



Expect the Unexpected: Are We
Clearly Prepared?

Developing and Implementing
ADA Accommodations
and
Preparing for ADA Litigation

Council on Licensure, Enforcement
2006 Annual and Regulation Alexandria,

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National Board of Medical Examiners

Presented at the 2006 CLEAR Annual Conference
September 14-16 Alexandria, Virginia

Session Overview

- Brief Overview of the ADA
- Crafting and Implementing Accommodations
- Short Break
- Preparing for ADA Litigation

ADA 101

Presented by:

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Counsel for United States Medical Licensing Examination Program

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ADA: Civil Rights Law

- Prohibits discrimination
- Also imposes duty to provide accommodations

Title III

- Applies to private entities
- Section 309 applies to any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes
- Requires that such persons offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Title II

- Applies to any authority that is a function of a state or local government
- Such an authority must make all of its programs accessible to persons with disabilities
- Includes physical access as well as modifications in the way a test is administered

Interpretations

- U.S. Department of Justice Regulations (“DOJ”)
- Federal court cases
- DOJ opinion letters

Definition of Disability

- (1) A physical or mental impairment that substantially limits one or more of the major life activities on an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.
- (1) above is pertinent portion of definition for purposes of Section 309.

Impairment

- Physiological, mental, or psychological disorder.
- Includes specific learning disabilities.
- Temporary impairment, e.g., broken limb, pregnancy, generally not deemed to be disability.
- Diagnosis of an impairment is part of, but not synonymous with, the definition of “disability”.

Substantial Limitation

- Title III Regulations: “The individual’s important life activities are restricted as to the condition, manner, or duration under which they can be performed in comparison to most people.”

Major Life Activities

- Examples include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.
- Aberrancy: One court has found testing to be a major life activity.

Accommodations

- Facilities that are accessible in equally convenient locations.
- Auxiliary aids and services may include taped examinations, Braille or large print examinations, qualified readers, or transcribers.
- Required modifications may include changes in testing time or adaptation of the manner in which the examination is given.

Fundamental Alteration

- Basis for denial of a test accommodation if the private entity can demonstrate that the requested accommodation would fundamentally alter the measurement of the skill or knowledge the examination is intended to test.

Individualized Assessment

- Applicants' documentation of disability.
- Appropriate and reasonable accommodation.
- Goal is equal opportunity, not a particular outcome.

Other Laws

- Section 504 of the Rehabilitation Act of 1973
 - ADA expands its provisions to the private sector
 - Applies to recipients of federal funds
- State statutes
 - May have different definitions of “disability”
 - E.g., California Unruh Act

Crafting, Implementing Accommodations

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What Are You Testing?

“The skills intended to be measured should be made explicit prior to making decisions about accommodations.”

Bolt, S. E. & Thurlow, M. L. (2004)

What Aren't You Testing?

Examples:

- Computer Skills (e.g., mousing)
- Pencil ability / Penmanship

Crafting Accommodations

Will the requested accommodation
alleviate the documented functional
limitation?

Matching Accommodations to Need

- Documentation must describe the need for accommodation
- Logical relationship between the impairment and the accommodation

Examples of “matching-up”:

- Back pain: Breaks to stretch, different chair, special cushion
- Vision impairment: Different lighting or contrast, large font, maybe extra time
- Reading impairment: Extra time, reader

Can You Negotiate?

Is there an accommodation that has NOT been requested that will alleviate the documented functional limitation?

Alternative Accommodations?

Request:

- Extra time
- Dictation Software

Alternative:

- Breaks
- Scribe

- * Sometimes documentation mentions a medical device requiring authorization to bring into the testing area.

Crafting Accommodations

**Is the requested accommodation
reasonable?**

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What's Reasonable?

- Must not cause undue burden (financial or administrative)
- Must not fundamentally alter the examination

Examples:

- If test measures the speed at which a task is performed, giving extra time
- If reading is a skill being tested, allowing a reader
- Blind electrician candidate requested an exam with no graphics, but reading plans and schematics was an essential function being tested

Crafting Accommodations

Is the requested accommodation feasible
given the test administration format?

Is the Accommodation Feasible?

- May need to negotiate with the candidate and work with the test center

Examples:

- Candidate who needs to be able to stand to take exam – may not be feasible in usual CBT testing carrel
- Might need to arrange for separate room

Security Considerations

Does the requested accommodation pose concerns for test security?

Implementing Accommodations

How does the test center know about the accommodation?

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The Implementation Process

- Request from candidate or sponsor
- Candidate submits paperwork
- In most cases, sponsor grants or denies
- Iterative process to work through implementation issues
- Candidate schedules exam

Implementing Accommodations

How can you ensure that the accommodation is in place and ready in advance of test day?

Preventing Test Day Problems

- Notification process (no surprises)
- Shipping special equipment (tracking and receiving)
- Integration and testing of equipment
- Maintain confidentiality

Murphy's Law

- Most of the time, everything goes smoothly.
- Despite careful preparation, problems can arise.
- What types of problems have you encountered when a candidate arrives at the test center?
- How have you handled them?

Problems Encountered

- Candidate decided to reject the test accommodation on test day
- Reader failed to appear
- Candidate didn't like font change because of scrolling
- Hardware shipment not received in time

Implementing Accommodations

What are some of the unusual requests you have received and how did you implement them?

Unusual Requests

Examples:

- Own chair
- Own lamp
- Cot
- Left - handed accessories (joy stick)
- Foot operated mouse
- Hardware / software integration

Preparing for Change

- **Evolving Programs**
 - As your exam program changes, how will that change the nature of requests for test accommodations?
- **Emerging Technology**

Break

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ADA Litigation: How Ready Are You?

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Policy & Procedure

Which boards/agencies have a written policy statement relating to test accommodations?

Policy & Procedure

Which boards/agencies have documented their decision-making procedure?

Policy & Procedure

What accommodations would represent a
“fundamental alteration” of your test?

Process

Which boards/agencies have written guidelines or directions for documenting a request for accommodations?

Process

Which boards/agencies have an on-going relationship with an expert consultant?

Process

What information do you give the consultant regarding the board's policies/procedures?

Process

Is your consultant rendering an opinion or making a decision?

Privacy: Document Management

What steps does your board/agency take to maintain confidentiality?

Privacy: Document Management

How does your test vendor handle confidentiality in the test center vis-à-vis examinees receiving accommodations?

Persuasion: Legal Challenges

Which boards/agencies have a relationship with a lawyer who is knowledgeable about ADA and testing?

Persuasion: Legal Challenges

How does your board/agency handle inquiries/correspondence from a lawyer representing an applicant?

Persuasion: Legal Challenges

Which boards/agencies have been sued
or named in a DOJ complaint?

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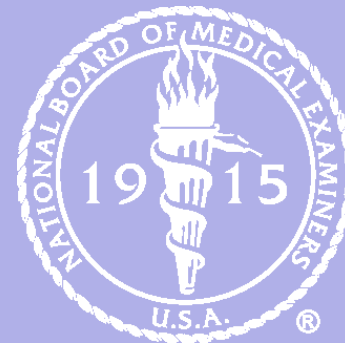
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