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### Setting the Bar: Applying a Uniform Standard of Documentation in Accommodating Bar Examinees With AD/HD in Compliance with Title III of the ADA

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## SETTING THE BAR: APPLYING A UNIFORM STANDARD OF DOCUMENTATION IN ACCOMMODATING BAR EXAMINEES WITH AD/HD IN COMPLIANCE WITH TITLE III OF THE ADA

### I. INTRODUCTION

Doctors diagnosed Bethany Morris with adult Attention Deficit/Hyperactivity Disorder (“AD/HD”) at the age of twenty-four.<sup>1</sup> Previously, she never had a problem focusing her attention on schoolwork. In fact, her academic performance in high school and her undergraduate education did not show any indication of a learning disability. However, after her first semester at an accredited law school in Florida, Bethany began to notice a change in her learning behavior. Her grades revealed poor performance on her examinations, which came as a surprise to not only her, but to her law professors as well.

Due to Bethany’s inability to stay focused in class and her lack of motivation, professors recommended she undergo testing for adult AD/HD. She completed a two-day psycho-educational evaluation that analyzed her learning and thought processes. The test results indicated that Bethany had adult AD/HD. The correlation between her testing results and poor performance in school signified she needed special accommodations to reach her full potential. To receive special accommodations, the Florida law school only required that Bethany turn in the results of the psycho-educational evaluation.

The law school granted Bethany additional time, as well as a private room, to take her examinations. Once she received these special accommodations, her grades improved. However, near the end of Bethany’s third year of law school, her faculty advisors forewarned her that obtaining accommodations for the state bar examination would be far more difficult than in law school. She feared that her adult AD/HD would prevent her from becoming an attorney because of the time restraints surrounding each portion of the state bar examination.

In March, Bethany applied to take the Florida state bar examination, which required her to submit several forms for testing accommodations.<sup>2</sup>

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<sup>1</sup> This scenario is fictional and solely the work of the author.

<sup>2</sup> See Florida Board of Bar Examiners, *Instructions for Submitting a Test Accommodations Petition*, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/81B83C031CF544D185257C0C006DF60D> (last visited Apr. 8, 2015), archived at <http://perma.cc/AB9L-U7WR> [hereinafter *Instructions for Submitting*] (listing the documents an individual requesting testing accommodations for the Florida Bar Exam must provide). Specifically, individuals with AD/HD must complete a form requesting

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One of the required forms requested evidence that indicated a history of AD/HD symptoms present in her childhood.<sup>3</sup> However, because doctors only recently diagnosed Bethany with adult AD/HD she was unable to complete these requirements. Thus, after submitting the requisite paperwork for testing accommodations to the Florida Board of Bar Examiners (“the Board”), she received a letter denying her request because she had failed to produce documents indicating symptoms of AD/HD throughout her childhood. Furthermore, the Board did not find that Bethany’s AD/HD substantially limited a major life activity. Discouraged, but not defeated, she appealed her request. Once again, the Board denied Bethany’s accommodations, forcing her to apply to take the state bar examination in Connecticut where her accommodations were met.<sup>4</sup> Because of Florida’s unfair accommodation requirements, Bethany now must leave her family, friends, and law school network for Connecticut to pursue her dream of becoming a lawyer.

Law school graduates with learning disabilities are finding that accommodations to take the state bar examination are not as easily

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accommodations as well as a personal narrative attached to that form. *Id.* Additionally, these individuals must submit the AD/HD verification form. *Id.* A portion of this form is to be completed by the individual whereas the latter part of the form is to be completed by the diagnosing physician. *Id.* Medical documentation indicating an individual’s testing results must also be included. *Id.* Also attached to this form must be copies of an individual’s transcripts as well as an Academic Report from LSAC. *Instructions for Submitting, supra.* Furthermore, these individuals must submit a form indicating their accommodation history. *Id.* This form should include any accommodations received for the MPRE, LSAT, ACT, undergraduate or graduate school, and elementary through high school. *Id.*

<sup>3</sup> See Florida Board of Bar Examiners, *Form 3: Attention Deficit/Hyperactivity Disorder Verification*, [https://www.floridabarexam.org/\\_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/eb6ca213efbd03f785257c0c0077d9d6](https://www.floridabarexam.org/_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/eb6ca213efbd03f785257c0c0077d9d6) (last visited Apr. 8, 2015), archived at <http://perma.cc/NZ6X-3V6A> (specifying what must be included in an individual’s comprehensive evaluation report). Florida Board of Bar Examiners requires five components that must be included in the comprehensive evaluation report. *Id.* Specifically, there must be “objective evidence that symptoms of inattention and/or hyperactivity-impulsivity that caused impairment were present during childhood.” *Id.*

<sup>4</sup> See Connecticut Bar Examining Committee, *Instructions for Filing Petition for Non-Standard Testing Conditions on the Connecticut Bar Examination*, <http://www.jud.ct.gov/cbec/instrucNST.htm#Forms> (last visited Apr. 8, 2015), archived at <http://perma.cc/VZP5-KD52> [hereinafter *Instructions for Filing*] (listing the documents an individual must submit when requesting testing accommodations for the Connecticut Bar Examination). Specifically, an individual with AD/HD must submit a form requesting testing accommodations as well as a form verifying an individual’s AD/HD diagnosis. *Id.* Attached to those forms should be medical documentation from the diagnosing physician showing an individual’s testing results. *Id.* Additionally, an individual must submit a form indicating a history of accommodations. *Id.* Connecticut Bar Examining Committee does not require an individual to submit elementary, middle, or high school transcripts, but can request such documents. *Id.* Finally, an individual must submit a notarized authorization and release form. *Id.*

acquired as accommodations in law school.<sup>5</sup> Law schools provide students with AD/HD special accommodations during examinations, provided the student shows proof of the necessary documentation completed by a doctor.<sup>6</sup> However, when taking the state bar examination, individuals with AD/HD find it harder to receive testing accommodations because of the different standards among the states.<sup>7</sup> As a result of the state board of bar examiners' overall failure to have uniform and obtainable standards for receiving accommodations, success rates for AD/HD test takers are negatively affected.<sup>8</sup> Because there is no uniform policy among the states, it has become increasingly difficult for

<sup>5</sup> Samuel S. Heywood, *Without Lowering the Bar: Eligibility for Reasonable Accommodations on the Bar Exam for Learning Disabled Individuals Under the Americans with Disabilities Act*, 33 GA. L. REV. 603, 631–32 (1999).

<sup>6</sup> See generally *Policies and Procedures for Students with Disabilities*, FLA. COASTAL SCH. OF L. 1 (2013), <https://www.fcsl.edu/sites/fcsl.edu/files/ADA%20Policies-Procedures%202013-2014.pdf>, archived at <http://perma.cc/6WHH-Y95L> (providing Florida Coastal School of Law's procedures for an individual with a disability to obtain testing accommodations). Florida Coastal's accommodations process consists of the individual submitting a student ADA Accommodations Intake Form and having "a qualified practitioner complete the specific Disability Verification Form and submit it, along with appropriate evaluations and testing, to the Student Services Coordinator." *Id.* at 2. Once the student submits the required documents, the Office of Student Affairs meets to review "all documentation and makes a determination regarding the presence of a disability and a corresponding need for accommodation." *Id.*

According to Valparaiso University Law School's policy, an individual requesting accommodations must fill out an application. *Disability Accommodations*, VALPARAISO LAW SCH., <http://www.valpo.edu/law/current-students/orientation/disability-accommodations> (last visited Apr. 11, 2015), archived at <http://perma.cc/E8HT-DPET>. The necessary documentation consists of a report from an appropriate professional "explaining the testing that has been completed, the diagnosis, the major life activity that is affected by the disability, and a recommendation of appropriate accommodations." *Id.* Once the appropriate professional completes all the necessary documentation and forms, the "Director of Disability Support Services" reviews and approves the accommodation request. *Id.*

<sup>7</sup> See *Bar Information for Applicants with Disabilities*, AM. BAR ASS'N., <http://www.americanbar.org/groups/disabilityrights/resources/biad.html> (last visited Apr. 2, 2015), archived at <http://perma.cc/38FC-JHW7> (providing a portal for accessing the different accommodation standards for each state bar examination). To view each state's policies pertaining to testing accommodations, each state must be accessed individually through the ABA's website.

<sup>8</sup> See, e.g., Heywood, *supra* note 5, at 603–04 (providing an example of an individual with a learning disability whose success on the bar exam is at a disadvantage due to the effects of her disability). Many judges and attorneys do not recognize that reading and writing are essential skills to be successful on the state bar examination. *Id.* at 636. In fact, both claim that the practice of law rarely requires "[r]eading and writing under timed conditions." *Id.* AD/HD also affects an individual's processing speed as well as their reading fluency and comprehension. E. Mark Mahone, *The Effects of ADHD (Beyond Decoding Accuracy) on Reading Fluency and Comprehension*, JOHN HOPKINS U. (2011), <http://education.jhu.edu/PD/newhorizons/Journals/Winter2011/Mahone>, archived at <http://perma.cc/4XKR-KZTW>.

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individuals with AD/HD to obtain accommodations for the state bar examination.<sup>9</sup> As a consequence, states must implement uniform standards and methods for granting accommodations in order to comply with Title III of the Americans with Disabilities Act (“ADA”) and avoid discrimination.<sup>10</sup>

State bar examiners discriminate against individuals with AD/HD by failing to comply with the ADA’s guidelines for testing accommodations.<sup>11</sup> As a result, this Note proposes amending section 36.309 of the ADA to include a uniform list of documents that individuals with AD/HD must provide for testing accommodations.<sup>12</sup> Part II begins by explaining the symptoms of AD/HD, including how it often goes undiagnosed in adults, the history of the ADA and the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), and the different processes an individual with AD/HD must go through to obtain testing

<sup>9</sup> See *Bar Information for Applicants with Disabilities*, *supra* note 7 (providing a portal to research the different state accommodations requirements).

<sup>10</sup> See, e.g., *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 187 (D.C. App. Ct. 1998) (determining that a legally blind plaintiff “is likely to suffer irreparable harm” without an injunction allowing her to take the bar examination with accommodations); see also *Enyart v. Nat’l Conference of Bar Exam’r, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (affirming that the Board of Bar Examiners violated Title III of the ADA by denying a legally blind applicant testing accommodations); *Cox v. Ala. State Bar*, 392 F. Supp. 2d 1295, 1298, 1302 (M.D. Ala. 2005) (denying the Alabama State Bar’s motion for summary judgment for refusing to accommodate plaintiff suffering from ADD and dyslexia); *Argen v. N.Y. State Bd. of Law Exam’rs*, 860 F. Supp. 84, 86, 91 (W.D. N.Y. 1994) (denying an individual’s request for testing accommodation because he did not provide substantial evidence of a learning disability); *D’Amico v. N.Y. State Bd. of Law Exam’rs*, 813 F. Supp. 217, 218–19, 223–24 (W.D. N.Y. 1993) (ordering the Board of Law Examiners under the ADA to grant plaintiff’s accommodations for his severe visual disability). Compare *Fla. Bd. of Bar Exam’r re S.G.*, 707 So. 2d 323, 324–25 (Fla. 1998) (denying applicant’s request to the Board of Bar Examiners to average scores on two parts of the bar exam that the plaintiff took at separate times, because it “would result in preferential treatment and is not a reasonable accommodation”), and *Varad v. Barshark*, 261 F. Supp. 2d 47, 48 (Mass. Dist. Ct. 2003) (ordering that failure to deny plaintiffs handwriting disability was in violation of the ADA), with *In re Rubenstein*, 637 A.2d 1131, 1132, 1134–35, 1140 (Del. 1994) (waiving applicant’s passage requirements for admission to the Delaware Bar after being granted accommodations for the essay portion, but being denied accommodations for the MBE portion, after previously failing the maximum amount of times).

<sup>11</sup> 42 U.S.C. § 12182(a) (1990). Section 12182(a) provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

*Id.*

<sup>12</sup> See *infra* Part IV (amending regulation 36.309 to include a uniform list of documents that each states board of bar examiners would have to follow in order to comply with Title III of the ADA).

accommodations for law school examinations, as well as state bar examinations.<sup>13</sup> Part III of this Note analyzes the regulations of Title III of the ADA regarding its processes for granting individuals testing accommodations compared to the process used by law schools and the board of state bar examiners.<sup>14</sup> Finally, Part IV of this Note recommends amending regulation 36.309 of Title III of the ADA to better guide entities in granting testing accommodations.<sup>15</sup>

## II. BACKGROUND

It is essential for a law student with AD/HD to have a fair opportunity to succeed on the state bar examination.<sup>16</sup> The United States Department of Justice established the ADA, a set of legally binding regulations, to protect individuals with disabilities as well as list specific entities that must provide accommodations.<sup>17</sup> However, there is no uniform standard among state bar examiners regarding the types of documents an individual with AD/HD must provide to obtain testing accommodations for the state bar examination.<sup>18</sup> First, Part II.A explains the diagnostic

<sup>13</sup> See *infra* Part II.A (giving an overview of the statistics, diagnosis, testing, and treatment options adults with AD/HD are given to determine whether he or she has the disorder); *infra* Part II.B (discussing the narrow language used in the ADA, why Congress broadened the language, and the major revisions to the ADA in 2008); *infra* Part II.C (comparing the difficulties an individual with AD/HD faces in obtaining accommodations for law school examinations with accommodations for the state bar examination).

<sup>14</sup> See *infra* Part III (analyzing the process law schools and the board of state bar examiners use when determining whether to award an individual with AD/HD testing accommodations).

<sup>15</sup> See *infra* Part IV (amending regulation 36.309 of Title III of the ADA to include a uniform list of documents individuals with AD/HD must provide to the board of state bar examiners to obtain testing accommodations for the state bar examination).

<sup>16</sup> See *Leveling the Playing Field: Testing Accommodations on the Bar Exam*, BAR EXAM TOOLBOX (May 5, 2014), <http://barexamtoolbox.com/leveling-the-playing-field-testing-accommodations-on-the-bar-exam/>, archived at <http://perma.cc/Z5LP-J8AJ> (“[A]llowing students to compete with their peers on a level playing field.”).

<sup>17</sup> *Americans with Disabilities Act Title III Regulations*, ADA (Sept. 15, 2010), available at [http://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.htm](http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm); see U.S. Equal Emp. Opportunity Comm’n, *Americans with Disabilities Act: Questions and Answers*, ADA (Oct. 9, 2008), available at <http://www.ada.gov/qandaeng.htm>, archived at <http://perma.cc/3NVX-QJ76> (providing answers to which entities must provide accommodations to individuals with disabilities); see also M. Patrick Yingling, *Learning Disabilities and the ADA: Licensing Exam Accommodations in the Wake of the ADA Amendments Act of 2008*, 59 CLEV. ST. L. REV. 291, 294 (2011) (“Prior to the ADA, there were no federal grounds [for an individual with a disability] to challenge the fairness of bar exams . . .”). However, Title II now defines licensing examination boards as instrumentalities of state governments. *Id.* at 295.

<sup>18</sup> See *Bar Information for Applicants with Disabilities*, *supra* note 7 (providing links to every state’s accommodation requirements); see also 28 C.F.R. § 36.309(a)–(c) (2011) (referencing the examinations and courses that private entities provide to individuals with disabilities).

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criteria, treatment, and stigmas surrounding AD/HD.<sup>19</sup> Second, Part II.B discusses the history of the ADA, as well as the current regulations that Congress amended under Title III of the ADAAA.<sup>20</sup> Third, Part II.C discusses the guidelines law schools and state bar examiners use to grant individuals with AD/HD testing accommodations.<sup>21</sup>

A. *Explaining AD/HD*

“[AD/HD] . . . is the most common behavioral disorder.”<sup>22</sup> Individuals with AD/HD often experience difficulty focusing on something without being distracted.<sup>23</sup> Although AD/HD initially manifests in children, it also affects adults.<sup>24</sup> Part II.A.1 explains why doctors often fail to diagnose AD/HD in adults.<sup>25</sup> Part II.A.2 describes the diagnostic criteria as well as the types of testing used to determine an individual’s AD/HD.<sup>26</sup> Part II.A.3 discusses the treatment options

<sup>19</sup> See *infra* Part II.A (explaining the diagnostic criteria for AD/HD).

<sup>20</sup> See *infra* Part II.B (discussing the ADA and current regulations under the ADAAA).

<sup>21</sup> See *infra* Part II.C (reviewing the procedures laws schools and state bar examiners use when granting individuals with AD/HD testing accommodations).

<sup>22</sup> *What is ADHD (Attention Deficit Hyperactivity Disorder)?*, MED. NEWS TODAY (2015), <http://www.medicalnewstoday.com/info/adhd/>, archived at <http://perma.cc/LQ29-49R7> [hereinafter *What is ADHD?*]. AD/HD is a neurobehavioral developmental disorder that researchers believe is genetic. *Id.* While scientists commonly agree with this statement, there are many that argue “AD/HD is the result of chemical imbalances in the brain.” *Id.* Usually AD/HD starts during childhood, but adults can also suffer from AD/HD. *Id.* AD/HD makes it difficult for individuals to focus on tasks “without being distracted.” *Id.* People with AD/HD are often “more impulsive and restless” than those without AD/HD. *Id.*

<sup>23</sup> See Bianca Nogrady, *Diagnosing ADHD: Why is it So Challenging?*, ABC HEALTH & WELLBEING (July 3, 2014), <http://www.abc.net.au/health/features/stories/2014/03/07/3958306.htm>, archived at <http://perma.cc/BT3B-4R7W> (discussing the symptoms of AD/HD). Psychiatrists use the DSM-V to diagnose an individual with AD/HD. *Id.* An individual “must have at least six symptoms from either (or both) the inattention group of criteria or the hyperactivity and impulsivity criteria.” *Id.* The DSM-V includes a range of behaviors an individual suffering from AD/HD will have, such as difficulty staying focused, fidgeting, not listening, and not following directions, and being easily distracted. *Id.*

<sup>24</sup> *What is ADHD?*, *supra* note 22. The APA revised the DSM-V to include “diagnostic criteria not only for children, but also for adolescents and adults.” See *ADHD Fact File*, ABC HEALTH & WELLBEING (Apr. 24, 2003), <http://www.abc.net.au/health/library/stories/2003/04/24/1828304.htm>, archived at <http://perma.cc/6MCP-LR7W> (determining the effects of AD/HD in children and adults). “[AD/HD] is three times more common in boys than in girls, and symptoms usually emerge before a child starts school.” *Id.* However, sometimes the symptoms of AD/HD in children get overlooked because skeptics argue that these behaviors are nothing more than a child displaying an exuberant amount of energy. *Id.*

<sup>25</sup> See *infra* Part II.A.1 (explaining the misdiagnosis of AD/HD in adults).

<sup>26</sup> See *infra* Part II.A.2 (describing the diagnostic criteria for AD/HD in the DSM-V as well as the types of testing used in psycho-educational evaluations).

available for individuals suffering from AD/HD and examines the stigmas associated with an AD/HD diagnosis.<sup>27</sup>

### 1. Reasons Adult AD/HD Goes Undiagnosed

As of 2007, the number of children ever diagnosed with AD/HD was 5.4 million.<sup>28</sup> According to researchers, AD/HD affects about 4.4% of adults.<sup>29</sup> “[M]ore than 80% of adults with [AD/HD experience] anxiety, depression, . . . substance misuse, or mood and sleep disorders.”<sup>30</sup> Follow-up studies indicate that adults continue to experience symptoms of AD/HD in about 10% to 66% of cases.<sup>31</sup> However, doctors often fail to diagnose adults with AD/HD.<sup>32</sup> Most adults do not recognize that the symptoms they suffer from are AD/HD-related.<sup>33</sup>

<sup>27</sup> See *infra* Part II.A.3 (examining the stigmas often associated with AD/HD).

<sup>28</sup> Salyann Boyles, CDC: *Nearly 1 in 10 Kids Has ADHD*, WEBMD (Nov. 10, 2010), <http://www.webmd.com/add-adhd/childhood-adhd/news/20101109/cdc-nearly-1-10-kids-has-adhd>, archived at <http://perma.cc/BAG8-HMLQ>.

<sup>29</sup> *What is Adult ADHD?*, CTR. FOR CHILDREN WITH SPECIAL NEEDS (2010), <https://research.tufts-nemc.org/help4kids/docs/LEAP%20Handouts/Adult%20ADHD/Adult%20ADHD.pdf> (last visited Apr. 7, 2015), archived at <http://perma.cc/2XU9-59QK>. Generally, “[AD/HD] is a persisting disorder;” individuals diagnosed with AD/HD at a young age experience “significant difficulties in adulthood.” *Attention Deficit Hyperactivity Disorder: Diagnosis and Management of ADHD in Children, Young People and Adults*, NAT’L INST. FOR HEALTH & CLINICAL EXCELLENCE 5 (2013), <http://www.nice.org.uk/guidance/cg72/resources/guidance-attention-deficit-hyperactivity-disorder-pdf>, archived at <http://perma.cc/PMU2-JHAF>. Individuals may go on to develop “personality disorders, emotional and social difficulties, substance misuse, unemployment and involvement in crime” as a result of AD/HD. *Id.* at 5–6.

<sup>30</sup> *Attention Deficit Hyperactivity Disorder (ADHD): Adults Diagnosis and Treatment Guideline*, GRP. HEALTH 2 (2011), <http://www.ghc.org/all-site/guidelines/adhd-adult.pdf> [hereinafter *Adults Diagnosis and Treatment Guideline*]. Additional symptoms include antisocial personality and neurodevelopmental disorders. *Id.* These symptoms “may complicate [an adult’s] diagnosis and affect treatment and outcomes.” *Id.*

<sup>31</sup> *Id.* Studies show that “an estimated 15% [of adults] retain[] most of their symptoms[,]” while an estimated 50% experience some symptoms. *Id.* However, symptoms of hyperactivity often decrease with age. *Adults Diagnosis and Treatment Guideline, supra.*

<sup>32</sup> See J. RUSSELL RAMSAY & ANTHONY L. ROSTAIN, COGNITIVE-BEHAVIORAL THERAPY FOR ADULT ADHD: AN INTEGRATIVE PSYCHOSOCIAL AND MEDICAL APPROACH 2 (2011). Because “[m]ost clinicians have not received formal training in the assessment and treatment of [adult AD/HD],” there is an “increasing . . . likelihood that the diagnosis of AD/HD will be missed.” *Id.*

<sup>33</sup> See *What is Adult ADHD?*, *supra* note 29 (having effective coping skills often causes adults with AD/HD to avoid seeking treatment); *Attention Deficit Hyperactivity Disorder*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder/index.shtml> (last visited Jan. 19, 2015), archived at <http://perma.cc/LST6-CBWM> (explaining that parents and teachers can mistake the symptoms of AD/HD in early childhood as disciplinary problems). Often times, AD/HD can be mistaken for other types of problems. *Id.*



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For example, an adult who displays a higher level of intelligence is less likely to seek any type of clinical advice about his symptoms because he has been successful at coping with the symptoms associated with AD/HD.<sup>34</sup> Additionally, an adult may become complacent with his behavior, therefore causing him to fail to seek clinical advice.<sup>35</sup> Moreover, an adult from a strict home or school setting may also avoid clinical advice.<sup>36</sup> Other factors such as ethnicity, gender, and socioeconomic status may also be potential reasons adults avoid seeking professional help.<sup>37</sup>

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<sup>34</sup> Neha M. Sampat & Esme V. Grant, *The Aspiring Attorney with ADHD: Bar Accommodations or a Bar to Practice?*, 9 HASTINGS RACE & POVERTY L. J. 291, 302 (2012). Common characteristics of individuals with AD/HD are creativity, entrepreneurship, and "out-of-the-box" thinking." See Roxanne Smolko, *Why Being Smart Doesn't Help People with ADHD*, HEALTHLINE (Dec. 18, 2012), <http://www.healthline.com/health/adhd/iq-adhd>, archived at <http://perma.cc/FXK8-KZK9> (establishing "that [AD/HD] affects children and adults at every IQ level"). Scientists have determined "that [AD/HD] and intelligence are highly dependent upon genetic inheritance." *Id.*

<sup>35</sup> Sampat & Grant, *supra* note 34, at 302; see Melanie Howard, *Guide to Adult ADHD: Could You Have Adult Attention Deficit Hyperactivity Disorder?* PARENTING, <http://www.parenting.com/article/guide-to-adult-adhd> (last visited Jan. 19, 2015), archived at <http://perma.cc/3WUC-55ZP> (determining that individuals from "structured, supportive home environments," may be able to better cope with their AD/HD).

<sup>36</sup> Sampat & Grant, *supra* note 34, at 302. Because attention deficit affects inattention and impulsivity, "[AD/HD] individuals have limited resources to cope with stressful . . . events." See Susan Young, *Coping Strategies Used by Adults with ADHD*, 38 PERSONALITY & INDIVIDUAL DIFFERENCES 809, 810 (2005), available at <http://www.sciencedirect.com/science/article/pii/S0191886904001771>, archived at <http://perma.cc/2B62-XAN2> (assessing the influences affecting how individuals with AD/HD cope with their problems). These individuals may lack support networks to reach out to for advice. *Id.* Attention deficit may mean that these individuals may lack adaptive cognitive strategies to help cope with their symptoms. *Id.* Impulsive tendencies can cause these individuals to respond aggressively or spontaneously to stressful situations. *Id.*

<sup>37</sup> See J. Gershon & Jonathan Gershon, *A Meta-Analytic Review of Gender Differences in ADHD*, 5 J. ATTENTION DISORDERS 143, 143 (2002) (indicating fewer females than males are seen at clinics for AD/HD). A study done by Dr. Stephen Hinshaw, a Professor of Psychology at the University of California at Berkeley, suggests "that [AD/HD] impairs girls differently, particularly as they enter adolescence and young adulthood." Wendy Donahue, *ADHD Gender Gap: New Study Surprises*, CHI. TRIB. (Dec. 27, 2013), available at [http://articles.chicagotribune.com/2013-12-27/health/sc-health-1225-adhd-boys-girls-20131227\\_1\\_adhd-treatments-gender-gap-hinshaw](http://articles.chicagotribune.com/2013-12-27/health/sc-health-1225-adhd-boys-girls-20131227_1_adhd-treatments-gender-gap-hinshaw), archived at <http://perma.cc/2CKZ-QTEU> (studying the effects AD/HD has on women). Professor Hinshaw's research shows that among girls between the ages of seventeen to twenty-four, "[23% of them] had made a serious suicide attempt." *Id.* Additionally, 51% of girls with AD/HD performed some sort of "non-suicidal self-injury." *Id.* Hinshaw further explained that research done on boys with AD/HD never indicated such results. *Id.* Hinshaw argues this is because boys are more outwardly aggressive, whereas girls tend to direct everything inward. *Id.* In the United Kingdom, individuals displaying hyperactive behavior are "more likely to be diagnosed [with a] conduct disorder" than AD/HD. Stephen V. Faraone et al., *The Worldwide Prevalence of ADHD: Is it an American Condition?*, WORLD PSYCHIATRY 2 (June 2003),

However, most adults have trouble coping with the symptoms of AD/HD in college because it requires “more multi-tasking and focus.”<sup>38</sup> Usually a major change in an adult’s lifestyle causes the symptoms associated with AD/HD to become more prevalent.<sup>39</sup> For example, in law school the workload is heavier than that of undergraduate school.<sup>40</sup> The average law student spends forty-five to sixty hours per week reading and

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<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC15>, archived at <http://perma.cc/QW58-MCWV>. However, AD/HD is predominantly an American disorder. *Id.* Researchers suggest this may be because of certain “social and cultural factors which are more common in American society.” *Id.*

<sup>38</sup> Howard, *supra* note 35. Most individuals with AD/HD tend to have lower grades as well as lower standardized test scores. See Melissa Dvorsky, *Predicting the Academic Functioning of College Students with Attention-Deficit/Hyperactivity Disorder: The Importance of Executive Functions and Parent Report*, VA. COMMONWEALTH UNIV. 1 (2014) (discussing that individuals with AD/HD are at risk for facing academic difficulties during their lifespan). Unfortunately, individuals with AD/HD are at a greater risk of not completing their degrees from undergraduate or graduate school programs. *Id.* at 2. Additionally, the transition into an environment like college can cause academic changes that may be difficult for individuals with AD/HD. *Id.* at 3. As a result, many individuals with AD/HD “experience significant academic impairment following the transition to college.” *Id.* at 4.

<sup>39</sup> See *Adult ADD/ADHD: Signs, Symptoms, Effects, and Treatment*, HELPGUIDE, <http://www.helpguide.org/articles/add-adhd/adult-adhd-attention-deficit-disorder.htm> (last visited Apr. 9, 2015), archived at <http://perma.cc/P3EM-J6DH> (having more responsibilities can cause more problems for an individual with AD/HD); see also Lenard A. Adler & Hong C. Chua, *Management of ADHD in Adults*, 63 J. CLINICAL PSYCHIATRY 29, 30 (2002) (providing several examples of major changes in an adult’s life that can cause the symptoms associated with AD/HD to progressively worsen). For example, it is difficult for an individual with AD/HD to function in the morning and be productive. *Id.* Furthermore, if an individual with AD/HD has children that have AD/HD themselves, it may be difficult to get them up and functioning for school in the morning. *Id.* What may seem like an average task can be “extremely complicated for [an] adult with AD/HD.” *Id.* On average, adults with AD/HD experience greater difficulties in school. See also *ADHD Across the Lifespan*, MY ADHD, <http://myadhd.com/adhdacrosslifespan.html> (last visited Jan. 19, 2015), archived at <http://perma.cc/CWS4-T8ZL> (discussing the effects AD/HD may have on an adult’s “academic and occupational functioning, social skills, and family functioning . . .”). Inattentiveness and impulsivity often contribute to social difficulties an adult with AD/HD may experience. *Id.* Adults with AD/HD “are more likely to have children who also have AD/HD.” *Id.*

<sup>40</sup> Tara Kuther, *How Law School is Different from College*, ABOUT, <http://gradschool.about.com/od/lawschooladmissions/fl/How-Law-School-is-Different-from-College.htm> (last visited Apr. 9, 2015), archived at <http://perma.cc/J6GW-2HRW>; see RUTA K. STROPUS & CHARLOTTE D. TAYLOR, *BRIDGING THE GAP BETWEEN COLLEGE AND LAW SCHOOL: STRATEGIES FOR SUCCESS* 127–28 (Carolina Academic Press 2001) (comparing college and law school). In undergraduate school, “it was possible [for students] to pull an all nighter and perform successfully” on examinations. *Id.* However, “[t]hat approach will not work in law school.” *Id.* “[L]aw school requires [students] to engage in problem solving[.]” whereas undergraduate school often times requires only memorization. *Id.* at 128.

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preparing for class.<sup>41</sup> Therefore, the sudden change from undergraduate school to a learning environment like that of law school can cause symptoms to worsen and affect an individual's academic success.<sup>42</sup>

## 2. Diagnostics and Testing

A pattern of behavior that results in social, educational, or work performance characterizes AD/HD.<sup>43</sup> *The Diagnostic and Statistical Manual of Mental Disorders IV* ("DSM-IV") divides AD/HD into three subparts: AD/HD Predominantly Inattentive Type, AD/HD Predominantly Hyperactive-Impulsive, and AD/HD Combined Type.<sup>44</sup> The criteria for the three subtypes are divided into two categories: inattention and hyperactivity.<sup>45</sup> The inattention category consists of symptoms involving difficulty organizing and maintaining attention in tasks.<sup>46</sup> The

<sup>41</sup> Michael Hunter Schwartz & Stacey Hunter Schwartz, *A Chapter for the Family and Friends of Law Students*, in *EXPERT LEARNING FOR LAW STUDENTS* 253–54 (2d ed. 2008).

<sup>42</sup> See Sampat & Grant, *supra* note 34, at 302 (explaining how the pressures of law school correlate with the symptoms of AD/HD).

<sup>43</sup> *Attention Deficit/Hyperactivity Disorder*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/Documents/ADHD%20Facts%20Sheet.pdf> (last visited Jan. 3, 2014), archived at <http://perma.cc/S42E-53KZ>. The American Psychiatric Association updated the definition of AD/HD in the DSM-V to properly characterize symptoms of affected adults. *Id.* "Two decades of research [indicates] that . . . although [AD/HD is usually] a disorder begin[ning] in childhood, [it] can continue through[out] adulthood . . . ." *Id.* The DSM-V adopts the criteria necessary to ensure adults with AD/HD can get the care they need. *Id.*

<sup>44</sup> AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 80 (4th ed. 2000) [hereinafter *DIAGNOSTIC AND STATISTICAL MANUAL*]. Doctors find AD/HD Combined Type when an individual suffers from "six (or more) symptoms of inattention and six (or more) symptoms of hyperactivity . . . for at least [six] months." *Id.* Doctors diagnose AD/HD Predominantly Inattentive Type if the individual suffers from "six (or more) symptoms of inattention (but fewer than six symptoms of hyperactivity) . . . for at least [six] months." *Id.* Doctors find AD/HD Predominantly Hyperactivity-Impulsive Type if the individual suffers from "six (or more) symptoms of hyperactivity (but fewer than six symptoms of inattention) . . . for at least [six] months." *Id.*

<sup>45</sup> *Id.* at 83–84. Several hyperactivity and inattention symptoms "must have been present before [the] age [of seven]." *Id.* at 78. However, most doctors diagnose individuals with AD/HD after the individual showed symptoms for several years. *DIAGNOSTIC AND STATISTICAL MANUAL*, *supra* note 44, at 78. Additionally, doctors must find at least two settings for impairment to result from the symptoms of AD/HD. *Id.* Settings include places like school, work, or home. *Id.* Further, "[i]nattention may be manifest in academic, occupational, or social situations." *Id.*

<sup>46</sup> *DIAGNOSTIC AND STATISTICAL MANUAL*, *supra* note 44, at 83–84. Symptoms of inattention include:

- (a) often fails to give close attention to details or makes careless mistakes in schoolwork, work, or other activities;
- (b) often has difficulty sustaining attention in tasks or play activities;
- (c) often does not seem to listen when spoken to directly;
- (d) often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the

hyperactivity category entails symptoms of excessive talking and fidgeting.<sup>47</sup> An individual must display a certain amount of symptoms from each category to determine the correct subtype of AD/HD.<sup>48</sup> For example, if an individual shows six or more symptoms of hyperactivity, but less than six symptoms of inattention, doctors would diagnose him as having AD/HD Predominantly Hyperactive-Impulsive Disorder.<sup>49</sup> However, the newly revised *Diagnostic and Statistical Manual of Mental Disorders V* (“DSM-V”) has changed the criteria used for diagnosing AD/HD in several ways.<sup>50</sup>

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workplace (not due to oppositional behavior or failure to understand instructions); (e) often has difficulty organizing tasks and activities; (f) often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (such as schoolwork or homework); (g) often loses things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, or tools); (h) is often easily distracted by extraneous stimuli; (i) is often forgetful in daily activities.

*Id.*

<sup>47</sup> *Id.* Symptoms of hyperactivity include:

(a) often fidgets with hands or feet or squirms in seat; (b) often leaves seat in classroom or in other situations in which remaining seated is expected; (c) often runs about or climbs excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feelings of restlessness); (d) often has difficulty playing or engaging in leisure activities quietly; (e) is often “on the go” or often acts as if “driven by a motor;” (f) often talks excessively.

*Id.*

<sup>48</sup> See Jana Aupperlee et al., *DSM-IV (Text Revision) Definition Attention-Deficit/Hyperactivity Disorder*, MSU PSYCHOLOGY PROGRAM, <http://www.msu.edu/course/cep/888/ADHD%20files/DSM-IV.htm> (last visited June 25, 2014), archived at <http://perma.cc/3JM7-S7FB> (explaining the diagnostic criteria for the three subparts of AD/HD).

<sup>49</sup> See *id.* (specifying that individuals must display “[s]ix (or more) . . . symptoms . . . for a least six months to a degree that is maladaptive and inconsistent with [his] developmental level”).

<sup>50</sup> See *Highlights of Changes from DSM-IV-TR to DSM-5*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/Documents/ADHD%20Facts%20Sheet.pdf> (last visited Jan. 15, 2015), archived at <http://perma.cc/S42E-53KZ> (addressing the changes made to the DSM-V). The American Psychiatric Association stated:

Several changes have been made [to the DSM-V]: 1) examples have been added to the criterion items to facilitate application across the life span; 2) the cross-situational requirement has been strengthened to “several” symptoms in each setting; 3) the onset criterion has been changed from “symptoms that caused impairment were present before age 7 years” to “several inattentive or hyperactive-impulsive symptoms were present prior to age 12”; 4) subtypes have been replaced with presentation specifiers that map directly to the prior subtypes; 5) a comorbid diagnosis with autism spectrum disorder is now allowed; and 6) a symptom threshold change has been made for adults, to reflect their substantial evidence of clinically significant ADHD impairment, with

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The *DSM-V* changed the diagnostics by altering the symptom threshold in children and adults with AD/HD.<sup>51</sup> Under the *DSM-V*, children must display at least six of the symptoms from either the hyperactivity or inattention category.<sup>52</sup> However, adults and adolescents over the age of seventeen only need to display five of the symptoms.<sup>53</sup> Additionally, the *DSM-V* examines children for AD/HD symptoms prior to twelve years of age.<sup>54</sup> The *DSM-V* has also included examples to illustrate the types of behavior children, adolescents, and adults with AD/HD may exhibit.<sup>55</sup> The American Psychiatric Association (“APA”)

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the cutoff for ADHD of five symptoms, instead of six required for younger persons, both for inattention and for hyperactivity and impulsivity. Finally, ADHD was placed in the neurodevelopmental disorders chapter to reflect brain developmental correlates with ADHD and the [DSM-V] decision to eliminate the DSM-IV chapter that includes all diagnoses usually first made in infancy, childhood, or adolescence.

*Id.*

<sup>51</sup> See John M. Grohol, *DSM-5 Changes: Attention Deficit Hyperactivity Disorder (ADHD)*, PSYCH CENT. (2013), <http://www.pro.psychcentral.com/2013/dsm-5-changes-attention-deficit-hyperactivity-disorder-adhd/004321.html>, archived at <http://perma.cc/C8QQ-K647> (citing a symptom change made for adults). For a doctor to diagnose an adult with AD/HD, he or she only needs to show five of the symptoms “instead of [the] six required for [children].” *Id.* “Rather, this change reflects clinical experience and real-world practice, where adults with [AD/HD] often experience it in a slightly different way than teens and children do.” *Id.*

<sup>52</sup> See *Highlights of Changes from DSM-IV-TR to DSM-5*, *supra* note 50, at 2 (stating the diagnostic criteria for children in the *DSM-V* are similar to those used in the *DSM-IV*). The *DSM-V* uses the same list of symptoms used in the *DSM-IV*. *Id.* Additionally, it continues to divide AD/HD into two categories (inattention and hyperactivity) in the *DSM-V*. *Id.* In the *DSM-V* a doctor’s diagnosis requires children to display at least six of the symptoms from either category, whereas adults only have to display five. *Id.*

<sup>53</sup> See Dr. Thomas E. Brown, *DSM-5 Changes in ADHD Diagnostic Criteria*, DRTHOMASEBROWN BLOG (July 5, 2013), <http://www.drthomasebrown.com/blog/>, archived at <http://perma.cc/3PT5-XQE4> (finding changes in the age of onset for the diagnosis of AD/HD). Under the *DSM-IV*, a diagnosis of AD/HD required that six of the symptoms of AD/HD be present in an individual by the age of seven. *Id.* The *DSM-V* changed this in two ways: (1) an adult only has to show five symptoms; and (2) the “[*DSM-V*] raised the age criterion to having several [AD/HD] symptoms present by age [twelve] years or earlier.” *Id.*

<sup>54</sup> *Highlights of Changes from DSM-IV-TR to DSM-5*, *supra* note 50, at 2. The *DSM-IV* stated: “symptoms that caused impairment were present before age [seven] years,” whereas the *DSM-V* states: “several inattentive or hyperactive-impulsive symptoms were present prior to age 12.” *Id.*

<sup>55</sup> Grohol, *supra* note 51. Examples under the inattention category include: “avoid[ing] . . . tasks that require sustained mental effort [such as] . . . preparing reports, completing forms, or reviewing lengthy papers.” See *Attention-Deficit/Hyperactivity Disorder (ADHD)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 29, 2014), <http://www.cdc.gov/ncbddd/adhd/diagnosis.html>, archived at <http://perma.cc/F9H3-9X95> (illustrating examples added to the categories of inattention and hyperactivity symptoms). Examples under the hyperactivity category include: an inability to sit “still for an extended [amount of] time . . . in restaurants, meetings, etc.) . . .” *Id.*

made these changes to “provide appropriate guidance to clinicians in diagnosing adults with [AD/HD].”<sup>56</sup>

Although the *DSM-V* lists the criteria needed to establish AD/HD, there are still several psychological tests an individual must complete in order for doctors to diagnose AD/HD.<sup>57</sup> A psycho-educational evaluation is necessary to diagnose an individual with AD/HD.<sup>58</sup> A licensed clinical psychologist usually administers this type of testing.<sup>59</sup> A psycho-educational evaluation includes tests of intelligence, cognitive abilities, achievement, and behavior.<sup>60</sup> The standard scores received upon completion of each test provide information about an individual’s “own

<sup>56</sup> *Attention Deficit/Hyperactivity Disorder*, *supra* note 43.

<sup>57</sup> See *Psychoeducational Evaluation Instruments*, INTERMOUNTAIN HEALTHCARE 1-2, <http://www.intermountainhealthcare.org/ext/Dcmnt?ncid=51081009> (last visited June 24, 2014), *archived at* <http://perma.cc/Q5PC-5A6X> (describing the various tests administered during a psycho-educational evaluation). Doctors divide these tests into three categories: behavioral, psychological, and cognitive. *Id.*

<sup>58</sup> Kathleen Ross-Kiddler, *LD/ADHD Psycho/Educational Assessment*, EPCS, <http://home.gwu.edu/~kkid/testing.html>, *archived at* <http://perma.cc/7B96-FH94>. A psycho-educational evaluation consists “of two types of testing: psychological assessment and educational assessment.” *Id.* Doctors use psychological testing to measure an individual’s processing deficit. *Id.* Educational testing measures academics as well as how the disability “negatively impacts an individual.” *Id.*

<sup>59</sup> Michelle F. Eabon & Dan Abrahamson, *Understanding Psychological Testing and Assessment*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/helpcenter/assessment.aspx> (last visited Dec. 21, 2014), *archived at* <http://perma.cc/27BL-7AC5>. “Psychologists pick . . . a specific set of . . . tests for each individual . . .” *Id.* However, “not just anyone can perform [an] . . . evaluation[;] [l]icensed clinical psychologists are expertly trained to administer [the various] tests [as well as] interpret [its] results.” *Id.* Furthermore, psychiatrists can also “diagnose and prescribe medication” to treat AD/HD. *Who Can Diagnose ADHD?*, ADD RES., <http://www.addresources.org/who-can-diagnose-adhd-2/> (last visited Jan. 27, 2015), *archived at* <http://perma.cc/Z5QH-PN97>.

<sup>60</sup> Dr. Sherry Mee Bell, *Psychoeducational Assessment: How to Read, Understand, and Use Psychoeducational Reports*, KEYS TO EFFECTIVE LD TEACHING PRACTICE 24–28, [http://www.cls.utk.edu/pdf/keys\\_Id/chapter2\\_pa.pdf](http://www.cls.utk.edu/pdf/keys_Id/chapter2_pa.pdf) (last visited June 8, 2014), *archived at* <http://perma.cc/P296-LS7Z>. “The most common [intelligence] tests use[d] are the Wechsler intelligence scales.” *Id.* at 24. This test measures “intelligence, verbal comprehension, and visual-spatial reasoning.” *Id.* at 25. Tests that measure an individual’s cognitive ability are the “Kaufman Adolescent and Adult Intelligence Test and Woodcock Johnson III (WJ-III) Tests of Cognitive Ability.” *Id.* The WJ-III Tests of Cognitive Ability measures: “auditory processing; phonemic awareness; visual processing, long-term retrieval/memory; short-term memory; processing speed; verbal reasoning; general information/knowledge; fluid reasoning; and quantitative ability.” *Id.* at 25–26. However, there are also tests that measure educational achievement. *Id.* at 26. The WJ-III Tests of Achievement are comprehensive, whereas the Wide Range Achievement Test-III (WRAT-III) only measures reading, writing, and math. Bell, *supra*, at 27. “There is no single test for . . . ([AD/HD]).” *Id.* at 28. Some commonly used behavior rating tests include: “Conners Adult [AD/HD] Rating Scales; Attention-Deficit Scales for Adults; Brown Attention-Deficit Disorder Scales, Adult Version; Adult Version Copeland Symptom Checklist for Attention Deficit Disorders, Adult Version.” *Id.*

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learning style, indicating specific strengths and weaknesses.”<sup>61</sup> A learning disability exists when there is “discrepancy between one’s cognitive abilities and actual academic performance.”<sup>62</sup> Therefore, a child with a learning disability usually displays weakness in “an academic area but also shows a pattern of deficits that tend to be associated with specific learning disabilities.”<sup>63</sup> The theory behind psycho-educational testing is to determine whether a child “is acquiring academic skills at a level that is consistent with their abilities.”<sup>64</sup>

## 3. Treatment and Stigmas

An individual diagnosed with AD/HD has several treatment options available.<sup>65</sup> A common form of treatment is medication.<sup>66</sup> However, medication alone does not cure AD/HD; rather, it only helps relieve some of its symptoms.<sup>67</sup> Therefore, for effective treatment, individuals with

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<sup>61</sup> Robyn P. Waxman, Ph.D., *Understanding the Psycho-educational Evaluation*, LEARNING DISORDERS 1 (2010), <http://www.robynwaxmanphd.com/documents/Understanding%20the%20Evaluation%20In-Depth.pdf>, archived at <http://perma.cc/5PLN-V98D>.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Attention Deficit Hyperactivity Disorder*, *supra* note 33. Several treatment options are available, such as: “medication, . . . psychotherapy, education and training, or a combination of [the three].” *Id.* at 7. The treatment options available for AD/HD “aim at reducing the symptoms [as well as] improving functioning.” *Id.*

<sup>66</sup> *Id.* The forms of medication consist of: psychostimulant drugs, non-stimulants drugs, alpha-2 agonists drugs, and antidepressants. *Id.* However, the most primary form of medication for AD/HD is psychostimulant drugs. *Id.* These drugs “stimulate [an individual’s] central nervous system.” *Attention Deficit Hyperactivity Disorder*, *supra* note 33, at 7. Examples of these drugs include: Ritalin, Adderall, and Vyvanse. *Id.* Ritalin is also known as a methylphenidate. *Id.* Methylphenidate is the “most commonly used psychostimulant in treating AD/HD in both children and adults.” *Id.* A methylphenidate “increases dopamine, a neurotransmitter [that helps with] attention and focus.” *Id.* The other psychostimulant drugs are Adderall, also known as an amphetamine, and Vyvanse, a lisdexamfetamine. *Id.* Both of these drugs “block[] the reabsorption of . . . dopamine and norepinephrine [in the brain].” *Attention Deficit Hyperactivity Disorder*, *supra* note 33, at 7. Another form of medication is a non-stimulant called Atomoxetine. *Id.* This drug works by “increasing higher levels of both dopamine and norepinephrine [in the brain].” *Id.* The alpha-2 agonists drug “stimulate[s] the neurotransmitter norepinephrine.” *Id.* Although the FDA has not approved antidepressants for treating AD/HD, antidepressants “work about as well as behavioral therapy instead.” *Id.*

<sup>67</sup> *Id.* Medication is important to help teens be successful in school. Jyoti Bhagia, *Children with AD/HD May Continue to Have Symptoms Into Adulthood*, SUN SENTINEL (Feb. 18, 2014), [http://articles.sun-sentinel.com/2014-02-18/health/fl-jjps-adhd-0219-20140218\\_1\\_adhd-medication-attention-deficit-hyperactivity-disorder-school-day](http://articles.sun-sentinel.com/2014-02-18/health/fl-jjps-adhd-0219-20140218_1_adhd-medication-attention-deficit-hyperactivity-disorder-school-day), archived at <http://perma.cc/69GE-4GX3>. AD/HD medication helps teens retain information learned in the classroom. *Id.* However, without medication, tasks in secondary education become more difficult because of the heavier workload. *Id.* Further, AD/HD medication helps teens stay

AD/HD need a comprehensive treatment plan.<sup>68</sup> These additional treatments may include behavioral therapy, where an individual learns to “modify certain behaviors and to deal with the emotional effects of AD/HD.”<sup>69</sup> Overall, the “most effective treatment [option] for AD/HD is a combination of medication, therapy or counseling.”<sup>70</sup>

Because AD/HD is commonly treated with medication, there are several myths surrounding the disorder.<sup>71</sup> For example, some students

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organized. *Id.* Teens taking several courses and having multiple teachers “requires a high level of organizational skill.” *Id.*

<sup>68</sup> See *Evaluation and Treatment: How is ADHD Diagnosed?*, CHILDREN & ADULTS WITH ATTENTION-DEFICIT/HYPERACTIVITY DISORDER, <http://www.chadd.org/Understanding-ADHD/Parents-Caregivers-of-Children-with-ADHD/Evaluation-and-Treatment/ComplimentaryandAlternativeTreatmentsWWK6.aspx> (last visited Jan. 5, 2014), archived at <http://perma.cc/VH2H-3JDV> (listing other forms of treatment to include: “parent training, behavioral intervention strategies, an appropriate educational program, education regarding [AD/HD, and] medication, when necessary”).

<sup>69</sup> *Helping Adults with ADHD Lead Better Lives*, ATTENTION DEFICIT DISORDER ASS’N, [http://www.add.org/?page=ADHD\\_Fact\\_Sheet](http://www.add.org/?page=ADHD_Fact_Sheet) (last visited June 30, 2014), archived at <http://perma.cc/3UDY-5258> [hereinafter *Helping Adults*]. Therapy allows an individual “to learn coping skills and adaptive behaviors.” *Id.* Additionally, “many adults benefit from working with an AD/HD coach.” *Id.* An AD/HD coach helps an adult “develop coping skills, such as improving organizational skills and improving productivity.” *Id.* Further, because AD/HD is a disability under the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals With Disabilities Education Act, accommodations can be made at schools for children with AD/HD. *Id.* Accommodations help individuals with AD/HD “work more efficiently and productively.” *Id.*

<sup>70</sup> *Helping Adults with ADHD Lead Better Lives*, *supra* note 69. The American Academy of Pediatrics released a new practice guideline that provided recommendations for the treatment of AD/HD in children. Am. Acad. of Pediatrics, *ADHD Guidelines: Recommendations*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/adhd/guidelines.htm> (last visited July 3, 2014), archived at <http://perma.cc/Q89X-TYRY>. Clinicians use this guideline in primary care settings. *Id.* The guideline recommends adolescents of twelve to eighteen years of age be prescribed a Food and Drug Administration-approved medication for treating AD/HD as well as behavior therapy, “preferably both.” *Id.*

<sup>71</sup> See Margarita Tartakovsky, *9 Myths, Misconceptions and Stereotypes About ADHD*, PSYCH CENT., <http://psychcentral.com/blog/archives/2011/06/24/9-myths-misconceptions-and-stereotypes-about-adhd/> (last visited Apr. 22, 2015), archived at <http://perma.cc/6FXC-982Q> (referencing 9 myths surrounding AD/HD); Alan D. DeSantis et al., *Illicit Use of Prescription ADHD Medications on a College Campus: A Multi-Methodological Approach*, 57 J. AM. COLL. HEALTH 315, 319 (2008) (providing information from a campus survey where students indicated they regularly “misuse/abuse Adderall for academic purposes”). One of the factors contributing to AD/HD medication abuse is the increasing amount of individuals who fake AD/HD symptoms to obtain a diagnosis. Erinn L. Rigney, Note, *Doctor’s Orders: A New Prescription for ADHD Medication Abuse*, 88 NOTRE DAME L. REV. 1033, 1040 (2012). This is especially true when individuals desire an AD/HD diagnosis for accommodations in school such as additional time on tests. *Id.* Further, students fake symptoms in an effort to obtain the medication as a study aid. *Id.* at 1041. “Studies have shown ‘that [the] symptoms checklist [used in the DSM-IV] for [AD/HD] lack specificity and are prone to over-[diagnosing] both[ children and adults].” *Id.*



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who do not have AD/HD may seek out AD/HD medication for purposes of “enhance[ing] their academic performance.”<sup>72</sup> Research has shown that in 2006, 5.4% of college students misused methylphenidate.<sup>73</sup> Furthermore, misuse of AD/HD medication is increasing among middle and high school students.<sup>74</sup> The misuse of AD/HD is not the only misconception.<sup>75</sup>

Another misconception and negative stigma associated with an AD/HD diagnosis is that an individual can outgrow its symptoms.<sup>76</sup> Although studies indicate symptoms improve with age, about 30%–60% of affected individuals still experience them throughout adulthood.<sup>77</sup> Additionally, some researchers believe that broadening the definition of

<sup>72</sup> Ruth Hughes, *Medication Abuse and Diversion*, CHILDREN & ADULTS WITH ATTENTION-DEFICIT/HYPERACTIVITY DISORDER, <http://www.chadd.org/Understanding-ADHD/Parents-Caregivers-of-Children-with-ADHD/Medication-Abuse-and-Diversion.aspx> (last visited Jan. 1, 2014), archived at <http://perma.cc/6RXD-8RQU>. Researchers have found that stimulants allow children to “function better in every [aspect] of their lives.” Joseph Chien, *Between Scientific Discourse and Lay Knowledge: Understanding the Non-Medical Use of Stimulants*, 22 S. CAL. REV. L. & SOC. JUST. 185, 192 (2013).

<sup>73</sup> Shaheen E. Lakhan & Annette Kirchgessner, *Prescription Stimulants in Individuals With and Without Attention Deficit Hyperactivity Disorder: Misuse, Cognitive Impact, and Adverse Effects*, BRAIN & BEHAVIOR (July 23, 2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3489818/>, archived at <http://perma.cc/WL7G-7VU8>; see *supra* note 64 and accompanying text (defining methylphenidate). In 2007, Adderall was one of the top five prescriptions given to children. See Madeline J. Cohen, Note, *Off Label: Combating the Dangerous Overprescription of Amphetamines to Children*, 82 GEO. WASH. L. REV. 174, 179 (2013) (addressing the issue of AD/HD medication in the United States). Between 2007 and 2008, doctors prescribed stimulants more often than any other type of AD/HD medication for children. *Id.* Between 2002 and 2010 the percentage of AD/HD medication prescribed increased by 46%. *Id.*

<sup>74</sup> See Cohen, *supra* note 73, at 179 (discussing the increase in prescription of AD/HD medications, especially Adderall). “Adderall sales increased 3136% from 2002 to 2006, and over eighteen million total prescriptions for Adderall were issued in 2010 alone.” *Id.*

<sup>75</sup> See *Myths, Misconceptions, and Stigma Tied to ADHD*, MSN HEALTHY LIVING, <http://healthyliving.msn.com/diseases/adhd/myths-misconceptions-and-stigma-tied-to-adhd-1> (last visited Jan. 12, 2014), archived at <http://perma.cc/S7LB-DKTT> (providing misconceptions and a chart that lists the most common myths about AD/HD). For example, one myth states that AD/HD medication will make an individual seem “drugged.” *Id.* However, medication for AD/HD is properly adjusted to “sharpen [an individual’s] focus and increases his or her ability to control [their] behavior.” *Id.*

<sup>76</sup> Compare *id.* (noting that “about [70%] of children with [AD/HD] continue to have symptoms during their teen years and about [50%] have symptoms in adulthood”), with Lindsay Minnema, *Will Kids Outgrow ADHD?*, WASH. POST. (Nov. 27, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/23/AR2007112301415.html>, archived at <http://perma.cc/ECP7-RGQP> (“finding[] that attention-deficit hyperactivity disorder may stem from a developmental delay that children could outgrow”).

<sup>77</sup> V.A. Harpin, *The Effect of ADHD on the Life of an Individual, Their Family, and Community from Preschool to Adult Life*, 90 ARCHIVES OF DISEASE IN CHILDHOOD Supp. 1, i2 (2005), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1765272/pdf/v090p000i2.pdf>, archived at <http://perma.cc/XT98-UF76>.

AD/HD has led to its over-diagnosis.<sup>78</sup> However, research has found factors contributing to the under-diagnosis of AD/HD.<sup>79</sup> Because some individuals are diagnosed by doctors later in life, they may not develop their coping strategies, completely dismissing any indication of the disorder.<sup>80</sup> Due to the stigmas surrounding AD/HD, individuals who do not seek out appropriate treatment will continue to suffer from the devastating consequences of the disorder.<sup>81</sup>

*B. Discussing the ADA and ADA AAA*

The ADA's primary purpose is to provide disabled persons protection against employment discrimination.<sup>82</sup> Courts have so narrowly interpreted the ADA's language regarding who qualifies as a disabled person and what constitutes a major life activity that the result is courts will dismiss an individual's claim if his disability does not fall within the narrow definition.<sup>83</sup> AD/HD is a disability that falls under the protection

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<sup>78</sup> Susan Perry, *ADHD is Overdiagnosed, Leading to Needless and Harmful Treatment, Researchers Say*, MINN. POST. (Nov. 7, 2013), <http://www.minnpost.com/second-opinion/2013/11/adhd-overdiagnosed-leading-needless-and-harmful-treatment-researchers-say>, archived at <http://perma.cc/FY7A-FECG>. Researchers fear that an overdiagnosis of AD/HD will lead to needless or harmful medical treatment. *Id.* Some researchers estimate that the diagnosis of AD/HD "will rise more than 15% [due to] the diagnostic changes [made to] the [DSM-V]." *Id.* But see Eileen Bailey, *Is ADHD Overdiagnosed?*, HEALTH CENT., [http://www.healthcentral.com/adhd/just-diagnosed-263797-5\\_2.html](http://www.healthcentral.com/adhd/just-diagnosed-263797-5_2.html) (last visited Jan. 25, 2015), archived at <http://perma.cc/LK2R-YNE4> (citing to a scientists statement about how the myths and stories surrounding AD/HD may prevent individuals from seeking treatment).

<sup>79</sup> See *Attention Deficit Hyperactivity Disorder*, N.Y. TIMES (Mar. 31, 2015), available at <http://www.nytimes.com/health/guides/disease/attention-deficit-hyperactivity-disorder-adhd/diagnosis.html>, archived at <http://perma.cc/J8MM-BK8T> (reviewing factors leading to an under-diagnosis of AD/HD).

<sup>80</sup> Neha Sampat, *Research Project: Bar Examination Accommodations for AD/HD Graduates*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1211, 1216 (2013). Some researchers suggest that girls with AD/HD are often under-diagnosed. See *Attention Deficit Hyperactivity Disorder*, *supra* note 79 (discussing why girls with AD/HD are under-diagnosed). Girls with AD/HD "are often inattentive but not hyperactive or impulsive." *Id.* Although, "older girls with [AD/HD] tend to have social problems due to withdrawal and internalized emotions, showing symptoms of anxiety and depression." *Id.*

<sup>81</sup> Margarita Tartakovsky, *Breaking the Silence of ADHD Stigma*, PSYCH CENT., <http://psychcentral.com/blog/archives/2012/04/02/breaking-the-silence-of-adhd-stigma/> (last visited June 30, 2014), archived at <http://perma.cc/SS5A-CZKQ>. Parents are often afraid to have their children evaluated and treated. *Id.* Therefore, causing individuals to often go untreated; leading to unhealthy lives resulting in depression or substance abuse. *Id.*

<sup>82</sup> Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 423 (2011).

<sup>83</sup> James M. Carrol, *The Causal Nexus Doctrine: A Further Limitation on the Employer's ADA Duty of Reasonable Accommodation in the Seventh Circuit*, 91 MARQ. L. REV. 839, 839 (2008). The

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of the ADA.<sup>84</sup> In 2008, Congress enacted the ADAAA to make significant changes to the definition of disability in the ADA and to provide protection for a broader array of disabled individuals.<sup>85</sup> Under the amended statute, courts focus less on the disability itself and more on whether discrimination has occurred.<sup>86</sup>

Part B.1 discusses the history behind the ADA and its evolution over time.<sup>87</sup> Part B.2 explains why Congress amended the ADA's previous regulations in 2008 to become the ADAAA.<sup>88</sup> Further, it compares the

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court concluded that Ms. Allen failed to demonstrate that her migraines affected a major life activity by not showing that the headaches substantially limited her job performance. *See, e.g., Allen v. SouthCrest Hosp.*, 45 Fed.Appx. 827, 835 (10th Cir. 2011) (providing an example of how the court narrowly construed plaintiffs migraine headaches to not constitute a disability under the ADA); *see also* 42 U.S.C. § 12102(2)(A)-(B) (2012) (providing the definition of major life activity). Section 12102 provides:

Major life activities: (A) In general: For purpose of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; (B) Majorly bodily functions: For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2)(A)-(B).

<sup>84</sup> *See What You Need to Know About the Americans with Disabilities Act*, ADDITUDE, <http://www.additudemag.com/adhd-web/article/674.html> (last visited June 30, 2014), archived at <http://perma.cc/ZUJ6-WXD5> [hereinafter *What You Need to Know*] (stating AD/HD is a mental condition as defined by the ADA). In order for an individual with AD/HD to receive protection under the ADA, he or she must meet certain conditions. *Id.* First, AD/HD must cause some sort of limitation to a major life activity. *Id.* Second, an individual must be "regarded as having a disability." *Id.* Third, an individual must have a record of having a disability. *Id.* Fourth, an individual must be able to perform "essential job functions with or without accommodations to qualify as [disabled] under the [ADA]." *Id.*

<sup>85</sup> U.S. Equal Employment Opportunity Commission, *Fact Sheet On the EEOC's Final Regulations Implementing the ADAAA*, [http://www.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm](http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm) (last visited Apr. 9, 2015), archived at <http://perma.cc/ZZN2-SVKE>; *see Hickox, supra* note 82, at 429 (discussing how Congress has the authority to "rewrite the [ADA] to protect people who can work but whose disabilities have been excluded from coverage under the statute by the courts").

<sup>86</sup> *See* NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 14 (July 23, 2013), <http://www.ncd.gov/publications/2013/07232013/> archived at <http://perma.cc/W2NV-6XP3> (providing findings from several court cases).

<sup>87</sup> *See infra* Part II.B.1 (discussing the overall history of Title III of the ADA since its enactment in 1990).

<sup>88</sup> *See infra* Part II.B.2 (examining Congress's reasoning for revision to previous regulations in the ADA).

amended regulations with the original regulations in the ADA and how this change expands protection against discrimination for individuals with AD/HD.<sup>89</sup>

#### 1. The ADA of 1990

On July 26, 1990, President George H.W. Bush signed the ADA into law.<sup>90</sup> This was the “nation’s first civil rights law addressing the needs of [individuals] with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.”<sup>91</sup> Specifically, Title III of the ADA prohibits places that offer public accommodations from discriminating against individuals with a disability.<sup>92</sup> Title III also states that any place offering courses or professional licensing examinations must provide them in a manner that is accessible to individuals with disabilities or make other alternatives available.<sup>93</sup>

The ADA defines an individual with a disability as anyone who has “a physical or mental impairment that substantially limits [several] major life activities.”<sup>94</sup> A physical impairment under the ADA’s definition is “[a]ny physiological . . . condition, cosmetic disfigurement, or anatomical loss.”<sup>95</sup> A mental impairment includes “any . . . psychological disorder

<sup>89</sup> See *infra* Part II.B.2 (comparing the newly amended regulations with the original regulations in the ADA).

<sup>90</sup> Eric A. Harris, Note, *The Americans with Disabilities Act: Equal Opportunity for Individuals with Disabilities, in Some Large Businesses, in Some Major Cities, Sometimes* 69 U. PITT. L. REV. 657, 658 (2008) (“The purpose of the ADA was to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”).

<sup>91</sup> *The Americans with Disabilities Act of 1990*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Jan. 20, 2015), archived at <http://perma.cc/J3WU-JZBK>.

<sup>92</sup> 42 U.S.C. § 12182(a) (2012) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

<sup>93</sup> 42 U.S.C. § 12189 (2012). Section 12189 provides:

Any private entity that offers examinations or courses related to applications, licensing, certification, 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.

*Id.*

<sup>94</sup> 42 U.S.C. § 12102(2)(A)-(C) (2012) (“(A) a physical or mental impairment that substantially limits several major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”).

<sup>95</sup> *Id.* § 12102(1)(i). The phrase physical impairment means:

(i) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

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such as mental retardation, . . . emotional . . . illness, [or] a specific learning disability.”<sup>96</sup> For an individual to receive protection under Title III of the ADA, his or her disability must substantially limit several major life activities.<sup>97</sup>

Initially, courts used a mitigating measures approach to determine whether an individual had a disability under the ADA.<sup>98</sup> Mitigating

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neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine . . . (iii) the phrase physical . . . impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, . . . HIV disease (whether symptomatic or asymptomatic), tuberculosis . . . (iv) the phrase physical . . . impairment does not include homosexuality or bisexuality.

*Id.*

<sup>96</sup> *Id.* The phrase mental impairment means:

(ii) [a]ny mental or psychological disorder such as mental retardation, organic birth syndrome, emotional or mental illness, and specific learning disabilities; (iii) the phrase . . . mental impairment includes, but is not limited to . . . mental retardation, emotional illness, specific learning disabilities . . . drug addiction, and alcoholism.

*Id.*

<sup>97</sup> 42 U.S.C. § 12102(2)(A)–(B). Section 12102(A)–(B) provides:

Major life activities: (A) In general: For purpose of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; (B) Majorly bodily functions: For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

*Id.*

<sup>98</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999). The Court in *Sutton* stated:

We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled” under the Act.

*Id.*; *Murphy v. United Parcel Serv.*, 527 U.S. 516, 520 (1999) (applying the same approach used in *Sutton* by stating that “an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed.”); see also Alex B.

measures are used to manage individual's impairments.<sup>99</sup> Additionally, courts defined the term "substantially limits" as an impairment that prevents or severely restricts an individual from performing major life activities.<sup>100</sup> However, when Congress enacted the ADA, it did not define major life activity.<sup>101</sup> Rather, agencies that enforced various titles of the ADA had the task of defining this term on their own.<sup>102</sup> It was not until Congress amended the ADA in 2008 that the Act set forth a detailed list of activities constituting a major life activity.<sup>103</sup>

Under Title III, a public entity is anything affiliated with "any state or local government" whereas a private entity is defined as anything "other than a public entity."<sup>104</sup> Title III of the ADA lists private entities that must provide accommodations to individuals with disabilities.<sup>105</sup> Among that

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Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008) (noting that "when limited to the facts of *Sutton*, [an individual] who [is] legally blind but use[s] eyeglasses to achieve 20/20 vision, the [use of] mitigating measures [is] not . . . objectionable").

<sup>99</sup> See NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA NO. 11, THE ROLE OF MITIGATING MEASURES IN THE NARROWING OF THE ADA'S COVERAGE 3 (Mar. 17, 2003), [http://www.ncd.gov/rawmedia\\_repository/2c8e4061\\_1281\\_4e82\\_a1bc\\_9d1f38983f9b?document.pdf](http://www.ncd.gov/rawmedia_repository/2c8e4061_1281_4e82_a1bc_9d1f38983f9b?document.pdf), archived at <http://perma.cc/YLL8-K8T7> (listing examples of mitigating measures as "a prosthetic limb, wheelchairs, or eyeglasses"). A mitigating measure is thought of as an "adjustment[] . . . to an individual's . . . personal environment [that] minimize[s] [any] limitations that might result from impairment[]." *Id.*

<sup>100</sup> See *Toyota Motor. Mfg. v. Williams*, 534 U.S. 184, 198 (1999) (holding "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

<sup>101</sup> Long *supra* note 98, at 221.

<sup>102</sup> *Id.* For example, the Equal Employment Opportunities Commission ("EEOC") did not define the term "major life activity." *Id.* at 221-22. Instead, the EEOC created "an illustrative list of major life activities." *Id.* Due to the authority given to these agencies, numerous questions were raised "as to whether certain activities, such as lifting, qualify[ed] as a major life activit[y]." *Id.* at 222.

<sup>103</sup> See 42 U.S.C. § 12102(2)(A)-(B) (2012) (specifying what activities constitute as major life activities under the ADA's definition).

<sup>104</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 301(6), 104 Stat. 327 (July 26, 1990) (codified at 42 U.S.C. § 12181) (defining public entity as: "(a) any State or local government; (b) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (c) the National Railroad Corporation, and any commuter authority").

<sup>105</sup> *Id.* § 301(7). The following private entities are considered public accommodations for purposes of this title:

Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least of the following categories: (1) Place of lodging, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a "place of lodging" if it is: (i) an inn, hotel, or motel;

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list are “nursery[ies], elementary, secondary, undergraduate, [and] postgraduate . . . schools, [as well as any] other place of education.”<sup>106</sup> In regard to these specific accommodations, the ADA prohibits discrimination against an individual with a disability in two ways—general prohibitions and specific prohibitions.<sup>107</sup>

Under the regulations that explain the general prohibitions, “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”<sup>108</sup> In addition, the ADA expressly prohibits an entity, that an individual with a disability is associated with, from denying him equal accommodations or opportunities.<sup>109</sup> Under the specific

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or (ii) a facility that: (A) provides guest rooms for sleeping for stays that primarily are short-term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or until after the conclusion of his or her stay; and (B) provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following: (1) on or off site management and reservations service; (2) rooms available on a walk up or call in basis; (3) availability of housekeeping or linen service; and (4) acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check in, and without a prior lease or security deposit; (iii) a restaurant, bar, or other establishment serving food or drink; (iv) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (v) an auditorium, convention center, lecture hall, or other place of public gathering; (vi) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (vii) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (viii) a terminal, depot, or other station used for specified public transportation; (ix) a museum, library, gallery, or other place of public display or collection; (x) a park, zoo, amusement park, or other place of recreation; (xi) a nursery, elementary, secondary, undergraduate, or postgraduate school, or other place of education; (xii) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (xiii) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.*

<sup>106</sup> See *id.* (referencing places of education that are considered private entities that provide accommodations to individuals with disabilities).

<sup>107</sup> 42 U.S.C. § 12182(b)(1)–(2) (2012).

<sup>108</sup> 28 C.F.R. § 35.130(a) (2014). A public entity may not deny a benefit or aid based on an individual’s disability. *Id.* § 35.130(b)(1).

<sup>109</sup> 42 U.S.C. § 12182(b)(1)(E) (2012). (“It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other

prohibitions of the ADA, there are several restrictions that prevent discrimination against individuals with disabilities.<sup>110</sup> First, specific prohibitions restrict an entity from excluding an individual with a disability from fully enjoying accommodations based on the individual's application.<sup>111</sup> Second, an entity cannot fail to "make reasonable modifications in policies, practices, or procedures . . ." when it is necessary to accommodate an individual with a disability.<sup>112</sup> Third, an entity must take the necessary steps to "ensure [an] individual with a disability is [not] denied services . . . or . . . treated differently."<sup>113</sup> Fourth, an entity must remove any architectural or communication barriers, "where such removal is readily achievable."<sup>114</sup> The fifth and final specific prohibition

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opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.").

<sup>110</sup> See *id.* § 12182(b)(2)(A)(i)-(v) (failing to make reasonable modifications, take necessary steps, or remove barriers will be considered a specific prohibition under this section of the Act).

<sup>111</sup> *Id.* § 12182(b)(2)(A)(i). Section 12182(b)(2)(A)(i) provides:

[T]he imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered[.]

*Id.*

<sup>112</sup> *Id.* § 12182(b)(2)(A)(ii). Section 12182(b)(2)(A)(ii) provides:

[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

<sup>113</sup> *Id.* § 12182(b)(2)(A)(iii). Section 12182(b)(2)(A)(iii) provides:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]

*Id.*

<sup>114</sup> *Id.* § 12182(b)(2)(A)(iv). Section 12182(b)(2)(A)(iv) provides:

[A] failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail



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states that where “the removal of a barrier . . . is not readily achievable, . . . [an entity must make] accommodations available through alternate methods if such methods are readily achievable.”<sup>115</sup>

2. The ADAAA of 2008

On September 25, 2008, President George W. Bush signed the ADAAA into law.<sup>116</sup> Congress’s main purpose for enacting the ADAAA was to “respond to the Supreme Court’s treatment of the definition of disability, which had the effect of severely reducing coverage for people with impairments intended to receive coverage.”<sup>117</sup> Therefore, the ADAAA broadens the definitions of disability as well as rejects the mitigating measures approach “adopted by the Supreme Court in *Sutton v. United Air Lines, Inc.*”<sup>118</sup>

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passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable[.]

*Id.*

<sup>115</sup> 42 U.S.C. § 12182(b)(2)(A)(v) (2012). Section 12182(b)(2)(A)(v) provides:

[W]here an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

*Id.*

<sup>116</sup> Emily A. Benfer, *The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act*, AM. CONST. SOC’Y 1 (Sept. 2009), [http://www.acslaw.org/files/Benfer%20ADAAA\\_0.pdf](http://www.acslaw.org/files/Benfer%20ADAAA_0.pdf), archived at <http://perma.cc/2JWC-FR87>. See generally *Americans with Disabilities Act Amendments Act of 2008*, Pub. L. No. 110-325, § 3406, 2008 U.S.C.A.N. (122 Stat.) 8 (reinstating the broad scope of protection that was originally intended by the ADA).

<sup>117</sup> Benfer, *supra* note 116, at 2. Benfer explains:

In the ADAAA, Congress clearly states that the Supreme Court and the Equal Employment Opportunity Commission have imposed too high a level of limitation in their interpretations of disability, specifically the terms “substantially limits” and “major” in life activities. Congress achieved the goal of creating a lower standard by rejecting these past Supreme Court decisions and requiring that the definition of disability be construed broadly.

*Id.*

<sup>118</sup> Alex H. Glaser, *The Americans with Disabilities Act Amendments Act: Legal Implications and the Effect on Employer-Employee Relationships*, 59 LA. B. J. 94, 95 (2011). The ADAAA broadens the definition of disability in three ways. *Id.* First, the definition of major life activities was broadened to include major bodily functions. *Id.* Second, under the original ADA, “an impairment had to be perceived by an employer to limit or ‘substantially limit’ a major life activity to be considered a disability.” *Id.* However, the ADAAA broadens the language so that “an employee need only show that he or she has been subjected to an adverse employment action, regardless of an employer’s perceived knowledge of an employee’s disability.” *Id.* Furthermore, the ADAAA includes in the definition of disability that “any impairment that is episodic or in remission if it would substantially limit a major life activity when active.” *Id.* Additionally, “the ameliorative effects of ‘mitigating measures’

The first of the ADAAA's revisions impacted the definition of "substantially limits."<sup>119</sup> Under the ADAAA, an individual's disability still must substantially limit a major life activity.<sup>120</sup> However, the ADAAA enacted a less restrictive and broader definition of "substantially limits" by providing a list of what constitutes a substantial limitation.<sup>121</sup>

The second of the ADAAA's revisions rejects the ADA's mitigating measures approach.<sup>122</sup> This means that a court must determine whether a disability limits a major life activity "without regard to the ameliorative

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cannot be taken into account when assessing whether an impairment substantially limits a person's major life activities." Glaser, *supra*; see also Long, *supra* note 98, at 220 (stating an overview of the Courts holding in *Sutton*). "In *Sutton*, the Court held that the question of whether an individual has a disability must be determined with reference to any mitigating or corrective measures the individual uses to offset the effects of a physical or mental impairment." Long, *supra* note 98, at 220.

<sup>119</sup> See Long, *supra* note 98, at 219-21 (discussing the substantially limits language of the ADAAA). A previous definition of the term was an impairment that "prevents or severely restricts an individual from performing major life activities." *Id.* at 219. Originally, the ADA determined whether an individual had a disability by considering "any mitigating or corrective measures [an] individual uses to offset the effects of a physical or mental impairment." *Id.* at 220. Additionally, an individual with a disability that was in remission or episodic in nature used to have difficulties establishing that such an impairment was substantially limiting. *Id.* at 221. The final Act adopted rules of construction to use when determining if an individual's impairment substantially limits a major life activity. See generally Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 2008 U.S.C.C.A.N. (122 Stat.) 8 (listing the rules of construction).

<sup>120</sup> 42 U.S.C. § 12102(4)(B)-(D) (2012). Section 12102(4)(B)-(D) provides:

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008. (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

*Id.*

<sup>121</sup> *Id.* § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

<sup>122</sup> *Id.* § 12102(4)(E)(i). Section 12102(4)(E)(i) provides:

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as - (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) uses of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.

*Id.*

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effects of mitigating measures.”<sup>123</sup> Mitigating measures consist of things such as medication, artificial aids, assistive technology, and reasonable accommodations.<sup>124</sup> As a result, courts applying the ADAAA have found numerous individuals with severe mental and physical impairments to have a disability.<sup>125</sup>

The third of the ADAAA’s revisions was defining what constituted a major life activity.<sup>126</sup> In 1990, the ADA did not define the phrase major life activity.<sup>127</sup> Rather, agencies that enforced various titles of the ADA were given the task of defining this term on their own.<sup>128</sup> However, to avoid agency discretion, the ADAAA made several changes to establish the definition of major life activity.<sup>129</sup> First, the impairment only has to limit one major life activity.<sup>130</sup> Second, the ADAAA no longer requires a narrow interpretation of the term “substantially limits.”<sup>131</sup> The ADAAA provides a list of major life activities that Congress expressly incorporated.<sup>132</sup>

<sup>123</sup> 42 U.S.C. § 12102(4)(E)(i) (2012). The courts previously held that “if an individual is not substantially limited in a major life activity when the impairment is mitigated, [he or she] does not have a disability.” Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000). This interpretation meant that an individual would not have protection under the ADA. *Id.*

<sup>124</sup> 42 U.S.C. § 12102(4)(E)(i)(I) (2012); see Maureen R. Walsh, *What Constitutes a “Disability” Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 927 (1998) (according to the EEOC’s interpretive guidelines, a “mitigating measure[] include[s], but [is] not limited to, medicines[,] . . . assistive or prosthetic devices”).

<sup>125</sup> See e.g., *Floyd v. Lee*, No. 11–01228, 2015 U.S. Dist. WL 1501664, at \*14 (U.S.D.C. Mar. 31, 2015) (noting that mitigating measures, other than eyeglasses, cannot be considered when determining whether an individual has a disability).

<sup>126</sup> See 42 U.S.C. § 12102(2)(A)–(B) (2012) (defining major life activity under the ADAAA of 2008).

<sup>127</sup> Long, *supra* note 98, at 221.

<sup>128</sup> *Id.* However, the Supreme Court applied a strict interpretation of the term in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. *Id.* at 222. The Court held that a major life activity was one that was at the “central importance to most people’s daily lives.” *Id.*

<sup>129</sup> See *id.* (assessing the changes the ADAAA made to the ADA’s definition of major life activity).

<sup>130</sup> 42 U.S.C. § 12102(4)(C) (2012) (“An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”).

<sup>131</sup> *Id.* § 12102(4)(A)–(B). Section 12102 provides:

The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter. (B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

*Id.*

<sup>132</sup> *Id.* § 12102(2)(A)(1) (“Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”).

In addition to the changes made to the definition of disability, the ADAAA includes a new provision regarding the duty of an entity to provide reasonable accommodations to individuals who have a disability.<sup>133</sup> This duty is to provide a modification to the environment or manner in which an activity is performed.<sup>134</sup> Therefore, under the ADAAA, an individual no longer has to be “regarded as” having a disability to receive reasonable accommodations.<sup>135</sup>

There are also regulations promulgated under the ADAAA.<sup>136</sup> The purpose of the regulations is to implement Title III of the ADA, which prohibits discrimination on the basis of disability by public accommodations.<sup>137</sup> Specifically, Title III of the ADA does not include a

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<sup>133</sup> 42 U.S.C. § 12116 (2012). Section 12116 provides:

It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

*Id.* First, “Congress made it easier for an individual [to] seek[] protection under the ADA[’s]” definition of disability. See *Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [http://www1.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm?renderforprint=1](http://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?renderforprint=1) (last visited July 2, 2014), archived at <http://perma.cc/6QCL-84SP> (describing changes to the ADAAA). Second, Congress[] mandate[d]...the definition of disability [to] be construed broadly.” *Id.* Third, “the regulations implement Congress’s intent [by] set[ting] forth ‘rules of construction.’” *Id.* Fourth, the ADAAA makes it easier for an individual to receive “coverage under the ‘regarded as’ part of the definition of ‘disability.’” *Id.*

<sup>134</sup> 42 U.S.C. § 12205(a) (2012). Section 12205(a) provides:

The term reasonable accommodation means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances qualified to perform the essential functions of the position; or (iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

*Id.*

<sup>135</sup> See Long, *supra* note 98, at 224 (stating that courts have ended the ongoing dispute about the reasonable and regarded as definitions). The ADA mandates that “[e]mployers and other defendants are required to provide reasonable accommodations for [any] known [disabilities an] individual[] [may have].” *Id.* at 225. The ADA enforced this provision to eliminate barriers that prevented “full participation by individuals with disabilities.” *Id.* Reasonable accommodations can include “modifications to [an individual’s] work environment or the manner in which a job is . . . performed.” *Id.*

<sup>136</sup> See *Americans with Disabilities Act Title III Regulations*, ADA (2010), [http://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.htm](http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm) (providing a list of the Americans with Disabilities Act Title III regulations).

<sup>137</sup> 28 C.F.R. § 36.101 (2014). The C.F.R. reads:

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documentation section.<sup>138</sup> These regulations were promulgated to enforce private and public entities that offer “examinations or courses related to applications, licensing, [and] certification . . .” to provide coverage for disabled individuals.<sup>139</sup>

C. *Testing Accommodations for Law School Examinations and State Bar Examinations*

Entities grant testing accommodations on a case-by-case basis for individuals with AD/HD.<sup>140</sup> For example, the Law School Admission Council (“LSAC”) evaluates individuals with AD/HD on a case-by-case basis to determine whether to grant accommodations.<sup>141</sup> Each case is analyzed based on the documents submitted by an individual to a particular entity, such as a law school or state bar examiner.<sup>142</sup> The required documents an individual with AD/HD must provide are more burdensome for standardized tests like the Law School Admissions Test (“LSAT”) and the Multistate Bar Examination (“MBE”) than for law school examinations.<sup>143</sup>

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The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

*Id.*

<sup>138</sup> See 42 U.S.C. § 12189 (2012) (addressing examinations and courses administered by private entities, but not the types of documentation individuals should provide to these entities to receive testing accommodations).

<sup>139</sup> See 28 C.F.R. § 36.102 (2014) (providing the application of non-discrimination on the basis of disability by public accommodations and in commercial facilities).

<sup>140</sup> *Testing Accommodations for Candidates with Disabilities: Remarks from LSAC’s President*, LAW SCH. ADMISSION COUNCIL (2011), <http://www.lsac.org/docs/default-source/jd-docs/accommodatebrochure.pdf>, archived at <http://perma.cc/BB73-M6ZW>. See *Student Services: Disability Services*, GOLDEN GATE UNIV. SCH. OF LAW (2013), <http://law.ggu.edu/law-student-services/disability-services/>, archived at <http://perma.cc/L8Z8-FRAQ> (assessing the Law School’s policy that testing accommodations are determined on a case-by-case basis); see also *supra* note 6 and accompanying text (providing examples from other law schools granting accommodations on a case-by-case basis).

<sup>141</sup> See *Testing Accommodations for Candidates with Disabilities*, *supra* note 140 (noting that accommodation requests are hard to obtain for standardized tests like the LSAT).

<sup>142</sup> See *supra* note 6 and accompanying text (providing examples of the various documents an individual with AD/HD must submit to the entity administering the examination).

<sup>143</sup> See Edward Dunn, *An Opportunity To Be Heard: A Call for Impartiality in the Law School Admission Council’s Disability Accommodation Review Process*, 33 B.C. J.L. & SOC. JUST. 183, 201–202 (2013) (stating that “LSAC requires such an extensive amount of documentation because ‘[t]he LSAT is a high-stakes test’ and ‘[i]n order to be fair to all test takers, [it] must ensure that [its] decisions are based on appropriate documentation that supports [an individual’s] rights to accommodations”).

Part C.1 discusses the methods law schools use when granting students with AD/HD testing accommodations, as well as the necessary forms these individuals must submit.<sup>144</sup> Additionally, Part C.2 focuses on the process state bar examiners apply to determine whether an individual with AD/HD should receive testing accommodations for the state bar examination.<sup>145</sup>

### 1. Law School Examinations

Law school is the “most performance-based academic curriculum of all graduate schools.”<sup>146</sup> This is because law schools create a teaching structure completely oriented towards performance.<sup>147</sup> Therefore, law students with disabilities are unlikely to perform successfully without accommodations in such a teaching structure.<sup>148</sup>

Most law schools only require minimal documentation from students requesting testing accommodations.<sup>149</sup> Furthermore, the same documentation is required of all individuals with any type of disability.<sup>150</sup>

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<sup>144</sup> See *infra* Part II.C.1 (focusing on the vast difference in documents an individual with AD/HD must provide in order to receive accommodations for law school examinations).

<sup>145</sup> See *infra* Part II.C.2 (reviewing the standards different boards of state bar examiners use when determining whether an individual with AD/HD should be granted testing accommodations for the examination).

<sup>146</sup> Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 LAW & PSYCHOL. REV. 57, 58 (2009).

<sup>147</sup> See *id.* (arguing that law schools rely too much on grading as opposed to evaluating a student’s performance).

<sup>148</sup> See Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 507 (2006) (“Law schools regularly deal with academically dismissed students claiming that disability resulted in their academic failure, and asserting that, perhaps with accommodations, they can be successful . . .”).

<sup>149</sup> See, e.g., *ADA Accommodations Policies and Procedures and Intake Form*, FLA, COASTAL SCH. OF LAW, <https://www.fcsl.edu/sites/fcsl.edu/files/ADA%20Policies-Procedures%202013-2014.pdf> (last visited Jan. 3, 2014), archived at <http://perma.cc/MW59-YHTG>. The list of documents an individual with a disability must provide when requesting accommodations in law school are as follows:

- (a) The credentials of the evaluator;
- (b) A diagnostic statement identifying the disability;
- (c) A description of the diagnostic methodology used;
- (d) A description of the current functional limitations;
- (e) A description of the expected progression or stability of the disability;
- (f) A description of current and past accommodations, services and/or medications;
- (g) Recommendations for accommodations.

*Id.* See generally *supra* note 136 (providing the documents individuals with a disability must submit to receive testing accommodations).

<sup>150</sup> *ADA Accommodations Policies and Procedures and Intake Form*, *supra* note 145. The Guidelines for Disability Documentation provides:

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In practice, law schools create a uniform standard by requesting the same documents required for obtaining testing accommodations regardless of the individual's particular disability.<sup>151</sup>

The types of testing accommodation documents usually required in law school are simple.<sup>152</sup> In general, a student must submit the following signed doctor's forms to receive accommodations: (1) a copy of the testing results; and (2) a list of the accommodations the doctor feels are necessary to adhere to the student's individual needs.<sup>153</sup> Upon receiving the

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Students who request accommodations on examinations or other academic modifications on the basis of a disability must provide documentation that meets the guidelines set forth below. In all cases, the cost of obtaining the professional verification to establish the disability shall be borne by the student. In the event that a student requests an academic accommodation that is not supported by the data in the assessment, or if the initial verification is incomplete or inadequate to determine the extent of the disability, it is incumbent on the student to obtain supplemental testing and assessment at the student's expense. Documentation must indicate that a disability exists and the disability substantially limits one or more major life activities. A diagnosis of a disorder in and of itself does not automatically qualify an individual for disability accommodations. Documentation must support the request for accommodations. Documentation must indicate that a disability exists and the disability substantially limits one or more major life activities. A diagnosis of a disorder in and of itself does not automatically qualify an individual for disability accommodations. Documentation must support the request for accommodations.

*Id.* See, e.g., *Disability Accommodations*, HARVARD LAW SCH. (Nov. 16, 2013), <http://www3.law.harvard.edu/dos/studentsupport/disabilities/>, archived at <http://perma.cc/Y94N-A5S6> (listing the forms an individual with a disability must submit to receive testing accommodations). Harvard Law requires an individual to submit a release of information provided by the licensed professional who performed their testing. *Id.* An individual must provide a statement of the diagnosis from his or her medical provider. *Id.* This statement must include a description of the method used to diagnose the disability as well as a list of the limitations affected by the disability. *Id.* There must also be reference to any past accommodations the individual received. *Id.* Finally, a licensed professional will provide a list of recommended accommodations for the individual seeking accommodations. *Id.*

<sup>151</sup> See generally *supra* note 140 and accompanying text (providing examples of documentation law schools require for testing accommodations); Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 226 (2004) (noting that law schools strive for equality, especially when it comes to examinations).

<sup>152</sup> See, e.g., *Policy Handbook for Students with Disabilities*, U. PACIFIC MCGEORGE SCH. L. (2007), <http://www.mcgeorge.edu/Documents/Policies/studentsDisabilitiesHandbook.pdf>, archived at <http://perma.cc/9CBB-GUGH> (requiring students to obtain certain types of documentation for testing accommodations that demonstrate a current need for such accommodations).

<sup>153</sup> See, e.g., *Special Accommodations Guidelines*, ST. THOMAS U. SCH. OF LAW (2014), <https://web.stu.edu/IMG/pdf/DisabilityGuidelineweb.pdf>, archived at <http://perma.cc/>

required documents, an independent body meets to discuss whether the student should obtain testing accommodations.<sup>154</sup> This process is similar for law schools, but differs among state bar examiners.<sup>155</sup>

## 2. State Bar Examinations

To become a practicing attorney, almost all law school graduates must pass the bar examination, which is administered twice a year.<sup>156</sup> “The most common testing configuration consists of a two-day bar examination.”<sup>157</sup> One part of the bar examination is referred to as the Multistate Bar Examination (“MBE”).<sup>158</sup> The MBE consists of 200 multiple-choice questions given over a six-hour period.<sup>159</sup> Test takers have an average of 1.8 minutes to answer each question.<sup>160</sup> All but two jurisdictions incorporate the MBE as part of the bar examination.<sup>161</sup>

Each state sets its own format and typically tests on aspects of its law.<sup>162</sup> The format of a state’s bar examination includes a combination of the following: MBE, Multistate Essay Examination (“MEE”), Multistate Performance Test (“MPT”), Multistate Professional Responsibility

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5E8Z-9K6E (providing a list of the necessary forms a student requesting testing accommodations must submit).

<sup>154</sup> See, e.g., *Policies and Procedures for Students with Disabilities*, *supra* note 3 (discussing the reviewing process an accommodations committee takes in its decision making process). For example, Florida Coastal School of Law has an Office of Student Affairs. *Id.*

<sup>155</sup> See *supra* note 150 and accompanying text (providing examples from various law schools of the testing accommodations process).

<sup>156</sup> *Basic Overview: Bar Admissions Basic Overview*, AM. BAR ASS’N (2015), [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html), archived at <http://perma.cc/TME6-T7PE>. Each states bar examination is administered twice a year, once in February and once in July. *The Multistate Bar Examination*, NAT’L CONFERENCE OF BAR EXAM’R (2015), <http://www.ncbex.org/exams/mbe>, archived at <http://perma.cc/5Q2N-FEUE7>.

<sup>157</sup> *Basic Overview: Bar Admissions Basic Overview*, *supra* note 156.

<sup>158</sup> *Id.*

<sup>159</sup> DENISE RIEBE, *PASS THE BAR!* 39 (2006).

<sup>160</sup> *Id.* at 40.

<sup>161</sup> See *The Multistate Bar Examination*, *supra* note 156 (referring to the state of Louisiana and Puerto Rico as the only states that do not include the MBE as part of its state bar examination).

<sup>162</sup> RIEBE, *supra* note 159, at 39. Riebe explains:

Because each state structures its own bar exam, each state’s exam is unique. States usually include similar components in their bar exams, however, so that exams are more similar than different. Whichever state’s bar exam you’re taking, your exam likely includes a National Conference of Bar Examiners (“NCBE”) component and a state-created component.

*Id.* “States decide individually what subjects to test on state-created portions of their exams. Note that many questions target state laws that coincide with the majority or minority rules tested on the multistate exams.” *Id.* at 44.



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Examination (“MPRE”), state specific essays, state specific multiple choice, and/or a state developed performance test(s).<sup>163</sup> Generally, the purpose of the state bar examination is to test an examinee’s ability to identify issues, articulate the legal principles applicable to the set of facts provided, and analyze the facts in a clear, concise, and organized manner.<sup>164</sup>

Because of the importance of the state bar examination, individuals with AD/HD usually request testing accommodations similar to those they received in law school.<sup>165</sup> Testing accommodations for individuals with AD/HD may include additional time as well as an isolated or semi-private room to “allow [an individual] to function at the same level as law students who do not have a learning disability.”<sup>166</sup> However, the degree of difficulty in obtaining testing accommodations for individuals with AD/HD varies from state-to-state.<sup>167</sup>

In July 2011, the National Conference of Bar Examiners (“NCBE”) created the ADA Model Form.<sup>168</sup> The ADA Model Form is “a model test accommodations application form for jurisdictions to use in [the] bar admissions [process].”<sup>169</sup> The ADA Model Form consists of four sections: (1) general instructions for an individual requesting accommodations; (2) an individual’s request for testing accommodations; (3) five disability

<sup>163</sup> See *Comprehensive Guide to Bar Admission Requirements*, NAT’L CONFERENCE OF BAR EXAM’R 25 (2015), <http://www.ncbex.org/pubs/bar-admissions-guide/2015/index.html#p=2>, archived at <http://perma.cc/5J7Z-AD87> (providing a composition of the bar examination).

<sup>164</sup> *Id.* at ix.

<sup>165</sup> *The Bar Exam: What 3L’s Can Do RIGHT NOW to Make Life Easier Later*, U.C. DAVIS SCH. OF L., <https://law.ucdavis.edu/academic-success/files/The-Bar-Exam-What-3Ls-can-do-RIGHT-NOW-to-make-life-easier-later.pdf> (last visited May 1, 2015), archived at <http://perma.cc/GK4A-RPNK>; see SUZANNE DARROW-KLEINHAUS, *ACING THE BAR EXAM* 52 (2008) (“If you had special accommodations during exams in law school, then you will want to have them for the bar exam as well.”). LaFleur requested additional time and a private testing room for both law school examinations and the state bar examination. See, e.g., *In re Reasonable Testing Accommodations of LaFleur*, 722 N.W.2d 559, 560 (S.D. 2006) (providing an example of a student that requested similar testing accommodations he received in law school for the state bar examination).

<sup>166</sup> See LEAH M. CHRISTENSEN, *LEARNING OUTSIDE THE BOX: A HANDBOOK FOR LAW STUDENTS WHO LEARN DIFFERENTLY* 91, 98–101 (2011) (providing examples of the types of accommodations a student with a disability is likely to receive).

<sup>167</sup> See *Bar Information for Applicants with Disabilities*, *supra* note 7 (providing a link with a list of all fifty states different accommodation standards for individuals with AD/HD); see also DARROW-KLEINHAUS, *supra* note 165, at 52 (“[E]ach jurisdiction has its own policy and procedures with respect to test accommodations.”).

<sup>168</sup> Laurie Elwell, *A Model Application Form for Test Accommodations*, BAR EXAM’R, Dec. 2012, at 17. “The goal was to create an efficient, clear application – with consistent instructions and documentation requirements – to elicit information pertinent to a thorough and well-informed determination, without unduly burdening the applicant with paperwork.” *Id.*

<sup>169</sup> *Id.*

verification forms; and (4) a certification of an individual's accommodations history.<sup>170</sup> Although the ADA Model Form seems to provide a uniform standard for the documents required of an individual requesting testing accommodations, the NCBE admits that a jurisdiction has the ability to "customize certain portions of the ADA Model Form to reflect [its] specific policies."<sup>171</sup> As a result, the state bar examiners "may be stricter, or [an individual] might have to provide more detailed and recent documentation of [their] disability – which may take a significant amount of time [and resources]."<sup>172</sup>

### III. ANALYSIS

There has been much controversy surrounding the methods of granting individuals testing accommodations for the state bar examination.<sup>173</sup> Unfortunately for individuals with AD/HD, the odds of obtaining testing accommodations for the bar examination are

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<sup>170</sup> See *id.* at 17–18 (outlining the four standard forms the ADA Model provided to guide each state in the accommodations process).

<sup>171</sup> See *id.* at 18 (stating that most states only follow certain portions of the Model Form while others create their own state-specific forms).

<sup>172</sup> RIEBE, *supra* note 159, at 58.

<sup>173</sup> See, e.g., *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011) (providing that the NCBE never argued that allowing Enyart to use a computer equipped with JAWS would result in unreliable or unfair exam results). However, the court ruled in favor of plaintiff and the NCBE was required to provide her with the equipment necessary to adhere to her visual impairment. *Id.*; *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74 (2nd Cir. 2000) (concluding that the court should not have taken into account plaintiffs ability to self-accommodate did not take her "outside of the protective provisions of the ADA"); *Cox v. Ala. State Bar*, 392 F. Supp. 2d 1295, 1301 (M.D. Ala. 2004) (arguing that the plaintiff is "entitled to summary judgment because the [doctor's] declaration that his requested accommodations are reasonable [should] be given greater weight than the evidence of the defendant to the contrary). Instead, the court gave greater weight to the Alabama's state board of bar examiners physician, who reviewed plaintiffs documentation and revealed that double time on the state bar examination was not a reasonable accommodation. *Id.*; *Varad v. Barkshark*, 261 F. Supp. 2d 47, 55 (Mass. Dist. Ct. 2004) (reasoning that because the board of bar examiners was a public entity, Title III of the ADA should not apply); *Ware v. Wyo. Bd. of Law Exam'rs*, 973 F. Supp. 1339, 1353 (Wyo. Dist. Ct. 1997) (rejecting plaintiffs theory that state bar rules preempt the ADA); *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 87 (W.D. N.Y. 1994) (discussing plaintiffs burden of proof by preponderance of the evidence that he suffers from a specific learning disability; if burden is met, he will be entitled to the special accommodation requested); *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 222 (W.D. N.Y. 1993) (granting plaintiffs motion for a preliminary injunction that required the board of bar examiners to provide with the accommodation recommended by her treating physician all); *Florida Bd. of Bar Exam'rs re S.G.*, 707 So.2d 323, 325 (Fla. 1998) (determining that averaging the scores of parts A and B of the state bar examination which were taken during separate administrations, did not constitute reasonable accommodations under the ADA's definition).

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uncertain.<sup>174</sup> The process an individual with AD/HD must go through to obtain testing accommodations for each state bar examination is overly burdensome and does not comply with Title III of the ADA.<sup>175</sup> As a result, these individuals are left with a disadvantage in taking the state bar examination.<sup>176</sup>

Part III of this Note analyzes the differences between the goals of law school examinations and the state bar examinations.<sup>177</sup> Additionally, it examines how the symptoms of AD/HD affect an individual's ability to achieve those goals.<sup>178</sup> Part III.A reviews the objectives of law school examinations and explains why it is less burdensome for individuals with AD/HD to obtain testing accommodations.<sup>179</sup> Part III.B identifies the purpose of the bar examination and why it is much more difficult for individuals with AD/HD to receive testing accommodations.<sup>180</sup> Furthermore, Part III.B compares the boards of state bar examiners requirements for granting individuals with AD/HD testing accommodations with Title III of the ADA and the corresponding regulations.<sup>181</sup> As this analysis shows, it is necessary to amend Title 28 section 36.309 of the Code of Federal Regulations to establish a uniform

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<sup>174</sup> Compare *Kelly v. West Virginia Bd. of Law Exam'rs*, No. 2:08-00933, 2010 U.S. Dist. WL 9921505, at \*5-7 (S.D.W.V. Apr. 16, 2010) (describing the process the plaintiff had to take in order to be considered for testing accommodations on the state bar examination), with *Enyart*, 630 F.3d at 1167 (granting plaintiffs request for accommodations); see also *Sampat & Grant*, *supra* note 34, at 327-35 (analyzing how the childhood documentation requirement for individuals with AD/HD violates the ADA because it is unsupported by the DSM).

<sup>175</sup> *Sampat & Grant*, *supra* note 34, at 330. There is a discrepancy in a number of state bar requirements for individuals with AD/HD applying for testing accommodations. *Id.* For example, some state board of bar examiners require an individual to present documentation indicating a childhood history of AD/HD. *Id.* Further, even if the state board of bar examiners determines the individual does have AD/HD, if he or she cannot provide documentation indicating a childhood history of the disorder, he or she will most likely be denied accommodations. *Id.*; see 42 U.S.C. § 12182 (2012) (stating that it is discriminatory to deny an individual the opportunity to benefit from accommodations that are not equal to those afforded to other individuals).

<sup>176</sup> See e.g., *Kelly*, No. 2:08-00933, 2010 U.S. Dist. WL 9921505, at \*11-12 (discussing that the board of bar examiners denial of plaintiff's testing accommodations resulted in his failure to pass the bar examination).

<sup>177</sup> See *infra* Part III.A-C (analyzing law school examinations with the objectives from each portion of the state bar examination).

<sup>178</sup> See *infra* Part III.A-C (examining how an individual's AD/HD affects his or her ability to perform accurately on examinations without receiving the necessary accommodations).

<sup>179</sup> See *infra* Part III.A (reviewing the type of documentation law schools require individuals with AD/HD to receive accommodations on examinations).

<sup>180</sup> See *infra* Part III.B (focusing on the inconsistency in the number of documents individuals with AD/HD must provide to the state board of bar examiners to receive testing accommodations).

<sup>181</sup> See *infra* Part III.B (comparing the state board of bar examiner's documentation requirements for individuals with AD/HD with Title III of the ADA).

requirement among the states to specify the type of documents needed for individuals with AD/HD to receive testing accommodations.<sup>182</sup>

*A. The Uniform Standard for Testing Accommodations Among Law Schools*

Law schools create an equal opportunity to request accommodations under Title III of the ADA by establishing a uniform standard in the number of documents an individual with AD/HD must submit.<sup>183</sup> Such an opportunity is beneficial to an individual's ability to perform on law school examinations.<sup>184</sup> Accordingly, law schools emphasize the need to accommodate individuals with AD/HD so that an individual's accommodations will reflect his or her abilities.<sup>185</sup> In doing so, law schools will continue to recognize that an individual's examination score obtained under standard conditions may not be the same as a score obtained with accommodations. Therefore, law schools properly ensure that the skills of an individual with AD/HD are being measured instead of his or her disability.<sup>186</sup>

Further, law schools require a set of documents that will indicate whether an individual has a qualifying disability under Title III of the ADA.<sup>187</sup> These documents highlight an individual's strengths and weaknesses by providing in detail the major life activities an individual's

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<sup>182</sup> See *infra* Part IV (proposing regulation 36.309 of Title III of the ADA to be amended to include a uniform list of documents that individuals with AD/HD would have to provide to obtain testing accommodations).

<sup>183</sup> 42 U.S.C. § 12182(b)(1)(A)(ii) (2012). Section 12182(b)(1)(A)(ii) provides:

It shall be discriminatory to afford an individual or class of individuals, on the basis or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

*Id.* See *e.g.*, *supra* note 6 and accompanying text (providing examples from law schools that indicate the number of documents an individual with AD/HD must submit to receive testing accommodations).

<sup>184</sup> See Weiss, *supra* note 151, at 228 (reviewing "the scope of accommodations, [under] the ADA . . . to customary changes in the work or school environment that allow the disabled individual to enjoy equal opportunities").

<sup>185</sup> See, *e.g.*, *Policies and Procedures for Students with Disabilities*, *supra* note 6, at 1 (citing specific language used in Florida Coastal School of Law accommodation policies); CHRISTENSEN, *supra* note 166, at 91 (discussing the purpose behind "disability accommodations is to level the playing field").

<sup>186</sup> See Weiss, *supra* note 151, at 223, 230-31 (noting that law schools provide students with AD/HD "equal treatment in the opportunities afforded to them").

<sup>187</sup> See *e.g.*, *supra* note 6 and accompanying text (comparing various law schools required documentation for individuals with AD/HD).

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disability effects.<sup>188</sup> A law school will not validate a diagnosis of AD/HD from a family practitioner.<sup>189</sup> Rather, law schools refer to the testing results from clinical psychologists to determine if accommodations are necessary.<sup>190</sup> Because the proper testing will show an individual's diagnosis, law schools do not need to extensively analyze an individual's disability.<sup>191</sup> Based on these documents, law schools are able to provide an individual with AD/HD accommodations that level the playing field with other students.<sup>192</sup> Therefore, law schools properly ensure that no individual with a disability has an advantage over another in receiving testing accommodations.<sup>193</sup>

*B. The Board of State Bar Examiners Lack of Uniformity in the Number of Documents an Individual with AD/HD Must Provide to Obtain Testing Accommodations*

Unlike law schools, state bar examiners do not apply a uniform standard among states in the number of documents an individual with AD/HD must submit to receive testing accommodations for the state bar examination.<sup>194</sup> Part B.1 examines how state bar examiners discriminate against individuals with AD/HD when granting testing accommodations.<sup>195</sup> Part B.2 considers the effects AD/HD has on an individual's ability to complete sections of the state bar examination.<sup>196</sup> Part B.3 analyzes how state bar examiners fail to comply with Title III of the ADA.<sup>197</sup>

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<sup>188</sup> See *supra* note 6 and accompanying text (referring to an individual's testing and evaluation to determine his or her diagnosis).

<sup>189</sup> See *Who Can Diagnose ADHD?*, *supra* note 59 (indicating that an individual with AD/HD must acquire the appropriate testing through a licensed clinical psychologist).

<sup>190</sup> See Eabon & Abrahamson, *supra* note 59 (explaining that a licensed clinical psychologist must administer an evaluation).

<sup>191</sup> See Weiss, *supra* note 151, at 230-31 (noting that law schools are "prevented from employing overly burdensome methods of proof in relation to the disability").

<sup>192</sup> CHRISTENSEN, *supra* note 166, at 91.

<sup>193</sup> Weiss, *supra* note 151, at 231.

<sup>194</sup> See *Bar Information for Applicants with Disabilities*, *supra* note 7 (citing a complete list of documents states require for AD/HD, physical, and visual impairments on the American Bar Associations website).

<sup>195</sup> See *infra* Part III.B.1 (examining how state bar examiners discriminate against individuals with AD/HD by requiring these individuals to produce more documentation than individuals with other disabilities when granting testing accommodations).

<sup>196</sup> See *infra* Part III.B.2 (considering each section of the state bar examination as applied to individuals with AD/HD).

<sup>197</sup> See *infra* Part III.B.3 (analyzing state bar examiners failure to comply with the language stated in Title III of the ADA when granting individuals with AD/HD testing accommodations).

1. State Bar Examiners' Discrimination Against Individuals with AD/HD

State bar examiners discriminate against individuals with AD/HD by requiring these individuals to produce more documents than those with other types of disabilities.<sup>198</sup> For example, an individual with a visual impairment applying to take the bar examination in a particular state may have to submit less documents for accommodations than an individual with AD/HD.<sup>199</sup> However, under the ADA, additional documents should not be required for individuals with AD/HD because the statute mandates individuals with any disability be given the same opportunity to succeed.<sup>200</sup> Thus, state bar examiners discriminate because they create an unequal opportunity for individuals with AD/HD to receive testing accommodations.<sup>201</sup>

As a consequence, state bar examiners may force individuals with AD/HD to forum-shop for a jurisdiction that has a less burdensome process of obtaining testing accommodations.<sup>202</sup> This may result in one of two problematic scenarios. First, an individual could choose to take the bar examination in a state in which he or she does not want to practice, but has a better chance of receiving testing accommodations due to the state's document requirements. On the other hand, an individual may want to take the bar examination in a particular state, but faces a greater risk of not receiving accommodations because he or she cannot produce all the documents that state requires.<sup>203</sup> It is unfair to make an individual with AD/HD choose between these scenarios—essentially risking bar

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<sup>198</sup> See *Bar Information for Applicants with Disabilities*, *supra* note 7 (providing a list of each state's accommodation requirements).

<sup>199</sup> See *id.* (comparing the difference among the states in the number of documents an individual with AD/HD must provide to an individual with a visual impairment). However, not every state requires an individual with AD/HD to produce more documents than those with other disabilities. The ABA's website provides a full list of the documents required to receive testing accommodations for the state bar examination for persons with disabilities—including AD/HD.

<sup>200</sup> Heywood, *supra* note 5, at 619.

<sup>201</sup> See Heywood, *supra* note 5, at 622 (reaffirming that courts should not deter from the essential purpose of the ADA).

<sup>202</sup> See *Sampat & Grant*, *supra* note 34, at 323 & n.229 (discussing that entities "may impose [their] own criteria to establish a disability and a need for accommodation[s]"). "However, the criteria established . . . cannot be so burdensome that [it] prevents individuals with disabilities from [receiving] accommodations to which they are entitled." *Id.*

<sup>203</sup> See *id.* (demonstrating how it can be difficult to acquire some of the documents state bar examiners require to prove an existence of AD/HD and how it often becomes an overburdening process).

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passage when determining where to take the bar examination based on the number of documents a state requires.<sup>204</sup>

Furthermore, state bar examiners discriminate by requiring individuals with AD/HD to show a finding of AD/HD symptoms throughout childhood.<sup>205</sup> By requiring documents, such as elementary and middle school report cards, state bar examiners fail to recognize that some individuals are not diagnosed with AD/HD until adulthood.<sup>206</sup> Therefore, individuals diagnosed with AD/HD as an adult are unable to acquire these documents.<sup>207</sup>

In addition, state bar examiners stigmatize AD/HD as being overdiagnosed, and in return burden these individuals by requiring an excessive number of documents.<sup>208</sup> State bar examiners reason that if an individual cannot produce such documents, he or she must be “faking” the symptoms of AD/HD for academic purposes.<sup>209</sup> However, in doing so, state bar examiners incorrectly adhere to the stigmas surrounding AD/HD instead of relying on an individual’s testing results.<sup>210</sup> As discussed below, implementing a uniform standard of documents among all states bar examiners would eliminate discrimination against individuals with AD/HD.<sup>211</sup>

## 2. Sections of the State Bar Examination as Applied to Individuals with AD/HD

The format and timing of each portion of the bar examination affects an individual with AD/HD in several ways.<sup>212</sup> First, the ratio between the

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<sup>204</sup> See *id.* (providing an example of an individual who was unable to produce documentation indicating a childhood history of AD/HD).

<sup>205</sup> See *id.* at 306 (reasoning that because an individual may not be able to show a history of his or her learning disability throughout childhood, states board of bar examiners often determine there is not enough evidence to prove he or she had a learning disability that needed accommodations).

<sup>206</sup> *Id.* at 306.

<sup>207</sup> See Sampat & Grant, *supra* note 34, at 291–92 (using an example of one student who was unable to produce documentation from childhood because she was not diagnosed with AD/HD until her mid-twenties, when she chose to come to law school).

<sup>208</sup> See Perry, *supra* note 78, at 2 (noting that “children who are diagnosed with AD/HD are at a greater risk of being stigmatized”).

<sup>209</sup> Rigney, *supra* note 71, at 1040–41.

<sup>210</sup> See *id.* at 1041 (arguing that because “symptom checklists for [AD/HD] lack specificity and are prone to over-identifying both students at the post-secondary level and adults in the general population as having [AD/HD] when they do not”).

<sup>211</sup> See *infra* Part IV (proposing a list of reasonable documents that Congress should add to regulation 36.309 so that state bar examiners can implement a uniform standard for granting testing accommodations to individuals with AD/HD).

<sup>212</sup> See Sampat & Grant, *supra* note 34, at 328 (noting that timed examinations may cause AD/HD symptoms to worsen in an individual).

amount of time per question on the MBE may have an effect on the processing speed of an individual with AD/HD when reading and answering each question.<sup>213</sup> Because it takes an individual with AD/HD more time to read and process information than it would for an average test taker, an individual with AD/HD cannot work effectively under this time restraint.<sup>214</sup>

Furthermore, the MBE is designed to assess how well test takers can apply legal principles and reasoning skills to specific fact patterns.<sup>215</sup> If an individual with AD/HD does not receive testing accommodations, the MBE may not accurately assess that individual's skills because an individual may be more concerned with completing that portion of the examination than focusing on their ability to accurately answer each question. Without being granted additional time on an examination, an individual with ADHD may not be afforded the same opportunity to finish the examination or focus on demonstrating their knowledge and skills because he or she is either processing the information slower or losing focus due to the timing. Thus, it creates a discrepancy between the results of individuals with AD/HD who are not granted testing accommodations and those who are granted accommodations.

Additionally, granting individuals with AD/HD testing accommodations would still achieve the goals behind the written portions of the state bar examination.<sup>216</sup> Individuals with AD/HD may require additional time for processing sets of facts. Therefore, having to develop a new exam strategy creates an unnecessary burden that could be overcome if these individuals were to receive testing accommodations.<sup>217</sup> For example, because the goal behind the MPT is to evaluate the test taker's lawyering skills, rather than testing substantive knowledge, state

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<sup>213</sup> See RIEBE, *supra* note 159, at 40 (arguing that allowing an individual with AD/HD only 1.8 minutes per question on the MBE would not accurately reflect his or her decision making process); see also Mahone, *supra* note 8 (discussing an individual with AD/HD's processing speed).

<sup>214</sup> See Mahone, *supra* note 8 (analyzing how AD/HD affects an individual's processing speed as well as their reading fluency and comprehension).

<sup>215</sup> See *Multistate Bar Examination*, *supra* note 156 (assessing the purpose of the MBE portion of the state bar examination).

<sup>216</sup> See *The Multistate Performance Test*, NAT'L CONFERENCE OF BAR EXAM'R (2015), <http://www.ncbex.org/exams/mpt/>, archived at <http://perma.cc/G59G-GD2K> (concluding that applying the goals behind the written portions of the state bar examination to an individual with AD/HD testing accommodations would still allow him to effectively communicate on essays and short answers); *The Multistate Essay Examination*, NAT'L CONFERENCE OF BAR EXAM'R (2015), <http://www.ncbex.org/about-ncbe-exams/mbe/>, archived at <http://perma.cc/U2PJ-4BL7> (discussing the goals behind the MEE portion of the state bar examination).

<sup>217</sup> See Mahone, *supra* note 5 (analyzing the processing speed and reading comprehension of individuals with AD/HD).



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bar examiners should allow an individual with AD/HD to complete this portion under conditions he or she would confront daily.<sup>218</sup> When these individuals are in real life practice, they will still suffer from AD/HD. However, they will be able to take the necessary measures to complete the task in a manner that would accurately reflect their lawyering skills.

3. State Bar Examiners Failure to Comply with Title III of the ADA in Granting Testing Accommodations to Individuals with AD/HD

There are several ways state bar examiners may not comply with Title III of the ADA when considering testing accommodations for individuals with AD/HD.<sup>219</sup> First, state bar examiners fail to provide individuals with AD/HD the same benefit as individuals with other disabilities by making it a difficult process for individuals with AD/HD to receive testing accommodations.<sup>220</sup> Therefore, state bar examiners that require an individual with AD/HD to produce more documents than those with other disabilities deny an individual with AD/HD the same opportunity to benefit from accommodations.<sup>221</sup> By not complying with Title III of the ADA, state bar examiners effectively discriminate based on an individual's disability.<sup>222</sup> Second, state bar examiners should not deny an individual with AD/HD accommodations based on the number of documents provided.<sup>223</sup> Rather, state bar examiners need to make a decision based on how the individual's disability affects one's performance on the examination.<sup>224</sup>

Additionally, because any licensed medical doctor can prescribe AD/HD medication, state bar examiners wrongly characterize AD/HD as

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<sup>218</sup> *The Multistate Performance Test*, *supra* note 216.

<sup>219</sup> See W. Ray Williams, *Hand-Up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 657 (raising critical psychometric concerns about the ADA's reasonable accommodations provisions for learning disabled bar applicants).

<sup>220</sup> See *id.* (considering the effects an individual with AD/HD may encounter if he or she is not granted testing accommodations for the state bar examination).

<sup>221</sup> See *id.* (citing 28 C.F.R. § 36.309(b)(4) discussing that alternate arrangements must be made for these individuals).

<sup>222</sup> See 42 U.S.C. § 12182(b)(1)(A)(ii) (2012) (citing specific language in Title III of the ADA that states that an entity shall not discriminate against an individual for the basis of his or her disability).

<sup>223</sup> Sampat & Grant, *supra* note 34, at 302.

<sup>224</sup> See 42 U.S.C. § 12102(2)(A)-(B) (2008) (establishing reading, concentrating, and thinking as major life activities that an individual's disability can affect). In this author's opinion, in order to comply with Title III of the ADA, state bar examiners need to realize that it takes several of the major life activities defined in Title III of the ADA to perform accurately on the state bar examination. Therefore, when an individual with AD/HD produces testing results that displays one of more affected major life activities, the state bar examiners should allow these individuals to obtain the proper testing accommodations.

a disability that individuals can cure with a pill.<sup>225</sup> As a result, state bar examiners deny individuals with AD/HD testing accommodations based on a mitigating factor, which no longer exists under Title III of the ADA.<sup>226</sup> Finally, state bar examiners need to modify the amount of documents an individual with AD/HD must provide for accommodations.<sup>227</sup> Modifying the amount of documents individuals with AD/HD must submit is necessary because some individuals cannot obtain certain documents state bar examiners require.<sup>228</sup> This causes individuals with AD/HD to spend more money to go through the process of acquiring the additional documents needed to obtain testing accommodations for the state bar examination.<sup>229</sup> State bar examiners must comply with Title III of the ADA by providing an alternative means of accommodations if these individuals cannot produce the number of documents a state requires.<sup>230</sup> Therefore, the approach state bar examiners use in determining whether an individual with AD/HD should receive testing accommodations does not comply with Title III of the ADA and accordingly must be changed.<sup>231</sup>

#### IV. CONTRIBUTION

As discussed above, there is no uniformity among state bar examiners in the documents an individual with AD/HD must submit to obtain testing accommodations for the state bar examination.<sup>232</sup> Failing to grant testing accommodations to an individual with AD/HD could be the determining factor of whether he or she passes the state bar examination.<sup>233</sup> Thus, a uniform standard outlining the necessary

<sup>225</sup> See Bhagia *supra* note 67 (explaining that individuals who manage AD/HD without medication do so through life style choices, not because the condition has gone away).

<sup>226</sup> See 42 U.S.C. § 12102(4)(E)(i) (2008) (citing to examples of mitigating factors in Title III of the ADA that entities can no longer use to deny an individual with a disability accommodations).

<sup>227</sup> See *infra* Part IV (implementing a standard set of documents under regulation 36.309 of Title III of the ADA to make it easier for individuals with AD/HD to receive testing accommodations for the state bar examination).

<sup>228</sup> See *infra* Part IV (implementing a uniform set of documents under the ADA individuals with AD/HD would have to submit to the state bar examiners for testing accommodations).

<sup>229</sup> See Sampat & Grant, *supra* note 34, at 335 (recognizing the difficulty of obtaining some documents such as a childhood history of AD/HD).

<sup>230</sup> See 42 U.S.C. § 12182(b)(1)(A)(ii) (stating that reasonable modifications or adjustments must be made for an individual with a disability if accommodations are not available).

<sup>231</sup> See *supra* Part III (analyzing how an individual's AD/HD affects his or her ability to perform accurately on the state bar examination as well as state bar examiners failure to comply with Title III of the ADA).

<sup>232</sup> See *supra* Part II.C.2 (discussing the approach of obtaining testing accommodations for individuals with disabilities on the state bar examination).

<sup>233</sup> See *generally supra* Part III.B (examining how state bar examiners fail to comply with the language stated in Title III of the ADA).

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documents individuals with AD/HD must submit to state bar examiners when requesting accommodations is essential to prevent discrimination.<sup>234</sup>

A lack of uniformity among the states has two effects on individuals with AD/HD. First, if an individual chooses to take the bar examination in a state that requires an excessive amount of documents, he or she risks not receiving accommodations if he or she cannot obtain all the necessary documents.<sup>235</sup> Second, the amount of documents required varies among states, causing individuals with AD/HD to take the bar examination in a state that requires less documentation for accommodations even though that state is not their preferred place to practice.<sup>236</sup>

The following amendment to Title 28 section 36.309 of the Code of Federal Regulation's will result in a more equal application of the ADA among state bar examiners across the country and correct its deficiencies.<sup>237</sup> Amending this section is the first step in forcing state bar examiners to comply with Title III of the ADA.<sup>238</sup>

A. *Proposed Amendment to 28 C.F.R. § 36.309 to Provide a Uniform List of Documents Necessary for Individuals with AD/HD to Obtain Testing Accommodations*

This Note proposes an amendment to regulation 36.309 that will provide a uniform list of the documents individuals with AD/HD must submit when requesting accommodations.<sup>239</sup> In its current form, the provision only establishes what private entities offering examinations must assure.<sup>240</sup> There is nothing in regulation 36.309 that identifies what type of documents private entities require for individuals to obtain accommodations.<sup>241</sup> The proposed amendment to regulation 36.309 would read as follows:

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<sup>234</sup> See *infra* Part IV.A (outlining the recommended changes to section 36.309 of the ADA).

<sup>235</sup> See, e.g., Sampat & Grant, *supra* note 34, at 292 (providing an example of an individual's difficulty to obtain testing accommodations for the state bar examination).

<sup>236</sup> See *Bar Information for Applicants with Disabilities supra* note 6 (listing each states bar examination testing accommodation policy).

<sup>237</sup> See 28 C.F.R. § 36.309 (2014) (amending the examinations and courses section of the regulation to include a uniform set of documents individuals with AD/HD must provide to obtain testing accommodations).

<sup>238</sup> See *infra* Part IV.B (commenting on the advantages and disadvantages of amending regulation 36.309 of the ADA).

<sup>239</sup> See 28 C.F.R. § 36.309 (2014) (proposing a uniform set of reasonable documentation individuals with AD/HD will have to provide for each state's bar examination).

<sup>240</sup> See *id.* (referencing what private entities can and cannot do when granting accommodations to individuals with disabilities).

<sup>241</sup> See *id.* (determining there is no protection for individuals with AD/HD under this regulation).

(a) General. Any private entity that offers examinations or courses related to applications, licensing, certification, 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.

(b) Examinations.

(1) Any private entity offering an examination covered by this section must assure that—[ . . . ]

*(iv) The examination is selected and administered to best ensure that, when the examination is administered to an individual with a disability that impairs processing speed, reading comprehension, focus, or memory, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired processing speed, reading comprehension, focus, or memory;*

*(v)(~~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. The necessary documentation for disabilities required by private entities is as follows:*

*i. Attention Deficit/Hyperactivity Disorder*

*1. Form requesting testing accommodations to the private entity offering the examination;*

*2. Letter from previous institutions where testing accommodations were granted;*

*3. Letter describing the type of testing accommodations received;*

*4. Copy of Psycho-Educational Evaluation results (within the last five years);*

*5. Letter from Physician who conducted the Psycho-Educational Evaluation, setting out a list of reasonable accommodations an individual needs based on his or her testing results;*

*(vi)(~~v~~) Any private entity offering examinations may not alter the amount of necessary documentation required by an individual regardless of his or her disability;*

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~~(vii)(ei)~~ When considering requests for modifications, accommodations, or auxiliary aids or services, the entity *shall* give 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 section 504 Plan), *but will not be the sole factor in determining whether such modifications, accommodations, or auxiliary aids or services are to be granted to an individual.*

(2) Required modifications to an examination may include *but are not limited to* changes in the length of the time permitted for completion of the examination, *an adaptation to the manner in which the examination is given, as well as an isolated room.*<sup>242</sup>

B. *Commentary*

The modification to regulation 36.309 corrects three deficiencies within the ADA's current statute. First, it provides a list of reasonable documents individuals with AD/HD must submit when requesting accommodations to a private entity. The original ADA states that documentation required by private entities must be reasonable and limited to the need of the accommodation.<sup>243</sup> Amending the provision to include a standard list of documents individuals with AD/HD must provide would create uniformity among all private entities offering examinations.

Second, the amendment specifies that private entities offering examinations cannot add or reduce the number of documents an individual with AD/HD is required to produce. The original ADA does not include a provision limiting the number of documents required for

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<sup>242</sup> The proposed amendments are italicized. The proposed amendments are the contribution of the author and influenced by the ADA. The unitalicized portions of the proposed amendments model the original form of the ADA, while the two portions that have a strike through should be deleted.

<sup>243</sup> 42 U.S.C. § 12182 (2012).

accommodations.<sup>244</sup> Without this amendment, private entities are given the discretion to request any number of documents from an individual with AD/HD. Therefore, by implementing this revised section of the regulation, entities that administer state bar examinations will have to comply with a standard list of required documents to grant accommodations.

Finally, this proposed amendment alters the language in section 36.309 and limits the weight entities give to past accommodations. Limiting the weight given to past accommodations allows states bar examiners across the nation to focus more on the individual's current need for accommodations. Without amending this language, individuals with AD/HD will be less likely to receive accommodations. This is because doctors do not diagnose some individuals with AD/HD until adulthood, making it impossible to provide a showing of past accommodations.

Critics may argue that state bar examiners are correct in requiring individuals with AD/HD to produce more documents for testing accommodations than individuals with other disabilities. However, this argument fails because the ADA states that entities cannot deny an individual an accommodation on the basis of his disability.<sup>245</sup> Further, because any licensed medical doctor can administer AD/HD medication, critics may argue that by creating a higher number of documents that individuals with AD/HD must submit, state bar examiners will be able to sort out imposters from those who really suffer from AD/HD. However, the proposed amendment addresses this criticism by establishing a uniform standard of documents that will accurately reflect an individual's AD/HD diagnosis.

Additionally, critics may claim that individuals abuse AD/HD medication for purposes of enhancing academic performance. State bar examiners take precaution by requiring additional proof of AD/HD other than medical doctors' recommendations. However, this argument fails because licensed clinical psychologists perform a psycho-educational evaluation to determine the effects AD/HD has on an individual's ability to perform. Moreover, critics may consider AD/HD medication to be a form of an accommodation. This argument also fails because the ADA states that entities can no longer consider mitigating factors, such as medication, when determining an individual's need for accommodations.<sup>246</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

V. CONCLUSION

Testing accommodations on the state bar examination play a crucial role in determining the future of individuals with AD/HD. Over the years, the number of individuals diagnosed with adult AD/HD has increased. Individuals with AD/HD are severely disadvantaged from receiving testing accommodations when states require an excessive amount of documentation. Thus, the risk of these individuals not passing the state bar examination increases when one cannot receive the accommodations needed to accurately perform on the examination.

The ADA influences state bar examiners' decisions regarding testing accommodations for individuals with disabilities. Congress designed the ADA to prevent discrimination against individuals with disabilities. Although it achieves this purpose in some areas, state bar examiners fail to comply entirely with the language in Title III of the ADA. As previously explained, each state differs in the amount of documents an individual with AD/HD must submit to obtain testing accommodations. In addition, by treating AD/HD differently from other disabilities, state bar examiners wrongly discriminate against those test takers who suffer from AD/HD.

As a result of these limitations, it is essential that the regulations be amended to include a uniform standard of the documents individuals with AD/HD must provide to obtain accommodations. Amending section 36.309 of the Code of Federal Regulations to include this standardized list of documents provides state bar examiners with better guidance when granting accommodations to individuals with AD/HD. In addition, amending section 36.309 places less weight on past accommodations to allow state bar examiners to consider an individual's current need for accommodations.

Returning to the hypothetical described at the beginning of this Note: under the current state of Title III of the ADA, Bethany is unable to provide some of the documents the Florida state bar examination requires, therefore, she cannot receive testing accommodations. Bethany presented results from tests her physician conducted, as well as letters from her law school indicating the types of accommodations she previously received. Yet, under the current statute and accompanying regulations, state bar examiners require no uniform standard for the amount of documents an individual with AD/HD must submit, and thus Florida is able to deny her request for accommodations. This lack of uniformity allows state bar examiners the discretion to increase or decrease the amount of documents required for accommodations. However, if the regulations are amended as this Note's proposes, the Florida Board of Bar Examiners would grant Bethany testing accommodations for the Florida state bar examination. Accordingly, Congress should amend section 36.309 of the Code of

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*Setting the Bar*

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Federal Regulations as proposed in this Note to help students like Bethany reach their full potential on the state bar examination, regardless of the state in which they choose to practice.

**Sam L. Bussey\***

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