

NEW REGULATIONS UNDER TITLES II AND III OF THE ADA: WHAT HAS CHANGED RELATIVE TO THE ADMINISTRATION OF LICENSING EXAMINATIONS?

by Robert A. Burgoyne and Caroline M. Mew

Title II of the Americans with Disabilities Act (the ADA) prohibits discrimination against disabled individuals in the services, programs, and activities of state and local governments. This general prohibition extends to the administration of examinations by state governmental entities. Title III of the ADA prohibits discrimination by “public accommodations,” such as hotels, restaurants, museums, and auditoriums, but it also includes a section that applies expressly to entities that administer examinations.

On September 15, 2010, the United States Department of Justice (DOJ) released new regulations under Titles II and III of the ADA (to be effective as of March 15, 2011).¹ The vast majority of the new regulations are not relevant to the testing-related activities of state bar examiners. A handful of regulatory changes are relevant, however, as is the DOJ’s supplemental discussion of testing accommodations in a document that accompanied the new regulations titled “Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities.”²

FIRST PRINCIPLES: THE LANGUAGE OF THE ADA

The only provision in Titles II and III of the ADA that expressly addresses the administration of examinations is Section 12189:

Any person that offers examinations or courses related to applications, licensing, certifications, or credentialing for secondary or postsecondary 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.³

Section 12189 is found in Title III of the ADA.

THE DOJ’S NOTICE OF PROPOSED RULEMAKING

In June 2008, the DOJ issued a Notice of Proposed Rulemaking (NPRM) to amend its ADA regulations.⁴ The proposed amendments included a very minor change to 28 C.F.R. § 36.309, which is the section of the regulations that implements Section 12189 of the ADA. The proposed change imposed a “reasonable-

ness” requirement on testing entities when asking examinees to provide documentation in support of accommodation requests.⁵ The new regulatory language mirrored language that was already found in the DOJ’s ADA *Title III Technical Assistance Manual*,⁶ and most testing entities had reasonable documentation requirements in place already. Therefore, the proposed amendment to Section 36.309 was not controversial.

The DOJ’s ADA rulemaking, along with other open rulemakings, was placed on hold by the Obama administration when it took office in January 2009, but final regulations were published in the Federal Register on September 15, 2010.⁷ The new regulations include changes to 28 C.F.R. § 36.309, as well as changes to other provisions that may be relevant in the context of requests for specific auxiliary aids or accommodations.⁸ The effective date of the new regulations is March 15, 2011.

The discussion that follows identifies the new regulatory language that is likely to be of interest to organizations that administer examinations. It also includes related discussion from the DOJ’s Appendix A, the “Guidance” document that was published with the amendments to the actual regulations.

SUGGESTED REVISION TO THE DOJ’S TITLE II REGULATIONS TO EXPRESSLY ADDRESS TESTING

Before discussing the DOJ’s new Title III ADA regulations, it is worth mentioning an amendment that was suggested for the Title II regulations. Title II applies to services provided by state and local governmental entities. In response to its 2008 NPRM, the DOJ “received one comment requesting that [the DOJ] specifically include language regarding exami-

nations and courses in the title II regulation.”⁹ The DOJ declined to do so, stating as follows:

Because section 309 of the ADA [(42 U.S.C. § 12189)] reaches “[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or [postsecondary] education, professional, or trade purposes,” public entities also are covered by this section of the ADA. . . . [T]he Department acknowledges that the title III regulation, because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations.¹⁰

The DOJ stated above that the Title III regulations dealing with examinations can be consulted as a “guide for determining what constitutes discriminatory conduct by a public entity in testing situations,” because public entities are covered by the testing provision in Title III of the ADA, 42 U.S.C. § 12189. However, Title III is captioned “Public Accommodations and Services Operated by Private Entities,” and 42 U.S.C. § 12189 has generally been understood as being directly applicable only to *private* testing entities. As the DOJ itself explained when it first promulgated regulations implementing Section 12189, Section 12189 “is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 of the Rehabilitation Act [because they do not receive federal funds] or title II of the ADA [because they are private entities rather than state or local governmental entities].”¹¹

Consistent with that background, the DOJ’s regulations state that 28 C.F.R. § 36.309 applies to any “[p]rivate entity that offers examinations or

courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.”¹² And the DOJ’s Title II Technical Assistance Manual states that “[p]ublic entities are not subject to title III of the ADA, which covers only private entities. Conversely, private entities are not subject to title II.”¹³ In all events, courts are likely to look to 28 C.F.R. § 36.309 in all non-employment cases involving testing accommodation requests, regardless of whether the testing entity is a public or private entity.

THE DOJ’S TESTING-RELATED REVISIONS TO ITS TITLE III REGULATIONS

Set forth below are various provisions from the DOJ’s Title III regulations that are relevant to testing. In some instances, language is also quoted from Appendix A, the “Guidance” document that accompanied the DOJ’s amendments to its regulations.

Revisions to 28 C.F.R. § 36.104 (“Definitions”)

The DOJ added two new definitions to the Title III regulations, for terms found in a later section of the regulations that discusses the types of auxiliary aids and services that may be needed for certain types of disabilities (the new language is shown in italics):

§ 36.104 Definitions.

...

Qualified interpreter means an interpreter who, *via a video remote interpreting (VRI) service or an on-site appearance*, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. *Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.*

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

[Appendix A Guidance:]

[T]he Department emphasizes that a reader, in order to be “qualified,” must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a bar examination, that reader, in order to be qualified, must know the proper pronunciation of all legal terminology used and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading.¹⁴

Revisions to 28 C.F.R. § 36.303 (“Auxiliary Aids and Services”)

The DOJ added new examples to its list of auxiliary aids and services that may be needed for individuals with certain types of disabilities, as well as a discussion of what the DOJ means when it says that auxiliary aids and services should ensure “effective communication” (the new language is shown in italics):

§ 36.303 Auxiliary aids and services.

...

(b) Examples: The term “auxiliary aids and services” includes –

...

- (1) Qualified interpreters . . . or other effective methods of making aurally delivered information available to individuals *who are deaf or hard of hearing.*
- (2) Qualified readers; taped texts; audio recordings; Brailled materials *and displays*; *screen reader*

software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

...

(c) Effective communication.

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities

...

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

[Appendix A Guidance:]

Section 36.303 in the final rule codifies the Department's long[-]standing policies in this area, and includes provisions based on technological advances and breakthroughs in the area of auxiliary aids and services that have occurred since the 1991 title III regulation was published.

...

As the Department noted in the preamble to the NPRM, the list of auxiliary aids in § 36.303(b) is merely illustrative. The Department does not intend that every public accommodation covered by title III must have access to every device or all new technology at all times, as long as the communication provided is effective.

...

Many commenters urged the Department to amend this provision to require public accommodations to give primary consideration to the expressed choice of an individual with a disability. However, as the Department explained when it initially promulgated the 1991 title III regulation, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability.

...

[T]he Department understands that there are many new devices and advances in technology that should be included in the definition of available auxiliary aids and is including many of the telecommunications devices and some new technology. While much of this technology is not expensive and should be available to most title III entities, there may be legitimate reasons why in a particular situation some of these new and developing auxiliary aids may not be available, may be prohibitively costly (thus supporting an undue burden defense), or may otherwise not be suitable given other circumstances related to the particular terrain, situation, or functionality in specialized areas where security, among other things, may be a factor limiting the appropriateness of the use of a particular technology or device.¹⁵

Revisions to 28 C.F.R. § 36.309 (“Examinations and Courses”)

The only amendment to 28 C.F.R. § 36.309 that was included in the DOJ’s June 2008 NPRM was the amendment requiring testing entities to have “reasonable” documentation requirements. The final rule included two additional requirements (the new language is shown in italics):

§ 36.309 Examinations and courses.

...

(1) Any private entity offering an examination covered by this section must assure that –

...

(iv) Any request for documentation, if such documentation is required, is reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.

(v) When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).

*(vi) The entity responds in a timely manner to requests for modifications, accommodations, or aids to ensure equal opportunity for individuals with disabilities.*¹⁶

THE DOJ’S APPENDIX A DISCUSSION REGARDING ACCOMMODATIONS FOR EXAMINATIONS

The DOJ’s amendment to 28 C.F.R. § 36.309 added only three sentences and imposed relatively straightforward requirements: (1) have reasonable documentation requirements, (2) give considerable weight to past accommodations, and (3) respond to requests in a timely manner. For many if not most testing entities, these requirements will not result in any changes in the way they already handle accommodation requests.

However, the DOJ supplemented its limited changes to the regulation with almost three pages of single-spaced text relating to accommodations in the testing context in its “Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities.” Appendix A is not part of the actual regulations, but it will still be referenced by some examinees when seeking accommodations, and it indicates the perspective the DOJ will have when investigating complaints.

Appendix A includes the following statements by the DOJ relating to requests for accommodations on examinations:

[S]ignificant problems remain for individuals with disabilities who seek necessary modifications to examinations and courses. These problems include detailed questions about the nature of documentation materials submitted by candidates, testing entities’ questioning of documentation provided by qualified professionals with expertise in the particular disability at issue, and lack of timeliness in determining whether

to provide requested accommodations or modifications.

...

It remains the Department's view that, when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation, or aid requested, they shall generally accept such documentation and provide the accommodation.

...

[I]f an applicant has been granted accommodations post-high school by a standardized testing agency, there is no need for reassessment for a subsequent examination.

...

Commenters also sought clarification of the term individualized assessment. The Department's intention in using this term is to ensure that documentation provided on behalf of a testing candidate is not only provided by a qualified professional, but also reflects that the qualified professional has individually and personally evaluated the candidate as opposed to simply considering scores from a review of documents. This is particularly important in the learning disabilities context, where proper diagnosis requires face-to-face evaluation. Reports from experts who have personal familiarity with the candidate should take precedence over those from, for example, reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment.

...

The Department's view is that . . . [w]hen an applicant's documentation demonstrates a consistent history of a diagnosis of a disability, and is prepared by a qualified professional who has made an individualized evaluation of the applicant, there is little need for further inquiry into the nature of the disability and generally testing entities should grant the requested modification, accommodation, or aid.

...

The new regulatory language clarifies that an applicant's past use of a particular modification, accommodation, or auxiliary aid or service in a similar testing setting or pursuant to an IEP or Section 504 Plan provides critical information in determining those examination modifications that would be applicable in a given circumstance. The addition of this language and the appropriate weight to be accorded it is seen as important by the Department because the types of accommodations provided in both these circumstances are typically granted in the context of individual consideration of a student's needs by a team of qualified and experienced professionals. Even though these accommodations decisions form a commonsense and logical basis for testing entities to rely upon, they are often discounted and ignored by testing entities.

For example, considerable weight is warranted when a student with a Section 504 Plan in place since middle school that includes the accommodations of extra time and a quiet room for testing is seeking these same accommodations from a testing entity covered by section [12189] of the Act. In this example, a testing entity receiving such documentation should clearly grant the request for accommodations. A history of test accommodations in secondary

schools or in postsecondary institutions, particularly when determined through the rigors of a process required and detailed by Federal law, is as useful and instructive for determining whether a specific accommodation is required as accommodations provided in standardized testing situations.

It is important to note, however, that the inclusion of this [requirement to give considerable] weight does not suggest that individuals without IEPs or Section 504 Plans are not also entitled to receive testing accommodations.

...

[M]any students with learning disabilities have made use of informal, but effective[,] accommodations. For example, such students often receive undocumented accommodations such as time to complete tests after school or at lunchtime, or being graded on content and not form or spelling of written work. Finally, testing entities shall also consider that because private schools are not subject to the [Individuals with Disabilities Education Act (IDEA)], students at private schools may have a history of receiving accommodations in similar settings that are not pursuant to an IEP or Section 504 Plan.

...

Testing entities are to ensure that their established process for securing testing accommodations provides applicants with a reasonable opportunity to supplement the testing entities' requests for additional information, if necessary, and still be able to take the test in the same testing cycle.¹⁷

ASSESSING APPENDIX A

Unfortunately, the supplemental discussion quoted above does not reflect a balanced analysis of the factual and legal issues that arise in the context of accommodation requests for standardized tests. The DOJ appears to have taken at face value blanket criticisms that, even if warranted as to some entities, certainly do not apply to all testing entities. At the same time, the DOJ appears to have given little or no weight to the very legitimate concerns of testing organizations when evaluating requests from examinees to take a standardized test in a nonstandardized manner, or to the interests of those who rely on the scores obtained on those tests (including the general public in the case of licensure exams), or to the interests of examinees who must test under standard testing conditions and who often are competing with the individuals who are asking for extra testing time or other nonstandard testing conditions.

The courts have recognized the legitimacy of these interests. Consider, for example, the following statement from *Powell v. National Board of Medical Examiners*, in which the Second Circuit affirmed summary judgment in favor of the defendant Board on an examinee's ADA claim:

[The Board's] procedures are designed to ensure that individuals with bona fide disabilities receive accommodations, and that those without disabilities do not receive accommodations that they are not entitled to, and which could provide them with an unfair advantage when taking the medical licensing examination. As administrator of the national exam used by a number of states for licensing medical doctors, the National Board has a duty to ensure that its examina-

tion is fairly administered to all those taking it.¹⁸

Another ruling, *Love v. Law School Admission Council, Inc.*, also recognized that accommodations can affect the validity of the resulting test score. The court in *Love* ruled in favor of LSAC following a trial on the merits, noting in the process that “the research indicates that if you give someone extra testing time on a timed test like the GMAT or the LSAT, their score will improve whether they have a learning disability or not.”¹⁹

It remains to be seen whether certain of the propositions advanced by the DOJ in Appendix A to the revised regulations will be endorsed by the courts as a proper interpretation of obligations imposed under the ADA.

Past History of Accommodations:

Not Always an Indicator of a Present Need for Accommodations

Many individuals require reasonable accommodations in order to have an equal opportunity when taking standardized tests, and accommodations are properly and routinely provided to such individuals. But it cannot be said that every accommodation request is legitimate and warranted simply because it is supported by a “qualified professional” or by a history of receiving accommodations in different contexts or even on other standardized tests.

For many disabilities, functional limitations change over time, and it cannot automatically be

assumed that an individual currently needs accommodations. Likewise, the fact that someone received accommodations in elementary or secondary school under the Individuals with Disabilities Education Act to help them maximize their academic performance does not mean that they need or are entitled to accommodations on a standardized test

whose results are intended to predict academic success in a professional school or college, or to serve as an objective and reliable indication of the individual’s knowledge or skills for purposes of licensure.

The court recognized these legitimate issues in *Ware v. Wyoming Board of Law Examiners*, stating as follows:

Although information regarding past accommodations may be helpful to the Board, the fact that a person has been granted a particular accommodation in the past

does not mean that such accommodations are presumably reasonable. Each testing agency has an independent duty under the ADA to determine reasonableness on a case-by-case basis.²⁰

Documentation by a Qualified Professional: Not Immune from Additional Review

Although the DOJ suggests that considerable weight should be given to the diagnoses and recommendations of a prospective examinee’s qualified professional, it is proper for a testing organization to independently evaluate the conclusions reached by such professionals.

[I]T CANNOT BE SAID THAT EVERY ACCOMMODATION REQUEST IS LEGITIMATE AND WARRANTED SIMPLY BECAUSE IT IS SUPPORTED BY A “QUALIFIED PROFESSIONAL” OR BY A HISTORY OF RECEIVING ACCOMMODATIONS IN DIFFERENT CONTEXTS OR EVEN ON OTHER STANDARDIZED TESTS.

FOR MANY DISABILITIES, FUNCTIONAL LIMITATIONS CHANGE OVER TIME, AND IT CANNOT AUTOMATICALLY BE ASSUMED THAT AN INDIVIDUAL CURRENTLY NEEDS ACCOMMODATIONS.

Many qualified professionals are consulted for the limited and specific purpose of obtaining testing accommodations.²¹ In this context, as in other contexts where benefits can be obtained based upon a disability diagnosis, it is reasonable to go beyond the documentation of the professional consulted by the examinee if the facts warrant doing so.²² For example, many diagnoses rely heavily upon examinee self-report. If examinees are willing to engage in conduct that is illegal in order to increase their scores on high-stakes tests,²³ it should come as no surprise that some examinees will be less than forthright in their efforts to obtain a diagnosis that will give them extra testing time.

There are also instances in which the documentation submitted by an examinee is not sufficiently recent to provide a reliable picture of the examinee's current condition and functional limitations. Likewise, there are many instances in which a diagnosis is provided by the examinee's professional without supporting information, and instances in which the supporting information contradicts the diagnosis.

In this regard, it is interesting to note the DOJ's internal policies for handling requests for accommodations by DOJ employees. Those policies state that the DOJ has the right to go beyond the documentation provided by its employees when they request accommodations, even when the documentation includes documentation from a qualified professional:

[W]hen a disability and/or need for reasonable accommodation is not obvious . . . , the

component may require that the individual provide reasonable documentation about the disability and functional limitations. The agency has a right to request supplemental medical information if the information submitted does not clearly explain the nature of the disability or the need for reasonable accommodation

*The agency also has the right to have medical information reviewed by a medical expert of the agency's choosing at the agency's request and at the agency's expense.*²⁴

CONCLUSION

It is entirely appropriate, and consistent with obligations imposed by the ADA, for testing organizations to have rigorous but fair processes in place for evaluating requests for accommodations on high-stakes standardized tests. The DOJ's new regulations should not cause testing entities to conclude otherwise. Careful attention should be given to the supporting documentation of a prospective examinee's qualified professional. That does not mean, however, that testing organizations must automatically defer to the diagnostic conclusions and accommodation recommendations of the examinee's professional. A history of prior accommodations should also be carefully considered, but that information is likewise not dispositive. As before, all relevant information contained in a given individual's documentation should be considered in deciding whether the individual is disabled within the meaning of the ADA and needs reasonable testing accommodations. And, as before, testing organizations should not hesitate to provide reasonable

accommodations to individuals who properly document a disability within the meaning of the ADA and the need for such accommodations when testing. ■

NOTES

1. The ADA was enacted in 1990 and has recently been amended. The ADA Amendments Act of 2008 (ADAAA) was signed into law by President Bush on September 25, 2008, with an effective date of January 1, 2009. It is intended to expand the number of people covered by ADA protections. For an overview of the ADAAA's changes pertinent to the bar exam, see Judith A. Gundersen, *The ADAAA and the Bar Exam*, THE BAR EXAMINER, May 2009, at 40. Although released after the effective date of the ADAAA, the DOJ's new regulations were proposed earlier and were not promulgated in response to the ADAAA.
2. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, at 56296–56298 (Sept. 15, 2010).
3. 42 U.S.C. § 12189 (2010). Title I of the ADA, which prohibits discrimination in the employment context, also includes a provision that applies expressly to testing: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual As used in . . . this section, the term ‘discriminate’ . . . includes . . . (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability . . . , such test results accurately reflect the skills, aptitude, or whatever other factor . . . such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).” 42 U.S.C. § 12112(b)(7) (2010).
4. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508 (June 17, 2008).
5. *Id.* at 34556.
6. U.S. DEPARTMENT OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL 41 (1992).
7. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236 (Sept. 15, 2010).
8. The complete text of the DOJ's Title III ADA regulations, as amended, is available on the DOJ's ADA website in a format that shows, in bold, language that was added by way of the regulatory amendments published on September 15, 2010. See http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_withbold.htm.
9. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164, at 56236 (Sept. 15, 2010).
10. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164, at 56236 (Sept. 15, 2010).
11. 28 C.F.R. Part 36, App. B (2010).
12. 28 C.F.R. §§ 36.102(a)(3), 36.309(a) (2010).
13. U.S. DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL 1 (1992).
14. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, at 56250, 56265 (Sept. 15, 2010).
15. *Id.* at 56253, 56265, 56280–56281, 56284.
16. *Id.* at 56255.
17. *Id.* at 56296–56298.
18. *Powell v. Nat'l Bd. of Medical Examiners*, 364 F.3d 79, 88–89 (2d Cir. 2004).
19. *Love v. Law School Admission Council, Inc.*, 513 F. Supp. 2d 206, 216 n.7 (E.D. Pa. 2007).
20. *Ware v. Wyoming Bd. of Law Examiners*, 973 F. Supp. 1339, 1357 (D. Wyo. 1997).
21. For example, a licensed clinical psychologist in California offers “Fly-in Testing” so that individuals “from out of state or out of the country” can obtain assessment reports to support requests for accommodations on the LSAT, the bar exam, the MCAT, the GMAT, the SAT, and other examinations. The assessments can be conducted in the prospective examinee's hotel or in one of the seven offices that are identified on the psychologist's website. See www.testaccommodations.com.
22. See, e.g., B. Sullivan, K. May & L. Galbally, *Symptom Exaggeration by College Adults in Attention-Deficit Hyperactivity Disorder and Learning Disorder Assessments*, APPLIED NEUROPSYCHOLOGY, Vol. 14, No. 3, 189 (2007) (examining LD and ADHD diagnoses for students at a midsize college over a four-year period, and concluding that “significant numbers of college students demonstrate poor effort in the context of ADHD and LD evaluations, and that such poor effort is an indication of symptom magnification motivated by secondary gain potentials”); GAO REPORT HEHS-99-151, SUPPLEMENTAL SECURITY INCOME: ADDITIONAL ACTIONS NEEDED TO REDUCE PROGRAM VULNERABILITY TO FRAUD AND ABUSE, at 6 (Sept. 1999) (noting that the SSI program “is inherently vulnerable to people who, with the help of others, feign their impairments to obtain benefits,” and finding that “[o]ver 60 percent of SSI disability cases from an SSA statistical sample involved impairments that are difficult to objectively verify, and thousands of SSI recipients in the six states we studied used suspicious medical providers to gain access to the program”); see also *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003) (rejecting the argument that there should be an evidentiary presumption in favor of a plaintiff's treating physician in cases involving eligibility for disability benefits under ERISA).
23. See, e.g., James A. Wollack, *Detecting Answer Copying on High-Stakes Tests*, THE BAR EXAMINER, May 2004, at 35; Gregg Colton, *Exam Security and High-Tech Cheating*, THE BAR EXAMINER, August 1998, at 13.
24. U.S. DEPARTMENT OF JUSTICE, MANUAL AND PROCEDURES FOR PROVIDING REASONABLE ACCOMMODATIONS 4 (Oct. 2002) (emphasis added); see also Memorandum from Thomas E. Perez, Ass't Attorney General, U.S. Department of Justice Civil Rights Division, to Civil Rights Division Employees, re: “Process for Requests for Reasonable Accommodations by Individuals with Disabilities,” at 5 (May 28, 2010) (“[The Civil Rights Division] may have [your] medical documentation reviewed by a medical expert selected by [the Division] and at [the Division's] expense.”).



ROBERT A. BURGOYNE is a partner in the Washington DC office of Fulbright & Jaworski L.L.P. His practice involves civil litigation on a nationwide basis, investigations by the U.S. Department of Justice and other federal agencies, and general counseling. He represents a variety of association, university, and corporate clients, including several national testing programs for which he regularly provides advice and representation on the Americans with Disabilities Act, copyright, and other matters. He has handled numerous ADA lawsuits at both the trial and appellate levels, including class actions and a case in which the DOJ alleged a nationwide pattern-and-practice of discrimination. Burgoyne is a graduate of Ohio Wesleyan University (B.A., *summa cum laude*) and the University of North Carolina School of Law (J.D. with honors), where he was Note and Comment Editor of the *North Carolina Law Review*. He is admitted to practice in the United States Supreme Court, various federal appellate courts, and the federal and local courts in the District of Columbia.



CAROLINE M. MEW is a senior counsel in the Washington DC office of Fulbright & Jaworski L.L.P. Her litigation practice includes representation of universities, higher education trade associations, and national testing programs in a variety of matters, including matters arising under the Americans with Disabilities Act. Mew is a graduate of the University of North Carolina (B.A. with honors) and the University of North Carolina School of Law (J.D. with honors). While attending law school, Mew was elected to the Order of the Coif and was a Note and Comment Editor for the *North Carolina Journal of International Law and Commercial Regulation*. She is licensed to practice law in North Carolina and the District of Columbia and is admitted to practice before numerous federal district and appellate courts.