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Edward Dunn
Boston College Law School, edward.dunn@bc.edu

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AN OPPORTUNITY TO BE HEARD: A CALL FOR IMPARTIALITY IN THE LAW SCHOOL ADMISSION COUNCIL’S DISABILITY ACCOMMODATION REVIEW PROCESS

Edward Dunn*

Abstract: Congress passed the Americans with Disabilities Act (ADA) in 1990, endeavoring to eliminate discrimination against disabled Americans and assure equality of opportunity. The Law School Admission Council’s (LSAC) accommodation review process contradicts this purpose when it denies disabled individuals seeking accommodation on the Law School Admission Test (LSAT). In its current state, this review process enables LSAC to issue denials without affording the disabled applicants an opportunity to be heard or to confront adverse witnesses. These omissions fail to meet procedural due process standards, but LSAC, as a non-profit, private corporation, is not compelled to meet these standards unless its monopolistic and coercive position over law school applicants qualifies its conduct as public in character. This Note argues that if the purpose of the ADA is to be fully realized, LSAC should implement an impartial appellate review process for disputes arising from accommodation requests by disabled individuals.

INTRODUCTION

Abby Rothberg noticed that she was different in the second grade when she could not read like the rest of her peers.1 Two years later, a psychologist diagnosed her with a learning disability based on her processing speed, confirming her suspicions.2 Rothberg’s school district provided her with various accommodations, including extended time on tests, throughout the course of her elementary and secondary education, enabling her to succeed academically.3

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1 See Rothberg v. Law Sch. Admission Council, Inc. (Rothberg 1), 300 F. Supp. 2d 1093, 1095 (D. Colo. 2004), rev’d, 102 F. App’x 122 (10th Cir. 2004).
2 Id.
3 Id. at 1095–96. Rothberg received an Individualized Educational Plan (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA). Id. Recognizing that the educational needs of students with disabilities were not being adequately met, Congress enacted IDEA to ensure “equality of opportunity, full participation, independent living, and
Rothberg took both the SAT and the ACT before applying to college. She took the SAT without an extended time accommodation and scored a 960, placing her in the 38th percentile of those who took the test. Rothberg received 50% additional time to complete the ACT and scored a 25, placing her in the 82nd percentile. She matriculated to Syracuse University and received accommodations throughout her college education. By the start of her senior year, she had earned a grade point average of 3.3 out of 4.0.

During her senior year, Rothberg decided to continue her education by attending law school. She registered for the Law School Admission Test (LSAT) and applied to the Law School Admission Council (LSAC) for the accommodation of fifty percent additional time. LSAC denied her request, claiming that her documentation did not establish her disability. Rothberg took the LSAT in October 2003 without any accommodation. Hindered by her disability, she could not complete a significant portion of the test and resorted to randomly selecting answers for approximately one-third of the multiple-choice questions. As a result, she scored a 148, placing her in the 38th percentile.

Unsatisfied with her score, Rothberg decided to take the LSAT again and registered for the December 2003 test. She again attempted to secure an accommodation for the test and addressed LSAC’s concerns regarding the documentation of her disability. She

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4 See Rothberg I, 300 F. Supp. 2d at 1096.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 See Rothberg I, 300 F. Supp. 2d at 1096.
11 See id. Rothberg included in her initial request to LSAC a letter from her high school IEP case manager that stated she had been diagnosed with a processing speed learning disability and that extended time on tests was essential for her success. See id.
12 Id.
13 Id.
14 Id.
15 See id. at 1098.
16 See Rothberg I, 300 F. Supp. 2d at 1098.
underwent a neuropsychological evaluation, conducted by a clinical psychologist experienced in learning disabilities, to obtain an assessment of her disability and a recommendation for taking standardized tests.\textsuperscript{17} This evaluation confirmed Rothberg’s learning disability and concluded that because of her weak processing speed, it took her significantly longer “than the majority of her peers to complete the same volume of material.”\textsuperscript{18} The evaluation recommended that Rothberg receive extended time to complete all standardized tests to account for her disability.\textsuperscript{19}

Rothberg submitted the report to LSAC as part of her application for an accommodation on the December 2003 LSAT.\textsuperscript{20} LSAC did not dispute the psychologist’s qualifications to make such a recommendation, but denied the request because the psychologist did not administer a particular reading test.\textsuperscript{21}

After multiple fruitless appeals asking LSAC to reconsider, Rothberg opted not to take the LSAT that December.\textsuperscript{22} Instead, she visited another psychologist who administered the required reading test; the second psychologist also concluded that Rothberg required additional time on standardized tests.\textsuperscript{23}

Rothberg once again registered to take the LSAT, this time in February 2004, and again applied for an accommodation, submitting documentation from both evaluations.\textsuperscript{24} Despite two independent diagnoses and her repeated efforts to satisfy LSAC, the council once again denied Rothberg’s request for an accommodation, stating that “her documentation did not demonstrate a substantial impairment related to taking the LSAT.”\textsuperscript{25}

In each instance, LSAC’s Disabilities Specialist and Manager of Accommodated Testing, Kim Dempsey, reviewed Rothberg’s accommoda-

\textsuperscript{17} Id. at 1097.
\textsuperscript{18} Id.
\textsuperscript{19} See id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 1098. The test LSAC required is the Nelson-Denny Reading Test (NDRT). Id. The NDRT assesses an individual’s reading skills, including vocabulary, comprehension, and reading rate. See Nelson-Denny Reading Test, Riverside Publishing, http://riverpub.com/products/ndrt/index.html (last visited Dec. 29, 2012). LSAC relies on this test because it regards the reading skills assessed by the NDRT as the closest match to the reading skills assessed by the LSAT. See Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 222 (E.D. Pa. 2007).
\textsuperscript{22} See Rothberg I, 300 F. Supp. 2d at 1098–99.
\textsuperscript{23} See id. at 1099.
\textsuperscript{24} Id.
\textsuperscript{25} See id. at 1098–99.
tion requests. At the time of her review, Dempsey was not a licensed psychologist nor had she achieved her clinical doctorate. LSAC reserves the right to make final judgments regarding accommodation requests and the only avenue for appeal is to "provide substantive supplemental documentation." Thus, Dempsey could overrule doctors’ recommendations, even though she possessed no comparable level of expertise.

Rothberg filed a complaint against LSAC in the U.S. District Court for the District of Colorado. She alleged that LSAC’s actions constituted discrimination in violation of Title III of the Americans with Disabilities Act (ADA) "by failing to provide her reasonable accommodation in connection with taking the [LSAT] and by failing to engage in an interactive process with her regarding her requested accommodation." She sought a preliminary injunction ordering LSAC to allow her fifty percent additional time on the LSAT. After hearing expert testimony from both sides, the district court granted Rothberg’s motion, finding that her processing speed inhibited her ability to process information efficiently and that, without accommodation, her LSAT scores would not "accurately reflect her aptitude or achievement level."

Rothberg took the LSAT on February 7, 2004 with full accommodations, but LSAC refused to report her score in the same manner as other test takers. The district court ordered LSAC to report her score, and LSAC filed a notice of appeal and requested a stay of the injunc-

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26 Id. at 1099.
27 Id.
29 See Rothberg I, 300 F. Supp. 2d at 1099. Although Dempsey agreed with the diagnosing psychologists’ finding that Rothberg had a learning disability, she disputed their conclusion that Rothberg was substantially impaired compared to the average person and warranted an accommodation on the LSAT in the form of extended time. Id. at 1100. In reaching her conclusion that Rothberg was not substantially impaired in her ability to take the LSAT, Dempsey “relied heavily on the fact that Rothberg was able to perform in the average range on the SAT and LSAT (although in the low range of average) without accommodation.” Id. She also asserted that Rothberg’s developmental writing and arithmetic disorders would not impact her performance on the LSAT because “the LSAT does not test mathematics or actual written ability.” Id. at 1098, 1100.
30 See id. at 1095.
31 Id.
32 Id.
33 See id. at 1101. The district court also found the diagnosing psychologists’ testimonies to be more credible than that of Dempsey. Id.
34 See Rothberg v. Law Sch. Admission Council, Inc. (Rothberg II), 102 F. App’x 122, 123 (10th Cir. 2004).
The U.S. Court of Appeals for the Tenth Circuit granted the stay pending appeal. On appeal, the Tenth Circuit reversed the district court, finding that the balance of irreparable harms weighed against Rothberg. The court lifted the preliminary injunction noting that if the injunction stood, LSAC’s claim that Rothberg was not entitled to accommodation would be rendered moot. The Tenth Circuit determined that the harm to LSAC outweighed Rothberg’s stated harm of delayed educational plans and violation of the ADA because she could continue to pursue admission to law school and redress of the statutory violation, whereas LSAC’s injury would be permanent if forced to report her score.

The Tenth Circuit’s ruling left Rothberg with two choices: (1) continue her litigation against LSAC, incurring additional legal expenses and prolonging her plans to attend law school, or (2) apply to law schools with a score that did not accurately reflect her intellectual abilities. She chose the latter and graduated from Suffolk University Law School in 2007.

Rothberg’s case raises a serious issue regarding the effectiveness of the ADA in protecting individuals with learning disabilities. This issue concerns the method of measuring whether an individual’s impairment constitutes a substantial limitation to a major life activity. Rothberg’s clinical evaluations exhibited a significant discrepancy between her processing speed and innate cognitive abilities, making her “substantially impaired as compared to the average person in her ability to read

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35 Id.
36 Id.
37 See id. at 125–27.
38 See id. at 126.
39 See id.
40 See Rothberg II, 102 F. App’x at 126–27; Rothberg I, 300 F. Supp. 2d at 1101.
42 See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(b)(1) (2006) (stating that the purpose of the statute is to eliminate discrimination against individuals with disabilities); see, e.g., Bartlett v. N.Y. State Bd. of Law Exam’rs, 156 F.3d 321, 324 (2d Cir. 1998) (ruling in favor of a bar applicant’s accommodation on the bar exam, later vacated by the Supreme Court), vacated, 527 U.S. 1031 (1999); Love, 513 F. Supp. 2d at 228 (ruling that an individual with a reading impairment was not substantially limited in his ability to read and learn as compared to the average person).
43 42 U.S.C. § 12102(1)(A) (defining “disability”); see Rothberg I, 300 F. Supp. 2d at 1099–1100 (featuring two different ways of measuring an impairment in the standardized testing context that led to separate outcomes).
and process information.”

44 LSAC claimed that this impairment did not substantially impair her ability to take the LSAT because she was able to perform in the average range when taking the test without accommodation.45 Courts have taken both sides of this argument, with varying outcomes.46 The ambiguity over what constitutes a substantial limitation creates uncertainty as to which line of reasoning a court might adopt in a given case and leaves individuals like Rothberg in the difficult position of choosing between rolling the dice with litigation or simply moving on with their lives.47

Proponents on both sides articulate meritorious positions.48 On one hand, testing institutions articulate the need to preserve the academic integrity of objective measurements of ability, like the LSAT, from the potential erosion of their standardized format as more students qualify for accommodations.49 On the other hand, disability advocates argue that comparing disabled students to the average person restricts them from achieving their true potential.50

Regardless of normative policy concerns, disabled people like Rothberg are at the mercy of institutions like LSAC when they apply for an accommodation.51 By reserving the right to make the final judgment of whether an individual’s disability warrants accommodation, LSAC retains the power to overrule diagnoses of licensed psychologists and clinical experts.52 Thus, disabled applicants must resort to the ex-

44 See Rothberg I, 300 F. Supp. 2d at 1099.
45 See id. at 1100.
47 See Rothberg II, 102 F. App’x at 126–27 (finding that LSAC’s claim that Rothberg was not entitled to accommodation still warranted consideration despite the district court’s finding that she was entitled to accommodation); Rothberg I, 300 F. Supp. 2d at 1105.
49 See Lerner, supra note 48, at 1046–47.
50 See Townsend, supra note 48, at 232.
51 See Rothberg I, 300 F. Supp. 2d at 1099–1100.
52 See id.; General Information, supra note 28, at 1–2.
pensive and time consuming judicial process, an inequity that pits them against a corporation with vast resources.\(^5\)

This Note examines LSAC’s accommodation requests process and highlights the void that exists in the dispute process upon the denial of such requests. It recommends implementation of an independent third-party review that is more accessible than federal district courts. Part I examines the history of the ADA, including Congress’s passage of amendments in 2008 as a response to the courts’ interpretation of the initial legislation. Part II focuses on how courts have employed conflicting interpretations of the ADA to cases concerning learning disabilities. Part III analyzes the history of the LSAT as an objective measurement of academic ability and discusses the LSAC’s review process for accommodation requests. Finally, Part IV addresses the due process problem surrounding quasi-state actors and advocates for impartial review in LSAC’s accommodation request process. This independent review could, for example, be implemented through administrative agency review or arbitration.

I. THE HISTORY OF THE ADA

Congress drafted the ADA to establish a “national mandate for the elimination of discrimination against individuals with disabilities;” however, the Act’s ambiguous language led to contrasting findings of law by various courts after its passage.\(^5\) This ambiguity inspired Congress to pass several amendments to the ADA in 2008 in an effort to clarify the statutory language; it is still unclear how courts will apply these amendments.\(^5\)

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\(^5\) See Rothberg II, 102 F. App’x at 126–27 (finding that plaintiff’s delayed educational plans did not outweigh the injury to defendant); Law School Admission Council, Inc., Form 990, Foundation Center 9 (2009), http://dynamodata.fdncenter.org/990_pdf_archive/132/132998164/132998164_201006_990.pdf (showing that LSAC generated over seventy million dollars in total revenue in 2009).

54 See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(b)(1) (2006); see, e.g., Rothberg v. Law Sch. Admission Council, Inc. (Rothberg I), 300 F. Supp. 2d 1093, 1105–07 (D. Colo. 2004) (finding that plaintiff’s learning disability was substantially limiting in processing information and thus she was disabled under the law despite a previous LSAT score in the low average range), rev’d, 102 F. App’x 122 (10th Cir. 2004); Price v. Nat’l Bd. of Med. Exam’rs, 966 F. Supp. 419, 427 (S.D. W. Va. 1997) (finding that plaintiffs were not substantially limited in learning, and thus, not disabled under the law because their prior academic success showed that they could learn at least as well as the average person).

A. Legislative Background and Statutory Construction

In 1990, Congress passed the ADA to protect those with disabilities from discrimination in places of public accommodation.\(^{56}\) Congress found that disabled individuals “occupy an inferior status in our society” and concluded that unlike victims of racial, gender, ethnic, religious, or age discrimination, the disabled generally had no recourse for addressing discrimination against them.\(^{57}\) This discrimination takes various forms, including “failure to make modifications to existing facilities and practices, [and] exclusionary qualification standards and criteria . . . .”\(^{58}\) In passing the ADA, Congress invoked authority conferred on it by the Fourteenth Amendment and the Commerce Clause “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”\(^{59}\)

Congress organized the ADA into five titles; testing institutions are subject to Title III, which covers private persons and groups that operate places or entities of public accommodation.\(^{60}\) Thus, organizations like LSAC are subject to the ADA as places of public accommodation because they “offer[] examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education . . . .”\(^{61}\)

Under the ADA, courts may provide injunctive relief if discriminatory actions are taken against a disabled plaintiff.\(^{62}\) Defendants dis-
criminate when they fail to make “reasonable accommodations to . . . known physical or mental limitations . . . .” Upon showing a legitimate, non-discriminatory justification for their actions, however, defendants can demonstrate that they have not discriminated against the disabled plaintiff.

To prevail, a plaintiff must show that he or she is disabled under the meaning of the statute, that the request for accommodation is reasonable, and that the defendant denied that request. The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities . . . .” This definition establishes “a three-part inquiry” when considering whether a plaintiff’s asserted disability is covered by the ADA: (1) does the plaintiff suffer from a physical or mental impairment; (2) does that impairment affect a major life activity; and (3) is the plaintiff substantially limited in that major life activity?

The statute addresses the meaning of “major life activity” through an extensive but not exhaustive list of actions and bodily functions including “learning, reading, concentrating, thinking, communicating, and working.” The statute does not define “physical or mental impairment” or “substantially limits.” For further clarity regarding this issue, courts typically turn to regulatory definitions issued by the Department of Justice (DOJ) for Title III claims. The DOJ defines a mental impairment as “[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

63 42 U.S.C. § 12112(b)(5)(A); Rothberg I, 300 F. Supp. 2d at 1103.
64 See Herzog, 2009 WL 3271246, at *8 (finding that defendant did not discriminate because it had a legitimate, non-discriminatory reason for dismissing the disabled student).
65 See Rothberg I, 300 F. Supp. 2d at 1103.
68 42 U.S.C. § 12102(2).
The DOJ does not define “substantially limits.” Consequently, the only guidance as to what this term means comes from the regulatory definition issued by the Equal Employment Opportunity Commission (EEOC) for Title I claims, which defines “substantially limits” as affecting “the ability of an individual to perform a major life activity as compared to most people in the general population.” The regulation states that this term should “be construed broadly in favor of expansive coverage,” and that “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity . . . .” Even with this expansive understanding of “substantially limits,” the regulation states that “not every impairment will constitute a disability . . . .” This definition’s ambiguity coupled with the absence of any definition from the DOJ’s regulations has led to inconsistent application of the ADA across the federal judicial structure and has proven to be the biggest obstacle for disabled individuals in asserting their rights.

B. Early Cases and Interpretations

Courts struggled with the ambiguity of the term “substantially limits” in initial ADA cases, which resulted in contradictory findings. In one of the first cases to address the issue, the U.S. District Court for the Western District of New York relied on the treating physician’s recom-

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72 See id. § 35.104.
73 29 C.F.R. § 1630.2(j)(1)(ii) (2011); Aalaei, supra note 70, at 423–24 (establishing that the Equal Employment Opportunity Commission issued regulations to assist courts in interpreting the ADA).
74 29 C.F.R. § 1630.2(j).
75 Id.
76 See Gonzales v. Nat’l Bd. of Med. Exam’rs, 225 F.3d 620, 629 (6th Cir. 2000) (finding plaintiff was not substantially limited in a major life activity because his previous performance on standardized tests without accommodations proved that he could read “as well as the average person”). Compare Sutton v. United Air Lines, 527 U.S. 471, 480–93 (1999) (finding plaintiffs were not substantially limited in a major life activity; and therefore not disabled under the ADA, because of the use of corrective lenses), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, with Bartlett v. N.Y. St. Bd. of Law Exam’rs (Bartlett VI), No. 93 CIV. 4986(SS), 2001 WL 930792, at *36–37 (S.D.N.Y. Aug. 15, 2001) (finding plaintiff was substantially limited in the major life activity of reading as compared to most people despite the existence of mitigating measures).
77 See Yingling, supra note 55, at 296 (stating that early cases involving ADA claims concerned questions of how to interpret the ADA’s ambiguous terms). Compare Price, 966 F. Supp. at 424 (finding the defendant’s expert testimony was more compelling than that of the plaintiff resulting in the finding that plaintiff was not substantially limited in a major life activity), with D’Amico v. N.Y. St. Bd. of Law Exam’rs, 813 F. Supp. 217, 223 (W.D.N.Y. 1993) (relying on plaintiff’s expert testimony over the defendant’s in finding that he was substantially limited in a major life activity and thus entitled to his requested accommodation).
mendation in concluding that the plaintiff’s visual disability was substantially limiting, as reading for extended periods of time resulted in blurring, tearing, and burning sensations. The court thus required the defendant to provide the plaintiff with the physician’s recommended accommodations “[i]n order to demonstrate her abilities on an equal basis.” A few years later, however, the U.S. District Court for the Southern District of West Virginia found that the defendant’s experts were more credible than the treating physician and consequently held that the plaintiffs were not substantially limited because their academic histories exhibited academic success without accommodation.

The Supreme Court addressed this controversial ambiguity in 1999 when it decided three cases commonly known as “the Sutton Trilogy.” The Court held in these cases that any mitigating measures taken by individuals to reduce the effects of their disabilities must be considered in determining whether they are substantially limited in a major life activity and are therefore legally disabled. These three decisions appreciably narrowed ADA protections by requiring courts to consider the actions taken by disabled individuals to consciously or subconsciously reduce the effect of their disabilities on their lives. Thus, if plaintiffs are able to compensate for their disabilities with the help of auxiliary aids or corrective measures such that they are no longer substantially limited, courts will deny them ADA protection even if discriminated against based on their disabilities. These holdings continued to inform lower courts’ decisions regarding ADA claims until 2008, when Congress took action to reverse this unintended narrowing effect.

79 Id. at 222–23.
81 See Gallagher, supra note 67, at 156.
82 See Yingling, supra note 55, at 297–98; Gallagher, supra note 67, at 156.
83 See Yingling, supra note 55, at 298.
C. The ADA Amendments Act of 2008

Congress passed the ADA Amendments Act of 2008 (ADAAA) in direct response to the Supreme Court’s holding in *Sutton v. United Air Lines*.

Congress found that the holding “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” Specifically, the Court’s definition of “substantially limits” was “inconsistent with congressional intent, by expressing too high a standard.” Consequently, Congress drafted the ADAAA to reject the Court’s standard and reinstate a more expansive scope of protection under the ADA.

Congress achieved this purpose, in part, by constructing a list of rules to be applied when courts make findings of disability. One rule mandates that courts construe the definition of disability “to the maximum extent permitted by the terms of [the] Act.” Another rule directs that “substantially limits” be “interpreted consistently with the findings and purpose” of the ADAAA. A third rule commands that, in determining whether an individual is substantially limited, courts cannot consider mitigating measures, including medication, assistive technology, reasonable accommodations, or “learned behavioral or adaptive neurological modifications.”

The ADAAA took effect on January 1, 2009, and much remains to be seen as to how the Supreme Court and lower courts will interpret these amendments in the varying contexts of different disabilities.

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See § 2, 122 Stat. at 3553.

Id. § 2(a)(4).

Id. § 2(a)(8).

Id.

See id. § 4(a)(3)(4). Additionally, Congress struck language from the original draft that the Supreme Court relied on in denying protection for disabled individuals with correctable conditions. See *Yingling*, supra note 55, at 305–06. It also incorporated an extensive, non-exhaustive list of activities considered “major life activities,” as applied to the statutory definition of disability. See § 4(a)(3)(2); *Yingling*, supra note 55, at 306.


Id. § 4(a)(3)(4)(B).


See *Cox*, supra note 85, at 188–89.
Regardless of the surviving ambiguities in the ADAAA, Congress made one thing clear: the courts got it wrong the first time around.\(^95\)

### II. APPLICATION OF THE ADA TO LEARNING DISABILITIES

The scope of ADA protection covers individuals with learning disabilities.\(^96\) The ambiguous statutory phrase “substantially limits” has proved problematic, however, because courts have employed at least two different lines of reasoning in determining whether a learning impairment constitutes a disability under the Act.\(^97\) Although educational testing organizations like LSAC fear that a spike in accommodation requests will compromise their academic integrity, ample opportunity exists for these institutions to defend their integrity under the law.\(^98\)

#### A. ADA Claims Concerning Learning Disabilities

The Diagnostic and Statistical Manual of Mental Disorders defines the term “learning disability” as a broad range of mental disorders, including Reading Disorder, Mathematics Disorder, and Disorder of Written Expression.\(^99\) The basic definition incorporates two elements: (1) a “substantial discrepancy” between innate intelligence and academic achievement; and (2) a neurological basis for this discrepancy.\(^100\)

The most common of these disabilities is Reading Disorder, otherwise known as dyslexia.\(^101\) Dyslexia typically exists in students who

\(^{95}\) See § 2, 122 Stat. at 3553.


\(^{100}\) See Rowe, supra note 99, at 175.

\(^{101}\) Id. at 174.
exhibit high IQ scores but struggle with basic reading skills.\footnote{102 See id. at 175.} Thus, an unexpected discrepancy exists between dyslexic students’ overall intelligence and their reading ability.\footnote{103 See id. at 175–76.} Dyslexic students are distinguished from other poorly performing students because they exhibit high cognitive ability in other areas and something other than low intelligence inhibits their performance with written language.\footnote{104 See id.}

The ADA does not directly mention learning disabilities in its text, but the EEOC and DOJ incorporated “specific learning disabilities” into their definitions of mental impairments covered under Titles I and III of the ADA.\footnote{105 See 28 C.F.R. § 35.104(1)(i)(B) (2011); 29 C.F.R. § 1630.2(h)(2) (2011); see also Yingling, supra note 55, at 293 (stating that while the text of the ADA does not clearly cover learning disabilities, the implementing regulations clarifies their coverage “under the ADA’s umbrella of protection”).} The ADA’s coverage of learning disabled individuals is largely undisputed.\footnote{106 See Gonzales, 225 F.3d at 626 (defendant did not dispute the ADA’s applicability to learning disabilities); Rothberg I, 300 F. Supp. 2d at 1103 (same); Price, 966 F. Supp. at 424 (defendant agreed that ADHD, Disorder of Written Expression, and Reading Disorder were mental impairments covered under the ADA).} Instead, the locus of dispute centers on whether mentally impaired individuals are substantially limited in major life activities, and thus, whether their conditions are cognizable disabilities under the ADA.\footnote{107 See Gonzales, 225 F.3d at 626; Rothberg I, 300 F. Supp. 2d at 1104; Price, 966 F. Supp. at 424.} Courts have employed two different lines of reasoning in determining whether a learning disabled individual is substantially limited: (1) whether the disability inhibits the individual in a major life activity as compared to the average person; or (2) whether the disability inhibits the individual in the major life activity as compared to the average person of the same achievement level.\footnote{108 Compare Bartlett v. N.Y. St. Bd. of Law Exam’rs (Bartlett I), 970 F. Supp. 1094, 1126 (S.D.N.Y. 1997) (demonstrating the second line of reasoning in finding that plaintiff was substantially limited in reading as compared to the average law student), aff’d in part, vacated in part, 156 F.3d 321 (2d Cir. 1998), vacated, 527 U.S. 1031 (1999), with Price, 966 F. Supp. at 427–28 (demonstrating the first line of reasoning in explaining that “there is a complete lack of evidence suggesting that plaintiffs cannot learn at least as well as the average person”).}

Courts have emphasized these two lines of reasoning to varying degrees during the course of the ADA’s evolution, creating significant uncertainty for potential litigants as to the types of learning disabilities that are protected under the ADA.\footnote{109 See, e.g., Gonzales, 225 F.3d at 629 (adopting the first line of reasoning in finding that plaintiff’s impairment did not substantially limit him because he could read as well as...}
of Medical Examiners, the U.S. District Court for the Southern District of West Virginia concluded that individuals must show that they are substantially limited in a major life activity “as compared with most people.”\textsuperscript{110} The court found that the plaintiffs failed to show this due, in part, to their previous academic success without accommodations.\textsuperscript{111} While the court noted that the plaintiffs had difficulty learning, it found their claims were unfounded because they exhibited above average intellectual ability without accommodation and could learn “at least as well as the average person.”\textsuperscript{112}

This reasoning was contradicted less than a month later when the U.S. District Court for the Southern District of New York issued its opinion in Bartlett v. New York State Board of Law Examiners.\textsuperscript{113} The court found that the plaintiff, a bar applicant, was disabled because she was not able to “read in the same condition, manner, or duration as other law students” despite her inconsistent history of accommodation.\textsuperscript{114} The court reasoned that, when considering whether she was substantially limited, the proper comparison is not to the average person in the general population but to the “‘average person having comparable training, skills and abilities.’”\textsuperscript{115} As a result, even though the plaintiff could read and learn at least as well as the average person—as evidenced by her non-accommodated performance in college and graduate school—she was still substantially limited as compared to the average law student and thus was disabled under the definition of the ADA.\textsuperscript{116}

After the Supreme Court decided its Sutton Trilogy cases, courts continued to employ both lines of reasoning, arriving at contrasting conclusions of law.\textsuperscript{117} This ambiguity inspired Congress to pass the ADA Amendments Act of 2008 (ADAAA).\textsuperscript{118} During deliberations regarding

\textsuperscript{110} See Price, 966 F. Supp. at 428.

\textsuperscript{111} See id. at 427–28.

\textsuperscript{112} See id.

\textsuperscript{113} See Bartlett I, 970 F. Supp. at 1126.

\textsuperscript{114} See id. at 1101–04, 1126.

\textsuperscript{115} See id. at 1120 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2011)).

\textsuperscript{116} See id. at 1120, 1126.

\textsuperscript{117} Compare Gonzales, 225 F.3d at 629 (finding plaintiff’s impairment did not substantially limit him because he could read as well as the average person), with Rothberg I, 300 F. Supp. 2d at 1104–05 (finding plaintiff was substantially limited despite her average, non-accommodated performance on the LSAT).

the ADAAA, the Committee on Education and Labor rejected the reasoning in *Price*, concluding that prior academic success without accommodation does not preclude a finding of a disability.\(^\text{119}\)

While Congress expected the ADAAA to better protect the learning disabled, the two cases decided in its aftermath declined to apply the broadened scope and instead resorted to the reasoning found in *Price*.\(^\text{120}\) It remains to be seen whether future courts will continue to ignore this mandate and the instructive legislative history or whether they will adopt reasoning more consistent with the purpose of the ADAAA, leaving prospective plaintiffs and defendants with a great deal of uncertainty.\(^\text{121}\)

B. The Debate Over Accommodations for Students with Learning Disabilities

Critics argue that accommodations like “extra time on exams, distraction free environments for testing, and course waivers . . . would aid all students and therefore, give disabled students an unfair competitive advantage and ultimately result in lowering the educational bar.”\(^\text{122}\) One common refrain in this argument is that granting accommodations compromises the academic integrity of educational institutions by affording an advantage to students purporting to have disabilities in order to cheat the system to gain preferential treatment.\(^\text{123}\)

Educational institutions have the right to protect their academic integrity and the courts have recognized the importance of allowing institutions to determine and maintain appropriate standards.\(^\text{124}\) The


\(^{121}\) See § 2(b)(1)–(2), 122 Stat. at 3553; Herzog, 2009 WL 3271246, at *6–7; Singh, 597 F. Supp. 2d at 95; H.R. Rep. No. 110-730(1), pt. 1, at 10; see also Yingling, *supra* note 55, at 306 (“What is yet to be seen is the extent to which the courts will incorporate and acknowledge the ADAAA’s legislative history with respect to the rights of individuals with learning disabilities.”).

\(^{122}\) See Wilhelm, *supra* note 69, at 580.

\(^{123}\) See Lerner, *supra* note 48, at 1075; Wilhelm, *supra* note 69, at 580.

\(^{124}\) See, e.g., Axelrod v. Phillips Acad., Andover, 46 F. Supp. 2d 72, 74 (D. Mass. 1999) (“Courts have neither the authority nor the expertise to prescribe academic standards . . . Phillips Academy has quite properly set high academic standards for its students.”); Bartlett, *supra* at 1131 (“D]ereference is due a state in determining the qualifications an individual needs to practice law in that state.”); *Price*, 966 F. Supp. at 422 (“T]esting accommodations to persons that do not have disabilities within the meaning of the ADA . . . would allow persons to advance to professional positions through the proverbial back door.”).
purpose of the ADA, however, is not to usurp “the integrity of standards.”\textsuperscript{125} Instead, the law strikes “a balance between the rights of the disabled individual to be integrated and the legitimate interest of the academic institution in preserving the integrity of their programs.”\textsuperscript{126}

One way in which the law strikes this balance is by setting a high standard of proof for plaintiffs to qualify as disabled under the ADA.\textsuperscript{127} One may not merely assert a disability, but must show that he or she is substantially limited in a major life activity.\textsuperscript{128} For the purposes of establishing a learning disability, this means undertaking an extensive process that includes a battery of psychometric tests conducted by a licensed professional and accumulating sufficient data to support this assertion.\textsuperscript{129} Indeed, institutions retain the right to set reasonable standards requiring an individual “to provide current documentation from a qualified professional concerning his learning disability.”\textsuperscript{130}

In addition, the EEOC’s regulations state that “not every impairment will constitute a disability” under the ADA.\textsuperscript{131} Courts take seriously the inquiry of whether an impairment substantially limits a major life activity and routinely rule in favor of defendants when plaintiffs fail to show this limitation.\textsuperscript{132} Thus, there is ample opportunity for institutions to defend their academic integrity within the construction of the ADA without abolishing the practice of accommodating the learning disabled.\textsuperscript{133}

\section*{III. The Law School Admissions Council}

LSAC, the corporation responsible for administering the LSAT, was formed in the late 1940s and in the ensuing decades has grown into a multi-million dollar entity.\textsuperscript{134} LSAC enumerates several requirements

\begin{itemize}
\item \textsuperscript{125}See Jeff Brown, \textit{A Learning-Disabled Lawyer’s Perspective: A Response to “Lowering the Bar” Integrity, Stereotypical Attitudes and Reasonable Accommodations}, 42 S. Tex. L. Rev. 129, 132, 136 (2000).
\item \textsuperscript{126}See id. at 136.
\item \textsuperscript{127}See 42 U.S.C. § 12102(1) (Supp. II 2008).
\item \textsuperscript{128}See id. § 12102(1)(A).
\item \textsuperscript{129}See Bartlett I, 970 F. Supp. at 1104–09 (listing various tests administered to plaintiff in diagnosing her learning disability).
\item \textsuperscript{130}See Guckenberger, 974 F. Supp. at 135.
\item \textsuperscript{131}See 29 C.F.R. § 1630.2(j)(ii) (2011).
\item \textsuperscript{132}See, e.g., Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1067 (9th Cir. 2004); Singh, 597 F. Supp. 2d at 95; Price, 966 F. Supp. at 427–28.
\item \textsuperscript{133}See Brown, supra note 125, at 136.
\item \textsuperscript{134}See About LSAC, LSAC, http://lsac.org/AboutLSAC/about-lsac.asp (last visited Dec. 30, 2012); Form 990, supra note 53, at 9 (showing that LSAC generated over seventy million dollars in total revenue for 2009).
\end{itemize}
that submitting parties must meet in requesting an accommodation for the LSAT.\footnote{See Accommodations Request Packet: Guidelines for Documentation of Cognitive Impairments, LSAC 1–4, http://lsac.org/JD/pdfs/GuidelinesCognitive-NON.pdf (last visited Dec. 30, 2012) [hereinafter Guidelines for Documentation of Cognitive Impairments].} LSAC reserves the right to make all final determinations regarding accommodation requests but it does not provide any information as to what makes its employees more qualified to make these judgments over other professionals.\footnote{General Information, supra note 28, at 2; see Testing Accommodations for Candidates with Disabilities, LSAC 7 (2011), http://lsac.org/JD/pdfs/accommodatebrochure.pdf.} Consequently, this inequity results in a legal disadvantage for individuals disputing the denials issued to them.\footnote{See Badgley v. Law Sch. Admission Council, Inc., No. CIV.A. 4:99CV-0103-M, 2000 WL 33225418, at *2 (N.D. Tex. Aug. 24, 2000) (finding LSAC did not clearly indicate why plaintiff failed to meet its standards for accommodation); Letter from Accommodated Testing, LSAC, to author (Aug. 20, 2009) (on file with author) (citing that all psychometric test scores fell between the low-average to very superior range and thus the applicant did not warrant accommodation but failing to provide any clinical analysis refuting the evaluator’s determination of a learning disorder and a need for accommodation); E-mail from Accommodated Testing, LSAC, to author (Aug. 21, 2009, 17:26 EST) (on file with author).}

A. The Rise of LSAC

The advent of standardized testing arose out of a recognition that intelligence measurements should account for externalities beyond an individual’s control, like social class or place of birth, through an objective mechanism that focuses on innate mental aptitude.\footnote{See Lerner, supra note 48, at 1094–96.} In 1930, law schools began experimenting with the idea of an admissions test “explicitly designed to supplement other criteria and especially to provide some control on the wide variation in the meaning of college records.”\footnote{See William P. LaPiana, Rita and Joseph Solomon Professor, New York Law School, Keynote Address at 1998 LSAC Annual Meeting (May 28, 1998), in A HISTORY OF THE LAW SCHOOL ADMISSION COUNCIL AND THE LSAT 1, 1 (2001), available at http://www.lsac.org/LSACResources/Publications/PDFs/history-lsac-lsat.pdf.} Later that year, deans from several law schools met in Princeton to discuss the test, constituting the first meeting of a new organization of law schools that would come to be known as the Law School Admission Council (LSAC).\footnote{See id. at 5–6.}

LSAC is a nonprofit corporation that provides “services to ease the admission process for law schools and their applicants worldwide.”\footnote{See About LSAC, supra note 134.} Originally, LSAC oversaw the administration of the LSAT, but the in-
come from the rapidly growing test allowed LSAC to expand its services, eventually leading to a complete online law school application apparatus.\footnote{See LaPiana, supra note 139, at 6; About LSAC, supra note 134. This apparatus consists of the Credential Assembly Service and the Candidate Referral Service. See About LSAC, supra note 134.}

LSAC’s most valuable service, however, remains the administration of the LSAT and the test’s rise to prominence as an integral component of the law school application process fostered LSAC’s significant financial growth.\footnote{See About LSAT, LSAC, http://lsac.org/JD/LSAT/about-the-LSAT.asp (last visited Dec. 30, 2012); Form 990, supra note 53, at 9.} The size of the LSAT’s administration grew substantially in the ensuing decades after its initial offering in 1948, and LSAC’s membership mirrored that expansion.\footnote{See LaPiana, supra note 139, at 1–12 (follow the timeline at the bottom of each page).} LSAC administers more than 150,000 tests annually and its membership consists of over 200 law schools in the United States, Canada, and Australia, including every law school approved by the American Bar Association (ABA).\footnote{See About LSAT, supra note 134.} In 2009, LSAC generated revenue totaling $51,298,416 with $31,562,502 deriving from registration fees for the LSAT.\footnote{See Form 990, supra note 53, at 9.} With only $5,468,425 in testing administration expenses, LSAC increased its overall net worth that year by almost $20,000,000 with assets totaling $191,161,595.\footnote{See id.}

**B. LSAC’s Accommodation Review Process**

LSAC requires extensive documentation from individuals with learning disabilities requesting accommodation for the LSAT.\footnote{See Guidelines for Documentation of Cognitive Impairments, supra note 135, at 1–4.} This documentation is necessary to establish that an individual’s asserted impairment affects a major life activity, and therefore his or her ability to take the LSAT under standard conditions.\footnote{See DOJ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.309(b)(1)(iv) (2011).} As part of its regulations implementing the ADA, the DOJ supports such requirements for documentation provided that they are “reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.”\footnote{Id. at 1.}

LSAC’s required documentation consists of a psychoeducational evaluation conducted by a diagnostician with “comprehensive training
and direct experience in working with adult populations.”\textsuperscript{151} The evaluation must include: a diagnostic interview, an aptitude assessment, an achievement assessment, an information processing assessment, and a personality assessment.\textsuperscript{152} At the conclusion of the evaluation, the diagnostician must author a report that incorporates the data compiled from the testing with his or her own clinical observations and a specific diagnosis of a cognitive impairment.\textsuperscript{153} The report must also explain the necessity of each specific accommodation requested as it pertains to the impairment.\textsuperscript{154}

LSAC requires such extensive documentation because “[t]he LSAT is a high-stakes test” and “[i]n order to be fair to all test takers, [it] must ensure that [its] decisions are based on appropriate documentation that supports [an individual’s] right to accommodations.”\textsuperscript{155} LSAC is entitled to protect its most valuable asset, the LSAT, as an objective measurement by requiring individuals seeking accommodation to show functional limitations.\textsuperscript{156} The veracity of the LSAT’s objectivity relies entirely upon the standardized format so that the results “can be interpreted fairly across a broad range of candidates.”\textsuperscript{157} Thus, LSAC has an obligation to all of the test takers and law schools relying on these results to ensure that any deviation from the standardized format is designed only to give the disabled individual a fair chance on the test and not an unfair advantage.\textsuperscript{158}

LSAC’s requirements concerning documentation are clearly enumerated and legally supported; however, LSAC’s process of review once accommodation requests are properly formulated and submitted is much less clear.\textsuperscript{159} LSAC creates a file for every submission and monitors its completeness, notifying an applicant when additional information is required.\textsuperscript{160} Once completed, LSAC’s Accommodated Testing staff evaluates the submission for the appropriateness of the accommo-

\textsuperscript{151} Guidelines for Documentation of Cognitive Impairments, supra note 135, at 1.
\textsuperscript{152} Id. at 2.
\textsuperscript{153} Id. at 3.
\textsuperscript{154} Id.
\textsuperscript{156} See Badgley, 2000 WL 33225418, at *1.
\textsuperscript{157} See id.
\textsuperscript{158} See id.; Guidelines for Documentation of Cognitive Impairments, supra note 135, at 3.
\textsuperscript{159} See Guidelines for Documentation of Cognitive Impairments, supra note 135, at 1–4 (making no mention of LSAC’s review process once a submission is received).
\textsuperscript{160} Testing Accommodations for Candidates with Disabilities, supra note 136, at 7.
dation requested and informs the applicant of its decision.\(^{161}\) If the applicant disagrees with LSAC’s decision, the applicant may request reconsideration in writing by providing "substantive supplemental documentation" in addition to what was included in the initial submission.\(^{162}\) Otherwise, the decision stands, as LSAC “reserves the right to make final judgment concerning testing accommodations.”\(^{163}\)

Although LSAC requires substantive information regarding the qualifications and credentials of diagnosticians evaluating individuals for cognitive impairments, it reveals no information in its materials describing its Accommodated Testing Department on the qualifications of the individuals who form its Accommodated Testing staff.\(^{164}\) Judicial decisions reveal that LSAC employed Dr. Kim Dempsey as its Disabilities Specialist and Manager of Accommodated Testing as recently as 2007 and that she was solely responsible for determining whether a request for accommodation was granted or denied.\(^{165}\)

LSAC makes no mention of this position on its webpage or in its accompanying literature, and it is unclear whether LSAC still employs Dempsey in this capacity and whether she retains sole responsibility for granting or denying accommodation requests.\(^{166}\) It is also unclear whether Dempsey, or any other LSAC employee, possesses comparable “comprehensive training and direct experience in working with adult

\(^{161}\) Id.

\(^{162}\) General Information, supra note 28, at 2.

\(^{163}\) Id. at 3.


\(^{165}\) Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 209 (E.D. Pa. 2007). In 2007, Dempsey held a Ph.D. in Clinical Psychology and the U.S. District Court for the Eastern District of Pennsylvania qualified her “as an expert in assessing learning disabilities and ADHD, and determining reasonable accommodations for individuals with learning disabilities and ADHD.” Id. Dempsey did not always hold these credentials while employed as LSAC’s disabilities specialist, however, and courts twice discredited her clinical conclusions due, in part, to a lack of expertise. See Rothberg v. Law Sch. Admission Council, Inc. (Rothberg I), 300 F. Supp. 2d 1093, 1099–1100 (D. Colo. 2004), rev’d, 102 F. App’x 122 (10th Cir. 2004); Badgley, 2000 WL 33225418, at *2.

\(^{166}\) See Accommodated Testing, supra note 164; General Information, supra note 28, at 1–2; Guidelines for Documentation of Cognitive Impairments, supra note 135, at 1–4; Kim Dempsey, LinkedIn, http://www.linkedin.com/pub/kim-dempsey/12/603/34a (last visited Dec. 30, 2012) (stating only that Dempsey is employed by LSAC as a “Manager”); Testing Accommodations for Candidates with Disabilities, supra note 136, at 1–8.
populations” that LSAC demands from diagnosticians submitting requests for accommodation.167

The system of review undertaken by the Accommodated Testing staff is equally perplexing to individuals requesting accommodation.168 Dempsey’s process was uncovered before the U.S. District Court for the District of Colorado in 2004 when it was revealed that she “relied heavily on the fact that [the plaintiff] was able to perform in the average range on the SAT and LSAT (although in the low range of average) without accommodation.”169 The ADAAA and the DOJ’s subsequent regulations implementing the ADAAA expressly reject this reliance on previous academic performance as dispositive of a major life limitation in 2008.170 Due to LSAC’s lack of transparency in its process since the ADAAA’s passage, it is unclear whether LSAC still engages a similar line of reasoning when assessing accommodation requests.171

Due to its nonprofit status, LSAC is not required to disclose the structure of its internal organization like a federal agency or a for-profit corporation.172 As such, the difference between the information LSAC requires of the submitting parties and the lack of information it provides about its own processes presents a troubling inequity for individuals requesting an accommodation.173 The symptoms of learning disabilities vary from person to person and experts with equivalent


168 See Testing Accommodations for Candidates with Disabilities, supra note 136, at 7 (stating that files are reviewed to evaluate the accommodation requested, but not mentioning the process undertaken in assessing such a request).

169 Rothberg I, 300 F. Supp. 2d at 1100.


172 See Lerner, supra note 48, at 1096–97 (stating that Educational Testing Service, which administers the SAT, exists in a “twilight zone” as a “nonprofit, tax-exempt, allegedly scientific/educational institution”).

qualifications often arrive at differing diagnostic conclusions.\footnote{See Gallagher, supra note 67, at 168.}

Yet, despite this elasticity, LSAC reserves the right to make all final determinations regarding accommodation requests without providing any information as to what makes its employees more qualified than other professionals to make these judgments.\footnote{See General Information, supra note 28, at 2; see Testing Accommodations for Candidates with Disabilities, supra note 136, at 7.} This inequity puts individuals desiring to contest a denied request at a disadvantage, as they are given no explanation for the denial and are left to guess why LSAC made its determination.\footnote{See General Information, supra note 28, at 2; E-mail from Accommodated Testing to author, supra note 137 (stating that the new documentation received did not provide evidence of a substantial limitation and that the evaluator must determine what additional documentation may be submitted on applicant’s behalf, but failing to address the applicant’s specific questions concerning the inadequacies of the accommodation request).}

\section*{IV. The Due Process Problem}

LSAC’s one-sided accommodation review process runs contrary to traditional notions of due process because it lacks institutional transparency, impartiality, and the opportunity for denied applicants to orally present their disputes before an independent decisionmaker.\footnote{See Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (holding that the absence of an opportunity to be heard and to confront adverse witnesses were fatal to the constitutional adequacy of the procedures in question).} LSAC is exempt from constitutional due process requirements, however, unless the coercive nature of its monopolistic position over law school applicants transforms its private conduct into public action.\footnote{See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 303 (2001).} Even if its conduct does not amount to that of a quasi-state actor, the status quo of LSAC as the final arbiter of who does or does not warrant accommodation offends the purpose of the ADA; the implementation of an impartial review process for disputes arising from the denial of accommodations would resolve this inequality.\footnote{See 20 U.S.C. § 1415(f)–(h) (2006) (giving parties with a cause of action under the statute a right to be heard); 42 U.S.C. § 12101(b) (2006).}

\subsection*{A. The Goldberg Due Process Standard}

The Fourteenth Amendment guarantees that no state shall deprive any of its citizens of their rights without due process of law; however, this guarantee only applies to state action and generally does not ex-
tend to the actions of private organizations.\textsuperscript{180} In 1970, in \textit{Goldberg v. Kelly}, the Supreme Court issued a landmark decision regarding the procedural due process rights of individuals subject to the termination of benefits by state action.\textsuperscript{181} The Court held that the omissions of opportunities to orally present evidence and confront adverse witnesses were “fatal to the constitutional adequacy of the procedures.”\textsuperscript{182}

LSAC’s accommodation review process mirrors the process at issue in \textit{Goldberg} in that any request for reconsideration of a decision may only be submitted in writing without an opportunity to be heard.\textsuperscript{183} As was the case in \textit{Goldberg}, the absence of an opportunity to be heard before an independent decisionmaker is problematic because it does not allow an applicant to be fully informed of the reasoning behind the denial of his or her rights and thus severely hampers an applicant’s ability to produce evidence in rebuttal.\textsuperscript{184} In fact, LSAC forces the applicant to determine what additional information to submit for reconsideration because it does not detail the reasoning behind its decisions or explain where a given submission fell short.\textsuperscript{185}

The determination of whether a learning disabled individual warrants accommodation on the LSAT is subject to the credibility of both the submitting and deciding parties.\textsuperscript{186} The fact that some of LSAC’s own disabilities specialists’ diagnoses were previously rejected by differ-

\begin{thebibliography}{9}
\bibitem{180} U.S. \textsc{const.} amend. XIV, § 1; see Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 191 (1988) (stating that the Fourteenth Amendment applies to state action but generally not to private conduct “no matter how unfair that conduct may be”).
\bibitem{181} See 397 U.S. at 255.
\bibitem{182} Id. at 268.
\bibitem{183} See \textit{id.} at 258–59; \textit{General Information, supra} note 28, at 2 (requiring any request for reconsideration of a decision be in writing and provide substantive supplemental documentation).
\bibitem{185} See \textit{Badgley}, 2000 WL 33225418, at *2; \textit{General Information, supra} note 28, at 2 (requiring any request for reconsideration of a decision provide substantive supplemental documentation); E-mail from Accommodated Testing to author, \textit{supra} note 137 (responding to a request for reconsideration by stating that the evaluator will need to determine what additional documentation is required for accommodation, but failing to respond to the applicant’s specific inquiries).
\bibitem{186} See \textit{Goldberg}, 397 U.S. at 209 (finding that credibility was at issue in termination proceedings); Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 228 (E.D. Pa. 2007) (finding plaintiff’s impairment did not amount to a disability that warranted accommodation on the LSAT); Rothberg v. Law Sch. Admission Council, Inc. (\textit{Rothberg I}), 300 F. Supp. 2d 1093, 1101 (D. Colo. 2004) (finding that plaintiff’s experts were more credible than that of defendant), rev’d, 102 F. App’x 122 (10th Cir. 2004).
\end{thebibliography}
ent courts draws into question the reliability of its review process.\textsuperscript{187} Furthermore, LSAC’s role as the final arbiter of who warrants an accommodation presents a possible conflict of interest because of its incentive to minimize the quantity of granted accommodation requests to preserve the LSAT’s functional value as an objective measurement of ability.\textsuperscript{188}

Given the varying nature of learning disabilities and the fact that experts can reasonably disagree over a diagnosis, it would appear, as the Court found in \textit{Goldberg}, that an impartial decisionmaker is essential in settling disputes over LSAC’s determinations regarding accommodation requests.\textsuperscript{189}

Unlike in \textit{Goldberg}, however, LSAC is a private corporation and thus is not subject to the same procedural due process standards as state actors.\textsuperscript{190} An exception for private conduct exists when the nature of the conduct is so closely related to a state apparatus that it essentially assumes a public character.\textsuperscript{191} The Supreme Court stated in 2001, in \textit{Brentwood Academy v. Tennessee Secondary School Athletic Association}, that some private organizations may be held to procedural due process standards when “there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”\textsuperscript{192} Thus, if LSAC’s accommodation request process is subject to any due process standard, the corporation must be considered as public in character through its relation to the state.\textsuperscript{193}

\textbf{B. The Case for LSAC as a Quasi-State Actor}

In \textit{Brentwood}, the Supreme Court held that a nonprofit membership corporation’s regulatory activity should be treated as a state action because of the close relationship between it and public actors, namely

\textsuperscript{187} Rothberg I, 300 F. Supp. 2d at 1100 (finding LSAC’s disabilities specialist’s opinions not credible on the issue of disability); \textit{Badgley}, 2000 WL 33225418, at *2.

\textsuperscript{188} See \textit{Badgley}, 2000 WL 33225418, at *1 (finding LSAC has a legitimate interest in preserving the LSAT’s standardized format); Lerner, supra note 48, at 1105 (“The overall fairness of the educational process may be jeopardized if growing numbers of students are granted accommodations . . . .”); \textit{Accommodated Testing Frequently Asked Questions}, supra note 155 (stating the LSAT is a high-stakes test and that in order to be fair to all test takers LSAC must ensure that decisions are based on appropriate documentation).

\textsuperscript{189} See \textit{Goldberg}, 397 U.S. at 271; \textit{Gallagher}, supra note 67, at 168.

\textsuperscript{190} See \textit{Tarkanian}, 488 U.S. at 193 (finding that the multi-state membership of the NCAA meant it was independent of any one particular state and thus not a quasi-state actor).

\textsuperscript{191} \textit{Brentwood}, 531 U.S. at 295.

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.}
public high schools. The corporation was the Tennessee Secondary Athletic Association (TSAA), created to regulate interscholastic sporting events between public and private high schools within the state. Eighty-four percent of its membership consisted of public schools and the Court recognized that the TSAA would not exist without public school officials to perform its essential functions. As a result, the officials' management and control over the TSAA constituted unmistakable entwinement with the state, warranting that TSAA, a private organization, "be charged with a public character and judged by constitutional standards . . . ."

LSAC is a nonprofit membership corporation like the TSAA, but its membership includes only eighty-one public law schools out of the more than two hundred law schools accredited by the ABA. The fact that public schools comprise a minority of its membership reduces LSAC's level of entwinement with a governmental actor when compared to the public officials' entwinement with the TSAA in Brentwood. Additionally, LSAC employs private citizens to undertake its functions and generates sources of income by charging fees for its products and services, distinguishing it further from the TSAA, which could not exist without public officials carrying out its basic functions.

LSAC's construction is more analogous to the National Collegiate Athletic Association (NCAA), which the Supreme Court found was not sufficiently entwined with a governmental actor to warrant a public characterization. The NCAA is a membership association comprised of "virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States." In 1988, in National Collegiate Athletic Association v. Tarkanian, the Supreme Court held that this multi-state membership evidenced the

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194 Id. at 291, 299–300.
195 Id. at 291.
196 Id. at 299–300.
197 Brentwood, 531 U.S. at 302.
199 See Brentwood, 531 U.S. at 299–300.
200 Id.; Form 990, supra note 53, at 36–37 (showing revenue generated for the year 2009 by charging for its services and listing the salaries of executive officers and highly-compensated employees).
201 See Tarkanian, 488 U.S. at 193, 196.
202 Id. at 183.
NCAA’s independence from any particular state. The Court concluded that a state university is unquestionably a state actor; however, it does not follow that when a state university decides to adopt the NCAA’s standards and enforce them over university employees that the NCAA is then acting under the color of state law. Likewise, when a public law school decides to join LSAC and include the LSAT as a requisite for admission, it does not follow that LSAC is then acting under the color of state law when it determines the propriety of accommodation requests.

One notable distinction between Brentwood and Tarkanian is the Court’s consideration of coercion in analyzing whether a private action serves a public function. In Tarkanian, the Court held that even if NCAA’s monopolistic position over collegiate athletics enabled it to exert significant influence over state universities, “it does not follow that such a private party is therefore acting under color of state law.” In Brentwood, however, the Court found that the inquiry of whether a private action constituted a state action incorporated a case-by-case analysis and that coercion is another factor, like entwinement, that could justify finding that a private action exhibits a public character.

Given that every accredited law school in the United States requires an LSAT score for admission, LSAC arguably coerces any person with aspirations of attending law school to comply with its rules and procedures regarding the administration of the LSAT. Furthermore, law schools are rated nationally based on criteria “which give an utterly disproportionate importance to the test scores of the entering class,” leading to a heightened significance surrounding an individual’s com-

203 See id. at 193.
204 See id. at 192, 195.
205 See id.
206 See Brentwood, 531 U.S. at 303; Tarkanian, 488 U.S. at 198–99.
207 Tarkanian, 488 U.S. at 198–99.
208 See Brentwood, 531 U.S. at 303.
209 See id.; American Bar Association, 2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools 36 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf (“A law school shall require each applicant for admission as a first year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant’s capability of satisfactorily completing the school’s educational program.”); Danny Jacobs, ABA Committee Reviews LSAT Requirement, LEGAL NEWS (Feb. 22, 2011), http://www.legalnews.com/macomb/1004913 (quoting Donald J. Polden, Dean of the Santa Clara University School of Law: “The LSAT has been the only entrance exam found to be valid and reliable for the purpose of predicting success in law school”); About the Law School Admission Council, supra note 198.
pliance with LSAC’s administration of the LSAT. The LSAT has evolved into “a precondition” of becoming a lawyer in the United States and LSAC’s monopolistic position as the sole administrator of this test makes it a de facto gate-keeper of the American legal profession.

The extraordinary level of influence LSAC holds over law school applicants, and over an entire profession as a consequence, should satisfy the Supreme Court’s fact-driven analysis concerning whether LSAC’s actions constitute a public function. Although LSAC closely analogizes to the NCAA in its construction, it is distinguished from the NCAA because of its gate-keeper position over the legal profession. When Tarkanian accepted the position of basketball coach at the University of Nevada Las Vegas, he did so in full knowledge of the university’s standing as a member of the NCAA. Logic follows that Tarkanian, either directly or impliedly, agreed to coach by the NCAA’s rules when he chose to coach at a known NCAA school. Thus, it was unsurprising when the university chose to implement the NCAA’s recommendations for punishment after finding Tarkanian responsible for numerous recruiting violations. Furthermore, the university council that ultimately approved the NCAA’s recommendations afforded Tarkanian the opportunity to be heard before imposing these punishments and Tarkanian appeared, accompanied by legal representation.

Disabled individuals with career aspirations in the legal profession are afforded no such choice or opportunity to be heard in their dealings with LSAC. In fact, LSAC mandates that any individual seeking an accommodation must first register to take the LSAT before any re-

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  \item 210 See LaPiana, supra note 139, at 10.
  \item 211 See Brentwood, 531 U.S. at 303 (stating that a finding of coercive action “can justify characterizing an ostensibly private action as public instead”); Bartlett v. N.Y. St. Bd. of Law Exam’rs (Bartlett I), 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997) (referring to the passage of the state bar examination as “a precondition” to practicing as a lawyer), aff’d in part, vacated in part, 156 F.3d 321 (2d Cir. 1998), vacated, 527 U.S. 1031 (1999); American Bar Association, supra note 209, at 36; Jacobs, supra note 209; About the Law School Admission Council, supra note 198 (stating that LSAC’s membership consists of every accredited law school in the United States).
  \item 212 See Brentwood, 531 U.S. at 303.
  \item 213 See Tarkanian, 488 U.S. at 193, 196; American Bar Association, supra note 209, at 36; About the Law School Admission Council, supra note 198; Jacobs, supra note 209.
  \item 214 See Tarkanian, 488 U.S. at 180, 185 (stating that Tarkanian became the basketball coach in 1973, but the NCAA’s investigation commenced in 1972).
  \item 215 See id.
  \item 216 See id. at 186.
  \item 217 See id.
  \item 218 See General Information, supra note 28, at 1 (requiring requests for reconsideration of a decision be in writing).
\end{itemize}
quest can be processed.\textsuperscript{219} For LSAC to consider a disabled individual’s request for accommodation, that individual must agree to the rules and determinations set forth by LSAC, including its reservation “to make final judgment concerning testing accommodations.”\textsuperscript{220} Consequently, disabled individuals are coerced into agreeing with LSAC’s determinations regarding their accommodation requests before they even know what they are.\textsuperscript{221} Furthermore, when LSAC denies disabled individuals accommodations, they are forced to choose between forgoing their statutory right to compete on a level playing field with their non-disabled counterparts or, if they can afford it, incurring the expenses of time and money to bring an ADA challenge in federal district court.\textsuperscript{222}

LSAC’s reduced level of entwinement with public actors as compared to that of the TSAA should not diminish any due process claim based on coercion because, as the Court stated:

“Coercion” and “encouragement” are like “entwinement” in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.\textsuperscript{223} Thus, a due process claim based on a private actor’s coercive nature is not diminished by the absence or reduced presence of other significant factors.\textsuperscript{224} Therefore, if the Court were to find that LSAC’s coercive nature matches that of the TSAA’s entwinement, then it could characterize LSAC’s private actions as public.\textsuperscript{225}

\textsuperscript{219} Id.
\textsuperscript{220} Id. at 2.
\textsuperscript{221} Id. at 1–2.
\textsuperscript{222} 42 U.S.C. § 12101(a)(9) (2006); see Rothberg v. Law Sch. Admission Council, Inc. (\textit{Rothberg II}), 102 F. App’x 122, 126–27 (10th Cir. 2004) (citing that the continuance of the judicial process will result in a year-long delay of plaintiff’s educational plans); Turner v. Ass’n of Am. Med. Colls., 85 Cal. Rptr. 3d 94, 99 (2008) (citing the trial court’s award of $1,969,000 in attorney’s fees to the plaintiffs in a case concerning the accommodation requests of four learning disabled plaintiffs for the MCAT).
\textsuperscript{223} \textit{Brentwood}, 531 U.S. at 303.
\textsuperscript{224} See id.
\textsuperscript{225} See id.
Though LSAC’s position is distinguished from that of the NCAA, much remains uncertain as to how the Court would view LSAC’s coercive nature with respect to the Fourteenth Amendment.226 Nonetheless, the need for independent review outside of the federal judicial system in LSAC’s accommodation request process remains a key component in ensuring that learning disabled law school applicants are fully afforded their rights vis–à–vis the ADA.227

C. The Call for Impartial Review

The call for procedural reform gained traction recently when the ABA expressed its displeasure with LSAC’s accommodation request process.228 The ABA urged LSAC to “make its policies clear to those with disabilities, to give applicants decisions in a timely manner, and to provide adequate time for appeals of denials of accommodations.”229 By issuing this statement, the ABA underscored the inadequacies of LSAC’s process and expressed its concern over its treatment of disabled individuals, giving a powerful new voice to the call for change.230

LSAC’s accommodation request process empowers it to exercise broad authority in applying a federal law to citizens asserting their statutory rights and the only check on this authority is the expensive and time-consuming judicial process.231 As a result, disabled individuals must invest significant resources in counsel, on top of other necessary investments in applying to law schools, simply to challenge LSAC’s determinations in the hope that they may take the LSAT in the manner intended by the ADA.232 Further, disabled individuals are forced to make this in-

226 See U.S. Const. amend. XIV, § 1; Brentwood, 531 U.S. at 298 (citing dictum from Tarkanian that foresaw a circumstance where an association’s member schools were all located within one state); Tarkanian, 488 U.S. at 193 n.13 (stating that the Court’s holding might be different if the membership consisted of institutions entirely located within one state).

227 See 42 U.S.C. § 12101(a)(9) (asserting that one of the purposes of the ADA is to allow for disabled individuals to compete equally with non-disabled individuals); Rothberg II, 102 F. App’x at 126–27 (finding plaintiff’s year-long delay of her educational plans did not warrant upholding an injunction against LSAC compelling it to report her accommodated LSAT score to law schools).


229 Id.

230 See id.

231 See Rothberg II, 102 F. App’x at 126; Turner, 85 Cal. Rptr. 3d at 99; General Information, supra note 28, at 2.

232 42 U.S.C. § 12101(a)(9); see Rothberg I, 300 F. Supp. 2d at 1105; Turner, 85 Cal. Rptr. 3d at 99.
vestment with no discernible probability of outcome due to the conflicting interpretive history of ADA jurisprudence. This amounts to a substantial burden on learning disabled individuals who are denied accommodations for the LSAT and left with the choice of incurring the costs of legal action or taking the test without accommodation: a choice that disadvantages them regardless of the choice they make.

LSAC maintains that it receives over two thousand accommodation requests annually and that fifty percent are granted in some form. This leaves approximately one thousand individuals who may have a legitimate grievance against LSAC’s determinations in a given year. It is important to note that LSAC has justifiably denied requests in the past and many of these individuals may choose not to contest LSAC’s determinations because their claims are weak or they simply agree that they do not suffer from a legally cognizable disability. Equally important, however, is the fact that LSAC has denied accommodations to individuals with cognizable disabilities, showing that its process suffers from inconsistency and human error. Thus, a portion of the approximately one thousand individuals seeking accommodation every year are likely wrongly denied their statutory rights.

The purpose of the ADA, particularly in light of the ADAAA’s passage in 2008, is to facilitate equal opportunity for disabled individuals to participate in society, including career pursuits. LSAC’s accommodation review process fails to satisfy this purpose when it denies valid accommodation requests because these denials effectively increase the LSAT’s level of difficulty for the disabled. By forcing adherence to time limits that are suitable for the information processing speeds of

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233 Compare Love, 513 F. Supp. 2d at 227–28 (finding plaintiff was not disabled due to his previous academic success without accommodation), with Rothberg I, 300 F. Supp. 2d at 1096, 1101 (finding plaintiff was disabled despite her previous ability to score in the low average range of the LSAT without accommodation).

234 See Turner, 85 Cal. Rptr. 3d at 99; Form 990, supra note 53, at 9.

235 Sloan, supra note 228.

236 See id.

237 See, e.g., Love, 513 F. Supp. 2d at 228 (finding plaintiff was impaired, but not disabled under the law, and therefore did not warrant accommodation on the LSAT).

238 See, e.g., Badgley, 2000 WL 33225418, at *3 (finding LSAC failed to provide reasonable accommodation to disabled plaintiff).

239 See Rothberg I, 300 F. Supp. 2d at 1105–07; Badgley, 2000 WL 33225418, at *3; Sloan, supra note 228.


non-disabled individuals but utterly unsuitable for their disabled counterparts, these denials force learning disabled individuals to compete on an unequal playing field in direct conflict with the ADA’s express purpose.\textsuperscript{242}

LSAC’s process could easily be altered to fit within the ADA’s mandate by allowing for an independent party to serve as the final arbiter regarding whether an applicant is disabled under the law.\textsuperscript{243} The opportunity for a denied applicant to contest LSAC’s determinations would enable each side to state its case before an impartial finder of fact and for both sides to cross-examine adverse witnesses.\textsuperscript{244} This would also allow for the denied applicant to receive a detailed account of how LSAC arrived at its determination, providing much needed transparency in its review process and establishing adequate accountability.\textsuperscript{245} Ultimately, this would allow an independent decisionmaker to assess the credibility of each party’s experts, without any conflict of interest, and conclude whether or not the applicant’s purported disability is cognizable under the ADA, therefore warranting accommodation.\textsuperscript{246}

One solution could take the form of a quasi-judicial body housed in the Department of Education, like the review process incorporated in the Individuals with Disabilities Education Act (IDEA).\textsuperscript{247} In disputes arising from disagreements over placements of children in special education programs, IDEA affords parents “an impartial due process hearing” conducted by a state educational agency, including such procedural safeguards as the right to present evidence and the right to

\textsuperscript{242} See Rothberg II, 102 F. App’x at 126 (finding the harm to LSAC outweighed the harm to plaintiff who was found to be disabled under the law by the district court); Rothberg I, 300 F. Supp. 2d at 1105 (finding plaintiff’s impairment restricted her ability to take the LSAT and that without accommodation her results would not accurately reflect her ability); Rush, 268 F. Supp. 2d at 677.

\textsuperscript{243} See 42 U.S.C. § 12101(a)(7)–(9); Goldberg, 397 U.S. at 271 (stating that an impartial decisionmaker is essential for adequate due process).

\textsuperscript{244} See Goldberg, 397 U.S. at 268 (finding that the omission of the opportunity to present evidence orally and to confront adverse witnesses did not suffice due process standards).

\textsuperscript{245} See Badgley, 2000 WL 33225418, at *2 (finding that LSAC did not clearly define in its correspondence with plaintiff what additional information was required to secure an accommodation on the LSAT).

\textsuperscript{246} See Goldberg, 397 U.S. at 269; 271; see, e.g., Love, 513 F. Supp. 2d at 222 (finding that while plaintiff’s processing speed was clinically significant, other indicators showed that he was not disabled under the law, relying in part on defense’s expert witnesses); Rothberg I, 300 F. Supp. 2d at 1100 (finding that plaintiff was disabled under the law, relying on plaintiff’s expert witnesses as more credible than defense’s expert witnesses).

\textsuperscript{247} See 20 U.S.C. § 1415(f), (h) (2006) (providing due process safeguards including the opportunity to be heard to parents of children with disabilities who disagree with determinations made by local educational agencies).
confront witnesses.248 The Department of Education could host a similar impartial hearing process for disputes arising from accommodation requests for standardized tests and licensing exams, specializing in determining whether an asserted disability is cognizable under the ADA.249 Federal oversight of LSAC is warranted because it serves as a de facto gate-keeper of the legal profession and the government has a vested interest in ensuring that disabled individuals are afforded the opportunities to compete equally within this broad professional field pursuant to the ADA.250

Alternatively, a similar solution could be achieved through the employment of private arbitration services.251 LSAC could include a provision in its contract with registered test-takers that requires all controversies regarding the administration of the LSAT to be settled through arbitration.252 Arbitration is commonly “touted as an inexpensive, speedy, informal, and private alternative to the judicial system.”253 While the prospect of private arbitrators defining disability pursuant to the ADA certainly evinces some concerns, LSAC can take preemptive measures to ensure that arbitration successfully serves the impartial decision-making function.254 For instance, LSAC can ensure impartiality by requiring that both parties participate in the selection of the arbitrator and that a different arbitrator serve in every case.255 Although arbitration may not be the most desirable solution, the increased accessibility of an impartial review process would certainly improve the status quo.256

Regardless of the form it takes, the need for independent review of disputes arising from LSAC’s accommodation request process is

248 Id.
250 See 42 U.S.C. § 12101(a)(7)–(9); Bartlett, 970 F. Supp. at 1121; American Bar Association, supra note 209; Jacobs, supra note 209.
251 See 9 U.S.C. § 2 (2006) (establishing that a written provision in a contract for a commercial transaction may bind parties to arbitration arising out of controversies regarding the transaction).
252 See id.
254 See id. at 451–52, 458 (stating that “parties injured by arbitral misconduct have limited recourse and effectively no remedy”).
255 See id. at 451–52 (noting that there are thousands of individual arbitrators, that parties may include provisions in their contracts regarding the use of their services, and that arbitration is typically defined as impartial dispute resolution by a judge mutually accepted by the disputing parties).
256 See id. at 452, 458 (stating that arbitration is a speedy and informal alternative to the judicial system but that arbitral misconduct is effectively immune to a judicial recourse).
clear.\textsuperscript{257} Just as LSAC is entitled to protect the objectivity of its test, learning disabled individuals are equally entitled to compete against their non-disabled counterparts on an equal footing.\textsuperscript{258} It seems only fair that disputes over accommodation requests should be fought on an equal footing as well, and the inclusion of an independent review process outside of the federal judicial system would help ensure that denied applicants have access to an adequate remedial procedure.\textsuperscript{259}

**Conclusion**

LSAC provides an important service to the legal community by administering an objective measurement of ability to thousands of law school applicants annually. The need for objectivity in higher-education arose out of a counter-elitist movement that called for equal opportunity in the application process. Unfortunately, and somewhat ironically, LSAC’s current accommodation review process achieves the opposite effect by forcing denied learning disabled applicants into an impossibly unfair decision to sue or play by LSAC’s rules.

The ADA was written to eliminate the barriers that disabled people face in becoming functional, successful, and perhaps most importantly, normal members of our society. As it is currently constructed, LSAC’s accommodation review process only exacerbates the difficulty of living with a disability when it denies accommodation to a disabled individual without proper procedural due process. Regardless of the remedial form, the ADA makes clear that the status quo is unacceptable and if we are to achieve its purpose in eliminating discrimination against the disabled, LSAC must be held to a higher standard.

\textsuperscript{257} See \textit{Goldberg}, 397 U.S. at 271 (finding that an impartial decisionmaker is essential for adequate due process); American Bar Association, supra note 209, at 36; Jacobs, supra note 209; Sloan, supra note 228.


\textsuperscript{259} See \textit{Goldberg}, 397 U.S. at 271; Sloan, supra note 228 (stating that LSAC grants accommodations to fifty percent of the two thousand annual accommodation requests).