Reviewing ADHD Accommodations Requests for the Bar Exam: What Has and Has Not Changed over 20 Years

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Over 20 years ago, bar examiners began to receive requests for accommodations on the bar exam based on diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and other mental conditions. The examinees requesting accommodations based on ADHD described problems such as inattention and distractibility that they purported to experience when taking exams. Requests for extended exam time and/or a separate room became the norm. Bar examiners were often baffled by the range and seemingly diverse quality of psychiatric and psychological evaluations submitted in support of these requests. Bar examiners expressed concerns regarding fairness and exam validity in situations where a select group is allowed accommodations that many examinees might find beneficial. Without clinical training and with little history of providing accommodations to those with a diagnosis of ADHD, they sought help from professionals like me with clinical background in various diagnostic conditions to understand evaluations submitted in support of accommodations requests and, ultimately, to decide whether or not accommodations were warranted.

The 1990 Americans with Disabilities Act and a Changed ADHD Accommodations Landscape

Prior to the Americans with Disabilities Act (ADA) becoming law in 1990, examinees diagnosed with ADHD did not routinely request that exams be given in a manner that they viewed as alleviating cognitive weaknesses attributable to ADHD symptoms. I have reviewed requests for accommodations on the bar exam based on a diagnosis of ADHD for over 20 years, and the framework for examining a request for accommodations has not changed significantly since I first provided an update on that topic in the Bar Examiner in 2000.

However, scientific knowledge about ADHD has progressed; clinical practice has adopted a new diagnostic scheme (the DSM-5, the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders); some research has been conducted in regard to the impact of accommodations requested by examinees with ADHD on exam validity; organizations have improved their procedural guidance for examinees submitting accommodations requests; and the interpretation of disability under the ADA
has been in a process of revision. Consequently, there remain complicated clinical, scientific, legal, and even ethical issues that ultimately contribute to any decision regarding whether to grant accommodations on the bar exam or any other professional licensing exam.

The Rise of ADHD Accommodations Requests in Spite of a Narrow ADA Disability Definition

Shortly after beginning to consult with testing organizations regarding ADHD accommodations requests, I made one completely inaccurate prediction regarding the future of this practice. This prediction was that the practice of accommodating people for ADHD (and other mental conditions), at least on professional licensing exams such as the bar exam, would quickly wither away. This prediction was not based on any sense that individuals would cease to receive ADHD diagnoses, although there was no way of knowing at that time that the prevalence of this disorder would continue to rise dramatically. Rather, this prediction was based on an interpretation of the ADA disability definition that seemed to leave little, if any, room for this practice to continue at this advanced level.

The vast majority of law school graduates simply did not meet the rigorous disability definition described in the ADA—the requirement of having a condition that “substantially limits one or more major life activities” compared to the performance of the average person in the population.\(^5\) Law students generally are not average students with a history of significant limitations in learning or taking exams. There was also no reason to presume that taking exams would necessarily be considered a major life activity under this law. Most initial case law interpreting this definition seemed to clearly uphold a stringent disability standard.\(^5\)

Nevertheless, in hindsight, this prediction appears to have been hopelessly naive. Rather than reviewing only an occasional request for accommodations due to ADHD, I found that my help was sought more frequently as more states saw an increase in the number of law school graduates requesting accommodations for ADHD diagnosis. The most sweeping change that has occurred over the past 20 years is that, for better or worse, the provision of accommodations on exams based on an ADHD diagnosis has become a fairly routine and accepted practice that cannot be avoided by any organization that administers licensing exams.

Reviewing ADHD Accommodations Requests in the Context of Today’s Changes

Although reviewing evaluations submitted by examinees in support of accommodations requests based on ADHD diagnoses continues to present challenges, not the least of which is due to a lack of agreement in how to interpret some recent rulings and regulations regarding current disability law, I would still argue that the basic process of reviewing any request for ADHD accommodations has not changed significantly. It remains a fairly straightforward process in which the reviewer tries to help a testing organization answer three basic, overlapping questions.

1. Has information been provided to explain how this person came to be given a clinical diagnosis of ADHD?

2. Has information been provided to indicate that this person’s condition is associated with impairment?

3. Has information been provided to suggest that this impairment is associated with a limitation in taking exams that can be adequately alleviated by the accommodations that are being requested?
What is less straightforward, however, is how to integrate the increasing scientific knowledge and cultural acceptance of this diagnostic condition, including the routine provision of accommodations, with a constantly evolving framework of disability law in order to make an informed decision regarding whether or not to accommodate an examinee requesting accommodations based on ADHD diagnosis. The purpose of this article is to examine these three basic questions while highlighting the changes emanating from research, clinical experience, and legal decisions over the course of the last two decades.

**Information Regarding ADHD Diagnosis**

**Adult ADHD Studies**

In 1990 there were almost no studies published in regard to adult ADHD. By 2014, studies of adult ADHD had grown to well over 500 articles per year. These studies have established that children with ADHD symptoms often, but not always, grow up to be adults with similar symptoms. There is general clinical acceptance that some adults who were never given a formal diagnosis of ADHD during childhood or adolescence may warrant this diagnosis even when presenting later in life if there are indications that problems attributable to ADHD symptoms were overlooked earlier in life. Multiple correlational studies provide information as to various biological markers for ADHD, environmental factors that might contribute, and neuropsychological correlates that help identify impairments. Also, as discussed later, studies have established that ADHD is associated with significant impairment in life. Thus, most clinicians have a much stronger database from which to conduct clinical practice, yet it is not necessarily clear that clinical practice has changed significantly over this time.

**The DSM-5’s Changed ADHD Criteria**

The recent adoption of the updated diagnostic classification scheme provided by the DSM-5 is one aspect of clinical practice that has changed. Despite significant criticism of this new scheme, most practitioners currently utilize the DSM-5. As I discussed in a 2014 presentation for the National Conference of Bar Examiners, the primary changes pertaining to ADHD between the previous edition of the DSM (the DSM-IV, published in 1994) and the DSM-5 (published in 2013) include a change in the age by which the disorder should be manifest (age 12 rather than 7); a slightly lower symptom threshold (five rather than six symptoms) if diagnosed during adulthood, to reflect the fact that this condition tends to diminish in severity over development; and a change to the ADHD Not Otherwise Specified category, replacing it with the categories Other Specified ADHD and Unspecified ADHD. (These two new categories are for cases in which the individual does not meet the full ADHD criteria yet has significant distress or impairment—the former category for cases in which the clinician states the reason for which the full criteria are not met, and the latter category for cases in which the clinician does not specify the reason.) None of these changes are particularly dramatic, and, as I would argue, they seem unlikely to change anything about clinical practice. Additionally, none of these changes in the DSM-5 seem likely to slow the continuing increase in the prevalence of ADHD diagnosis in the coming years.

**ADHD Diagnosis in Children**

A study by the Centers for Disease Control and Prevention (CDC) reported on the significant increases in the diagnosis and treatment of ADHD in children (42% increase from 2003–04 to 2011–12). Interestingly, the rate of diagnosis varies considerably
across states, with some southern states exhibiting the highest ADHD prevalence—my home state of Kentucky coming in first with 18.7%, while the low being Nevada with 5.6% (the average is 10.1%). The reasons for the differential diagnostic rates by state are difficult to explain. Diagnostic practice does not seem to differ substantially by state, and it is not clear that these differences can be accounted for on the basis of differential practitioner prevalence by state. One persuasive argument is that local prevalence rates for ADHD diagnosis increase, in part, when states adopt educational accountability laws that alter school funding based on state testing that would subtly encourage increased diagnosis. This explanation highlights the fact that psychiatric diagnosis is often as dependent upon the legal and cultural environment as it is on biological, behavioral, or psychological presentation.

Accommodations Requests Based on Multiple Conditions

It would be incorrect to think that ADHD is the only diagnosis rising in prevalence. Other psychiatric conditions such as autism and bipolar disorder have also shown rising diagnostic prevalence in recent years. Additionally, the lifetime prevalence for psychiatric disorder is now approaching 50% of the population. Perhaps for these reasons, during the past few years, research has concluded that adult ADHD is very frequently associated with a wide variety of co-existing psychiatric disorders—in particular, anxiety and mood disorders, aggressive and impulsive behavior disorders, and general learning disorders. Therefore, as many of us who review accommodations requests are aware, there has been a significant increase in requests for accommodations that are based on multiple conditions. Discussion as to how best to tease apart the impact of ADHD from multiple additional psychiatric conditions when reviewing a request for accommodations is beyond the scope of this article.

History of ADHD Diagnosis, Treatment, and Accommodations in Young Adults

Ultimately, the rise in childhood ADHD diagnosis means that there are many more young adults with a history of ADHD diagnosis and treatment attending college and professional schools today than 20 years ago. This also means that, in comparison to years ago, more of the law school graduates who request accommodations on the bar exam have a history of having received academic support and accommodations, sometimes throughout most of their lives. Over the past 20 years, a huge dissemination of information to the public regarding ADHD explains it as a disorder beginning during childhood that causes significant problems within the school and home environments. Thus, it would seem that it should be less likely today that ADHD would be overlooked until a person reaches adulthood, although there is no indication that this is the case. In fact, a recent study argues that adult ADHD might be a condition that does not, in fact, require any history of symptoms beginning during development, a finding that, if supported, would further open the floodgates to adult diagnosis.

Recommended Practice for Adult ADHD Diagnostic Determination

Recommended clinical practice for adult ADHD diagnostic determination has not changed significantly in the past 20 years. Comprehensive ADHD evaluation, particularly when focused on disability determination, requires careful attention to multiple sources of information in addition to self-report, including observational ratings and a review of past school records and clinical evaluations when possible. Neuropsychological testing (tests administered primarily to assess cognitive functions in
order to make inferences about known or suspected brain dysfunction) is often misunderstood as providing direct evidence of ADHD diagnosis; it does not in fact provide anything but indirect evidence, yet it is recommended, since it can provide some signs that the condition is associated with inefficient attention and cognitive processing. In an evaluation to establish a need for accommodations, tests of intelligence and academic skill development are recommended to rule out issues that might better account for the typical presenting complaint involving a problem meeting the demands of an academic environment.

The Quality of Diagnostic Evaluations
Years ago I reported that clinical diagnostic evaluations for ADHD submitted on behalf of examinees requesting accommodations on the bar exam were remarkably uneven in quality and comprehensiveness. Unfortunately, research continues to cast a rather negative light on current diagnostic practice. A recent study found that less than 1% of the diagnostic evaluations submitted on behalf of postsecondary students requesting accommodations met basic, recommended criteria for ADHD diagnostic determination. Why so poor? Since it seems unlikely that practitioner ignorance or lack of training can explain the inferior quality of many ADHD diagnostic evaluations, an alternative explanation might be that practitioners cannot currently be adequately compensated for taking the time and effort to conduct a full, thorough diagnostic evaluation. Whatever the reasons, any testing organization reviewing accommodations requests for ADHD will typically encounter some ADHD diagnostic evaluations that are no more comprehensive today than 20 years ago.

Documentation of Childhood Impairment
A 2014 study also reported that a majority of the reports submitted on behalf of adults requesting exam accommodations for ADHD lacked information in regard to childhood impairment. Most view a history of childhood impairment as critical for establishing current ADHD diagnosis, particularly as part of a comprehensive practice to document need for accommodations. However, concern has been expressed in recent years that insisting upon the provision of a history of ADHD evaluation and school-based academic support prior to adult diagnosis likely disadvantages students from less affluent backgrounds. Research and clinical experience definitely suggest that students who are able to afford very expensive, lengthy evaluations to assess learning and behavioral problems during childhood are more apt to meet this basic criterion than those from impoverished backgrounds. For instance, some audits have indicated that exam accommodations on the SAT tend to be provided more frequently to people from affluent backgrounds. Similar difficulties in establishing early childhood history can arise when the adult is older or is from a foreign country. Students who fall into these categories (impoverished backgrounds, older adults, foreign backgrounds, etc.) should not automatically be excluded from consideration for accommodations simply because they are unable to demonstrate a history of ADHD evaluation and school-based academic support prior to adult diagnosis.

Symptom Validity Tests for Evaluations
A number of studies have found that a large number of postsecondary students routinely abuse or at least misuse stimulant medications that are used to treat ADHD. Additionally, recent studies indicate that college students who currently request evaluation for ADHD may engage in dissimulation specifically in order to receive legal stimulant medication (perhaps to improve attention and focus) or in order to obtain academic support, including exam
accommodations. In recent years, it is accepted practice within the neuropsychological community to employ specific cognitive measures known as symptom validity tests in order to assess cognitive effort during any evaluation. This practice is also recommended when conducting an adult ADHD evaluation, particularly if the sole reason for conducting the evaluation is to document impairment in order to request exam accommodations. Nevertheless, this practice has been slow to catch on with practitioners evaluating suspected ADHD. A 2014 study found that symptom validity tests were employed in only 3% of evaluations of post-secondary students requesting accommodations. Although my experience suggests that the use of symptom validity measures has increased over the years beyond 3%, it remains infrequent. Without their use, however, findings of unusual and sometimes extreme levels of cognitive impairment cannot be reliably attributed to ADHD.

The State of ADHD Diagnosis: A Summary

In short, an increasing number of individuals are being given a clinical diagnosis of ADHD during both childhood and adulthood. There is nothing about the DSM-5 or current clinical practice that has impeded the continuing rise in the clinical diagnosis of this condition. This increase is likely driven by a variety of factors, including sociocultural factors that encompass legal changes. Procedural guidelines implemented by state bar examiners to encourage better-documented requests for accommodations have not necessarily improved the quality of evaluations submitted for requests based on ADHD. Realistically, every ADHD accommodations case submitted for review will contain some information to establish that the person has been given this clinical diagnosis. However, most if not all of these evaluations will have some deficiency in describing the basis for the diagnosis. Nevertheless, some will have been done in a reasonable manner consistent with current clinical practice and with some attention to most diagnostic criteria. If so, the first criterion for potentially warranting consideration of accommodations on the bar exam has been met.

Determination of Impairment Due to ADHD

In my experience examining hundreds of requests for accommodations based on ADHD over the years, I have found that the one aspect of ADHD diagnostic evaluation that is frequently lacking is a clear, reasonable description of the impairment attributable to this clinical condition. The DSM-IV-TR (published in 2000 to include updated research and information since the publication of the DSM-IV) stated that a diagnosis of ADHD should only be made if “some impairment from the [ADHD] symptoms is present in two or more settings (e.g., at school [or work] and at home).” The DSM-5, on the other hand, seems to soften this criterion by stating that a diagnosis of ADHD should be made if the condition is present in two or more settings and “there is clear evidence that the symptoms interfere with, or reduce the quality of social, academic or occupational functioning.” For this reason, almost anyone today who currently reports symptoms of ADHD while expressing some concern that the symptoms interfere with academic performance may reasonably qualify for the clinical diagnosis.

ADHD Diagnosis Alone Does Not Mean Determination of Disability

The lack of objective indication of impairment is typically associated with an implied belief that any clinical diagnosis of ADHD is equivalent to a determination of disability. However, it has been
explained in countless articles and books that a diagnosis is a necessary yet not sufficient condition for determining current disability under the ADA. Nevertheless, this mistake continues to be routinely made by clinicians supporting accommodations requests. Disability determination is dependent upon legal, procedural, and medical definitions in addition to medical or psychiatric diagnosis. This is true in most areas of disability law. For instance, if a person claims disability for Social Security purposes, the medical or psychiatric diagnosis is only relevant if the condition affects the person’s ability to maintain employment. The procedural guidelines for requesting accommodations provided to examinees and evaluators by state bar examiners have not appeared to significantly reduce this problem.

The determination of functional impairment has been described as the “800-pound gorilla in the room” (as opposed to a mere elephant in the room) in regard to accommodations. The most critical aspect of establishing a disability is to make a determination of impairment and limitation arising from the diagnosed disorder. Yet that determination is frequently overlooked, or ignored, by practitioners who submit evaluations in support of accommodations requests.

**Impairment versus Limitation**

I tend to separate these two issues, impairment and limitation, when reviewing a request for accommodations, although these concepts clearly have a good deal of overlap. In the case of ADHD, impairment refers to a mental skill, such as sustained attention or processing speed, that is weakened, diminished, or damaged by this condition. Limitation, on the other hand, discussed in the next section, involves the functional restriction or boundary imposed by the impairment associated with the disorder. The determination of limitation is ultimately guided by the actual legal definition of disability in the ADA. To explain with a simple example, a person might have peripheral nerve damage due to a back injury (diagnosis) that causes pain and leg weakness (impairments) insufficient to cause the person any limitation in walking yet sufficient to cause limitation if the person is required to run.

**Methods for Establishing Impairment Due to ADHD**

Impairment due to ADHD can be addressed in a variety of ways, although some ways have slightly greater objectivity than others. The least objective manner in which to establish impairment in an ADHD evaluation is to merely accept the report of the person being evaluated. A number of studies have concluded that self-report alone involves multiple problems, limiting its value for establishing functional impairment. Observational ratings and/or information from third-party individuals who know the person well can provide additional information regarding impairment. Observer ratings are presumably somewhat more objective than a potentially self-serving personal report.

Neuropsychological measures can also provide indirect objective evidence of impairment that correlates with the behavioral symptoms of ADHD. As previously stated, these measures do not diagnose ADHD, yet they can provide objective indication of impairment (not limitation) in such skills as sustained attention, working memory, and cognitive processing speed. Over the past few years there have been sufficient numbers of neuropsychological studies to produce meta-analytic reviews of the cognitive impairments associated with adult ADHD. These studies do not, in fact, offer much to conclude that there are any highly specific and sensitive cognitive tests that will consistently document impairment due to ADHD. They do, however, tend to support the likelihood that many adults...
with ADHD have mild, relative impairments in such skills as sustained attention, working memory, and executive problem solving. I prefer to categorize these discrete yet overlapping cognitive functions as all requiring “cognitive efficiency.” To date, there is no indication that every adult with ADHD will show impairment on these cognitive tests. There is similarly no indication that mild, relative impairment on any specific cognitive measure is sufficient to document a diagnosis of ADHD in the absence of the person’s actual behavioral presentation. To the extent that a competently executed neuropsychological evaluation documents some impairment on tests requiring cognitive efficiency, this tends to indicate an impairment that might cause limitation when taking exams.

Many clinicians who submit evaluations in support of accommodations requests provide cognitive test findings for which a label of “impaired” or even “severely impaired” is included, even though the actual test scores are within a completely normal, average range. This issue has been discussed extensively in regard to the diagnosis of learning disabilities, and it also applies to neuropsychological evaluation of ADHD. Acceptable practice is usually that test deviation at least fall below the average range before being designated as “impaired.” Too often, however, evaluators supporting ADHD accommodations requests say that the person is impaired because of a slight, minor deviation on one single neurocognitive measure administered on one occasion even when the score technically falls within the average range.

In the past few years, one area of ADHD neuropsychological research has had some indirect relevance to the primary accommodation request of extended time on the bar exam. This research suggests that a subset of individuals with ADHD appear to have a generally slow cognitive processing style, also sometimes referred to as a slow cognitive tempo. There is debate as to whether or not this group does, in fact, fall under the rubric of ADHD. Nevertheless, such individuals are often placed within this diagnostic category even though slow processing is not a listed symptom of ADHD in the DSM-V. A relatively small number of studies offer some support for the possibility that some adults diagnosed with ADHD exhibit weakness on standard neuropsychological measures of rote cognitive processing speed. There is no reason to dispute the fact that some people who report ADHD symptoms likely tend to have a slower, more plodding type of cognitive processing style than some people who do not report any symptoms of ADHD. The extent to which this has any appreciable impact on their ability to quickly and efficiently complete tasks that require concentration and focus over time, such as lengthy exams, is unclear.

**Determination of Impairment: A Summary**

In short, the determination of impairment from ADHD, while virtually always based in part on self-report, requires additional information in order to provide more credible indication of impairment. Observational ratings and cognitive measures are imperfect but can provide some support for the likelihood that the condition is associated with impairment that might plausibly correlate with difficulty maintaining cognitive efficiency during exams. For these reasons, applicants for accommodations are encouraged to submit both past (if available) and current evaluations that include neuropsychological testing in order to further bolster an argument that they have been dealing with a condition causing impairment for many years. Ideally, the neuropsychological evaluation includes symptom validity measures. Unfortunately, experience to date suggests that many evaluators do not bother to assess...
whether their clients are, in fact, making appropriate efforts on neuropsychological tests.

**Determination of Limitation Due to Impairment**

If a determination of functional impairment is the “800-pound gorilla,” then a determination of limitation is, in the final analysis, where the “rubber meets the road.” Determination of a limitation requires the provision of information that gives some plausible indication that the impairment attributable to ADHD causes an actual problem in the person’s life. During the past few years, extensive research has described how adults with ADHD do, in fact, show multiple indications of impairment and limitation in life activities, and these limitations can be quite substantial. For instance, studies indicate that people with ADHD, perhaps due to distractibility, have many more car accidents than normal adults.44 Longitudinal studies of adults with ADHD indicate that they achieve substantially lower levels of academic and vocational success than normal adults.45 Children with ADHD who also exhibit serious conduct problems frequently end up within the prison system.46 In addition, recent research even suggests that individuals with ADHD have a higher mortality rate.47

**Establishing Academic Limitation**

Realistically, many of the ADHD cases reviewed for accommodations on the bar exam offer much less dramatic examples of limitation in life. Not infrequently, the limitation involves little more than a self-reported concern that one’s academic results do not seem consistent with the effort expended. It would seem self-evident that the most direct indication of an academic limitation would be any past academic performance difficulties suggesting that a limitation does, in fact, exist; however, such an indication is often left unaddressed by evaluators who support accommodations requests. Thus, a reviewer needs to review transcripts and past exam scores to potentially determine that there might be some indication of limitation.

Admittedly, this often places a postsecondary student in a catch-22 situation, since it can be difficult to explain how the person came to be in law school despite impairment that imposes a limitation on being able to achieve adequate exam performance.48 Realistically, the best that can be provided are indications that the person has struggled to achieve adequate academic or exam performance during some or much of his or her academic career. In the absence of a clear history of having required academic support including exam accommodations in order to succeed academically, this might include course failure, inconsistent grades, the need to take entrance exams multiple times, and/or low scores on entrance exams despite adequate intellectual level. None of these “limitations” are particularly compelling when one considers the limitations associated with severe ADHD, but these kinds of problems can provide some indication of a limitation affecting academic performance.

**The Impact of the 2008 ADA Amendments Act on Determining Limitation**

The determination of limitation is not based on diagnostic information or clinical evidence of impairment. It is technically based on a legal definition that is currently in flux under the ADA and that is arguably the most contentious underlying issue surrounding the provision of accommodations on professional licensing exams. The ADA disability definition involves a “substantial limitation” in a “major life activity” and thus appeared to leave little, if any, room for the provision of accommodations on licensing exams. The ADA was amended by
The extremely vague mental facility of “concentrating,” which clearly relates indirectly to ADHD diagnosis, was specifically identified as a “major life activity” under the ADAAA. Additionally, the determination of disability was to be made without consideration of mitigating measures. This specific change was significant in regard to accommodations requests for ADHD. Since stimulant medication often does, in fact, ameliorate the impairing symptoms from the disorder, the previous recommendation had been to consider whether the person had limitation when being treated. At the same time, however, the disability definition continued to include language indicating that disability remains defined as a substantial limitation in comparison to the general population.

Thus, the ADAAA did little to clarify the degree of impairment or limitation that should be used as a standard for identifying individuals who legally have a claim to receive accommodations on the bar exam. On the one hand, it called for greater inclusiveness with a broadened view of disability, yet it also seemed to hold to the stringent standard of comparison to the average person. A subsequent Department of Justice regulation that included a statement to give considerable weight to past accommodations was not clearly viewed by some as altering anything about the process of reviewing accommodations requests for the bar exam. Nevertheless, there is a recommendation in these regulations to make the process less onerous with perhaps more deference to applicant requests than in the past.

The Impact of the 2014 LSAC Consent Decree on ADHD Accommodations

It is fair to say that the current process for accommodating examinees continues to be confusing partly in light of a consent decree resolving a dispute involving the Law School Admission Council in regard to provision of accommodations on the Law School Admission Test (LSAT). In the Final Report of the “Best Practices” Panel (a report filed by the Justice Department outlining recommendations that LSAC must implement to be in compliance with the ADA, which were identified by an expert panel convened for this purpose), a number of recommendations were made that would significantly alter the manner in which cases of ADHD (and other disabilities) would be reviewed by this testing organization in the future.

The recommendations imply that virtually any past diagnosis of ADHD, whether made in a comprehensive manner or not, would suffice to determine current disability. Additionally, anyone with a history of requiring accommodations, even if the accommodations were in the distant past, would be accommodated in the future. This recommendation seems to discount all the research indicating that the symptoms of ADHD often diminish significantly over the course of development. These guidelines also recommend that specific accommodations, for instance 50% extended time, be routinely granted for ADHD. A minority report and a number of responses to the final report, including one signed by me, express serious reservations about this document. This consent decree relates specifically to the LSAT and therefore does not necessarily have any direct application to the review of requests for accommodations on the bar exam.

Nevertheless, a report from the U.S. Department of Justice Civil Rights Division providing guidelines...
for “ADA Requirements” to testing organizations cites the recommendations of this “Best Practices” panel and, thus, echoes a seemingly lenient, much less stringent view of accommodation provision.55

Certain points are worth highlighting. A history of accommodations is to be given significant weight in these determinations. In fact, according to this document, “Proof of past testing accommodations in similar test settings is generally sufficient to support a request for the same testing accommodations for a current standardized exam or other high-stakes test.”56 Additionally, “A person with a history of academic success may still be a person with a disability who is entitled to testing accommodations under the ADA.”57 This is perhaps true for someone who has graduated from high school, but it is more difficult to accept such a statement with regard to someone who has graduated from law school, or even college, without indication of disability due to ADHD. Finally, these guidelines indicate that “Testing entities should defer to documentation from a qualified professional” and that this documentation “should take precedence over reports from testing entity reviewers”58 who did not, of course, actually perform the evaluation. Unfortunately, anyone who has reviewed such evaluations often finds them lacking, particularly in regard to evidence of impairment or limitation.

There remains a statement, however, that a finding of substantial limitation should be based on a comparison of the “condition, manner, or duration” in which a person performs the major life activity (including “concentrating”) to that of the “general population,” presumably not the population of advanced students who are typically taking the bar exam. While it is my understanding that these are meant as general guidelines for testing organizations, the implication, at minimum, is that the Justice Department holds to a much more inclusive standard of disability determination. At the same time, the disability definition of requiring a substantial limitation is not typically established for many, if not most, of the students who currently have some history of accommodation or who can provide an evaluation report indicating that they have been given a clinical diagnosis of ADHD.

**Determination of Limitation:**
**A Summary**

In short, the determination of limitation is arguably the most critical aspect of any accommodation review. It is ultimately based on legal rulings that seem to present conflicting standards that are difficult to interpret. Most of the individuals requesting accommodations and the evaluators supporting these requests have minimal understanding of the ADAAA and its implications. This is hardly surprising since the rulings themselves are a type of Necker cube (a well-known optical illusion in which ambiguity results in two different images or points of view). In this case, ambiguity in the law allows one to perceive either the maintenance of a very strict disability determination or a continuing expansion and evolution of disability determination to possibly include people who have very mild impairments that cause minimal limitation in some specific and rather demanding situations such as the bar exam.

**Summary and Recommendations for Providing ADHD Accommodations**

During the last 20 years, scientific understanding of adult ADHD has increased, but it has not identified, nor is it likely to identify, some specific biological or psychological test that will routinely confirm the diagnosis with associative impairment. This knowledge of ADHD has increased as the prevalence of diagnosing and treating ADHD has also
increased. Cultural acceptance and the lack of a clear test or metric for making the clinical diagnosis likely explain at least some of this increase. As culture has not impeded the significant increase in ADHD diagnosis, neither has the ADA disability definition clearly established a stringent standard for disability determination, as many of us thought would have been the case. The provision of exam accommodations for ADHD has become accepted practice even if there are significant questions and disagreements about this practice.

Two Points of View Regarding ADHD Accommodations

At one end of the disagreement are those who believe that almost anyone given a clinical diagnosis of ADHD at any time by any acceptable professional should thereafter be granted exam accommodations. Future legal rulings could conceivably make this the standard upon which accommodations are granted. However, there is no indication that this is the standard that testing organizations should currently adopt. Given the goal of licensing exams, including the bar exam, there is still a need to maintain a more stringent guideline for disability determination than is becoming the norm within postsecondary education.

On the other hand, some continue to believe that testing organizations should hold to a very stringent disability standard as expressed in the original ADA definition and seemingly upheld in the ADAAA. The problem with this stance, in my opinion, is that almost nobody is holding to a stringent disability definition, which has been the case for quite some time. Already, most of us who review accommodations requests for licensing exams are fully aware that many colleges and professional schools, including law schools, routinely grant accommodations on the basis of little more than a brief diagnostic statement with no objective history of impairment or limitation required. In fact, in regard to ADHD, it has been reported that the majority of postsecondary institutions do not require extensive documentation of disability before providing accommodations.

A Middle Ground Approach

In my skeptical opinion, future legal rulings will probably not provide complete clarity as to the manner and standard by which disability determination is to be made by testing organizations unless decisions eventually hold that any person with a diagnosis of ADHD should be accommodated. If so, the floodgates will open and the number of requests for accommodations will increase substantially. In the meantime, there is a middle ground that takes into account the intention to broaden the provision of help under the ADA while not granting accommodations unreservedly to anyone who reports symptoms of ADHD in order to obtain more time on the bar exam. This will continue to require some type of individualized analysis of each request for accommodations on the part of a testing organization; realistically, this is not a perfect process but one evolving to respond to this current legal climate.

Guidelines with the ADAAA in Mind

The guidelines that follow are similar to those I recommended years ago, although perhaps less stringent particularly in regard to two main issues. First, the ADAAA indicated that a determination of disability should not consider the impact of treatment in alleviating impairment and limitation. Second, and more importantly, recent guidelines seem to strongly suggest that past accommodations should be given significant weight in terms of the current accommodations request. These general guidelines are not meant to apply to every single request for
accommodations based on ADHD, since it is impossible to account for every circumstance.

RECOMMENDATIONS FOR ACCOMMODATIONS REQUESTS SUPPORTED BY DOCUMENTATION OF ADHD DIAGNOSIS ONLY

There is no indication that most current clinical practice routinely demands that all ADHD diagnostic criteria be determined with objective data. This is truer today as the prevalence of ADHD continues to rise and the DSM-5 has watered down the impairment criterion. This diagnosis is currently given quite frequently to adults, and most research suggests that it is typically given on the basis of inadequate, noncomprehensive evaluation.

In short, there should not be an expectation that every applicant for accommodations based on ADHD will be able to provide an evaluation that is perfect or fully describes every diagnostic criterion in detail. This is not usually the fault of the applicant, who often pays a significant amount of money, even though he or she receives a clinical evaluation that is not fully comprehensive. Insistence that every ADHD evaluation include clear, objective information establishing early childhood academic problems facilitates a determination of impairment and limitation, but it should not be required in every case as has previously been strongly argued. In particular, rigid adherence to this standard likely disadvantages some applicants who did not have ready access to expensive evaluation and academic support during childhood or adolescence.

Once again, the critical aspect of the diagnostic evaluation is not whether each and every diagnostic criterion has been fully documented; it is whether or not it has been done in a manner that adequately documents a history of impairment and limitation due to the condition. Perhaps it bears repeating: a clinical diagnosis says relatively little about whether the condition is disabling and in need of accommodation.

Therefore, it is recommended that accommodations be considered for applicants who are only able to provide documentation for a clinical diagnosis of ADHD, even if based on evaluations that are not fully comprehensive and are lacking adequate explanation of past and current impairment and limitation, in the following situations:

- Routine requests for an allowance to take prescribed ADHD medication (stimulant or other) in a comfortable manner (usually with water and a light snack) during the exam should be granted.
- A minor request for use of acceptable earplugs to reduce distractions should be granted.
- In light of a key guideline from the Justice Department that a history of accommodations be given significant weight in these decisions, if the person has a formally documented history of accommodations prior to college, during college, and extending through law school (including on the LSAT), requests for accommodations, including extended time (50% maximum), off-the-clock breaks (without other extended time), and a distraction-reduced testing environment should be considered. In these cases, there should be a presumption that the limitation was adequately addressed by the prior accommodations (whether this is true or not). However, this does not mean that individuals who have performed adequately on past exams such as the SAT and the LSAT with 50% extended time should be granted a current request for 100% extended time and a private room merely...
because they think the bar exam will be more difficult.

RECOMMENDATIONS FOR ACCOMMODATIONS REQUESTS SUPPORTED BY DOCUMENTATION OF IMPAIRMENT DUE TO ADHD

Determination of impairment attributable to ADHD is, at best, an imperfect process with imperfect measures. Research continues to question the relationship between self-report and impairment. Thus, while ADHD evaluation based solely on self-report is fairly typical of standard psychiatric practice and is deemed adequate to document a clinical diagnosis of ADHD, it is not adequate to document impairment for determination of any functional limitation. At minimum there should be some attempt to corroborate these self-reported symptoms, past and present, with observational measures, reports from supervisors or professors, and competent neuropsychological evaluation.

Neuropsychological evaluation can provide some indication of reduced cognitive efficiency in order to document current impairment (for instance, below-average scores on measures of attention, processing speed, working memory, or executive functions). Such measures should be accepted as providing indication of impairment, unless the performance level is clearly within an average range. Also, some current evaluation reports purport to show levels of cognitive impairment that are extremely severe, beyond that of individuals with severe brain trauma (for instance, scores beyond two standard deviations below average). Even in the absence of symptom validity measures, this can only be explained on the basis of inadequate effort during the evaluation. These evaluations should not be accepted as establishing anything related to impairment.

If the applicant for accommodations based on ADHD has provided a reasonable—not perfect—clinical diagnosis of ADHD with some indications of current impairment (not based solely on either self-report or minimal cognitive impairment on neuropsychological testing) attributable to ADHD symptoms, then the following recommendation is made (in addition to those made earlier).

- Requests for extended time (50% maximum), a distraction-reduced testing environment, and/or off-the-clock breaks only (without additional extended time) should be considered if there is a documented history of having received these accommodations prior to law school (college exams, LSAT, other entrance exams) and extending through law school.

RECOMMENDATIONS FOR ACCOMMODATIONS REQUESTS SUPPORTED BY DOCUMENTATION OF LIMITATION DUE TO IMPAIRMENT

Documenting a limitation under the original ADA definition was almost impossible for applicants to the bar exam unless there existed a clear, comprehensive diagnostic evaluation with inclusion of a developmental history of impairment and limitation and documentation of continued impairment and limitation. Limitation is ultimately based not on a clinical diagnosis of ADHD or indications of impairment on behavioral or cognitive measures, but on transcripts and past exam performance indicating limitation in actual academic performance. This requires a review of transcripts indicating long-standing academic inconsistency, poor entrance exam scores, and the like. Since few evaluations submitted on behalf of applicants requesting exam accommodations for ADHD have routinely included an objective review of past academic performance, guidelines from testing organizations have typically encouraged
submission of these transcripts and entrance exam scores (SAT, GMAT, LSAT) from the applicant for review by a clinically trained reviewer.

An interesting issue involves how to assess an applicant for accommodations where the person clearly documents significant limitation in life consistent with research about severe ADHD (car accidents, loss of jobs, unstable relationships, legal entanglements, etc.) yet has rather little indication of any difficulty taking exams under standard conditions. Such information assists in diagnostic confirmation, yet accommodations are supposed to be tailored to the need to alleviate a limitation taking exams. Without some information to suggest limitation in taking exams, the other information is not fully relevant.

Experience indicates that some applicants’ requests for accommodations will, in fact, include a fully comprehensive diagnostic evaluation with a full, reasonable explanation of past and current impairment and limitation when administered exams without accommodations. In these relatively rare instances, the following recommendation is made (in addition to those made earlier):

- Requests for extended time (50% maximum), a distraction-reduced testing environment, and/or off-the-clock breaks only (without additional extended time) should be considered if the documented history of accommodations did not begin until law school.

**ADDITIONAL GENERAL RECOMMENDATIONS**

I conclude with the following general recommendations:

- Given that ADHD is not yet considered a diagnostic condition that can arise in adulthood without signs of difficulty earlier in life, there can be no reasonable rationale for providing accommodations to a person who completes law school without accommodations and therefore has no history of requiring exam accommodations. In other words, failure on the bar exam is an inadequate documentation of limitation.

- Research into the value of accommodations has not yet established that the most typical requests granted for ADHD—those being 50% extended time and a distraction-reduced testing environment—are fair, necessary, or even of any value in alleviating limitations attributable to ADHD. Additionally, it has recently been shown that some parts of the bar exam (the Multistate Bar Examination, for instance) have minimal, if any, time pressure. Therefore, there is no established rationale for requests of 100% extended time or a completely separate testing room for usual, uncomplicated cases of ADHD. These requests might be considered in the rare instance in which the person has documentation that he or she has been limited on exams only when not provided these extensive accommodations in the past.

- Finally, the Justice Department guidelines suggest, and I agree, that every effort should be made to make this process less onerous in the future for applicants requesting accommodations. Of course, it would often be less onerous if the applicants requesting accommodations for ADHD and the practitioners who submit evaluations on their behalf would simply read and follow the guidelines offered by bar examiners.

**FINAL THOUGHTS**

Every reviewer who assists testing organizations in examining documentation from applicants requesting accommodations for ADHD is well aware that some ADHD cases offer no indication that the
clinical diagnosis was given in a reasonable manner (for instance, in the case of self-reported symptoms only), and that often the only evidence of impairment or limitation is that a person of average ability has reported finding law school to be a difficult and demanding academic environment. Frequently, this person is nevertheless passing law school classes before ever being granted an accommodation on a law school exam. Accommodations for such individuals should be denied, since they are simply unnecessary.

Other cases will, however, provide multiple ADHD diagnostic evaluations spanning many years with ample formal documentation of past accommodations. There is essentially no reason to deny current accommodations to an individual in such a case unless the request is for unreasonable accommodations never requested or received in the past.

Most applicants for ADHD accommodations fall somewhere in between these extremes—the documentation of diagnosis is somewhat reasonable by current standards yet the documentation of impairment is questionable and the history of limitation is thin. If I were to make one statement as to how I review accommodations cases today as opposed to years ago, it is that the benefit of the doubt should now be given to the applicant in some of these cases, whereas it was generally previously given to the testing organization. Rather than look for every deficiency in an applicant’s request for accommodations, in the spirit of the current regulations, an attempt should be made to look for the merits of the request. Of course, these merits do not always exist.

**Notes**

1. The author would like to thank Dr. Mary Barber, Ph.D., for her helpful comments and suggestions.

17. _Id._


26. Id.


33. Nelson et al., supra note 25.


35. Barkley et al., supra note 8.


38. Lovett & Lewandowski, supra note 36.


40. Boonstra et al., supra note 11; Hervey et al., supra note 11.


42. Lovett & Lewandowski, supra note 36.


45. Barkley et al., supra note 8.


48. Ranseen & Parks, supra note 37.


50. Ranseen, supra note 3.

[Editor’s Note: For an overview of the ADAAA’s changes pertinent to the bar exam, see Judith A. Gundersen, The ADAAA and the Bar Exam, 78(2) The Bar Examiner 40–45 (May 2009).]

56. Id.
57. Id.
58. Id.
60. Ranssen, supra note 3.
61. Murphy & Gordon, supra note 23; Gordon & Keiser, supra note 27.
62. Lovett & Lewandowski, supra note 36.

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