53. Bors, *supra* note 2, at 596 (quoting AMERICAN PSYCHIATRIC ASS'N: DIAGNOSTIC &
much with the acquisition of information, but with the ability to perform effectively. These disorders are also often not permanent and there is a high rate of remission among adults.54

III. ACADEMIC ACCOMMODATIONS FOR LEARNING-DISABLED STUDENTS

The provisions of Title II and III of the ADA apply to both public and private universities.55 Therefore, a law school is prohibited from discriminating against a student who is considered disabled under the ADA as long as he or she is found to be otherwise qualified under the Act. "A disabled individual is qualified if she can meet the law school’s ‘essential eligibility requirements’ either ‘with or without reasonable modifications.’"56

There is a great deal of debate over what are a school’s “essential eligibility requirements.”57 Academic institutions often rightfully feel that they should be able to unilaterally determine what the requirements are for granting a degree from their institutions. This major issue was addressed in Guckenberger v. Boston University,58 where the court stated, “this class action concerns the interplay between the rights of learning-disabled students to reasonable accommodation and the rights of institutions of higher education to establish and enforce academic standards.”59

This may even be more of an issue when it comes to a professional school such as law school, where the institution is guaranteeing that the students that matriculate have acquired the requisite skills to perform certain jobs. If some students are given accommodations and not required to meet the same standards as the others, this could damage the school’s credibility in the eyes of employers. There is a debate as to whether essential eligibility requirements should be the ability to perform in law school and pass exams, or the ability to function well as an attorney. As has been mentioned before, this is an issue that has a serious impact on legal employers.60 Arthur Frakt, author of Learning Disabilities: Law School Dilemma61 and dean of the Widener School of Law, has argued...
strongly that the standard should be that of a legal practitioner, not of a law student, because it is a professional school.62

Most schools, however, seem as though they would be willing to provide accommodations to students who legitimately show that they are learning-disabled. The courts have found, however, that schools are not expected to fundamentally alter their programs in order to accommodate a disabled student.63 If a school can show that a certain accommodation will harm the integrity of its academic program, then it will not be expected to make the accommodation.64

Guckenberger, a recent and influential case about accommodating learning-disabled students, including law students, at Boston University, lays out what a university must do to accommodate learning disabled students:

Southeastern Community College v. Davis66 established that a college need not make fundamental changes in coursework to accommodate a student with a disability, but it does not allow universities free reign to refuse to make accommodations. Wynne [v. Tufts University School Of Medicine]67 established that an institution must be able to show persuasively that a decision to deny a requested accommodation at a college or university was made only after reasoned, diligent deliberation, and that it included input from all qualified persons.68

There are some that argue that law schools have an ethical responsibility to accommodate disabled students due to their role as educators and upholders of the law.69 Others caution that law schools should be careful not to create a dependency among their learning-disabled students upon accommodations that they are unlikely to receive in the workplace.70 Such a perspective calls for assisting learning disabled

62. Id.
63. Guckenberger, 974 F. Supp. at 146 (determining the balance between the interest of a learning-disabled student to reasonable accommodation and the interest of schools to preserve the standards of their programs).
64. Id. (stating that “a fundamental alteration in the nature of the program is far more than the ‘modification’ regulation requires”) (citations omitted).
65. The first named plaintiff in Guckenberger, Elizabeth Guckenberger, was a student at the law school at Boston University diagnosed with dyslexia. Id. at 124. In her first year there, she was “given notetaking assistance, a reduced course load, priority registration for a section with afternoon classes, and time and one half on exams in a quiet, distraction-free room.” Id.
67. 932 F.2d 19 (1st Cir. 1991).
68. Bors, supra note 2, at 609-10 (citing Wynne 932 F.2d 19, 25-26 (1st Cir. 1991)).
69. See Smith, supra note 18, at 81-86 (outlining nine principles which should be followed by law school administrators when accommodating disabled students).
70. Lisa Eichhorn, Reasonable Accommodation and Awkward Compromises: Issues
students early on and helping them to develop methods to compensate for their disabilities even in the absence of specific accommodations.

Many people believe that academic accommodations for learning-disabled students promote laziness and destroy the incentive for students to challenge themselves. In his promotion of this viewpoint, Provost Westling of Boston University created the character “Somnolent Samantha,” a student in his class who he said received accommodations for a auditory processing disability, including the right to fall asleep in class and have him update her on any materials she might have missed. He believed this to be an outrageous statement about what was becoming of academics as a result of accommodating learning-disabled students. “Somnolent Samantha” was made up, however, and he admitted in court that she had nothing to do with any actual students he had encountered during his twenty-three years at Boston University. Such opinions seem to be based on a lack of information and ignorance. Very few cases have ever been found where a student was “faking” a learning disability to get out of required academic work.

Some have argued that the ADA can basically demand that law schools alter or remove writing requirements as part of their requisite curriculum. Others have quite the opposite view. Some have contended that writing is an essential element of a lawyers’ work, and he or she will not be able to function as an attorney if he or she cannot write well. “A prospective law student who is unable to write, for whatever reason, should consider a different career path.”

One author offered an explanation for why so many people are opposed to accommodating learning-disabled law students in particular:

LDs, ADD, and ADHD possess several characteristics which result in suspicion or disdain by law school administrators, legal educators, and non-disabled law students. First, these disabilities usually involve one or more of the mental, communicative,
expressive, or organizational skills which are related to being a competent attorney.... Thus, it is easy to dismiss the student simply as not being ‘cut out’ to be an attorney.77

These disabilities are also “not directly observable and are not subject to the same level of scientific verification and understanding.”78 They are also often diagnosed late, even upon a student’s entrance into law school, which can seem highly opportune and suspicious, especially when combined with the individual’s previous academic success leading to his or her acceptance into law school.79

Most law schools do provide at least some accommodations to learning-disabled students, as required by law.80 “At the far end of the spectrum, the Hastings College of Law at the University of California can provide, among other accommodations, note-takers, typists, transcribers, tape recordings of books, readers, library assistants, special research training, extensions of deadlines for written assignments, and proofreaders for written assignments.”81 Most schools provide some, but not all of these accommodations. Those most commonly discussed and referred to are extra time on exams, note taking assistance, and extensions on writing assignments.82

According to at least one case, law schools are not required “to provide accommodations that would have guaranteed.. success in law school .... Rather, they guaranteed an opportunity to take the examinations on a level playing field with... fellow students.”83 In a case brought against the University of Maryland School of Law, Plaintiff Frank Phillips sued the school because he was unable to find gainful employment as a result of the low grades he received as a law student. While it seems as though the court also felt that Phillips had not made sufficient effort to find a job,84 this is a situation that learning-disabled law students should consider. A law school that does not provide them with adequate accommodations while they are students can have a significant impact on

77. Smith, supra note 18, at 18-19.
78. Id. at 19.
79. Id. at 19-20 (explaining why learning disabilities may seem especially suspicious to legal educators and students).
80. See Eichhorn, supra note 70, at 54 (showing that regulations implemented with Title III of the ADA require modifications to be made by both public and private schools).
81. Id. (citing Patsy Wegner Oppenheim, Hastings College of Law, Addressing the Needs of Students with Disabilities, Material Submitted for Joint Conference on Disability Issues, St. Louis, MO (April 1995)).
82. Id. at 57 (stating that “[t]he most common exam accommodation accorded to students at the post-secondary level is an allowance of extra time”).
84. See id.
their future employment and success. Legal employers seem to consider law school academic performance to be the best indicator of future success as a lawyer. This assumption is clearly debatable, but it must be taken into consideration since many employers rely on grades to predict performance.

A student can also encounter problems even though a school has provided reasonable accommodations for his disability, because the courts often do not enforce accommodations. In *Betts v. Rector*, Robert Betts II applied to medical school but was not immediately accepted. He enrolled in a transitional program designed to prepare economically disadvantaged and minority students for admission into the School of Medicine at the University of Virginia. In order to gain acceptance into the medical school, students in the program had to maintain a grade point average (GPA) of 2.75 per semester. During his first semester, Betts had difficulty and only obtained a GPA of 2.2. He was allowed to remain in the program because the University's Learning Needs and Evaluation Center determined that he had a learning disability and the school decided that he would be given double time on his future examinations. With the extra time Betts obtained a GPA of 3.5 on five of his spring examinations. His overall GPA still remained below 2.75 and the school, despite having recognized and rectified the problem still denied him admission into the medical school. The district court found that Betts was not a "qualified individual," because he was unable to meet the requirements of admission into the medical school, and awarded summary judgement to the school. The court of appeals reversed, holding that if a person can meet the requirements with reasonable accommodations, as Betts showed that he could, then he was qualified. The Fourth Circuit did not, however, find in favor of Betts; it remanded the case back to the trial court to determine whether or not he could be considered disabled under the ADA. If the lower court found that Betts could score as well as the average person without receiving accommodations, then he would not be considered disabled under the Act, despite his improvement when given accommodations, and the school would not be required to admit him to the

86. *Id.* at *1.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at *2.
91. *Id.* (stating that "because several of his spring exams were taken prior to the double time accommodation, however, Betts had only a GPA of 2.84 for the spring semester. As a result, Betts had a cumulative GPA of 2.53 for the year").
92. *Id.*
93. *Id.* at *4* (defining what it means to be a "qualified individual with a disability" as being "able to meet the academic standards required for admission").
school of medicine. This shows that even a person like Robert Betts, who had been granted reasonable accommodations by his academic institution and thrived, could still be denied protection based on the decision of the court.

As a potential learning-disabled law student, an individual should examine the schools he or she is considering attending very closely since each individual school’s willingness to accommodate may vary dramatically. The courts in the jurisdiction, depending upon whether they adopt the “average person” standard or not, may find that a student who was able to gain admission to law school is not disabled under the ADA because such performance cannot be considered below average.

IV. LAW SCHOOLS IN RELATION TO LEGAL EMPLOYERS

A. Should Law Schools Have to Disclose the Fact that Students Received Accommodations to Legal Employers?

Many would likely argue that legal employers are entitled to know that the student they are recruiting has been given accommodations while in law school. Most legal employers base their hiring largely on academic success, as they believe that law school examinations reflect how well a person will function as a legal professional. An individual who took those exams without time constraints may not have met the criteria and performed as well under stress as the recruiting firm thought he or she did, and may not be able to perform as expected in the employment setting.

While this issue has not yet been addressed by the courts, it seems that, as of now, law schools might be able to disclose the accommodations, even though it seems highly prejudicial and a tremendous invasion of a student’s privacy. Flagging results on standardized test scores, such as the LSAT (for the LSAT, only those examinees who receive extra time are flagged), when the exams were taken with accommodation, is common practice and has not been disallowed. Test scores of those who take exams with accommodations are not guaranteed to be totally comparable to those taken under standard conditions and are so flagged when received by

94. See id. at *7 (stating that unless an individual’s ability to learn is limited in comparison to most people, that individual’s ability is not significantly restricted and thus the individual is not disabled under the ADA).
95. Mayer, supra note 4, at 471.
96. See, e.g., Eichhorn, supra note 70, at 46-47 (showing that ADA regulations only prohibit schools from directly asking applicants whether they are disabled but does not prohibit LSAT flagging); Mayer, supra note 4, at 479 (stating that flagging test scores has largely escaped court scrutiny).
the educational institutions. It could be argued that law schools have an obligation to disclose the fact that a student received accommodations because, as professional schools, they are guaranteeing that their students have acquired certain skills before graduation. Those in favor of flagging law school grades might argue that it has been found that, statistically, law schools treat students, with and without accommodations, with similar LSATs and grades as comparable when evaluating them for admission. They are accepted at the same rates.

While, under Title I, a legal employer may not question a potential employee about his possible disabilities unless it is clear they will affect his work, flagging appears to be a back door way for legal educational institutions to convey such private and potentially stigmatizing information to employers. According to one scholar, "[a]lready, schools are considering the possibility of flagging the class grades of disabled students who receive accommodations." The concept of flagging law school grades possesses serious flaws. There is still a significant stigma attached to learning disabilities. Revealing these disabilities could have a serious detrimental effect on the individual’s chance at admission to law school, and could have an even stronger effect on his chance at attaining a job. This effect goes beyond the studies done of law school admissions rates where many other factors are involved. If flagging test scores could have such a negative impact, then flagging grades, the primary measurement used by legal employers to determine how a student will perform as a professional, could have an exceedingly detrimental and unmerited effect upon a student.

Other authors have further discussed the stigma associated with learning disabilities which suggests that a student’s privacy should be closely guarded. Andrew Weis discusses the significant stigmas, prejudices, and discrimination suffered by a learning disabled individual as a child and then later as an adult in the employment environment. In Kristan Mayer’s article, she discusses the fact that many lawyers and law students are reluctant to reveal the fact that they are learning disabled and

97. See Mayer, supra note 4, at 471 (describing how the scores of students with extra accommodation are flagged by testing services as “nonstandard”).
98. See, e.g., Eichhorn, supra note 70, at 47; Mayer, supra note 4, at 477 (listing LSDAS' arguments for flagging test scores).
99. See Mayer, supra note 4, at 497 (citing a 1993 Law Services Study showing accommodated test takers to have comparable acceptance rates to law schools to unaccommodated test takers).
100. 42 U.S.C. § 12112(d)(2)(B); see also Mayer, supra note 4, at 521.
101. Mayer, supra note 4, at 521.
102. Id.
receive accommodations.\textsuperscript{104} They opt to appear to be mediocre students rather than face the stigmas associated with people who are learning disabled.\textsuperscript{105}

V. EMPLOYMENT

As noted earlier, Title I provides, inter alia, that "no covered entity shall discriminate against a qualified individual with a disability because of that disability."\textsuperscript{106} Each term has been defined and elucidated by various court decisions. The court must determine if each individual case meets all the necessary criteria. The court must first determine if the individual is disabled under the Act and whether he or she is a "qualified person":

A "qualified individual" is: an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purpose of this [Title], consideration shall be given to the employer's judgement as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.\textsuperscript{107}

The courts will allow covered entities to discriminate only if the employee is unable to "perform an essential function of the position and no reasonable accommodation [is] available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship" on the employer.\textsuperscript{108}

The court must next determine what in each situation would constitute a "reasonable accommodation."\textsuperscript{109} A wide range of things can be considered reasonable depending on the specific facts in a given situation:

A "reasonable accommodation" may include: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate

\textsuperscript{104} Mayer, \textit{supra} note 4, at 496.

\textsuperscript{105} \textit{Id.} at 497 (discussing several studies and individual anecdotes about the lack of self-identification among many learning disabled students).

\textsuperscript{106} Buhai, \textit{supra} note 16, at 142 (citing 42 U.S.C. §12122(a) (1994)).

\textsuperscript{107} \textit{Id.} at 142 (quoting 42 U.S.C. § 12111(8) (1994)).

\textsuperscript{108} \textit{Id.} at 143. (quoting Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1130 (S.D.N.Y. 1997)).

\textsuperscript{109} \textit{Id.} (describing what may be considered reasonable accommodations in different situations).
adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\textsuperscript{110}

The court must next determine whether the "reasonable accommodations" would place too great a burden on the employer and should therefore not be required. In order to do this, the court must determine whether the accommodations cause an "undue hardship" for the employer:

The term "undue hardship" means an action involving "significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth" in the Act. To determine whether the entity would face an undue hardship, such that accommodation would not be reasonable, the following factors are considered: (1) the nature and cost of the accommodation needed under the Act; (2) "the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effects on expenses and resources," or the impact otherwise of such accommodation upon the operation of the facility; (3) "the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type and location of its facilities;" and, (4) "the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, the geographical separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity."\textsuperscript{111}

The court must also determine which are the "essential job functions" of a particular job, as the individual is only required to be able to complete these tasks with reasonable accommodations.\textsuperscript{112} The individual is not expected or required to complete secondary or non-essential job functions. The court must examine each case individually to determine which are the essential functions. It must "decide if the responsibility or duty is 'fundamental to the job—a core, critical, or basic component of the job.'"\textsuperscript{113}

\textsuperscript{110} Id. (quoting Bartlett, 970 F. Supp. at 1128-31).

\textsuperscript{111} Id. at 143-44 (citations omitted).

\textsuperscript{112} The requirements for establishing a prima facie case under the ADA are outlined in Meekison v. Voinovich, 17 F. Supp. 2d 725, 730 (S.D. Ohio 1998) (quoting Gilday v. Mecosta County, 124 F.3d 760, 762 (6th Cir. 1997)) ("To establish a prima facie case under the ADA, [plaintiff] must show: (1) she was disabled within the meaning of the statute at the time of her employment; (2) she was qualified to perform the essential functions of her job with or without accommodation; and (3) she suffered an adverse employment decision because of her disability."). See also Buhai, supra note 16, at 144 (describing how to determine if a job function is essential).

\textsuperscript{113} Buhai, supra note 16, at 145 (quoting Philip C. Grant, Essential or Marginal? Job
Learning disabilities create especially difficult situations under the ADA, because they are misunderstood, associated with stigma, and hard to identify. Some have argued that while certain learning disabilities are considered to be disabilities under the ADA, they are particularly hard claims to prove, and most learning disabled individuals who bring claims are unsuccessful. This is attributed to the fact that learning disabilities are hard to identify, diagnose and understand.

Learning disabilities have been described as creating a Catch-22 when it comes to workplace discrimination. "[S]uccess negates the existence of the disability, whereas failure justifies dismissal for incompetency.... When the plaintiff exhibits compensatory abilities, some judges cite this as evidence that the person cannot qualify as an individual with a disability." Judges will often look for some other explanation for the individual's difficulty, even if he or she has been diagnosed with a learning disability, and therefore deny his or her claims.

VI. LEGAL EMPLOYERS

Once an individual has achieved admittance into a law school, passed all of his or her classes, graduated and passed the bar examination, with or without accommodations, he or she will have to examine his or her employment prospects.

A student at a top tier law school will find herself interviewing in an on-campus recruiting process ("OCR"). She will have to determine whether to reveal her disability (if her grades have not already been flagged). Assuming that her grades are not flagged, the student has not revealed her disability and her grades are good, she, like most of her classmates, is likely to receive an offer from a large, top tier law firm and be offered a high starting salary. The learning disabled student will probably be aware that she may not be able to perform some of the essential functions of her job without accommodations. She is also, after her success, likely confident (and rightly so) that, given those accommodations, she can perform as well as, if not better than, her fellow associates. The problem she will face is that she is not guaranteed to receive the accommodations she needs and may therefore be unable to achieve the success she has the potential to achieve. The stigma placed on learning disabilities by our society may prevent a large corporate employer


114. Abram, supra note 38, at 128.
115. Weis, supra note 103, at 205; Abram, supra note 38, at 128.
116. Weis, supra note 103, at 205.
117. Id. at 205-06.
118. Id. (citing Beck v. James, 793 S.W.2d 416 (Mo. Ct. App. 1990)).
from feeling that she is worth the time, money, or risk.

It will be helpful to examine her situation under the structure of the ADA, assuming that she is dyslexic and has trouble reading quickly as well as performing under great stress or pressure. She would therefore contend that she was disabled in the major life activity of working, because she could not read as quickly as others and perform under great stress. She would request the reasonable accommodations of fewer assignments so that she could complete the ones she had on time and with less stress, more time to complete those assignments, and a proofreader to check for spelling and grammatical mistakes in her writing. In order to receive accommodations in the employment setting, an individual must demonstrate three things:

1. That the employee is an individual with a disability under the ADA.

2. Establish the essential job functions of the desired position.

3. If the candidate's disability presents a problem in performing the essential job functions, it is necessary to establish that the candidate can perform the essential job functions with reasonable accommodations.

A. Is the Individual Disabled Under the ADA?

Under Title I of the ADA, the individual will be compared to "the average person having comparable training, skills, and abilities." This most likely will be interpreted to mean that her skills (in terms of being able to read and complete work on time) should be compared to those of the average law school graduate. While this is a high standard, the graduate of a top law school may be able to perform at the level of an average lawyer. The court may therefore be unwilling to find that she is disabled under the ADA, even though with accommodations she can perform at a level that is well above average and consistent with her high intelligence level. This may not be of any concern to a court whose sole purpose is to "level the playing field" for those with disabilities. The judge may not find that she is entitled to live up to her full potential and earn a starting salary of $100,000 when most law school graduates are earning much less. The judge would also likely find that this is just the kind of

119. See Buhai, supra note 16, at 177-180 (suggesting possible reasonable accommodations for a learning disabled attorney).

120. Id. at 185-86 (organizing and simplifying what is necessary in order to merit accommodations under the ADA).

unique employment not covered by Title I.\textsuperscript{122} A person who can practice law, and is limited in only one elite area of the field, is not likely to be covered by the Act.

While this may seem logical and is probably the law, there are a number of issues which ought to be considered. An individual who has graduated with a high grade point average from a top law school clearly has overcome great adversity and has tremendous motivation and focus as well as skill. Most law students would agree that on most exams, extra time most certainly does not guarantee an "A". A student must think about and uncover the issues on an exam, and all the time in the world will not reveal the correct answers to a student who does not have the skill and intelligence to identify them. The learning disabled person is likely being denied the chance to demonstrate her skill and live up to her potential when she is not afforded extra time.

One cannot ignore the fact that there are many success stories among the learning disabled. Such individuals may be even more qualified than their peers after they receive accommodations. An example is Andrew Weis, an associate at the law firm of Sidley & Austin, Washington, D.C., who received his A.B. from Stanford University in 1990, and his J.D. from Stanford Law School in 1996. He attributes his success in overcoming his learning disabilities to the remedial assistance he was given early in his education.\textsuperscript{123} I have met many other ambitious students, both as an undergraduate and as a law student, who would not have been able to reach the points they had without academic accommodations. At a minimum, these people were my intellectual equals, and contributed valuably to my academic environment. These were also people who, having seen their drive and success, I would be more than happy to work side by side with in an employment environment.

B. Essential Functions

Assuming that she was found to be disabled under the ADA by a judge who shared my views (anything is possible as the ADA requires an individual case by case review of every situation), it would then be necessary to determine the essential functions of the job. These functions would clearly vary depending upon the department and specialty of the individual. Reading, research, and writing assignments seem as though they could easily be completed given the reasonable accommodations of extended time and fewer and smaller assignments. The firm is likely to be large enough to absorb the impact of spreading the work around and big

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\textsuperscript{122} See 29 C.F.R. §1630.2(j)(3) (1995) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").
\textsuperscript{123} Weis, supra note 103, at 208.
\end{flushright}
enough to give the learning disabled associate her own office so that she can concentrate with few distractions. The more important issues in this case are whether time pressures and long hours are essential functions of a job at a large corporate law firm, implied by the award of such large salaries.

It is well known that employees of large law firms tend to work extremely long hours and have high-pressure jobs. The question is whether or not these are essential or secondary functions of the positions. A close analysis reveals that they are secondary. The positions are not advertised by the employers as requiring such extreme input. Most firms, in fact, advertise themselves as "family friendly" and say that they encourage their associates to have an active life outside of the office. Since they do not present the position as one requiring such inputs, they should not be found to be essential functions.

As mentioned earlier, most dyslexic, above average law students who have successfully graduated from top law schools would not have problems completing the essential job functions if provided with reasonable accommodations. There are situations where this has been found to be accurate. In San Francisco, there was a case where an attorney who was hired into a high paying job after graduation, and was working sixty hours a week, became depressed. He argued that shorter hours were necessary to accommodate his disability. An arbitrator found that allowing him a half day off every time he worked more than 45 hours in a week was a reasonable accommodation and awarded him 1.1 million dollars in damages. Clearly, long hours were not considered to be an essential function of the job, despite the fact that most attorneys work long hours and receive high salaries in return.

VII. CONCLUSION

It is clear that learning disabled individuals face a number of obstacles in an attempt to enter into and excel in the legal profession. They do, however, have many options other than big corporate law work, which they may find to be the most hostile environment. In her article, Practice Makes Perfect: Reasonable Accommodations of Law Students with Disabilities in Clinical Placements, Sande Buhai discusses a number of different approaches that learning disabled lawyers can take in their practice to mitigate some of their problems. Lawyers often work extra hours to
make up for the fact that they work slowly and do not bill clients for much of their time. While acknowledging that they face difficulties, Buhai goes on to write that, "with proper accommodations, ‘lawyers with disabilities can contribute as much [as] or more than others’ because people who have ‘gone to law school and passed the bar with disabilities are able, intelligent, and most importantly, highly motivated.’”

129. Id.
130. Id. (quoting Pamela Wilson, Attorneys With Disabilities Seek to Raise Consciousness, SAN DIEGO DAILY TRANSCRIPT, Jan. 22, 1993, available at 1993 WL 3276952 (page numbers unavailable)).