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Legal Issues Webinar Series**


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- Closed captioning – click  icon (top of screen) or control-F8 and adjust your screen
- Questions - type and submit questions in the Chat Area Text box or press control-M and enter text in the Chat Area
- Please do not use emoticons or hand-raising features during this session




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**Post Secondary Education and
Licensing Under the ADA**

Presented by:
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Equip for Equality.

Valuable assistance by Staff Attorney Lauren Lowe
March 16, 2011



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Overview

- **General Requirements on ADA Reasonable Accommodations (Titles II and III, § 504)**
- **Cases on Post-Secondary Reasonable Accommodations**
 - ◊ At School
 - ◊ On Licensing Tests
- **Cases Involving Expulsion of College Students with Mental Illness**
- **Required Disclosure of Medical Treatment on Professional Licensing Applications**

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Continuing Legal Education Credit for Illinois Attorneys

- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org**
- **This slide will be repeated at the end.**

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Post Secondary Education and Licensing Under the ADA


Title II, Title III, and Rehabilitation Act Provisions

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Title II Anti-Discrimination Requirements

- Public colleges and universities are covered under Title II of the ADA.
 - ◊ Title II or III entities are also covered by the Rehabilitation Act if they receive federal funding. (ADA & Rehab Act – use same legal standards).
- Title II anti-discrimination provision:
 - ◊ "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

[42 U.S.C. § 12132; 29 U.S.C. § 794\(a\), et seq.](#)




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Additional Title II Requirements

- Title II entities have duties that Title III entities do not:
 - ◊ Appoint an ADA /504 Coordinator
 - ◊ Self-evaluation & transition plan
 - ◊ Provide notice of accessibility
 - ◊ Internal grievance procedure

[See 42 U.S.C. § 12132; 28 C.F.R. Part 35](#)



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Title II: 11th Amendment Sovereign Immunity

Bd. of Trustees of the Univ. of Alabama v. Garrett,
531 U.S. 356 (2001)


- Under *Garrett*, 11th Amendment sovereign immunity may apply to state licensing boards; it depends on the circuit.

[Hason v. Medical Board of California](#), 279 F.3d 1167, (9th Cir. 2002), rehearing *en banc* denied 294 F.3d 1166 (9th Cir. 2002)

- The state licensing board **is not immune** for money damages and subject to the ADA

[Brewer v. Wisconsin Board of Bar Examiners, et. al.](#), 2008 WL 687315 (7th Cir. 2008) (Not reported)

- The state's licensing board **is immune** for money damages under the 11th Amendment.



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Title III Anti-Discrimination Requirements

- No discrimination in “full and equal enjoyment” of goods, services, facilities, privileges..., or accommodations...”
 - No discrimination “through contractual, licensing, or other arrangements...”
 - Discrimination may include: Denial of participation, unequal or separate benefits, or improper eligibility criteria.
 - Discrimination also includes: Failing to make reasonable modifications or accommodations in policies, practices, or procedures.
 - Unless the entity can show that making the changes would cause an “undue burden” or would “fundamentally alter” the nature of its services.”

42 U.S.C. § 12182



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Title III Requirements: Licensing Examinations and Courses

- ADA standards apply to: (1) administrative methods; (2) eligibility requirements; (3) modification to policies, practices and procedures, and (4) auxiliary aids and services.
- Examinations or courses related to “applications, licensing, certification, or credentialing ... shall offer such examinations or courses in [an accessible] place and manner...”
 - Must “accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [impairment].”
 - “Auxiliary aids must be provided unless [they] would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden,” defined as significant difficulty or expense.”

42 U.S.C. § 12189; 28 C.F.R. §§ 36.204; 36.301; 36.302; 36.303; 36.307, 36.309



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Possible ADA Modifications or Accommodations




- Reasonable modifications may include:
 - Extra time for tests or course completion
 - Alternative sites or methods for testing or providing materials
 - Allowing use of assistive technology
 - Note-takers
 - Readers



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Possible ADA Modifications or Accommodations

- Reasonable modifications may include:
 - ❖ Fragrance or distraction-free environments
 - ❖ Barrier removal
 - ❖ Providing auxiliary aids & services absent undue burden:
 - Materials in alternative formats
 - ASL interpreters
 - Acquisition or modification of equipment or devices


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Reasonable Modification / Accommodation Issues

- Who gets reasonable modifications/accommodations?
 - ❖ Disability & Qualified Issues
- Providing Effective Reasonable Modifications / Accommodations Absent Fundamental Alteration
- Fundamental Alteration Issues
 - ❖ Modifying eligibility requirements
 - ❖ Fairness to others
- Personal devices and services are not required.
 - ❖ Wheelchairs, prescription eyeglasses, hearing aids, personal services such as assistance in eating, toileting, or dressing.



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Post Secondary Education: Disability Issues

- **Disability Query:** For "substantial limitation," do you compare students to an "average person" or an "average student"?
 - ❖ See, *Love v. Law Sch. Admissions Council, Inc. ("LSAC")*, 513 F.Supp.2d 206 (E.D. Pa. 2007)(finding student not disabled).
 - ❖ Cases on the definition of disability arising before the ADAAA are contained in the legal brief that will be distributed but this issue will not be addressed in the webinar.
 - ❖ The ADAAA and expected DOJ regulations should make it easier to establish a disability.
 - ❖ **Query:** Will the ADAAA result in more students getting accommodations?
Please Answer "Yes" or "No"



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**Post Secondary Education:
Qualified Issues**



- **Title II:** "A qualified individual with a disability" is "a disabled person who, with or without reasonable modifications, meets the essential eligibility requirements."
- **Title III:** No express "qualified" standard
- **Sec. 504:** "Otherwise qualified individual with a disability."
 - ◊ Courts generally apply the Title II definition in most situations.
 - ◊ *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006)(ADA and Rehab Act standards are "interchangeable.").

See 42 U.S.C. § § 12131(2), 12182; 29 U.S.C. § 794(a)

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**Post Secondary Education:
Qualified Issues**




Generally, educational institutions do not have to lower academic standards for a professional degree.

Millington v. Temple Univ., 261 Fed.Appx. 363 (3d Cir. 2008)

- A student who could not meet eligibility standards with accommodations is not "qualified" under Title II or the Rehab Act.

Mershon v. St. Louis Univ., 442 F.3d 1069 (8th Cir. 2006).

- "Basic qualifications come into play [in] post-secondary education... implicit in Title III's acknowledgment... that requested modifications need not be provided if they will fundamentally alter the nature of the program.

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**Cases:
Policy Modifications and Fundamental Alteration**

Mershon v. St. Louis Univ., 442 F.3d 1069 (8th Cir. 2006).

- Early registration may be a reasonable accommodation for a student who needs to receive his disability benefits check early to pay tuition.

Powell v. NBME., et.al., 364 F.3d 79 (2nd Cir. 2004).

- **Facts:** 2nd year medical student with a learning disability failed USMLE twice and was expelled after receiving accommodations.
- **Court:** Student is not entitled to be readmitted to UConn – policy requiring passing the USMLE to be promoted to 3rd year was lawful.
 - ◊ Changing policy would be fundamental alteration.
 - ◊ Accommodations were provided - including 2 years of tutoring.
- Extended time for USMLE from NBME was not required.
 - ◊ "It [would] alter the substance of the product ... scores would not be guaranteed to reflect each examinee's abilities accurately."

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Case: Policy Modifications and Fundamental Alteration

Fialka-Feldman v. Oakland Univ. Bd. of Trustees,
678 F. Supp. 2d 576 (E.D. Mich. 2010)

- **Facts:** Student had cognitive impairments and enrolled a non-degree program offered by the university for students with disabilities.
- School limited its on-campus housing to students in degree programs.
 - ◊ Therefore, the plaintiff was not allowed to live in a campus dormitory.
 - ◊ School argued fundamental alteration to let student live in a campus dorm.
 - ◊ Student sued under Title II, Rehab Act, & FHA seeking policy modification.



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Court Decision – *Oakland University*

- **Court:** Even though rule was disability neutral, disparate impact on students with disabilities.
- Denied student equal access to on-campus housing.
- No individualized inquiry.
- Rejected fundamental alteration argument – school argued with change the “culture” of on-campus housing and impede students seeking degrees.
- Student contributed to the academic purpose of the school through his active engagement with his professors and fellow students.
- School’s fundamental alteration defense was grounded in “prejudice, stereotypes, and unfounded fear.”



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Case: Effective Accommodations in School


Di Lella v. Univ. of D.C. Sch. of Law, 570 F.Supp.2d 1 (D.D.C. 2008)

- Student with a learning disability sought accommodations but felt that the ones provided were not effective.
 - ◊ Also alleged retaliation and other claims (defamation and Sec. 1983).
- School has discretion but must provide an “effective accommodation.” (cited ADA Title I employment regs.)
- School already provided:
 - ◊ Double time to complete examinations and a separate, quiet testing room
 - ◊ Extended time on written projects.
 - ◊ A notetaker (school later unilaterally changed this to transcriptions).
- Professor mentioned her learning disability in class.
 - ◊ Student also accused of plagiarism.
- As transcriptions were not timely, effectiveness is at issue.




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Case: Effective Accommodations in School




Hayden v. Redwoods Community College, No. 05-01785, 2007 WL 61886 (N.D. Cal. Jan. 8, 2007)


- Student who was deaf received interpreting services but complained about the quality of the interpreters and sporadic availability.
- College tried to find other live interpreters and explored the option of video interpreting and transcribed lectures.
 - ◊ Claimed undue administrative burden to let student select interpreters or include her in selection process
 - ◊ Also claimed undue financial hardship (7% of disabled services dept. budget)
 - ◊ Student felt only live interpreters would be effective and filed suit under Title II and Rehab Act.

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Court Decision – Redwoods Community College



- Factual dispute as to whether auxiliary aids offered were effective.
 - ◊ Although student rejected other aids without trying them, it was the college's burden to prove that these aids would have been effective.
 - ◊ Student had some lip-reading ability and may have benefitted from note-takers, but...
 - ◊ Fact-finder determines whether offered auxiliary aids met the ADA's "equally effective communication" standard.
- Factual dispute on undue administrative burden issue.
 - ◊ Because interpreting for students who are deaf requires special skills, having the student's input may be necessary to render the auxiliary aid effective.


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Court Decision – Redwoods Community College

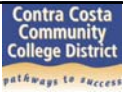


- Factual dispute on undue hardship
- Don't only look at department budget
- Requires "case-by-case analysis" weighing the following factors:
 - ◊ (1) "Overall size of the program;" - # employees, # and type of facilities, and size of budget;
 - ◊ (2) the type of the operation;
 - ◊ (3) the nature and cost of the accommodation needed
 - ◊ Overall financial resources of the parent corporation

Citing *Olmstead v. L.C.*, 527 U.S. 581 (1999); 28 C.F.R. § 36.104


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Case: Effective Accommodations in School



Hoffman v. Contra Costa College, 21 Fed. Appx. 748 (9th Cir. 2001)


- Student with MS was given accommodations of extra time on exams, a quiet space for taking exams, and use of formula sheets in math courses as MS impaired her ability to memorize math formulas.
 - However, college denied her request to use personal notes and other materials during closed-book exams.
- **Court of Appeals:** Affirmed holding that the college did not violate the ADA or Rehab Act.
- Undisputed evidence demonstrated that the college had provided reasonable accommodations to the plaintiff.
- An effective accommodation need not be the specific accommodation requested by a student.



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Case: Self-Evaluation Requirements



Huezo v. Los Angeles Community College, No. 04-9772, 2007 WL 7289347 (C.D. Cal. Feb. 27, 2007)

- Student who used a wheelchair sought summary judgment on school's compliance with Title II self-evaluation regulations:
 - "A public entity shall . . . evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [Title II] and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications."
 - Regulations require public entities with more than fifty employees to create public reports on the self-evaluation and modification process.
- Student alleged that the school lacked accessible parking, sidewalks, desks, classrooms, and gym facilities.




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Court Opinion – Los Angeles Community College


- **Court:** The law is unclear on whether there's a private right of action to enforce self-evaluation regulations.
 - Unnecessary to decide as the school's failure to comply with the self-evaluation regulations is just one of the factors relevant to whether the school's programs, services, and facilities were readily accessible.
- Held that the school did not comply with the self-evaluation regulations and that the school denied the plaintiff meaningful access to its educational services.
- The court emphasized that the school failed to take affirmative steps to ensure accessibility noting that the plaintiff had to make several complaints in order to gain access.




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Entrance Exam Accommodations in General




- Most accredited post-secondary education programs require applicants to submit scores from a standardized test as an objective measure of comparison to other applicants.
- Standardized tests may be biased against persons whose impairments substantially limit them in learning or test-taking skills.
- For accommodations, applicant must formally apply in advance from the private company that owns and/or administers the exam.
- The company assesses how the person's impairment relates to the skills and functions involved in the particular test.
 - Enlarged print or other alternative formats and accessible test-taking sites and seating are seen as moderate accommodations requests.
 - Requests for a separate test setting or extended time are seen as being more extensive accommodations.

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Entrance Exam Accommodations in General



- Private company then makes accommodation decision based on its own assessment.
 - In most cases, testing entities will require documentation of both the disability and the need for the requested accommodation.
- Cases have arisen involving:
 - Law School Admissions Test ("LSAT"), which is owned and administered by the Law School Admissions Council. ("LSAC"), and
 - Medical College Admission Test ("MCAT"), owned and administered by the Association of American Medical Colleges ("AAMC").


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Entrance Exam Accommodations – Flagging Accommodations



- May be ADA implications when test-takers with accommodations have their test "flagged" to alert admissions committees.
 - Whether this flagging violates the ADA is not settled among courts.
 - See, e.g., *Doe v. Nat'l Bd. Med. Exam'rs*, No. 05-2254, 2006 WL 3697230 (3d Cir. Dec. 11, 2006) (finding that plaintiff did not have standing to raise the flagging issue as he passed the examination).
- Recently, the College Board, the American College Testing Program ("ACT") the Scholastic Aptitude Test ("SAT"), and the Graduate Management Admission Test ("GMAT") have discontinued flagging.
 - This may signal more widespread discontinuance of flagging.

The legal brief lists several law review articles on this topic, See e.g., Jennifer Jolly-Ryan, *The Fable of the Tamed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 Cumb. L. Rev. 33 (2007).

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Cases: Entrance Exam Accommodations

Rothberg v. LSAC, 300 F.Supp.2d 1093 (D. Colo. 2004)

- Student was denied extended time on first LSAT attempt.
 - ◊ Was diagnosed with a learning disability at an early age and received special education services through high school
 - ◊ Received extended time on all in-class tests and written assignments.
 - ◊ Had been granted extra time to take the ACT.
 - ◊ In college, was granted extended test time and note-taking services.
- LSAC felt documentation was incomplete and out of date.



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Rothberg – LSAT Accommodations

- Scored low-average range on the first LSAT
 - ◊ Was reevaluated and submitted the new results in her second accommodation application to LSAC.
 - ◊ Diagnosed with Developmental Expressive Writing Disorder and Developmental Arithmetic Disorder.
- Despite this, LSAC again denied the request, triggering a lawsuit.
- **Court:** Documentation was sufficient.
- Student had a disability and LSAC violated the ADA by not providing extra time.



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The NBME Examination – In General




- The National Board of Medical Examiners (“NBME”) is a private non-profit corporation that develops and administers the United States Medical Licensing Examination (“USMLE”).
- Measures the student’s mastery of basic medical sciences and the ability to apply this knowledge.
- Exam is administered in three steps.
 - ◊ Several cases involve the denial of accommodations for the first step, which comes after the second year of medical school.
- A second-year medical student usually cannot move on to the third year unless he or she passes USMLE Step 1.
 - ◊ In other programs, the student’s score is one factor in determining the student’s placement in residency and other specialty programs.
 - ◊ Additional time for persons with reading and processing disabilities could mean the difference between passing and failing the test.




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Case: Licensing Exam Accommodations



Rush v. NBME, 268 F.Supp.2d 673 (N.D. TX 2003)


- A second-year medical student with reading and visual processing skills impairments was denied extended time on USMLE Step 1.
- **Court:** Student was substantially limited in his ability to read and process information compared to most people.
- Student would suffer an irreparable injury if the requested injunction for additional time was denied.

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Cases: Licensing Exam Accommodations



Jenkins v. Nat'l Bd. of Med. Exam'rs, 2009 WL 331638 (6th Cir. Feb. 11, 2009)


- NBME applicant sought additional time.
 - Jenkins was diagnosed with a reading disability at a young age, had received accommodations at each stage of his education, and had received extra time to take the ACT and MCAT examinations.
- **Court:** Applied ADAAA retroactively find the student had a disability.
 - ADAAA should be applied retroactively where the only remedy sought is prospective injunctive relief, *i.e.*, a request for future accommodations rather than money damages for past acts.
- NBME must offer its examination "in a place and manner accessible to persons with disabilities." 42 U.S.C. § § 12189.
 - "This nuanced determination is not governed by previous, voluntarily provided accommodations that Jenkins has received, nor [by the] previous narrow definition of disability."

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DOJ Settlement: NBME Licensing Exam Accommodations



- NBME accommodation process should become simplified after a recent settlement announced by DOJ on Feb. 22, 2011.
- Case involved the extensive documentation required by the NBME from applicants seeking testing accommodations. (Title III).
- Under the settlement, a Yale Medical School student with dyslexia will receive double testing time and a separate testing area.
- In addition, the NBME will be required to:
 - Only request documentation about:
 - (a) the existence of a physical or mental impairment;
 - (b) whether the applicant's impairment substantially limits one or more major life activities within the meaning of the ADA; and
 - (c) whether and how the impairment limits the applicant's ability to take the USMLE under standard conditions.

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**DOJ Settlement:
NBME Licensing Exam
Accommodations**




The NBME will also be required to:

- Carefully consider the recommendations of qualified professionals who have personally observed the applicant in a clinical setting and recommended accommodations; and
- Carefully consider all evidence indicating whether an individual's ability to read is substantially limited within the meaning of the ADA.


The settlement can be found at: <http://www.ada.gov/nbme.htm>

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**DOJ Settlement:
NBME Licensing Exam
Accommodations**



- **Note:** Law students face a different set of issues as bar exams are administered by the states.
- As with other tests, extended time requests are the most common issue in this area of litigation.
- Requests for changes to the scoring of the exam have been denied by courts as unreasonable.
- **Query:** Do students who get extra time or other accommodations due to disability have an unfair advantage?
Please Answer "Yes" or "No"


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**Case: Bar Licensing Exam
Accommodations**




Enyart v. National Conference of Bar Examiners, No. 10-15286, 2011 WL 9735 (9th Cir. Jan. 4, 2011)

- State bar association had agreed to let law school graduate who was legally blind use a laptop with assistive technology, (JAWS and ZoomText), but the national bar organization refused.
 - Graduate had been granted some testing accommodations, including extra time, hourly breaks, and a private room.
- **Appellate Court:** Affirmed granting an injunction allowing use of AT on the laptop.
- Granted accommodations did not make the exam accessible to the plaintiff and did not provide "effective communication."

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Court Holding in *Enyart*



- **Title III regulation:** Examination must be "administered so as to *best ensure* that ... the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure."
- **Court:** Applying this "best ensure" standard, the accommodations offered to the plaintiff would not make the exam accessible because she would still suffer eye fatigue, disorientation, and nausea.
- Rejected NCBE's argument that the plaintiff's success on other standardized tests without the assistive technology demonstrated that the bar exam was accessible.
- The court noted that the plaintiff's disability was progressive and that testing accommodations should advance as technology progresses.

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Post Secondary Education and Licensing Under the ADA

School Discipline and Expulsion Issues


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Issues Surrounding Discipline and Expulsion from College

- Due to concerns over student suicides and violence, some schools have implemented policies regarding students with self-injurious behaviors or thoughts.
 - ✦ Codes of Conduct may prohibit violence or dangerous behavior including harm to self.
 - ✦ Requiring a leave of absence
 - ✦ Inserting policies in residential halls or housing contracts prohibiting acts of violence including self-injurious behaviors.
- At times, students who exhibited no inappropriate conduct have been expelled for disclosing a mental illness.
- While no one wants students to be injured, it seems that myths, stereotypes, and fears regarding people with mental illness play a role in these policies and their enforcement.


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School Discipline & Expulsion – DOE / OCR




Students challenging these policies can seek relief in Federal Court or with the Department of Education's Office of Civil Rights.


- There are currently no court rulings on cases challenging these policies as most of these cases have settled.
- The Department of Education's Office of Civil Rights has ruled in a case that eviction or imposition of a mandatory leave of absence for self-injurious thoughts or behavior violates Section 504.
- See OCR Complaint #15-04-2042, regarding a Bluffton University student who cut herself and took an overdose of pills in an apparent suicide attempt available at: <http://ilru.net/dbtac/topical/504/ocr/bluffton>

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Issues Surrounding Expulsion from College




- Discipline is often taken while a student is still in the hospital after engaging in self-injurious behavior.
- These policies may have exactly the wrong effect:
 - ◊ Discourage students from getting help due to fear of negative consequences
 - ◊ Isolate the students from friends and support when support is most needed, and
 - ◊ Sends the message that students have done something wrong.

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Direct Threat Framework for Assessing Risk of Harm

- The school's **individualized assessment** of a "direct threat" must consider:
 - ◊ The **duration** of the risk
 - ◊ The **nature and severity** of the potential harm
 - ◊ The **likelihood** that the potential harm will occur
 - ◊ The **imminence** of the potential harm
 See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).
- Schools must also show that no reasonable accommodation would help alleviate or eliminate the "direct threat."
- **Note:** Direct threat to self is not specifically mentioned in Title II or III regulations – only threat to others.

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Equip for Equality (EFE) Expulsion Case – Millikin University



- Freshman on a music scholarship at Millikin University in Decatur, IL with Obsessive Compulsive Disorder (OCD) sought help from an Associate Dean following a “panic attack” arising from his disability.
- As a result, he was “administratively withdrawn” by the school with just seven weeks remaining in the semester.
- University refused to reinstate him and an ADA lawsuit was filed.
- EFE sought and obtained a temporary restraining order for the student permitting him to return to school.



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EFE Expulsion Case – Millikin University

- After a hearing began regarding permanent reinstatement, the case was settled.
- University reinstated the student.
- Millikin agreed to expunge all references of the incident from the student’s school records.
- Depositions revealed that Millikin administrators showed a lack of awareness regarding the rights of students under the ADA.
 - Millikin’s actions were based on speculation and irrational fears about people with mental illness.



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Expulsion Case – George Washington University

Nott v. George Washington University, Civil Case No. 05-8503, Superior Court of D.C. (2005)


- The student was a close friend of another student who took his own life in April 2004.
- Next fall, the student went to the University Counseling Center for treatment for insomnia and depression.
- Student was not suicidal and never threatened suicide but did disclose general suicidal thoughts.
- When his roommate was out of town, the student checked himself into GW Hospital one morning for mental health treatment.



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**Expulsion Case –
George Washington University**


- Within hours, he received a letter stating that he would not be permitted back into his dorm under the residential hall psychological distress policy.
- The next day, while still in the hospital, he received a letter charging him with Code of Conduct violations and was immediately suspended, barred from the university, and threatened with arrest if he returned to campus.
- The student was told that if he withdrew from school voluntarily, the suspension would not appear on his record.
- If he fought the charges and lost, he could face suspension or expulsion with the charges on his record.


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**Expulsion Case –
George Washington University**

- Student withdrew, transferred to another school, and filed suit under the ADA seeking damages, injunctive relief, and attorneys fees claiming:
 - ◊ Schools actions violated the ADA, Rehab Act, FHA, and state anti-discrimination, tort, and confidentiality laws.
 - ◊ Information was released to administrators without permission
 - ◊ Intentional infliction of emotional distress.
- This case was later settled under confidential terms.

See Bazelon press release at: <http://www.bazelon.org/In-Court/Closed-Cases/Nott-v.-George-Washington-University.aspx>.



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**Expulsion Case –
Hunter College**



- Student admitted herself to a medical center after taking a large number of Tylenol pills and then calling 911.
- When she returned to the dorm, the locks were changed.
- She was allowed to remove her belongings only in the presence of a security guard.
- She was not allowed to return even after her doctors determined that she was not a danger to herself or others.
- Suit filed under the ADA, Rehabilitation Act, and Fair Housing Act.
- College (CUNY) settled by paying damages to the student, paying attorneys' fees, and agreeing to review and modify its "suicide policy" to require individualized assessments.

See Bazelon press release at: <http://www.bazelon.org/In-Court/Closed-Cases/Jane-Doe-v.-Hunter-College.aspx>.


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Bazon Model Policy

FOCUS ON THE
**BAZELON
 CENTERS**
**MENTAL
 HEALTH
 LAW** protect and advance
 the rights of adults
 and children who
 have mental
 disabilities

Bazon has a model policy that contains the following suggestions:

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

• See Bazon Model Policy available at:
<http://www.bazon.org/LinkClick.aspx?fileticket=2sA8atOxLT0%3D&tabid=225>




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Additional Policy Suggestions


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

Note: A recent article found that 25% of students who visit campus health care experience depression and 10% have suicidal thoughts.
Depression and Suicide Ideation Among Students Accessing Campus Health Care, American Journal of Orthopsychiatry, Volume 81, Issue 1, pages 101-107, January 2011




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**Post Secondary Education and Licensing
 Under the ADA**


**Professional Licensing -
 Disclosure and Discipline
 Issues**




A member of the ADA National Network




Issues Surrounding Professional Licensing



- Many Professional Organizations require information on medical treatment on licensing applications.
 - Most cases address mental health questions.
- Common for social workers, attorneys, doctors & other medical professionals, financial professionals, rehabilitation counselors, and other professions.
- Often further investigation or discipline are imposed based solely on a diagnosis or treatment history rather than being based on conduct.
- DOJ asserts, and courts agree, that State Licensing Boards are covered by Title II of the ADA (& Rehab Act).



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Issues with Mental Health Questions and Policies




- Perpetuates myths & stereotypes about mental illness
- Discourages disclosure and treatment
- Inquiries & discipline are based on treatment, not conduct
- Involves lengthy time periods and broad inquiries about treatment.
- May not catch potentially incompetent professionals.
- Under-inclusive (People may not seek treatment)
- Over-inclusive (1/2 of people treated have no mental illness)
- Terms may not be defined, e.g., performing essential job functions.


See "ADA Is Narrowing Mental Health Inquiries..." *The Georgetown Journal of Legal Ethics*, Fall 2000 by Alkhan Mariam.


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Professional Organization Recommendations



- **American Psychiatric Association (APA):** "Psychiatric history is not an accurate predictor of fitness except in the context of understanding current functioning."
- **American Bar Association (ABA):** Recommends limiting job-related questions to information on specific behaviors, conducts, or conditions that significantly impair handling attorney responsibilities.


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Sample Questions on Applications for Professional Licensing

1. "Have you ever **consulted** a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition...?"
2. "Have you ever been **diagnosed** as having a nervous, mental or emotional condition, drug or alcohol problem?"
3. "Have you ever been **prescribed** psychotropic medication?"
4. "Do you currently . . . have a mental health condition . . . which in any way impairs or limits, or if **untreated could impair or limit, your ability to practice law** in a competent and professional manner?"

Note: The first three questions above may violate the ADA and were the basis for denying a motion to dismiss in *Ellen S. v. Florida Board of Bar Examiners*, 859 F. Supp. 1489, 1491 (S.D. Fla. 1994).

The fourth question was found to violate the ADA in *Clark v. VA Bd. of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995).



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Sample Questions on Applications for Professional Licensing



4. "Have you, within the last ten (10) years, abused or been addicted to, or **treated** for the use or abuse of alcohol or any other substance...?"
5. "Within the last ten (10) years, have you been **diagnosed** with, or have you been **treated** for, bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"
6. "Have you, since attaining the age of eighteen or within the last ten (10) years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"

Note: Questions 4-6 were upheld as proper in *Applicants v. Tex. State Bd. of Law Exam'rs*, 1994 WL 776693 (W.D. Tex. 1994).



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Issues Surrounding Professional Licensing

- At least eight states, (CT, FL, ME, MN, NY, PN, RI, TX), have altered their mental health questions on bar applications in light of potential or actual ADA litigation.
- Other licensing bodies assert that the questions are needed to safeguard the public from professionals with mental impairments who may not be screened out solely by conduct-based inquiries.
- **Query:** Do These Questions Fulfill That Mission? Please Answer "Yes" or "No"




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Professional Organization Questions – Medical Setting

- In Minnesota, mental health inquiries have been abandoned by a medical licensing board in favor of conduct-based inquiries.
 - ◊ See *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559 (Minn. Ct. App. 1994) (upholding an investigation into a physician's license based on claims of improper conduct including "disorganized rambling discharge summaries [and] inconsistency with patient care...").
- However, most state medical licensing boards are still vigilant about monitoring prospective and active doctors' mental health status.
- Medical doctors are subject to re-licensing and work under close observation before licensing.
 - ◊ Still, consumer groups often complain about the medical profession's failure of self-regulation.

"ADA Is Narrowing Mental Health Inquiries...", *The Georgetown Journal of Legal Ethics*, Fall 2000 by Alkhan Mariani.




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Demonstrating the Problems: *Clark v. Virginia Board of Bar Examiners*

Clark v. VA Bd. of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1995)


- In Virginia, of 10,000 bar applicants screened over five years, only 47 admitted mental health treatment.
 - ◊ None of the 47 applicants who disclosed were barred.
- This figure of less than 1% is many times lower than the national average of people with mental illness.
- **Court:** Required the Board to show the questions were **necessary** for a complete evaluation of applicant's fitness to practice law.
 - ◊ Past behavior is the best indicator
 - ◊ No correlation between treatment and fitness
 - ◊ Inquiry is ineffective in unfit individuals
 - ◊ Inquiries deter individuals from seeking treatment




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Court Decision: *Clark v. Virginia Board of Bar Examiners*



- **Court:** Bar examiners did not show inquiries were necessary.
- No evidence of a correlation between mental health treatment and fitness to practice (or function in the workplace).
- Questions were overbroad and were not proven effective for weeding out unfit individuals.
- Also noted that there was "considerable evidence of the stigmatizing and inhibiting effect of broad mental health questions," and that the questions would deter individuals from seeking treatment.
- The court admonished the bar examiners' failure to do an "individualized assessment" and ordered the questions to "be rewritten to achieve the Board's objective of protecting the public."



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Other Court Approaches – Rhode Island



In re Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333 (R.I. 1996)

- Questions on bar application sought information about diagnosis or treatment for "mental disorders" that affected the ability to practice law
- **Court:** Compared licensing to the employment provisions of Title I, concluding that "the bar committee operates as the equivalent of an employer when it screens applicants."
- Mental health inquiries must determine an attorney is competent while "protecting the individual applicant from unnecessary intrusions into his zone of privacy."
- "The burden is on those who propose to ask the questions to show an actual relationship" between the questions asked and ... traits that could render an attorney "unqualified" or a "direct threat" to his or her clients. **(Necessary and job-related).**



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Rhode Island Court's Holding



- **Court:** Relied upon a special master's report that found:
- "Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace..."
- "There is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action ..."
- "Most disciplinary problems and grievance issues arise after an attorney has been in practice for a number of years, and in nearly all such cases no indicators of future difficulty manifested themselves at the time of original licensure..."
- "Almost half of all Americans who seek mental-health treatment do not have a diagnosable mental health problem."



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Rhode Island Court's Holding




- Court noted that the initial bar application screening is usually performed by lay individuals with no mental-health training.
- Further, "even mental-health practitioners would experience difficulty in predicting with accuracy the future threat posed during a lifetime of practicing law."
- **Holding:** Questions unduly intrusive and ordered that the wording of the application be changed to include the word "currently":
 - ◊ "Are you currently using narcotics, drugs, or intoxicating liquors to such an extent that your ability to practice law would be impaired?" (The court also required a more detailed definition of the phrase "ability to practice law");
 - ◊ "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?"




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Additional Cases




- See also, *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994) (Holding that the board was covered by Title II and that the "inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability.").
- **Note:** DOJ filed an *Amicus Curiae* Brief in support of *Ellen S.*, which can be found at: < <http://www.ada.gov/briefs/ellensbr.doc>>.
- **Note:** Equip for Equality handled a case where a social worker licensing applicant disclosed her bi-polar diagnosis even though it was under control. As a result, she was placed on probation and her bi-polar condition was posted on the state's website (until EFE intervened).

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But See, *Applicants v. Texas*

But See, Applicants v. Tex. State Bd. of Law Exam'rs, 1994 WL 776693 (W.D. Tex. 1994)


- Upheld bar application questions asking about treatment for "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder."
- Court broadly stated that these conditions are "serious mental illnesses that may affect a person's ability to practice law."
- Admitted a diagnosis "will not necessarily predict ... future behavior."
 - ◊ Also stated that a current absence of symptoms "does not mean that the person will not experience another episode in the future or that the person is currently fit to practice law."
- No supporting medical authority was cited by the court, which nonetheless felt that information about "severe mental illness [was] necessary" for the bar examiners to assess applicants.
- Other courts have not followed this stereotypical approach.

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Practical Tips for Licensing Boards

For Licensing Boards:

- A conduct-based approach is preferable to a diagnosis or treatment-based approach.
- Time-limited inquiries are preferred.
- Broad disclosure requirements do not prevent professional misconduct, are unduly intrusive, and may violate the ADA.
- For these reasons, some organizations, including the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), have removed questions requiring disclosure of medical treatment or conditions from the bar applications, instead using a conduct-based approach.

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Practical Tips for Test Applicants

For applicants:

- Do not provide false information (although *Clark* upheld the plaintiff's refusal to answer invasive questions).
- If the question is clear, it should be answered directly.
- However, if a question vaguely asks about medical conditions that interfere with the ability to perform job functions, an applicant need not list any health conditions if the condition will not interfere with the applicant's ability to do the job.
- It is imperative to be truthful when answering; providing false information may be grounds for disciplinary action.



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General ADA Resources



- **National Network of ADA Centers:** www.adata.org; 800/949-4232(V/TTY)
- **Department of Justice:** www.ada.gov; 800/514-0301 (V); 800/514-0383 (TTY)
- **Department of Education, OCR:** www.ed.gov; 800-421-3481 (V); 877-521-2172 (TDD); Email: OCR@ed.gov
- **Equip For Equality:** www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)
- **DBTAC: Great Lakes ADA Center:** www.adagreatlakes.org; (312) 413-1407 (V/TTY) or (800) 949-4232 (V/TTY)



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- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**
barryt@equipforequality.org



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The End
Post Secondary Education & Licensing Under the ADA

Presented by:
Barry Taylor, Legal Advocacy Director,
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Equip for Equality
March 16, 2011

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