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# Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students

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**Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students**

By

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December 6, 2006

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The debate over who should be considered disabled rages fervently in the context of learning disabilities. A learning disabled person is not easy to see like a man in a wheelchair who is unable to walk. Nor is there a simple means of measuring learning disabilities as a hearing test is used to identify deafness. Precisely this difficulty in acquiring reliable evidence makes defining the outer edge of the learning disabled category vexing. Some postmodern critics go so far as to suggest that the entire concept of learning disabilities is merely a subjective social construct that is inherently tied to underlying politics.<sup>1</sup> Medical professionals and law makers, however, have relied for years on the discrepancy between a student's ability and achievement to determine the presence of a learning disability.<sup>2</sup> Mental health clinicians also generally accept that even high-functioning individuals can suffer from learning disabilities.<sup>3</sup>

Individuals with high academic potential who have a learning disability present the hardest question as to how disability should be defined. Within the context of the Americans with Disabilities Act (ADA) this question arises most often in cases involving

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<sup>1</sup> Phil Smith, *Inquiry Cantos: Poetics of Developmental Disability*, 39 MENTAL RETARDATION 379, 390 (2001); Jeanne Neath, *Social Causes of Impairment, Disability and Abuse: A Feminist Perspective*, 8 J. DISABILITY POL'Y STUD. 195, 230 (1997); ROBERT BOGDAN & STEVEN TAYLOR, *THE SOCIAL MEANING OF MENTAL RETARDATION: TWO LIFE STORIES* (Teachers College Press 1994).

<sup>2</sup> Traditionally learning disabilities are diagnosed when an individual's achievement on diagnostic tests is substantially below what would be expected for their age and intelligence. Statistical methods are used to establish discrepancy between the individual's achievement and IQ test scores. See PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, *A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES* 25 (2002) [hereinafter *President's Commission*], available at <http://www.ed.gov/inits/commissionsboards/whspecialeducation/index.html> (noting that assessment of IQ and achievement is currently predominant); Individuals with Disabilities Education Act, Pub. L. No. 11-476, 104 Stat. 1141 (Oct. 30, 1990).

<sup>3</sup> See Sally M. Reis et al., *Case Studies of High-Ability Students with Learning Disabilities Who Have Achieved*, 63 EXCEPTIONAL CHILD. 463, 464-65 (1997); Linda E. Brody & Carol J. Mills, *Gifted Children with Learning Disabilities: A Review of the Issues*, 30 J. LEARNING DISABILITIES 282, 284-97(1997); C. Lynne Hannah & Bruce M. Shore, *Meta-cognition and High Intellectual Ability: Insights from the Study of Learning-Disabled Gifted Students*. 39 GIFTED CHILD Q. 95, 98-106. (1995); Susan Baum & Steven V. Owen, *High Ability Learning Disabled Students: How Are They Different?*, 32 GIFTED CHILD Q. 321, 322-26 (1988). See also Pamela B. Adelman & Susan A. Vogel, *Adults with learning disabilities*, in LEARNING ABOUT LEARNING DISABILITIES 657, 701 (B. Wong ed. 1998).

requests for accommodations on professional licensing exams.<sup>4</sup> Recent Supreme Court cases have narrowed the definition of disability under the ADA in an attempt to preserve the act's potency.<sup>5</sup> This impulse to narrow the definition of disability stems from the concern that if everyone who differs from average in some way is considered disabled, the ADA will become watered down and consequently will be unable to adequately help those it was originally meant to.

This trend toward narrowing the definition of disability, and thus drawing a more distinct line between the disabled and society at large, is in conflict with recent legislation which tries to fold disabled students into the mainstream. For example, the No Child Left Behind Act<sup>6</sup> takes a one-size-fits-all approach to education, treating disabled students like everyone else instead of focusing on their individualized needs. Under No Child Left Behind the majority of disabled students are measured alongside their classmates on the exact same standardized test and schools are held accountable for the standardized test scores of disabled children.<sup>7</sup> The goal behind holding these disabled students to the same standards as all other children is an admirable one. The No Child Left Behind Act endeavors to make sure that teachers have incentives to teach the disabled students effectively and bring them up to grade level.<sup>8</sup> The fear being that if schools are not held accountable for the test scores of students with disabilities, disabled students will be left behind while their teachers focus instead on pupils whose test scores may determine whether the school is sanctioned or even closed.

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<sup>4</sup> See *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998); *Price, Singleton, & Morris v. National Board of Medical Examiners*, 966 F. Supp. 419 (S.D.W.V. 1997).

<sup>5</sup> See *Sutton v. United Air Lines*, 527 U.S. 471, 478 (1999); *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 193 (2002).

<sup>6</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002) (reauthorizing the Elementary and Secondary Education Act).

<sup>7</sup> *Id.*

<sup>8</sup> See *Id.*

The commonly accepted practice of comparing a student's potential ability as demonstrated through an IQ test to the student's achievement on reading and other diagnostic tests is not the only way to measure learning disabilities. Companion legislation which arose out of the No Child Left Behind philosophy will allow states to abandon this traditional method. The Individuals with Disabilities Education Improvement Act (IDEIA) and the accompanying Department of Education guidelines provide room for states to change the way learning disabilities are identified.<sup>9</sup> The Bush administration's Notice of Proposed Rulemaking urges that the use of discrepancy between IQ subtests of ability and achievement be abandoned as a means of measuring learning disability.<sup>10</sup> The Department of Education's Proposed Rulemaking instead recommends assessment of the struggling student's response to high-quality general education instruction as a new standard or, alternatively, an absolute low level of achievement as a second option for identifying learning disabled students.<sup>11</sup>

These alternative standards are consistent with the philosophy of No Child Left Behind in that learning disabled students are measured against the same basic universal standards as other children. However, by eliminating the individual ability component of the old standard, the IDEIA transforms disability identification into a rule-like process and undermines the integrity of the learning disability classification. By changing the way learning disabilities are identified, the Department of Education may radically alter the entire definition of learning disability. The alternate standards proposed by the Department of Education as a means of measuring learning disability could bar students

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<sup>9</sup> See Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1414 *et seq.* (2004).

<sup>10</sup> 70 Fed. Reg. 35,864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307(a)(1)) ("In addition, the criteria adopted by the State . . . [m]ay prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability").

<sup>11</sup> *Id.* at 35,802.

with high academic potential who also have a learning disability from ever obtaining the help they need. Imagine a bright child who manages to get by with mediocre grades despite a learning disability, but with a little extra attention and some alternative teaching methods that child could rise to a much higher level of achievement. Under the proposed standard that child would not qualify as learning disabled because the new rule compares him to the universal threshold of average grade level instead of the old individual ability standard. By changing the process for measuring learning disabilities, this regulation could write gifted students with learning disabilities out of special education law and deny those children accommodations which are essential to realizing their full potential.

The ADA licensing exam cases and the No Child Left Behind legislation are in philosophical tension. Recent Supreme Court cases have narrowed the ADA's definition of disability for fear that a broad definition that recognizes too many people as disabled will undermine the act's potency.<sup>12</sup> No Child Left Behind and its companion legislation, on the other hand, try to integrate children with disabilities into the mainstream of American education instead of drawing a sharp distinction between disabled and non-disabled. Both are policy choices born of good intentions. However, the average person standard which arises to some extent in both contexts dangerously shifts the essential meaning of learning disabilities. Measuring learning disability by comparison to the average person instead of an individual's potential is underinclusive, excluding those learning disabled students with high potential from receiving the accommodations they need to realize it. In effect, the average person standard becomes a restriction on their rights. These laws change the definition of learning disabilities in a way that threatens to

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<sup>12</sup> See *Sutton*, 527 U.S. at 478; *Toyota*, 534 U.S. at 187.

bar a specific category of highly achieving learning disabled individuals from realizing their potential by placing a ceiling on their right to claim legal protection.

I. Learning Disabled Students and Licensing Exams under the ADA: Narrowing the Definition of Disability

Accommodations on standardized tests and licensing exams for students with learning disabilities are generally covered under the ADA.<sup>13</sup> Recently, however, courts have adopted a narrower view of disability under the ADA.<sup>14</sup> These latest cases provide a stark example of how legal definitions of disability are in conflict with the more inclusive view employed by current mental health and educational practices.<sup>15</sup> Despite decisions which restrict the scope of the ADA, accommodations are routinely provided for students diagnosed with learning disabilities and ADHD at all levels of academic testing.<sup>16</sup> It is essential to identify the gaps in the existing law and square them with real-world implementation by educators and test administrators.

**A. Recent Trends in Accommodations and High Pressure Testing**

*(i) More Accommodations Requested and More Litigation*

Between 1987 and 2000 the number of students receiving accommodations on the SATs quadrupled.<sup>17</sup> In 2002, the President's Commission on Excellence in Special Education reported a thirty six percent increase in the number of students with specific

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<sup>13</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (2000).

<sup>14</sup> *See Sutton*, 527 U.S. at 478; *Toyota*, 534 U.S. at 187; *Bartlett v. N.Y. State Bd. of Law Exam'rs*, no. 93 Civ. 4986, 2001 WL 930792 (S.D.N.Y. 2001).

<sup>15</sup> John D. Ranssen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting From the ADA's Disability Definition*, 11 PSYCH. PUB. POL. & L. 83, 85 (2005).

<sup>16</sup> Jane Goodman-Delahunty, *Psychological Impairment under the Americans with Disabilities Act: Legal Guidelines*, 31 PROF. PSYCH.: RES. & PRAC. 197, 205 (2000); M. Gordon et al., *Attention Deficit Hyperactivity Disorder (ADHD) and Test Accommodations*, 67 BAR EXAMINER 26, 36 (1998).

<sup>17</sup> *See Samuel J. Abrams, The Demand for Special Accommodations*, 37 EDUC. NEXT 40 (2003), available at <http://www.educationnext.org/20034/pdf/36.pdf>.

learning disabilities identified for special education services, making learning disabilities one of the top three categories experiencing large increases over the past ten years.<sup>18</sup> Approximately ninety percent of accommodated test-takers had been diagnosed with learning disabilities.<sup>19</sup> Data indicates that approximately one in eleven college freshmen self-identifies as having a disability.<sup>20</sup>

Some scholars see this increase to two percent of all test-takers as an alarming “arms race” driven by non-rigorous diagnosis.<sup>21</sup> However, this increase may simply be the natural result of the special education mandates which were put in place in 1975 making it possible, by the late-1980s and 1990s, for more individuals with learning disabilities graduating from high school to participate in challenging academics as they grew old enough for college.<sup>22</sup> The passage of the ADA also drew wide media coverage and focused public attention on disability accommodations causing more Americans to act on those rights.<sup>23</sup>

Regardless of the cause, since 1990 the number of people in the United States identified with learning disabilities has been increasing.<sup>24</sup> With increased awareness of

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<sup>18</sup> *President’s Commission*, *supra* note 2, at 24 (finding a 319 percent increase in the other health impairment category, a 45 percent increase in the orthopedic impairment category, and a 36 percent increase in the specific learning disabilities category).

<sup>19</sup> See The College Board, Research Notes: *Testing with Extended Time on the SAT I: Effects for Students with Learning Disabilities* at 1 (2000), available at [http://www.collegeboard.com/repository/testing with extended 10509.pdf](http://www.collegeboard.com/repository/testing_with_extended_10509.pdf).

<sup>20</sup> American Council on Education, *More College Freshmen Report Disabilities, New ACE Study Shows*, 49 HIGHER EDUC. & NAT’L AFF. 2 (2000).

<sup>21</sup> Craig S. Lerner, *Accommodations for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?* 57 VAND. L. REV. 1043, 1071 (2004).

<sup>22</sup> Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 124 (2004).

<sup>23</sup> *Id.*; Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 119, 119-20 (1997).

<sup>24</sup> Robert F. Rich et al., *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1, 6 (2002).

disability rights a flood of accommodation-related complaints were filed.<sup>25</sup> The Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) have both provided limited guidance for determining disability in such cases. These agencies set forth two different standards as to whether an applicant with learning impairments is substantially limited in major life activities. The plaintiff is compared to the “average person” in the DOJ guidelines.<sup>26</sup> Under the DOJ standard, a person is not substantially limited in a major life activity unless they are "significantly restricted as to the conditions, manner, or duration" in which they can perform a particular major life activity as compared to the “condition, manner, or duration under which the average person in the general population” can perform that activity.<sup>27</sup> On the other hand, focusing on employment, the EEOC compares the applicant to "the average person having comparable training, skills and abilities."<sup>28</sup> Thus, the EEOC standard compares the disabled individual to a smaller reference group.

*(ii) Narrower Definition of Disability*

Inherent conflicts reflected in recent Supreme Court decisions affect students with learning disabilities who request testing accommodations, especially those taking licensing exams and other standardized tests. Confusion and disagreement over the definition of learning disabilities reflects the changing influence of culture, politics, and economics. Some theorists have argued that learning disabilities are merely social constructs with no basis in objective reality.<sup>29</sup> This postmodernist view of disability is

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<sup>25</sup> Laura F. Rothstein, *The American with Disabilities Act: A Ten-Year Retrospective: Higher Education and the Future of Disability Policy*, 52 ALA. L. REV 241, 244 (2000).

<sup>26</sup> 28 C.F.R. pt. 35, app. A, 35.104.

<sup>27</sup> *Id.*

<sup>28</sup> 29 C.F.R. § 1630.2(j)(3)(i).

<sup>29</sup> *See supra* note 1.

subjective and inherently tied to politics. Under this view, such fundamentally political questions might be better handled by politically accountable actors in the executive and legislative branches. However, courts have taken the lead in cutting back on the ADA's protection. Many scholars have expressed concerns that courts are taking an extremely narrow view of the definition of disability under the ADA.<sup>30</sup> Such scholars have criticized the court's narrowing of the definition of disability under the ADA as inconsistent with the intent of Congress.<sup>31</sup>

Growing wary of the increase in accommodation requests, some testing organizations have denied various requests from learning-disabled students especially where that student has only recently been diagnosed and cannot produce extensive documentation.<sup>32</sup> In order to qualify to sit for the medical boards or the bar the learning disabled student is by definition above average in many ways; however, now his past achievements could count against him forming the basis for denial of essential accommodations. Thus, the DOJ's average person standard threatens to bar highly achieving learning disabled students from receiving accommodations on licensing exams.

In light of the narrowing definition of disability, varying standards have been applied by lower courts in the context of accommodation requests on licensing exams.<sup>33</sup>

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<sup>30</sup> See Cheryl L. Anderson, *Deserving Disabilities: Why the Definition of Disability under the Americans With Disabilities Act Should be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 150 (2000); Michelle T. Friedland, *Not Disabled Enough: The ADA's Major Life Activity Definition of Disability*, 52 STAN. L. REV. 171, 203 (1999); Robert L. Burgdorf, *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 585 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans With Disabilities Act*, 68 U. COLO. L. REV. 107, 146 (1997).

<sup>31</sup> Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1574 (1998).

<sup>32</sup> Ranseen, *supra* note 15, at 84.

<sup>33</sup> See *Bartlett*, 156 F.3d at 329; *Price*, 966 F. Supp. at 427-28; *Pazer v. New York State Board of Law Examiners*, 849 F. Supp. 284 (S.D.N.Y. 1994); *Argen v. New York State Board of Law Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994).

In most cases, however, licensing organizations still routinely provide testing accommodations for applicants diagnosed with learning impairments.<sup>34</sup> As the first generation of learning disabled students raised with the protection of the ADA completes graduate school, the need for a consistent interpretation of its application is essential. Especially given the increased importance placed on standardized testing in America, it is vital that Americans understand the protections the ADA provides and the standards they will have to meet to receive accommodations in the future.

## **B. Statutory Framework of the Americans with Disabilities Act**

### *(i) Legislative Background*

As part of its philosophy of deregulation, the Reagan Administration undertook a campaign of systematic litigation to reverse many of the expansive civil rights remedies created in the 1960s and 1970s.<sup>35</sup> Led by Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds, the 1980s saw a reduction in the federal government's role in enforcing laws designed to combat discrimination.<sup>36</sup> In the disability context, due to reduced enforcement by administrative agencies, federal resources were not widely used for the enforcement of the 1973 Rehabilitation Act.<sup>37</sup>

Against this backdrop of deregulation and restraining civil rights, the enactment of the ADA in 1990 was remarkable. The ADA was enacted with substantial Republican support, including key support from the Bush Administration.<sup>38</sup> The new legislation

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<sup>34</sup> See SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT (American Psychological Association 2001).

<sup>35</sup> Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation - Survival Against the Odds*, 62 TUL. L. REV. 681, 685 n.16 (1988); Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 313 (1984).

<sup>36</sup> David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1157 (1989).

<sup>37</sup> Rothstein, *supra* note 25, at 243.

<sup>38</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 964-67 (2000).

proved to be a significant expansion of civil rights, adding disability to the list of characteristics broadly protected against discrimination by public and private entities.<sup>39</sup> This represented the first forbidden classification added to the federal prohibitions against discrimination by places of public accommodation since the Civil Rights Act of 1964. Most importantly the ADA provides a broad mandate of reasonable accommodation.<sup>40</sup>

The ADA covers a wide range of issues concerning disabled Americans. Title I requires employers to provide reasonable accommodations to qualified individuals with disabilities and prevents hiring practices and benefit structures from placing uneven burdens on the disabled.<sup>41</sup> The EEOC is charged with implementing Title I. Title II regulates government activities such as education, courts, and voting, requiring that these activities be accessible to people with disabilities.<sup>42</sup> Title III deals with public accommodations prohibiting exclusion, segregation, and unequal treatment of the disabled.<sup>43</sup> The accessibility requirements of Title III apply to all private people and groups who own, lease, or operate facilities open to the public.<sup>44</sup> The DOJ is charged with implementing and enforcing both Title II and Title III. Title IV addresses telecommunications and requires telephone companies to provide telephone services to people who use teletypewriters.<sup>45</sup> Title IV is enforced by the Federal Communications

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<sup>39</sup> Samuel R. Bagenstos, *Rational Discrimination, Accommodation, and the Politics of Disability Civil Rights*, 89 VA. L. REV. 825, 906 (2003).

<sup>40</sup> 42 U.S.C. § 12182(b)(2)(A)(ii) (2000) (requiring places of public accommodation to "make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford [their] goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities").

<sup>41</sup> 42 U.S.C. § 12101 *et. seq.* (2000); 29 C.F.R. § 1602, 1630.

<sup>42</sup> *Id.*; Title II implementing regulation, 28 C.F.R. 35.

<sup>43</sup> 42 U.S.C. § 12181 (2000); Title III Impl. Reg, 28 C.F.R. § 36; 49 C.F.R. §§ 27, 37, 38.

<sup>44</sup> *Id.*

<sup>45</sup> Title IV Impl. Reg., 47 C.F.R. § 64.601 *et. seq.*

Commission (FCC). Title V prohibits retaliation against or threatening of people with disabilities when they assert their rights under the ADA.<sup>46</sup>

*(ii) Making an ADA Claim*

The text of the ADA is not specific about the particular physical or mental impairments which qualify for protection under the act. The ADA leaves many of these disability determinations in individual circumstances up to the EEOC and other implementing agencies, such as the Departments of Education, Labor and Transportation.<sup>47</sup>

For the purpose of Title II and III claims, disability is defined as "a physical or mental impairment that substantially limits one or more major life activities."<sup>48</sup> A learning disabled plaintiff's main obstacle is demonstrating substantial limitation. Focusing on learning as the major life activity has proved difficult at times because the substantial limitation in question needs to effect the major life activity with respect to the "conditions, manner, or duration under which [the activity] can be performed in comparison to most people."<sup>49</sup> However, courts have accepted the claim that although the plaintiff's overall learning is not limited, it is nonetheless limited in more specific major life activities such as reading and writing.<sup>50</sup> Under this model some, but not all, individuals medically diagnosed with learning disabilities are protected under the ADA.

The explicit requirements of the ADA mandate accommodation on standardized tests for students with disabilities, stating "examinations or courses [shall be offered] in a

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<sup>46</sup> 42 U.S.C. § 12203 (2000).

<sup>47</sup> Rich, *supra* note 24, at 3.

<sup>48</sup> 42 U.S.C. § 12102(2)(A) (2000).

<sup>49</sup> 28 C.F.R. pt. 36 app. B 36.104 (2004) (DOJ regulations construing ADA).

<sup>50</sup> See *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 222 F.3d 620, 625 (6th Cir. 2000); *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *aff'd*, 156 F.3d 321 (2d Cir. 1998).

place and manner accessible to persons with disabilities or [the test administrator shall] offer alternative accessible arrangements."<sup>51</sup> The Department of Justice has provided regulations clarifying this mandate which state that tests should "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 sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure)."<sup>52</sup> Consequently, where an aspect of the testing format negatively impacts a disabled student's performance on the test, accommodations should be granted to minimize the impact.

To make out a valid ADA claim the accommodations requested must not "fundamentally alter the measurement of the skills or knowledge the examination is intended to test or it would result in an undue burden."<sup>53</sup> The most common accommodation requested by students with learning disabilities is extra time. The "fundamental alteration" question, however, tends not to be at the heart of litigation since speed is not a skill the SAT and other standardized tests purport to measure, rather it is merely incidental to the format of the test. The test makers themselves state that speed is incidental rather than a "skill ... that the examination purports to measure," and providing additional time to learning disabled students does not "fundamentally alter" the measurement of the skills assessed.<sup>54</sup>

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<sup>51</sup> 42 U.S.C. § 12189 (2000).

<sup>52</sup> 28 C.F.R. § 36.309(b)(1)(i) (2004).

<sup>53</sup> 28 C.F.R. § 36.309(b)(3) (2004); *Pandazides v. Virginia Board of Education*, 804 F. Supp. 794 (E.D. Va. 1992).

<sup>54</sup> *See* College Board, *THE COLLEGE BOARD TECHNICAL HANDBOOK FOR THE SCHOLASTIC APTITUDE TEST AND ACHIEVEMENT TESTS* (T.F. Donlon ed., 1984).

Since the ADA is not specific about which particular physical or mental impairments qualify for protection, the issue is largely left open for courts, administrative agencies, or legislators to fill in the gaps and interpret the act as it applies to our emerging understanding of learning disabilities.

### **C. Supreme Court Cases Reshaping the Landscape**

The Supreme Court's approach to analyzing ADA cases has changed over the past decade and a half. In the early 1990s, the court assumed that plaintiffs were disabled for the purposes of the case, allowing a *per se* definition of disability.<sup>55</sup> Under this older approach cases turned on whether the plaintiff had been discriminated against based on that disability.<sup>56</sup> However, by the mid-1990s the court shifted to a detailed individual assessment of the plaintiff's disability status.<sup>57</sup> Current opinions turn on whether a person has a disability at all. The Court often focuses on whether the impairment "substantially limits" an appropriate "major life activity."<sup>58</sup> The Supreme Court has expressed concern about imposing a burden on businesses to make accommodations for disabled people and thus placed limits on Congressional intent to provide broad ADA protection.<sup>59</sup> Recent opinions define disability in a way that could have significant implications for students with learning disabilities because the court's approach threatens to limit the provision of accommodations on licensing exams.

#### *(i) Sutton v. United Air Lines, Inc.*

In 1999, the Supreme Court narrowed the protection enjoyed by disabled Americans under the ADA and the Rehabilitation Act. In *Sutton v. United Air Lines*,

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<sup>55</sup> Rich, *supra* note 24, at 24.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *Sutton*, 527 U.S. at 478; *Toyota*, 534 U.S. at 187.

<sup>59</sup> See generally *id.* (denying ADA claims in both instances).

*Inc.*, the Supreme Court held that determinations of disability under the ADA should be made with reference to measures that mitigate the impairment.<sup>60</sup> After *Sutton*, if a plaintiff has a condition that is not substantially limiting due to mitigating measures, that person is no longer considered disabled and is not covered by the ADA.<sup>61</sup>

*Sutton* was actually a trilogy of cases, where the disability was vision correctable with glasses in *Sutton* and *Kirkingburg* and the disability was hypertension correctable with medication in *Murphy*.<sup>62</sup> The twin sisters involved in *Sutton*, both of whom have severe myopia, applied for positions as pilots with the airline.<sup>63</sup> They contended that the airline's refusal to hire them as pilots because of their uncorrected visual acuity was based upon their disability and was impermissible discrimination under the ADA.<sup>64</sup> The Supreme Court determined that these disabilities could be corrected to the point that they no longer interfered with normal life, thus they did not limit one or more “major life activities” when they were accompanied by mitigating treatment.<sup>65</sup> Circularly, the court reached the conclusion that the airline could reject the sisters based on their visual disability, but that the sisters could not raise an ADA claim because their disability was completely corrected by eyeglasses.<sup>66</sup>

The holding that mitigating measures such as eyeglasses or medication cause the disability to no longer create a substantial limitation results in the odd consequence that a person who has epilepsy may not have a disability if their medication controls their

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<sup>60</sup> *Sutton*, 527 U.S. at 475.

<sup>61</sup> *Id.* at 482-83.

<sup>62</sup> *Id.*; *Murphy v. United Parcel Service, Inc.* 527 U.S. 516 (1999); *Albertsons, Inc. v. Kirkingburg*. 527 U.S. 555 (1999).

<sup>63</sup> *Sutton*, 527 U.S. at 475.

<sup>64</sup> *Id.* at 476.

<sup>65</sup> *Id.* at 482-83.

<sup>66</sup> *Id.* at 475.

seizures.<sup>67</sup> Yet, if the disabled person did not use the medication they would not be qualified to perform the essential requirements of the position in the first place and thus could still not make out a successful claim.<sup>68</sup>

*Sutton* raises some interesting issues with respect to individuals with learning disabilities and whether they are disabled within the ADA's definition of disability. *Sutton* indicated that a limitation adequately ameliorated by treatment or compensated for by the individual is not a disability. Although the court did not specifically address the issue of learning disabilities, in deciding that mitigating measures should be considered, the Court referenced *Bartlett v. New York State Board of Law Examiners*, discussed *infra*, and remanded that case for evaluation in light of *Sutton*.<sup>69</sup>

(ii) *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*

In 2002, the Supreme Court decided another case that placed new limits on the boundaries of ADA protection. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court carefully analyzed what constitutes a major life activity for the purposes of the ADA.<sup>70</sup>

*Toyota* involved Ella Williams, an assembly line worker at Toyota, who developed bilateral tendonitis and carpal tunnel syndrome as a result of her job.<sup>71</sup> After making some accommodations, the company later fired Williams because she had difficulty performing her duties.<sup>72</sup> She argued that her disability made it difficult to

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<sup>67</sup> See, e.g., *Murphy*, 527 U.S. at 521 (finding that the petitioner's disability was not substantially limiting when his prescribed medication corrected his blood pressure impairment).

<sup>68</sup> *Id.*; Rothstein, *supra* note 22, at 135.

<sup>69</sup> *Sutton*, 527 U.S. at 477.

<sup>70</sup> *Toyota*, 534 U.S. at 187.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

perform the manual tasks she had been assigned.<sup>73</sup> Her requested accommodation, permission to return to her original position in the plant, was denied.<sup>74</sup> Toyota claimed her limitations did not affect any major life activities.<sup>75</sup> The Court noted that a major life activity is one that involves a variety of tasks central to most people's daily lives.<sup>76</sup> The Supreme Court declared that having a disability which is only work-related is not sufficient to qualify for protection under Title I of the ADA.<sup>77</sup> Focusing on the "major life activity" provision, the Court found that the plaintiff, who functioned normally in other aspects of life, was not disabled.<sup>78</sup> After *Toyota*, future claims under Title I must not rely solely on workplace impairment, and thus showing occupational impairment may be less important than demonstrating general impairment of routine life activities.

The *Sutton* and *Toyota* decisions are particularly relevant to students with learning disabilities because they signal a change in the court's approach to defining disabilities under the ADA, which will affect how the court addresses licensing exam cases and other issues related to learning disabilities. The Supreme Court's ruling in *Toyota* may imply that symptoms associated with learning disabilities, like slow reading speed or poor concentration, might not be sufficient to constitute a major life activity because they are limited to the academic context and thus could fail to be of central importance in the life of the average person as was the case with the Williams's carpal tunnel syndrome.<sup>79</sup> However, impairments in reading fluency are more pervasive than carpal tunnel

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<sup>73</sup> *Id.* at 189.

<sup>74</sup> *Id.*

<sup>75</sup> *Toyota*, 534 U.S. at 190.

<sup>76</sup> *See id.* at 195-96 (citing the EEOC definition of substantially limiting as controlling).

<sup>77</sup> *Id.* at 200-03.

<sup>78</sup> *Id.* at 202.

<sup>79</sup> *See, e.g., Toyota*, 534 U.S. at 187.

syndrome because reading is fundamental to many routine life activities and reaches into domains beyond academic life.

*Sutton* may also have a detrimental effect on students with learning disabilities seeking testing accommodations on licensing exams. Many students diagnosed with learning disabilities view past academic success as a function of their own hard work or ability to cope with their learning disability. *Sutton* might imply that a history of adequate self-accommodation precludes finding a learning disability.<sup>80</sup> This traps the learning disabled in a situation where without a history of academic success they would not be in a position to take tests like the medical boards, the GMAT, or the bar exam. Yet, that same success could preclude them from receiving the accommodations they need to succeed on those critical exams.<sup>81</sup> Questions remain, however, as to how these two Title I employment cases will apply in the specific context of learning disabilities and licensing exams.

#### **D. Licensing Exam Accommodation Cases**

Recent cases evolving out of the increasing volume of accommodation requests on licensing and other entrance exams highlight the inherent problems arising from the Supreme Court decisions discussed above. A gap exists within the body of law that has developed around licensing exam accommodations. This rift between the definitions courts use to identify disability and the real-world practice of granting accommodations must be resolved in order to avoid inconsistent treatment of similarly situated students. If

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<sup>80</sup> See, e.g., *Sutton*, 527 U.S. at 475-77.

<sup>81</sup> See S. STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICAN WITH DISABILITIES ACT (American Psychological Association 2001) (pointing out that if an average person standard is used in a rigid manner, it will effectively bar professionals from requesting test accommodations on licensing exams).

this rule of law problem is not addressed, learning disabled students could be denied valuable educational opportunities.

Extensive litigation has resulted from testing organizations' denial of accommodation requests from learning disabled test-takers. These cases center on the question of what constitutes a disability under the ADA. Those students who cannot provide full documentation of their learning disability, especially students with a fairly recent diagnosis, are most likely to be denied accommodations.<sup>82</sup> Usually the student's claim is based on the major life activity of learning or a component thereof such as reading or maintaining attention. However, testing organizations often question why this learning disability did not prevent success in high school, college, and graduate school.<sup>83</sup> Some students base claims upon the major life activity of working instead, arguing that denial of accommodations on a licensing exam bars access to their profession.<sup>84</sup> By focusing on the life activity of working, the court would be able to compare the plaintiff to persons "having comparable training, skills and abilities."<sup>85</sup> After *Toyota*, however, at least in the Title I context, plaintiffs cannot rely solely on impairments tied to the workplace.<sup>86</sup> As yet, it is unclear whether test-taking itself can be considered a major life activity, but based on the narrowing of ADA protection in the *Sutton* and *Toyota* decisions it seems unlikely.<sup>87</sup>

Although courts have differed in how it is applied to students in professional schools diagnosed with learning disabilities, most courts have upheld the average person

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<sup>82</sup> John D. Ranseen, *Lawyers with ADHD: The special test accommodation controversy*, 29 PROF. PSYCH. RES. & PRAC. 450, 459 (1998).

<sup>83</sup> Ranseen, *supra* note 15, at 91.

<sup>84</sup> *Bartlett*, 970 F. Supp. at 1121.

<sup>85</sup> 29 C.F.R. § 1630.2(j)(3)(i) (1998).

<sup>86</sup> *Toyota*, 534 U.S. at 187.

<sup>87</sup> *Id.*; *Sutton*, 527 U.S. at 475-77.

standard for determining disability under the ADA.<sup>88</sup> Under the average person standard when adjudicating disability the substantial limitation in a major life activity requirement should be measured in relation to the average person in the general population.<sup>89</sup> If rigidly applied, a strict average person standard could hurt highly achieving learning disabled students by using their past achievements to place a ceiling on how successful they can be in comparison to the average person.

(i) *Bartlett v. New York State Board of Law Examiners*

*Bartlett v. New York State Board of Law Examiners* is actually a series of decisions between 1997 and 2001 wrestling with the issue of making a disability determination for students with a high level of academic achievement. In *Bartlett*, a bar exam applicant diagnosed with a form of dyslexia was denied accommodations on the New York Bar Exam.<sup>90</sup> Although Ms. Bartlett was diagnosed with a reading disability, she achieved academic success including a doctorate and a law degree.<sup>91</sup> Sometimes Ms. Bartlett received formal accommodations, and at other times she did not require them. The district court found that her "history of self-accommodation has allowed her to achieve . . . roughly average reading skills (on some measures) when compared to the general population."<sup>92</sup>

Joined by the Justice Department, Ms. Bartlett claimed error, asserting that a person's ability to self-accommodate does not foreclose a finding of disability.<sup>93</sup> The Second Circuit faced the question whether she was disqualified from protection under the

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<sup>88</sup> *Price*, 966 F. Supp. at 427-28; *Bartlett*, 2001 WL 930792, at \*51.

<sup>89</sup> *Id.*

<sup>90</sup> *Bartlett*, 970 F. Supp. at 1102.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1120.

<sup>93</sup> *Bartlett*, 156 F.3d at 329.

ADA given her self-accommodations which helped her through college and law school.<sup>94</sup> They found that Ms. Bartlett's condition created a substantial limitation in the major life activity of reading and learning.<sup>95</sup> In reaching this decision, the court held that her history of self-accommodation should not be considered when determining disability.<sup>96</sup>

The Second Circuit's decision, however, was vacated and the case remanded for review in light of *Sutton*'s ruling that self-accommodation should be factored into disability determinations.<sup>97</sup> Nevertheless, the district court held that Ms. Bartlett was protected under the ADA. In 2001, the court held that she was substantially limited in the major life activity of reading when compared to the average person in the population.<sup>98</sup> Giving weight to the subjective aspects of the disability determination and clinical judgments from experts who focused on Bartlett's slow speed and lack of automaticity in reading, the court upheld the earlier disability finding.<sup>99</sup> Even where the plaintiff scored within the average range on some tests, the *Bartlett* Court found that reliance "on quantitative outcomes alone" was insufficient because the ADA requires courts to examine the "manner" in which plaintiffs achieve such outcomes in determining if the impairment substantially limits her.<sup>100</sup> The court concluded a rigid standard with a "definition of disability based on outcomes alone, particularly in the context of learning disabilities, would prevent a court from making a finding of disability in the case of any individual like Dr. Bartlett who is extremely bright and hardworking, and who used

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<sup>94</sup> *Id.* at 329.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Sutton*, 527 U.S. at 477.

<sup>98</sup> *Bartlett*, 2001 WL 930792, at \*51.

<sup>99</sup> *See Id.*

<sup>100</sup> *Id.* at \*37.

alternative routes to achieve academic success.”<sup>101</sup> In rejecting the defendant’s contention that Dr. Bartlett cannot have a reading disability because she has performed within the average range on tasks involving reading, the court found that testing strategies used by Dr. Bartlett and her personal struggle with automaticity were relevant to the manner in which the plaintiff performed on the test, not merely the resulting test score.<sup>102</sup>

*Bartlett* creates a critical gap between a seemingly objective standard and its subjective application. The court upheld the average person standard in *Bartlett*, yet implied subjective considerations are acceptable in the application of this standard.<sup>103</sup> In 2001, the *Bartlett* court rejected the idea that average test scores could create a cutoff for the existence of disability because it held that quantitative analysis of outcomes was not sufficient without also taking the qualitative aspects of how those outcomes were reached into account. Analysis of these qualitative aspects allows the court to make a more subjective inquiry into the manner in which the plaintiff struggled with his learning disability while taking the exam regardless of his score. Thus, in practice, the average person standard is applied more flexibly, especially in cases where there is some history of past accommodations.

*(ii) Medical Board Exam Cases*

In *Price v. National Board of Medical Examiners*, three medical students who were not granted accommodations on their licensing exams brought suit under Title III.<sup>104</sup> The court held that the medical students were not disabled under the ADA definition and thus not entitled to accommodations because their superior intellectual ability

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*37-38.

<sup>103</sup> Ranseen, *supra* note 15, at 93.

<sup>104</sup> *Price*, 966 F. Supp. at 427-28.

demonstrated that their impairments did not substantially limit a major life activity.<sup>105</sup> The *Price* court focused on the major life activity of learning.<sup>106</sup> Consistent with DOJ guidelines, the court used the "average person in the general population" as a point of reference.<sup>107</sup> Based on their prior academic accomplishments which were unaccommodated (unlike *Bartlett supra*), the court found that their records evinced learning above that of the average person.<sup>108</sup> Consequently, these three students were not entitled to reasonable accommodations. The *Price* and *Bartlett* courts reached opposite outcomes partly because the medical students in *Price* were asking for accommodations for the first time which led to a more skeptical and thus stricter application of the average person standard than the approach in *Bartlett*.

In *Price*, the court rejected *Pazer v. New York State Board of Law Examiners* and its analysis of the disparity between inherent capacity and performance.<sup>109</sup> The *Pazer* Court while finding that the plaintiff was not disabled suggested that "a disparity between inherent capacity and performance on a test may, in some circumstances, permit the inference that an individual has a learning disability, even though that individual's performance has met the standard of the ordinary person."<sup>110</sup> In *Price*, the court was wary of such expert diagnoses and its ability to evaluate their accuracy.<sup>111</sup> Instead of relying on experts, the *Price* Court employed a functionalist approach to determine whether the plaintiff's ability is limited as compared to the average person.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 423-28.

<sup>107</sup> 29 C.F.R. pt. 1630, app., 1630.2(j)(1)(ii).

<sup>108</sup> *Price*, 966 F. Supp. at 423-24.

<sup>109</sup> 849 F. Supp. 284 (S.D.N.Y. 1994).

<sup>110</sup> *Id.* at 287 (relying on DOJ regulations and compared the plaintiff to the "ordinary person").

<sup>111</sup> *Price*, 966 F. Supp. at 427.

Similarly, in *Gonzales v. National Board of Medical Examiners*, a learning disabled medical student was denied a preliminary injunction and thus not granted accommodations because his diagnosis was based on tests evaluated in relation to an above-average reference group.<sup>112</sup> The *Gonzales* Court cites *Price* favorably in so far as the case requires comparison to the average person.<sup>113</sup> Unlike *Bartlett*, however, Gonzalez had not received accommodations in the past, lacked documentation, and tests indicated his ability to read within the average to superior range.<sup>114</sup>

Critics of *Price* question whether when Congress passed the ADA it intended disabled individuals to be limited to “no more than an average level of socio-economic and educational success.”<sup>115</sup> The *Bartlett* decision in 2001 is a response to the Supreme Court’s narrowing of ADA protection and its application in the specific context of accommodations on licensing exams for highly achieving learning disabled students. *Bartlett* is consistent with *Price* in that it applies an average person standard which on its face appears to be objective.<sup>116</sup> However, the contrast between *Price* and *Bartlett* suggests a two-tiered framework for applying this average person standard.<sup>117</sup> If the student has never requested accommodations before and has no prior documentation of a learning disability, the court might apply the average person standard more rigidly as in *Price*. On the other hand, if there is a documented history of accommodations related to a learning disability, the court may apply the standard more leniently, trusting experts and their subjective diagnosis more readily.

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<sup>112</sup> *Gonzalez v. National Bd. of Med. Examiners*, 60 F. Supp. 2d 703, 707 (E.D. Mich. 1999).

<sup>113</sup> *Id.* at 708-10.

<sup>114</sup> *Id.* at 708 n.1 (noting no prior history of accommodations in high school or college).

<sup>115</sup> Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1574 (1998).

<sup>116</sup> *Price*, 966 F. Supp. at 427-28.

<sup>117</sup> *Compare Bartlett*, 2001 WL 930792, at \*37-40, *with Price*, 966 F. Supp. at 427.

*Rothberg v. Law School Admission Council, Inc.* is another recent case arising in the standardized testing context which fits neatly within this two-tiered framework. In *Rothberg*, where the plaintiff had a history of significant learning disability and a variety of accommodations, a Colorado District Court granted a preliminary injunction because the Law School Admission Counsel (LSAC) failed to accommodate the plaintiff's learning disability on the LSAT.<sup>118</sup> Based on the 2001 *Bartlett* decision, the *Rothberg* Court found undisputed evidence that the plaintiff's learning disability is a mental impairment within the meaning of the ADA and found a substantial likelihood of succeeding on the merits.<sup>119</sup> Although Ms. Rothberg's learning and reading skills were average or even above average in some areas, she was substantially limited in her ability to process information as compared to the average person and thus the court found that this disability impairs the plaintiff's ability to take the LSAT.<sup>120</sup> The 10<sup>th</sup> Circuit Court of Appeals later reversed, holding that the balance of harms did not warrant this preliminary injunction essentially because the district court erred in its application of mootness doctrine.<sup>121</sup> Despite reversal on other grounds, *Rothberg* provides a tentative example of how courts could apply a more lenient, subjective standard in cases with a documented history of accommodations than in cases where the plaintiff is claiming the right to accommodations for the first time.

#### **E. Areas for Future Action and Conclusions**

Recent Supreme Court cases have narrowed the definition of disability under the ADA. However, the apparently objective average person standard is applied by lower

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<sup>118</sup> *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1095 (D. Colo. 2004).

<sup>119</sup> *Id.* at 1105.

<sup>120</sup> *Id.*

<sup>121</sup> *Rothberg v. Law Sch. Admission Council*, 102 Fed. Appx. 122, 123 (10th Cir. 2004).

courts according to a two-tiered approach. Plaintiffs requesting accommodations for the first time on licensing exams without a documented history of learning disability face a more rigid and objective average person standard which often results in denial of accommodation.<sup>122</sup> On the other hand, the average person standard should be applied with less skepticism to plaintiffs who have received accommodations in the past and thus the court is more likely to consider qualitative aspects of the manner in which the plaintiff's learning disability affected him while taking the exam and not merely the quantitative exam results.<sup>123</sup> This two-tiered approach is consistent with the common real-world practice of granting testing accommodations to students with a documented history of a learning disability even when that student has achieved academic success in the past.

Tension persists within the government over what the appropriate definition of disability is and what the government's role in preventing discrimination should be. Some scholars seek to make a normative distinction between the ADA's mandate to provide "reasonable accommodation" to the disabled and the antidiscrimination provisions of the 1960s and 1970s civil rights laws.<sup>124</sup> This distinction is generally based on the idea of rational discrimination where non-accommodating employers seek to maximize profits making them less worthy of moral condemnation than the racially discriminatory employer.<sup>125</sup> This debate is fundamentally a political one about the appropriate role of government, the cost of accommodations, and the educational needs

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<sup>122</sup> *Price*, 966 F. Supp. at 427-28.

<sup>123</sup> *Bartlett*, 2001 WL 930792, at \*37-40.

<sup>124</sup> See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314-15 (2001) (expressing skepticism of the ADA); Sherwin Rosen, *Disability Accommodation and the Labor Market*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 18, 21 (Carolyn L. Weaver ed., 1991). *But see* Bagenstos, *supra* note 39, at 830.

<sup>125</sup> *Id.*

of learning disabled students. Courts have neither the institutional competency nor the democratic legitimacy to resolve such questions. However, the ADA creates a broad mandate of reasonable accommodation and courts are responsible for ensuring that the rights of learning disabled Americans are not curtailed by using a rigid average person standard as a ceiling which cuts off the rights of all learning disabled Americans whose test scores fall within the average range.

Future action in the field of learning disability law under the ADA should address several issues. First, appellate courts should clarify who is entitled to ADA protection. In light of *Sutton*, higher courts must address how a history of academic success should factor into the average person standard. Appellate courts should adopt the *Bartlett* 2001 decision and its relaxed application of the average person standard which looks at qualitative factors. Second, building on *Bartlett*, who is qualified to provide documentation? What documentation is needed to substantiate learning disabilities and what subjective circumstances can be taken into account? Appellate courts should reject a rigid application of the average person standard which could make average test scores a cutoff for the existence of a learning disability. However, maintaining the integrity of the learning disability classification is also a legitimate concern and thus courts should make clear what evidence may be considered in making learning disability determinations.

## II. No Child Left Behind: Losing the Meaning of Learning Disabilities in the Quest to Treat the Disabled like Everyone Else

Recent legislative reforms have dramatically increased the importance of standardized testing in American schools. Unlike the licensing exam cases discussed

above, the No Child Left Behind initiative was undertaken by politically accountable actors in order to install a system of accountability in American public education.<sup>126</sup> This controversial move toward more high pressure testing is a double-edged sword for learning disabled students. On one hand, if learning disabled children are not included in assessments and schools are not penalized when disabled children do not meet achievement standards, the result will be leaving learning disabled children behind while teachers focus on students' whose scores could cost them their jobs. On the other hand, students with disabilities understand firsthand the disconnect between test results and actual learning and are thus inherently skeptical of mass standardized testing.

No Child Left Behind is aimed at the well-intentioned goal of improving the quality of public education in America by bringing all categories of students up to grade level.<sup>127</sup> However, the No Child Left Behind philosophy and its effects on the reauthorization of the Individuals with Disabilities Education Act (IDEA) in 2004 have dramatic consequences for students with learning disabilities. No Child Left Behind's underlying assumptions about the homogeneity of learning are problematic because the imposition of universal standards sacrifices individualized education for a false sense of equality which ignores actual differences between students.

#### **A. No Child Left Behind Act of 2002**

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act into law.<sup>128</sup> President Bush emphasized education as one of his administration's major priorities declaring in his foreword address to the Act itself: "if our country fails in

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<sup>126</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002) (reauthorizing the Elementary and Secondary Education Act).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

its responsibility to educate every child, we're likely to fail in many other areas. But if we succeed in educating our youth, many other successes will follow throughout our country and in the lives of our citizens.”<sup>129</sup> No Child Left Behind reauthorized the Elementary and Secondary Education Act of 1965 with specific emphasis on assessment and school accountability.<sup>130</sup> To receive federal funds, states and school systems must comply with the act in the construction and implementation of an education plan.<sup>131</sup>

No Child Left Behind’s primary goal is to hold schools and their teachers accountable for students failing to make the grade.<sup>132</sup> In order to address failing schools and the achievement gap, the Bush Administration imposed high stakes accountability for the success of all children on school districts and teachers.<sup>133</sup> Thus, No Child Left Behind requires that all students, including those in certain subgroups, improve their standardized test scores every year.<sup>134</sup> The Act identifies subgroups such as gender, each major racial and ethnic group, non-English proficient students, migrant students, students with disabilities, and economically disadvantaged students.<sup>135</sup> Each state defines adequate yearly progress (AYP) which is used to measure improvement and implements a statewide accountability system for its elementary and secondary schools to monitor the state's AYP.<sup>136</sup> Theoretically, higher accountability standards will increase teacher motivation and result in better academic performance for all students.

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<sup>129</sup> President George W. Bush, Foreword, No Child Left Behind, *available at* <http://www.whitehouse.gov/news/reports/no-child-left-behind.html> (last visited March 19, 2006).

<sup>130</sup> 20 U.S.C. § 6301 (2002) (stating that the purpose of NCLB is "that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments").

<sup>131</sup> § 6311(a)(1).

<sup>132</sup> § 6301(4).

<sup>133</sup> § 6301(6).

<sup>134</sup> 20 U.S.C. § 6311(b)(2)(I)(i).

<sup>135</sup> § 6311(b)(3)(c)(xiii); *see also* § 6311(b)(2)(C)(v)(II).

<sup>136</sup> § 6311(b)(2)(B).

No Child Left Behind consists of three key elements: academic standards, academic assessments, and accountability. States must define “challenging academic standards” which set out the content of what students should learn.<sup>137</sup> All students are required under the Act to learn math, reading or language arts, and science.<sup>138</sup> Academic assessments are used to measure academic achievement and the relative level of learning in each subject.<sup>139</sup> A set of high-quality, yearly student academic assessments are used to measure whether schools have been successful in teaching students in accordance with the academic standards they defined. No Child Left Behind requires an accountability system that will ensure that schools make adequate yearly progress, which is measured by comparing the academic standards set to student’s academic assessment results.<sup>140</sup> In addition to assessment test results, adequate yearly progress is measured through secondary school graduation rates.<sup>141</sup>

Once data is received from these annual tests, all students, including those with disabilities, are held to the same fixed standard. The school’s overall AYP is calculated based on students’ test scores and the act requires that all subgroups, such as ethnic groups, economically disadvantaged students, and special education students, must achieve AYP separately.<sup>142</sup> No Child Left Behind requires that ninety five percent of each group be tested.<sup>143</sup> Thus, if any one disaggregated subgroup fails to make AYP, the school as a whole fails.

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<sup>137</sup> § 6311 (b)(1).

<sup>138</sup> § 6311 (b)(1)(C).

<sup>139</sup> § 6311 (b)(3)(A) (noting that states need not implement academic assessments relating to science until the beginning of the 2007-2008 school year).

<sup>140</sup> § 6311 (b)(2).

<sup>141</sup> § 6311 (b)(2)(vi).

<sup>142</sup> § 6311(b)(2)(C)(v)(II).

<sup>143</sup> § 6311(b)(2)(I).

Schools that are designated as failing or in need of improvement face sanctions in an effort to shame them into better performance. Three phases of sanctions exist within § 6311 of No Child Left Behind: (a) school improvement under paragraphs (1) or (5)(A), (b) corrective action under paragraph (7), and (c) school restructuring under paragraph (8). Schools that fail to make adequate yearly progress for two straight years are identified as in need of improvement.<sup>144</sup> The act's corrective action provisions are triggered if the school fails to make adequate yearly progress by the end of the second year after this identification.<sup>145</sup>

In phase (a), when their own school has been labeled as one in need of improvement, students are given the option to transfer to another school, such as a public charter school that has not been identified as a school in need of improvement.<sup>146</sup> A student in a school that has failed to make adequate yearly progress by the end of the first full school year after identification may receive tutoring from a private agency or other supplemental education services at any time.<sup>147</sup> In phase (b), when the school has failed to make adequate yearly progress by the end of the second full school year after the identification as needing improvement, the local educational agency must take “corrective action.”<sup>148</sup> Corrective action could include replacing school staff, instituting and fully implementing a new curriculum, or extending the school year or school day for the school.<sup>149</sup> If after one full year of corrective action, a school fails to make adequate

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<sup>144</sup> § 6316(b)(1)(A) (stating that a school is identified as in need of improvement following two consecutive years of adequate yearly progress failure).

<sup>145</sup> § 6316(b)(7)(C) (describing corrective action as appropriate for “any school served by a local educational agency under this part that fails to make adequate yearly progress ... by the end of the second full school year after the identification” as in need of improvement).

<sup>146</sup> §6316 (b)(1)(E)(i).

<sup>147</sup> §6316 (e).

<sup>148</sup> §6316 (b)(7)(C).

<sup>149</sup> §6316 (b)(7)(C)(iv).

yearly progress, school restructuring commences in phase (c).<sup>150</sup> Restructuring involves possibly reopening the school as a public charter school, replacing all or most of the school staff, entering into a contract with a private management company, or other major restructuring.<sup>151</sup> A school district must achieve AYP status for two consecutive years to be removed from the failing list.<sup>152</sup>

No Child Left Behind designates students with disabilities as a subgroup that must be considered separately and also must be included in the school's overall AYP figure.<sup>153</sup> There is evidence, however, that Congress passed No Child Left Behind with reservations concerning the act's policy toward disabled students.<sup>154</sup> In order for the school district to meet its target AYP, every disaggregated subgroup, including students with disabilities, must make AYP status individually.<sup>155</sup> Failure to meet standards for disaggregated subgroups is often a source of school failure. Local education agencies are required to submit a plan to the state education agency demonstrating how it will implement services under No Child Left Behind for students with disabilities.<sup>156</sup> The Act does allow for necessary accommodations to be made available on standardized tests.<sup>157</sup> It specifically provides for those "reasonable adaptations and accommodations" for students with disabilities which are necessary to properly measure their academic achievement.

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<sup>150</sup> § 6316 (b)(8).

<sup>151</sup> § 6316 (b)(8)(B).

<sup>152</sup> § 6316 (b)(12).

<sup>153</sup> § 6311(b)(2)(C)(v)(II).

<sup>154</sup> 147 CONG. REC. H10103 (daily ed. Dec. 13, 2001) (statement of Rep. Miller) (indicating that disagreement still exists as to how the act will effect special education).

<sup>155</sup> 20 U.S.C. § 6311(b)(3)(c)(xiii) (requiring disaggregation of all subgroups, except when at the school or local educational agency level "the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student").

<sup>156</sup> § 6312(b)(1)(E).

<sup>157</sup> § 6311(b)(3)(C)(ix)(II).

No Child Left Behind has dramatically changed the culture and environment of public schools. The Act is up for renewal in 2007. Its congressional review will be highly controversial given the broad criticism it has received from both Republicans and Democrats since its implementation. A recent Harvard University study showed that the act has benefited white middle-class children over blacks and other minorities in poorer regions.<sup>158</sup> Vast numbers of students are not getting the tutoring that the law offers.<sup>159</sup> Large gaps exist between state and federal tests scores, resulting in state exams which deem students proficient when the same children fail federal testing standards.<sup>160</sup> In response to broad public concerns, the Department of Education has promulgated new regulations, which attempt to "give local school districts greater flexibility in meeting the act's requirements for students with disabilities."<sup>161</sup>

Utah, which strongly supported Bush in 2000 and 2004, passed a bill which allows Utah school districts to prioritize efforts and resources to meet Utah education goals first, and then address the federal goals of No Child Left Behind.<sup>162</sup> Connecticut has filed a lawsuit claiming that the federal government has not provided enough money to pay for the testing and programs associated with the Act.<sup>163</sup> Using No Child Left Behind, a Maryland school board recently voted to take control of four more Baltimore high schools and seven middle schools with chronically low achievement, stripping the

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<sup>158</sup> *Harvard Study Blasts Bush Education Policy*, CNN.com, Feb. 16, 2006, available at <http://www.cnn.com/2006/EDUCATION/02/16/bush.education.reut/index.html>.

<sup>159</sup> Susan Saulny, *Tutor Program Offered by Law Is Going Unused*, N.Y. TIMES, Feb. 12, 2006, available at <http://www.nytimes.com/2006/02/12/education/12tutor.html>.

<sup>160</sup> *Huge Gaps in State, Federal Test Scores: Results Cast Doubt Over Student Progress*, CNN.com, Mar. 3, 2006, available at <http://www.cnn.com/2006/EDUCATION/03/03/reading.math.scores.ap/index.html>.

<sup>161</sup> *Spellings More Flexible on NCLB Law*, CNN.com, Jan. 19, 2006, available at <http://www.cnn.com/2006/EDUCATION/01/19/spellings.interview.ap/index.html>.

<sup>162</sup> Amanda Ripley & Sonja Steptoe, *Inside the Revolt Over Bush's School Rules The Reddest of All States is Leading the Charge Against No Child Left Behind*, TIME MAGAZINE, May 9, 2005, at 30.

<sup>163</sup> William Yardley, *School Financing Is Focus Of Lawsuit in Connecticut*, N.Y. TIMES, November 23, 2005, at B6.

City of Baltimore from direct operation of 11 schools.<sup>164</sup> Preliminary numbers from the Department of Education indicate that at least one-fourth of the nation's schools failed to meet the requirements of the No Child Left Behind Act last year.<sup>165</sup> A bipartisan commission has been created to take a "hard, independent look" at the Act's effectiveness and its potential problems.<sup>166</sup> The commission is due to report back to congress prior to the Act's renewal in 2007.

The No Child Left Behind Act has had broad effects beyond its direct implementation of accountability standards in public schools. The No Child Left Behind philosophy played an important role in shaping other laws such as the reauthorization of the IDEA in 2004. The honing of the IDEA to conform to the No Child Left Behind philosophy has important implications for students with learning disabilities.

## **B. Individuals with Disabilities Education Act**

The Individuals with Disabilities Education Act specifically governs the treatment of children with disabilities during their elementary and secondary education. Originally the IDEA was called the Education for All Handicapped Children Act of 1975; it was renamed when congress reauthorized the act in 1990.<sup>167</sup> The IDEA is intended to grant federal funds and provide an educational mandate for children with disabilities.<sup>168</sup>

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<sup>164</sup> Diana Jean Schemo, *Maryland Acts to Take Over Failing Baltimore Schools*, N.Y. TIMES, Mar. 30, 2006, available at [http://www.nytimes.com/2006/03/30/education/30child.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/03/30/education/30child.html?_r=1&oref=slogin).

<sup>165</sup> *One Fourth of Nation's Schools Fail 'No Child' Standards*, CNN.com, Mar. 30, 2006, available at <http://www.cnn.com/2006/EDUCATION/03/29/no.child.left.behind.ap/index.html>.

<sup>166</sup> Greg Toppo, *Bipartisan Panel to Study No Child Left Behind*, USA TODAY, Feb. 14 2006, available at [http://www.usatoday.com/news/education/2006-02-13-education-panel\\_x.htm](http://www.usatoday.com/news/education/2006-02-13-education-panel_x.htm).

<sup>167</sup> Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (amending Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)) (codified as amended at 20 U.S.C. §§ 1400-1487).

<sup>168</sup> *Id.*

The IDEA's focus is on ensuring that children age 3 to 21 years old who have a disability "receive a free and appropriate public education."<sup>169</sup> Special education and related services must be provided under the IDEA at public expense in the "least restrictive environment" based on each child's individual needs.<sup>170</sup> Public schools are required to develop an Individualized Educational Plan (IEP) for each qualifying child with a disability.<sup>171</sup> The IEP is a written document tailored to a student's unique needs and disabilities which is designed by a team made up of a special education teacher, the child's parents, specialists and the child's general curriculum teacher.<sup>172</sup> In addition to outlining academic goals and milestones, the 1997 amendment to the IDEA requires the IEP to detail the extent to which each student should interact with the general education curriculum.<sup>173</sup> Thus, the IDEA and its IEPs establish that students with disabilities should receive a unique education tailored to their individual needs. This individualized goal is at odds with No Child Left Behind and its emphasis on uniform standards for all public school students.

In an effort to avoid disabled students falling through the cracks of school accountability systems, the IDEA requires that states provide disabled students the opportunity to participate in statewide assessments.<sup>174</sup> The 1997 amendments also require expansion of the modifications provided by schools to disabled students taking

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<sup>169</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2000).

<sup>170</sup> § 1412(a)(5).

<sup>171</sup> § 1414(d).

<sup>172</sup> § 1414(d)(1)(B); 34 C.F.R. § 300.346 (2002) (describing development of IEP with consideration of a student's language abilities, previous evaluations, and past performance on district and statewide assessments).

<sup>173</sup> § 1414(d)(1)(A)(i)(I) (explaining that IEP must address "how the child's disability affects the child's involvement and progress in the general curriculum").

<sup>174</sup> § 1412(a)(17)(A) (requiring that states develop guidelines for students with disabilities in alternate assessments and that states conduct alternate assessments); 34 C.F.R. § 300.139 (1999) (mandating that states report on the number of students with disabilities participating in general and alternate assessments and on their general performance).

statewide assessments.<sup>175</sup> The IDEA requires states to provide necessary assessment accommodations for all students with disabilities.<sup>176</sup> States must also provide one or more alternate assessments for disabled students who cannot participate meaningfully in statewide assessments even with accommodations.<sup>177</sup>

*(i) Reauthorization by the Individuals with Disabilities Education Improvement Act of 2004*

When President Bush signed the reauthorized IDEA into law on December 3, 2004 the so called Individuals with Disabilities Education Improvement Act of 2004 ushered in important modifications to the method by which learning disabilities are identified.<sup>178</sup> Learning disability is defined in the IDEA as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."<sup>179</sup> This broad definition, until recently, was commonly operationalized by measuring a significant discrepancy between ability and achievement.

No Child Left Behind institutes a uniform, standard-based system that does not share the IDEA's emphasis on the individual needs of disabled students and their unique learning styles. However, the 2004 reauthorization of the IDEA attempts to bring it into

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<sup>175</sup> § 1414(d)(1)(A)(v)(I) (requiring IEPs to state "any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment"); 34 C.F.R. § 300.347(a)(5) (2002) (requiring the same).

<sup>176</sup> § 1412(a)(17)(A); 34 C.F.R. § 200.6 (2003) (discussing inclusion of all students in state academic assessments).

<sup>177</sup> *Id.*; 34 C.F.R. § 200.6(a)(2)(i).

<sup>178</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C. §§ 1400-1482 (2005)).

<sup>179</sup> § 1401(30)(A).

line with the No Child Left Behind philosophy.<sup>180</sup> In so doing, the reauthorized IDEA shifts the definition of disability sacrificing the IDEA's individualized approach to educating disabled students. Most importantly, after the amendments in 2004, the IDEA requires that in diagnosing a learning disability, "a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability."<sup>181</sup> This new language suggests that local agencies are permitted to use the discrepancy model, but cannot be forced to do so. This change in the eligibility determination rules for children with learning disabilities is the most important and broad reaching alteration made by the 2004 reauthorization of the IDEA. Some scholars have already criticized this new approach, which does not make the discrepancy model mandatory, because it gives individual school districts even more discretion in diagnosing learning disabilities and may lead to inconsistent standards.<sup>182</sup> The next section will examine in depth the implications this change has for the definition of learning disabilities and disabled students themselves.

Other modifications made in the 2004 reauthorization have also attempted to more closely align the IDEA with No Child Left Behind. The reauthorized IDEA now allows special education funds to be diverted to provide services to children who do not currently meet the legal eligibility standards for special education.<sup>183</sup> Up to fifteen percent of federal special education money can be used for early intervention for children who have not formally been identified as learning disabled.<sup>184</sup> Theoretically such

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<sup>180</sup> See Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 8 (2006).

<sup>181</sup> § 1414(b)(6)(A).

<sup>182</sup> Nancy Leong, *Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 STAN. L. REV. 2135, 2139 (2005).

<sup>183</sup> 20 U.S.C. § 1413(f).

<sup>184</sup> *Id.*

services may boost at risk children's performance so they never need to be found eligible and receive typical special education. Additionally, the reauthorized IDEA provides funding for special education for children whose parents have placed them in religious or private schools.<sup>185</sup> The updated IDEA also alters dispute resolution procedures, promoting settlement and somewhat undermining parents' rights.<sup>186</sup> Finally, the law changes disciplinary processes, making them harsher for children with disabilities.<sup>187</sup>

*(ii) The New Eligibility Determination Framework for Identifying Learning Disabled Children*

Now the IDEA permits school districts to evaluate learning disabilities without using the discrepancy between a student's ability and achievement.<sup>188</sup> This change arises from distrust regarding conventional use of IQ testing in measuring learning disabilities.<sup>189</sup> The United States Department of Education's Notice of Proposed Rulemaking urges abandonment of the discrepancy between IQ subtests of ability and achievement as a measure of learning disability.<sup>190</sup> The Department of Education characterized the discrepancy model as a "wait to fail" model because it results in

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<sup>185</sup> § 1412(a)(10)(A); 70 Fed. Reg. 35,845-47 (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.130-.134) (addressing services for children in religious and other private schools).

<sup>186</sup> See § 1415(c)(2) (imposing pleading rules such as opportunity to challenge the sufficiency of complaints and amendment procedure.); §§ 1415(f)(3)(C)-(D) (due process); § 1415(i)(2)(C) (court).

<sup>187</sup> 20 U.S.C. § 1412(a)(1)(A) (West 2005). A child who has been removed from the current placement, even for reasons of weapons possession, use or possession of drugs, or infliction of serious bodily injury on another, must "continue to receive educational services . . . so as to enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the child's IEP." 20 U.S.C. § § 1415(k)(1)(G), 1415(k)(1)(D)(i) (West 2005).

<sup>188</sup> § 1415(k)(1)(A); § 1415(k)(7)(D); § 1415(k)(1)(E)(i); § 1415(k)(4)(A); § 1415(k)(5)(B).

<sup>189</sup> See Karla K. Stuebing et al., *Validity of IQ-discrepancy Classifications of Reading Disabilities: A meta-analysis*, 39 AM. EDUC. RES. J. 469, 518 (2002); *President's Commission*, *supra* note 2, at 25-26 (criticizing use of IQ and achievement as a means of identifying learning disabilities); G. R. Lyon, et al., *Rethinking learning disabilities*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 259, 287 (Chester E. Finn et al. Eds., 2001).

<sup>190</sup> Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782 (proposed June 21, 2005) (to be codified at 34 C.F.R. pts. 300, 301, 304).

delaying intervention until the student's achievement is sufficiently low that the necessary discrepancy is achieved.<sup>191</sup>

Proposed Rule §300.307(a)(1) would allow states to prohibit the use of a severe discrepancy between achievement and intellectual ability for determining whether a student has a learning disability. Under Proposed Rule §300.307(a)(2), states may not require school districts to use the discrepancy model to determine whether a child has a learning disability. This proposed regulation is effectively a 180-degree reversal in policy which deserts the traditional discrepancy model and attempts to prohibit the conventional approach before finding a workable alternative.

If the discrepancy model is abandoned, the key question becomes how to measure the existence of a learning disability in the absence of the ability-achievement discrepancy standard. The updated IDEA permits use of "a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation."<sup>192</sup> The Department of Education's Notice of Proposed Rulemaking strongly recommends employing systematic assessment of a student's response to high-quality general education instruction. However, the proposed rulemaking also identifies other permissible models which look at "strengths and weaknesses in achievement, or simply rely on an absolute level of low achievement."<sup>193</sup>

The Department of Education's proposed regulations endorse the use of a response to intervention (RTI) model. This new approach sets up a two-step model: (1) "finding that the child does not achieve commensurate with the child's age in one or more of the eight specified areas when provided with learning experiences appropriate to

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<sup>191</sup> *Id.* at 35802.

<sup>192</sup> § 1414(b)(6)(B).

<sup>193</sup> 70 Fed. Reg. 35,802 (proposed June 21, 2005).

the child’s age”;<sup>194</sup> (2) Determining that “a child failed to make sufficient progress in meeting state-approved results when using a response to a scientific, research based intervention process, or the child exhibits a pattern of strengths and weakness that the team determines is relevant to the identification of a specific learning disability.”<sup>195</sup> This model incorporates an exception where children are not judged disabled if the problem is a result of cultural or economic disadvantage.<sup>196</sup> According to proposed §300.311(a)(5), the written report resulting from this model would only address whether the child has not achieved performance commensurate with his age rather than the discrepancy model’s reference to that child’s personal ability and achievement.<sup>197</sup>

Although the proposed regulations largely abandon the discrepancy model, seeds of comparison between individual ability and achievement still remain. In step two of the evaluation process, the proposed regulations specify that a “pattern of strengths and weaknesses may be in performance, achievement, or both or may be in performance, achievement or both relative to intellectual development.”<sup>198</sup> Furthermore, although the written report cannot focus on the traditional disparity measures, the regulations allow additional factors to be reported such as “whether there are strengths and weaknesses in performance or achievement or both or relative to intellectual development that require special education and related services.”<sup>199</sup>

In contrast to the old “test and treat” model, RTI’s supporters characterize it as a treat and treat model which allows educators to intervene as early as possible instead of

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 35803.

<sup>197</sup> *Id.*

<sup>198</sup> 70 Fed. Reg. 35,802 (proposed June 21, 2005).

<sup>199</sup> *Id.* at 35803.

waiting for extensive, time-consuming, and expensive assessments.<sup>200</sup> The RTI model tries to appropriately and immediately address the instructional needs of students who are difficult to teach. Universal screening of all kindergarten and first-grade students for reading difficulties will lead to identification of at risk students who will receive accelerated instruction through standard, “scientifically based protocols.”<sup>201</sup> At risk student’s progress will be constantly monitored and those who do not respond will become candidates for special education.<sup>202</sup> Arising from the No Child Left Behind philosophy, this RTI approach focuses on careful monitoring of progress with accountability for results. Students are identified with a learning disability if their achievement level does not respond despite increasingly intense instruction.

In the RTI model, discrepancy is evaluated based on the expectation that most students can learn if quality instruction is provided.<sup>203</sup> Children who do not respond to intervention have a discrepancy compared to this expectation that all students can learn reading, writing, and arithmetic. Thus, the definition of disability and identification of learning disabled students become linked to instruction. The RTI model requires seamless integration of general and special education because interventions and identification of disabled students are administered by general education teachers with special education experts only becoming involved later in the process, if at all.<sup>204</sup>

RTI shifts focus from eligibility to providing effective instruction. One of the major goals of this new model is eliminating instructional causes of learning problems.

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<sup>200</sup> See Jack M. Fletcher, *Alternative Approaches to the Definition and Identification of Learning Disabilities: Some Questions and Answers*, 54 ANNALS OF DYSLEXIA 304, 309 (2004).

<sup>201</sup> *Id.* at 311.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 313.

<sup>204</sup> *Id.* at 312.

Theoretically, the number of children identified with learning disabilities could be reduced if more effective reading instruction was provided. However, little guidance is given as to what specifically is entailed in this effective intervention and how it differs from standard methods of teaching children to read and write. The only example of scientific intervention provided is the HOSTS Language Arts program, which is currently used in Texas, Ohio, Florida, Delaware, Michigan, and Louisiana.<sup>205</sup>

(iii) *Inherent Dangers in the RTI Model and its Effect on the Definition of Disability*

The RTI model's focus on early intervention is laudable. Rigid application of the discrepancy model often means that public schools do not intervene until a student is literally failing, at which point, that child has already been psychologically scarred by the stigma of being a slow learner. However, the RTI approach has significant problems. First, realistically RTI's effective implementation places a heavy burden on already taxed public school teachers who have neither the training nor incentives to properly achieve its idealistic goals. Second and more importantly, the RTI model changes the definition of learning disabilities by significantly altering the way in which they are identified. This new definition shifts the category of children protected by the IDEA, leaving specific groups of highly achieving students with reading and writing difficulties unprotected. In the long run, the imposition of the RTI model in learning disability identification may weaken the protection offered under the IDEA because it obscures the political justifications behind the protections given to this class of individuals.

First, from a practical perspective, although the federal law refers to highly qualified teachers, this standard is really a minimum qualification which simply requires

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<sup>205</sup> H.R. Rep. No. 108-779, at 247 (2004).

teachers to know what they teach. No Child Left Behind requires that teachers have a bachelor's degree, a state license, and competence in their subject.<sup>206</sup> The RTI model of identifying learning disabled students places the burden of screening and identification in the hands of general education teachers.<sup>207</sup> Identification of at risk students is not handled by special education experts; instead the scientifically based intervention is administered by normal classroom teachers.

For RTI to function effectively, general and special education must operate seamlessly as one united whole, which seems unrealistic given the state of public education in America. Teachers who have been proven minimally qualified to teach math are not necessarily qualified to make critical judgments about the nature of a child's learning disability. The IDEA specifies that students whose learning problems stem from economic, racial, or cultural factors are not eligible.<sup>208</sup> Busy math and science teachers, who have no specific background in special education, will find it difficult to distinguish one type of learning problem from another. Many teachers already hold broad misconceptions about students with learning disabilities, their potential, and how to facilitate their unique learning needs.<sup>209</sup> Broad funding problems in American schools make it unlikely that significant money will be dedicated to training general education teachers on learning disabilities and the federal government's failure to properly fund the mandates already created by No Child Left Behind makes additional federal support unrealistic. Thus, the RTI model places uninformed overworked teachers who may

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<sup>206</sup> 34 C.F.R. § 200.56 (2002), *available at* <http://www.ed.gov/nclb/methods/teachers/hqtflexibility.html> (defining highly qualified teacher).

<sup>207</sup> *See* Fletcher, *supra* note 200, at 315.

<sup>208</sup> 70 Fed. Reg. 35,802, 35803 (proposed June 21, 2005).

<sup>209</sup> *See* Lynn Meltzer et al., *The Impact of Effort and Strategy Use on Academic Performance: Student and Teacher Perceptions*, 24 LEARNING DISABILITY Q. 85, 86-7 (2001).

already have misconceptions about the learning disabled as the gatekeepers responsible for the identification of learning disabled children, instead of experts who have experience with the hallmarks of specific learning problems.

From a practical standpoint, giving the responsibility for identification of learning disabilities to general education teachers is also dangerous because they have conflicting incentives. No Child Left Behind places the school's future and the teacher's job in danger if children's test scores are not up to par. Thus, teachers have strong incentives to act strategically to keep those statistics high rather than doing what is right for the individual child in question. Under No Child Left Behind, subgroups such as disabled students must be disaggregated and their scores must be at grade level in order for the entire school to avoid sanctions.<sup>210</sup> Potentially, under the RTI model, teachers may not identify struggling students as having a learning disability because the teachers' interests are poorly aligned with those of disabled students. If a student is designated as disabled, his score must be disaggregated and could result in sanctions; however, if that student remains in the general curriculum, his score can be balanced out by the higher scores in the larger student body and thus the teacher's job is safe. Since general education teachers are on the frontline administering the screenings for learning disabilities in the RTI model, they play a critical role in disability identification which may allow them to manipulate who is designated as disabled in service of their own interests.

Teachers may also have incentives to identify non-learning disabled students as disabled to protect the school and their jobs. Although originally federal regulations capped the number of students whose scores on alternate assessments could be considered in the school's proficiency determination at one percent, in 2005 the Department of

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<sup>210</sup> 20 U.S.C. § 6311(b)(3)(c)(xiii) (requiring disaggregation of all subgroups).

Education announced that an additional two percent of students who took alternate assessments could be included in the proficiency determination.<sup>211</sup> Generally, alternate assessment is intended for students with significant cognitive disabilities, who even with accommodations could not be expected to achieve commensurate with conventional assessment standards.<sup>212</sup> Teachers who have incentives to insure high scores may push poorly performing students into the alternative assessment framework even if their learning difficulties are related to family problems or other environmental factors. Teachers who fear losing their jobs will be inclined to focus more on how a student's score might affect potential sanctions than on specific hallmarks of learning disabilities. By aligning the RTI model with the No Child Left Behind philosophy, naturally the teacher's focus will shift from the individual needs and abilities of the children to the success of the school district as a whole and the school's overall level of achievement. Increased dropout rates have already been reported among students in special education since the implementation of No Child Left Behind.<sup>213</sup> Placing the responsibility for identifying learning disabled students with general education teachers is likely to make the problem worse.

Recent news provides ample evidence of the potential negative effects of teacher incentives and the No Child Left Behind philosophy on students with disabilities. The Associated Press discovered nearly two million children whose scores were not counted

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<sup>211</sup> Press Release, U.S. Dep't of Educ., Secretary Spellings Announces More Workable, "Common Sense" Approach to Implement No Child Left Behind Law (Apr. 7, 2005), *available at* <http://www.ed.gov/news/pressreleases/2005/04/04072005.html>.

<sup>212</sup> Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68699 (Dec. 9, 2003) (explaining proper use of alternate assessments).

<sup>213</sup> See Hon. Eugene W. Hickok, *Symposium: Keynote Address the Future of Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 403, 404 (2003) ("Dropout rates in some communities are at record levels, especially in our most challenged communities."); Erin Kucerik, *The No Child Left Behind Act of 2001: Will it Live Up to its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 482 (2002).

when it came to meeting the requirements of No Child Left Behind.<sup>214</sup> States are exploiting a loophole in the law which allows them to ignore scores from minority groups when that group of students is too small to be statistically significant, even though normally under No Child Left Behind the group would be disaggregated.<sup>215</sup> By asking for exemptions states are excluding large numbers of minority and disabled children. Virginia has already taken aim at special education students, excluding their scores from the schools' totals under this loophole.<sup>216</sup> The more disaggregated groups in a school, the greater the chance for school failure. Thus, under the RTI model, general education teachers may be reluctant to accept that children have a disability because they are concerned that if they have enough special education students to disaggregate the group, the school could be labeled as failing.

Beyond the myriad of practical implementation problems, the RTI model represents a dangerous philosophical shift in the definition of learning disabilities, a shift which threatens to undermine the validity of the category as a whole. According to the Learning Disability Roundtable in 2002 the hallmark of a learning disability is some form of "intra-individual discrepancy."<sup>217</sup> Discrepancy is generally manifested as unexpected underachievement relative to the student's aptitude. In the RTI model, this unexpected underachievement is theoretically captured by identifying students who have not responded to standard teaching and classifying their poor achievement as unexpected

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<sup>214</sup> Nicole Ziegler Dizon et al., *States Omitting Minorities' Test Scores*, ASSOCIATED PRESS, Apr. 18, 2006, available at [http://hosted.ap.org/dynamic/stories/N/NO\\_CHILD\\_LOOPHOLE?SITE=CAVAL&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/N/NO_CHILD_LOOPHOLE?SITE=CAVAL&SECTION=HOME&TEMPLATE=DEFAULT).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Learning Disabilities Roundtable. *Specific learning disabilities: Finding common ground*, U.S. Department of Education, Office of Special Education Programs, at 15 (July 25, 2002), available at <http://www.lidaamerica.org/pdf/commonground.pdf> [hereinafter *Disability Roundtable*].

relative to expectations that all students should respond to quality instruction. This interpretation has led many scholars to fear that the move to a system of identification relying on achievement rather than aptitude will be the death knell for the concept of learning disabilities.<sup>218</sup>

The RTI model, at first, seems to be predicated on a false assumption that all students have equal potential, e.g. the expectation that all students can learn to read and write with quality teaching. However, this expectation is not an assertion of equal aptitude; it merely sets a minimum level of competency. The substitution of minimal competency as a baseline for measuring disability instead of individual aptitude is a major policy shift which radically alters the definition of learning disabilities and the composition of the group who can claim to be protected under that definition.

The key rhetorical move in hiding how significant this change will be is framing the ceiling which is being placed on the potential of the learning disabled as a floor. Instead of merely guaranteeing that every child will be able to read and write, this new standard says that no learning disabled child has a right to anything more than learning to achieve these basics at an average level. Much like the average person standard, this new RTI model moves from a subjective standard based on individual aptitude to a more universal objective standard which tries to conform to the No Child Left Behind philosophy. This new approach becomes a ceiling on the ability of students with high potential, who can achieve scores in the average range in spite of their learning disability, preventing them from getting the help they need to realize their full potential. Under the

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<sup>218</sup> Thomas E. Scruggs & Margo A. Mastropieri, *On Babies and Bathwater: Addressing the Problems of Identification of Learning Disabilities*, 25 *LEARNING DISABILITY Q.* 155, 168 (2002); Kenneth A. Kavale & Steven R. Forness, *What Definitions of Learning Disability Say and Don't Say: A Critical Analysis*, 33 *J. OF LEARNING DISABILITIES* 239, 256 (2000).

new model those children are told that they have no right to anything more than this minimum threshold of achievement despite their vast potential to derive significant benefit from intervention.

The RTI model erroneously defines disabilities based on an inability to treat them. For example, if a learning disabled child initially is identified as at risk, but then responds to the intervention provided by his general education teacher, he is determined not to have a learning disability. This inaccurately characterizes learning disabilities as though they were a disease that could be cured with a pill. Learning disabled students may learn to cope with their disabilities, but they are not cured. Thus, a child who responds to the additional attention and new teaching techniques available through intervention may have learned some coping mechanisms which can temporarily help him to achieve at an average level. This does not imply that he no longer has a disability or that he could not benefit from learning further coping techniques which could unlock greater potential.

The philosophical pitfalls of the RTI model are exacerbated by its blurring of the line between general and special education. Avoiding placing a label on children in special education and setting them apart from their classmates is an admirable goal. However, the protections given to those in special education may be diluted as the line between special and general educations becomes unclear. The RTI model is a step in the direction of treating anyone whose achievement is below average in the same way as children who have specific disabilities. Necessarily some students are below average and the intent behind the special education laws cannot be to provide funding to every one of those students. Thus, as the category expands to include more individuals who merely have an absolute low level of achievement and are not identified with a specific

disability, the special education mandate becomes diluted and is less able to help those it was originally put in place to protect.

The Department of Education condones an absolute low level of achievement as a potential standard for assessing learning disabilities.<sup>219</sup> Absolute low achievement is neither a necessary nor sufficient element for measuring learning disabilities. Simply relying on poor test performance provides no grounds on which to distinguish students with learning disabilities from students with cognitive impairments, students whose performance is poor due to environmental factors, or students with other disabling conditions. At the very least, the absolute low level of achievement standard fails because it does not differentiate between the conditions above which may well call for different instructional strategies to be effectively addressed. At worst, the absolute low level of achievement standard denies the existence of specific learning disabilities all together by suggesting that anyone who does not achieve at a proficient level is learning disabled without regard to their individual potential or other subjective factors.

*(iv) Potential Alternatives*

Having identified many potential dangers to the RTI model, schools need not return to the rigidly applied discrepancy model employed in the past. That approach also carries distinct disadvantages such as delayed intervention and the problems inherent in IQ tests. However, intra-personal discrepancy can be measured in other ways. It is not necessary to abandon the entire idea of unexpected underachievement relative to ability in order to improve upon the past. Perhaps discrepancy could be measured across

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<sup>219</sup> Notice of Proposed Rulemaking, 70 Fed. Reg. 35802 (proposed June 21, 2005).

different domains.<sup>220</sup> For example, a student might seem generally bright and excel at math, but perform poorly at reading tasks. Specific focus on factors such as fluency in reading and writing may be helpful in this new approach. Such an approach would not be inconsistent with the current regulations which allow for analysis of a “pattern of strengths and weaknesses in performance.”<sup>221</sup>

Many of the ideas behind the No Child Left Behind philosophy and the RTI model are well intentioned. Integrating special and general education, earlier intervention, and direct accountability for the success of disabled students could all have their benefits. However, most of these goals can be achieved without changing the definition of learning disabilities so radically that the traditional core of unexpected underachievement is replaced with a ceiling which prevents learning disabled children from claiming a right to be anything more than minimally average.

### III. Conclusion

The definition of learning disabilities under both the ADA and the IDEA has shifted toward an average person standard over the past decade. Licensing exam cases decided in light of the Supreme Court’s recent narrow interpretation of the ADA have resulted in a standard which compares the plaintiff to the average person instead of other students with similar education and aptitude.<sup>222</sup> This standard, however, may be applied more flexibly in cases where the student can show a documented history of

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<sup>220</sup> See *Disability Roundtable*, *supra* note 217, at 18 (recommending assessments of aptitude such as the use of measures of cognitive or neuropsychological processing or listening comprehension as a way of measuring alternative forms of discrepancy).

<sup>221</sup> 70 Fed. Reg. 35,802 (proposed June 21, 2005).

<sup>222</sup> See *Price*, 966 F. Supp. at 427.

accommodations, thus taking some qualitative factors into account and yet still comparing the plaintiff to the population as a whole.<sup>223</sup>

In the IDEA context, efforts to coordinate the IDEA with the No Child Left Behind philosophy have led to a radical new definition of disability which abandons the old discrepancy model of learning disability identification. Instead of comparing a child's individual ability to his level of achievement, the new RTI model discards individual aptitude and replaces it with the assumption that all children can learn to read and write.<sup>224</sup> This new approach compares the disabled student's achievement to the universal assumption that the population as a whole can learn reading, writing, and arithmetic at average grade level. Thus, both of these new standards remove the subjective individualized element used to account for personal potential under the ADA and IDEA, replacing it with an average person baseline.

This change in the measurement and identification of learning disabilities is dangerous because it has shifted the old individualized standard toward a new universal rule. If rigidly applied, this rule threatens to become a ceiling on the ability of bright students who have learning disabilities to vindicate their rights under the IDEA or the ADA. Essentially, the average person will become the upper boundary of these students' ability to claim protection. Even though their potential may be much greater, under a strict interpretation of the new No Child Left Behind-friendly IDEA, learning disabled students with high intellectual ability may be excluded from the special education mandate because they can achieve minimal competence without it. Under this model, average performance becomes a cutoff for learning disabilities. No Child Left Behind's

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<sup>223</sup> See *Bartlett*, 2001 WL 930792, at \*37-40.

<sup>224</sup> Fletcher, *supra* note 200, at 313.

guarantee that all children will learn to read and write actually limits the rights of disabled students because the minimal floor it supposedly creates in American education becomes a ceiling on disabled children's right to receive help. This change could limit the aspirations of learning disabled students because they are consigned to be nothing more than average.

A more flexible approach similar to that adopted in *Bartlett* 2001 would be more equitable. The *Bartlett* Court rejected the idea that a simple quantitative test score could be used as a cutoff for the existence of a learning disability.<sup>225</sup> An alternate model based on *Bartlett* could still adhere to the average person standard while also taking into consideration qualitative factors such as the manner in which the child's learning disability affects his test-taking. If the model took into account qualitative aspects of test-taking, such as reading fluency, independent of the child's simple numeric test score, it could identify highly intelligent students as well as those identified under the RTI approach. Although the RTI model's singular focus on quantitative test scores is consistent with the No Child Left Behind philosophy, it makes the new rule-like process for identifying learning disabilities dangerously underinclusive. Standardized tests have been shown not to reveal the full nature of the learning problems encountered by dyslexics and other students with learning disabilities because their processing difficulties do not translate directly into test scores.<sup>226</sup>

Historically the concept of learning disabilities differed from that of mental retardation in that a person with a learning disability has both strengths and weaknesses

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<sup>225</sup> *Bartlett*, 2001 WL 930792, at \*41.

<sup>226</sup> See Maggie Bruck, *Component Spelling Skills of College Students with Childhood Diagnosis of Dyslexia*, 16 J. OF LEARNING DISABILITIES 171, 184 (1993); Maggie Bruck, *Word Recognition Skills of Adults with Childhood Diagnoses of Dyslexia*, 26 DEV. PSYCHOL. 439, 454 (1990).

instead of a flat, universally depressed ability level across the board.<sup>227</sup> Thus, the hallmark of learning disabilities is unexpected underachievement explained by processing difficulties.<sup>228</sup> The new models emerging under the IDEA and ADA threaten to replace underachievement with low achievement. While it is admittedly hard to measure the processing difficulties associated with learning disabilities, merely assuming they exist wherever underachievement occurs abandons the core idea behind learning disabilities. By focusing only on achievement as measured through numerical test scores, the RTI model abandons the attempt to specifically identify processing difficulties and fundamentally alters the concept behind learning disabilities.

The resulting underinclusiveness, however, might be seen as a negligible flaw in the model. Undoubtedly some will question whether above average students can truly be disabled and if they deserve the special protection provided by law.<sup>229</sup> Everyone is disabled when compared to a certain peer group, right? No. A normal man on the street cannot be viewed as a disabled NBA player just because he is below average when compared to that peer group. The traditional understanding of learning disabilities is “unexplained learning failure as embodied by the idea of underachievement.”<sup>230</sup> Thus, the man on the street is not disabled because he is not underachieving when he predictably fails to beat the NBA players.

Even with a reasonable accommodation it is unlikely that the man on the street’s odds of beating the NBA player would significantly improve. However, where a minor

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<sup>227</sup> Kavale A. Kenneth & Steven R. Forness, *The Politics of Learning Disabilities*, 21 LEARNING DISABILITY Q. 245, 246 (1998).

<sup>228</sup> *Id.*

<sup>229</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, 613 (2001).

<sup>230</sup> Kenneth, *supra* note 227, at 245.

accommodation could make Person A competitive, but would not allow the average person on the street to succeed, Person A may be disabled.<sup>231</sup> Although riding a golf cart may allow Casey Martin to play golf at a professional level,<sup>232</sup> it is unlikely that most Americans would be significantly more successful playing against Tiger Woods while using a golf cart than they would while walking. Thus, a disability is more likely to exist where *ex post* a reasonable accommodation yields significant improvement. Everybody is not disabled because even if they were given time and a half, most Americans could not get a perfect score on the LSAT. However, where a student improves immensely due to an accommodation which produces only minimal improvement in most people, this may provide evidence that the student suffers from processing difficulties which were compensated for by the accommodations. It makes intuitive sense to allocate scarce special education resources to the students who can benefit most from them. Even if a student's test scores are already average, if a little extra help could raise those scores significantly, those resources will not have been wasted.

The problem is that learning disabilities often must be judged *ex ante* when the person's potential is somewhat unclear. This problem is less significant in the licensing exam context, discussed in the first half of this paper, because the past academic success of the learning disabled student can serve as a proxy for future potential.<sup>233</sup> Viewed in this light, the two-tiered framework discussed above is logical because students who have a history of accommodations have demonstrated their potential to benefit significantly

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<sup>231</sup> See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690-691 (2001) (requiring the PGA to provide a golf cart to a disabled professional golfer as a reasonable accommodation under the ADA).

<sup>232</sup> *Id.*

<sup>233</sup> A severe reading of *Sutton* might suggest that past academic success is evidence of the individual's ability to compensate for his learning disability and thus he might not be disabled. However, as yet courts have not adopted this interpretation of *Sutton*. See *Bartlett*, 2001 WL 930792, at \*37-40 (refusing to recognize a cut-off for the existence of learning disabilities).

from accommodations, while those who are claiming a disability for the first time have no evidence that *ex post* they will significantly improve with accommodation.

However, in the IDEA context where the children are still very young, the question of *ex post* gain becomes more difficult because it is harder to predict the potential benefit of accommodations. This is why it is essential to look at qualitative factors which attempt to directly identify processing difficulties instead of relying on results as a proxy. My hypothetical model of *ex post* identification of learning disabilities is guilty of the same flaw as the RTI model. It puts the cart before the horse by trying to identify a problem based on the ability to cure it. This reasoning is especially specious in the IDEA context. The RTI theory that response to intervention can help identify which children are disabled focuses on the wrong component of learning disabilities, low achievement instead of processing problems. The RTI model identifies unexpected underachievement by classifying everyone who does poorly as potentially learning disabled. In order to design a more effective approach, it is necessary to look for specific processing difficulties instead. Improvement based on scientific intervention might be a symptom of learning disabilities, but it is not the cause. By measuring a symptom instead of the root source, the RTI model is vastly over and underinclusive. It will exclude highly intelligent students who have learning disabilities while including low achievers who show no signs of processing problems or other specific learning difficulties.

Even if highly intelligent learning disabled students are eventually incorporated into these new models, some argue that accommodations give the learning disabled false hope because once they get into the “real world” they will no longer receive a helping

hand.<sup>234</sup> This view fails to recognize that school is not the real world. Academia is artificial, as are Scantron bubbles and two-hour long tests which assess innate ability based on analogies. This artificial environment, however, plays a crucial gate-keeping role in American society. Thus, it is critical that the learning disabled are not foreclosed from the opportunities it offers. The peculiar restraints placed on standardized test-takers are not indicative of who will be most successful in the future. The best college student is rarely the one who can fill in an oval most precisely with a number two pencil and the best lawyers are usually the most insightful rather than the fastest readers. Suggesting that accommodations compromise the integrity of the test and give the learning disabled false hope places too much faith in the predictive validity of standardized tests and underestimates the potential of disabled Americans.

In 2002, the President's Commission on Excellence in Special Education found "compelling evidence" to support the existence of at least four high-incident learning disabilities.<sup>235</sup> Although at times it may be difficult to identify them precisely, there are many learning disabled Americans and they can greatly benefit from a little help. In light of the fact that an individual with a disability theoretically gains significantly more from accommodations than a typical person who is given extra time, the overall benefit to allowing appropriate accommodations for the learning disabled should outweigh any harm done by some inevitable misidentification. Thus, learning disability classification is better suited to a more individualized standard than this new rule-like approach which rests on the average person's qualitative test score. The new approach evolving in the IDEA and ADA contexts is dangerously altering the definition of learning disabilities by

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<sup>234</sup> See Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites, 57 Vand. L. Rev. 1043, 1123 (2004).

<sup>235</sup> President's Commission, *supra* note 2, at 22.

focusing too heavily on numeric achievement on standardized tests to the exclusion of qualitative factors and considerations of individual ability. Limiting learning disabled Americans to nothing more than average regardless of their individual potential is a tragic waste which hurts society as a whole.