

HOW TO OPTIMIZE THE USE OF OUTSIDE CONSULTANTS FOR ADA DOCUMENTATION REVIEWS

by Michael Gordon, Ph.D.

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Every year, over a thousand bar examination candidates apply for testing accommodations under the Americans with Disabilities Act (ADA). Boards of bar examiners are required to review the information that applicants submit to support the claims that they are disabled. To help them evaluate the legitimacy of the case for accommodations, boards may hire professional consultants. The integrity of the documentation review process for testing accommodations under the ADA relies heavily on the expertise of these reviewers. Without a cadre of qualified consultants, decisions might well be ill-informed and subject to question.

Identifying and vetting potential reviewers is no easy task, mainly because the circle of clinicians who have the requisite acumen in both clinical and ADA principles is small. It is also challenging to develop systems for working with consultants that establish clear boundaries and procedures. Outlined in this article are principles that can help organize the process of choosing and working with consultants in evaluating requests for testing accommodations.

I. VERIFY THAT THE CONSULTANT IS INDEED AN EXPERT IN CLINICAL ASSESSMENT

An unfortunate reality is that not all practitioners are sophisticated in their understanding of clinical diag-

nosis, especially when it comes to psychiatric and learning disorders. Judgments can too often derive from "clinical experience" and whim rather than from a solid understanding of the research literature underpinning a particular disorder. Any consultant a testing agency hires to review documentation should therefore have impeccable credentials, including a terminal degree in his or her field, full licensure, and a track record as a scientist-practitioner in his or her area of expertise.

Consultants who have published clinical research might be especially well suited, because they are most likely to stay current with the scientific literature, approach data-based decisions objectively, and integrate science into their clinical practice. Also required is a strong background in tests and measurement because, for many disorders, psychological testing and the administration of rating scales have become commonplace. A consultant should therefore have the background to evaluate whether clinicians who submit reports on behalf of an applicant fairly interpreted the data that were gathered.

Identifying individuals with expertise in a specific field requires some legwork, but it is by no means an impossible mission. Most testing agencies have assembled a corps of consultants who might be available to take on additional work. The current group of consultants may also identify or help to

vet new candidates. More than anything, they can offer an opinion on the extent to which a prospect's approach to assessment falls generally within the mainstream. Applicants who submit documentation deserve a review from an expert who represents a consensus view of clinical assessment, not one with a stance that strays markedly from the beaten path.

II. CONFIRM THAT THE CONSULTANT IS WELL TRAINED IN ADA-RELATED ISSUES

It would be a mistake to assume that a professional well versed in clinical matters will necessarily be knowledgeable about the dictates of the ADA. Clinical diagnosis and legal requirements for qualifying an individual as disabled entail distinct areas of expertise that involve different goals, metrics, and consequences.

The Distinction between Clinical and Legal Definitions of Disability

Practitioners who assign a clinical diagnosis are mainly intent on helping the patient reduce distress and achieve life objectives. They are less concerned about the niceties of legal requirements or the impact of an overly liberal diagnosis on others. Clinicians also operate with diagnostic criteria that are wide-open to interpretation. For example, the iconic phrase "evidence of clinically significant impairment" is as specific as the DSM-IV¹ psychiatric nomenclature can manage in establishing criteria for judging impairment. Also, professional training programs tend not to offer instruction on the dictates of the ADA. Perhaps for these reasons, surveys have

indicated that most clinicians are unfamiliar with the intent and requirements of disability law.²

What Consultants Must Understand about the ADA

Certain tenets of the ADA are essential for consultants to understand and accept at the outset. They underlie the distinction between a clinical diagnosis and a legal disability determination. It can be challenging to convince someone trained in a helping profession that a documentation review is not about helping, *per se*, but about arriving at an

objective assessment of the individual's level of functioning. That emphasis on dispassionate analysis as opposed to patient advocacy can be a hard sell to some veteran clinicians entering the ranks of documentation reviewers.

ADA Metrics for Judging Impairment

The first conceptual hurdle new consultants must jump concerns metrics for judging impairment. In the ADA context, an individual is considered impaired if he or she functions abnormally *relative to most people in the general population*. For documentation reviewers, this "average person standard" represents the proverbial beacon in the night of understanding whether an applicant is sufficiently impaired to warrant accommodations.

Unlike the criteria for judging impairment in a clinical setting (which casts a wide net for case identification), the "average person standard" establishes a narrower metric. By definition, it precludes an analysis of impairment based on comparison to other law students or individuals with high IQ scores or people who want to become lawyers. A person is

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disabled under this law if he or she is unable to function in a major life activity as compared to most people. Consultants who are comfortable with this relatively brighter line for characterizing abnormality are more likely than others to make recommendations that are consistent with the intent of the ADA. For example, they will make sure that clinicians providing test scores as part of the documentation interpret those data using norms for the general population, not for a specific educational cohort.

The Need for Credible Evidence of Functional Impairment

The second major principle for consultants to grasp is that judgments of disability must rely on credible evidence of functional impairment. According to the ADA, someone is disabled if he or she is unable to perform essential daily functions (which, with the advent of the recent amendments to the ADA, now include reading, writing, and concentrating) that most people can manage. Verification of that impairment rests on information about the person's actual functioning over time, and not just on self-reported symptoms, psychological test scores, or anecdotes about instances of sub-optimal achievement.

The evidence is clear that an individual can be highly symptomatic (for example, distractible or anxious) but not necessarily impaired by those symptoms.³ The opposite scenario can also hold true, in that a person can be somewhat quiet in symptom manifestation but still function abnormally.⁴ Similarly, it can be the case that a person who scores poorly on a reading test has nonetheless read well enough to earn a degree in English from a selective university without formal accommodations. If a person truly has a disorder, the impact of that disorder should be evident in how he or she has performed in the real world over time.

Accommodations Must Be Reasonable and Address the Functional Impairment

The third principle of ADA documentation reviews that new consultants might need clarified is that accommodations must be reasonable and address the impact of the functional impairment on the task at hand. Unlimited time on a timed exam may not be justified, given the level of the examinee's impairment or the logistics involved in allowing for unlimited time.⁵ Someone might also have a legitimate disability that would not affect the ability to take a particular exam. For example, an examinee with a bona fide math disability might not be entitled to accommodations on a test that has no items requiring mathematical computation.

The point of accommodations is not to optimize an examinee's outcome regardless of the nature of the disability. The goal is to ensure that the examinee has the opportunity to perform on the test without being limited by factors that are unrelated to what the test is intended to measure. The objective is also to protect the integrity of the test and validity of the scores, and to ensure fairness to examinees who are not being accommodated.

Research Literature Relevant to Disability Determinations

Lastly, consultants should be fully aware of the research literature relevant to disability determinations. While the literature is not vast, it does address some key elements of the process. For example, literature exists on the impact of extended time on both typical examinees and those with learning disabilities or Attention Deficit Hyperactivity Disorder (ADHD).⁶ Other studies explore the impact of patient effort level and malingering on evaluations,⁷ the impact of test anxiety on test performance,⁸ and so on. In a field clouded by conflicting opinions, the advent of a relevant scientific literature has introduced a welcome degree of clarity.

III. FAMILIARIZE THE CONSULTANT WITH THE EXAMINATION AND ACCOMMODATIONS PROCESS

Characteristics of the Examination

To determine what might constitute a reasonable accommodation for a specific test, the consultant has to understand the skills and abilities the test requires and the circumstances under which the test is given. At what reading level are the items written? How much of the exam is multiple-choice as opposed to essay? Are breaks provided? If so, how many and for how long? How much time is allotted to complete the exam? Do most examinees finish the exam in the usual amount of time? Is the test routinely administered via paper and pencil or laptop computer? How many other test takers are in the same room during the exam? All of these questions and more should be addressed so that the consultant is fully aware of the demands the examination places on the test taker.

Options for Accommodations—and Their Impact

The testing agency should also help the consultant understand options for accommodations. What is the most extended time that can feasibly be granted to an examinee? Is it practical to break down allotments of extra time into graduated units of perhaps 10, 20, or 30 percent rather than offering standard time and a half or double time? What options are available for allowing an examinee to take the test in an environment with reduced noise and distractions? To what extent can the administration of the test be altered to accommodate an examinee with vision problems or a physical disability (perhaps using large-print versions or audio formats)? What

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accommodation requests have a benign impact on the test's ability to assess what it is designed to assess? Is the test designed such that the speed at which an examinee proceeds represents an important factor? Which accommodations, if granted, would fundamentally alter the test's validity? The more the consultant understands about the particular examination procedure, the more he or she can fairly judge accommodations requests.

IV. ESTABLISH THE GROUND RULES

Like any productive relationship, a successful partnership with an outside consultant begins with a mutual understanding of the rules, boundaries, and expectations. Given the idiosyncrasies inherent in this particular consultancy, those elements might not always be obvious to the consultant.

Who Makes the Ultimate Decision?

The consultant might be under the impression that he or she is the sole arbiter of accommodations. That stance might shine through in how the report is written. Instead of writing, "My recommendation to the board is that it deny the request for accommodations," the consultant might declare, "This request is invalid and should be denied." The former construal is more in keeping with a consultant's advisory role. It should be made clear to the consultant that the ultimate decision rests with the testing agency's administrators and/or review board, not the outside consultant.

The Consultant's Role

The consultant should understand that his or her role is to review the information provided to determine whether sufficient evidence exists to make a case

that the individual meets diagnostic and impairment criteria for a disorder. That recommendation should not be based on a reading of the law or an interpretation of the testing agency's particular stance on the ADA.

Nor should a consultant entertain diagnoses that were not claimed by the applicant, no matter how obvious it might be that the applicant has been misdiagnosed. Again, the reviewer's primary responsibility is to decide whether the individual has made the case that he or she is substantially impaired relative to most people in major life activities because of symptoms that interfere with taking high-stakes tests.

The consultant should also know that testing agencies usually choose not to inform consultants about the final determination. The only exceptions tend to be when new materials are forwarded to the consultant because a decision to deny is in the process of being appealed. Otherwise, it is unlikely that the consultant will be aware of the outcome.

"If in Doubt, Accommodate"

The testing agency should be clear that, if a consultant is to err, he or she should err on the side of granting approval. "If in doubt, accommodate" is a rule that limits the chances of denying accommodations to someone who might be wholly deserving. As it happens, most accommodations review cases are relatively straightforward because the evidence for or against granting accommodations is substantial. Such is especially the case with applications for accommodations on the bar examination; by the time someone sits for the bar exam, he or she will have had years of education and a long paper trail to offer for review.

Nonetheless, some cases are less clear-cut, often because of special circumstances. The applicant

might have been home schooled or educated in a foreign country. Records might also have been lost along the way. In some cases, the clinician who wrote the clinical report may have failed to provide the full measure of information required to make a well-supported determination. Consultants should be comfortable still recommending approval if, in their judgment, the chances are high that additional information would only further confirm the disability. That conclusion is, of course, easier to draw if the applicant has a prior history of having been granted accommodations.

The Ultimate Goal: Fairness to All Test Takers

In that same vein, the testing agency should remind the consultant that the overarching agenda of the process is to be fair to all test takers, disabled or otherwise. Testing agencies do not look for reasons to deny requests for accommodations. If an applicant is qualified as disabled under the law, the testing agency's intent is to provide appropriate accommodations. In almost 20 years of working with testing agencies, I have yet to encounter anyone with an agenda to limit accommodations requests based on bias or economic imperatives. Administrators focus on the integrity of the process, not on suppressing the numbers of examinees who are accommodated in any given test administration. (It is also not lost on anyone that outside consultants are reimbursed at the same rate whether they recommend approval or denial of a request for accommodations.)

Basing the Review Only on the Documentation Provided

It may be worthwhile to emphasize to the consultant that he or she can review only what is actually submitted. Sometimes the case cries for more information or clarification, leaving the reviewer to think, "If I only had some report cards to review" or

“Why didn’t he submit something to verify that he did indeed require formal accommodations prior to law school?” or “I wonder how she performed on the SAT *without* accommodations?” Indeed, sometimes the consultant has a suspicion that one or another disorder might perhaps be legitimate, but the documentation is wholly insufficient.

From my standpoint, the review should primarily be about the extent to which the documentation was sufficient to verify disability. While the reviewer can point out what essential information was missing, it is up to the testing agency to decide how to handle cases with insufficient documentation. Some will communicate to the applicant, in essence, “Based on what you submitted, we are denying accommodations. Any future submission should make sure to provide the following information.” Others leave the door open by communicating that the application will be kept active until the missing information is provided. From the standpoint of the consultant, however, the job is to review the information the applicant has actually submitted.

The Importance of Thorough Documentation Requirements and Application Forms

In reality, the fairness and efficiency of a testing agency’s system for reviewing ADA applications depends heavily on the sophistication of its published documentation requirements and application forms. To be fair to both the applicant and the reviewer, expectations for what must be submitted should be complete, evidence-based, explicit, and well communicated. For this reason, most testing agencies have developed and refined application

forms over the years, often with input from their cadre of ADA reviewers. That collaboration can represent the best opportunity for creating a solid set of procedures.

For example, years ago most forms requesting information to verify a claim based on ADHD asked only about accommodations the applicant might have received in law school. However, ADHD is a developmental disorder that, by definition, starts during childhood. In most cases, someone who meets criteria for the disorder would necessarily have required special services well before law school. Consultants have since therefore requested that application forms ask whether special services were granted during elementary school, high school, and beyond. Specifying in the application form the essential information required makes it more likely that the materials submitted will be helpful to the reviewer. The more the essential information is requested up front, the easier it is for the consultant to review the documentation.

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V. ESTABLISH A FORMAT FOR THE CONSULTANT’S REVIEW

Most testing agencies offer only slight guidance about how they would like outside consultants to write their reports. Some are comfortable with an e-mail that records the recommendation and offers a brief rationale. Others prefer a more formal letter that reviews the case in greater detail. A few, however, require the consultant to complete a templated review form that addresses the central aspects of an accommodations determination. Such forms usually

ask if the documentation was current, if professional guidelines were followed by clinicians submitting documentation, whether evidence was provided that verified impairment, and so on.

How Feedback to the Applicant Drives the Report Format and Tone

What seems to drive a testing agency's preference for a particular type of report is its approach to offering feedback to the applicant when accommodations are denied. Testing agencies vary in how much justification for the decision they offer the applicant. Some denial letters sent to applicants are concise, while others provide a more detailed clinical and legal explanation for the denial. That more thorough explanation might be written by an administrator (presumably informed at least in part by the consultant's report), or it might actually reproduce some (preferably not all) of the consultant's review.

It is important to tell the consultant the extent to which the applicant will read all or parts of the actual report. Consultants are likely to write reviews that have more technical jargon and shorthand explanations when they know that the applicant is unlikely to see the review (except perhaps during litigation). Reports that are reproduced in denial letters will usually contain more extended explanations and fewer clinical terms. Regardless, it is essential not to disclose the name and contact information of the consultant to the applicant. The report should be regarded as a product of the testing agency's decision-making process, not the sole consequence of a particular reviewer's opinion. Testing agencies also will want to protect the consultant from direct contact by applicants and clinicians. Appeals should funnel through the testing agency's system.

It may also be wise to advise the consultant that reports are most often read by individuals without

clinical backgrounds. The most effective reviews are those that explain the rationale for the recommendation in simple language. Clarity of communication is particularly important given that some of the report might well find its way into the testing agency's feedback to the applicant. It can also help the testing agency's staff if a consultant's report tends to follow the same format time after time. A standard method of justifying the recommendation benefits all.

Finally, administrators should not hesitate to remind consultants that their reviews and all communications with the testing agency might become evidence in a legal proceeding. Offhand comments about the inadequacy of a clinician's report or the thinness of an applicant's claim are best left unstated.

VI. GET THE LOGISTICS RIGHT

Optimizing the use of outside consultants depends heavily upon establishing an infrastructure that minimizes wasted effort and confusion. If the testing agency makes it easy for the consultant to read the documentation and submit the review, it will get reports more quickly and at a lower cost. Now that documentation can be scanned and transmitted electronically, consultants can receive the documentation packets at any time and in a format that can be searched and copied. The capacity for e-mail reviews also saves time.

The single most common source of inefficiency, as I mentioned earlier, comes from application forms that fail to ask the right questions and specify the required kinds of documentation. Fortunately, that problem has diminished over time as testing agencies have worked to refine their forms. Snarls in the process can also come from inadequate review of the documentation packet by the testing agency's staff before it is transmitted to the consultant. Documentation packets may be sent that fail to

contain anything beyond the application form and a brief physician's statement on a prescription pad. Others include only clinical reports that were written well before the window established by most documentation requirements (typically three to five years for most disorders). It can save time and effort to shortcut those instances prior to involving the consultant.

VII. ESTABLISH A RESEARCH COLLABORATION WITH YOUR OUTSIDE CONSULTANTS


As I mentioned earlier, the accommodations arena is in sore need of scientific data to supplant the fog of conjecture. While a research literature is emerging, far more work is required. Many consultants have expertise in conducting clinical research and can work with testing agencies to design, conduct, analyze, and publish studies relevant to disability determinations.

Especially with the arrival of computer-based testing, many testing agencies are sitting on a mother lode of data that could easily be mined, much to the benefit of all. Even simple statistics could inform the process: How much extra time does the average accommodated examinee actually use? Do examinees identified as having a learning disorder or ADHD really complete fewer items in the standard allotment of time? How do examinees who are denied accommodations fare on the exam relative to those examinees who did not apply for accommodations? To what extent is test performance affected by the fact that an examinee learned English as a second language? Perhaps as the benefits of data analysis

become clearer, the door will open for more research in these areas.

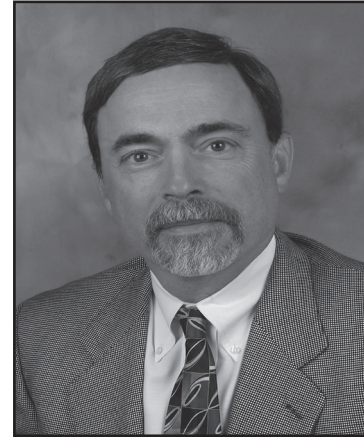
CONCLUSION

Reviewing applications for ADA accommodations is serious business with serious consequences. Everyone involved wants to get it right. The formula for maximizing the chances of making good decisions is, of course, universal to all good problem solving. It involves ensuring that (1) all information pertinent to the decision is fully solicited and incorporated, (2) all involved in the decision-making process are clear on the fundamental principles that should guide the decision, (3) those responsible have the professional qualifications and training to implement those fundamental principles, and (4) the system facilitates clear communication and feedback at all points along the way.

Since the ADA was passed in 1990, testing agencies have steadily developed procedures designed to ensure competent judgments regarding qualifications for disability accommodations. A significant element of that process has been determining how consultants can best contribute to those elements of good decision making. Perhaps their greatest value is in bridging that gap between the worlds of clinical diagnosis and disability determination. An outside consultant can provide expertise not only about what constitutes sufficient evidence to meet diagnostic criteria, but also about acceptable methods for establishing that an individual is impaired relative to most people. With careful selection, training, and monitoring, testing agencies can optimize the use of consultants to ensure sound accommodations decisions. 

NOTES

1. The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, known as the DSM-IV, is published by the American Psychiatric Association. It covers standard criteria for the classification of mental disorders and is used by mental health professionals in the United States in making psychiatric diagnoses and in communicating a patient's diagnosis to third parties after an evaluation.
2. M. Gordon, L. Lewandowski, K. Murphy & K. Dempsey, *ADA-Based Accommodations in Higher Education: A Survey of Clinicians about Documentation Requirements and Diagnostic Standards*, 35(4) J. LEARNING DISABILITIES 357–363 (2002); B. Hernandez, C. Keys & F. Balcazar, *The Americans with Disabilities Act Knowledge Survey: Strong Psychometrics and Weak Knowledge*, 48(2) REHABILITATION PSYCHOL. 93–99 (2003).
3. L. Lewandowski, B. Lovett & M. Gordon, *Measurement of Symptom Severity and Impairment*, in THE MEASUREMENT OF CLINICAL IMPAIRMENT IN PSYCHIATRIC DIAGNOSIS 5–14 (S. Goldstein & J. Naglieri eds., Springer Publishing 2009).
4. A. Angold, E. Costello, E. Farmer, B. Burns & A. Erkanli, *Impaired but Undiagnosed*, 38(2) J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 129–137 (1999).
5. B. Lovett, *Extended Time Testing Accommodations for Students with Disabilities: Answers to Five Fundamental Questions*, 80 REV. EDUC. RES. 611–638 (2010).
6. B. Lovett, *supra* note 5; S. Sireci, S. Scarpati & S. Li, *Test Accommodations for Students with Disabilities: An Analysis of the Interaction Hypothesis*, 75 REV. EDUC. RES. 457–490 (2005).
7. L. Jasinski & J. Ranssen, *Malingered ADHD Evaluations: A Further Complication for Accommodations Reviews*, 80(4) BAR EXAMINER 6–16 (2011).
8. R. Hembree, *Correlates, Causes, and Treatment of Test Anxiety*, 58 REV. EDUC. RES. 47–77 (1988).



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