

Court Orders & Papers

ADA Brief

This is a brief on the ADA and testing accommodations -- in a case involving the Law School Admissions Council. The brief was written in November/December 1999. It includes preliminary injunction material, and a brief history of Law School admissions testing, and arguments on testing accommodations.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LD, :

:

Plaintiff :

:

v. : Civil Action No.

:

LAW SCHOOL ADMISSIONS COUNCIL, INC., :

KIM DEMPSEY, :

:

Defendants :

BRIEF OF PLAINTIFF LD

IN SUPPORT OF MOTION FOR

TEMPORARY RESTRAINING ORDER

AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff LD, a _____ year old 1999 graduate from the University of _____, in _____, has sued the Law School Admissions Council, Inc. (LSAC) and its agent, Kim Dempsey, to ensure that she is permitted to take the Law School Admissions Test (LSAT) free from the illegal discrimination against her which the Defendants currently plan to impose. Ms. LD recently graduated from the University of _____ in _____ with a Bachelor's Degree in _____. Defendants have refused to permit her to take the LSAT with reasonable accommodations for her disabilities (accommodations recommended by her treating psychiatrist and her neuropsychologist) and, absent immediate relief from this Court, she will be unable to take the LSAT on Saturday, December 4, 1999 under conditions which accurately reflect her aptitude and abilities.

This action under the Americans With Disabilities Act of 1990 seeks emergency, preliminary and permanent injunctive relief, and damages, against Defendants based on the LSAC's discriminatory conduct against Plaintiff LD, a person with disabilities. Plaintiff LD has requested certain simple and inexpensive accommodations in the manner in which the LSAT is administered. She has requested to take the examination in one and one-half the standard period of time, and to take the examination in a separate quiet room. Each of these accommodations is recommended by her treating psychiatrist and her neuropsychologist.

These accommodations are necessary to ensure that the LSAT is accessible to Plaintiff LD who has Attention Deficit Hyperactivity Disorder, and _____, both of which are recognized mental disorders which substantially affect her thinking, learning, concentration, expression and other basic life functions. The requested accommodations are the same as those granted by Plaintiff's college, the University of _____.

The LSAC has refused to grant Plaintiff LD any accommodations at all, which refusal violates the Americans with Disabilities Act, 42 U.S.C. §§12101, et seq. (the "ADA"). The ADA prohibits entities such as the LSAC from discriminating against people with disabilities in the administration of tests and examinations. 42 U.S.C. §12189 (Title III of the ADA). The ADA permits awards of damages for its violation. Both compensatory and punitive damages are sought in this case. The ADA further provides that defendants who violate the ADA are liable for costs of litigation, including attorneys' fees, pursuant to specific provisions of the ADA and the Civil Rights Act of 1964.

Absent urgent and immediate relief, Plaintiff LD will be deprived of the benefits of appropriate testing for her law school admission process, will be denied or delayed in law school admission, and will lose the benefit of her extensive preparation and study for the LSAT, and will suffer further emotional distress and embarrassment. Defendants' violation of the ADA has already compelled her to miss the October 1999 LSAT. This Court's aid is sought to ensure that Defendants do not deny her the opportunity to take the December 4, 1999 LSAT, an examination which is necessary to her law school application effort.

STANDARDS FOR A PRELIMINARY INJUNCTION.

The ADA identifies injunctive relief as appropriate to remedy acts of discrimination against persons with disabilities. The ADA incorporates the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3, which state that whenever a person has engaged, or is about to engage, in a prohibited act, a temporary or permanent injunction is an appropriate remedy for the aggrieved party. 42 U.S.C. § 12188(a)(1). See *D'Amico v. New York State Board of Law Examiners*, 813 F.Supp. 217 (W.D.N.Y.1993) (granting injunction under ADA for accommodations in testing)

There are four factors, which, balanced together, are considered by courts in granting preliminary injunctions: 1) likelihood of success, 2) irreparable harm to plaintiff, 3) whether the injunction would harm others, and 4) the public interest. As the Third Circuit recently stated the test:

" 'Four factors,' as we have recently had occasion to observe, govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by the denial of the relief; (3) whether granting the preliminary relief will result in even greater harm; and (4) whether granting the preliminary relief will be in the public interest. [citations omitted]. A district court should endeavor to 'balance [] these four ... factors to determine if an injunction should issue.' "

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir.1999). Accord, *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir.1985) (citations omitted). The four factors are to be balanced; thus, they "are not prerequisites that must be satisfied." *In re Eagle-Picher Industries, Inc.*, 963 F.2d 855 (6th Cir.1992).

In the discussion below, we demonstrate that Plaintiff LD satisfies all four factors. Should the Court find that she does not fully meet one or more of them, the Court will find that, on balance and realistically, she should be permitted to take the Saturday, December 4, 1999 LSAT with the requested accommodations, while this litigation goes forward.

PLAINTIFF LD IS LIKELY TO SUCCEED ON THE MERITS.

The Law School Admission Process

In the early 1900's, Wigmore noted, the legal community tested would-be lawyers by seeing how they did in the first year of law studies; there were enough spaces to admit every applicant who met minimal credentials. In the 1920's, with more applicants than spaces, selection testing began and, in 1948, the LSAT was born. As the Supreme Court has noted, "It has been with us ever since."

The Defendant Law School Admissions Council, Inc. ("LSAC") administers the Law School Admissions Test ("LSAT") is central to any law school candidate's admission to ABA-accredited law schools. In addition to administering the LSAT which LD must take in the normal process to

gain admission to an accredited law school, Defendant LSAC provides lists of names of LSAT-takers and provides to law schools a summary of law school applicants' LSAT and college record, among other activities designed to emphasize LSAC's centrality to the admissions process. See *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3rd Cir. 1997) (affirming summary judgment in antitrust case in which LSAC was a defendant).

Today, admission to law schools is fiercely competitive. For example, at the University of Texas School of Law, ranked in the top 20 in 1995, over 4,000 applicants competed for the approximately 900 offered admission to achieve an entering class of 500 students. *Hopwood v. State of Tex.*, 78 F.3d 932, 935 (1996). Dealing with such large number of applicants results in law schools using numerical formulas for screening. Numbers are paramount in the process and it is typical that the LSAT score is a prime component of the computation, with the formula provided by the Defendant LSAC's Law School Data Assembly Service, to give the LSAT, in 1992 at least, 60% weight. See *Smith v. University of _____ Law School*, 2 F.Supp.2d 1324 (W.D.Wash. 1998) ("In measuring academic potential, the Law School relies primarily on undergraduate grade-point average ("GPA") and performance on the Law School Admission Test ("LSAT") as well as other factors).

Without fair participation in the LSAT testing, Plaintiff LD will be at a disadvantage when law schools examine her record. Having recently graduated from the University of _____ in _____, and in the midst of the law school application process, Ms. LD is seeking from the Defendant LSAC no more than the accommodations recommended by her doctors and what her University has provided.

The Americans with Disabilities Act (ADA) and Testing

A decade ago, Congress enacted the Americans with Disabilities Act of 1990(ADA), 42 U.S.C. § 12189. The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101.

The ADA is a broad statute intended by Congress to provide comprehensive remedies for discrimination. As the Third Circuit recently noted, it is a law with "remarkable breadth of language and purpose" *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 122 (3rd Cir. 1998) (J. Seitz).

Among the broadly stated purposes of the ADA, see 42 U.S.C. 12101(b), is the intent to "invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities." *Id.* 12101(b)(4). * * * Indeed, there is little doubt that Congress intended the ADA as a comprehensive remedial statute with broad ramifications.

Menkowitz, 154 F.3d at ____.

In addition to addressing employment and public accommodations, the ADA ensures that testing related to such things as licensing, certification, professional or trade purposes be offered in a "manner accessible to persons with disabilities or offer alternative accessible arrangements:"

Section 309 of the ADA covers "examinations and courses" and provides:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189 (Section 309).

The LSAT is a covered test. What must Plaintiff LD show to entitle her to accommodation in the December 4, 1990 test? We answer that question below.

ADA Requirements: The Three-factor Process

An individual analysis must be made with requests for accommodations in testing; the decision on reasonableness must be made on a case by case basis. See, e.g., 29 C.F.R. Part 1630 App., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). This person-specific process is required because the ADA itself imposes a "reasonableness" test in its effort to ensure that people with disabilities are not disadvantaged in testing and because the statute mandates testing in an "accessible manner" or through "alternative" arrangements. In the case-specific review, "[c]ourts reach their decision based on the circumstances presented and the objectives of the ADA." *Agranoff v. Law School Admission Council, Inc.*, __ F.Supp. __, p. 3 slip opinion (October 1, 1999, D. Mass.) (this decision is attached to this brief);

To succeed on a claim under the ADA, a plaintiff must show (1) that she is disabled, (2) that her requests for accommodations are reasonable, and (3) that those requests have been denied. E.g., *D'Amico v. N.Y. State Bd. of Law Examiners*, 813 F.Supp. 217, 221 (W.D. N.Y. 1993); *Agranoff v. Law School Admission Council, Inc.*, __ F.Supp. __ (October 1, 1999, D. Mass.); *Ware v. Wyoming Bd. of Law Examiners*, 973 F.Supp. 1339 (D.Wyo. 1997). The discussion below is organized around these factors.

Plaintiff LD is Disabled.

With respect to an individual, the ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The regulation echoes the statute.

Here, Ms. LD meets each of the three subparts of the definition. Because she seeks present

accommodation for her long-standing limiting impairments, she has demonstrated under "A" that she has mental impairment which substantially limit one or more major life activities.

Ms. LD is successful and talented in many areas of her life. However, she also has two mental disabilities: one is Attention Deficit and Hyperactivity Disorder (ADHD) and the other is _____. While each of these disorders affects her ability to take tests such as the LSAT, see discussion in next section, that is irrelevant to the first factor in evaluating her right to an injunction. The first factor is whether Ms. LD has a disability which is covered by the ADA.

ADHD is a recognized psychiatric disorder; it renders those with the condition substantially impaired in learning, concentration, expressiveness, thinking, and self-organization. There is no doubt that ADHD is covered by the ADA. The Department of Justice regulations describe disability with respect to an individual as encompassing "[a]ny mental or psychological disorder such as . . . specific learning disabilities." 28 C.F.R. § 35.104(1)(i)(B). The Third Circuit has recognized attention-deficit disorder as a disability. In *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir.1999), the Court reversed a district court's dismissal of an ADA Title III claim by an orthopedic surgeon who has an attention-deficit disorder who alleged that a hospital discriminated against him on the basis of his disability by denying him the opportunity to participate in the medical staff privileges offered by the hospital. See *Frederick L. v. Thomas*, 557 F.2d 373, 375 (3rd Cir. 1977) (learning disabilities are quite profound and are "disorders in basic psychological processes)."

ADHD is a psychiatric disorder, and well recognized as such by both the psychiatric profession and by courts.

Ms. LD's ADHD started in childhood and primary school, at least as early as second grade. She received a formal diagnosis in 1997 from her psychiatrist, Dr. _____, and was given trials of various medications. She currently takes _____ to reduce her distractibility and impulsivity, and to stabilize her mood. Since the medications have been in place, Ms. LD has had improvement in her ability to focus her attention, and improvements in her college transcripts, which showed a significant rise in her grade point average following diagnosis and appropriate treatment in 1997.

Ms. LD received accommodations at the University of _____ which consisted of extra time on tests and a private room for testing. This was granted after the University's review of her medical and related documentation. As the University of _____ confirmed to LSAC, "These accommodations were approved due to the ongoing effects of her disability without regard to any medications he took to help mitigate the effects of her disability" because the medications are not a cure for the "distractibility and focus that can interfere with" test-taking abilities. October 13, 1999 Letter from _____, Director, Disabled _____ Services, University of _____, Attachment A to the Complaint. The accommodations in testing beginning in her junior year included 50% more time for tests and the use of a 'quiet room.'

Ms. LD's disorders, her neuropsychologist found, "are likely to have a direct impact on Ms. LD's ability to perform in test situations that are time limited. She appears to respond to these situations with increased anxiety, some compulsive behavior, and heightened awareness of and

sensitivity to distraction from both internal and external sources. In addition she is likely to evidence poor time management and impulsivity that may require additional time to monitor and [so that] she can make corrections to her test responses as needed." Attachment B to the Complaint, _____ Report. The neuropsychologist "strongly recommended that Ms. LD be provided fifty percent additional time to complete each portion of her LSAT test, translating into roughly 20 minutes per section." Id. The additional time is based on her condition and her clinical presentation: "This is based on her history of poor performance on standardized tests when additional time is not provided (e.g. SAT), and on the basis of the observed deficits in organization/planning and historical problems with time management. " Id.

Ms. LD is under psychiatric care by Dr. _____, whom she sees one time per month for medication management. Dr. _____ has particular experience with, and has taught regarding, ADHD and other related disabilities. She is well-qualified to make diagnoses of Plaintiff LD and to determine needed accommodations and she has found that the requested accommodations are appropriate and necessary.

Ms. LD's ADHD is of a "persistent nature" and had an "early onset" in childhood and was evidenced by deficits at school, at home and socially. He found that the "evidences numerous symptoms of ADHD" by both "clinical presentation and by grade reports." Attachment C to the Complaint, _____ Report.

Plaintiff LD has carefully and fully documented her long-standing disabilities, with reports showing her condition from childhood, in school from second grade, and since that time. Her treating psychiatrist and neuropsychologist confirm this disability, both clinically and through testing. Surely, no more documentation could be considered necessary. *Guckenberger v. Boston University*, 974 F.Supp. 106 (D.Mass.1997) (documentation criteria for learning disabilities must be reasonable, and cannot be so imposing that they that unnecessarily screen out or tend to screen out truly disabled persons).

Ms. LD has also documented her _____, which affects her thinking and ability to process information in the midst of distractions. The Third Circuit has affirmed that _____ is a mental impairment under the ADA. *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 306-307 (3d Cir. 1999)(" No one disputes that _____ counts as a mental impairment under the ADA." That disorder limits thinking, which is a major life activity under the ADA. Id.

Ms. LD has disabilities which "substantially limit" major life activities under §12101 of the ADA. Those activities are learning, expressiveness and thinking, all at the heart of performance on the LSAT. Ms. LD need not be utterly unable to think or to function to be eligible for accommodation in testing. It is sufficient that she cannot perform those functions under the same conditions, in the same manner, for a similar period of time when compared to other people.

Note that, as discussed in the next section of this brief, the "most people" standard applies in determining whether the plaintiff is disabled; after that determination is made, the inquiry turns to ensuring that examinations result in accurate measurement of the testee's actual aptitude or achievement is exactly what the ADA requires. *Pazer v. New York State Board of Law Examiners*, 849 F.Supp. 284 (S.D.N.Y.1994) (student with visual processing disability is entitled

to accommodations to take the bar exam), the court focused on this mandate in Justice Department regulations that an individual's "aptitude or achievement level" be reflected by the examination. See 28 C.F.R. § 36.309 (1996).

There is no question that Plaintiff LD, who has both a _____ and ADHD, a learning disability, is a "disabled person" within the meaning of the ADA. See 42 U.S.C. § 12102(2)(which defines the term "disability") and 28 C.F.R. § 36.104. In some cases, courts have found that the named plaintiffs were not disabled, despite a diagnostic label, because they were able to learn and test as well as others. The case at bar is obviously a quite different situation.

Plaintiff LD Accommodation Requests are Reasonable.

A covered entity discriminates against a disabled individual when it fails to make "reasonable accommodations to known physical or mental limitations ..." 42 U.S.C. § 12112(b)(5)(A).

Ms. LD's accommodation request is no broader than that recommended by her treating psychiatrist, her neuropsychologist, and that which was granted in college, after her college reviewed her medical record. Ms. LD requests very limited accommodations, very much less than the Justice Department recognizes some people with learning disabilities may require.

Courts give great weight to student's past medical/psychological treatment, "various accommodations that have been made for plaintiff" in college, and a student's treating doctor's recommendations. D'Amico at 221-222; Agranoff v. LSAC, attached.

The regulations provide:

Any private entity offering an examination covered by this section must assure that ... [t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure)....

28 C.F.R. § 36.309(b)(1)(i). Emphasis on ensuring that examinations result in accurate measurement of the testee's actual aptitude or achievement is exactly what the ADA requires. For example, in Pazer v. New York State Board of Law Examiners, 849 F.Supp. 284 (S.D.N.Y.1994) (student with visual processing disability is entitled to accommodations to take the bar exam), the court focused on this mandate in Justice Department regulations that an individual's "aptitude or achievement level" be reflected by the examination. See 28 C.F.R. § 36.309 (1996), quoted above.

It is reasonable for Ms. LD to request additional time for the examination. The Justice Department anticipated that additional time was appropriate under the ADA in testing situations:

Aside from auxiliary aids or services, what other types of modifications may be required? In

order to ensure that an examination provides an accurate measurement of the applicant's aptitude or achievement level, or whatever other factor it purports to measure, the entity administering the examination may also be required to modify the manner in which it is administered.

ILLUSTRATION: X has a manual impairment that makes writing difficult. It may be necessary to provide X with more time to complete the exam and/or permit typing of answers.

U.S. Justice Dept., Title III of the Americans with Disabilities Act, Technical Assistance Manual, reproduced at <http://janweb.icdi.wvu.edu/kinder/pages/tam3.htm>.

A preliminary injunction was granted to require that four days, rather than the usual two days, be granted for the New York bar examination to a person with a severe visual difficulty. *D'Amico v. N.Y. State Bd. of Law Examiners*, 813 F.Supp. 217 (W.D. N.Y. 1993). The Board was required to provide all testing accommodations recommended by the person's physician, absent any medical evidence to rebut physician's medical opinion on nature of disability and applicant's abilities. See *Ware v. Wyoming Bd. of Law Examiners*, 973 F.Supp. 1339 (D.Wyo. 1997) (law board was correct to follow applicant's doctor's recommendations with regard to timing; applicant did not supply medical documentation for additional accommodations).

Courts find that the testing agency is not the decisor for individual's specific medical needs. It makes sense to reject the apparent LSAC position that it alone -- in judging hundreds of accommodation requests within its bureaucracy -- can pick and choose when to accept the treating physician's findings and when to ignore them. This is what the Court in *D'Amico* held, that

the opinion of the applicant's treating physician must be given great weight. The Board has no expertise concerning plaintiff's medical condition and, in my view, the Board is in no position to countermand plaintiff's treating physician's opinion as to what is the appropriate accommodation for her visual disability.

D'Amico at 222. Of course, the treating physician's opinions must be reasonable, but it is quite clear that the testing agency -- which has no knowledge of the student's disease, its treatment, or its effects on the individual -- cannot automatically countermand the physician.

The Board's opinion as to what is "reasonable" for a particular applicant can be given very little weight when the Board has no knowledge of the disability or disease, no expertise in its treatment, and no ability to make determinations about the physical capabilities of one afflicted with the disability or disease. This Court, must rely on the integrity of the treating physician. Absent any evidence that such information should be discounted, this Court must look to the treating physician to determine the appropriate accommodation for one with a disability.

D'Amico, at 223.

The Justice Department's final regulation on the ADA permits the testing agency to request documentation. Of persuasive significance here, the only example used is that documentation may include the physician's recommendation or evidence of prior accommodation:

Examiners may require evidence that an applicant is entitled to modifications or aids as required by this section, but requests for documentation must be reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program.

(emphasis added). In the case at bar, Plaintiff LD's accommodation request is quite minimal, is supported by medical and psychological experts who know her well, and are identical to those she received for her college examinations. By any test, these are "reasonable" accommodations under the ADA.

Defendants Denied the Accommodation Requests.

Defendants LSAC and Dempsey denied the Plaintiff's reasonable accommodation requests. There is no dispute about that. See Complaint, paragraphs 45-60.

PLAINTIFF LD WILL SUFFER IRREPARABLE HARM, ABSENT A PRELIMINARY INJUNCTION.

Plaintiff will suffer irreparable harm if injunctive relief is not granted.

It will be extremely difficult for her to take and pass the exam with her disability unless the LSAC grants her the accommodations she seeks.

She will lose the extensive time she has invested in preparation, will suffer a serious setback in her efforts to practice her chosen profession, and will face the prospect of taking and preparing for the exam another time, and will suffer the professional stigma of failure because of her medical disability.

Ms. LD will also be required to choose between a) putting off law school for a year, if she must skip the December sitting for the LSAT, or b) taking the examination without accommodations and, according to her experience and her medical evidence, failing to demonstrate her abilities on the examination. Ms. LD will suffer illegal discrimination on account of her disability, and be barred from entry into her professional school.

The issuance of injunctive relief is appropriate when a disabled person loses the chance to engage in a normal life activity. *Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 345 (D.Ariz.1992). See also *Chalk v. United States District Court Central District of California*, 840 F.2d 701, 710 (9th Cir.1988). Other courts have granted preliminary injunctive relief against the LSAC, *Agranoff v. LSAC*, attached, and other testing agencies. See cases cited in this brief *passim*.

The ADA specifically contemplates that temporary injunctive relief is appropriate to remedy acts of discrimination against persons with disabilities. It incorporates the provisions of 42 U.S.C. § 2000a-3, stating that, whenever any person has engaged, or there are reasonable grounds to believe a person is about to engage, in a prohibited act, a permanent or temporary injunction, or a restraining order is an appropriate remedy for the aggrieved party. 42 U.S.C. § 12188(a)(1).

A PRELIMINARY INJUNCTION WILL NOT HARM LSAC OR OTHERS.

LSAC and Kim Dempsey will not be harmed by an injunction. Their interests will be served, in fact, because a court has performed the expected role under the ADA to ensure that Defendants comply with the law.

Because LSAC has in place a system for accommodating testees, it is no burden on LSAC to include Plaintiff LD within those who receive the accommodated testing, especially because the type of testing is within the range which is usual for such exams.

THE PUBLIC INTEREST IS SERVED BY A PRELIMINARY INJUNCTION.

When the ADA, a statute which the Third Circuit has identified as one with "broad remedial ramifications" is enforced, there can be no doubt that such enforcement serves the public interest. Ms. LD is not an abstract "test case" but in her individual need for reasonable accommodation for the LSAT on December 4, 1999, she is someone whom Congress intended to protect when the ADA was enacted. It is in her interest, and also in the public's interest, that she be granted the accommodations in that examination which her treating doctor and her neuropsychologist have found necessary and appropriate.

Respectfully submitted,

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Footnotes

Wigmore, *Juristic Psychopoyemetrology--Or, How to Find Out Whether a Boy Has the Makings of a Lawyer*, 24 *Ill.L.Rev.* 454, 463--464 (1929), cited and discussed in *DeFunis v. Odegaard*, 416 U.S. 312, 327 (1974).

A selection process began eighty years ago, and it led to the LSAT in 1948:

But by the 1920's many law schools found that they could not admit all minimally qualified applicants, and some selection process began. The pressure to use some kind of admissions test mounted, and a number of schools instituted them. One early precursor to the modern day LSAT was the Ferson-Stoddard Law Aptitude examination. Wigmore conducted his own study of that test with 50 student volunteers, and concluded that it 'had no substantial practical value.' *Id.*, at 463. But his conclusions were not accepted, and the harried law schools still sought some kind of admissions test which would simplify the process of judging applicants, and in 1948 the LSAT was born. It has been with us ever since.

DeFunis v. Odegaard, 416 U.S. 312, 327-328 (1974) (noted omitted).

The Third Circuit describes the Defendant LSAC's broad functions:

The Law School Admissions Council, Inc. ("LSAC") is the successor organization to the Law School Admission Council and Law School Admission Services, Inc. The LSAC, as have its predecessors, administers the Law School Admissions Test ("LSAT"). The LSAC is not affiliated formally with either the ABA or the AALS and does not participate in the ABA accreditation process. Membership in the LSAC is open to any United States law school that (1) requires that "substantially all of its applicants for admission take the Law School Admission Test," and (2) is ABA-accredited or an AALS member. App. at 2552. * * *

In addition to administering the LSAT, the LSAC performs a number of other services. The Candidate Referral Service ("CRS") provides lists of names and addresses of people who have taken the LSAT. Use of the CRS is open to any school which has degree granting authority from a state, regardless of LSAC membership or ABA accreditation, and MSL has made use of this service. App. at 2410-12, 2511-12, 2427-29. The Law School Data Assembly Service ("LSDAS") provides a summary of a law school applicant's college record and LSAT score. LSDAS is also open to all schools and has been used by MSL. App. at 2410-12. The LSAC publishes a handbook, *The Official Guide to U.S. Law Schools*, with a two-page description of each United States LSAC member school, and two appendices with the names and addresses of Canadian LSAC members and unaccredited United States law schools, including MSL, known to the LSAC. The LSAC also sponsors regional recruiting forums for law school applicants and conferences of pre-law advisors which are only open to LSAC members.

Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1030-1031 (3rd Cir. 1997) (affirming summary judgment in antitrust case in which LSAC was a defendant).

Hopwood v. State of Tex., 78 F.3d 932, 935 n. 1 (1996).

The formulae were written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. As the LSAT was determined to be a better predictor of success in law school, the formulae for the class entering in 1992 accorded an approximate 60% weight to LSAT scores and 40% to GPA. The formula for students with a three-digit LSAT, see *infra* note 5, was calculated as: $LSAT + (10)(GPA) = TI$. For students with a two-digit LSAT, the formula was: $(1.25) LSAT + (10) GPA = TI$.

Cf., Justice Department Final Rule, which explains, "Section 36.309(b) sets forth specific requirements for examinations. Examinations covered by this section would include a bar exam or the Scholastic Aptitude Test prepared by the Educational Testing Service." See *Agranoff v. Law School Admission Council, Inc.*, ___ F.Supp. ___, p. 3 slip opinion (October 1, 1999, D. Mass.) (this decision is attached to this brief), in which an injunction was granted against the same Defendant, LSAC, with regard to the same examination, the LSAT.

The court in D'Amico explained,

There is a delicate balance that must be made in determining the reasonableness of a given request especially when it relates to examinations and testing procedures. The purpose of the ADA is to guarantee that those with disabilities are not disadvantaged. In this case, plaintiff claims that because of her visual impairment, she will be severely disadvantaged in taking the February exam unless she is provided with the accommodations recommended by her treating physician. In considering these issues, the Court recognizes that the ADA was not meant to give the disabled advantages over other applicants. The purpose of the ADA is to place those with disabilities on an equal footing and not to give them an unfair advantage.

D'Amico at 221.

28 C.F.R. § 36.104(1) states: "Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."

In Frederick L., Judge Adams explained:

Authorities appear to agree that learning disabilities constitute disorders in basic psychological processes that inhibit victims from understanding, assimilating, interpreting or retaining language and other concepts in a normal manner. Though learning disabled students often have the basic capability for normal intelligence, their disabilities ordinarily prevent them from benefiting from regular instruction and from achieving their true potential. As a result, learning disabled students frequently experience substantial frustration, and such reaction is manifested in emotional disturbances and socially disruptive conduct.

Price v. National Board of Law Examiners, 966 F.Supp. 419, 422-23 (S.D. W.Va. 1997)

ADHD is a psychiatric disorder. The Court finds that the Diagnostic & Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) accurately explains the symptoms and nature of ADHD. ADHD's essential feature is 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. Some hyperactive-impulsive or inattentive symptoms that cause impairment must have been present in the individual before he or she reached seven years of age. Impairment from the symptoms must be present in at least two settings. To be diagnosed with ADHD, an individual must clearly evidence interference with developmentally appropriate social, academic, or occupational functioning. The disturbance experienced by the individual cannot be better accounted for by other mental disorders, which should be ruled out by a differential diagnosis.

Because Price found that the particular plaintiff/s were not in fact disabled in learning, it is particularly significant that the court in that case did recognize that ADHD is a mental impairment for ADA purposes, and it does affect the major life activity of learning. *Id.* at 424.

Congress adopted the phrase "substantially limits" from the Federal Rehabilitation Act of 1973(FRA), 29 U.S.C. § 706(7)(B) (1985). The report of the Senate Committee on Labor and Human Resources, the congressional committee which developed the ADA's structure, notes that substantially limiting impairments cannot be "minor" or "trivial." S.REP. NO. 101-116 (1989), available in Westlaw, at A & P S. Rep. 101- 116, *23; see also H.R.REP. NO. 101-485, (II) (1990), available in Westlaw, at A & P H.R. Rep. 101-485, *52, U.S.Code Cong. & Admin.News 1990, at 303, 334. The impairments must restrict an individual's major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to most people." S.REP. NO. 101-116, available in Westlaw, at A & P S. Rep. 101-116, *23.

The phrase "major life activities" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104(2).

The Third Circuit has commented on the definition of "substantially limits" in *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 306-307 (3d Cir. 1999) (employment discrimination under the ADA):

The Supreme Court has said, "The ADA does not define 'substantially limits,' but 'substantially' suggests 'considerable' or 'specified to a large degree.'" *Sutton*, --- U.S. at ----, 119 S.Ct. at 2150. But while substantial limitations should be considerable, they also should not be equated with "utter inabilities." *Kirkingburg*, --- U.S. at --, 119 S.Ct. at 2168 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 641, ---- ____)

The Department of Justice, charged with promulgating regulations under Subchapter III of the ADA, defined "substantially limits" as follows: "when the individual's important life activities are restricted as to the condition, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. pt. 36, app. B; Accord, 29 C.F.R. 1630.2(j)(1)(ii).

28 C.F.R. § 36.104(1) states: "Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."

Price v. National Board of Law Examiners, 966 F.Supp. 419 (S.D. W.Va. 1997) (suit by three medical students for additional time on licensing exam; held that their ADHD was not a disability under the ADA because....) There was no negative effect of the disability of the three students in *Price*: "In this case, plaintiffs are able to learn as well as or better than the average person in the general population." *Id.* at 422. Their "record of superior performance is corroborated by standardized test scores measuring cognitive ability and performance." *Id.* at 427.

Gonzalez v. National Bd. of Medical Examiners, 60 F.Supp.2d 703 (E.D. Mich. 1999), a medical student suit against a testing service, held that plaintiff's alleged learning disorder did not constitute a substantial limitation on life activities of reading and learning, when measured against general population. The plaintiff *Gonzalez*, who had no history of accommodation before entering college, received a 4.3 grade point average (5.0 scale) in high school, with an A in all available advanced placement credits and did extremely well on the SAT examination without accommodation.

Argen v. N.Y. State Bd. of Law Examiners, 860 F.Supp. 84 (W.D. N.Y. 1994) (applicant failed to prove the he suffered a learning disability). The plaintiff in *Argen* had a B.S. in Science (geology and numerical geology), an M.S. in logic, and M.A. in ethics and environmental ethics, and had completed his coursework for a Ph.D. in philosophy. The expert on whom the *Argen* relied was "not a licensed psychologist and is not authorized to conduct psychological testing."

In any event, one could not reasonably define as "disabled" a person who is sufficiently educated and qualified to take the LSAT by measuring him or her against the "average" person in America who is not so educated. If one did that, then nobody could ever be "disabled" sufficiently to qualify for accommodations under the ADA. *Bartlett v. N.Y. State Bd. of Law Examiners*, 2 F.Supp.2d 388 (S.D. N.Y. 1997) (denying motion for reconsideration) (on appeal) concluded as much:

It is true that if nondisabled individuals were granted accommodations on the examination, the examination's integrity would be compromised. What the defendants and the *Price* court fail to recognize, however, is 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.

By 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. The ADA and its dictates are highly context-specific. See, e.g., 29 C.F.R. Part 1630 App., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Therefore, one can not look to whether an individual is disabled, without considering in what context the individual might be "substantially limited."

"Also, some individuals with learning disabilities may need auxiliary aids or services, such as readers, because of problems in perceiving and processing written information." U.S. Justice Dept., Title III of the Americans with Disabilities Act, Technical Assistance Manual, reproduced at <http://janweb.icdi.wvu.edu/kinder/pages/tam3.htm>.

Congress authorized the Attorney General (Department of Justice) to issue regulations regarding Part A of the Subchapter on Public Services, as well as Subchapter III, which addresses services operated by private entities. See 42 U.S.C. §§ 12134, 12186. Congress authorized the Equal Employment Opportunity Commission (EEOC) to issue regulations regarding Subchapter I, which addresses workplace discrimination. See id. § 12116. Congress authorized the Secretary of Transportation to issue regulations for the public transportation Subparts. See id. §§ 12149, 12164. Because "Congress explicitly delegated to [these] administrative agenc[ies] the authority to make specific policy determinations, [courts] must give the[ir] decision[s] controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324, 114 S.Ct. 835, 839, 127 L.Ed.2d 152 (1994) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984)).

As one court held,

It is true that the treating physician does not have the final word on determining what is or is not reasonable. But in a case where there is no medical evidence to the contrary, and the treating physician's opinion does not appear on its face to be outrageous, it is appropriate for the Court to give great weight to the physician's opinions as to the nature of the accommodations required for his patient.

D'Amico