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Sonia Sotomayor - 2nd Circuit (NY) [5]

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001. report	Re: Sonia Sotomayor (3 pages)	nd	P2, P5
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COLLECTION:

Clinton Presidential Records
 Counsel's Office
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FOLDER TITLE:

Sonia Sotomayor - 2nd Circuit (NY) [5]

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

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- b(1) National security classified information [(b)(1) of the FOIA]
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- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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LaTourette, Steven C. (R-19th OH)	1239	225-5731	98
Lazio, Rick (R-2nd NY)	2444	225-3335	86
Leach, Jim (R-1st IA)	2186	225-6576	60
Lee, Sheila Jackson (D-18th TX)	410	225-3816	113
Levin, Sander M. (D-12th MI)	2209	225-4961	72
Lewis, Jerry (R-40th CA)	2112	225-5861	39
Lewis, John (D-5th GA)	229	225-3801	50
Lewis, Ron (R-2nd KY)	223	225-3501	62
Linder, John (R-11th GA)	1005	225-4272	51
Lipinski, William O. (D-3rd IL)	1501	225-5701	54
Livingston, Bob (R-1st LA)	2406	225-3015	64
LoBiondo, Frank A. (R-2nd NJ)	222	225-6572	82
Lofgren, Zoe (D-16th CA)	318	225-3072	35
Lowey, Nita M. (D-18th NY)	2421	225-6506	89
Lucas, Frank D. (R-6th OK)	107	225-5565	99
Luther, Bill (D-6th MN)	117	225-2271	74
Maloney, Carolyn (D-14th NY)	1330	225-7944	88
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Mascara, Frank R. (D-20th PA)	314	225-4665	105
Matsui, Robert T. (D-5th CA)	2308	225-7163	33
McCarthy, Carolyn (D-4th NY)	1725	225-5516	86
McCarthy, Karen (D-5th MO)	1232	225-4535	77
McCollum, Bill (R-8th FL)	2266	225-2176	46
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McDade, Joseph M. (R-10th PA)	2107	225-3731	103
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McGovern, James P. (D-3rd MA)	512	225-6101	104
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McIntosh, David (R-2nd IN)	1208	225-3021	57
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Meeks, Gregory W. (D-6th NY)	1035	225-3461	87
Menendez, Robert (D-13th NJ)	405	225-7919	84
Metcalf, Jack (R-2nd WA)	1510	225-2605	120
Mica, John (R-7th FL)	106	225-4035	46
Millender-McDonald, Juanita (D-37th CA)	419	225-7924	38
Miller, Dan (R-13th FL)	102	225-5015	47
Miller, George (D-7th CA)	2205	225-2095	33
Minge, David (D-2nd MN)	1415	225-2331	73
Mink, Patsy T. (D-2nd HI)	2135	225-4906	52
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Mollohan, Alan B. (D-1st WV)	2346	225-4172	122

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Rangel, Charles B. (D-15th NY)	2354	225-4365	88
Redmond, Bill (R-3rd NM)	2268	225-6190	85
Regula, Ralph (R-16th OH)	2309	225-3876	97
Reyes, Silvestre (D-16th TX)	514	225-4831	113
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Stump, Bob (R-3rd AZ)	211	225-4576	30
Stupak, Bart (D-1st MI)	1410	225-4735	70
Sununu, John E. (R-1st NH)	1229	225-5456	81
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Tanner, John S. (D-8th TN)	1127	225-4714	110
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Tauzin, W.J. "Billy" (R-3rd LA)	2183	225-4031	64
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Taylor, Gene (D-5th MS)	2447	225-5772	76
Thomas, William M. (R-21st CA)	2208	225-2915	35
Thompson, Bennie G. (D-2nd MS)	1408	225-5876	75
Thornberry, William "Mac" (R-13th TX)	412	225-3706	112
Thune, John R. (R-At Large SD)	506	225-2801	108
Thurman, Karen (D-5th FL)	440	225-1002	46
Tiahrt, Todd (R-4th KS)	428	225-6216	61
Tiemey, John F. (D-6th MA)	120	225-8020	69
Torres, Esteban Edward (D-34th CA)	2269	225-5256	38
Towns, Edolphus (D-10th NY)	2232	225-5936	87
Traficant, James A., Jr. (D-17th OH)	2446	225-5261	97
Turner, Jim (D-2nd TX)	1508	225-2401	111
Underwood, Robert A. (D-GU)	424	225-1188	126
Upton, Fred (R-6th MI)	2333	225-3761	71
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Vento, Bruce F. (D-4th MN)	2304	225-6631	74
Visclosky, Peter J. (D-1st IN)	2313	225-2461	57
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Wamp, Zach (R-3rd TN)	423	225-3271	109
Waters, Maxine (D-35th CA)	2344	225-2201	38
Watkins, Wes W. (R-3rd OK)	2312	225-4565	99
Watt, Melvin (D-12th NC)	1230	225-1510	93
Watts, J.C. (R-4th OK)	1210	225-6165	99
Waxman, Henry A. (D-29th CA)	2204	225-3976	37
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Whitfield, Edward (R-1st KY)	236	225-3115	62
Wicker, Roger (R-1st MS)	206	225-4306	75
Wise, Robert E., Jr. (D-2nd WV)	2367	225-2711	122
Wolf, Frank R. (R-10th VA)	241	225-5136	119
Woolsey, Lynn (D-6th CA)	439	225-5161	33
Wynn, Albert (D-4th MD)	407	225-8699	67
Yates, Sidney R. (D-9th IL)	2109	225-2111	55
Young, C.W. Bill (R-10th FL)	2407	225-5961	46
Young, Don (R-At Large AK)	2111	225-5765	29

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12 Nydia M. Velázquez (D)

Of Brooklyn — Elected 1992, 3rd term

Biographical Information

Born: March 22, 1953, Yabucoa, P.R.

Education: U. of Puerto Rico, B.A. 1974; New York U., M.A. 1976.

Occupation: Professor.

Family: Divorced.

Religion: Roman Catholic.

Political Career: N.Y. City Council, 1984-85; defeated for re-election to N.Y. City Council, 1984.

Capitol Office: 1221 Longworth Bldg. 20515; 225-2361.

Committees

Banking & Financial Services

Domestic & International Monetary Policy; Housing & Community Opportunity

Small Business

Empowerment (ranking)



In Washington: Velázquez is the first Puerto Rican woman elected to Congress, the beneficiary of a district designed to expand Hispanic representation in Congress. Born in the sugar cane region of Puerto Rico, she was also the first Hispanic woman to serve on the New York City Council.

Velázquez began the 105th Congress with a new assignment — ranking Democrat on the Empowerment Subcommittee of the Small Business Committee — to complement her continued service on the Banking and Financial Services Committee. She also serves amid uncertainty: A federal court in February 1997 said her district, which reaches across three boroughs to take in a Hispanic majority, was an unconstitutional racial gerrymander. "I'm very disappointed," said Velázquez, who planned to appeal. "It's a sad day for communities of color."

Velázquez worked as a liaison between the Puerto Rican government and Latino communities in the United States from 1986 until her first House election in 1992. In Congress, she has been a vocal advocate for the concerns of immigrants at a time of growing public anger not only about illegal immigration, but also about the cost of providing services to people who come to this country legally.

In the 104th Congress, she voted against a Republican-sponsored measure to allow states to deny public education to illegal aliens. When the House considered overhauling the nation's immigration laws, she challenged a provision forbidding illegal aliens from collecting certain benefits on behalf of their U.S.-born children. Velázquez questioned how these children would obtain their lawful benefits, but her amendment to delete the provision was defeated, 151-269, in March 1996. That same month, she voted against a measure requiring employees to verify that their workers were in the country legally.

Also in March 1996, she blasted legislation

that would make English the official language of the U.S. government and require the government to conduct all official business in English. "It fuels the fire of anti-immigrant hatred, encouraging racism and discrimination," she said.

Like most other New York City Democrats, Velázquez compiles a liberal voting record. During her first four years in office, the liberal Americans for Democratic Action gave her favorable ratings of 95, 100, 100, and 100. She voted in the 104th against overhauling welfare, against repealing the ban on certain semiautomatic assault-style weapons, against limiting punitive damages in product liability cases, against banning a particular abortion technique that opponents call "partial-birth" abortion, against limiting congressional terms, against banning the federal recognition of same-sex marriages, and against balancing the budget largely through restraining the rate of growth in spending on Medicaid and Medicare.

"Many seniors will have to make hard choices between food on their table or the medical attention that they desperately need to survive," she said in June 1995. "Republicans argue that these cuts are necessary to save the system. However, the very same Republican budget that cuts Medicare contains a \$288 billion tax giveaway for the most affluent Americans. Senior citizens have worked hard and contributed all their lives to this country. They deserve affordable health care. Let us end these shameless cuts and consider real health care reform."

Like her fellow New York lawmaker, Jose E. Serrano, who also is of Puerto Rican ancestry, Velázquez voted against tightening the U.S. economic embargo of Cuba.

As befits her liberal leanings, she was a strong supporter of raising the minimum wage. "The latest polls show that 85 percent of Americans are in favor of raising the minimum wage," she said in April 1996 as the House GOP leadership continued to resist efforts by Democrats and some moderate Republicans to allow a minimum wage bill to reach the floor. "I will say to my Republican colleagues, they have lost the battle in the court

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NEW YORK

The 12th district, drawn to create a second Hispanic majority district, likely will look different before the 1998 elections. A federal court in February 1997 ruled that the district was an unconstitutional racial gerrymander.

The district was born as a result of an ongoing influx that began just after World War II. Hispanic population had grown by 1990 to nearly a quarter of the city's total. Yet only the South Bronx House district had sent a Hispanic to Congress.

Drawing a new Hispanic-majority district, however, was no easy matter. Unlike blacks, who often live in geographic concentrations, Hispanic immigrants settled in disparate low- and middle-income communities scattered across the city's five boroughs. Mapmakers had to go block-by-block to build a district that could reasonably assure a Hispanic's election. The result was the 12th, one of the most unusually shaped House districts in the nation's history. It follows a wildly meandering path through parts of three New York City boroughs: Queens, Brooklyn and Manhattan.

Along with its geographic sampling, the 12th also has an ethnic variety that the generic term Hispanic — which applies to nearly three-fifths of the district's residents — fails to capture. Puerto Ricans, by far the largest single group, make up nearly half the Hispanic population. The other groups came from Mexico, the Caribbean, and Central and South America.

The district's design had its desired effect in 1992: Velázquez, a Puerto Rican activist, won out over a crowded Democratic primary field that included non-Hispanic Democratic Rep. Stephen J. Solarz, whose district was eliminated under reapportionment. She then easily won the general election in this overwhelmingly

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Lower East Side of Manhattan; parts of Brooklyn and Queens

Democratic district.

But voter participation in the 12th is greatly dampened by such factors as residents' recent immigration status and poverty. In 1996, Velázquez received fewer votes than any other winning congressional candidate in the state, even though she polled 85 percent.

The district's northeastern terminus is well into Queens (the borough has slightly more than a quarter of the 12th's population). The district's parts of Jackson Heights, Corona and Elmhurst are largely Hispanic.

The district then moves southwest through Woodside and Maspeth and into Brooklyn, which has just over half the 12th's population. Hispanics share this section with blacks in East New York and Bushwick and with Hasidic Jews in Williamsburg; Sunset Park, at the southern end, is racially and ethnically mixed.

From there, the 12th crosses the East River — on the Brooklyn and Manhattan bridges and the Brooklyn-Battery Tunnel — to Manhattan's Lower East Side.

The Manhattan portion (about a fifth of the district) is the only one where Hispanics are in the minority. Here Asians are the largest racial group; the district takes in most of Chinatown. There are also remnants of the Lower East Side's once abundant Jewish population.

1990 Population: 580,340. White 196,368 (34%), Black 79,265 (14%), Other 304,707 (53%). Hispanic origin 335,817 (58%). 18 and over 417,933 (72%), 62 and over 60,819 (10%). Median age: 30.

of public opinion. . . . Instead of following the will of the American people, they are following the will of corporate America and the fat cats who have funded their campaigns. That is immoral."

An opponent of NAFTA, she also sided with organized labor in March 1997 when she voted against legislation allowing companies to offer their employees compensatory time off in lieu of overtime pay.

She has taken to the House floor on a number of other occasions to criticize Republican budget proposals. In March 1995, she accused the GOP of voting to cut the school lunch program. "With a five-year, \$5 billion program cut, the GOP will raise the nutritional deficit of thousands of school age kids," she said. "Republicans need to understand that in their callous and inhuman proposal, they will be hurting the most vulnerable of Americans — our nation's children."

And in September 1995, she strongly backed the Legal Services Corporation, calling Repub-

lican efforts to eliminate it "one of the most shameful attacks on the working poor that I have ever witnessed." She continued: "The Constitution says we are all entitled to equal protection under the law, but in today's society some of us seem to be more equal than others. You see, in this country if you have the money to hire a good lawyer, you can make your way through our legal system. If you are poor, new to this country, or don't understand the legal system, however, you will lose regardless of whether you are right or wrong. That's why the efforts of the Legal Services Corporation are so important. They are in over 900 communities, working to make sure that those who need help have a fighting chance."

In June 1996, she introduced legislation that she said would put an end to "cruel policies" of health maintenance organizations. "Across this country, Americans are joining managed care plans in order to cut costs," she said. "However, while ultra-wealthy HMOs are making multibil-

lion-dollar profits, working-class families are paying for these profits with their health and, in some cases, their lives. Health care companies should make people healthier, not sicker, yet HMO patients are routinely denied access to specialists and refused compensation for emergency room visits."

Velázquez was part of a group of 20 Latino women that met with Hillary Rodham Clinton in April 1993 to discuss health care reform. "I want Hillary to get the real picture when it comes to Latinas and health care," Velázquez said before the meeting.

Since the Clintons were looking to fully computerizing medical records as a way of cutting health costs, Velázquez stressed the importance of privacy. "People may fear seeking professional help if they feel their records could be leaked," Velázquez said.

During her first House campaign, an anonymous source faxed to the New York Post hospital records showing that she had attempted suicide in 1991. The records also revealed that she had been battling depression with alcohol and pills.

"It was a sad and painful experience for me — and one I thought was now in the past," she said at a news conference in Brooklyn at the time. Friends said her depression stemmed from being torn between duty to her ailing parents in Puerto Rico and her work with the New York Hispanic

community. She said counseling had helped her overcome her depression.

At Home: In 1992, Velázquez secured election in the newly drawn Hispanic-majority 12th by winning a hard-fought Democratic primary over five contenders, including nine-term Rep. Stephen J. Solarz.

Velázquez's local name recognition had increased dramatically shortly before her 1992 race, when she ran a Hispanic voter registration effort financed by the Puerto Rican government. She said the effort registered 200,000 voters nationwide, but critics contended that she targeted the Brooklyn sections that later became part of her congressional district.

Her biggest obstacle in the 1992 primary was Solarz, whose district had been dismantled in redistricting. Solarz targeted his ads to the Hispanic media, hired Hispanic advisers and learned a few Spanish phrases. But as an unknown to many of his would-be constituents, he was branded a carpetbagger and wealthy outsider.

Velázquez, if the local favorite, was not the only Latino candidate. With four other Hispanics in the primary, many predicted that Solarz would benefit from a split vote among Hispanics. But Velázquez got 33 percent to Solarz's 28 percent. General elections are an afterthought in the heavily Democratic district.

HOUSE ELECTIONS

1996 General			
Nydia M. Velazquez (D,L)	61,913	(85%)	
Miguel I. Prado (R,C,RTL)	9,978	(14%)	
Eleanor Garcia (SW)	1,283	(2%)	
1994 General			
Nydia M. Velazquez (D,L)	39,929	(92%)	
Genevieve R. Brennan (C)	2,747	(6%)	
Eric Ruano-Melendez (PHA)	589	(1%)	

Previous Winning Percentages: 1992 (77%)

CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Velazquez (D)	\$294,751	\$104,402 (35%)	\$236,564
Prado (R)	\$32,869	\$600 (2%)	\$23,991
1994			
Velazquez (D)	\$624,095	\$189,989 (30%)	\$605,787

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	80,852 (84%)	D	67,114 (68%)
R	10,249 (11%)	R	25,622 (26%)
I	2,296 (2%)	I	5,121 (5%)

KEY VOTES

1997	Ban "partial birth" abortions	N
1996	Approve farm bill	N
	Deny public education to illegal immigrants	N
	Repeal ban on certain assault-style weapons	N
	Increase minimum wage	Y
	Freeze defense spending	Y
	Approve welfare overhaul	N
1995	Approve balanced-budget constitutional amendment	N
	Relax Clean Water Act regulations	N
	Oppose limits on environmental regulations	Y
	Reduce projected Medicare spending	N
	Approve GOP budget with tax and spending cuts	N

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	78	20	94	4	2	94
1995	83	11	93	2	3	94
1994	71	28	94	2	6	92
1993	68	27	95	2	7	93

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	100	n/a	6	0
1995	100	100	8	13
1994	100	100	17	0
1993	95	100	0	0

5 Martin Olav Sabo (D)

Of Minneapolis — Elected 1978, 10th term

Biographical Information

Born: Feb. 28, 1938, Crosby, N.D.

Education: Augsburg College, B.A. 1959; U. of Minnesota, 1960.

Occupation: Public official.

Family: Wife, Sylvia Ann Lee; two children.

Religion: Lutheran.

Political Career: Minn. House, 1961-79, minority leader, 1969-73, speaker, 1973-79.

Capitol Office: 2336 Rayburn Bldg. 20515; 225-4755.

Committees

Appropriations

District of Columbia; National Security; Transportation (ranking)



In Washington: After spending the 103rd Congress helping make federal fiscal policy as chairman of the Budget Committee, Sabo was relegated by the Republican-led 104th Congress to a defensive role, fighting budget cutting efforts led by Rep. John R. Kasich, R-Ohio, the new

committee chairman.

In the 105th, Sabo steps away from the media swirl and controversy of the Budget Committee, having served there the maximum time permitted under Democratic rules. His new focus is Appropriations' Transportation Subcommittee, where he is ranking Democrat. Upon moving to the post, he said he would strongly support mass transit and alternative means of transportation such as bicycles. He also sits on Appropriations' National Security and District of Columbia subcommittees.

Sabo began the 105th by cosponsoring a bill he had proposed for much of the 1990s, so far to no avail. It would raise the minimum wage to \$6.50 an hour by July 1, 2000. Under legislation enacted in 1996, the minimum wage increased from \$4.25 to \$4.75 an hour in October 1996 and will increase to \$5.15 an hour in September 1997. "If we do not follow last year's action . . . the value of the minimum wage, the working wage, will erode," he said. Sabo also reintroduced legislation encouraging companies to limit their executives' compensation to 25 times what the lowest-paid worker earns.

As those two measures attest, Sabo usually toes the liberal line on both fiscal and social issues. He opposed the welfare overhaul bill signed by President Clinton in 1996, he voted against banning federal recognition of same sex marriages and he opposed conservatives' efforts to ban a particular abortion technique called a "partial-birth" abortion.

He is a staunch foe of the balanced-budget amendment. "The Constitution did not create our budget problems, and amending it will not solve

them," Sabo has said. "Rather, balancing our budget requires an exercise of political will that is not dependent on the Constitution. The amendment either would be an unenforceable promise that could undermine respect for the Constitution itself, or its enforcement would shift unprecedented budgetary powers away from the people's representatives in Congress to the courts and to the president."

But like many liberals, he has embraced the concept of balancing the budget, albeit not in the ways that Republicans prefer. In the 104th, Sabo joined members of The Coalition, a group of conservative Democrats better known as the "blue dogs," in supporting an alternative to the balanced-budget proposal pushed by the Republicans. Basically, it eschewed the GOP's tax cut plans and thus was able to reduce spending more modestly.

"We can reduce the deficit significantly without resorting to the extreme agenda that the Republican majority tried to enact," he said. "We can balance the budget without abandoning working families, without hurting the most vulnerable Americans and without jeopardizing the country's economic future."

From his perch on the Budget Committee, Sabo was outspoken in his opposition to the GOP plan. "Throughout this budget process, Republicans engaged in a one-sided attack on lower-income Americans," Sabo said. "It's historic but negative."

Early in the process of drafting a fiscal 1996 budget, he tried to eliminate the tax cuts that were a key ingredient of the Republicans' plan. In June 1995, Sabo unsuccessfully tried to instruct House-Senate budget conferees to give up the tax cuts and support smaller reductions in the earned-income tax credit for the working poor. Sabo's motion was defeated, 183-233.

He voted against all the Republican budget proposals and supported the temporary spending bills enacted to end the partial government shutdowns in November 1995 and January 1996. The GOP leadership ultimately yielded ground on the budget to President Clinton and voted to reopen the government. With that episode passed, Sabo

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Most residents of the 5th can honestly say they've never left the Democratic fold, no matter how well Republicans have done in national and statewide elections.

Minneapolis residents account for roughly two-thirds of the 5th's voters, and except for those on the southwest side, they predictably choose liberal candidates over conservatives.

The district is home to former Vice President Walter F. Mondale (when he lives in Minnesota) and routinely backs Democratic presidential candidates, even in elections when their nominee is being waxed nationally. When Democrats do well across the country, as Bill Clinton did in 1996, they do even better here; Clinton polled 64 percent of the vote.

Scandinavians remain the most conspicuous ethnic group; it is no coincidence that Sabo includes his middle name, Olav, on all his official papers to eliminate any doubt that he is of Norwegian heritage.

Although many of the flour mills that once lined the Mississippi River at St. Anthony's Falls have moved, the major companies that settled in Minneapolis — Pillsbury and General Mills — have remained and diversified.

They are among the major employers in the Twin Cities, along with the new "brain power" companies that find Minneapolis ideally suited for their needs. Honeywell has its worldwide headquarters here. The white-collar professionals who have been attracted by these "clean" industries help to give the city an image that is reflected in the glistening towers of its downtown area.

Even the presence of Fortune 500 companies could not halt a late 1980s downturn in the

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regional economy. But it has rebounded since then.

Minneapolis is not only parks, lakes, glass and chrome. Northwest of the downtown office towers are some poor neighborhoods, home to blacks and some of the city's Chippewa Indian population. East of the Mississippi are older, more traditional blue-collar areas adjoining the main campus of the University of Minnesota.

In 1993, the Supreme Court rejected the federally drawn redistricting map that had been used in the 1992 election. Candidates now run under a state-drawn plan. The recent rounds of redistricting have made the district a bit less Democratic. A number of suburban areas — including Golden Valley and New Hope — were added under the federal plan. The post-1992 state redistricting gave the 5th roughly half of the Republican-oriented suburb of Edina.

Republicans had hoped that these suburbs would mean more GOP votes and a chance to beat Sabo, but that has not happened. Sabo's 64 percent was his best performance since 1990, the election before reapportionment.

While the power of organized labor has waned over the years, it is still a factor in the 5th. So is the district's minority population.

1990 Population: 546,887. White 458,721 (84%), Black 51,602 (9%), Other 36,564 (7%). Hispanic origin 9,654 (2%). 18 and over 435,052 (80%), 62 and over 90,275 (17%) Median age: 33.

had a quieter second year as ranking Democrat on Budget: Republicans in 1996 were willing to compromise with the White House rather than risk election-year voter ire over further government shutdowns.

In contrast to his opposition to the Republicans' budget proposals, Sabo proudly claimed credit for his efforts in pushing through Clinton's 1993 budget plan, which resulted in four years of declining deficits. "Clearly, the 1993 deficit-reduction package has worked," Sabo said in October 1996.

When he took over as Budget chairman in 1993, Sabo was regarded as bright but not as well-versed in the obscure budget procedures as the man he replaced, Democrat Leon E. Panetta. Nevertheless, his patient negotiating and the Democratic majority's desire to stay united behind Clinton gave the president's first budget a successful journey through the House. Democrats voted down every substantive GOP effort to change it.

In late 1993, Sabo continued to play good sol-

dier for the administration on budget matters, helping to defeat a proposal, offered by deficit hawks Kasich and former Democratic Rep. Timothy J. Penny of Minnesota, to cut federal spending by an additional \$90 billion over five years. Instead, Sabo helped push through \$37 billion in spending cuts, an amount based in large part on a White House plan to cut the federal work force.

In arguing against the Penny-Kasich proposal, Sabo said deeper cuts would harm the Clinton administration's efforts at health care reform. Sabo was a cosponsor of Clinton's health care reform plan and also a single-payer plan introduced in the House.

On Appropriations, Sabo looks out for the major high-technology firms in his district as well as for the University of Minnesota, while advocating development of a federal policy on supercomputers. In April 1996, he sent a letter to the National Science Foundation urging that the National Center for Atmospheric Research (NCAR) in Boulder, Colo., buy an American-made

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supercomputer rather than a Japanese machine. Supercomputer manufacturer Cray Research is a major employer in Sabo's district.

And the fiscal 1996 transportation appropriations bill included \$2 million for an intelligent highway system in Minnesota. During the June 1995 Appropriations Committee markup of the bill, Sabo joined his fellow Democrats in opposing changes in labor law. The top Democrat on the Transportation Appropriations Subcommittee, Ronald D. Coleman, proposed to strike a provision of the bill that would eliminate the labor protections in federal transit law.

The Labor Department now reviews all federal grants to transit agencies to ensure that the money would not be used to the detriment of transit employees. Transit agencies complain that this requirement raises costs and holds up their funding needlessly. Coleman's amendment would have set a 60-day deadline for the department to approve each grant, in keeping with the department's own efforts to streamline and speed its reviews.

His voice wavering with emotion, Sabo said the proposed repeal would exacerbate a national trend toward lower wages for low-skill workers. "This is another fundamental attack on the income of working people of this country." The amendment was defeated, 23-25, with all Democrats and five Republicans voting yes.

Sabo has one semi-official duty in Congress each year, this one in the sports realm: He coaches the Democratic squad in the annual congress-

sional baseball game.

At Home: Sabo has never been a flashy campaigner, but he has been a significant presence in Minnesota politics virtually all his adult life.

When Democrat Donald Fraser left the House for an unsuccessful Senate try in 1978, nearly a dozen candidates began maneuvering to succeed him. But when Sabo announced that he wanted the job, nearly all bowed out of the contest. Those who remained either lost at the endorsing convention or badly trailed his 81 percent primary victory.

Even then, he was already a fixture on the political scene. Elected to the state Legislature at 22, he had served as state House Speaker for six years before trying for Congress. He was seen by most voters as the logical liberal successor to Fraser.

Sabo's first Republican opponent, dentist Mike Till, conducted a much more visible campaign than Republicans usually wage in this heavily Democratic district.

Sabo's winning percentage in 1978 (62 percent) was not quite up to what Fraser had been receiving. But by his second election, Sabo had achieved solid support throughout the area, even in the communities of the district where he was weakest against Till.

Sabo has won handily since then, although his GOP opponent in 1994, Dorothy LeGrand, a black woman who supported abortion rights, held Sabo to 62 percent, his lowest share since he first won the seat in 1978. He polled 64 percent in 1996.

HOUSE ELECTIONS

1996 General			
Martin Olav Sabo (D)	158,275	(64%)	
Jack Uldrich (R)	70,115	(28%)	
Erika Anderson (GR)	13,102	(5%)	
Jennifer Benton (SW)	4,284	(2%)	
1994 General			
Martin Olav Sabo (D)	121,515	(62%)	
Dorothy LeGrand (R)	73,258	(37%)	
Previous Winning Percentages: 1992 (63%) 1990 (73%)			
1988 (72%) 1986 (73%) 1984 (70%) 1982 (66%)			
1980 (70%) 1978 (62%)			

CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Sabo (D)	\$498,260	\$242,438 (49%)	\$515,970
Uldrich (R)	\$68,843	\$4,066 (6%)	\$66,821
1994			
Sabo (D)	\$460,657	\$307,710 (67%)	\$333,075
LeGrand (R)	\$150,790	\$8,992 (6%)	\$148,799

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	87	13	96	4	18	82
1995	88	11	94†	4†	14†	85†
1994	83	17	97	1	6	94
1993	81	18	96	2	11	84
1992	15	83	96	2	8	92
1991	30	68	91	5	8	89

† Not eligible for all recorded votes.

KEY VOTES

1997	Ban "partial birth" abortions	N
1996	Approve farm bill	N
	Deny public education to illegal immigrants	N
	Repeal ban on certain assault-style weapons	N
	Increase minimum wage	Y
	Freeze defense spending	Y
	Approve welfare overhaul	N
1995	Approve balanced-budget constitutional amendment	N
	Relax Clean Water Act regulations	N
	Oppose limits on environmental regulations	Y
	Reduce projected Medicare spending	N
	Approve GOP budget with tax and spending cuts	N

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	159,018 (64%)	D	168,457 (58%)
R	62,507 (25%)	R	70,766 (24%)
I	20,499 (8%)	I	52,539 (18%)

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	90	n/a	13	0
1995	100	100	17	4
1994	95	89	25	10
1993	100	100	9	0
1992	100	92	25	0
1991	90	92	10	0

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CALIFORNIA

33 Lucille Roybal-Allard (D)

Of Bell Gardens — Elected 1992, 3rd term

Biographical Information

Born: June 12, 1941, Los Angeles, Calif.
Education: California State U., Los Angeles, B.A. 1965.
Occupation: Non-profit worker.
Family: Husband, Edward Allard; two children, two stepchildren.
Religion: Roman Catholic.
Political Career: Calif. Assembly, 1987-93.
Capitol Office: 2435 Rayburn Bldg. 20515; 225-1766.

Committees

Banking & Financial Services
Capital Markets, Securities & Government Sponsored Enterprises; Financial Institutions & Consumer Credit
Budget



In Washington: In the still-early stages of her congressional tenure, Roybal-Allard can only dream of gaining the legislative clout achieved by her father and House predecessor, Edward R. Roybal.

During a House career that lasted 30 years, Democrat Roybal always was a member of the majority party, and he ended his tenure as chairman of an Appropriations subcommittee. But just two years after Roybal-Allard's easy 1992 win to succeed her father in the Los Angeles-based, Hispanic-majority 33rd District, Democrats lost control of Congress, and she found herself as a junior member of the House minority party.

Nonetheless, Roybal-Allard's solid political grounding has enabled her to quickly maneuver into several lower-profile but significant leadership positions.

At the beginning of the 105th Congress, Roybal-Allard was elected to chair the delegation of California House Democrats, who held a 29-to-23 seat advantage over their home-state Republican colleagues.

The election of Roybal-Allard set a precedent, as the delegation's chairmanship traditionally had gone to its most senior member.

However, George E. Brown Jr., the dean of the state's Democratic delegation, urged the election of a more junior member, citing a need for fresh ideas and noting that more senior members often have too many responsibilities to do justice to the California delegation.

Roybal-Allard is a staunchly liberal Democrat; she sided with a majority of her party against a majority of Republicans on 95 percent or more of House votes in each of her first four years in Congress. Given that record, it would not be surprising if Roybal-Allard used the platform of the Democratic delegation chair to speak against much of the congressional Republican agenda. However, upon her election to head the Democratic group, Roybal-Allard said she would

seek out California-related issues that could unite both Democrats and Republicans, and try to leverage the power of what is by far the biggest state delegation in the House.

"As I tell my colleagues from other states, I want their worst nightmare to come true — the California delegation coming together on key issues," she told the Los Angeles Times.

The Democratic leadership awarded Roybal-Allard a seat on the Budget Committee, where in May 1996 she persuaded members to adopt an amendment to the fiscal 1997 budget resolution. It required that any changes in the welfare system should not exacerbate domestic violence problems faced by low-income women. The provision, approved by voice vote, was the only Democratic amendment to the resolution adopted by the Republican-controlled panel.

That July, Roybal-Allard proposed a bill that aimed to give unemployment insurance benefits to women forced to leave jobs because of domestic violence. The bill also proposed that employers be required to allow domestic violence victims reasonable leave without penalty to seek medical assistance, counseling, safety planning and legal assistance, and to make necessary court appearances.

Allard also championed the rights of battered women in her role during the 104th as chair of Congress' Violence Against Women Task Force.

Issues of particular concern to Hispanics are a top priority for Roybal-Allard, who is the first Mexican-American woman in Congress, and served in the 104th as second vice-chairman of the Congressional Hispanic Caucus.

In her legislative work, she tries to balance the related but not always overlapping needs of the two chief components of her constituency: the minority "underclass," mired in chronic poverty, and a substantial Latino working class of laborers and shop owners who have grabbed a low rung on the economic ladder and aspire to buy homes and secure good educations for their children.

As a member of Budget and of the Banking and Financial Services Committee, Roybal-Allard has supported steps to stimulate investment in

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East-Central Los Angeles

As has been the case since it was established for the 1992 election, the 33rd had by far the worst voter turnout of any House district in the nation in 1996. Just 57,828 votes were cast in the contest that sent Roybal-Allard to a third House term.

However, there was a glimmer of optimism for those trying to get the district's overwhelming Hispanic majority, including large numbers of recent immigrants from Mexico, to get involved in the political process. The 1996 vote total, low as it was, was nearly 14 percent higher than in the House contest held in the 1992 presidential-election year.

There is no doubt about the party preferences of those residents who do vote, though. Roybal-Allard got at least 80 percent of the votes cast in her last two contests. In presidential voting, Bill Clinton also hit the 80 percent mark in 1996.

Much of the densely populated 33rd is economically deprived, though it avoided further hardship by being just east of south-central Los Angeles' worst May 1992 rioting.

Local officials are pinning some of their hopes for economic development on Los Angeles' Red Line subway, which opened in January 1993 inside the 33rd, as well as the Blue Line commuter train that runs from Long Beach to downtown through much of the district.

Bright spots for the district's economy include some new "green" industries, such as recycling companies. The district depends less on military contractors than does much of the rest of Los Angeles, so neither the defense industry's 1980s boom nor its early 1990s problems played much of a role in the economy here.

The northwest corner of the 33rd reaches into Los Angeles' downtown area and is com-

posed primarily of office buildings.

It is laced with Los Angeles' legendary crowded expressways. Some residents live in single-room occupancy hotels and shelters for homeless families and women, but the bulk of this area's residents live just north and south of downtown in Pico Union and Chinatown. Stores in Pico Union's downtown were looted in the 1992 riots, but the wholesale destruction seen in most of south-central did not occur.

Two cities in the district's midsection, Commerce and Vernon, house much of the 33rd's industry, with facilities including food processing plants and metal-plating operations.

The southeast areas of the district, including Cudahy, Maywood, Bell and Bell Gardens, are very poor and primarily residential, tending to have more single-family homes than apartment buildings.

South Gate lies just south of Cudahy. This city has converted itself over the past several years from heavy industries to small businesses and light manufacturing. It is not as Democratic as the rest of the district; it voted Republican for president throughout the 1980s, but for Clinton in 1992 and 1996.

The 33rd tops the state in two areas: It is 84 percent Hispanic, and 92 percent of its residents are members of minority groups.

1990 Population: 570,943. White 203,891 (36%), Black 25,473 (4%), Other 341,579 (60%). Hispanic origin 477,975 (84%). 18 and over 384,158 (67%), 62 and over 44,759 (8%). Median age: 26.

small businesses, which provide most of the jobs in the 33rd.

She has worked with the Federal National Mortgage Association (Fannie Mae) to bring residents of her district into a program aimed at helping low- and moderate-income families purchase homes. The program helps first-time buyers qualify for mortgages by reducing down payments and closing costs and setting less rigid requirements for obtaining credit.

Roybal-Allard has faithfully backed President Clinton's economic and social policies. After considerable soul-searching, she went with Clinton and against her allies in organized labor in 1993 to support NAFTA, which linked the United States, Mexico and Canada in a free-trade zone.

While critics said the agreement would shift blue-collar jobs to low-wage workers in Mexico, Roybal-Allard observed that in the modern economy, "change is becoming a fact of life," and she said NAFTA could help expand export opportunities. She also voted in 1994 to implement GATT,

again going against the wishes of organized labor.

Representing a huge Spanish-speaking immigrant population, Roybal-Allard defends federal spending for programs such as bilingual education in public schools, and she strongly opposes proposals to make English the official language of the United States.

At Home: With political blood flowing in her veins and a six-year tenure in the California Assembly as her seasoning, Roybal-Allard handily fulfilled expectations in 1992 that she would succeed her father upon his House retirement.

She drew insubstantial opposition in the Democratic primary and won nomination with 75 percent of the vote. That November, she ran up a 2-1 margin against Republican Robert Guzman, an education consultant. Her winning margins have increased since, to 81 percent in the 1994 general election and 82 percent in 1996.

The one blemish on her victories has been the astoundingly low voter turnout. The 33rd District is home to tens of thousands of immigrants from

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Central and South America; many of them are non-citizens, and many of those non-citizens are illegal aliens. Typically, these people have been reluctant or unwilling to enter the bureaucratic maze that citizenship applications entail.

However, there was a turnout uptick in 1996, in part a reflection of efforts by Hispanic activists and the Clinton administration to get more immigrants to become citizens and then register to vote. Just more than 50,000 ballots were cast in the 1992 general election and slightly more than 41,500 in November 1994. But in 1996, the number of House voters moved up to nearly 58,000.

Roybal-Allard had jumped at the chance to run in the 33rd. Redistricting before the 1992 election had given it an 84 percent Hispanic population,

even more favorable turf than the old 25th District in which her father had served. The 33rd has the largest Hispanic presence in any House district in the nation.

Before launching her House campaign, Roybal-Allard had won three terms in the state House, and all her election victories were by wide margins. She also scored points for galvanizing grass-roots opposition to a toxic waste incinerator proposed for the city of Vernon, which was in her state legislative district and is in the 33rd.

That five-year battle was successful, and Roybal-Allard parlayed the experience into enactment of a bill requiring environmental impact reports for such facilities.

HOUSE ELECTIONS

1996 General		
Lucille Roybal-Allard (D)	47,478	(82%)
John P. Leonard (R)	8,147	(14%)
Howard Johnson (LIBERT)	2,203	(4%)
1994 General		
Lucille Roybal-Allard (D)	33,814	(81%)
Kermit Booker (PFP)	7,694	(19%)

Previous Winning Percentages: 1992 (63%)

CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Roybal-Allard (D)	\$151,659	\$81,450 (54%)	\$144,278
Leonard (R)	\$6,221	\$16 (0%)	\$6,208
1994			
Roybal-Allard (D)	\$152,596	\$102,095 (67%)	\$124,271

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	48,636 (80%)	D	33,642 (63%)
R	8,538 (14%)	R	12,607 (24%)
I	2,691 (5%)	I	7,149 (13%)

KEY VOTES

1997	Ban "partial birth" abortions	N
1996	Approve farm bill	N
	Deny public education to illegal immigrants	N
	Repeal ban on certain assault-style weapons	N
	Increase minimum wage	Y
	Freeze defense spending	Y
	Approve welfare overhaul	N
1995	Approve balanced-budget constitutional amendment	N
	Relax Clean Water Act regulations	N
	Oppose limits on environmental regulations	Y
	Reduce projected Medicare spending	N
	Approve GOP budget with tax and spending cuts	N

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	80	16	95	3	12	84
1995	89	8	98	1	4	95
1994	87	13	99	1	14	86
1993	80	18	95	3	20	80

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	90	n/a	25	0
1995	95	100	13	4
1994	100	78	33	0
1993	95	92	20	4

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DELEGATES / RESIDENT COMMISSIONER

DELEGATE — GUAM

Robert A. Underwood (D)

Of Baza Gardens — Elected 1992, 3rd term



Biographical Information

Born: July 13, 1948, Tamuning, Guam.
Education: California State U., Los Angeles, B.A. 1969, M.A. 1971; U. of Southern California, Ph.D. 1987.
Occupation: Professor; college administrator.
Family: Wife, Lorraine Aguilar; five children.
Religion: Roman Catholic.
Political Career: No previous office.
Capitol Office: 424 Cannon Bldg. 20515; 225-1188.

Committees

National Security
Military Installations and Facilities; Military Personnel; Military Readiness

Resources

National Parks & Public Lands

DELEGATE — VIRGIN ISLANDS

Donna M. Christian-Green (D)

Of St. Croix — Elected 1996, 1st term



Biographical Information

Born: Sept. 19, 1945, Teaneck, N.J.
Education: St. Mary's College (Indiana), B.S. 1966; George Washington U., M.D. 1970.
Occupation: Physician; health official.
Family: Divorced; two children.
Religion: Moravian.
Political Career: Virgin Is. Democratic Territorial Committee, 1980-97, chair, 1980-82; Virgin Is. Board of Education, 1984-86; Virgin Is. acting commissioner of health,

1993-94.

Capitol Office: 1711 Longworth Bldg. 20515; 225-1790.

Committees

Resources

Energy & Mineral Resources; National Parks & Public Lands

RESIDENT COMMISSIONER — PUERTO RICO

Carlos Romero-Barceló (D)

Of San Juan — Elected 1992, 2nd term



Biographical Information

Born: Sept. 4, 1932, San Juan, P.R.
Education: Yale U., B.A. 1953; U. of Puerto Rico, LL.B. 1956.
Occupation: Lawyer; real estate broker.
Family: Wife, Kathleen Donnelly; four children.
Religion: Roman Catholic.
Political Career: Mayor of San Juan, 1967-77; governor, 1977-85; Puerto Rico Senate, 1986-88.

Capitol Office: 2443 Rayburn Bldg. 20515; 225-2615.

Committees

Education & Workforce

Postsecondary Education, Training & Life-Long Learning

Resources

Energy & Mineral Resources (ranking); National Parks & Public Lands

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TEXAS

28 **Ciro D. Rodriguez (D)**

Of San Antonio — Elected 1997, 1st term

Biographical Information

Born: Dec. 9, 1946; Piedras Negras, Mexico.

Education: St. Mary's University, B.A., 1973; Our Lady of the Lake University, M.S.W., 1978.

Occupation: Legislator, educator, social worker.

Family: Wife, Carolina Pena; one child.

Religion: Roman Catholic.

Political Career: Harlandale school board 1975-87; Texas House, 1987-97.

Capitol Office: 323 Cannon Bldg., 20515; 225-1640

Committees

National Security

Veterans' Affairs



The Path to Washington:

Three months into the 105th Congress, Rodriguez assumed the seat previously held by Democrat Frank Tejada, who died in January 1997. He was sworn in five days after collecting two-thirds of the vote in a special runoff election.

Rodriguez occupies the seat Tejada held on the National Security Committee — a post of key concern to the San Antonio area, which has been buffeted by base closures in recent years. Rodriguez has expressed a particular interest in seeking highway funds for his district in hopes that an improved infrastructure will boost trade. Rodriguez also sits on Veterans' Affairs, as did Tejada.

Rodriguez is likely to prove a fairly reliable vote for the Democratic leadership. He campaigned on his support for abortion rights and defense of such traditional Democratic domestic programs as education and Social Security.

A 10-year veteran of the state Legislature who previously had served 12 years on the Harlandale school board, Rodriguez had the backing of most of the San Antonio Democratic establishment in the April 1997 special election. He dominated the voting in the March special election, but his 46 percent share of the vote fell short of the majority required to win the seat outright.

So he headed into a runoff with his nearest rival, former City Councilman Juan Solis, also a Democrat, who got 27 percent in the first round. Solis launched an aggressive challenge against Rodriguez, characterizing himself as Tejada's true heir because he shared the former member's anti-abortion position. Rodriguez countered that he could not in good faith impose his religious beliefs on others (he is Roman Catholic).

Solis also campaigned for gunowners' rights and anti-crime measures and tried to tar Rodriguez as "a wild-eyed liberal." But Solis' best claim to the votes of conservatives and Tejada admirers may have been the endorsements he received from some members of Tejada's family.

Rodriguez countered Solis' claim to the Tejada mystique by saying he had known the deceased incumbent since they went to high school and college together.

Tejada had represented the district since its creation after the 1990 census; it was specifically envisioned as a Hispanic-majority seat.

After taking his oath of office, Rodriguez stood in the well of the House facing a packed chamber — an unusual morning audience anticipating an announcement from Speaker Newt Gingrich regarding his ethics case. Looking out on the faces of his new colleagues, Rodriguez drew a hearty laugh by deadpanning: "Thanks for getting together this welcome for me."

Rodriguez then noted that his wife, Carolina, was "Teacher of the Year" in 1996 in the South San Antonio Independent School District. Rodriguez, a former social worker, teacher and education consultant, also mentioned his years as a school board member. In the Texas Legislature he served as chairman of the Local Consent and Calendars Committee and as a member of the Public Health and the Higher Education committees.

In Austin, Rodriguez worked on equalizing education funding between school districts and on job creation through trade and private redevelopment of Kelly Air Force Base, which is in the process of closing. Rodriguez said he hoped to see C-5 aircraft maintained at Kelly under a private contract.

Tejada's death provoked a scramble among prospective successors who eventually numbered 15, including nine Democrats. But Rodriguez attracted most of the support from fellow legislators and prominent Democrats in city government.

Rodriguez was also the best-financed candidate in the field, raising about \$250,000 before the first round of special election voting and about the same amount for the runoff. The financing allowed Rodriguez to air broadcast ads in Bexar (San Antonio) County in the final weeks before the vote. Rodriguez also credited the backing of the San Antonio central labor council of the AFL-CIO, which helped him turn out a strong vote in March and again in April.

TEXAS 28
South San Antonio; Zapata

Mapmakers looking to create a new Hispanic-majority district in south-central Texas found two population bases — San Antonio and the Mexican border — and connected them with a winding trail of South Texas counties. The result was the 28th, one of three new districts the fast-growing Lone Star State acquired in reapportionment for the 1990s.

The 28th is heavily influenced by its proximity to Mexico and its abundance of military bases. The military presence helped keep the region's economy afloat during the oil price crash of the mid-1980s and the recession of the early 1990s.

San Antonio has five military installations, two of which are in the 28th. Randolph Air Force Base is a major training and recruitment center. Brooks Air Force Base is primarily an aerospace research center. It appeared on the Pentagon's 1995 base-closing list, but was spared.

However, neighboring Kelly Air Force Base (in the 20th) — the area's largest job-producer and employer of half the Hispanics in the Air Force — is facing closure by September 2001 of its major unit, the San Antonio Air Logistics Center. Much of Kelly will be realigned to San Antonio's Lackland Air Force Base (which lies in the 20th) and some of the workload will be privatized.

With the five bases and a pleasant climate, San Antonio is a popular spot with retirees. Almost two-thirds of the district's population is in Bexar County, the 28th's northernmost coun-

ty, which includes San Antonio, the third-largest city in Texas, and its suburbs. Harlandale is an old German town that has become an increasingly Hispanic San Antonio neighborhood.

As the district moves south toward the Rio Grande, it becomes more rural and poorer. Starr County, the nation's most heavily Hispanic county (97 percent), is economically devastated. Fifty percent of Starr's residents are below the poverty line, and its unemployment rate exceeds 25 percent. About 35 percent of the people in adjacent Zapata County (81 percent Hispanic) fall below the poverty line.

Starr and Zapata, which were taken from the 15th District to help create the new 28th, are two of the state's fastest growing counties.

An overlooked Republican enclave in the district is the northeast section of San Antonio, a predominantly white, middle-class suburb. But the 28th is a Democratic bastion: Bill Clinton received 62 percent of the district's vote in 1996, his highest non-urban tally in Texas.

1990 Population: 566,217. White 388,123 (69%), Black 48,295 (9%), Other 129,799 (23%). Hispanic origin 341,843 (60%). 18 and over 382,636 (68%), 62 and over 72,937 (13%). Median age: 29.

HOUSE ELECTIONS

1997 Special Runoff *		
ro D. Rodriguez (D)	19,992	(67%)
an Solis (D)	9,990	(33%)
1997 Special *		
ro D. Rodriguez (D)	14,018	(46%)
an Solis (D)	8,056	(27%)
ark Cude (R)	2,452	(8%)
arlos I. Uresti (D)	1,345	(4%)
hn P. Kelly (R)	1,229	(4%)
uro A. Bustamante (D)	818	(3%)
hn A. "Drew" Traeger (D)	718	(2%)
rciso V. Mendoza (R)	621	(2%)
il Ross (D)	376	(1%)

DISTRICT VOTE FOR PRESIDENT

	1996		1992
D	93,136 (62%)	D	94,115 (55%)
R	47,341 (32%)	R	51,291 (30%)
I	8,211 (6%)	I	27,195 (16%)

Nearly complete, unofficial returns.

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37 Juanita Millender-McDonald (D)

Of Carson — Elected 1996; 1st full term

Biographical Information

Born: Sept. 7, 1938, Birmingham, Ala.

Education: U. of Redlands, B.S.; California State U., Los Angeles, M.A.; U. of Southern California.

Occupation: Teacher.

Family: Husband, James McDonald Jr.; five children.

Religion: Baptist.

Political Career: Carson City Council, 1990-92, mayor pro tempore, 1991-92; Calif. Assembly, 1992-96.

Capitol Office: 419 Cannon Bldg. 20515; 225-7924.

Committees

Small Business

Regulatory Reform & Paperwork Reduction; Tax & Exports

Transportation & Infrastructure

Aviation; Surface Transportation



In Washington: Millender-McDonald, who first won the 37th in a March 1996 special election, has shown in her brief House career that she has no fondness for proposals by the Republican majority to rein in spending on social programs. Her district is one of the poorest in California

and she argues for allocating resources to help the underprivileged.

Millender-McDonald's electoral good fortune came after the fall of Democratic Rep. Walter R. Tucker III, who resigned from Congress Dec. 15, 1995, a week after a federal jury convicted him on felony charges of extortion and tax evasion. The charges stemmed from actions he took as mayor of Compton, prior to his election to Congress.

Millender-McDonald has made a priority of large-scale infrastructure projects in and around her territory, and she is in a position to advance them from her seat on the Transportation and Infrastructure Committee. The panel will be marking up legislation in 1997 to authorize perhaps \$175 billion in new highway and mass transit spending, and Millender-McDonald is certain to continue her quest for more federal dollars supporting the Alameda Corridor project. This continuing project, which runs the length of her district, would link Los Angeles railyards with the ports of that city and Long Beach. It received \$400 million in direct loans as part of the fiscal 1997 transportation spending law.

Millender-McDonald was also pleased to trumpet a \$20 million authorization to bring three Veterans Administration buildings in Long Beach up to code. In her maiden floor remarks, she made it clear that one of her top priorities is to ensure her earthquake-prone district receives federal protection.

Millender-McDonald took the lead on an issue that helps illustrate the continuing racial divide in the country. Concerned by articles in the San Jose Mercury News that said the Central Intelligence Agency had been involved in cocaine trafficking

in inner-city neighborhoods, she has introduced legislation to establish a select congressional committee to investigate. Millender-McDonald sponsored a hearing into the matter in her district in October 1996. A month later, she hosted CIA Director John M. Deutch as he took questions from her constituents in Watts about the allegations.

A regional whip, Millender-McDonald is a reliable vote for her party's liberal wing, consistently supporting abortion rights and other progressive causes. Since coming to Congress she has backed organized labor's point of view in voting to raise the minimum wage, block employers from offering compensatory time off in lieu of overtime pay, and voting against a successful effort to make it harder for Federal Express workers to unionize.

Millender-McDonald opposed a law that blocked federal recognition of same-sex marriages and voted to prohibit funding for certain tobacco programs. She opposed turning off the cash spigot funding the space station.

A former teacher, she is a vocal supporter of the Goals 2000 national educational standards initiative and favors more spending on bilingual education. (She voted against a bill to prohibit illegal immigrants from receiving a public education.) Millender-McDonald spoke against effectively raising the rent for public housing residents and voted against the welfare overhaul bill. "Welfare reform is not true reform unless it contains job training, child care and job location assistance," she declared.

The 37th is a majority-minority district, with Hispanics and blacks representing three-fourths of the population. Millender-McDonald sometimes takes to the floor to commemorate such events as Black History Month, and she spoke out strongly in favor of federalizing the crime of church burning after a rash of black churches in the South were torched. (Her father had been a minister in Alabama.)

At Home: At the same time Millender-McDonald won the right to complete Tucker's unexpired House term, Democratic voters also chose her to be their nominee for election to a full term in November 1996. She prevailed easily over

The 37th includes some of Los Angeles' poorest and most overwhelmingly Democratic communities, taking in the Carson, Compton and Lynwood areas of the city.

Residents of the 37th have quite a stake in efforts aimed at post-Cold War adjustments to the nation's defense industries. The closing of the Long Beach shipyard and planned closing of the naval station just south of the district are likely to squeeze the area anew.

Long Beach's port area draws many of its blue-collar workers from the district (the naval station alone employs more than 10,000 civilian and military personnel), and many others in the 37th work in small businesses that support the port. Military contractors concentrated in the southern end of the district also are suffering.

Carson, just north of the port, is a blue-collar city of 84,000, with its population split almost evenly among Hispanics, blacks, whites and Asians. This area was largely spared in the rioting of the spring of 1992, even though it is sandwiched between Long Beach and Compton, which both suffered fairly heavy damage.

Scores of Compton's businesses went up in the smoke of 135 separate fires. California's recession had been hurting the already-poor area, and many of the surviving jobs were lost as businesses damaged in the riot closed. The lots with burned buildings and debris have been cleared, leaving them vacant. Although there's been some renewal, it is hard to distinguish much of the land from the many vacant lots the city had before the riots.

Compton's Hispanic community has grown tremendously in the past decade. Forty-four percent of the city's 90,000 residents are

**CALIFORNIA 37
Southern Los Angeles County;
Compton; Carson**

Hispanic and 53 percent are black.

At the north end of the district is Lynwood, 70 percent of whose 62,000 residents are Hispanic and 21 percent of whom are black. The area sustained some damage during the riots, with more than 60 fires reported and 138 arrests.

One potential ray of light for the district is the Alameda Corridor project, an attempt to create a smooth conduit for goods to enter California through Long Beach without the traffic hassles of the Long Beach Freeway. The project runs the length of the district up Alameda Street and includes rail and road transportation improvements.

Another addition to the district is the 105 Freeway, known for years as the Century Freeway. The name gave rise to a local joke that the road, planned since the middle part of this century, would not be completed until the next. But it bears a new name — that of Democratic Rep. Glenn M. Anderson, who died in 1994. And it was recently completed. Now the area has finally been connected to the metropolitan area's freeway grid.

Bill Clinton carried the 37th in 1996 with 82 percent of the vote, his second best district in the state.

1990 Population: 572,049. White 149,689 (26%), Black 192,420 (34%), Other 229,940 (40%). Hispanic origin 258,278 (45%). 18 and over 375,216 (66%), 62 and over 49,338 (9%). Median age: 26.

Republican businessman Michael Voetee, a self-described "sacrificial lamb."

McDonald waited until Tucker's conviction to announce her candidacy for the 37th, and then she overtook fellow state Rep. Willard H. Murray Jr., who had begun campaigning nine months earlier, and a crowd of other Democrats. Among the also-rans were Compton Mayor Omar Bradley, Lynwood Mayor Paul H. Richards, Compton City Clerk Charles Davis, and Robin Tucker, the wife of the disgraced congressman, who had his endorsement.

Murray had the backing of Democratic Rep. Maxine Waters, a power in Los Angeles County politics for a generation. Millender-McDonald's campaign was handled by a consultant with ties to Willie Brown, the mayor of San Francisco and former longtime Speaker of the state Assembly.

Millender-McDonald, who held local office in Carson prior to her service in Sacramento, outpaced Murray in fund-raising, in part with the help of EMILY's List, a fundraising organization for

Democratic women candidates. She weathered criticism from her foes for accepting contributions from political action committees.

She scored points against Murray by criticizing his support for the state's placement of the troubled Compton Unified School District in receivership. The state took control of the school district under the terms of a bailout deal Murray sponsored in 1993. Millender-McDonald sponsored a bill in the Assembly in 1996 to return non-fiscal control to the school district. She also gained publicity in 1995 by supporting a state move to take over Lincoln Park Cemetery in Carson amid accusations of mismanagement and embezzlement. In response to problems at the cemetery, Millender-McDonald sponsored bills to outlaw necrophilia and require annual state inspections of cemeteries.

In a sparse turnout, Millender-McDonald won the special election with nearly 14,000 (27 percent); Murray had 20 percent. Robin Tucker ran sixth with 7 percent. In the concurrent

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Democratic primary voting for nomination to the 105th Congress, Millender-McDonald beat Murray by just over 1,000 votes, 24 to 21 percent.

The only sour note in Millender-McDonald's victory was the defeat of her son, Keith, in his bid to replace her in the Assembly. He lost in the

Democratic primary to former state Rep. Dick Floyd. In 1992, Floyd, who is white, lost to Juanita McDonald when redistricting that year forced him into the same district with another white assemblyman. They split the white vote, sending McDonald to Sacramento.

HOUSE ELECTIONS

1996 General		
Juanita Millender-McDonald (D)	87,247	(85%)
Michael E. Voetee (R)	15,399	(15%)
1996 Special Election		
Juanita Millender-McDonald (D)	13,868	(27%)
Willard H. Murray Jr. (D)	10,396	(20%)
Omar Bradley (D)	6,975	(14%)
Paul H. Richards (D)	6,035	(12%)
Robert M. Sausedo (D)	4,495	(9%)
Robin Tucker (D)	3,661	(7%)
Charles Davis (D)	2,555	(5%)
Murry J. Carter (D)	1,574	(3%)
Joyce Harris (D)	1,322	(3%)
1996 Primary		
Juanita Millender-McDonald (D)	10,213	(24%)
Willard H. Murray Jr. (D)	8,999	(21%)
M. Susan Carrillo (D)	6,681	(15%)
Omar Bradley (D)	5,746	(13%)
Paul H. Richards (D)	5,523	(13%)
Robin Tucker (D)	2,632	(6%)
Charles Davis (D)	2,131	(5%)
Joyce Harris (D)	660	(2%)
Dale C. Tatum (D)	580	(1%)

CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Millender-McDonald (D)	\$337,030	\$94,500 (28%)	\$327,257
Voetee (R)	\$43,806	\$16 (0%)	\$42,972

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	88,877 (82%)	D	90,523 (74%)
R	13,874 (13%)	R	19,299 (16%)
I	4,798 (4%)	I	12,905 (11%)

KEY VOTES

1997	
Ban "partial birth" abortions	N
1996	
Increase minimum wage	Y
Freeze defense spending	Y
Approve welfare overhaul	N

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	84	16	92	7	27	71

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	83	n/a	20	0

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12 Tom Lantos (D)

Of San Mateo — Elected 1980, 9th term

Biographical Information

Born: Feb. 1, 1928, Budapest, Hungary.

Education: U. of Washington, B.A. 1949, M.A. 1950; U. of California, Berkeley, Ph.D. 1953.

Occupation: Professor.

Family: Wife, Annette Tillemann; two children.

Religion: Jewish.

Political Career: Millbrae Board of Education, 1958-66.

Capitol Office: 2217 Rayburn Bldg. 20515; 225-3531.

Committees

Government Reform & Oversight

Human Resources; National Security, International Affairs & Criminal Justice

International Relations

International Economic Policy & Trade; International Operations & Human Rights (ranking)



In Washington: The traits Lantos exhibits in the House are derived from a lifetime of varied experience. Born in Hungary, Lantos has the civilized air of a man bred in a prewar Central European culture — and the stubbornness of a fighter in the anti-Nazi resistance in Budapest. He

retains the intellectual self-assurance — some say arrogance — of the professor he once was.

Despite his courtly manner, Lantos has brought an assertive and sometimes confrontational approach to his roles on the Government Reform and Oversight and International Relations committees. Lantos is the ranking member on International Relations' International Operations and Human Rights Subcommittee.

Lantos' confrontational side was evident early in the 104th when he condemned the Republicans for their partisan legislative push during the 100 days of the "Contract With America."

"The climate, in terms of partisanship, has deteriorated enormously," Lantos told the San Francisco Chronicle in April 1995. "The mood is surly, the attitude of people is very negative and there is a degree of confrontation I haven't seen in years." Lantos described the Republican majority as "goose-stepping" along on its agenda, the newspaper reported. The comment prompted an immediate and furious reply from GOP members, who objected that Lantos was labeling them Nazis.

Lantos said his intent was not to label them Nazis but to characterize the manner in which the Republicans were proceeding, without dissent or debate. "It was a new adjective and upon reflection I'm glad I used it," Lantos told the newspaper. "A parliamentary body in a political democracy must be a rational and deliberative body and, in many ways, this has not been that in the last 100 days."

Lantos was outraged when Oklahoma Republican Tom Coburn made remarks about the February 1997 broadcast of a widely acclaimed dramatic film about the Holocaust, "Schindler's List," on NBC. Coburn maintained that the broadcast took

network television "to an all-time low with full frontal nudity, violence and profanity being shown in our homes." His comments earned him the ire even of prominent Republicans, who castigated him for failing to recognize the film's historical accuracy.

Lantos, who was incarcerated in a Hungarian Nazi work camp in 1944 and escaped, led a group of members in a news conference condemning Coburn's remarks. "I find it far less discouraging that some child may have learned a four-letter word . . . I am more concerned about the 1.5 million children killed in the Holocaust," he said.

Coburn took to the House floor the next day and said, "I feel terrible that my criticism of NBC . . . has been misinterpreted as a criticism of 'Schindler's List' or the millions of Jews who died senselessly during the Holocaust."

Lantos, who is Jewish, is an enthusiastic supporter of Israel and a critic of its Arab adversaries. As a Holocaust survivor, Lantos also says devotion to human rights should drive U.S. foreign policy.

He was one of the first members to call for a tough U.S. response to what he called Serbia's aggression against the other former Yugoslavian republics of Croatia and Bosnia-Herzegovina. Frustrated by the early failure of multilateral efforts to resolve the conflict, Lantos called on the Clinton administration to act alone if necessary to arm Bosnia's Muslim-led government forces, despite a U.N. embargo that barred weapons shipments to any of the warring parties. Lantos was one of 93 Democrats supporting an August 1995 GOP measure requiring the president to end the Bosnian arms embargo. President Clinton vetoed the bill.

But once the warring parties agreed to sit down in Dayton, Ohio, in November 1995 to try to reach a U.S.-brokered peace agreement, Lantos backed Clinton's pledge to police the peace with 20,000 U.S. ground troops as part of a NATO force. He spoke strongly against an October 1995 House resolution urging Clinton to seek congressional approval before sending the troops to Bosnia. Lantos called the resolution "an irresponsible and reckless effort to raise doubts in the minds of the participants in the peace negotiations." Although the resolution passed, 315-103, U.S. troops were sent to Bosnia once the peace agreement was final.

Not too long ago, San Francisco supplied the vote for two congressional districts that often were split between the city's eastern and western halves. But because it now takes more than 570,000 inhabitants to make a district in California, San Francisco musters just one whole district and about one-fourth of another. The whole one is now the 8th, while the remaining city population is in the 12th.

The city portion of the 12th consists of the Twin Peaks area and the Sunset District south of Golden Gate Park. The nearby presence of the Pacific is palpable here, as clouds and fog often enshroud the area. The district's city portion also includes Lake Merced, the city zoo and a California State University campus (locally still called San Francisco State). The Sunset District is increasingly Chinese, and the 12th is 16 percent Asian.

The city portion of the district is Democratic: Bill Clinton beat Bob Dole there by 67 percent to 22 percent in 1996.

More than 70 percent of the 12th District residents live south of the San Francisco city limits in San Mateo County, and many of them live just over the city limits. The first suburb is Daly City, where spines of close-set homes appeared atop the rocky hillsides after World War II and inspired folk singer Pete Seeger's song "Little Boxes." Hard by the sea itself is Pacifica, harder to reach and blessed in good weather with magnificent views. Across the peninsula on the bay side lies South San Francisco, proclaimed "The Industrial City" by a Hollywood-style sign inscribed in a hillside. "South City," as locals call it, lies between the San Francisco International Airport and Candlestick Park, home of football's 49ers and baseball's Giants.

The center portion of the northern peninsula

CALIFORNIA 12 Most of San Mateo County; southwest San Francisco

is occupied by a huge state fish and game refuge. To the west are steep coastal mountains, to the east are heavily populated suburbs. Two freeways carry commuters south along the eastern portion of the peninsula: The Junipero Serra Freeway (I-280) glides along the less populated western route, while the Bayshore Freeway (U.S. 101) plows through the often smoggy, always crowded bayside suburbs. Halfway between the two freeways is another north-south artery, El Camino Real. This one-time route of Spanish soldiers and Roman Catholic priests is now an endless procession of overnight lodgings, restaurants and video stores, punctuated by some offices and upscale shopping.

Principal among the Bayshore communities are South San Francisco, San Bruno, Millbrae and Burlingame (which passes by before reaching the southbound commuter reaches the county seat of Redwood City) and Foster City to the east. Farther into the peninsula's highlands lies Hillsborough, one of the most exclusive estate communities on the West Coast.

San Mateo County has been somewhat less reliably Democratic than other counties around the bay. Lantos' district voted for Ronald Reagan in 1980 and 1984 before switching to support Michael S. Dukakis in 1988. San Mateo portions of the 12th gave 62 percent to Clinton in 1996.

1990 Population: 571,535. White 372,572 (65%), Black 23,649 (4%), Other 175,314 (31%). Hispanic origin 81,606 (14%). 18 and over 455,454 (80%), 62 and over 95,211 (17%). Median age: 36.

Lantos has been critical of China since its government's crackdown on pro-democracy demonstrators in Tiananmen Square in June 1989, and he has consistently urged an end to most-favored-nation (MFN) trading status for the Chinese, which allows Chinese goods to enter the United States with low, non-discriminatory tariffs. He has been critical of Clinton's refusal to deny the trading status to the Chinese, in light of their human rights abuses and threats of military action against Taiwan.

He was particularly angry in May 1995 that the White House at first refused to issue a visa to Taiwanese President Lee Teng-hui so he could privately visit the United States to receive an honorary degree from his alma mater, Cornell University. The White House resisted issuing the visa because of concerns it would strain relations with China, but the administration later relented.

Lantos introduced a resolution, that passed the International Relations Committee and the House unanimously, urging the president to issue the visa.

"I think it is long overdue that we stop kowtowing to the Communist butchers in Beijing and to stand on our own principles," Lantos told the House.

Although Lantos was critical of Clinton's China policy, he supported the president's effort in early 1997 to accept Mexico as a full partner in the battle against drugs. Under a 1986 law, the president must annually identify major producers and conduits for illegal narcotics. He must also determine whether those nations are cooperating with U.S. anti-drug efforts. Clinton certified that Mexico was cooperating, even though in 1996 there had been a spate of embarrassments highlighting Mexico's failure in the drug war.

The House in March 1997 approved, 251-175, a resolution reversing Clinton's decision to certify Mexico. "The president clearly understands that Mexico's record is far from perfect," Lantos told the House. "But it is better than it has been, and it is critical that this Mexican government work with us in fighting against illegal drugs."

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CALIFORNIA

Lantos opposed efforts by the GOP-led International Relations Committee to abolish three foreign policy agencies and to reduce the foreign aid budget by \$1 billion less than the previous year. In fact, when the bill was first considered in May 1995, Lantos and other Democrats boycotted the markup, saying they had not had enough time to review the legislation.

Lantos' sense of righteous anger was also on national display during the 101st Congress, when Lantos — then the chairman of the Government Operations Subcommittee on Employment and Housing — held hearings on alleged corruption at the Department of Housing and Urban Development. One witness was former Reagan administration Interior Secretary James G. Watt, who defended efforts by well-connected Republican consultants to obtain HUD subsidies for housing developers. Lantos laced into Watt, one of the most conservative members of the Reagan "movement."

"What I find most obnoxious so far is the unmitigated hypocrisy of people like James Watt who exude unctious, piety and noble motives, who carry on a crusade to destroy these programs and at the same time shamelessly milk them," Lantos said. The hearings helped persuade Congress to pass legislation placing new restrictions on HUD operating procedures.

At Home: It took Lantos two difficult and expensive elections before he could settle securely into his district. But his efforts since have given him an enviable comfort level.

He was working on Capitol Hill as a consultant to the Senate Foreign Relations Committee when Republican Bill Royer won a 1979 special election to replace Democrat Leo J. Ryan, who had been assassinated the year before in Jonestown, Guyana.

Ryan's assassination brought out a host of Democrats who claimed to be his logical political heir, and by the time the primary was finished, the party was badly splintered. Royer picked his way through the Democratic debris to win the seat for the GOP.

But Lantos, well-known within local Democratic circles, left his job right after Royer's victory and began preparing a challenge for 1980. The one-time economics professor at San Francisco State University had held elective office only as a school board president in suburban Millbrae. But he had been active in party efforts and had built up name recognition as a foreign affairs commentator for a Bay Area TV station. Royer, who had been a city councilman and county supervisor for 23 years before moving on to Congress, went into the contest with a solid political foundation.

Yet Lantos, who had held himself apart from the 1979 Democratic feuding, was able to unite his party around him for 1980. Although Lantos was less well-known than Royer and was short of campaign funds, he was politically astute and took advantage of the incumbent's overconfidence. Lantos filled the airwaves with advertising, while Royer, believing the election was his, yanked his own ads as an economy move. Lantos won by 3 percentage points.

Royer made it clear that he would be back two years later, and Lantos began raising money early. He pursued it not only at home, but within Jewish communities in the districts of other members — a habit that led initially to some hard feelings among his colleagues. By 1982, he was among the best-funded House candidates in the country. He dismissed Royer's comeback attempt and has won re-election handily ever since.

HOUSE ELECTIONS

1996 General		
Tom Lantos (D)	149,052	(72%)
Storm Jenkins (R)	49,278	(24%)
Christopher V.A. Schmidt (LIBERT)	6,111	(3%)
Richard Borg (NL)	3,472	(2%)
1994 General		
Tom Lantos (D)	118,408	(67%)
Deborah Wilder (R)	57,228	(33%)

Previous Winning Percentages: 1992 (69%) 1990 (66%)
 1988 (71%) 1986 (74%) 1984 (70%) 1982 (57%)
 1980 (46%)

KEY VOTES

1997	
Ban "partial birth" abortions	N
1996	
Approve farm bill	N
Deny public education to illegal immigrants	N
Repeal ban on certain assault-style weapons	N
Increase minimum wage	Y
Freeze defense spending	Y
Approve welfare overhaul	N
1995	
Approve balanced-budget constitutional amendment	N
Relax Clean Water Act regulations	N
Oppose limits on environmental regulations	Y
Reduce projected Medicare spending	N
Approve GOP budget with tax and spending cuts	N

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CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Lantos (D)	\$246,333	\$33,825 (14%)	\$591,305
Jenkins (R)	\$4,536	\$2,016 (44%)	\$4,016
1994			
Lantos (D)	\$314,688	\$94,300 (30%)	\$322,016
Wilder (R)	\$148,058	\$13,082 (9%)	\$146,133

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	141,084 (64%)	D	139,244 (58%)
R	58,260 (26%)	R	64,967 (27%)
I	11,994 (5%)	I	38,125 (16%)

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	82	13	91	3	14	78
1995	77	11	87	4	16	78
1994	79	15	85	5	44	53
1993	79	16	91	5	39	61
1992	19	81	90	6	31	69
1991	30	65	89	6	35	62

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	95	n/a	13	0
1995	90	100	25	22
1994	70	88	50	24
1993	90	100	18	9
1992	95	92	25	8
1991	75	100	11	11

ILLINOIS

4 Luis V. Gutierrez (D)

Of Chicago — Elected 1992, 3rd term

Biographical Information

Born: Dec. 10, 1954, Chicago, Ill.
Education: Northeastern Illinois U., B.A. 1975.
Occupation: Teacher; social worker.
Family: Wife, Soraida Arocho; two children.
Religion: Roman Catholic.
Political Career: Chicago City Council, 1986-93.
Capitol Office: 2438 Rayburn Bldg. 20515; 225-8203.

Committees

Banking & Financial Services
Capital Markets, Securities & Government Sponsored Enterprises; Housing & Community Opportunity
Veterans' Affairs
Health (ranking)



In Washington: Although Gutierrez has easily won three House contests in the overwhelmingly Democratic, Hispanic-majority 4th, questions about the constitutionality of the district's boundaries have prevented him from resting easy.

The oddly shaped 4th, was created in 1991 redistricting as Illinois' first and only Hispanic-majority district. It was challenged in court as an unconstitutional racial gerrymander. In March 1996, a three-judge federal panel described the distended, C-shaped district as an "uncouth configuration" and "a Rorschach ink blot." But the judges upheld the map on grounds that it served a compelling state interest of remedying past and present discrimination against Hispanics.

However, in November 1996, the Supreme Court, which had ordered the redrawing of unusually designed black- and-Hispanic-majority districts in other states, sent the 4th District case back to the Illinois panel for reconsideration.

Gutierrez has limited input in the judicial proceedings on his district, and his sway in the legislative arena is also modest, especially now that Republicans control the House. But he fashioned a role for himself as an active partisan spokesman and piquant critic of the GOP, appearing on the floor frequently to fault the conservative majority.

In November 1995, Gutierrez jumped on House Speaker Newt Gingrich's statement that suggested Gingrich had taken a tough stand in a budget showdown with President Clinton in part because of a perceived snub. The Speaker said that Clinton had not conferred with him on a long flight home from the Middle East following the funeral of assassinated Prime Minister Yitzhak Rabin of Israel. Gingrich complained that upon landing, Clinton left the plane by the front door, while Gingrich and others were shown the back exit.

After mockingly describing his own "traumatic experience" of being giving a window rather than an aisle seat on a recent flight and having to

exit with the rest of the passengers, Gutierrez laid into Gingrich: "Newt, have some decency. . . . The future of our Nation is more important than where you sit on an airplane. The next time you throw a temper tantrum, leave the American public out of it."

The following September, Gutierrez called on Gingrich to live up to his rhetoric about personal responsibility by stepping down as Speaker while the House investigated ethics complaints against him.

Rhetorical barbs have long been a Gutierrez trademark, although they largely caused self-inflicted wounds in his early House tenure. His nationally televised, freshman-term criticisms of Congress — then controlled by the Democrats — drew an icy response from his party colleagues.

In February 1994, just a year into his tenure, Gutierrez denounced Congress' shortcomings on the widely watched CBS program "60 Minutes."

Gutierrez's mocking of the ways of Washington drew raves from critics of Congress: After the show, his office reported receiving more than 500 phone calls and faxes praising his integrity and candor.

But within the House, many of Gutierrez's colleagues reacted with sneers, calling him a self-serving phony who had cut his political teeth in the rough-and-tumble of the Chicago City Council, then pronounced himself a great congressional reformer. Talk spread that some Democrats were so angry at Gutierrez that they wanted to get the party caucus to reprimand him.

Though that did not develop, Gutierrez has not enjoyed an inside lane to more prestigious committee assignments. He sits where he did as a freshman: on Banking and Financial Services (formerly Banking, Finance and Urban Affairs), and on Veterans' Affairs.

When the Democratic leadership appointed the first-ever Hispanic to Ways and Means in the 105th, the seat went to Xavier Becerra of California, who like Gutierrez was first elected in 1992. Gutierrez for the 105th had to make do with the ranking Democratic seat on the Veterans' Affairs Health Subcommittee.

Gutierrez is more careful these days not to

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Drawing the 4th to create a Hispanic-majority district required a creative touch. Whether it was too creative was still undecided more than five years after the district map was enacted.

The Supreme Court in November 1996 ordered a three-judge federal panel in Illinois to re-examine its rejection of a challenge that the 4th was unconstitutionally designed with race as the major factor.

The district was created as a result of a boom in Chicago's Hispanic population. The 1990 census reported that Chicago had 545,862 Hispanic residents, more than twice as many as in 1970.

However, most Chicago Hispanics live in two blocs, one northwest of downtown and the other nearby to the southwest, and a direct linkup between these areas would have bisected the black-majority 7th District. To avoid this, the 4th takes in a mostly Hispanic section of the North Side, follows a narrow, 10-mile band along the northern border of the 7th to the Cook County line, then moves south and east along the 7th to hook up with the other Hispanic concentration.

Despite its reach, 92 percent of the 4th's population is within Chicago; 5 percent is in adjacent Cicero. Most of the suburban territory is composed of railroad tracks, forest preserves, cemeteries and interstates.

Puerto Ricans hold sway in much of the northern part of the 4th. The former "Polish downtown" along lower Milwaukee Avenue is now mainly Hispanic. Parts of the West Town community are "gentrifying," but nearby Humboldt Park is mainly low-income and has one of the city's worst gang problems. To the north is Logan Square, which still has a sub-

ILLINOIS 4 Chicago — Parts of North Side, southwest side

stantial Polish community.

The southern part of the 4th is largely composed of two Mexican-American sections: Little Village, with a thriving business district and many single-family homes, and Pilsen, a poorer area that is upholding its history as a point of entry for immigrants.

In the 4th's southern reaches are ethnically mixed sections, including parts of Bridgeport and Back of the Yards. The latter area declined when the famed stockyards closed in the early 1970s, but community organizers have helped attract light industry and revive the retail trade.

The 4th lags far behind other Illinois House districts in voter participation. Many of the district's Puerto Ricans are poor and have yet to establish community roots. Many of the residents of Mexican origin are recent arrivals.

There were concerns among Hispanic activists when the district was created that a strong non-Hispanic white candidate could prevail. In fact, two white Chicago aldermen did file to run in the 1992 Democratic House primary. However, both dropped out of the race, and Gutierrez, of Puerto Rican heritage, took command of the district.

1990 Population: 571,530. White 277,739 (49%), Black 36,193 (6%), Other 257,598 (45%). Hispanic origin 371,663 (65%). 18 and over 383,497 (67%), 62 and over 53,817 (9%). Median age: 27.

offend sensibilities in his own party, but he still tries to maintain an image as a congressional reformer.

Soon after taking his House seat, Gutierrez led a group of freshmen seeking to freeze Congress members' cost of living adjustment, a sum that he said was "more money than most Americans make in two months." The Democratic leadership later agreed to suspend the pay increase.

In June 1995, the House by voice vote passed a Gutierrez amendment to the fiscal 1996 legislative branch appropriations bill barring unsolicited mass mailings by members of Congress within 90 days of an election. The amendment, which was enacted, lengthened the former 60-day ban on mass mailings.

Gutierrez is an advocate for low-income individuals and his fellow Hispanics. A member of the Banking and Financial Services Subcommittee on Housing and Community Opportunity, he joined Democrat Barney Frank of Massachusetts in 1995

on an unsuccessful amendment to a housing bill that proposed to continue limiting public housing rental rates to 30 percent of a tenants' income.

Early in the 105th Congress, Gutierrez undertook to overturn provisions in the 1996 welfare overhaul law to cut off food stamps and Medicaid benefits to legal immigrants.

Gutierrez in September 1996 had proposed a bill to restore those benefits while cutting billions of dollars in tax breaks for businesses. "Immigrants are making enormous contributions to America," he said. "Sadly, Congress' new welfare law treats them as scapegoats."

On Veterans' Affairs, Gutierrez has supported greatly expanding the VA's reproductive health care services for women veterans and backed funding for developing a program at the VA to deal with employees' sexual harassment complaints. He also has supported claims by Vietnam War veterans that they have suffered illnesses caused by exposure to the defoliant Agent Orange.

ILLINOIS

Gutierrez' ethnic background put him in the middle of an unusual Capitol Hill incident in 1996.

Returning to his office from a celebration of Puerto Rico with his daughter and niece, Gutierrez was confronted by a security officer who questioned his assertion that he was a member of Congress, then said, according to Gutierrez, "Everything would be all right if you and your people would go back to the country you come from."

At Home: As soon as the Hispanic-majority 4th was created for the 1992 election, Gutierrez was favored to win it. A Chicago alderman since 1986, he came into the campaign for the district with several advantages, not least of which was the endorsement of Chicago Mayor Richard M. Daley.

Hispanics accounted for 65 percent of the 4th's population but less than 40 percent of its voters. Whites made up 58 percent of the registered voter base, and Daley's support almost guaranteed that the crucial non-Hispanic white vote would go to Gutierrez.

Gutierrez had one primary opponent, former Alderman Juan M. Soliz, a Mexican-American. But Soliz's campaign was poorly funded; Gutierrez won with nearly 60 percent. That November, he easily became the first Hispanic elected to the House from Illinois. Soliz tried again in the 1994 Democratic primary, but Gutierrez topped 60 percent.

Running without a prominent Hispanic opponent in 1996, Gutierrez easily won his primary with 71 percent. For the first time, he had no Republican opponent, and took 94 percent against a Libertarian candidate.

Gutierrez and Daley were not always on cordial terms. In the 1983 mayor's race, Gutierrez backed Democrat Harold Washington over Daley. Gutierrez later challenged a Daley ally, veteran Rep. Dan Rostenkowski, for his 32nd Ward Democratic Committee seat and got less than a fourth of the vote. But after Washington's death in 1987, Gutierrez allied with Daley's camp.

HOUSE ELECTIONS

1996 General		
Luis V. Gutierrez (D)	85,278	(94%)
William Passmore (LIBERT)	5,857	(6%)
1996 Primary		
Luis V. Gutierrez (D)	27,140	(71%)
John Joseph Holowinski (D)	8,206	(21%)
William Garcia (D)	2,234	(6%)
Victor Amador (D)	736	(2%)
1994 General		
Luis V. Gutierrez (D)	46,695	(75%)
Steven Valtierra (R)	15,384	(25%)

Previous Winning Percentages: 1992 (78%)

CAMPAIGN FINANCE

	Receipts	Receipts from PACs	Expenditures
1996			
Gutierrez (D)	\$412,557	\$161,325 (39%)	\$261,252
1994			
Gutierrez (D)	\$406,609	\$201,824 (50%)	\$367,811
Valtierra (R)	\$12,995	\$14 (0%)	\$12,603

DISTRICT VOTE FOR PRESIDENT

1996		1992	
D	82,239 (80%)	D	82,497 (65%)
R	14,669 (14%)	R	29,091 (23%)
I	5,158 (5%)	I	15,392 (12%)

KEY VOTES

1997	Ban "partial birth" abortions	N
1996	Approve farm bill	N
	Deny public education to illegal immigrants	N
	Repeal ban on certain assault-style weapons	N
	Increase minimum wage	Y
	Freeze defense spending	Y
	Approve welfare overhaul	N
1995	Approve balanced-budget constitutional amendment	N
	Relax Clean Water Act regulations	N
	Oppose limits on environmental regulations	Y
	Reduce projected Medicare spending	N
	Approve GOP budget with tax and spending cuts	N

VOTING STUDIES

Year	Presidential Support		Party Unity		Conservative Coalition	
	S	O	S	O	S	O
1996	81	16	88	5	6	92
1995	83	11	90	5	10	86
1994	63	28	91	4	6	92
1993	72	24	90	4	11	82

INTEREST GROUP RATINGS

Year	ADA	AFL-CIO	CCUS	ACU
1996	100	n/a	14	0
1995	95	100	21	16
1994	90	100	33	0
1993	100	100	9	4

Members of the House of Representatives

	Office	Phone*	Page
Abercrombie, Neil (D-1st HI)	1233	225-2726	52
Ackerman, Gary L. (D-5th NY)	2243	225-2601	86
Aderholt, Robert B. (R-4th AL)	1007	225-4876	28
Allen, Thomas H. (D-1st ME)	1630	225-6116	65
Andrews, Robert E. (D-1st NJ)	2439	225-6501	82
Archer, Bill (R-7th TX)	1236	225-2571	111
Armey, Richard K. (R-26th TX)	301	225-7772	115
Bachus, Spencer (R-6th AL)	442	225-4921	28
Baesler, Scotty (D-6th KY)	2463	225-4706	63
Baker, Richard H. (R-6th LA)	434	225-3901	64
Baldacci, John E. (D-2nd ME)	1740	225-6306	65
Ballenger, Cass (R-10th NC)	2182	225-2576	93
Barcia, James (D-5th MI)	2419	225-8171	71
Bar, Bob (R-7th CA)	1130	225-2931	50
Barrett, Bill (R-3rd NE)	2458	225-6435	80
Barrett, Thomas (D-5th WI)	1224	225-3571	124
Bartlett, Roscoe (R-6th MD)	322	225-2721	67
Barton, Joe (R-6th TX)	2264	225-2002	111
Bass, Charles (R-2nd NH)	218	225-5206	81
Bateman, Herbert H. (R-1st VA)	2350	225-4261	118
Becerra, Xavier (D-30th CA)	1119	225-6235	37
Benisen, Ken (D-25th TX)	128	225-7508	114
Bereuter, Doug (R-1st NE)	2184	225-4806	79
Berman, Howard L. (D-26th CA)	2330	225-4695	36
Berry, Marion (D-1st AR)	1407	225-4076	31
Bilbray, Brian (R-49th CA)	1530	225-2040	40
Bilirakis, Michael (R-9th FL)	2369	225-5755	46
Bishop, Sanford, Jr. (D-2nd GA)	1433	225-3631	49
Blagojevich, Rod R. (D-5th IL)	501	225-4061	54
Bliley, Thomas J., Jr. (R-7th VA)	2409	225-2815	119
Blumenauer, Earl (D-3rd OR)	1113	225-4811	100
Blunt, Roy (R-7th MO)	508	225-6536	77
Boehert, Sherwood L. (R-23rd NY)	2246	225-3665	89
Boehner, John A. (R-8th OH)	1011	225-6205	96
Bonilla, Henry (R-23rd TX)	1427	225-4511	114
Bonior, David E. (D-10th MI)	2207	225-2106	72
Borski, Robert A. (D-3rd PA)	2267	225-8251	102
Boswell, Leonard L. (D-3rd IA)	1029	225-3806	60
Boucher, Rick (D-9th VA)	2329	225-3861	119
Boyd, F. Allen, Jr. (D-2nd FL)	1237	225-5235	45
Brady, Kevin P. (R-8th TX)	1531	225-4901	112
Brown, Corrine (D-3rd FL)	1610	225-0123	45
Brown, George E., Jr. (D-42nd CA)	2300	225-6161	39
Brown, Sherrod (D-13th OH)	328	225-3401	97
Bryant, Ed (R-7th TN)	408	225-2811	109
Bunning, Jim (R-4th KY)	2437	225-3465	63
Burr, Richard M. (R-5th NC)	1513	225-2071	92
Burton, Dan (R-6th IN)	2185	225-2276	58
Buyer, Steve (R-5th IN)	326	225-5037	58
Callahan, Sonny (R-1st AL)	2418	225-4931	27
Calvert, Ken (R-43rd CA)	1034	225-1986	39
Camp, Dave (R-4th MI)	137	225-3561	71
Campbell, Tom (R-15th CA)	2442	225-2631	34

* The area code for all numbers is 202.

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Counsel's Office
Sarah Wilson
OA/Box Number: 15130

FOLDER TITLE:

Sonia Sotomayor - 2nd Circuit (NY) [5]

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

2ND CASE of Level 1 printed in FULL format.

MARILYN J. BARTLETT, Plaintiff, - against - NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER, Individually and as Executive Secretary, New York State Board of Law Examiners; JOHN E. HOLT-HARRIS, JR., Individually and as Chairman, New York State Board of Law Examiners; RICHARD J. BARTLETT, Individually and as Member, New York State Board of Law Examiners, LAURA TAYLOR SWAIN, Individually and as Member, New York State Board of Law Examiners, CHARLES T. BEECHING, JR., Individually and as Member, New York State Board of Law Examiners and IRA P. SLOANE, Individually and as Member, New York State Board of Law Examiners, Defendants.

93 Civ. 4986 (SS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

970 F. Supp. 1094; 1997 U.S. Dist. LEXIS 9669

July 3, 1997, Decided

July 7, 1997, FILED

DISPOSITION: [*1] Plaintiff's equal protection, due process, and @ 1983 claims denied. Awarded her injunctive relief, and compensatory, but not punitive, damages.

COUNSEL: Appearances:

Jo Anne Simon, Esq., Patricia Ballner, Esq., Brooklyn, New York, Attorneys for Plaintiff.

Dennis Vacco, Esq., Attorney General of the State of New York, New York, New York. Judith T. Kramer, Esq., Rebecca Ann Durden, Esq., Assistant Attorneys General, Attorneys for Defendants.

JUDGES: SONIA SOTOMAYOR, U.S.D.J.

OPINIONBY: SONIA SOTOMAYOR

OPINION: FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

OPINION

SONIA SOTOMAYOR, U.S.D.J.

INTRODUCTION

This case, tried to the bench in 21 days of testimony accompanied by exhibits and briefs aggregating to more than 5000 pages, principally devolves to the meaning of a single word -- substantially -- as used in the Americans with Disabilities Act (the "ADA"), 42 U.S.C. @@ 12101-12213 (1995) and the Rehabilitation Act, 29 U.S.C. @@ 701-796 (1985) ("Section 504" or the "Rehabilitation Act"). Both Acts define a disability as "a physical or mental impairment that substantially limits one or more of" an individual's "major

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life activities." 42 U.S.C. @ 12102(2)(A) (1995 [*2] Supp.); 29 U.S.C. @ 706(8)(B) (1996 Supp.) (emphasis added).

Plaintiff claims she suffers from a learning disability that impairs her reading and her ability to be able to work as a lawyer. At issue in this case is whether plaintiff suffers from an impairment, and if so, whether it rises to the level of a substantial limitation cognizable under the ADA, thus entitling her to accommodations in taking New York State's Bar Examination. She sues for injunctive and other relief under Titles II and III of the ADA, Section 504 of the Rehabilitation Act, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and 42 U.S.C. @ 1983.

The evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit that evinces itself as a difficulty in reading with the speed, fluency and automaticity of an individual with her background and level of intellectual ability. Despite this impairment, plaintiff obtained a Ph.D. in Educational Administration and a law degree. By virtue of superior effort and not a small amount of courage, Marilyn Bartlett has been able to succeed academically and professionally despite the limitations her impairment has placed upon her. [*3]

But this case asks whether, in light of the confined language of the law, plaintiff is not merely impaired, but disabled.

The term "substantially limited" is defined in 29 C.F.R. @ 1630.2(j)(1)(ii) as:

(ii) Significantly restricted as to the condition, manner or duration under which an individual 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 same major life activity.

(emphasis added). n1 Similarly, with respect to the major life activity of working, "substantially limited" is defined by 29 U.S.C. @ 16300(3) to mean "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." (emphasis added). Regulations such as the foregoing must be accorded substantial deference because they reflect and incorporate active Congressional intervention in their fashioning. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 279, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1986) (citing Consolidated Rail Corp. [*4] v. Darrone, 465 U.S. 624, 634-35, 79 L. Ed. 2d 568, 104 S. Ct. 1248, & nn. 14-16 (1984)) (construing regulations adopted pursuant to the Rehabilitation Act).

-----Footnotes-----

n1 There are no significant textual or jurisprudential distinctions in the definition of disability, the burdens of proof or remedies between the ADA and Section 504. Accordingly, the definitions under both Acts are interchangeable for purposes of this case.

-----End Footnotes-----

For those of us for whom words sing, sentences paint pictures, and paragraphs create panoramic views of the world, the inability to identify and process

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words with ease would be crippling. Plaintiff, an obviously intelligent, highly articulate individual reads slowly, haltingly, and laboriously. She simply does not read in the manner of an average person. I reject the basic premise of defendants' experts that a learning disability in reading can be identified solely by a person's inability to decode, i.e., identify words, as measured by standardized tests, and I accept instead the basic premise of plaintiff's experts that a learning [*5] disability in reading has to be identified in the context of an individual's total processing difficulties.

Having witnessed all of the trial testimony and having studied the thousands of pages of exhibits, affidavits and depositions, I conclude that plaintiff is not able to read in the same condition, manner or duration as an average reader when measured against "the average person having comparable training, skills and abilities." 29 C.F.R. @ 1630.2(j)(3)(i). For this reason, I find that plaintiff is substantially impaired under the law, and she is therefore entitled to receive reasonable accommodations in taking the New York State Bar Examination.

For the reasons to be discussed, I deny plaintiff's equal protection, due process, and @ 1983 claims.

I award her injunctive relief, and compensatory, but not punitive, damages.

BACKGROUND

I. UNDISPUTED FACTS

The following consists substantially of undisputed facts taken from the joint pretrial order submitted by the parties. The Court has added, where indicated, some additional facts to this section in order to clarify or complete the presentation set forth in the undisputed facts agreed to by the parties.

A. [*6] Parties

Plaintiff is a law school graduate who has met all the qualifications necessary to take the New York State Bar Examination. Defendants John Holt-Harris, Jr., Richard J. Bartlett, Laura Taylor Swain, Charles T. Beeching, Jr., Ira P. Sloane, and James T. Fuller, as Executive Secretary, are the members of the New York State Board of Law Examiners (the "Board"), and as such are responsible for the administration of the New York State Bar Examination.

B. The Bar Examination

The Board is authorized to conduct a written bar examination, twice a year, consisting of legal problems in both "adjective and substantive law." (N.Y. Comp. Codes R. & Regs. tit. 22, @ 520.7 ("22 NYCRR")).

The Bar Examination is given over two days and tests the candidates' knowledge of legal principles and concepts that are relevant and important to the practice of law. The Board's mandate is to test for minimal competence to practice law. One day is devoted to answering the New York portion of the test, created by the Board and consisting of 50 multiple-choice questions and six essay questions. Unless an accommodation of extra time is granted for a disability, the New York portion of the test must [*7] be completed within six hours: a three-hour session in the morning and a three-hour session in the afternoon. The second day, which may be taken in another state, is devoted to

the 200 multiple-choice questions of the Multistate Bar Examination ("MBE"), created by the National Conference of Bar Examiners. The MBE normally takes six and one-half hours. If the candidate elects to take the MBE in New York, it is administered by the Board as part of the New York State Bar Examination. A combined score of 660 on the MBE and the New York portion of the test is needed to pass the Bar Examination. According to trial testimony, spelling errors in responding to questions are not penalized on the Bar Examination. The Court accepts plaintiff's contention, however, that difficulties in spelling affects the clarity of the presentation and detracts from the expression of concepts.

Title 22 NYCRR @ 220.13 authorizes the Board to adopt, amend or rescind rules it deems necessary and proper to enable it to discharge its duties. Title 22 NYCRR @ 6000.4(a) permits applicants to apply for accommodations for the Bar Examination based upon a disability. It is the policy of the Board to provide accommodations [*8] in testing conditions to candidates with disabilities to the extent such accommodations are reasonable, consistent with the nature and purpose of the examination, and necessitated by the candidate's disability.

The Board has provided, inter alia, the following accommodations to applicants with disabilities: granted access to food and drink, provided a private room in which to take the examination and large print examinations, permitted up to double the amount of time over two days to take the examination, and approved use of a computer or amanuensis to record answers. If the MBE is taken in New York by a candidate to whom the Board has granted accommodations, the same accommodations apply to the MBE portion of the test.

To request accommodations, an applicant completes a form enclosed with the application and returns it with supporting documentation to the Board. See 22 NYCRR @ 6000.4(b). The supporting documentation must state the nature of the candidate's disability, the requested accommodation, the causal relationship between the disability and the applicant's ability to take the Bar Examination without the requested accommodations, and the reason the specific accommodation [*9] requested by the candidate is required. See 22 NYCRR @ 6000.4(c).

The Board's rules also require applicants to provide documentation of the three most recent testing accommodations, if any, granted to the candidate by academic institutions, licensure authorities, or other test administrators. See 22 NYCRR @ 6000.4(c).

The Board has the discretion to require applicants to provide additional information relating to the disability and/or prior accommodations, and may also request that applicants submit to an examination by an expert designated by the Board in connection with an applicant's request for testing accommodations. See 22 NYCRR @ 6000.4(d).

If a requested accommodation is denied, either in whole or in part, the Board's notification must state the reason for the denial. The candidate may appeal the decision to the Board. See 22 NYCRR @ 6000.4(e). The Board must notify the applicant of its determination no later than twenty days prior to the date of the examination for which the accommodations are requested.

Title 22 NYCRR @ 6000.4(f) defines the term "disability" as a "physical, neurological or learning disability" and the term "candidates with disabilities" [*10] as an "otherwise qualified candidate having such disabilities."

The Board in its discretion may delegate to its members, its Executive Secretary or Deputy Executive Secretary, all or any part of its duties and responsibilities in granting or denying accommodations, with the exception of the responsibilities relating to appeals. See 22 NYCRR @ 6000.4(g).

C. Plaintiff's Educational Background

In 1970, plaintiff received a B.S.Ed. in Early Childhood Teacher Education from the State College at Worcester, Massachusetts. She graduated with a grade point average of 2.10. Plaintiff did not receive accommodations while at State College.

Plaintiff thereafter took the Graduate Record Examination without accommodations.

In 1976, plaintiff received a M.Ed. in Special Education, Educational Disturbances in Children, from Boston University. She graduated with a grade point average of 3.8. Plaintiff did not receive accommodations while at Boston University.

In the Fall of 1976, plaintiff entered the Ph.D. program in Educational Administration at New York University. Plaintiff first requested and received accommodations for the 1977 Summer semester. Plaintiff had not been formally diagnosed [*11] with a learning disability prior to receiving these accommodations. The Court accepts the plaintiffs and Dr. Evan's testimony that then-Ph.D. Program Director, Seymour Evans, who had knowledge of and experience with learning disabilities, recommended plaintiff for accommodations after he had worked with her and noted her reading difficulties.

New York University did not request, and plaintiff did not submit, any documentation of a learning disability in support of her request for accommodations. The accommodations granted to plaintiff at New York University included unlimited time to complete final examinations, unlimited time to take the written comprehensive examinations, use of an electronic typewriter with correction capability to take examinations, and the use of a department secretary as an amanuensis. Plaintiff was not granted accommodations for her examinations in statistics and administration, courses taught in another department. Plaintiff fulfilled her Ph.D. foreign language requirement by reading a passage in German and answering questions on the passage for the head of the German department. Plaintiff received her Ph.D. in 1981.

Plaintiff did not request accommodations [*12] for the Law School Aptitude Test, and she scored 32 out of a possible 48.

Plaintiff entered Vermont Law School in 1988. Plaintiff did not request accommodations during her first year of law school. Plaintiff's grade point average during that first year was 2.09, with a class ranking of 155 out of 166 students.

Plaintiff first requested and received accommodations during law school for the Fall 1989 examination period. Plaintiff received accommodations for the Spring 1990, Fall 1990 and Spring 1991 examination periods as well. The law school accommodations included time-and-a-half to take examinations, the use of a yellow legal pad with a red left margin instead of the traditional "blue book," and permission to circle the answers on multiple choice examinations

instead of filling in a computer-scored answer sheet. Plaintiff's grade point averages after receipt of the accommodations were: Fall 1989 - 2.58; Spring 1990 - 2.50; Fall 1990 - 1.82 n2; Spring 1991 - 2.90.

- - - - -Footnotes- - - - -

n2 At trial, plaintiff explained that during this semester she had spent a great deal of time traveling to, and caring for, an ill parent.

- - - - -End Footnotes- - - - -

[*13]

Plaintiff graduated from Vermont Law School in May 1991, with a cumulative grade point average of 2.32, and a class standing of 143 out of 153 students.

D. Plaintiff's Relevant Employment History n3

- - - - -Footnotes- - - - -

n3 The Court adds this section as its own finding of facts from testimony adduced at trial.

- - - - -End Footnotes- - - - -

Except for periods during which she was preparing for the bar examinations or moving from one job to another, plaintiff has been continuously employed since graduating from law school. Upon graduating from law school, plaintiff worked at a New York law firm until December 1992, when her firm dismissed her because she failed the Bar Examination for the third time. In January of 1993 and until June of 1993, she worked with a client of her former law firm on a special project until its completion. After a number of months of unemployment during which time she could not find work in the legal profession, in September of 1993, plaintiff became a director of a day care center in Brooklyn, New York. In July of 1994, plaintiff [*14] returned to her former profession of educational administration, and is currently employed as an Associate Professor of Educational Administration at Dowling College. She receives accommodations at work for her reading problems in the form of a full-time work-study student who assists her in reading and writing tasks. While working at the law firm, plaintiff predominantly self-accommodated her disability (e.g., dictating instead of writing reports, not billing for the additional time it took her to complete tasks), although she was given a computer before other associates because of her writing difficulties.

E. Plaintiff's Bar Exam Applications

Plaintiff took the Multistate Professional Responsibility Examination ("MPRE") in 1991 and received accommodations, including extra time, for that examination. The MPRE is not administered by the Board. In June 1991, fewer than 45 days before the examination, plaintiff applied, and requested accommodations, for the July 1991 Bar Examination.

Submitted with plaintiff's application was a Psychoeducational Evaluation from Philip M. Massad, Ph.D., a clinical psychologist, which indicated that he evaluated plaintiff on November 30, 1989 [*15] and December 7, 1989. In his evaluation, Dr. Massad concluded that plaintiff has "dyslexia characterized by

a deficit in phonological processing (DSM-III-R 315,00)." (Pl.'s Ex. 20a, at 5, Massad's Psychoeducational Evaluation,)

On July 1, 1991, James Fuller, the Executive Secretary to the Board, advised plaintiff that because she had missed the deadline for applying for accommodations, her request was denied. Fuller further indicated that the Board did not consider the materials she had submitted as current, and that the scores she earned in 1989 on the Woodcock test -- the test utilized by the Board to screen reading disabled applicants -- did not qualify plaintiff for accommodations. Fuller based his conclusion on the fact that the Woodcock Word Attack and Word Identification scores on plaintiff's test were above the 30th percentile. Dr. Frank R. Vellutino, a research psychologist retained by the Board to advise it on policies relating to learning disabled applicants, had previously indicated to the Board and Fuller that scores above the 30th percentile generally did not identify an applicant as having a significant reading disability. (Fuller Aff. P 52.) n4 Vellutino, however, [*16] did not review plaintiff's application at this time.

- - - - -Footnotes- - - - -

n4 Witnesses gave their direct testimony at trial by way of an affidavit. "Aff." refers to the affidavit of direct testimony of the named individual.

- - - - -End Footnotes- - - - -

Plaintiff failed the July 1991 Bar Examination with a score of 563 (a passing score is 660).

In November 1991, plaintiff applied for the February 1992 New York State Bar Examination. Plaintiff did not request accommodations for this test. Plaintiff took and failed the February 1992 Bar Examination with a score of 580.

In June 1992, plaintiff applied for the July 1992 Bar Examination. The parties dispute whether plaintiff applied for accommodations for this test. Plaintiff claims she did, but the Board has no record of the request. Plaintiff was not accommodated for the test, which she took and failed with a score of 576.

In January 1993, plaintiff applied for the February 1993 Bar Examination, again requesting accommodations for her learning disabilities. The accommodations sought by plaintiff were unlimited/extended [*17] time to take the test, and permission to tape record her essays and to circle her multiple choice answers in the test booklet.

Submitted with plaintiff's request for accommodations was Dr. Massad's 1989 Psychoeducational Evaluation, previously submitted by plaintiff, and a November 20, 1992 letter from Dr. Massad to plaintiff reasserting the opinion he set forth in his 1989 Evaluation.

Upon receipt of this application, Fuller referred the file to Dr. Vellutino. After evaluating the materials submitted to him, Dr. Vellutino recommended that plaintiff's request for accommodations be denied. Based on Dr. Massad's 1989 evaluation and his 1992 letter, Dr. Vellutino concluded that there was "no compelling documentation" of a learning disability and that the reading test data did not support a diagnosis of dyslexia.

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By letter dated January 20, 1993, Fuller forwarded the documentation relating to plaintiff and Dr. Vellutino's recommendation to the Board. The Board denied plaintiff's request for accommodations. In a letter dated January 26, 1993, Fuller advised plaintiff that the documentation she had submitted was insufficient to establish a basis for granting the accommodations requested. [*18]

Plaintiff appealed the Board's decision denying her accommodations in a letter received by the Board on February 17, 1993. Plaintiff did not submit any additional documentation concerning her learning disability with the appeal. By letter dated February 18, 1993, Fuller advised plaintiff that her appeal was untimely. Fuller also advised plaintiff that following consultation with an expert in the field, the Board had determined that the documentation that plaintiff had provided did not support the finding of a disability warranting accommodations.

Plaintiff took and failed the February 1993 Bar Examination with a score of 615.

In May 1993, plaintiff applied for the July 1993 Bar Examination, again requesting accommodations. On plaintiff's application, plaintiff identified her disability as "learning disabilities - DSM III-R 315.00." Plaintiff obtained a new evaluation from a clinical psychologist, Dr. Richard F. Heath. Plaintiff requested the following accommodations: extra time, use of a word processor or permission to dictate essay responses, and leave to circle answers on the multiple choice questions examination sheet. Fuller referred this application to Dr. Vellutino.

Dr. Vellutino [*19] again recommended that plaintiff's request for accommodations be denied, affirming his original opinion that plaintiff did not have a reading disability. By letter dated June 29, 1993, the Board advised plaintiff that the test profiles she had provided did not support a diagnosis of dyslexia, and therefore, her request for accommodations was denied.

By letter dated July 12, 1993 from Jo Anne Simon, Esq. to Fuller, plaintiff submitted her application for reconsideration. Plaintiff included the following with her appeal: an affidavit by Stephanie J. Wilbanks, Associate Dean for Academic Affairs at Vermont Law School, attesting to the fact that plaintiff was provided accommodations during her final two years at law school; Dr. Massad's and Dr. Heath's Evaluations; a copy of a letter from Paul A. Cullinan, Ph.D., Chair of the Educational Administration Department at New York University, stating that plaintiff had received accommodations at New York University; and a notice from the Pennsylvania Bar Examiners advising plaintiff that she had been granted accommodations for the July 1993 Pennsylvania Bar Examination. Dr. Heath also submitted a letter to the Board, dated July 3, 1993, wherein [*20] he reaffirmed his earlier evaluation and recommendation for accommodations.

Dr. Vellutino reviewed the file and again concluded that plaintiff's scores as reported by Dr. Massad and Dr. Heath supported his earlier opinion that there was insufficient documentation to support a finding of a learning disability. Fuller so notified plaintiff on July 19, 1993.

This litigation was commenced on July 20, 1993.

Pursuant to a Stipulation dated July 26, 1993 and so ordered by this Court, the parties agreed that plaintiff would receive accommodations during the July Bar Examination pending the outcome of this litigation. The Board gave plaintiff time-and-a-half -- a period of nine hours -- for the New York portion of the test and the use of an amanuensis to read the test questions to plaintiff and record her responses. In addition, the Board allowed plaintiff to mark the answers to the multiple choice portion of the examination in the question book rather than on the computerized answer sheet. Plaintiff elected to take the MBE in Pennsylvania.

Pursuant to the terms of the Stipulation, if plaintiff passed the July 1993 New York State Bar Examination with accommodations, the results were not [*21] to be certified to the Court of Appeals unless she was successful in this litigation.

Despite accommodation, plaintiff failed the July 1993 Bar Examination with a score of 597. At trial, plaintiff claimed the accommodations granted to her for this test were inadequate because she had had insufficient time to rest between the New York and Pennsylvania Bar Examinations or to practice with her amanuensis, an accommodation she had never previously used. She also complained that the proctor placed in her room caused distracting noises during the test.

F. Other Bar Examinations

In July 1993, plaintiff took the Pennsylvania Bar Examination and MBE with accommodations. The Pennsylvania Bar Examiners allowed plaintiff to mark her answers directly in the question booklet, gave her a separate room to take the test, granted her time-and-a-half -- the maximum allowable time -- and authorized her to use an amanuensis.

Plaintiff did not pass the Pennsylvania Bar Examination despite the accommodations.

G. Overview of the Applications Submitted to the Board for Accommodations

In February 1992, the Board administered the Bar Examination to 2,231 applicants. Among the applicants, 71 requested [*22] accommodations; 65 were granted, 4 were denied and 2 requested accommodations but either did not apply for the February 1992 Bar Examination or withdrew. Of the 71 applicants, 13 requested accommodations on the basis of a learning disability; 10 requests were granted and 3 were denied.

In July 1992, the Board administered the Bar Examination to 7,436 applicants. Of the applicants, 152 requested accommodations; 127 were granted, 7 were denied, 10 did not apply for the July 1992 Bar Examination or withdrew, one applicant passed the previous Bar Examination on appeal, 6 applicants did not provide additional documentation requested, and one applicant changed location due to a medical reason. Of the 152 applicants, 26 requested accommodations on the basis of a learning disability or attention deficit disorder; 21 requests were granted and 5 were denied.

In February 1993, the Board administered the Bar Examination to 2,202 applicants. Among the applicants, 102 requested accommodations; 88 were granted, 8 were denied, 1 did not qualify, 4 did not apply for the February 1993 Bar Examination or withdrew, and one applicant passed the previous Bar Examination

on appeal. Of the 102 applicants, [*23] 19 requested accommodations on the basis of a learning disability or attention deficit disorder; 16 requests were granted and 3 were denied.

In July 1993, the Board administered the Bar Examination to 7,373 applicants. Of the applicants, 181 requested accommodations; 155 requests were granted, 16 were denied and 10 applicants did not respond to a request for additional information. Of the 181 applicants, 51 requested accommodations of the basis of a learning disability or attention deficit disorder; 37 requests were granted and 14 were denied.

II. ADDITIONAL FACTS

Based on the testimony presented and the exhibits admitted during the bench trial, my additional factual findings pursuant to Fed. R. Civ. P. 52 are as follows:

A. Plaintiff's Psychoeducational Evaluations

The evaluations of plaintiff by her three psychologists, all of whom testified at trial, can be summarized as follows.

1. PHILLIP M. MASSAD, Ph.D. (Examination in December 1989)

a) test results

Wechsler Adult Intelligence Scale - Revised ("WAIS")

Verbal IQ:	126
Performance IQ:	109
Full Scale IQ:	122
Mean = 100, Standard Deviation = 15	

Verbal Scale		Performance Scale	
Information	15	Picture Completion	15
Digit Span	10	Picture Arrangement	11
Similarities	16	Block Design	11
Arithmetic	11	Object Assembly	10
Vocabulary	15	Digit Symbol	10
Comprehension	16		

Mean = 10, Standard Deviation = 3

[*24]

Woodcock Reading Mastery Test - Revised, Form H

Subtest	Percentile Rank (by age)
Work Attack	67th
Word Identification	52nd
Word Comprehension	98th
Passage Comprehension	97th
Overall Reading Cluster	90th
Reading Comp. Cluster	97th
Basic Skills Cluster	64th

Wide Range Achievement Test - Revised ("WRAT")	
Subtest	Percentile Rank (by age)
Spelling	34th
Arithmetic	63rd

Rey Osterreith Complex Figures Test	
Subtest	Percentile Rank (by age)
Immediate Recall	35th
Delayed Recall	65th

b) clinical observations

Dr. Massad administered four tests for which he reported no scores: the Detroit Tests of Learning Aptitude, a test of visual memory with which he reported plaintiff "had difficulty"; the Bender Gestalt Visual Motor Test about which he made no comment; the Minnesota Multiphasic Personality Inventory from which he found no evidence of undue test anxiety or other psychopathology; and the Gray Test of Oral Reading - Revised (the "Gray"). (Dr. Massad's Psychoeducational Evaluation is at Pl.'s Ex. 20a.) Of particular significance is the Gray, because it is a test on which the subject [*25] reads aloud from a passage and reading speed is measured. It is untimed, meaning the test taker is under no time constraints to complete the reading assignment. Questions are then asked to assess reading comprehension. Dr. Massad testified that he had plaintiff read aloud from the test passage to "get a feel" for plaintiff's reading rate. (Tr. at 222.) n5 He did not score the result, and made no mention of it in his six-page Psychoeducational Evaluation because it is not normed for adults and because he did not remember that its findings were "significant or germane to the diagnoses or what I was trying to determine." (Id.) "I didn't see anything remarkable to report." (Tr. at 224.) Dr. Massad administered no other test that evaluated plaintiff's reading speed, nor did he draw any conclusions with regard to whether plaintiff was a slow reader. (Tr. at 206, 208.)

- - - - -Footnotes- - - - -

n5 As noted at the outset of this opinion, the trial transcript and exhibits are voluminous. Many of the witnesses at trial repeated themselves at various times. The Court is only citing, as deemed appropriate, to one place in the record where an issue is discussed. Citations to the trial transcript are made with the designation "Tr." followed by the relevant page number(s).

- - - - -End Footnotes- - - - -

[*26]

Based on his examination, Dr. Massad testified at trial that "it is my professional opinion that the plaintiff has learning disabilities characterized by difficulties with automaticity, phonological processing, organizing and processing visual-spacial information, short term memory and sequential processing and will require accommodations on the New York State Bar Examination." (Massad Aff. P 79.) Dr. Massad, however, did not discuss plaintiff's automaticity problems in the evaluation he submitted to the Board. (Tr. at 233.) He defines automaticity as the "ability to not have to

deliberate when decoding a word." (Id.)

Dr. Massad agrees with the definition of learning disabilities contained in the Diagnostic and Statistical Manual III-R. n6 Based on this definition, Dr. Massad believes that learning disabilities are characterized and identified by "intraindividual" variability in test performance scores. (Massad Aff. P 42.) He views plaintiff's disabilities as reflected in the variability exhibited by plaintiff's subtest scores on the Passage and Reading Comprehension WAIS subtests as compared to her Word Attack and Word Identification scores, and as between her verbal IQ and [*27] her spelling score on the WRAT. He further finds that plaintiff "had difficulty organizing and processing visual-spatial information" as evidenced by her score on the Block Design and Object Assembly subtests, and her Rey-Osterreith score. Dr. Massad also concludes that plaintiff's reading skills were below what would be expected of a subject with plaintiff's record of academic achievement and intelligence. (Massad Aff. P 81.)

- - - - -Footnotes- - - - -

n6 The DSM-III-R definition reads, in pertinent part:

Developmental Reading Disorder. The essential feature of this disorder is marked impairment in the development of word recognition skills and reading comprehension that is not explainable by mental retardation or inadequate schooling and that is not due to visual or hearing defect or a neurologic disorder. The diagnosis is made only if this impairment significantly interferes with academic achievement or with the activities of daily living that require reading skills. Oral reading is characterized by omissions, distortions, and substitutions of words and by slow, halting reading. Reading comprehension is also affected. This disorder has been referred to as "dyslexia."

(Pl.'s Ex. 99.)

The definition was revised in the latest version of the manual, the DSM-IV:

The essential feature of reading disorder is reading achievement (i.e. reading accuracy, speed or comprehension as measured by individually administered tests) that falls substantially below that expected given the individual's chronological age, measured intelligence and age-appropriate education.

(Pl.'s Ex. aa.)

- - - - -End Footnotes- - - - -

[*28]

2. RICHARD F. HEATH, Ph.D. (Examination in May 1993)

a) test results

Woodcock Reading Mastery Test - Revised (The "Woodcock")
Form G Form H G & H G & H
%ile %ile %ile %ile
(age) (age) (age)

(grade) *

Visual-Auditory Learning 46

970 F. Supp. 1094; 1997 U.S. Dist. LEXIS 9669, *28

Letter Identification	18			
Word Identification	37	52	45	35
Word Attack	28	50	37	26
Word Comprehension	76	90	84	73
Passage Comprehension	74	99	88	90
Readiness Cluster	28			
Basic Skills Cluster	36	53	43	25
Reading Comp. Cluster	78	98	89	85
Total Reading Cluster	48	84	66	

* The Woodcock is normed up to grade 16.9, i.e., college graduates. Plaintiff's percentile rank thus represents the proportion of college graduates in a demographically representative sample who scored below her on the test.

b) clinical observations

Dr. Heath, a clinician with an extensive background in diagnosing learning disabilities in adults, did not purport to diagnose plaintiff in his evaluation to the Board, but only to confirm Dr. Massad's diagnosis and supply plaintiff with the Woodcock scores requested by the Board. (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation; [*29] Heath Aff. P 52; Tr. at 505-06.) In his evaluation, however, Dr. Heath described plaintiff as a "dyslexic adult" in his evaluation. (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) Moreover, he noted in his evaluation that "Dr. Bartlett decoded words slowly and without automaticity; self-corrections were common." (Id. at 1.) Further, in describing her reading tests, he noted that "she read [] passages slowly, and she typically read the more complex passages two or three times in order to ascertain their meaning." (Id. at 2.)

In his trial affidavit, Dr. Heath described his observations more fully:

58. In administering the Woodcock to plaintiff, I observed several things which are relevant to and supportive of my opinion that the plaintiff has a learning disability. First, I noticed that she had to make several attempts to sound out words which should have been second nature to her. She [sic] reading was full of hesitations, and self corrections. In other words, plaintiff will attempt to read a word such as "instigator" as "investigator." Since she will hear that it sounds incorrect she will start over and often corrects her reading of the word after several [*30] attempts. On the Woodcock, this would be credited as a correct response, even though it took her three attempts to get it right and took more time than it would have taken a person who did not have to read in this fashion.

59. Second, I observed that she needs to use her finger to keep her place when reading a paragraph in the passage comprehension subtest. The paragraphs on this subtest are only three to five lines long and yet plaintiff has difficulty keeping her place when reading.

60. Third, I observed that plaintiff reads aloud in a hesitant manner, slowly and without automaticity. Automaticity is the phenomenon by which a person recognizes a printed word and is able to read it accurately, and immediately; in other words, automatically and without thinking. In particular, plaintiff had a great deal of difficulty reading polysyllabic words, vowels (especially diphthongs, digraphs and in ascertaining differences between long and short vowels), consonant blends and silent consonant conventions.

61. Fourth, I also observed that on the more complex reading passages, Dr. Bartlett typically read the passages over two or three times before she could respond to that test [*31] item. She uses contextual cues to facilitate her decoding. She reads very slowly. She will reread a phrase or sentence to make sure she gets it. You can often see her lips move or hear her read quietly to herself and when she does this, you can hear the mispronunciations. When she is faced with an unfamiliar polysyllabic word she is very slow to break down the word to different parts and she will mispronounce parts of the word. She is slow to synthesize the morphemes into a word.

In his trial affidavit, Dr. Heath also opined that the results of the Woodcock test he administered were consistent with Dr. Massad's diagnosis:

As I mentioned earlier, I observed the plaintiff needed to sound out words slowly and with repeated attempts. This pattern of word attack is indicative of someone whose decoding skills are not fully formed. Word attack skills are generally well formed by junior high school age. Plaintiff's scaled score on the Word Attack subtest form G was 91, 28th percentile with a grade equivalent of 4.7. Thus, in laymen's terms plaintiff decodes pseudo-words at a fourth grade level. This is a strikingly different performance from what one would expect of a person whose [*32] Passage Comprehension score on the same form of the test (G) was 110 or the 74th percentile.

(Heath Aff. P 62.)

Dr. Heath further described plaintiff as suffering from a "mild to moderate" reading disability. (Tr. at 507.) Dr. Heath utilizes the same diagnostic approach as Dr. Massad, viewing a learning disability as "intraindividual or intrinsic to the nature of the individual." (Heath Aff. P 47.) n7 Dr. Heath uses a history, neuropsychological battery, intelligence tests and achievement tests to diagnose learning disability. He looks for variation between the verbal and performance IQ scores on the WAIS, discrepancies between timed and untimed subtests, and errors in subtests. (Heath Aff. P 40.)

- - - - -Footnotes- - - - -

n7 Dr. Heath prefers the definition of learning disabilities adopted by the National Joint Committee on Learning Disabilities ("NJCLD"), which reads:

Learning disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviors, social perception, and social interaction may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.

(Pl.'s Ex. 96, Donald D. Hammill, On Defining Learning Disabilities: An Emerging Consensus, 23 J. Of Learning Disabilities 74, 77 (1990) (quoting 1988 NJCLD

1).)

- - - - -End Footnotes- - - - -

[*33]

In the evaluation he submitted to the Board, Dr. Heath identified the difference between plaintiffs' Basic Skills Cluster score and Reading Comprehension Cluster score as consistent with dyslexia:

[Bartlett's] pattern of decoding errors, as well as the significant discrepancy between her basic reading skills (43rd percentile) and reading comprehension (89th percentile), are consistent with a language-based learning disability.

(Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) At trial, he also maintained that any discrepancy between IQ and achievement scores over 1.5 standard deviations was strong evidence of a learning disability. (Heath Aff. P 71.)

3. ROSA A. HAGIN, Ph.D. (Examination in September 1994)

a) test results

Woodcock Reading Mastery Test - Revised

	Form G	Form H
	%ile	%ile
	(age)	(age)
Word Attack	50	50

Diagnostic Reading Test ("DRT") *

	Form C (timed)	Form A (untimed)
	50th %ile	98th %ile
	4th %ile (195 wpm)	>1st %ile (156 wpm)
Comprehension		
Speed		

* The DRT is not age normed. The highest grade norm is college freshmen, and thus plaintiff's score is ranked against that group.

[*34]

Wide Range Achievement Test	%ile
	(age)
Oral Reading	86
Spelling	45

Neuropsychological Battery

Bender Gestalt Visual Motor Test: 2/9 figures recalled

Phoenician Spelling Test
(spelling nonsense words):

19/20 correct

Trailmaking Test:

Speed abnormally low, poor
visual scanning

Purdue Pegboard:

Normal speed, but poor

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	laterality
Extension Test:	Equivocal laterality
Finger Gnosis:	4/7 errors, most on left; poor laterality
Directionality	5/7 errors in directional orientation

b) clinical observations

Dr. Hagin has been among the nation's leading researchers in the field of learning disability for more than two decades and is the author of many books and articles on the subject. She holds faculty appointments at Fordham University and in the Department of Psychiatry at New York University Medical Center, and supervises clinics at both institutions. She examined plaintiff in preparation for trial and served as her lead expert witness.

Dr. Hagin opined, based on Drs. Massad's and Heath's evaluations and her own, that plaintiff "has a learning disability consistent with the National Joint Committee on Learning [*35] Disabilities definition." (Pl.'s Ex. 93, Hagin's Psychological Evaluation, at 3; see definition supra, note 7.) Dr. Hagin placed considerable emphasis on the DRT results, which she viewed as demonstrating plaintiff's slow rate of reading. She also based her opinion on: (a) the 17-point discrepancy between plaintiff's WAIS verbal and performance scores, which Dr. Hagin asserted occurs in less than 20% of the population; (b) neuropsychological findings suggesting "central nervous system dysfunction"; (c) variations of 1 1/2 standard deviations or more among WRMT subtest scores and WAIS subtest scores; (d) an 18-point discrepancy between the verbal IQ score and the Word Attack scores, which Dr. Hagin asserted occurs in 5% of the population; (e) plaintiff's performance on a 53-word writing sample, which was "laborious" and contained five spelling errors, and (f) achievement test scores that, overall, contrast with plaintiff's superior cognitive abilities and academic achievement. (Pl.'s Ex. 93, Hagin's Psychological Evaluation at 3.)

Of central importance in her diagnosis is Dr. Hagin's view that plaintiff has evolved a set of personal skills to compensate for her disability: [*36]

She used several kinds of cues to assist her in responding to the tasks presented: slowing down the rate of response, verbal rehearsal of rote sequencing items, pointing cues to assist in keeping her place on visual text.

(Pl.'s Ex. 93, at 2.) Dr. Hagin believed that plaintiff's earlier work as a school teacher where phonics were stressed allowed plaintiff to develop "self-accommodations" that account for her ability to spell better and to perform better on word identity and word attack tests than would be expected of a reading disabled person.

According to Dr. Hagin, a learning disability's diagnosis cannot be made "on the basis of any one score or any one test. It made [sic] based on a total picture." (Hagin Aff. P 110.). For this reason, she prefers the NJCLD definition of learning disability. n8 Although many of plaintiff's achievement scores fell in the average range when compared with plaintiff's age group, Dr. Hagin's judgment is that "one's educational level and expectancy" and clinical judgment should be dispositive in identifying a learning disability rather than test scores based on age norms. "Clearly, graduation from law school denotes a high level of [*37] achievement and correlated expectancies." (Hagin Aff. P 123.)

-Footnotes-

n8 See note 7, supra.

-End Footnotes-

Dr. Hagin believes that Dr. Vellutino's definition of dyslexia as solely a phonological decoding problem is too narrow. (Tr. at 698.) She views the reading task as more complex than simply identifying words. The reading process also requires understanding what text means. (Tr. at 695-96.) To Dr. Hagin, because the Woodcock tests relied upon by Dr. Vellutino do not test automaticity or reading rate, they are poor indicators of a decoding problem in individuals like plaintiff who function at higher cognitive levels. (Tr. at 699-703.) Dr. Hagin notes that the DRT is a "very easy test" -- comparable to reading a passage in Reader's Digest. Dr. Hagin expects a college-educated person to read DRT passages at the rate of 300 words-per-minute. Instead, plaintiff read at 195 words-per-minute timed -- the fourth percentile compared to college freshman, and 156 words-per-minute untimed -- below the first percentile compared to [*38] college freshman. (Tr. at 435, 701, 1050-51, 1092.) According to Dr. Hagin, plaintiff should have been performing at the 50th percentile of college freshmen, and instead reads very slowly when compared to a college student. (Tr. at 1050-51.)

For Dr. Hagin, the issue is not whether plaintiff can comprehend as she reads but the difficulty plaintiff has in the process of comprehending what she reads. (Tr. at 1076, 1632.) Dr. Hagin concludes that plaintiff does not read in the same condition, manner or duration of the average adult reader in that plaintiff does not read with the automaticity or speed of an average reader. (Tr. at 2494-98, 2545.)

4. Plaintiff's In-Court Demonstration

As part of plaintiff's proof, Dr. Hagin administered an in-court demonstration of plaintiff's reading and writing ability. Plaintiff was asked to read a passage describing a criminal law hypothetical from a 1988 bar exam, a document selected at random by the Court from among the exhibits, consisting of 426 words. Plaintiff read haltingly and laboriously, whispering and sounding out some words more than once under her breath before she spoke them aloud. Plaintiff marked the right-hand side of the text with [*39] her right index finger, advancing it down the right margin and using her left hand to read across the line. (Tr. at 748.) She made one word identification error, reading the word "indicted" as "indicated." Plaintiff's reading speed was approximately 40 words per minute.

Plaintiff was also asked to write a 48-word passage as it was dictated to her. The specimen produced, Plaintiff's Exhibit 174, has six grammar and spelling errors ("families" for "family's," "prapar" for "prepare," "Dave" for "David," "brotha" for "brother," "inadvertently" for "inadvertently" and "omited" for "omitted"), and three words crossed out at the right margin which appear to have been written backwards or in "mirror writing." It took plaintiff approximately 10 minutes to complete the task.

Another specimen of plaintiff's handwritten work product admitted into evidence was her essay answers on the February 1993 New York Bar Examination, consisting of 38 single-spaced pages. (Pl.'s Ex. 185; Def.'s Ex. B.) Omitting

what are commonly understood shorthand condensations of words (e.g., "managemt" for "management,"), I count 10 spelling errors. There are no examples of mirror writing, and the handwriting is [*40] generally legible. Plaintiff completed all six of the essay questions.

The Court recognizes that the trial setting undoubtedly affected plaintiff's performance in the courtroom demonstration. Therefore, the Court places limited value on the demonstration. The Court instead relies upon Dr. Hagin's and Dr. Heath's testimony of what they saw during their evaluation of the plaintiff and uses the demonstration only as illustrative of some of the phenomena Dr. Hagin and Dr. Heath described during their testimony.

B. Defendants' Expert Opinions

1. FRANK R. VELLUTINO, Ph.D.

At all relevant times, the Board employed a research psychologist expert in the field of learning disabilities, Dr. Frank R. Vellutino, to advise it on policies relating to the identification and accommodation of learning disabled applicants, and to screen applications for accommodations. Dr. Vellutino is a leading researcher in the field of learning disabilities and has published numerous books and articles on the subject. His primary experience is with children. He is a Professor in the departments of Linguistics, Psychology and Educational Psychology and Statistics at the State University of New York at Albany. [*41] He also supervises a clinic engaged in the identification and treatment of children with dyslexia.

In its rules and regulations, the Board does not specify what tests, if any, applicants for accommodations should submit with their applications. n9 Dr. Vellutino prefers to receive scores from each of the Woodcock Reading Mastery Test - Revised Word Attack and Word Identification subtests in evaluating applicants claiming a reading disability. The Board advises applicants of Dr. Vellutino's preferences if they call or write asking which test results they should submit. Even if an application does not provide results from the Woodcock test, Dr. Vellutino will examine the results from whatever tests are submitted and evaluate whether those test results contain a word identification/word attack component sufficient to support the clinician's conclusions.

- - - - -Footnotes- - - - -

n9 See note 33, infra.

- - - - -End Footnotes- - - - -

The Woodcock Word Attack test requires a subject to sound out nonsense words and is thus a test of a person's ability correctly to [*42] associate letter combinations with their sounds, a task referred to as phonological decoding ability. A subject is presented with 45 separate words, beginning with simple one-syllable patterns (e.g., "ip" and "din") and progressing to more complex combinations (e.g., "ceisminadolt" and "gnouthe"). The Woodcock Word Identification test requires a subject to identify 106 real words in isolation that range from simple ("is") to difficult ("zymolysis"). Both tests are untimed, and the scores do not reflect incorrect tries that precede a correct answer.

Dr. Vellutino discounts the significance of discrepancies in test scores as an identifier or discriminator for learning disabilities in an individual because even superior readers have discrepancies in scores. (Tr. at 1787-88 (noting that IQ/Achievement discrepancies are present in both good and poor readers); Vellutino Aff. P 14 (stating that discrepancy reported in Dr. Bartlett's scores is contrary to that found in reading disabled applicants because she has higher score in verbal skills than performance skills).) Similarly, Dr. Vellutino claims that research studies demonstrate that problems with spelling do not define a learning [*43] disabled person because "there are many good readers who are also poor spellers." (Vellutino Aff. P 14.) Neither do visual spatial organization problems, directional confusion or the like identify a reading disabled individual for Dr. Vellutino. (Tr. at 1173 (reporting that "in every piece of research we've done . . . we get no differences between poor and normal readers" in performing these tasks); id. at 1200 (stating he does not believe that Dr. Hagin's tests are "important diagnostic signs").)

Dr. Hagin concurs with Dr. Vellutino that a discrepancy in scores or difficulty in other visual or spatial functions do not identify a learning disabled individual, but she believes that the discrepancies and task malfunctions can signal the existence of a disability. (Hagin Aff. PP 116, 126.) In Dr. Bartlett's case, as discussed, Dr. Hagin notes that plaintiff performed poorly on directional task tests; further, Dr. Hagin clinically observed the effect of such confusion upon plaintiff's reading in plaintiff's use of her finger to track left to right reading, and in plaintiff's frequent skipping of a line when returning to the right side of the page. (Tr. at 748-49.)

According to Dr. [*44] Vellutino, directional reading confusion exists in both learning disabled and nonlearning disabled children, and many adults retain vestiges of childhood coping mechanisms for reading difficulties. (Tr. at 1849-50.) Because the signals relied upon by Dr. Hagin are not, according to him, discriminators of learning disability, Dr. Vellutino believes that a diagnosis of dyslexia can only "be based exclusively on measures of reading ability, in particular measures of Word Identification and phonetic decoding or word analysis skills (ability to 'sound out' a word), deficiencies in which are characteristic of individuals with severe reading disability." (Vellutino Aff. P 33(a).) The only tests available which measure these functions are the Woodcock Reading Mastery Test - Revised or the Woodcock-Johnson Psychoeducational Test Battery. (Id. P 33(c).) Dr. Vellutino prefers the Woodcock Reading Mastery Test over the Woodcock Johnson because the Mastery Test is more comprehensive. (Id.) Moreover, Dr. Vellutino believes the Word Attack subtest, is the most "direct measure of phonological dyslexia." (Tr. at 1804.)

Based on his view that a reading disability must affect an applicant's [*45] ability to perform on reading function tests like word attack and word identification, Dr. Vellutino recommended to the Board that it automatically grant accommodations to applicants claiming reading disabilities if their scores on the Woodcock Word Attack and Word Identification tests are below the 30th percentile when age-normed or grade-normed. (Vellutino Aff. P 33(e); Tr. at 2058 (defining "significantly impaired in reading" as "deficiency in reading subskills").) Dr. Vellutino recommended the 30th percentile cutoff on the basis of studies showing that the incidence of learning disability in the population is estimated at between 5% and 20% and thus, a 30% cutoff, according to him, would be reasonably certain to capture all disabled applicants. (Vellutino Aff. P 32; see also Tr. at 1305-06 (describing his choice of a 30th percentile

cut-off as arbitrary, but not irrational because the cut-off is over inclusive).) Dr. Vellutino admits that scores on the Woodcock, and hence his cut-off, do not distinguish reading disabled applicants who read slowly from purely slow readers. (Tr. at 2401-02.)

Dr. Vellutino, however, will give applicants the benefit of doubt and has recommended [*46] accommodations for an applicant if either their Word Attack or Word Identification score is below 30% or 1 or 2 percentage points above, or other subset reading scores show marked deviations from the average range or are marginal. (See, e.g., Pl.'s Ex. 123-A68; Tr. at 2080-84, 2089, 2094, and 2123.)

Plaintiff scored in the 29th percentile on the Word attack test given by Dr. Heath but Dr. Vellutino did not give her the benefit of the doubt or recommend accommodations for her because he considered that one score an anomaly among other test scores that demonstrated above average, if not superior, reading functions. Moreover, he viewed that score as within an average range. (Tr. at 1303-05, 2118-19, 2167.) Dr. Vellutino also discounted Dr. Hagin's characterization of plaintiff as a slow reader because he viewed plaintiff's performance at the rate of 195 words-per-minute on the DRT test as within average range. (Vellutino Aff. P 62; Tr. at 1212-15.) In reaching this conclusion, Dr. Vellutino relied upon various studies of reading rates and extrapolated from them that plaintiff's DRT was within the normal range, despite the 4% untimed college norm and 1% timed college norm of the test. [*47] (Tr. at 1822.) Finally, Dr. Vellutino assumes that anyone who can score above the 30th percentile in Forms G and H of the Woodcock has sufficient automaticity to read most texts. (Tr. at 2405.) In short, Dr. Vellutino recommended against giving Dr. Bartlett accommodations because he has "rarely" seen clinical findings of a significant disability with such high test scores. (Tr. at 1314; but see Pl.'s Ex. 123-18; Tr. at 2161 (applicant with scores much like plaintiff's who Dr. Vellutino recommended for accommodation).)

2. DR. JACK M. FLETCHER

Dr. Fletcher holds professorships at the University of Texas Medical School at Houston and the University of Houston. He is a psychologist and holds a diplomate in neuropsychology. He has published widely on dyslexia and neuropsychology, and devotes half of his time to clinical practice, principally, but not exclusively, with children.

Earlier in his career, Dr. Fletcher wrote articles criticizing Dr. Vellutino's approach to the diagnosis of learning disabilities. (Fletcher Aff. P 9.) However, based on his own research and that of others, Dr. Fletcher has concluded that Vellutino's approach is the only valid approach for identifying a learning [*48] disability. (Id. ("Over the years, Dr. Vellutino's original hypotheses concerning the cognitive basis of reading disability have been shown to be correct. His early hypotheses presaged the now widely accepted understanding that reading disabilities have a linguistic basis and specifically reflect fundamental problems with the development of word decoding abilities that, in turn, reflect deficiencies in the acquisition of phonological awareness skills.")) After examining plaintiff's evaluation reports, he concluded that plaintiff was neither impaired nor disabled. (Fletcher Aff. P 11.) He concurred fully with Dr. Vellutino's evaluation of plaintiff's application for accommodations. (Fletcher Aff. P 47.)

C. Plaintiff's evidence of disability.

1. Psychometric Testing.

The experts in this case disagreed on much, but none challenged the efficacy of psychometric testing per se. Plaintiff's experts use the same cluster of achievement tests as defendants' experts to assess the presence of a reading disability. These tests have been standard in the psychology discipline for decades. The tests have gained acceptance in the field in part because statistical measures of their [*49] reliability are positive. n10 Plaintiff's experts mention, as a general proposition, that test scores alone can not reliably identify reading disabled individuals, and they criticize Dr. Vellutino's reliance on the Woodcock for identifying adults with a reading disability. I agree with plaintiff's experts.

- - - - -Footnotes- - - - -

n10 For the Woodcock, median split-half reliability coefficients (using the Spearman-Brown formula) range from .84 to .98. (Pl.'s Ex. 183 at 912.) The Tenth Mental Measurements Yearbook, a guide viewed by plaintiff's lead expert, Dr. Hagin, as authoritative, (Tr. at 551), concludes:

the Woodcock Reading Mastery Tests--Revised is a reliable instrument useful in measuring some aspects of the reading process. Used in conjunction with the more valid process-oriented measures, the WRMT-R can potentially contribute to a thorough review of a subject's reading growth.

(Pl.'s Ex. 183 at 913) (emphasis added). But see, Pl.'s Ex. 183 at 916 (A second reviewer concluded that the diagnostic value of the WRMT--R is "debatable" and that "evidence offered in support of the reliability and validity . . . must be judged inadequate.") The percentile rankings derived from the scores, however, are accurate to within plus or minus 5 points. (Id.) The fact that plaintiff was tested on both Forms G and H increases the statistical reliability of the scores.

For the Wide Range Achievement Test--Revised, all the subtests administered to plaintiff have a reliability of .91 or better as determined by test-retest measures. (Id. at 902.)

- - - - -End Footnotes- - - - -

[*50]

Plaintiff's experts have persuaded me that plaintiff's reading disability cannot be measured solely by psychometric testing. For example, no test measures automaticity directly. (Tr. 489, 503, 702.) A lack of automaticity in understanding words without undue attention to them is usually inferred from a combination of test scores and clinical observations. (Tr. at 701-02.) In this case, all three of plaintiff's experts noted plaintiff's stark lack of automaticity when she was required to read aloud. On the Woodcock tests themselves, plaintiff had to sound out the words repeatedly before coming to an answer. Plaintiff's lack of automaticity is further confirmed by her slow rate of reading compared to college freshmen on the DRT test. In that test, plaintiff's timed reading rate of 195 wpm compared to the 4% percentile of college freshmen. Finally, plaintiff's reading test data was not consistent across a wide range of reading-related skills. As noted by Dr. Heath and Dr.

Hagin, plaintiff's high comprehension scores were incongruent with her relatively lower Word Attack and Word Identification scores.

I find seriously infirm Drs. Vellutino and Fletcher's presumption (albeit according [*51] to them rebuttable presumption) that a score above the 30th percentile on the Woodcock Word Attack and Word Identification subtests in all cases identifies the absence of a reading disability. As admitted by Dr. Vellutino, such a screening mechanism suffers from serious problems where an applicant's other scores and clinical reports place him or her at or below the average on other reading skill indicators. (See, e.g., Tr. at 2107). Further, the best evidence for the Woodcock's shortcomings comes from defendants' experts and the scientific evidence upon which they rely.

To support their testimony, both Drs. Vellutino and Fletcher relied principally on the studies of adult dyslexics conducted by Dr. Maggie Bruck. (Tr. at 280, 1780.) Yet, Bruck found the Woodcock subtests poor discriminators for a learning disability unless the subject's reaction time was measured. (Defs.' Ex. JJ at 444; Pl.'s Ex. 149 at 262 ("It is the slowness of reading that is particularly characteristic of the deficient word recognition skills of adult Dyslexics".)) The Woodcock is an untimed measure of phonological decoding ability and does not score for reaction time. Further, both Dr. Fletcher and Dr. Vellutino [*52] do not credit clinical reports of lack of automaticity. Yet, Dr. Vellutino did acknowledge the Woodcock's weakness with regard to discriminating for lack of automaticity. (Tr. at 2305.)

A second criticism of the tests is that they are designed principally to test children and thus do not have enough items in the difficult range. Dr. Vellutino, in a recent research article, acknowledged the Woodcock has "severe limitations," in that "there are far too few items at any given level to be certain of reliability at that level." (Pl.'s Ex. 89 at 304 (Vellutino, Scanlon & Tanzman, Components of Reading Ability (1994).) Further, although Form G and H are supposed to be equivalent tests for norms, Dr. Vellutino admits that in his clinical experience Form G is harder than Form H. (Tr. at 1955.) Dr. Fletcher does not use these tests in his research.

Moreover, although Dr. Vellutino claims the 30th percentile cutoff is "over inclusive," Bruck reported that, using a test similar to the Woodcock, "one third of the subjects [adult Dyslexics] scored above the 30th percentile on the WRAT-R Level II." (Defs.' Ex. KK at 877.) In an earlier study of college-student dyslexics, the average score [*53] was at the 32nd percentile, with the range being from the 3rd to 81st. (Defs. Ex. JJ, Table 1, at 443.) Thus, despite Dr. Vellutino's insistence that the 30th percentile cut-off is over generous in identifying reading disabled applicants, the studies he relies upon provide testing data that show reading disabled college students performing well above the 30th percentile. Bruck reports that using a test similar to the Woodcock, "one third of the [adult dyslexics] subjects scored above the 30th percentile on the WRAT-R Level II." (Def. Ex. KK at 877). In an earlier study of college-student dyslexics, the average score was at the 32nd percentile, with the range being from the 33rd to 81st percentiles. (Def. Ex. JJ, Table 1, at 443).

Finally, I do not credit Dr. Vellutino's attempt to equate Bartlett's low DRT reading rate score with an average rate by extrapolation to other tests. This approach is seriously infirm in that it attempt to compare scores on different tests with different subject populations. As noted by Dr. Hagin, to be within

the average range of college freshmen, plaintiff should have been performing at the 50th percentile of the DRT, and instead she reads at a very [*54] slow rate for the college student population which this test directly measures. (Tr. at 1050-51.)

In short, I do not accept Dr. Vellutino and Dr. Fletcher's conclusions that reading disabled individuals are incapable of having the test scores reflected by plaintiff. Plaintiff's experts have convinced me that a reading disability is not quantifiable merely in test scores. A learning disability is not measurable in the same way a blood disease can be measured in a serum test. By its very nature, diagnosing a learning disability requires clinical judgment. Clinicians need to examine a patient to ensure that low or disparate scores are not the result of low intelligence, or emotional or other social problems. Moreover, I accept the opinion of plaintiff's experts, based on the studies of Dr. Maggie Bruck, that tests like the Woodcock are "poor discriminators" for adults. (Defs.' Exh. JJ at 444.) Thus, as much as the Board would like to find an easy test discriminator for a reading disability in its applicants, such a test does not exist. Finally, I also do not accept the position of defendants' experts that clinical judgments of a lack of automaticity must be rejected as subjective. Clearly, [*55] plaintiff's low, albeit within the average range, test scores on the Woodcock, combined with clinical observations of her manner of reading amply support a conclusion that she has an automaticity and a reading rate problem.

2. Discrepancy versus performance measures

Central to this case has been the contention by plaintiff's experts that reading disability can be identified by significant variations (one standard deviation or more) between either (i) intelligence (or aptitude) measures versus reading performance (or achievement) measures or (ii) within the discrete subskills comprising intelligence or within those comprising reading ability. This theory, commonly called the discrepancy theory, has engendered considerable controversy in the psychology profession. n11

- - - - -Footnotes- - - - -

n11 "Today, the value of these discrepancy formulas is one of the most hotly disputed issues in the field of learning disabilities." (Pl.'s Ex. 96 at 77 (Donald D. Hammill, On Defining Learning Disabilities: An Emerging Consensus, 23 J. Learning Disabilities 73, 77 (Feb. 1990).)

Notwithstanding its contested basis, federal regulation and many states have adopted the discrepancy definition pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. @ 1400 et seq. IDEA lists learning disabilities as among those covered, 20 U.S.C. @ 1401(a)(1)(A), and the regulations define a learning disabled child as one who "does not achieve commensurate with his or her age and ability level" and "has a severe discrepancy between achievement and intellectual ability in ... [among other things] basic reading skill." 34 C.F.R. @ 300.543. New York's definition tracks the federal rule, but quantifies "severe" as "a discrepancy of 50% or more between expected achievement and actual achievement ..." 8 NYCRR @ 200.1(6). Forty-five states have adopted some form of the discrepancy definitions. (Pl.'s Ex. 168 at 149.)

The only case in this circuit to reach the issue of a disputed diagnosis of learning disability under IDEA found for defendants on the grounds that plaintiff's "overall scores on psychological tests ... ranged from average to below average," *Hiller v. Bd. of Educ. of Brunswick Cent. Sch. D.*, 743 F. Supp. 958, 975 (N.D.N.Y. 1990), and that Dr. Vellutino's expert opinion in the case was more credible than plaintiff's experts. *Id.* at 971 n.50.

- - - - -End Footnotes- - - - -
[*56]

As applied to this case, the plaintiff's experts did not agree on a uniform measure of discrepancy and this fact undermined the discrepancy theory's validity. Dr. Massad defined it as a discrepancy between verbal IQ and decoding scores on the Woodcock, (Pl.'s Ex. 20(a), Massad's Psychoeducational Evaluation, at 5), or, in the alternative, between subtest scores on the Verbal Scale. (Tr. at 219.) Dr. Heath maintained that the most probative discrepancy measure was the differential between plaintiff's basic reading skills (the 43rd percentile) and her reading comprehension (89th percentile). (Pl.'s Ex. 16, Heath's Psychoeducational Evaluation, at 2.) Dr. Hagin testified that she uses the widest differential between an intelligence score and reading achievement scores. (Tr. at 1105 ("I think the expectancy estimate should be the most optimistic estimate.")) Perhaps even more confusingly, at the same time that defendants' expert, Dr. Vellutino, strongly criticizes the discrepancy theory, he avows an adherence to a definition of dyslexia that appears to approve explicitly the discrepancy theory. Specifically, Dr. Vellutino subscribes to the following "research definition" of dyslexia promulgated [*57] by the Orton Dyslexia Society:

Dyslexia is one of several distinct learning disabilities. It is a specific language-based disorder of constitutional origin characterized by difficulties in single word decoding, usually reflecting insufficient phonological processing abilities. These difficulties in single word decoding are often unexpected in relation to age and other cognitive and academic abilities, they are not the result of generalized developmental disability or sensory impairment. Dyslexia is manifested by variable difficulty with different forms of language, often including, in addition to problems reading, a conspicuous problem with acquiring proficiency in writing and spelling.

(Pl.'s Ex. 94.) (emphasis added).

A standard that adopts a purely self-referential measure of an impairment's severity, however, is fraught with danger as it is likely to be both under and over inclusive. n12 In assessing reading disability, individuals with very high IQ scores but average reading ability will be found disabled, although their reading skills may be less developed because of any number of factors other than the presence of a disorder:

All persons have some [*58] mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automatically constitute handicaps.

American Motors Corp. v. Labor and Indus. Review Comm'n, 119 Wis. 2d 706, 350 N.W.2d 120, 123-24 (Wisc. 1984). Under inclusion would result from a methodology which excluded individuals whose IQ and reading scores were both below the norm, but not widely enough apart to trigger statistical significance. As will be

discussed, *infra*, the Rehabilitation Act presumes resort to an extrinsic average to define disability, and I believe Congress intended to adopt such a standard in defining disability under the ADA. n13

- - - - -Footnotes- - - - -

n12 But see *In re Rubenstein*, 637 A.2d 1131 at 1133 (crediting discrepancy definition as basis for diagnosis of learning disability); *Pazer v. New York State Bd. of Law Examiners*, 849 F. Supp. 284 at 287 (finding "some merit" to discrepancy theory but ruling for defendants on grounds that Dr. Vellutino's opinion and average to superior test scores refuted plaintiff's claim that he had a learning disability).

n13 In the EEOC's interpretive guidance to its regulations promulgated under Title I, it explained that:

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below averages speed.

29 C.F.R. Pt. 1630, App. Section 1630.2(j).

- - - - -End Footnotes- - - - -

[*59]

I do not need, however, to decide whether the discrepancy theory is scientifically valid. I accept Dr. Hagin's position that deviations or discrepancies in test scores should only be used as an indication that a learning disability exists. They do not, standing alone, identify a learning disabled person. Clinical judgment, including the elimination of other potential causative factors, must then be used to identify a learning disability. I accept Dr. Vellutino's proposition that the absence of a statistical correlation between deviations in test scores and a learning disability makes them an inappropriate diagnostic discriminator. Nevertheless, this does not a fortiori mean that deviations are not helpful in identifying a learning disability. It simply means that tests score deviations do not, standing alone, identify a learning disabled person. Because a learning disability is not susceptible to metric testing, clinical judgment must be used to identify whether the deviation in a particular case reflects the existence of a learning disability.

CONCLUSIONS OF LAW

I adopt herein any Finding of Fact previously set forth which might more properly be deemed a Conclusion [*60] of Law.

I. PLAINTIFF'S ADA AND REHABILITATION ACT CLAIMS

As noted previously, the threshold issue in any claim brought pursuant to the ADA or Section 504 -- and therefore the underlying determination upon which all of plaintiff's claims, both statutory and constitutional, are based -- is the

determination whether the claimant is substantially impaired, and hence disabled, as defined by the law. See *Flight v. Gloeckler*, 68 F.3d 61 (2d Cir. 1995); *Argen v. New York State Bd. of Law Exam'r*, 860 F. Supp. 84, 86 (W.D.N.Y. 1994); *Pazer v. New York State Bd. of Law Exam'r*, 849 F. Supp. 284, 287 (S.D.N.Y. 1994). The burden of proof, of course, is on plaintiff and it is satisfied by the preponderance of the evidence. See *Borkowski v. Valley School District*, 63 F.3d 131, 145-48 (2d Cir. 1996) (discussing plaintiff's burden of preponderance of the evidence) (Newman, C.J., concurring).

A. Background: The ADA and Section 504

The ADA and Section 504 of the Rehabilitation Act define disability with nearly identical language.

The term "disability" means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of [*61] the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. @ 12102(2) (Supp. 1995) (ADA); see 29 U.S.C. @ 706(8)(B) (Supp. 1996) (Rehabilitation Act, as amended). By enacting the ADA, Congress explicitly intended to expand upon the foundation laid by the earlier enacted Rehabilitation Act:

The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local government or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance.

H.R. 101-485(II), 101st Cong. (1990), reprinted in 1990 4 U.S.C.C.A.N. 303, 366. The ADA's legislative history contains many references to judicial opinions construing Section 504. See, e.g., *id.* at 354 (citing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983)). I thus conclude that Congress intended courts construing the ADA to use relevant precedent developed [*62] under the Rehabilitation Act. As will be discussed, cases defining substantial impairment in the employment context are particularly useful in determining the elements of the substantiality test generally.

Plaintiff claims the following are "major life activities" in which she is impaired: learning, reading, writing, studying, test-taking and, alternatively, working. (Pl.'s Post-Trial Mem. at 5, 9.)

The regulations promulgated under Title II of the ADA define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 28 C.F.R. @ 35.104(1)(iii)(2) (1991). n14 More instructive are the regulations promulgated under Title I by the Equal Employment Opportunities Commission ("EEOC") which define major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt 1630, App. @ 1630.2(i) (1991). By this standard, which I accept, all of plaintiff's proposed activities qualify as major life activities. Only test-taking could arguably not be "basic." But in the modern

era, where test-taking begins in the [*63] first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of "major life activity."

-Footnotes-

n14 The ADA is divided into five titles: Title I addresses discrimination by private employers; Title II by public entities; Title III in public accommodations and services operated by private entities; Title IV in telecommunications; and Title V contains miscellaneous provisions.

-End Footnotes-

The Rehabilitation Act covers a "specific learning disability." 29 U.S.C. @ 706(15)(A)(iii) (1996 Supp.). Congress explicitly intended that learning be considered a major life activity and that learning disabilities be covered under the ADA as well. See, e.g. H.R. 101-485(II), 101st Cong. (1990), reprinted in 1990 4 U.S.C.C.A.N. 303, 333-34 ("A . . . mental impairment means . . . any . . . psychological disorder, such as . . . specific learning disabilities." "A 'major life activity' means [inter alia] . . . learning . . ."). The ADA's [*64] regulations track this language. See 28 C.F.R. 35.104(1)(i)(B) (as to public entities, a mental impairment means "any mental or psychological disorder . . ., and specific learning disabilities"); 29 C.F.R. 1630.2(h)(2) (as to private employers, same). The experts who testified at trial agreed that reading is the major life activity most commonly affected by learning disabilities, with reading disabilities accounting for approximately 70-80% of all those diagnosed as learning disabled. (Fletcher Aff. P 12.) Clearly reading is a major life activity, as other courts have found. See, e.g., Pridemore v. Rural Legal Aid Society, 625 F. Supp. 1180, 1183-84 (S.D. Ohio 1985). Writing is also indisputably a major life activity.

For purposes of this case, plaintiff's claimed disability collapses into an inability to read like the average person on tests like the bar examination, for that is the skill that plaintiff claims constricts her ability to engage in all the other relevant major life activities. Also, and in the alternative, I will address plaintiff's contention that she is substantially impaired in the major life activity of working. The EEOC regulations provide the following [*65] definition for substantial limitation in the major life activity of working:

With respect to the major life activity of working--
(i) The Term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. @ 1630.2(j)(3)(i) (emphasis added).

B. Application of the Statutes to Defendants

Defendants do not contest that Titles II and III of the ADA apply to them. Title II reads:

Subject to the provisions of this subchapter, no qualified individual with a

disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. @ 12132.

Further, the Department of Justice was charged with enacting regulations under Title II, which read, in pertinent part:

A public entity may [*66] not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. @ 35.130 (b) (6) (1991). n15

- - - - -Footnotes- - - - -

n15 For a further discussion of Title II and Title III in the context of employment exams such as the bar examination, see part F., infra.

- - - - -End Footnotes- - - - -

Defendants argue, however, as a predicate matter, that they are beyond the reach of the Rehabilitation Act, which applies only to recipients of federal funds. Section 504 of the Rehabilitation Act provides:

No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. @ 794(a) (1996 Supp.).

The Board argues it is merely a conduit for crediting back to the state federal funds it receives for the benefit of disabled [*67] applicants. These funds are monies the state receives to pay the bar application fee of disabled applicants that are credited to the Board and then deposited by the Board in the State's general fund. According to the statute itself, however, any of the following receiving federal funds are covered by the Rehabilitation Act:

(b) 'Program or activity' defined

For the purposes of this section, the term 'program or activity' means all of the operations of--

- (1) (A) a department, agency, special purpose district, or other instrumentality of a State or local government; or
- (B) the entity or such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State of local government.

29 U.S.C. @ 794(b) (1) (emphasis added).

There is no dispute that the Board is a creature of the State. Defendants argue, however, that there is an insufficient nexus between them and the federal funds because the Board lacks the discretion to use the money. Nevertheless,

the relevant issue is whether the State or the Board have the [*68] discretion under State law to refuse the federal funds altogether. See *Grove City College v. Bell*, 465 U.S. 555, 575, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984) (holding that "indirect" receipt of federal funds, such as student loans, still qualifies as federal funding for purposes of Title IX; the school had discretion to discontinue accepting such federal funding to be freed from Title IX's dictates). Because the Board and the State could refuse the federal programs that require them to accept payment of an applicant's fee from the federal government, by electing to accept the money, both the Board and the State consented to place the Board under the burdens of Section 504. What the State permits the Board to do with the money after the Board receives it is irrelevant.

With this understood, I move to consider plaintiff's claims under both the Rehabilitation Act and the ADA. Before I do so, however, I must address another predicate question which plaintiff proposes defines the burden of proof in establishing whether she is, in fact, disabled.

C. The Treating Physician Rule

Plaintiff first proposes that the Court apply to ADA cases the "treating physician rule" adopted by [*69] this Circuit in *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986), as modified by *Schisler v. Bowen*, 851 F.2d 43 (2d Cir. 1988). The pertinent language plaintiff relies upon states as follows:

[A] treating physician's opinion on the subject of a medical disability, i.e., diagnosis and nature and degree of impairment, is: (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians.

Schisler, 787 F.2d at 81.

Since this standard was adopted, the Department of Health and Human Services has promulgated its own rule, under which:

[HHS gives] more weight to opinions from [plaintiff's] treating sources, since these sources are more likely to be the medical professionals most able to provide a detailed, longitudinal picture of [plaintiff's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.
[*70]

20 C.F.R. @@ 404.1527(d)(2), 416.927(d)(2).

As applied to this case, plaintiff maintains that the Board should have given more weight to the opinions of the two psychologists whose reports plaintiff submitted with her application for accommodations as compared to Dr. Vellutino's because (1) Dr. Vellutino never examined the plaintiff, and (2) her psychologists (a) used well-supported acceptable clinical diagnostic techniques, (b) were consistent, and (c) were well qualified, all factors the HHS rule and the Second Circuit cases consider. For the same reasons, plaintiff proffers Dr. Hagin's testimony as more weighty than that of either Dr. Vellutino or Dr. Fletcher. I cannot agree that such a presumption should be automatically

applied by either the Board or this Court.

The treating physician rule, in all its incarnations, is premised upon the existence of an ongoing therapeutic relationship between an applicant and a treating physician. HHS' regulation identifies a "treating physician" differently than "individual examinations, such as consultative examinations" of the type plaintiff's psychologists supplied. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). No ongoing relationship [*71] of substantial duration existed between plaintiff and her psychologists. For this reason, plaintiff's reliance upon D'Amico to support the use of a treating physician rule as a presumption in cases such as this one is misplaced. In D'Amico, the court chose, not as a presumption, but as an evidentiary matter, to give deference to a treating doctor based on a 20-year treatment relationship between the plaintiff and the doctor who reported upon her condition. See D'Amico, 813 F. Supp. 217 at 222. Such a relationship does not exist here.

Moreover, in the treating physician cases cited by plaintiff, there is no fundamental difference of scientific opinion as to the very definition and testing criteria necessary to identify a disabling condition. Rather, it is the applicability of well-settled medical standards to particular patients that is at issue in the cases upon which plaintiff relies. Here, science has yet to yield either a definitive understanding of the etiology of learning disability or a consensus as to the best means of measuring or identifying it.

In short, whatever benefit the treating physician rule might have in social security disability cases, it is inappropriate [*72] to apply it as a presumption in ADA cases of this type. To the extent the Board may choose to avoid liability for an erroneous determination that a particular applicant is not disabled, the rule may have some advantages. n16 A court may also, in the context of particular cases, choose, as an evidentiary matter, to give extra weight to an appropriate treating physician, but there is no basis in law to apply the presumption plaintiff seeks to all cases of this type.

- - - - -Footnotes- - - - -

n16 For a discussion of how other bar examiners and some law schools evaluate learning disability applications, see note 33, infra.

- - - - -End Footnotes- - - - -

D. Substantial Limitation Under the Law

1. Determining the Appropriate Demographic Group for Comparison: Is the Practice of Law a Sufficiently Broad Category of jobs

As noted at the outset, the core issue to be decided in this case is whether plaintiff suffers a disability that "substantially limits" a major life activity within the meaning of the ADA. Because "substantially limits" is a necessarily amorphous [*73] concept, the Court must look to the regulations promulgated by the EEOC and to relevant case law to define its precise contours.

As to most major life activities, such as reading and learning, the EEOC's regulations, promulgated under Title I of the ADA, define the concept as follows:

- 1. The term substantially limits means:
 - (i) unable to perform a major life activity that the average person in the general population can perform; or
 - (ii) significantly restricted as to the condition, manner or duration under which an individual 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 same major life activity.

29 C.F.R. @ 1630.2(j)(1) (emphasis added). n17

-Footnotes-

n17 The commentary notes:

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact on an individual's life to the degree that they constitute disabling impairments.

29 C.F.R. @ 1630. App. @ 1630.2(j).

-End Footnotes-

[*74]

However, the EEOC regulations define substantial limitation in the major life activity of working differently:

With respect to the major life activity of working--

- (i) The Term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. @ 1630.2(j)(3)(i) (emphasis added). As can be seen, the pivotal difference between the test for substantial impairment in most major life activities and the test for substantial impairment in the major life activity of working is the appropriate demographic group to whom the plaintiff will be compared. With respect to most major life activities, the plaintiff is compared to "the average person in the general population." 29 C.F.R. @ 1630.2(j)(1). Therefore, to determine whether plaintiff is substantially impaired in her reading, learning, or even test-taking, I must decide whether, when compared to the average person [*75] in the general population, plaintiff is substantially limited in these major life activities.

However, when I consider whether plaintiff is substantially limited in the major life activity of working, an entirely different reference group must be utilized. No longer is plaintiff compared to the "average person in the general population." Instead, the relevant comparison group is "the average person having comparable training, skills and abilities." 29 C.F.R. @ 1630.2(j)(3)(i). This becomes a crucial distinction in a case such as this one, where plaintiff's history of self-accommodation has allowed her to achieve great accomplishments, one of which includes roughly average reading skills (on some measures) when compared to the general population.

When plaintiff is compared to persons of "comparable training, skills, and abilities," however, a completely different evaluation of plaintiff's abilities emerges. All of her tremendous accomplishments through self-accommodation to the side, when compared to this population, plaintiff does not read like the average college student much less the average law school student. When compared to this population, her reading skills (which [*76] when compared to the general population are barely average) are well below normal.

There is an important caveat to this analysis, however. As the regulation regarding the major life activity of working provides, "the inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. @ 1630.2(j)(3)(i). Rather, plaintiff must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes" Id. (emphasis added). The question then turns to whether plaintiff's attempt to compete in the bar examination as do other qualified candidates implicates an ability or inability "to perform either a class of jobs or a broad range of jobs in various classes." Id.

Foremost, there is no question that fairly competing in the bar examination thus making it possible that one could at least potentially pass the examination is a precondition to practicing as a lawyer. n18 Just as obvious is the fact that plaintiff is not entitled to an accommodation which will ensure that she actually passes the bar examination. Rather, the [*77] accommodation is given so that she might be able to compete on a level playing field with other applicants taking the bar examination.

- - - - -Footnotes- - - - -

n18 See discussion of employment tests, part F., infra.

- - - - -End Footnotes- - - - -

If plaintiff's disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working because if she is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that field. In this sense, the bar examination clearly implicates the major life activity of working. Without the successful passing of the bar examination that can only come after one has been given a fair opportunity to compete on the examination, an individual may be able to involve themselves in a narrow range of law-related activities, such as being a law school professor or a legal consultant. However, without a fair chance to compete for admission to the bar, a law school [*78] graduate is effectively excluded from performing "a class of jobs," most specifically, lawyering, including providing legal advice or performing all of the functions that comprise the essence of being a lawyer. Therefore, plaintiff's inability to read and take the bar examination as do other law school graduates has the effect of impeding her entry into a "class of jobs," as that concept is understood under the ADA. Cf.. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626, 79 L. Ed. 2d 568, 104 S. Ct. 1248 (1984) (noting that "among [the Rehabilitation Act's] purposes are 'to promote and expand employment opportunities in the public and private sectors for handicapped individuals and place such individuals in employment.'").

I conclude that plaintiff's exclusion is much greater than an exclusion from "a single, particular job." 29 C.F.R. @ 1630.2(j)(3)(i). She is excluded from performing any and all jobs that comprise the "class of jobs" known as the practice of law. Again, the interpretative regulations of the ADA promulgated by the EEOC are instructive on this point. They provide three additional factors that may be considered when determining whether there is a substantial [*79] limitation in the major life activity of working:

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of working.

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. @ 1630.2(j)(3)(ii). n19 The first of these factors, the geographical area to which the individual has reasonable access, is somewhat irrelevant to this discussion because plaintiff's [*80] inability to compete on a level playing field for admission to the bar could potentially exclude her practice of law anywhere in the country. While she is only applying for admission to the New York State Bar, a large geographic area in and of itself, her inability to gain bar admission will also result in her inability to be admitted pro hac vice in other jurisdictions. Therefore, regardless of the range of plaintiff's reasonable geographic access, she is impeded from participating in the profession for which she labored for three years in law school. See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1101 (D. Hawaii 1980) ("If an individual were disqualified from the same or similar jobs offered by employers throughout the area to which he [or she] had reasonable access, then his [or her] impairment or perceived impairment would have to be considered as resulting in a substantial handicap to employment.").

- - - - -Footnotes- - - - -

n19 The interpretative guidelines attached to the EEOC regulations provide that:

The terms "number and types of jobs" and "number and types of other jobs" as used in the factors . . . are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

29 C.F.R. Pt. 1630, App. Section 1630.2(j).

- - - - -End Footnotes- - - - -

[*81]

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The next factor mentioned in the regulation suggests that a court examine "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. @ 1630.2(j)(3)(ii)(B). This is a crucial factor weighing in favor of a finding of plaintiff's substantial impairment. Her inability to read as well as the average law student -- and her accompanying impairment in attempting to become bar-admitted -- disqualifies plaintiff from a whole host of jobs which utilize the training, knowledge, skills or abilities of a law school graduate. Consider the number and types of jobs involving the practice of law in New York City alone, much less in the broader geographical market to which plaintiff has reasonable access. All of these countless jobs and opportunities are foreclosed to plaintiff as long as her failure to pass the bar examination is affected by the Board's refusal to accommodate her learning disability. While it may be said that plaintiff can utilize her law degree in other ways by becoming a law professor or legal consultant, the fact of the matter is that [*82] this small category of jobs represents a very small subset of the much broader class of jobs from which plaintiff is excluded by her inability to compete fairly and hence to have an opportunity to gain admission to the bar. See Black, 497 F. Supp. at 1101 (providing that a plaintiff's "own job expectations and training must be taken into account" in considering category of jobs from which plaintiff is excluded); id. at 1101-02 ("Certainly, if an applicant were disqualified from an entire field, there would be a substantial handicap to employment. But, questions as to subfields and the like must be answered on a case-by-case basis, . . .").

The final factor to be considered under the EEOC regulations is "the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. @ 1630.2(j)(3)(ii)(C). The number and types of jobs that fall into this category are quite small, because plaintiff has not alleged that she is excluded from a "broad range of jobs in various classes." Id. n20 Rather, she has alleged that she is excluded from [*83] one specific class of jobs: the practice of law. In sum, having considered these factors, I find that plaintiff is substantially limited in the major life activity of working because her inability to be accommodated on the bar examination -- and her accompanying impediment to becoming bar-admitted -- exclude her from a "class of jobs" under the ADA.

- - - - -Footnotes- - - - -

n20 As the EEOC interpretive guidance explains this factor, it looks to those individuals who are not excluded from any one class of jobs because of their impairment, but rather are excluded from a broad range of jobs in various classes because of their impairment. The EEOC writes:

An individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. . . . For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially

limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

29 C.F.R. Pt. 1630, App. Section 1630.2(j).

- - - - -End Footnotes- - - - -
[*84]

In promulgating these regulations, the EEOC attached (as an "Interpretive Guidance") a lengthy elucidation of the meaning of the regulations. On the question of the substantiality of an impairment in the major life activity of working, the EEOC wrote:

An individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized [*85] job or a narrow range of jobs. See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

29 C.F.R. Pt. 1630, App. Section 1630.2(j) (emphasis added). This interpretive guidance from the EEOC, and the examples it provides, lend further support to my finding that plaintiff has been substantially limited in the major life activity of working by her exclusion from the opportunity to participate in the "class of jobs" designated as the practice of law.

First, as previously noted, plaintiff is not excluded merely from "a particular job for one employer," *id.*; rather, she is excluded from thousands of jobs by hundreds of employers. Furthermore, I cannot find under these regulations that the practice of law is "a specialized job or profession requiring extraordinary skill, prowess or talent." *Id.* Particularly in light of the example given -- that of a baseball player with a bad elbow -- I do not find that the regulation was intended to classify the practice of law as a specialized profession. If it were, then every profession would be considered a specialized [*86] profession, because each contains its own "extraordinary skill, prowess, or talent." If such were to be the interpretation of the regulation, then many Americans with disabilities would be wholesale excluded from many of the most prominent, lucrative, and rewarding occupations known as "professions" such as doctoring, lawyering, and accounting. In light of the commentary given, I find the EEOC's language is not designed to apply to generalized professions but is designed to prevent challenges brought by a person who is dissatisfied because some impairment prevents him or her from being a qualified individual for a highly specialized job, such as that of a professional athlete. n21

-Footnotes-

n21 For an excellent example of what the EEOC intended to prevent with the "specialized profession" language, see discussion of *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985), part E., *infra*.

-End Footnotes-

Case law, while somewhat murky in this area, is also instructive on the question whether the [*87] practice of law is a sufficiently broad category of jobs.

In *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980), n22 one of the first published cases to address the question of what constitutes a substantial impairment in the context of the major life activity of working, the United States District Court in Hawaii reviewed the determination of an Administrative Law Judge ("the ALJ") that plaintiff's back condition -- while an impairment -- did not substantially impair his ability to work because it did not affect his "employment generally." The ALJ held that plaintiff must "demonstrate that the impairment . . . impeded activities relevant to many or most jobs." *Id.* at 1094. The Hawaii district court reversed the ALJ's ruling, stating that the ALJ's test regarding "employment generally" was invalid. The Court explained that "this type of definition drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended." *Id.* at 1099. The Court went on to explain:

A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely [*88] to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities.

Id. Clearly, the same sorts of concerns that motivated the district court's ruling in *Black* are present here. Plaintiff struggled through three laborious years of law school at no small fiscal or psychic cost. To tell her now that she is free to go and practice another profession, or to return to her prior field of education, would not be consistent with the remedial goals that Congress intended in passing the ADA.

-Footnotes-

n22 *Black* has been relied upon by numerous courts as "the most comprehensive examination by a court to date" of the standards for finding disability under the ADA and the Rehabilitation Act. See, e.g., *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Padilla v. City of Topeka*, 238 Kan. 218, 708 P.2d 543, 549-50 (Kan. 1985).

-End Footnotes-

[*89]

Numerous courts have likewise held that in determining whether a plaintiff's impairment is substantial in the major life activity of working, the proper scope of inquiry is to the relevant employment at issue -- not to employment

generally or more broadly construed. See, e.g., *Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 25 (1st Cir. 1993) (upholding jury's finding that "plaintiff's limitations foreclosed a broad range of employment options in the health care industry" plaintiff's chosen field); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (where plaintiff held degree in safety and failed to achieve position as firefighter because of numbness in his fingers, court specifically notes that plaintiff "did not show that his degree in Safety qualified him solely for the position of firefighter"); *id.* (also noting that plaintiff's "assumption that other fire departments would also misapply standards regarding employment of firefighters so as to disqualify him is only speculation. [Plaintiff] failed to present evidence like [a] vocational expert's opinion that the plaintiff would be precluded from [*90] performing not only the specific job for which she applied, but a wide range of jobs . . ."); *Taylor v. United States Postal Service*, 946 F.2d 1214, 1217 (6th Cir. 1991) (noting with approval Black's conclusion that plaintiff "would be substantially limited in obtaining his career goal"); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (requiring that plaintiff show that the impairment "foreclose generally the type of employment involved") (emphasis added); *id.* (noting that plaintiff "'had no difficulty in obtaining other jobs in his field") (emphasis added); *id.* (adding that "far from being regarded as having a 'substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant and nothing more."); *Gupton v. Virginia*, 14 F.3d 203, 205 (4th Cir.) (plaintiff had to show that her allergy "foreclosed generally her opportunity to obtain the type of employment involved") (citing *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (emphasis added) (citations and internal quotations omitted), cert. denied, 513 U.S. 810, 130 L. Ed. 2d 17, 115 S. Ct. 59 (1994); *id.* (describing prior holding that no disability is found where plaintiff [*91] "had shown no difficulty in obtaining other jobs in his field.") (citations and internal quotations omitted) (emphasis added); *id.* at 206 n. 4 (citing cases and explaining that plaintiffs in them were not foreclosed generally from "obtaining jobs doing the type of work plaintiff has chosen as his field.") (emphasis added); *Padilla v. City of Topeka*, 238 Kan. 218, 225, 708 P.2d 543 (S. Ct. Ks. 1985) (endorsing Black's rejection of "employment generally" test). See also *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 384 (2d Cir. 1996) (citing cases); *Heilweil v. Mt. Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994) ("An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one."); *id.* at 723-24 (citing cases); *id.* at 724 ("Nothing suggests plaintiff's education and previous job experiences would hinder her ability to find a suitable position in the general field of administration" plaintiff's chosen career.); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (plaintiff's impairment excluded him only from particular position of police officer) (emphasis added). But see [*92] *Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992) (misquoting Black as providing that "an ability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally.").

Second Circuit precedent likewise acknowledges that the appropriate focus is not plaintiff's exclusion from employment generally, but instead is something more than exclusion from a particular job with a particular employer. See *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379 (2d Cir. 1996) (providing that "if a jury reasonably could have found that Wernick needed work environment modifications in order to perform any job, and that therefore she was disabled, it was error for the district court to hold that, as a matter of

law, she was not disabled. If, however, the only reasonable conclusion a jury could have reached was that Wernick needed the accommodations solely to perform her current job, the district court correctly granted summary judgement in favor of [the defendant] on the ground that Wernick was not disabled, because, as we held in Heilweil, 'an impairment that disqualifies a person [*93] from only a narrow range of jobs is not considered a substantially limiting one.'" (emphasis added); Heilweil v. Mt. Sinai Hospital, 32 F.3d 718, 723 (2d Cir. 1994) (stating that when determining whether a plaintiff's physical impairment substantially limits her ability to work, "the kinds of jobs from which the impaired individual is disqualified must be carefully considered. An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.") (citing Jasany, supra), cert. denied, 513 U.S. 1147, 130 L. Ed. 2d 1063, 115 S. Ct. 1095 (1995); id. 32 F.3d 718 at 723-24 ("In Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) we stated the obvious fact that a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working. In fact, every circuit to visit this issue has so ruled.") (citing cases); id. at 724 (where plaintiff could not continue her work as blood bank administrator because her asthmatic condition was exacerbated by the facility's ventilation system, Court provides that "nothing suggests plaintiff's education and previous job experiences would hinder her ability [*94] to find a suitable position in the general field of administration."); Daley v. Koch, 892 F.2d 212, 214-15 (2d Cir. 1989) (unsuccessful police department candidate suffering from "poor judgment, irresponsible behavior and poor impulse control" but no "particular psychological disease or disorder" was not disabled within the meaning of the ADA because he had failed to meet the "unique qualifications" of the job and because "being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity.") (emphasis added); id. at 215 (also finding that plaintiff's "personality traits could be described as commonplace; they in no way rise to the level of an impairment.").

In Redlich v. Albany Law School of Union University, 899 F. Supp. 100, 107 (N.D.N.Y. 1995), the Court considered that for purposes of the regulation defining substantial impairment in the major life activity of working, plaintiff's "class" of job was "that of law professor." Id. Surely, if a law professorship is a sufficiently broad "class" of jobs, so is the still broader "class" of jobs encompassed by "law practice" -- plaintiff's chosen field. [*95]

When all is said and done, then, the cases and regulations discussed above confirm my conclusion that the practice of law is a sufficiently broad "class" of jobs for purposes of defining plaintiff's substantial limitation in the major life activity of working. Unlike the plaintiffs in Forrisi and Jasany, Dr. Bartlett has been impeded from participation in an entire field of employment not just a particular job with a particular employer. Therefore, having concluded that the appropriate demographic group to which plaintiff should be compared is a group of individuals with similar background, skills, and abilities, I now move to the question whether when compared to this population, plaintiff is qualified for her position and whether she is substantially impaired in the major life activity of working.

2. A Finding of Substantial Impairment

As noted, an essential predicate to interpreting plaintiff's reading ability is the establishment of the criterion against which they will be measured. Plaintiff argues that the proper metric is comparison to people with educational achievement comparable to her own. She proposes using the average scores of college graduates [*96] as the appropriate proxy, because that is the highest educational level against which the Woodcock and the WRAT are normed. Were norms available for law school graduates or bar exam test-takers, she advocates those be used. I agree.

I take judicial notice of the fact that in 1993, 21.9% of the adult U.S. population had graduated from a four-year college. See Chart No. 238, Educational Attainment: 1960 to 1994, Statistical Abstract of the United States (1995). In 1994, less than one half of one percent of the adult population (861,000 out of 180 million) were lawyers. Id., Chart No. 649, Employed Civilians, by Occupation.

Plaintiff maintains that her ability to take the Bar Examination must be measured against this standard and that for the reasons set forth by her experts, she is significantly disabled because she cannot read in the same condition, manner, or duration as other law students. I agree with plaintiff and her experts that plaintiff cannot and does not read like the average law student. As a practical matter, I concur with Dr. Hagin that an average law school graduate reads significantly faster than the 4th percentile of a college student score on the DRT and [*97] with substantially greater automaticity. n23 For this reason, and applying the standards articulated above, I conclude that plaintiff has proven by a preponderance of the evidence that she is substantially impaired in the major life activity of working and thereby is a disabled individual, as that term is understood both under the ADA and Section 504.

- - - - -Footnotes- - - - -

n23 See Dr. Hagin's description of plaintiff's abilities as compared with college freshmen, Conclusions of Fact, II, B.3, supra.

- - - - -End Footnotes- - - - -

E. Qualified for the Job

Now that the Court has determined that the practice of law is the relevant category of jobs from which plaintiff has been excluded because of her substantial impairment, and that plaintiff is "substantially limited" in this major life activity of working, it remains to be discussed whether plaintiff is qualified to perform the job. See Borkowski v. Valley Central School District, 63 F.3d 131, 137-38 (2d Cir. 1995) (providing that "plaintiff bears the burden of proving either that she can meet the [*98] requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions.").

This Court is cognizant of the fear of many legislators, judges, and scholars, that opening the door for disabled Americans to enter professions of their choice could lead to absurd results such as the first baseman with the bad elbow suing for damages or an accommodation under the ADA. This argument was cogently rebuked by the Black Court. I quote the Black Court's discussion on this point in full:

The Administrative Law Judge was concerned that focusing on particular jobs or particular fields rather than on employability in general would lead to anomalous results.

. . . To illustrate: a person may have as his life's dream employment as a running back with the Dallas Cowboys. He may be denied this employment solely on the basis of his inability to run 100-yards in 10 seconds or less. This person would then have an "impairment" (condition lessening physical ability) which actually prevented his obtaining particular, desired employment. Yet this person would not be considered "handicapped" within the meaning of the statutory definition [*99] since this particular impairment is not likely to impact adversely on his employability (since few jobs require this particular talent). The same point could be illustrated by a concert pianist with too-short fingers, or a 5'5 basketball star. These individuals have conditions which may actually affect their ability to obtain a particular job. But they are not "handicapped" within the meaning of the statutory definition because their respective impairments are not likely to affect their employability generally, measured against the full spectrum of possible employments.

Administrative Law Judge's Decision, at 12. The Judge's concerns are misplaced. It is true that the individuals he discusses would not be protected by the Act, but the reason is not because their impairment did not substantially limit employability. The individuals he discusses are not "capable of performing a particular job" and hence are not "qualified handicapped individuals" within the meaning of 60 C.F.R. @ 60-741.2. An individual who is 5'5 is not capable of performing the job of center on the New York Knicks. An individual with extremely short fingers is not capable of performing the job of concert pianist. [*100] An individual who runs the 100 in 27 seconds is not capable of performing the job as running back for the Dallas Cowboys. Thus, what appears to be a major rationale for the definition adopted by the Administrative Law Judge disappears.

Black, 497 F. Supp. at 1100.

While largely approving of the Black rationale (calling Black "the most comprehensive examination by a court to date of the . . . definition of 'handicapped'"), the Court in *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985) -- also cited by the EEOC -- opined that Black "did not adequately analyze the focus and relationship of the definitional elements of the statute impairment, substantial limitation of a major life activity, and qualified person." *Jasany*, 755 F.2d at 1249. The Court wrote:

The Black Court was right in rejecting the ALJ's illustrations of people incapable of playing professional sports, but for the wrong reason. Characteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not impairments. The distinction can be an important one. The [*101] burden is on the plaintiff to establish the existence of an impairment that substantially limits a major life activity as an element of the plaintiff's prima facie case. Once a prima facie case has been presented, the burden shifts to the defendant employer to demonstrate that challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible.

Id.; see also *id.* at 1250 n. 5 (noting the purported "error in the professional athlete hypotheticals" by stating that "those individuals probably could not

show that they were qualified for the position in question even apart from their 'handicap.'").

Despite the fact that the two courts disagree on the approach to identifying when a disabled person is entitled to accommodations, their views are not mutually exclusive. I simply view the two cases as alternative holdings under the ADA. Hence, the most important thing to be gleaned from the Black and Jasany Courts' discussion is that two separate grounds under the law exist to dispel the specter of an individual being able to bring suit alleging that his or her rights were violated because he or she was unable to secure [*102] a specialized position like that of a Yankees first baseman. First, using the Black analysis, the individual would not be considered a "qualified individual" for the position: his or her inability to throw and catch exceptionally well would disqualify him or her from the requirements of the job. Second, under the Jasany analysis, the individual's poor throwing ability (or other "average" limitations) would not be deemed an "impairment" under the law, so a prima facie case of disability discrimination could never be made. These two legal protections are routinely invoked in accommodations cases. Numerous decisions are based on the fact that an individual's impairment, unfortunately for the individual, goes directly to a necessary function of the job -- as with the pilot of a commercial airline whose vision does not permit him or her to see clearly enough to pass safety standards. See 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

Hence, with these standards in mind, it is clear that courts should consider two essential questions in evaluating a plaintiff's career choice: has the plaintiff demonstrated that he or she is qualified to perform the job at issue and, if [*103] so, does he or she have a substantial impairment in performing that job. Having already found that Dr. Bartlett is substantially impaired in the major life activity of working, I now turn to the question of whether she is otherwise qualified to perform as a legal practitioner.

There is no insinuation, and I cannot find, that Dr. Bartlett is incapable of performing the functions of a practicing lawyer. She practiced as a law clerk in a law firm before she was terminated due to her inability to pass the bar examination. Through self-accommodation and other accommodations from a reasonable employer, plaintiff is and will be perfectly capable of fulfilling the essential functions of lawyering. Moreover, speed in reading is not tested by the bar examination, nor is speed in reading one of the essential functions of lawyering. See, Part F, infra, (noting that speed and visual ability to read are not what is tested by the bar examination, nor what are required of practicing attorneys). Therefore, while it is undoubtedly true that not every person is physically able to be a Yankees first baseman, it is likewise true that it would be grossly unfair to impede whole classes of individuals [*104] like plaintiff, with plaintiff's automaticity and reading rate disabilities, from participating in entire classes of customary professions such as the practice of law because they can not read a professional examination like average law school (or other professional school) graduates. This was unquestionably the reasoning of the Black and Jasany courts, and that reasoning was implicitly sanctioned by the EEOC's citation to the cases in its Interpretive Guidance of the regulations. See 29 C.F.R. Pt. 1630, App. Section 1630.2(j) (citing *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980)).

F. Proof of Discrimination under the ADA and Section 504

To establish liability under the ADA and Section 504, plaintiff must prove by a preponderance of the evidence that she was a qualified person with a disability and that "by reason of such disability," she was "excluded from participation or denied the benefits of the services, programs, or activities of a public entity, or [was] subjected to discrimination by any such entity." 42 U.S.C. @ [*105] 12132. Alternatively, plaintiff can establish defendants' liability by a preponderance of the evidence under Title III of the ADA. Although Title III generally applies only to private entities, the examination provision has unanimously been held to apply to public entities, and specifically to state bar examinations, including New York's. See, e.g., Argen, 860 F. Supp. at 87; Pazer, 849 F. Supp. at 286-87; D'Amico v. New York State Bd. of Law Exam'r, 813 F. Supp. 217, 221 (W.D.N.Y. 1993); In Re Rubenstein, 637 A.2d 1131, 1136-37 (Del. 1994) (noting that "in the interpretive analysis of its Title III regulations, the United States Department of Justice has taken the position that 'examinations covered by this section would include a bar exam.'" (citing ADA Handbook, III-100, Oct. 1991.)). This is so because "person" is defined generally in the ADA to cover public entities. See 42 U.S.C. @ 12111(7).

Specifically referring to licensing procedures such as the bar examination at issue here, Title III states that:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary [*106] education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. @ 12189.

The relevant implementing regulation promulgated by the Department of Justice under Title III states that:

An examination covered by this section must assure that (i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

28 C.F.R. @ 36.309(b)(I).

For comparison, the EEOC-promulgated regulations under Title I pertaining to the administration of tests for employment provides: n24

It is unlawful for a covered entity to fail to select and administer tests concerning employment [*107] in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factors of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except

where such skills are the factors that the test purports to measure).

29 C.F.R. @ 1630.11. The EEOC's Interpretive Guidance on this provision further elucidates the agency's thinking in promulgating the regulation and provides a useful analytical approach for this Court:

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with [*108] disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

. . .

Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he [or she] is disabled with dyslexia, and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual.

. . .

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. . . . An employer may also be required, as a reasonable accommodation, to allow more time to complete the test.

29 C.F.R. Pt. 1630, App. Section 1630.11. The only exception to the rather stringent and straightforward requirements articulated above is the EEOC's reminder that "this provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills." Id. Specifically referring to dyslexics, the EEOC wrote: [*109]

Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within an established time frame if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Id. The question, then, of course, is whether the bar examination is a test intended to measure the applicants' ability to read or ability to perform under specific time constraints, and, necessarily, whether those abilities are "essential functions" of being a lawyer. For several reasons, I find that this is not the purpose of the bar examination and that these are not "essential functions" of being a lawyer as determined by the examination.

- - - - -Footnotes- - - - -

n24 I have previously determined that the regulations promulgated by the EEOC pursuant to Title I are useful in elucidating the appropriate standards under the ADA. See Part I, supra.

- - - - -End Footnotes- - - - -
[*110]

First, the notion that the bar examination is intended to be a reading test is most strongly belied by the fact that numerous accommodations, including time extensions, are granted every year to persons whose physical impairments make it difficult visually to read, including persons who are blind. If the bar examination were intended to test a person's visual ability to read or a person's ability to perform under time pressure, there would be no blind attorneys. Thankfully, this is very far from the reality of modern law practice. Given that defendants admit that they grant accommodations to persons with various types of disabilities, they are estopped from arguing that the bar examination is intended to test either reading or the ability to perform tasks under time constraints.

Second, I find that even if this were the purpose of the bar examination -- which it certainly is not, as revealed by defendants' very practice of granting accommodations in numerous cases -- the visual ability to read and the ability to perform tests under time constraints are not "essential functions" of a lawyer. In fact, at least one of my colleagues, on the District of Columbia Circuit Court of Appeals, [*111] does not have the visual ability to read. He reads braille instead, and uses the services of a reader and a dictaphone. This is but one powerful example of an attorney with an impairment who has been able to practice law. Clearly, being able to see and quickly comprehend visual images on a page is not "essential" to the practice of law.

The Board may be within its rights to declare that extra time would impair the integrity of the bar examination, provided it can demonstrate that the ability to perform legal tasks under the bar examination's time constraints is essential to minimal competence in the practice of law, and that the bar examination actually intends to test this skill. See *Southeastern Community College v. Davis*, 442 U.S. 397, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979) (holding that a nursing program need not adjust its training procedures to accommodate a person who, because of her disability, could not serve the nursing profession "in all customary ways"). Although "reading, thinking, and writing under time constraints are important skills of a competent lawyer," (Swain Aff. P 7), Taylor Swain, a member of the Board, conceded that the bar examination is not a "speeded" [*112] test -- it is not intended and does not measure the ability of applicants to answer questions within time constraints. Instead, the Examiners presume that adequate time exists for the average person to answer the questions posed. (See Tr. at 1661 ("under normal circumstances, most normal candidates have sufficient time to complete the examination"); Tr. at 1666 (the Board has never done a study to measure reading rate necessary to take examination).)

Because I find that plaintiff is disabled and that she was denied reasonable accommodations in taking the bar examination even though she was otherwise qualified, I must find that her rights under the ADA and under Section 504 were violated. See *D'Amico*, 813 F. Supp. at 221 ("To succeed on a claim under the

ADA, plaintiff must show (1) that she is disabled, (2) that her requests for accommodations are reasonable, and (3) that those requests have been denied."). Although defendants try to escape this liability by shrouding themselves under the banner of the Eleventh Amendment and hiding behind the expert opinion of their consultant, Dr. Vellutino, I cannot excuse them from their obvious liability in this case.

In essence, defendants [*113] attempt a burden shifting defense: that they are, as state actors, entitled to special deference in their policy determinations with regard to disabilities and its application to specific applicants. They also claim that because they make their determinations based on an expert's opinion, they are entitled to deference in their judgment that an applicant should not be accommodated. (Tr. at 2168.) I disagree. The ADA makes no distinctions regarding the burdens of proof allocated to covered entities, and explicitly strips the states of their Eleventh Amendment immunity. See 42 U.S.C. @ 12202. No court has accorded a state entity such deference, although several courts have deferred to academic institutions in their judgments as to assessing whether disabled students are "otherwise qualified" and to the sculpting of "reasonable accommodations." See, e.g., *Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir 1970); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991). Clearly, deference is due a state in determining the qualifications an individual needs to practice law in that state. See also *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474, 477 (7th [*114] Cir. 1974) ("Admission to practice in a state and before its courts is primarily a matter of state concern. And the determination of which individuals have the requisite knowledge and skill to practice may properly be committed to a body such as the Illinois Board of Law Examiners. A federal court is not justified in interfering with this determination unless there is proof that it was predicated upon a constitutionally impermissible reason.") (citations omitted). But cf. *Schwartz v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) ("A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.").

The issue here, however, is different: Are defendants improperly identifying learning or reading disabled applicants? On this question, no deference is due because no deference is due to the Board's or expert's determinations of what defines a learning disabled applicant. This is an issue of fact for the trier of fact, and as previously [*115] stated, I find that plaintiff has shown by a preponderance of the evidence that she is disabled under the law.

II. PLAINTIFF'S EQUAL PROTECTION CLAIM

A. The Appropriate Standard of Review

At least until the passage of the ADA in 1990, n25 it was clear that the rational basis standard was the appropriate standard of review under the Equal Protection Clause for reviewing purported instances of discrimination against handicapped individuals. In *City of Cleburne v. Texas, Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), the Supreme Court wrote that "absent controlling congressional direction," the Court would "devise[] standards for determining the validity of . . . official action that is challenged as denying equal protection." *Id.* 473 U.S. at 439-40. After considering whether and how certain groups have come to receive heightened

review under the Equal Protection Clause, the Court in the end concluded:

If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who perhaps have immutable disabilities [*116] setting them off from others, who themselves cannot mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Id. 473 U.S. 432 at 445-46 (emphasis added).

-----Footnotes-----

n25 Although the ADA was passed in 1990, its effective date was not until January 26, 1992. See 42 U.S.C.A. @ 12181. Therefore, many courts who reviewed legislation or action disadvantaging the handicapped after 1990 did not address the question of the statute's effect on the level of review because the cases before them were filed before the effective date of the statute. See, e.g., Duc Van Le v. Ibarra, 1992 Colo. LEXIS 385, 1992 WL 77908, *9 (Colo. 1992) (en banc) (declining to apply strict scrutiny to disabled in part because the ADA "is not applicable here because this case was not brought under that Act and that Act was not in effect at the time of trial."), cert. denied, 510 U.S. 1085, 127 L. Ed. 2d 207, 114 S. Ct. 918 (1994); Tomsha v. City of Colorado Springs, 856 P.2d 13, 14 (Colo. Ct. App. 1993) (rejecting claimant's strict scrutiny argument because the ADA "is applicable here because claimant was injured before its effective date."); see also Heller v. Doe, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) ("Even if respondent were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

-----End Footnotes-----

[*117]

Congress' passage of the ADA in 1990 cast some doubt n26 on this holding to the extent that in the congressional findings accompanying the Act, Congress intimated that the disabled should be deemed a suspect class for purposes of equal protection review. Invoking the classic language attributed to "suspect" classes in constitutional jurisprudence, see United States v. Carolene Prods., 304 U.S. 144, 152 n.4, 82 L. Ed. 1234, 58 S. Ct. 778 (1938), the Congress wrote:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

42 U.S.C.A. @ 12101(a)(7) (reporting Congress' various findings under the statute). Several questions arise from Congress' invocation of this language. It is unclear what Congress attempted to effect by this language -- whether Congress [*118] intended to force the courts to subject legislation or behavior respecting disabled persons to strict scrutiny review or whether the Congress merely desired to send a message to the courts that a heightened level of review of the claims of disabled individuals was appropriate.

- - - - -Footnotes- - - - -

n26 For excellent discussions of the issue, see Lisa A. Montanaro, Comment, The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases, 15 Pace L. Rev. 621 (1995); Amy S. Lowndes, Note, The Americans with Disabilities Act of 1990: A Congressional Mandate For Heightened Judicial Protection of Disabled Persons, 44 Fla. L. Rev. 417 (1992); see also James B. Miller, Note and Comment, The Disabled, the ADA & Strict Scrutiny, 6 St. Thomas L. Rev. 393 (1994); Neil D. O'Toole, The ADA: Strict Scrutiny Protection for Disabled Workers, 21 Colo. Law. 733 (1992); William H. Pauley III, The Americans with Disabilities Act of 1990: Cases of First Impression, 455 PLI/Lit 403 (1993); Andrew Weis, Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities, 33 Willamette L. Rev. 1 (1997).

- - - - -End Footnotes- - - - -

[*119]

Predictably, the ambiguity within the Act has generated an ensuing confusion in the nation's courts regarding what level of review should be afforded the disabled in light of the ADA's findings. Numerous courts have held that the rational basis test remains the appropriate standard for reviewing discrimination claims brought by the handicapped. See, e.g., Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1001 (3d Cir. 1993) (in affirmative action context, court holds that there was "no evidence that the ADA overruled Cleburne, and the limited case law is to the contrary. Moreover, we believe application of heightened scrutiny to the preference for handicapped business owners would run counter to the ADA, which Congress enacted to reduce discrimination against handicapped persons."); Duc Van Le v. Ibarra, 1992 Colo. LEXIS 385, 1992 WL 77908, *9 (Colo. 1992) (en banc) (after finding the ADA inapplicable because the case was not brought until after the Act's effective date, holding that "to declare the mentally ill to be a suspect or quasi-suspect class would be contrary to previous decisions of the United States Supreme Court that have interpreted the Equal [*120] Protection Clause of the United States Constitution."), cert. denied, 510 U.S. 1085, 127 L. Ed. 2d 207, 114 S. Ct. 918 (1994). Other courts, taking at least the spirit of the legislation to heart in interpreting the federal Equal Protection Clause and other state and federal laws, have concluded that a higher level of review should be given to handicapped persons. See, e.g., Martin v. Voinovich, 840 F. Supp. 1175, 1208-10 (S.D. Ohio 1993) (applying intermediate scrutiny to disabled in light of ADA); Trautz v. Weisman, 819 F. Supp. 282 (S.D.N.Y. 1993) (discussing the "revolution" resulting from the passage of the ADA and concluding in the context of a @ 1985(3) prosecution that "while [the ADA] may not provide heightened scrutiny for discrimination against individuals with disabilities under the equal protection clause, it is relevant to Congress' interpretation of @ 1985(3)."); People v. Green, 148 Misc. 2d 666, 561 N.Y.S.2d 130, 132-33 (Westchester Co. 1990) (discussing the ADA's purposes generally

and finding that hearing impaired jurors should not be excluded from juries in part because "disabled persons in general . . . may constitute a suspect classification" under New York's constitution;). [*121] Finally, many courts have applied the rational basis standard without discussing whether the passage of the ADA has changed or should change their thinking on the subject. See, e.g., *Suffolk Parents of Handicapped Adult v. Wingate*, 101 F.3d 818, 824-27 (2d Cir. 1996) (applying rational basis standard to claims of handicapped individuals who challenged state's denial of funding), cert. denied, 137 L. Ed. 2d 1047, 117 S. Ct. 1843 (1997); *Story v. Green*, 978 F.2d 60, 64 (2d Cir. 1992) (noting "in passing that most authorities have not considered disability to be a suspect or quasi-suspect classification"; providing no discussion of the ADA); *More v. Farrier*, 984 F.2d 269 (8th Cir.) (applying rational basis test without discussion), cert. denied, 510 U.S. 819, 126 L. Ed. 2d 43, 114 S. Ct. 74 (1993). With no clear answer emanating from case precedent, I move to an analysis of Congress' intent in passing the ADA and whether Congressional legislation should alter Supreme Court precedent. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

1. The Congress' Intent in Passing [*122] the ADA

It is not entirely clear what the Congress intended by describing the disabled in its findings in a manner that would suggest that the group be deemed a suspect class. There does not appear to be any direct legislative history on the question. However, a comparison of the ADA's findings with another statute, the Religious Freedom Restoration Act ("RFRA"), suggests that Congress was probably not intending the ADA to change directly the level of review afforded disabled persons under the Equal Protection Clause. This conclusion can be gleaned from the difference between the two statutes. In RFRA, Congress expressly declared the level of review it believed should be afforded legislation impacting religious freedoms. See 42 U.S.C. @ 2000bb(a)-(b) (stating that "governments should not substantially burden religious exercise without compelling justification" and that one of the purposes of RFRA was "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."). In contrast, the ADA does not expressly state that courts should employ either a strict scrutiny or even a quasi-strict (or [*123] "intermediate") level of review. See 42 U.S.C.A. @ 12101(a)(7). Rather, Congress appears to be utilizing its recognizably superior fact-finding function, providing to the Court data from which it hopes the Court will arrive at the conclusion that disabled persons should be given heightened scrutiny under the Equal Protection Clause. Pronouncing a finding of fact, and couching it in such factual, not legal, terms, Congress likely intended the ADA to be a springing board from which the courts might themselves develop a stricter level of scrutiny for legislation or action impacting the disabled.

2. The Congress' @ 5 Power

Congress' power to legislate changes in the level of the Court's scrutiny under the Equal Protection Clause is the source of some ambiguity in the law, resulting most noticeably in a difficulty in line-drawing n27 between what Congress can and can not do with its constitutionally-derived power to "enforce [the Fourteenth Amendment] by appropriate legislation." U.S. Const. amend. xiv. n28 Once again, a consideration of the legal fate of RFRA is instructive on the ADA's meaning and impact in this context.

-----Footnotes-----

n27 See *City of Boerne v. P.F. Lores*, 500 U.S. 926, 111 S. Ct. 2037, 114 L. Ed. 2d 122, 1997 WL 345322, *8 (1997) (admitting that "the line between [Congressional] measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern. . . . There must be a congruence or proportionality between the injury to be prevented or remedied and the means adopted to that end."). [*124]

n28 For elucidating discussions of Congress' power under @ 5, see Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029 (1993); Stephen L. Carter, *The Morgan Power and the Forced Reconsideration of Constitutional Decisions*, 53 U. Chi. L. Rev. 819 (1986). see generally, *Katzenbach v. Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966) (establishing that Congress' Section Five power permitted Congress to find an equal protection violation where the Supreme Court had not).

-----End Footnotes-----

The Supreme Court's recent invalidation of RFRA in *City of Boerne v. P.F. Lores*, 500 U.S. 926, 114 L. Ed. 2d 122, 111 S. Ct. 2037, 1997 WL 345322 (1997) suggests an answer to the question whether Congress has the authority under @ 5 of the Fourteenth Amendment to declare what level of scrutiny should be employed in equal protection cases. Although *Boerne* involved religious liberty and the Due Process, not the Equal Protection, Clause of the Fourteenth Amendment, [*125] the Supreme Court's holding that Congress does not have the power to declare substantive protections, but only has the power to enforce them, is easily applicable to the instant question, particularly given that Congress' @ 5 power is the same under both clauses.

In *Boerne*, the Supreme Court reiterated their prior holding that "as broad as the congressional enforcement power is, it is not unlimited." *Boerne*, at *7 (citing *Oregon v. Mitchell*, 400 U.S. 112, 128, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970) (Black, J.)). The Court stated that "the design of the Amendment and the text of @ 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* at *8. Simply put, the Court explained that "Congress does not enforce a constitutional duty by changing what the right is." *Id.* Hence, at the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause. What remains to be seen, however, is what will be done with Congress' fact-driven suggestion in the ADA that the courts themselves [*126] change the level of scrutiny afforded handicapped persons. For the reasons to be discussed, in the end, the question must be left for the Supreme Court to decide.

3. Authority of this Court to Decide the Question

Recently, the Supreme Court reaffirmed the notion in *Agostini v. Felton*, 138 L. Ed. 2d 391, 117 S. Ct. 1997, 1997 WL 338583 (1997) that when a lower court is presented with a situation to which Supreme Court precedent has "direct application," the lower court should refrain from deciding the case inconsistently with prior precedent, and should leave to the Supreme Court "the prerogative of overruling its own decisions." *Id.* at *22 (quoting *Rodriguez de*

Quijas v. Shearson/American Express, 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)); see also Ellis v. District of Columbia, 318 U.S. App. D.C. 39, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (applying Rodriguez rule); Distribuidora Dimsa S.A. v. Linea Aerea Del Cobre S.A., 768 F. Supp. 74, 77 (S.D.N.Y. 1991) (providing that "[a] district court has no authority to reject a doctrine developed by a higher court unless subsequent events make it 'almost certain that the higher court would repudiate the [*127] doctrine if given a chance to do so.'"). I find that the Cleburne case has direct application here, and that fact constrains my ability to determine whether the ADA has, or should, effect a change in the level of scrutiny afforded the disabled. Such a question must be brought to this nation's highest Court to decide.

B. The Legal Standard

Having concluded that this Court should apply the traditional rational basis standard to claims brought by the disabled, as determined by the Supreme Court in Cleburne, "the fundamental principles governing equal protection are well established." United States v. Yonkers, 96 F.3d 600, 611 (2d Cir. 1996). "A plaintiff is required to show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." Id; see also E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987) (providing that "mere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause. There must be intentional discrimination."), cert. denied, 485 U.S. 961, 99 L. Ed. 2d 425, 108 S. Ct. 1225 (1988). The Second [*128] Circuit has recently held that "it is elemental that 'disparate treatment is not necessarily a denial of the equal protection guaranteed by the Constitution'; rather, the Supreme Court has afforded 'wide discretion . . . to the states in establishing acceptable classifications.'" Suffolk Parents of Handicapped Adult v. Wingate, 101 F.3d 818, 824-25 (2d Cir. 1996). The Court has steadfastly held that states "must have substantial latitude to establish classifications that roughly approximate the nature of the problems perceived, that accommodate competing concerns for both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Id. "The general rule, therefore, is that 'state legislation or other official action that is challenged as denying equal protection . . . is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.'" Id. (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)). See also Ricketts v. City of Hartford, 74 F.3d 1397, 1407 (2d Cir.) ("It is well established that [*129] a claimant under the Fourteenth Amendment's Equal Protection Clause . . . must establish intentional discrimination.") (citing McCleskey v. Kemp, 481 U.S. 279, 292, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)), cert. denied, 136 L. Ed. 2d 26, 117 S. Ct. 65 (1996); Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995) ("To prove an equal protection violation, claimants must prove purposeful discrimination.").

C. Application to Plaintiff's Case

While plaintiff has established the presence of a number of troubling facts, such as the fact that for the years at issue, applicants claiming a learning disability were approximately 3.5 times more likely to be denied accommodations than those claiming other types of disabilities, I cannot find that plaintiff has demonstrated that any such effect was intentional or that the Board's underlying purpose was irrational. In the Board's defense, physical

disabilities may be more susceptible to scientific testing, and the "chaos" in the learning disability field creates less exactitude in identifying a reading disability. Cf. *Heller v. Doe*, 509 U.S. 312, 321, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (upholding under the rational basis standard a Kentucky [*130] statute under which "the applicable burden of proof in mental retardation commitment proceedings is clear and convincing evidence while the standard in mental illness proceedings is beyond a reasonable doubt" in part because "mental retardation is easier to diagnose than is mental illness.") Therefore, despite my concerns about the Board's practices, I find that the Board's procedures, including the subjection of applicants' reports to review by an expert, are rationally related to the legitimate government end of discerning whom should be afforded accommodations on the state bar examination.

However, I must note that the perception of bias generated by the disparate effect noted above is exacerbated by the suspicion with which the Board views learning disabled applicants. Of great concern to this Court were reports by two reputable witnesses of direct bias comments by Fuller, Executive Secretary of the Board. (See *Duchossoi Aff.* PP 6,7, and 8 (Learning Services Program Coordinator at New York University alleges Fuller told her he had 1) "to confess to a certain cynicism as to the existence of learning disabilities to begin with"; and 2) "anyone who has the money can pay for a [*131] report [concerning a learning disability]" and "too many times I see testing reports that I really doubt are legitimate"; and 3) "You have to realize that the law is a learned profession and I am not sure that a person with a learning disability should aspire to such a goal."); *Rosenthal Aff.* P 24 (a learning disabled applicant initially denied accommodations by the Board, now a licensed lawyer, claims Fuller told her that it was "his job to protect the public from incompetent and incapable lawyers" and the public would be "unaware that they would be purchasing a defective product in the case of learning disabilities."))

Much of the Board's bias appears to arise from its presumption that giving extra time to applicants with learning disabilities or impairments gives them an unfair advantage over other applicants. Fuller testified that he believed the Bar Examination's ability to certify the minimal competence of applicants was impaired when the examination was taken with extra time. (Tr. at 912.) Similarly, Taylor Swain, a Board member, testified at trial that psychometric principles taught that giving extra time to some applicants compromised the results of the test because the [*132] test would not be measuring the same factors. (Tr. at 1676-77.)

I am also concerned that Board members have not taken the time to familiarize themselves with the qualifications of its experts or the criticisms that exist against Vellutino's school of thought in the field. (Tr. at 1682-83 (The Board has delegated to Fuller responsibility to find experts and to ensure that Fletcher and Vellutino are "respected and noted experts in the field." She has had no direct contact with anyone other than Vellutino.); Tr. at 974, 979 (until recently, Fuller had interviewed no one other than Dr. Vellutino to advise the Board on learning disabilities. Current experts are recommended by Dr. Vellutino).) As discussed, there is no unanimity in the profession in how to define or identify a learning disability. See generally Tamar Lewin, *Fictitious Learning-Disabled Student is at Center of Lawsuit Against College*, N.Y. Times, April 8, 1997, at B9 (discussing the problems inherent in identifying learning disabled students and the bias against them which often ensues). By relying on one theory alone and by failing adequately to advise applicants of such

reliance, the Board may be discriminating [*133] against applicants who qualify as learning disabled under the law.

Nevertheless, despite these suggestions of potential bias, I cannot find that plaintiff has proven that the Board intentionally discriminated against applicants with learning disabilities or against plaintiff herself, particularly when the Board has come forward with "rational" explanations for its procedures. Dr. Vellutino is a respected research scientist in the field of children's learning disabilities. As noted, however, the field of learning disabilities is replete with chaos. Dr. Vellutino's theories, while not in the mainstream of the learning disability diagnostic community, are at the very least rational, particularly when it comes to determining whether an applicant is substantially disabled as compared to an average person. Dr. Vellutino and the Board simply did not recognize that the proper measure of comparison is not to an average population, but rather is to an average person performing the task at issue, i.e., the average law school graduate reading on a test like the bar examination.

Finally, even plaintiff's own experts in their evaluations did not address or identify plaintiff's reading [*134] problem with clarity. Dr. Massad did not even mention plaintiff's automaticity problem in the report he sent to the Board. Neither Dr. Massad nor Dr. Hagin addressed plaintiff's reading rate problem in their reports. Dr. Hagin did not provide the comparison data concerning plaintiff's reading rate on the DRT until requested to do so by the Court. Clearly, under these circumstances, it is not irrational for the Board to use an expert to assist in the evaluation of such clinicians' reports. Likewise, the choice of Dr. Vellutino as that expert was perfectly rational, as were Dr. Vellutino's theories. Plaintiff's equal protection claim is therefore denied.

III. PLAINTIFF'S DUE PROCESS CLAIM n29

- - - - -Footnotes- - - - -

n29 Defendant asserts that "plaintiff never alleged a due process claim in her complaint and never included one in the PTO and concludes from this that it is improper at this late date to add a new claim." (Def. Post-Trial Brief at 107). While defendant concedes that "plaintiff's claims now raised as due process violations, were previously raised as equal protection violations in the Pre-Trial Memorandum of Law," (id.) the defendant urges this Court not to consider the new claim "unless plaintiff makes an application to reopen the record and defendants are given an opportunity to respond to specific allegations." (Id. at 4 n.1).

The Court will consider the due process argument, however, because the facts underlying the claim were clearly established at the time of trial and since then the question has been fully briefed by the parties.

- - - - -End Footnotes- - - - -

[*135]

A. Constitutional Underpinnings

It is axiomatic that "admission to practice [law] in a state and before its courts is primarily a matter of state concern [and that] the determination of which individuals have the requisite knowledge and skill to practice may

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properly be committed to a body such as the [] Board of Law Examiners." Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974); see also Newsome v. Dominique, 455 F. Supp. 1373 (E.D. MO. 1978) (citing Whitfield and providing that "allegations of arbitrary cutoff scores and retesting procedures are simply insufficient to justify this Court's intervention into matters entrusted to the Missouri Supreme Court."). However, it is equally axiomatic that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment." Schware v. Board of Examiners of the State of New Mexico, 353 U.S. 232, 238-39, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957). Hence, while it is uncontroverted that "[a] State can require high standards of qualification, such as good moral character [*136] or proficiency in its law, before it admits an applicant to the bar," it must be remembered that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Id. at 239. In time-honored precedent, the Supreme Court has written that:

Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Id; see also id. at 246-47 (holding that State violated due process where it denied plaintiff opportunity to sit for bar exam and thereby "qualify for the practice of law" where there was "no evidence in the record which rationally justifies a finding that [plaintiff] was morally unfit to practice law").

As will be discussed below, however, the instant case does not implicate a state's prerogative to establish criteria for admission to the bar. Rather, this case involves a state agency's purported violation of a federal statute. Nevertheless, [*137] before I proceed to a consideration of plaintiff's due process claim, I must determine as a threshold matter whether this Court has jurisdiction to hear plaintiff's arguments.

B. Threshold Question: Jurisdiction over Due Process Claim

As a threshold matter, it must be decided whether this Court has authority to hear the merits of plaintiff's due process claim. Defendants argue that under Second Circuit and Supreme Court precedent, this Court is prevented from reviewing the Board's determination or conduct under the due process clause. They cite precedent establishing that under the due process clause "[a] federal court's review of state administrative proceedings is limited to whether the state has provided adequate avenues of redress to review and correct arbitrary action." FSK Drug Corp. v. Perales, 960 F.2d 6, 11 (2d Cir. 1992) (providing that court lacked jurisdiction to hear due process claim where former Medicaid provider brought action against Commissioner of New York Department of Social Services to challenge denial of re-enrollment application without prior hearing). They emphasize that "[a] section 1983 action is not an appropriate vehicle to consider whether [*138] a state or local administrative determination was arbitrary or capricious." Id. (noting that "this claim could have been, but was not, raised in a state court proceeding under [Article 78]."); see also Alfaro Motors v. Ward, 814 F.2d 883, 888 (2d Cir. 1987) (same) (citing Parratt v. Taylor, 451 U.S. 527, 543-44, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981) and Hudson v. Palmer, 468 U.S. 517, 534-36, 82 L. Ed. 2d 393, 104

S. Ct. 3194 (1984)); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.) ("Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum."), cert. denied, 459 U.S. 989, 74 L. Ed. 2d 385, 103 S. Ct. 345 (1982); but cf. *id.* (providing that "[a] different situation may be presented in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination, or fundamentally unfair procedures. . . Different considerations may also be [*139] present where recognized fundamental constitutional rights are abridged by official action or state regulation."). However, defendants' analysis on this issue is wholly cursory. Upon deeper exploration, it is clear that precedent dictates that this Court has jurisdiction over plaintiff's due process claim.

In *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-81 (2d Cir. 1996), the Second Circuit articulated the pragmatic considerations that underlie the rule that federal courts should not review deprivations of due process which can be redressed in the form of an adequate state postdeprivation remedy:

When a deprivation occurs because of a random, arbitrary act by a state employee, it is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is . . . almost . . . [invariably] beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. . . . Furthermore, that an individual employee himself is able [*140] to foresee a deprivation is simply of no consequence. The controlling inquiry is whether the state is in a position to provide for predeprivation process.

101 F.3d at 880 (citing *Hudson v. Palmer*, 468 U.S. at 532-33) (citations and internal quotation marks omitted).

The Supreme Court's lengthy discussion of the question in *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1989) is instructive on the question of whether and when a federal due process claim will be preempted by the availability of an adequate state postdeprivation remedy. *Zinermon* involved a patient who was admitted to a state mental health facility pursuant to voluntary admission forms he signed while heavily medicated. The patient brought an action against the facility and other state defendants alleging that he was thereby deprived of his liberty without due process of law. The *Zinermon* Court held that regardless of whether the plaintiff had adequate postdeprivation tort remedies under state law, his allegations were sufficient to state a claim under the federal due process clause as well. Referring to the *Parratt* line of cases which decline review of alleged due process [*141] violations where there is an adequate state remedy available, the Supreme Court rejected the cases' application to the situation before them and held that "because petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occur without adequate procedural protections." *Id.* at 135. The Court wrote:

It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in

admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking Parratt and Hudson. . . . [Plaintiff's] suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. [Plaintiff] is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed [*142] power to effect the deprivation at issue.

Id. at 135-36. The question for this Court, then, is whether the Board's unique policy of reviewing applications of purportedly learning disabled candidates was an established state procedure or instead a random, unauthorized act by state employees. I find here that plaintiff is challenging a state procedure, and not a random act by a state employee.

In Zinermon, the Court articulated three reasons that the case was not controlled by the Parratt line of cases. First, the Court stated that "petitioners cannot claim that the deprivation of [plaintiff's] liberty was unpredictable" because it "is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent." Id. at 136. The Court distinguished the situation in Parratt and Hudson by stating that in those cases, while it might be anticipated that losses would occur, it was unknown at precisely what point they could be expected. However, in Zinermon, the Court found that "any erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process -- when a patient is given admission [*143] forms to sign." Id. Such is the case with Dr. Bartlett's claim as well. The State can anticipate that if the Board is using arbitrary and capricious practices or procedures to determine who is eligible for accommodations on the state bar exam, such a deprivation of a liberty or property interest will occur at the particular stage in which the Board is reviewing applications for accommodations.

The second reason articulated by the Supreme Court in Zinermon is even more compelling and relevant to the present purposes. The Court persuasively distinguished Parratt and its progeny by explaining that a random act cannot be remedied by a pre-deprivation process, but a state policy generally can be corrected by a pre-deprivation process. See id. at 137-38. In the instant case, predeprivation process is not impossible. Dr. Bartlett is not challenging the random, isolated action taken by a mere employee bent on a malicious purpose. Rather, she is challenging the stated policies and procedures of a State Board with virtually unreviewable authority to determine whether she receives the reasonable accommodations to which the ADA affords her. n30 There is undoubtedly in this context [*144] a possibility for establishing adequate pre-deprivation process and procedure. In fact, it is clear that some pre-deprivation process and procedure is already in place.

- - - - -Footnotes- - - - -

n30 In Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985), the Second Circuit articulated an important caveat to the Supreme Court's analysis in this context and explained that "although the [Supreme] Court found crucial the inability of states to anticipate the actions of depriving employees, it nonetheless must have recognized that a state, as an incorporeal entity, can establish policy, take action, and anticipate events only through its officials and employees."

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Id. at 832. The Court went on to hold that:

Where the depriving actions were taken by a high-ranking official having final authority over the decision-making process, this Court has found that they were not random or unauthorized within the meaning of Parratt.

Id. The Court cited its prior opinion in *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983) which involved the City's razing of an apartment building without giving its owner notice and an opportunity to be heard at a predemolition hearing. In that case, the Second Circuit rejected the City's arguments that because this was unlawful under City ordinances it could not have been expected by the state and held that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure." Id. at 988; see also *Patterson v. Coughlin*, 761 F.2d 886, 891-93 (2d Cir. 1985), cert. denied, 474 U.S. 1100, 88 L. Ed. 2d 916, 106 S. Ct. 879 (1986); but cf. *Hellenic*, 101 F.3d at 880-881 (not mentioning line of cases which establish that actions by high-ranking officials with final authority over decisionmaking process are not deemed random or unauthorized).

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[*145]

Third and finally, the Supreme Court distinguished the Parratt line of cases by stating that where "the State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement," "petitioners cannot characterize their conduct as 'unauthorized' in the sense the term is used in Parratt and Hudson." *Zinermon*, 494 U.S. 113 at 138, 108 L. Ed. 2d 100, 494 U.S. 113. The Court wrote that "in Parratt and Hudson, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate . . . the procedural safeguards required before deprivations occur." Id. Clearly, the instant defendants were likewise imbued with broad authority to determine and provide the legally required accommodations to persons meriting them under the ADA and/or the Rehabilitation Act. Like the defendants in *Zinermon*, then, they cannot look to the law for relief and attempt to characterize their actions as "unauthorized" actions by mere state employees. Rather, their broad authority to determine who is given accommodations [*146] on the state bar examination brings along with it a concomitant duty: the duty to see that such accommodations are not arbitrarily or capriciously withheld. See also *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-81 (2d Cir. 1996) (distinguishing between due process claims that are based in "established state procedure" and due process claims premised on "random, unauthorized acts by state employees."); *Adams v. Chief of Security Operations*, 966 F. Supp. 210, 1997 U.S. Dist. LEXIS 7378, 1997 WL 282234 (S.D.N.Y. 1997) (holding that "because the deprivation alleged in this case was allegedly neither random nor unauthorized and the defendants have not attempted to show that a predeprivation hearing was not possible or practicable, the availability of a postdeprivation state law remedy is not a sufficient basis to dismiss the complaint as a matter of law.").

For all of these reasons, I conclude that plaintiff has established this Court's jurisdiction to hear her due process claim.

C. The Appropriate Focus of Plaintiff's Due Process Claim

As alluded to above, it is crucial to note at the outset of the examination of plaintiff's claim that plaintiff is not challenging defendant's [*147] failure to admit her to the New York State Bar. Such a review of a particular applicant's denial of admission to the bar can only be reviewed by the United States Supreme Court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Even where "the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar," the district court does not have jurisdiction to hear the claim because in such an instance "the District Court is in essence being called upon to review the state court decision" regarding the particular applicant. Id. 460 U.S. at 482-83 n. 16.

Establishing qualifications for the practice of law and applying those criteria to individual applicants is somewhat different, however, from the conduct and determination at issue in the instant case. Here, plaintiff was applying for an accommodation in the taking of the New York state bar examination, and her due process challenge attacks defendant's practice of determining whether applicants were learning disabled by [*148] using an allegedly arbitrary cutoff score on one particular testing measure. Hence plaintiff is not aggrieved by her denial of admission to the bar. Rather, she challenges the Board's failure to grant her the reasonable accommodations in the taking of the bar examination to which she was entitled under the ADA and Section 504. Given that this factual context differs in important ways from the situation confronted in the cases where state bar qualifications are reviewed under federal due process, see, e.g., District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983) (providing that "United States District Courts . . . have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case."), I will begin my analysis by addressing the Second Circuit's holding in Charry v. Hall, 709 F.2d 139 (2d Cir. 1983).

In Charry, the Second Circuit addressed the question "whether the right to sit for an examination for admission to a profession represents a constitutionally protectible property [*149] or liberty interest comparable to a license already granted to practice that profession." 709 F.2d at 144. The plaintiff in that action, a Ph.D. graduate from New York University's Human Relations and Social Policy Department, challenged a state agency's finding that this program was not an accredited psychology program and that the plaintiff therefore could not sit for the examination required of all individuals seeking admission to practice psychology with a license. In examining the question whether the plaintiff's due process challenge could survive, the Second Circuit stated that "the right to take an examination is hardly the equivalent of the grant of the license for which it is taken; the applicant may fail the examination, in which event, unlike the successful licensee, he will not have any property interest entitled to due process protection." Id. Defendants in this action make much of this language. (see, e.g., Def.'s Post-Trial Mem. at 109-10.) However, upon closer examination, it is clear that the Second Circuit's holding in Charry is inapposite for at least two reasons.

First, and most importantly, the Second Circuit in Charry found that even though "the [*150] right to take an examination is hardly the equivalent of the grant of the license for which it is taken," id., the "arbitrary rejection of an application made by a fully qualified candidate can work a serious injustice on the applicant, depriving him of even the opportunity to obtain the license." Id. With this in mind, the Court concluded that it was "persuaded that an applicant satisfying statutory prerequisites has a 'legitimate claim of entitlement' to take the examination for the professional status of psychologist." Id. (providing that "since the present complaint . . . raises a federal due process issue, the district court erred in dismissing it for lack of subject matter jurisdiction."). Although the Charry Court in the end determined that plaintiff's procedural due process claim failed under the Mathews v. Eldridge test, n31 it nonetheless unquestionably recognized that a due process interest was at stake.

- - - - -Footnotes- - - - -

n31 The Court found that:

In the present case the private interest, i.e., the right to take an examination, while important enough to be classified as a constitutionally protectible property interest, hardly approximates the importance of a vested property right such as a license itself.

709 F.2d at 145. The Court, while somewhat troubled by the Board's procedures, in the end concluded that sufficient process under Mathews v. Eldridge was afforded the plaintiff. The Court stated that "the administrative review procedure provided by the state . . . is extensive and appears to us reasonably calculated to uncover and correct errors committed in denying an applicant the right to sit for an examination." Id. at 145. Furthermore, in rejecting the plaintiff's suggestion that he was entitled to an evidentiary hearing, the Court held that:

The possible occurrence of an error in one or two cases does not call for an expansion of the review system to add cumbersome and expensive evidentiary hearings with detailed findings, at least when the only property at stake is the right to sit for an examination. To do so would heap an excessive burden on the state in cases in which applications are denied. The Due Process Clause of the Fourteenth Amendment does not guarantee errorless administrative decisions. It assures only a procedure that is reasonably calculated to protect a person's property right. The review procedure here met that standard.

Id. at 146.

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[*151]

Second, there is some question whether the Charry holding is even relevant to the instant plaintiff's claims. Here, plaintiff is not attempting to circumvent the Board's policy of requiring (with some certain exceptions) that only law school graduates from accredited schools sit for the bar examination. Plaintiff has no reason to challenge such a policy because she was a successful graduate from an accredited law school. Rather, plaintiff challenges the Board's purportedly arbitrary and capricious determination that she was not entitled to accommodation in taking the bar examination. Therefore, plaintiff is not

invoking the somewhat constitutionally suspect "right to take an examination"; rather, she is seeking to enforce her statutory right as a disabled individual to receive the accommodations to which she is entitled under law. The question for this Court, then, is whether plaintiff was denied her statutorily-entitled accommodations in an arbitrary and capricious manner in violation of federal due process.

D. Whether Statutory Violations can Establish Due Process Claims

There is no question that plaintiff was denied her rights under the ADA and Section 504 to have reasonable [*152] accommodations in the taking of the New York State Bar Examination. See Part I, supra. However, there is considerable question whether plaintiff can subsequently bootstrap this violation into a federal due process violation. Even if defendants arbitrarily and capriciously denied Dr. Bartlett the accommodations to which federal law entitled her, I cannot find that this rises to the level of either a substantive or procedural due process violation.

First, under a substantive due process analysis, Dr. Bartlett has not shown that the existence of statutorily-created right under the ADA and Section 504 is a sufficient liberty or property interest that qualifies as a "fundamental right" requiring protection under the due process clause. While Charry and Schwere reveal that there may be a federally ensured liberty or property interest in the taking of a professional examination, as discussed above, that is not the interest at issue here. Rather, here plaintiff challenges the defendants' failure to grant her accommodations in the examination -- not their refusal to allow her to take the examination itself. Hence, I do not find that this failure to uphold plaintiff's statutory [*153] rights under the ADA and Section 504 amounts to a sufficient liberty or property interest under the due process clause to give plaintiff a claim. Cf. Sutton v. Marianna School District A., 573 F. Supp. 159, 165 (E. D. Ark. 1983) (providing that where plaintiff has a cause of action based on a state statute which provides her with "a full remedy . . . consistent with Federal due process requirements," her federal constitutional rights are protected because "to hold otherwise would be to provide a basis for bootstrapping every cause of action based on state law into a Section 1983 case.").

Under a procedural due process analysis, there might be a more cogent argument available to plaintiff, but it, too, must fail. While the federal statutes entitling her to accommodations may constitute a sufficient deprivation to entitle plaintiff to pre-deprivation procedures, I cannot find under these facts that plaintiff was denied such pre-deprivation protection. Applying the Mathews v. Eldridge analysis, see 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (requiring that in considering procedural due process claims courts consider three factors: "first, the private interest that will be affected by the [*154] official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."), I find that while it is unquestionably true that the Board's procedures resulted in an erroneous result at least in this case and while it may be said that their methodology borders on the arbitrary, it is sufficient procedure to satisfy the federal due process clause.

Furthermore, in effect, plaintiff seeks to alter the substantive rule employed by the Board, not the process due to her in that determination. She does not claim that the Board failed to give her notice or an opportunity to be heard; rather, she is disgruntled that the Board and its expert made the wrong conclusion about whether she was disabled and thereby deserving of accommodation. In effect, plaintiff is arguing that the substantive rule invoked by the expert and by the Board was arbitrary in that it used an arbitrary cutoff score that was [*155] applied in an uneven fashion. n32 Such a review of a substantive policy determination is beyond the jurisdiction or authority of the Court under a procedural due process analysis.

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n32 Plaintiff alleges that "the Board's procedure for complying with the ADA is constitutionally inadequate because: (a) it relies on a single measure or type of measure (decoding cut-off) to determine learning disabilities; (b) said cut-off is admittedly arbitrary; and (c) the Board applies its policy in such an arbitrary and capricious fashion as to create an environment which fosters disparate treatment." (Pl. Post-Trial Brief at 69). She asserts that defendant's determination of which applicants are disabled under the law and thereby entitled to accommodations on the bar exam "must be based on a qualitative functional analysis rather than an underinclusive statistical test which even if it were applied uniformly would still violate the law because it draws an arbitrary line in the sand and excludes otherwise qualified applicants." (Id.)

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[*156]

E. Reservations About Defendants' Conduct

Nevertheless, despite my holding that defendants' conduct does not rise to the level of a due process violation, I must pause to note some of the very disturbing findings that came to light in the course of this trial regarding defendants' policies and procedures.

As recognized by Dr. Vellutino, there is a serious measure of arbitrariness at play when learning disabled applicants are not advised of the criteria the Board is employing in assessing learning disabilities. n33 As previously discussed, Dr. Vellutino gives the benefit of the doubt to, and recommends accommodations for, any applicant who reports a word attack or word identification score at or below 30%, whether or not other scores support a conclusion of reading disability. Thus, applicants with test scores remarkably similar to Dr. Bartlett's were given accommodations because they happened to supply a word attack or word identification score below 30% with their first application. Plaintiff, unfortunately for her, only sent Dr. Massad's Form H report with her first application. On that Form, she received scores of above the 30th percentile. Only Dr. Heath first tested plaintiff [*157] on Form G. There, she scored in the 28th percentile on the word attack portion of the test. Dr. Vellutino, however, did not give her the benefit of the doubt because he concluded that the report was an anomaly, emphasizing instead other test scores that demonstrated above average, if not superior, reading facility. (Tr. at 1303-05, 2118-19, 2167.)

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n33 The parties at trial did not present a survey of what law schools or other state bar examiners do in evaluating learning disability reports. Dr. Hagin recommended that schools or other entities like bar examiners evaluating a learning disability report simply accept the diagnosis of learning disability so long as the report is issued by a person trained or licensed to diagnosis such disabilities and the report covers the four standard areas of information upon which psychologists rely in rendering a learning disability. (Tr. at 559-600, 562, 586-87.) Those four areas include information concerning the applicant's history, cognitive development, educational ability and reading sub-skills. (Tr. at 1587.) According to Dr. Hagin licensed, clinical or school psychologists are competent to diagnosis learning disabilities. (Tr. 562.) There is evidence in the record, however, that at least two law schools, the University of California Hastings College of the Law and the University of Houston Law Center, defines the criteria they use in determining whether a learning disability exists:

The four criteria necessary to establish a student's eligibility for learning disability adjustments or accommodations are: (1) average or above average intelligence as measured by a standardized intelligence test which includes assessment of verbal and non-verbal abilities; (2) the presence of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized test of achievement which is 1.5 standard deviations or more below the level corresponding to a student's sub-scale or full-scale IQ; (3) the presence of disorders in cognitive or sensory processing such as those related to memory, language, or attention; and (4) an absence of other primary causal factors leading to achievement below expectations such as visual or auditory disabilities, emotional or behavioral disorders, a lack opportunity to learn due to cultural or socio-economic circumstances, or deficiencies in intellectual ability,

(Pl.'s 181 at 53, 169.) These criteria are closely akin to those used by Dr. Hagin. This law schools, like Dr. Hagin recommended, also require a report to be prepared by a "professional qualified to diagnose a learning disability, including but not limited to a licensed physician, learning disability specialist, or psychologist" and which covers basically the four areas of information also suggested by Dr. Hagin. (Id. at 53-54, 170.) Mr. Fuller reported at trial that most state bar examiners simply accept the diagnosis of learning disability submitted in a an applicant's report but that approximately ten states use experts in assisting them in reviewing applicants' documentation. (Tr. at 880-81.) At least one state, Michigan, uses a panel of four individuals -- including a psychiatrist, a specialist in learning disabilities, and a judge -- to evaluate a learning disability application. (Tr. at 882.)

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[*158]

Recognizing the lack of "concordance" in defining a learning disability, Dr. Vellutino testified at trial that he has recommended to the Board that it not attempt to "get into the business of" trying to evaluate learning disabled applicants. (Tr. at 1997.) Instead, he has recommended that the Board give untimed power tests designed to assess minimum competence by testing specific skills. (Tr. at 1998, 2002, and 2004-005.) The Board has rejected this recommendation. In short, the Board's decision to continue this methodology, despite knowing its deficiencies, leaves much to be desired and suggests an element of arbitrariness, irrationality and capriciousness even though I cannot find under the law that it rises to the level of a procedural due

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process violation. Nevertheless, the Board's continued use of its procedures may, in the future, subject it and its members to possible liability under the ADA and the Rehabilitation Act.

IV. PLAINTIFF'S SECTION 1983 CLAIM n34

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n34 Section 1983 provides:

Every person who, under color of [law] subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. @ 1983 (emphasis added).

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[*159]

Because I have concluded, above, that plaintiff has failed to establish that her rights under the equal protection or due process clauses of the Constitution were violated by the defendants, the only remaining arguable basis for plaintiff's @ 1983 claim is the underlying statutory violations of the Rehabilitation Act and the ADA. See *Maine v. Thiboutot*, 448 U.S. 1, 4, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980) (providing that Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution). However, it is important to note that not every statutory violation is actionable under @ 1983. Rather, the Supreme Court has set forth two important exceptions to the general rule that @ 1983 remedies deprivations of federally secured rights. In *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990), the Supreme Court succinctly stated the two exceptions:

A plaintiff alleging a violation of a federal statute will be permitted to sue under @ 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of @ 1983,' or (2) 'Congress has foreclosed such [*160] enforcement of the statute in the enactment itself.'

Id. (citing *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987)).

Here, plaintiff's case clearly does not fall within the first exception because it is undeniable that the ADA and the Rehabilitation Act create enforceable rights; plaintiff has now successfully litigated and secured such rights in this Court. However, it is equally clear that Congress would not have intended that plaintiffs seek redress for violations of their ADA and Rehabilitation Act rights through the vehicle of @ 1983. Despite the Supreme Court's admonition that "we do not lightly conclude that Congress intended to preclude reliance on @ 1983 as a remedy for the deprivation of a federally secured right," *id.* at 520 (citations and internal quotation marks omitted), I find that this is one of the limited cases in which Congress did not intend for individuals like plaintiff to seek remedy through @ 1983. I note that "the burden is on the State to show by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private

enforcement." [*161] Id. at 520-21. Where, however, -- as here -- "the Act [itself] does not expressly preclude resort to @ 1983," id., the Court has found "private enforcement foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under @ 1983.'" Id. Unquestionably, the ADA and the Rehabilitation Act n35 provide such "sufficiently comprehensive" remedies for violations of plaintiff's rights that I do not countenance allowing plaintiff to recover under @ 1983 as well. See *Suter v. Artist M.*, 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992) (holding that the Adoption Assistance and Child Welfare Act of 1980 does not create a federally enforceable right under @ 1983 because the language of the Act could be read "to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary . . ."); *Messier v. Southbury Training School*, 916 F. Supp. 133, 142-46 (D. Conn. 1996) (discussing precedent in this context and assessing whether *Suter* obviated the *Wilder* analysis with respect to the first exception). [*162]

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n35 When I refer to the "Rehabilitation Act," it must be remembered that I am referring to the provisions of the Act under which plaintiff's cause of action is brought not other provisions or Titles of the Act. I note this because the Second Circuit has held that violations of Title I of the Act which does not provide for a private cause of action can be redressed via a @ 1983 action. See *Marshall v. Switzer*, 10 F.3d 925, 930 (2d Cir. 1993) (noting that the Supreme Court typically forbids prosecution under @ 1983 where "the statutes at issue themselves provide[] for private judicial remedies, thereby evidencing congressional intent to supplant the @ 1983 remedy.").

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V. PLAINTIFF'S DAMAGES

Having concluded that plaintiff's rights under the ADA and the Rehabilitation Act were violated, I now move to the question of damages. First, I will consider whether the individually-named defendants are entitled to qualified immunity for their conduct. Then, I will assess [*163] whether plaintiff can recover injunctive relief, declaratory relief, compensatory damages, and punitive damages.

A. Qualified Immunity

In a recent opinion, the Second Circuit succinctly summarized the law of qualified immunity:

Public officials are entitled to qualified immunity from claims for damages if (1) their conduct did not violate federal statutory or constitutional rights that were clearly established at the time, or (2) it was objectively reasonable for them to believe their acts did not violate those rights. In determining whether a right was clearly established, we consider (1) whether the right in question was defined with 'reasonable specificity', (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question, and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

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Brown v. City of Oneonta, 106 F.3d 1125, 1130-31 (2d Cir. 1997) (citations and internal quotation marks omitted).

1. Clearly Established Right

As noted above, there is a three-prong test to determine whether a right was "clearly established" [*164] at the time of defendant's conduct. See id. First, the Court must look to whether the right was defined with "reasonable specificity." Here, the right at issue was plaintiff's entitlement to reasonable accommodations in the taking of the state bar examination. As can be seen from the lengthy discussion above, this Court is of the opinion that plaintiff's entitlement to accommodations in the taking of the bar examination was not defined with reasonable specificity under either statute. Nor, under the second prong of the test, was the case law immensely helpful on this question. Therefore, under the third prong of the test, I must conclude that a reasonable defendant would not have understood that his or her acts were unlawful. This Court had to go to extraordinary lengths to determine whether plaintiff was substantially impaired under the law and to evaluate the many disagreements among the experts. I cannot find, therefore, that the individual defendants acted unreasonably when they determined that plaintiff was not disabled under the law.

2. Objectively Reasonable Conduct

However, even if I were to find that plaintiff's right to reasonable accommodations on the bar examination [*165] were "clearly established" at the time of defendants' conduct, I nevertheless would conclude that the defendants' conduct was objectively reasonable. Defendants seemingly made an attempt to comply with the statutes. Their only error was in the base group to which they compared plaintiff, and this error was only exacerbated by the tremendous degree of confusion in the literature of learning disabilities regarding what constitutes a learning disability -- as well as the somewhat unsettled state of the law regarding whether a professional licensing examination is a "work activity" (and necessarily whether the legal profession is a sufficiently "broad" category of jobs) entitling plaintiff to be compared to a population with similar skills, training, and experience. See Giacalone v. Abrams, 850 F.2d 79, 85 (2d Cir. 1988) (requiring the Court "to consider the operation of the rule in the context of the circumstances with which [the official] was confronted."). Because the Court itself was challenged by the legal issues presented in this case, I cannot deem defendants' conduct objectively unreasonable. I remain mindful of the policies underpinning the doctrine of qualified immunity, [*166] which provide that:

The doctrine of qualified immunity attempts to balance the strong policy of encouraging the vindication of federal civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope to exercise vigorously the duties with which they are charged, by relieving them from the fear of being sued personally and thereby made subject to monetary liability.

Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir. 1995). For these reasons, and because I find that their conduct was objectively reasonable, I conclude that all of the individually-named defendants are entitled to qualified immunity. n36

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n36 Because I find that all of the individual defendants are entitled to qualified immunity, I need not reach the question whether individual liability exists under either Act. See, e.g., Lane v. Maryhaven Center of Hope, 944 F. Supp. 158, 161 (E.D.N.Y. 1996) (recognizing that the Second Circuit has not yet answered the question whether individual liability exists under the ADA, but analyzing lower court cases as well as Second Circuit precedent under Title VII and concluding that individual liability does not exist).

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[*167]

B. Injunctive and Declaratory Relief

Having demonstrated that she is disabled under the ADA and the Rehabilitation Act, plaintiff is entitled to injunctive relief in the form of reasonable accommodations on the bar examination. Plaintiff seeks the following injunctive relief: "double time; n37 the use of a computer; n38 permission to circle multiple choice answers in the examination booklet and large print on both the New York State and Multistate Bar Exam." (Pl.'s Post-Trial Mem. at 83.) I agree that plaintiff is entitled to this injunctive relief under the Act. I do not conclude, however, that declaratory relief is appropriate in this case. As defendants aptly point out, this is not a class action, and plaintiff does not have standing to seek declaratory relief, or any relief beyond that relief necessary to remedy her individual claim. Accordingly, I grant plaintiff the individual, injunctive relief she seeks under the act. Cf. D'Amico v. New York State Board of Law Examiners, 813 F. Supp. 217, 223-24 (W.D.N.Y. 1993) (granting preliminary injunction requiring Board to provide all testing accommodations recommended by applicant's physician, including the provision of a "four-day [*168] testing schedule consisting of six hours of testing per day plus a one hour lunch break each day.").

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n37 Mr. Fuller testified in his trial affidavit that the Board has provided "up to four days for taking the examination" to other applicants. (Fuller Aff. P 86.) The Board has proffered no reason why plaintiff's requested accommodation for double time is unreasonable. Accordingly, I find the requested four days to be a reasonable accommodation in this case.

n38 Although there was testimony at trial that Mr. Fuller and the Board were "resistant" to the use of computers on the bar examination, (see Tr. at 887-893), I find the use of a computer or wordprocessor to be a reasonable accommodation. Any of the Board's security concerns about the use of a computer can be alleviated either by a computer technician's inspection of the hardware before each session of the examination, or, in the alternative, by the use of a proctor to monitor the applicant's use of the computer during the examination. Moreover, the Board's arguments carry little weight to the extent the Board admits that it has approved the use of computers by other applicants in the past. (Tr. at 890.)

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[*169]

C. Compensatory Damages

As one court has noted, "the relief provisions of Title II of the ADA are complex; one must trace a chain of legislation and caselaw through several steps to reach the operative law." *Tafoya v. Bobroff*, 865 F. Supp. 742, 748 (D. N.M. 1994), *aff'd*, 74 F.3d 1250 (10th Cir. 1996). The curious labyrinth begins with the damages provision of the ADA, which states that the "remedies, procedures, and rights" under the Act "shall be the remedies, procedures, and rights" provided under the Rehabilitation Act. 42 U.S.C. @ 12133. n39 The Rehabilitation Act, in turn, provides that for "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title," the damages available shall be the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. @ 2000d et seq.] . . ." 29 U.S.C.A. @ 794a(2). Unfortunately, because Title VI of the Civil Rights Act was an implied cause of action instituted by the Courts rather than Congress, there is some uncertainty regarding what damages are available to plaintiffs under Title VI, particularly [*170] in cases where there is no clear evidence of intentional discrimination.

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n39 In making this pronouncement, the ADA provision is unclear, however. It refers to "section 794a of Title 29" (which is the Rehabilitation Act damages provision) without specifying whether @ 794a(a)(1) or @ 794a(a)(2) is the operative and controlling provision for purposes of the ADA. Unfortunately, this is a critical distinction. Subsection 794a(a)(1) provides that the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964" shall control Rehabilitation Act claims brought under section 791 of the Rehabilitation Act. 29 U.S.C. @ 794a(a)(1). Subsection 794a(a)(2), however, states that Rehabilitation Act claims brought under "section 794 of this Title" -- (Section 504 of Rehabilitation Act) shall be governed by the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964. See 29 U.S.C. @ 794a(a)(2).

Despite the lack of clarity in the provision, numerous courts have stated that the damages provision controlling the ADA is the damages provision of Section 504 of the Rehabilitation Act, or @ 794a(a)(2), which looks to the remedies provided under Title VI of the Civil Rights Act. See, e.g., *Tafoya v. Bobroff*, 865 F. Supp. 742, 748-750 (D. N.M. 1994) (discussing the important differences between @ 794a(a)(1) and (a)(2), and concluding that the ADA is governed by @ 794a(a)(2)); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 1997 WL 142187, *7 (D. Conn. 1997) (providing, without explanation or distinction between @ 794a(a)(1) and (a)(2) that the damages remedy of the ADA should be the same as the damages available under the Rehabilitation Act). Because this Court believes that Congress intended Section 504 damages to govern ADA claims -- not the provisions of the Rehabilitation Act that deal with administrative determinations, I will follow the lead of my colleagues and analyze plaintiff's claim under @ 794a(a)(2), which then requires me to look to the remedies outlined in Title VI of the Civil Rights Act of 1964.

I should also note that defendants concede that @ 794a(a)(2), pointing as it does to Title VI, is the appropriate provision for establishing damages under the ADA. (See Defs.' Post-Trial Mem. at 122 & n.20.)

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[*171]

1. Whether (and What) Intent is Required to Recover Compensatory Damages

Most, but not all, courts agree that compensatory damages are recoverable under the ADA and Section 504 only in cases involving intentional discrimination. See, e.g., *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-31, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984) (providing that "without determining the extent to which money damages are available under @ 504, we think it is clear that @ 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay."); *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219-20 (11th Cir. 1992) (providing that "controlling precedent on Title VI remedies, made applicable to section 504 actions under the Rehabilitation Act, indicates that compensatory damages are precluded in cases of unintentional discrimination, but are permissible on a showing of intentional discrimination.") (citing, inter alia, *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983); *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 621 (11th Cir. 1990), rev'd on other grounds, 503 U.S. 60, 117 L. Ed. 2d 208, [*172] 112 S. Ct. 1028 (1992)); *Naiman v. New York University*, 1997 U.S. Dist. LEXIS 6616, 1997 WL 249970, *5 (S.D.N.Y. 1997) (providing that while "there is still some disagreement as to the scope of available remedies under the [Rehabilitation Act], most courts agree that compensatory damages are available"; leaving aside question whether intent was required since sufficient intent could be inferred from the fact that plaintiff requested an accommodation and was denied it); *Sharp v. Abate*, 887 F. Supp. 695, 699 (S.D.N.Y. 1995) (stating in wrongful termination case that "compensatory damages, including emotional damages, as well as punitive damages are available under the ADA," without expressly holding that a finding of intent was required); *Zaffino v. Surles*, 1995 U.S. Dist. LEXIS 4225, 1995 WL 146207, *2-3 (S.D.N.Y. 1995) (surveying the law after *Franklin* and concluding that "*Franklin* strongly suggests that Title VI and [the Rehabilitation Act] should be read as authorizing all traditional legal and equitable remedies" but noting that at least in instances of intentional discrimination, there should be no distinction between the recovery of pecuniary versus non-pecuniary damages); *Hernandez v. City of Hartford*, [*173] 959 F. Supp. 125, 1997 WL 142187, *7 & n. 10 (D. Conn. 1997) (following the Court's prior analysis finding that *Franklin* dictated that damages were available under the Rehabilitation Act, the Court extends this analysis to the ADA but distinguishes a case from another jurisdiction on the grounds that that case did not involve intentional discrimination); *DeLeo v. City of Stamford*, 919 F. Supp. 70, 72-74 (D. Conn. 1995) (concluding that *Franklin* mandates that compensatory damages are recoverable under the Rehabilitation Act); *Adelman v. Dunmire*, 1996 U.S. Dist. LEXIS 2810, 1996 WL 107853, *4 (E.D. Pa. 1996) ("Compensatory damages are . . . unavailable absent an allegation and proof of an intentional violation of Title II."); *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1444 (D. Kan. 1994) (concluding that especially in cases of unintentional discrimination, compensatory damages under the ADA are not available). But see *Wilder v. City of New York*, 568 F. Supp. 1132 (E.D.N.Y. 1983) (holding that "although the Court in *Guardians Assn.* requires a showing of discriminatory intent before awarding damages, such a showing is unnecessary here. Section 504 differs from Title VI in [*174] that discriminatory intent is not essential to a violation of the Rehabilitation Act."). n40

-Footnotes-

n40 For a cogent discussion of the Section 504 damages question, see generally Sarah Poston, Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue, 1992/1993 Ann. Surv. Am. L. 419.

-End Footnotes-

Much of this conclusion rests on the Supreme Court's holding in Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582, 598, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983) and its progeny which provides that intentional discrimination is a prerequisite to recovery under Title VI. In Guardians, a much-divided Supreme Court explained why a finding of intent was necessary:

Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies [*175] available thereunder.

In the typical case where deliberate discrimination on racial grounds is not shown, the recipient [of federal funds] will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

Id. But see Consolidated Rail Corp., 465 U.S. at 630 n.9 (explaining that when all the votes were tallied in Guardians "[a] majority of the Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI.") (emphasis added).

The Supreme Court's more recent holding in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) [*176] permitting compensatory and punitive damages under Title IX of the Civil Rights Act further explains the Court's thinking on this question. There the Court stated that "the point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged." Id. 503 U.S. at 74-75.

As plaintiff aptly alludes in her papers, however, the concept of intent in an accommodations case such as this one is markedly different from the concept of intent in employment discrimination cases or in cases involving a palpable bias or animus against disabled persons. In those cases, there is a negative action taken toward an employee because of his or her disability (most often a termination or an alteration in the terms or conditions of employment) or an

adverse action taken against a group of disabled individuals because of their disability. In the instant case, however, as in all accommodations cases, the concept of intent is more difficult [*177] to pinpoint because it is the defendants' failure to provide the plaintiff with an advantage which is the very subject of the "discrimination." In this sense, an accommodations case falls somewhere between the "disparate impact" sort of discrimination case to which the Supreme Court referred in *Guardians and Franklin* and the sort of direct, intentional discrimination that is the run-of-the-mill discrimination case in the employment context.

Here, it is clear that defendants did something intentionally. It was not that they had a facially neutral policy which resulted in a disparity of disabled individuals being adversely impacted, as was the case in the Title VI cases discussed in *Guardians and Franklin*. Rather, defendants intentionally withheld from plaintiff an accommodation to which this Court has deemed she was entitled. Clearly, defendants were of the opinion that under the law, Dr. Bartlett was not a disabled individual, but one cannot say that they were without notice that Dr. Bartlett was claiming a disability. And notice is what the Supreme Court appeared concerned with in both *Guardians and Franklin*. As plaintiff writes in her Post-Trial Reply [*178] brief:

Most reasonable accommodations case [sic] do not raise issues of lack of notice because they arise only after a defendant has rebuffed a specific request from a person with a disability. In such a situation, the defendant is put on notice before the filing of the lawsuit. The risk of surprise is not a [sic] great as it may be in disparate impact disputes.

(Pl.'s Post-Trial Reply Mem. at 68). Therefore, it is fair to charge defendants with notice, and thereby intent, of their wrongful failure to provide a reasonable accommodation. Undoubtedly, the defendants believed what they were doing was within the confines of the law (but see Pl.'s Post-Trial Reply at 59-61 (detailing defendants' admitted errors and inconsistencies in the processing of accommodations applications and discussing Department of Justice investigation of Board for its failures)), but it could be said that almost every defendant harbors such a belief. The question really is, then, who pays the price for the inherent miscalculation in such a belief, especially where, as here, it is clear that defendants at least negligently arrived at their conclusion that Dr. Bartlett was not learning disabled. [*179]

The Supreme Court's analysis in *Alexander v. Choate*, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) is somewhat instructive on the question of what level and sort of intent should be required to trigger damages under the Acts. There, the Court held that Congress intended the Rehabilitation Act to cover instances of non-intentional discrimination. Although the Court did not address the question of damages, the Court explained that "[discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus." *Id.* at 295. The Court recognized and affirmed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* 469 U.S. at 296-97. The Court explained:

For example, elimination [*180] of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. . . . And Senator Humphrey, again in introducing the proposal that later became @ 504, listed, among the instances of discrimination that the section would prohibit, the use of "transportation and architectural barriers," the "discriminatory effect of job qualification . . . procedures," and the denial of "special educational assistance" for handicapped children. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.

Id. at 297. Likewise, in the instant case, it could be similarly argued that "much of the conduct that Congress sought to alter in passing" the Rehabilitation Act as well as the ADA "would be difficult if not impossible to reach" if the Acts are construed only to provide damages for that "conduct fueled by a discriminatory intent." Id. at 296-97. While Alexander's holding extending the Rehabilitation Act's reach to disparate impact cases is admittedly a far cry from a holding that compensatory [*181] damages may be recovered in such cases, I think the case helps illustrate the purposes of Congress in passing the Rehabilitation Act, and by extension, the ADA. At the very least, it demonstrates an awareness on the part of the Supreme Court that the concept of intent differs markedly in accommodations cases, and hence that a different conception of intent is appropriate for recovery of compensatory damages in non-employment accommodations cases.

In *Wilder v. City of New York*, 568 F. Supp. 1132 (E.D.N.Y. 1983), Judge McLaughlin (then of the Eastern District) used an analogous logic to dispense with the intent requirement altogether in accommodations cases. He wrote:

Although the Court in *Guardians Assn.* requires a showing of discriminatory intent before awarding damages, such a showing is unnecessary here. Section 504 differs from Title VI in that discriminatory intent is not essential to a violation of the Rehabilitation Act.

Id. at 1136. A short time ago, Judge McKenna of this Court, without answering the question whether intent was a prerequisite to the recovery of compensatory damages, found intent where a reasonable accommodation was denied. He wrote: [*182]

Assuming that intent is a prerequisite for monetary relief under the [Rehabilitation Act], [plaintiff's] allegation that he requested a qualified interpreter, which was not provided, coupled with the absence of any allegation that [the defendant] attempted to provide [the plaintiff] with effective communication, sufficiently alleges intent.

Naiman v. New York University, 1997 U.S. Dist. LEXIS 6616, 1997 WL 249970, *5 (S.D.N.Y. 1997). See also *J.L. v. Social Security Administration*, 971 F.2d 260, 262-265 (9th Cir. 1992) (providing that plaintiffs could recover compensatory damages where they were denied reasonable accommodations in the procedure for security social security benefits); *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1106-09 (9th Cir. 1987) (permitting action for monetary relief to proceed in case involving refusal to provide interpreters to prospective jurors who were deaf).

In the end, what all of these cases reveal, and what the clear policy of Congress mandates, n41 is that the question of intent in accommodations cases does not require that plaintiff show that defendants harbored an animus towards her or those disabled such as she. Rather, [*183] intentional discrimination is shown by an intentional, or willful, violation of the Act itself. With this understood, it becomes clear, that while defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated the ADA and the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly. Therefore, to the extent that intent may be held to be required for recovery of damages under the Acts, plaintiff has met her burden of proof on this issue, and she is entitled to compensatory damages.

- - - - -Footnotes- - - - -

n41 Congress clearly intended to provide for compensatory damages in situations such as the instant case. As plaintiff describes in her Post-Trial Reply Memorandum:

Senator Harkin, the chief sponsor of the [ADA] in the Senate, emphasized that damages were available to private litigants under Title II: It is true that the employment provisions of title I make available the rights and remedies of title VII of the Civil Rights Act, which provides for backpay and equitable relief. Also under . . . title III, the bill expressly limits relief to equitable remedies. However, title II of the Act, covering public services, contains no such limitations. Title II of the bill makes available the rights and remedies also available under Section 505 of the Rehabilitation Act, and damages remedies are available under . . . section 504 of the Rehabilitation Act and, therefore also under title II of this bill. 135 Cong. Rec. 19, 855 (1989) (emphasis added).

(Pl.'s Post-Trial Reply Mem. at 65.)

- - - - -End Footnotes- - - - -

[*184]

2. The 1991 Amendment to the Civil Rights Act

Although this case, as discussed above, implicates -- for purposes of determining whether plaintiff is "substantially impaired" -- the "major life activity of working," I cannot say that this is an "employment case." Therefore, the 1991 Amendment to the Civil Rights Act is inapplicable as it pertains only to individuals who have been discriminated against by employers making employment decisions. See 42 U.S.C. @ 1981a(a). The defendants in this case are not employers; rather, they are the legal entity charged with testing bar applicants who are seeking professional licenses to practice law. There were no terms or conditions of employment at issue and therefore the 1991 Amendment to the Civil Rights Act is not relevant. See, e.g., Tyler v. City of Manhattan, 849 F. Supp. 1442, 1445 (D. Kan. 1994) (holding that because "the Civil Rights Act of 1991 amended only those portions of the ADA that prohibit discrimination in employment . . . [and because] the plaintiff's claims in this case have nothing to do with employment . . . the Civil Rights Act of 1991 does not entitle plaintiff to compensatory damages . . ."). n42

-Footnotes-

n42 It should be noted that in the 1991 Amendment to the Civil Rights Act, Congress established, in essence, a good faith defense for defendants who have wrongfully denied plaintiffs a reasonable accommodation. The Act states:

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. @ 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C.A. @ 1981a(a)(3). Again, however, by the express language of the provision (including the last line which refers to the "operation of the business"), this rule applies only in employment cases, not in a case covered by Title II of the ADA. Furthermore, I cannot say that defendants made a good faith effort "to identify and make a reasonable accommodation" to plaintiff. Although defendants may have been acting in good faith when they attempted to discern whether plaintiff was learning disabled, because of their faulty conclusion on that question, they never reached the point where there were making a good faith effort to accommodate her.

-End Footnotes-

[*185]

3. Computation of Compensatory Damages

Having found that compensatory damages are appropriate, I now move to the question of what damages have been proven in this case. Although plaintiff submitted evidence and testimony regarding purported losses in salary and benefits (and the accompanying incurring of greater debt) that she suffered as a result of not having passed the bar examination, (see Letter from Jo Anne Simon to the Court (May 28, 1996)), I find that these calculations are unduly speculative. As defendants correctly point out, "plaintiff has failed to prove that with accommodations she would have passed the Bar exam." (Letter from Gregory J. McDonald to the Court (Aug. 28, 1996)). Although this Court holds the greatest hope for Dr. Bartlett's ability to pass the bar examination, the painful truth is that even when she was granted accommodations on the examination pursuant to this Court's preliminary injunction, she did not pass. Although the Court accepts that plaintiff may have had difficulty adjusting to the use of a amanuensis, the fact remains that even when plaintiff was granted the accommodations she desired in law school, her grade point average and/or class [*186] standing did not appreciably improve. Moreover, she did not pass the Pennsylvania Bar Examination in which she was given the accommodations she requested. These facts, coupled with the inherent speculation of predicting what one's career might have become and whether or not another law firm would have hired plaintiff after her original law firm disbanded, render a great portion of plaintiff's claim for compensatory damages unduly speculative. n43 Cf. Edward A. Adams, ABA Sees Lingering Problems at CUNY Law School, N.Y.L.J., April 22, 1996, at I (providing that while the state-wide passing rate on the bar examination

is roughly 80%, at some schools it is as low as 39%).

-Footnotes-

n43 As for plaintiff's assertions regarding the mental pain and humiliation that she suffered as a result of not passing the bar examination, I likewise cannot find that such damages, if incurred and recoverable, should be recompensed. It is impossible to separate the pain and humiliation suffered by plaintiff because she failed the exam without accommodations, from the pain and humiliation she might have felt, as do many unsuccessful bar exam applicants, from failing the exam even with accommodations. Hence, I do not grant plaintiff damages for mental anguish.

-End Footnotes-

[*187]

What is clear is that plaintiff's taking of the bar examination without the accommodations to which she was entitled under the law was a waste of her time and money. For these losses, plaintiff should be reimbursed. Plaintiff claims that she "incurred costs of \$ 2,500" for each of the five bar examinations that she took. (See Letter from Jo Anne Simon, supra, at 2 ("\$ 2,500 for each of four additional bar examinations"); Pl.'s Post-Trial Mem. at 82 (plaintiff "incurred the expenses associated with taking the Bar Exam and bar review courses five (5) times").) The Court accordingly awards plaintiff compensatory damages in the amount of \$ 12,500.00.

D. Punitive Damages

As with compensatory damages, courts are divided on the question of whether punitive damages are recoverable under the ADA and/or the Rehabilitation Act, especially as against a governmental entity. Compare U.S. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1285-1287 (7th Cir. 1995) (upholding compensatory and punitive damages award in ADA employment case); Sharp v. Abate, 887 F. Supp. 695, 699 (S.D.N.Y. 1995) (Kaplan, J.) (holding that "compensatory damages, [*188] including emotional damages, as well as punitive damages are available under the ADA.") (emphasis added); DeLeo v. City of Stamford, 919 F. Supp. 70, 72-74 & n.4 (D. Conn. 1995) (holding that "punitive damages are included within the full panoply of remedies and must be available for a violation of the Rehabilitation Act 'absent clear direction to the contrary by Congress.'"); Kilroy v. Husson College, 959 F. Supp. 22, 24 (D. Maine 1997) (providing that punitive damages are recoverable under the ADA); Kedra v. Nazareth Hospital, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (concluding after discussion that punitive damages are recoverable under Section 504) with Moreno v. Consolidated Rail Corp., 99 F.3d 782, 784 (6th Cir. 1996) (holding that punitive damages are not recoverable under Section 504); Adelman v. Dunmire, 1996 U.S. Dist. LEXIS 2810, 1996 WL 107853, *4 (E.D. Pa. 1996) (providing that "punitive damages are not available from a governmental entity"); Harrelson v. City of Millbrook, 5 Nat. Disability Law Rep. 297 (M.D. Ala. 1994) (holding that "punitive damages are not available to a plaintiff asserting a claim under Title II of the ADA" in part because "Congress' express provision [*189] of punitive damages under Title I of the ADA via the Civil Rights Act of 1991 counsels against a statutory construction that punitive damages are available under Title II by inference."). However, I need not address the question whether punitive damages are available under either Act in this case because even if I found them to be available, I would conclude that

defendants' conduct do not warrant them. Cf. Luciano v. Olsten Corp., 110 F.3d 210, 220-21 (2d Cir. 1997) (providing that the statutory standard for punitive damages under Title VII and under the 1991 Amendment to the Civil Rights Act is the "same as the language in other civil rights laws": punitive damage are appropriate where a defendant discriminates "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."); Kilroy v. Husson College, 959 F. Supp. 22, 24 (D. Maine 1997) (providing that punitive damages are recoverable under the ADA "if a plaintiff demonstrates that her employer 'engaged in discriminatory behavior with 'malice' or 'reckless indifference' to her federally protected rights."). Because of the "chaos" in the learning disability field and the ambiguity [*190] in the law, I do not find the level of "malice" or "reckless indifference" to federally protected rights that would justify an award of punitive damages.

CONCLUSION

For the reasons discussed, I find that plaintiff is disabled under the ADA and under Section 504 and that the Board's failure to accommodate her reasonably on the New York State Bar Examination amounted to discrimination under the ADA and Section 504. I do not find, however, that plaintiff has established an equal protection, due process, or a @ 1983 violation by defendants.

I further conclude that all of the individually-named defendants are entitled to qualified immunity and that plaintiff is entitled to injunctive relief in the form of reasonable accommodations on the examination. I award compensatory damages in the amount of \$ 12,500.00. I do not award punitive damages.

Plaintiff shall also receive the following reasonable accommodations in the taking of the bar examination, should she decide to re-take it in the future:

- (1) double time over four days;
- (2) the use of a computer;
- (3) permission to circle multiple choice answers in the examination booklet;
and
- (4) large print on both the New York State [*191] and Multistate Bar Examinations.

The Clerk of the Court is hereby directed to enter judgment in accordance with this Opinion.

SO ORDERED.

Dated: New York, New York

July 3, 1997

SONIA SOTOMAYOR

U.S.D.J.

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1ST CASE of Level 1 printed in FULL format.

MARILYN J. BARTLETT; Plaintiff, - against - NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER, Individually and as Executive Secretary, New York State Board of Law Examiners; JOHN E. HOLT-HARRIS, JR., Individually and as Chairman, New York State Board of Law Examiners; RICHARD J. BARTLETT, Individually and as Member, New York State Board of Law Examiners, LAURA TAYLOR SWAIN, Individually and as Member, New York State Board of Law Examiners, CHARLES T. BEECHING, JR., Individually and as Member, New York State Board of Law Examiners and IRA P. SLOANE, Individually and as Member, New York State Board of Law Examiners, Defendants.

93 Civ. 4986 (SS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

1997 U.S. Dist. LEXIS 12227

August 15, 1997, Decided
August 18, 1997, Filed

DISPOSITION: [*1] Defendants' motion for reconsideration DENIED.

COUNSEL: For Plaintiff: Jo Anne Simon, Esq., Patricia Ballner, Esq., Brooklyn, New York.

For Defendants: Dennis Vacco, Esq., Attorney General of the State of New York, New York, New York.

For Defendants: Judith T. Kramer, Esq., Rebecca Ann Durden, Esq., Assistant Attorneys General.

JUDGES: SONIA SOTOMAYOR, U.S.D.J.

OPINIONBY: SONIA SOTOMAYOR

OPINION: MEMORANDUM OPINION AND ORDER

SONIA SOTOMAYOR, U.S.D.J.

Defendants move, pursuant to Fed. R. Civ. P. 59(e) and 60(b), for amendment of the judgment or relief from the decision and order of this Court rendered on July 3, 1997 (the "Opinion"), familiarity with which is assumed. For the reasons to be discussed, defendants' motion is DENIED.

I. The Court's Use of The EEOC Regulations Under Title I of the ADA

A. The Appropriateness of Employing Title I Regulations Generally

In its Opinion, the Court used the regulations promulgated by the EEOC under Title I of the Americans with Disabilities Act (the "ADA" or the "Act") to elucidate and expand upon the Court's understanding of the concept of "substantial limitation" as it relates to defining who is disabled under the

Act. [*2] The Court employed the Title I regulations for this purpose even though plaintiff's claim was brought under Titles II and III of the Act, and the Department of Justice, not the EEOC, is charged with promulgating regulations pursuant to those titles. While neither party directly challenges the Court's use of the EEOC regulations and interpretive guidance, the tenor of the defendants' instant motion for reconsideration implies that the use of the Title I regulations was somehow inappropriate. n1 The Court disagrees for the following reasons.

- - - - -Footnotes- - - - -

n1 The Defendants only raise the question vaguely in a footnote in their brief:

Both this Court and the court in Price rely upon EEOC regulations for guidance even though they pertain only to Subchapter I which addresses workplace discrimination and neither this case nor Price were filed against employers nor do they involve discrimination in the workplace.

(Defs.' Brief at 4 n.2). Although defendants raise the question, they do not discuss it further, nor do they explain why they likewise relied upon the EEOC regulations in presenting their arguments to the Court.

- - - - -End Footnotes- - - - -

[*3]

Initially, one must understand, how, if at all, regulations under Title I and Title II differ, keeping in mind that the statutory definition of "disabled" is the same for all titles of the Act and that no agency is imbued with dispositive authority to state what the term means. The only difference between the Title I regulations promulgated by the EEOC and the Title II regulations promulgated by the Justice Department is that the EEOC goes to much greater lengths to explore the concept of substantial limitation, particularly as that concept relates to the major life activity of working. Both sets of regulations define a disability -- according to the statutory definition -- as an impairment that substantially limits any major life activity. Both regulations list the following examples of major life activities: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. @ 1630.2(i) (Title I regulation) (emphasis added); 28 C.F.R. @ 36.104(2) (Title II regulation) (emphasis added).

Clearly, then, the Department of Justice in promulgating rules under Title II contemplated an assessment of a plaintiff's impairment [*4] under the major life activity of working. The only question is whether the Department of Justice regulations under Title II forecloses application of the EEOC's interpretation that substantial limitation in the context of the major life activity of working should be measured by a different reference population -- by a comparison to "the average person with comparable training, skills and abilities" 29 C.F.R. @ 1630.2(j)(1)(ii) rather than "the average person in the general population." 29 C.F.R. @ 1630.2(j)(3)(i). n2 I hereby reaffirm my prior conclusion that the EEOC's interpretation of substantial limitation in the context of the major life activity of working is both a part of, and consistent with, the Department of Justice's regulations and the purpose of the ADA.

- - - - -Footnotes- - - - -

n2 The Justice Department regulations under Title II merely define the phrase "major life activities", without giving any definition of "substantial limitation" or any reference to whether or what comparison should be made in finding a substantial limitation. In its analysis of the definition of "major life activities," the Department only discusses the concept of substantial limitation briefly, without defining what it means. Its analysis explains that "[a] person is considered an individual with a disability . . . when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." U.S. Equal Employment Opportunity Commission & U.S. Department of Justice, Americans With Disabilities Act Handbook II-20 (1992). What the Department neglects to explain is whether "most people" refers to most people in the general population or to most people engaging in that particular life activity. Obviously, such a distinction is of critical importance in this context.

- - - - -End Footnotes- - - - -
[*5]

I reach this conclusion in part because of the cooperative spirit in which the regulations were promulgated. See, e.g., I Henry H. Perritt, Jr., Americans With Disabilities Act Handbook @ 1.9 (3d ed. 1997) (discussing the fact that the Justice Department and EEOC regulations were issued jointly, as required by @ 107(b) of the ADA). In addition, the Department of Justice's own "rule of interpretation," under Title II provides: "Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to the title." 28 C.F.R. @ 36.103. Notably, the Rehabilitation Act now looks to the standards established by Title I of the ADA and the regulations promulgated thereunder. See 29 U.S.C. @ 793(d) (providing that "the standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act").

In its analysis of this "rule of interpretation," the [*6] Justice Department has even more pointedly written: "Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles." 28 C.F.R. @ 35.103, App. A, reprinted in, Arlene B. Mayerson, ed., Americans With Disabilities Act Annotated: Legislative History, Regulations & Commentary Title II - 25 (1997); see also H.R. Rep. No. 101-485 at 49-51 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472-74 ("Title II should be read to incorporate provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973 However, nothing in the other titles should be construed to lessen the standards in the Rehabilitation Act regulations which are incorporated by reference in Section 204."); U.S. Equal Employment Opportunity Commission & The Department of Justice, Americans with Disabilities Act Handbook I-3 (1992) ("It is the intent of Congress that the regulations implementing the ADA be comprehensive and easily [*7] understood. Part 1630 [promulgated by the EEOC], therefore, defines terms not previously defined in the regulation implementing section

504 of the Rehabilitation Act, such as "substantially limits . . ." Where possible, part 1630 establishes parameters to serve as guidelines in such inquiries.").

From these two statements, it is self-evident that the Department of Justice's own "rule of interpretation" sanctions the use of regulations from a different title to help lend meaning to a concept that is not addressed in its own regulations, see note 2, supra, provided that the other regulations do not impose or permit a "lesser standard." Here, the Title I regulation merely determines the appropriate characteristics -- comparable training, skills, and abilities -- of the persons within the general population against which a substantial limitation is measured in the context of the major life activity of working. The EEOC's conclusion, therefore, does not provide a lesser standard. Moreover, it is perfectly consistent with the Rehabilitation Act, as well as Title II and the remedial nature of the ADA as a whole, and has a sound basis in logic. Thus, the Court's invocation of the [*8] Title I regulations as a meaningful interpretive tool was consistent with general rules of statutory interpretation. See, eg., *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 31 (3d Cir. 1995) (explaining that there is "a basic tenet of statutory construction, equally applicable to regulatory construction, that a statute 'should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.'" (citation omitted); *Bower v. Federal Express Corp.*, 96 F.3d 200, 209-10 (6th Cir. 1996) (arguing that the better choice is to use another regulation for interpretative guidance rather than interpret a term "without regulatory assistance"); *Yeskoo v. United States*, 34 Fed. Cl. 720, 734 (Ct. Fed. Cl. 1996) (providing that "in construing a statute, courts should attempt not to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless or superfluous. . . . The meaning of statutory language depends on context, and a statute should be read as a [*9] whole. . . . Therefore, when reviewing the statute and regulations at issue in this case, this court must construe each part of a statute in connection with all the other sections, so as to produce a harmonious whole. Moreover, common sense requires that the same words used twice in the same act should have the same meaning."); *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (providing that a defendant can not be convicted under the regulations of a statute different from that under which he was indicted, but that nevertheless "a regulation implementing a different statute might aid in interpreting those under another statute."); *Price v. The National Board of Medical Examiners*, 966 F. Supp. 419, 426 & n.2 (S.D. W. Va. 1997) (employing the Title I regulations in a Title II case, and explaining that "The EEOC guidelines do not govern [Title II] because the guidelines pertain only to Subchapter I. However, Congress clearly intended for the term 'disability' (and, therefore, the phrase 'substantially limits') to have a uniform meaning throughout the ADA. Accordingly, wherever possible, the Court must define the phrase 'substantially limits' in a manner consistent with [*10] each of the agencies' interpretations."); *Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294, 1993 WL 413016 (D. N.J. 1993) (importing Title I requirements into Title II context); *Ellen S. v. Florida Board of Law Examiners*, 859 F. Supp. 1489 (S.D. Fla. 1994) (applying Title I standard regarding pre-employment inquiries to Title II case involving bar application).

B. The Appropriateness of Invoking the Major Life Activity of Working

1. The Court Considered Other Major Life Activities First

As previously explained, the defendants do not directly challenge the Court's reliance upon the Title I regulations. In fact, defendants invoke the Title I regulations promulgated by the EEOC as the correct test for assessing disability under the Act. (See Defs.' Brief at 3). However, looking to the EEOC regulations, the defendants contend that the Court erred by analyzing plaintiff's impairment as one which impacts the major life activity of working "without first determining whether [plaintiff's impairment] substantially limits her ability to read or learn" (Defs.' Brief at 4).

Defendants seem to suggest that it only would have been appropriate for the Court to look to the [*11] major life activity of working if it first found that plaintiff was substantially limited in other major life activities. In fact, the reverse is true. If the Court had found, which it did not, that plaintiff was substantially limited in any other major life activity, it would have been prevented, by the EEOC analysis, to consider the effect of plaintiff's impairment on any other major life activity, and specifically the major life activity of working. If, however, as was the case, the Court found that plaintiff was not substantially limited in the other major life activities, it had a duty to see whether plaintiff was substantially limited in the major life activity of working. See 29 C.F.R. Pt. 1630, App., @ 1630.2(j).

The interpretive guidance to the EEOC regulations clearly provide that:

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.

29 [*12] C.F.R. Pt. 1630, App., @ 1630.2(j) (emphasis added). In explaining why other major life activities should be considered before the major life activity of working, the EEOC has written:

Most of the discussion and analysis of substantial limitation has focused on its meaning as applied to the major life activity of working. This is largely because there has been little dispute about what is meant by such terms as "breathing" "walking" "hearing" or "seeing" but much dispute about what is meant by the term "working." Consequently, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working.

For example, if an individual's arthritis makes it unusually difficult (as compared to most people or to the average person [*13] in the general population) to walk, then the individual is substantially limited in the ability to walk. In that case, one would not need to ascertain whether the individual is also substantially limited in working. If, however, it was not clear whether the person's impairment substantially limited his/her ability to walk (or to perform other major life activities), then one would have to analyze whether the

impairment substantially limited the person's ability to work.

EEOC Compliance Manual @ 902 --Definition of the Term "Disability" -- reprinted in Arlene B. Mayerson, Americans with Disabilities Act Annotated: Legislative History, Regulations & Commentary App. P. at p. 27 (1994) (emphasis added).

In its Opinion, the Court did the very analysis that defendants insist should have been done by the Court. The Court first considered whether plaintiff was "substantially limited" in her reading when compared to the average person in the general population. Finding that plaintiff's history of self accommodation enabled her to perform marginally as well as the average person in the general population, the Court concluded that plaintiff was not substantially limited [*14] when compared to this population. (See Opinion at 56 (stating that when plaintiff's reading skills are compared to the average person in the general population, she would be considered "barely average.")) Then, and only then, did the Court embark on its analysis of whether plaintiff's impairment substantially limited her ability to work. Using the benchmark of "the average person having comparable training, skills and abilities," 29 C.F.R. @ 1630.2(j)(3)(i), the Court found that plaintiff was substantially limited and therefore "disabled" under the law. There is nothing in the law, the regulations, or the EEOC guidance to suggest that this analysis was anything but appropriate.

2. The Appropriateness of Invoking the Major Life Activity of Working

Despite framing the bulk of their argument in terms of the Court's purported failure to consider other major life activities before considering the major life activity of working, it appears that what actually troubles the defendants is that the major life activity of working was invoked at all. To this end, the defendants place tremendous (and almost exclusive) weight in their reconsideration memorandum on a case from the Southern [*15] District of West Virginia, Price et al. v. The National Board of Medical Examiners, 966 F. Supp. 419 (S.D. W. Va. June 6, 1997). Although the case and the arguments found therein have superficial appeal, especially as applied to the limited facts and legal argument before that court, upon closer examination they are revealed as unpersuasive authority for the issues before this Court.

Price involved a suit for injunctive relief brought by medical students who were seeking additional time and other accommodations on the medical licensing examination administered by the National Board of Medical Examiners. According to the opinion, medical students are required to pass "Step 1" of the examination before proceeding on in their medical school education. This factual context differs markedly from the instant case, of course, where the plaintiff has completed all of the necessary schooling required to practice as a lawyer and where the only obstacle remaining between her and the practice of law is her passing the bar examination.

After a limited evidentiary hearing (as opposed to the very lengthy trial and voluminous submissions in this case), the Price court found that the [*16] plaintiffs' "history of significant scholastic achievement" id. at 427, in college and medical school evinced the fact that the plaintiffs were not substantially limited in their ability to learn as compared to "most unimpaired persons." Id. at 425. Analyzing all of the plaintiffs' impairments under the major life activity of learning (without any mention of the major life activity of working), the Court found that the plaintiffs were "able to learn as well as or better than the average person in the general population." Id. at 422.

Hence, the court found that the plaintiffs were not disabled under the law.

Price differs from the instant case in an important factual respect. The Price plaintiffs all claimed they had Attention Deficit Hyperactivity Disorder ("ADHD"). n3 Thus, their very claims went to their ability to learn, which was belied by their significant achievements in education. However, in the instant case, plaintiff's so-called "learning" disability is in actuality a difficulty in reading words -- not in learning per se. This is an important distinction because plaintiff's significant accomplishments in education do not belie her claim that she has [*17] significant difficulty reading.

-Footnotes-

n3 Although two of the three plaintiffs had been diagnosed with "Disorder of Written Expression and Reading Disorder," Price, 966 F. Supp. at 422, Price discussed their impairment, and limited its analysis, to a "learning" disability in the strictest sense of that word.

-End Footnotes-

In reaching its ultimate conclusion that the plaintiffs were not disabled, the Price Court raised the following concern:

The ADA is not designed "to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door." Jamie Katz & Janine Valles [sic], The Americans with Disabilities Act and Professional Licensing, 17 Mental & Physical Disability L. Rep. 556, 561 (Sept./Oct. 1993). If a court were to grant testing accommodations to persons that do not have disabilities within the meaning of [*18] the ADA, it would allow persons to advance to professional positions though the proverbial back door. In so undermining the integrity of the USMLE, that court would hinder the Board's ability to distinguish between qualified students and unqualified students.

Price, at *1. This argument is reminiscent of the defendants' claims in the instant case. It is true that if nondisabled individuals were granted accommodations on the examination, the examination's integrity would be compromised. n4 What the defendants and the Price court fail to recognize, however, is the impact of measuring applicants' impairments against inappropriate reference characteristics and how that practice would systematically result in persons with legitimate impairments being found not disabled under the Act, thereby seriously compromising the purpose of the Act, which is to employ disabled individuals to their fullest potential.

-Footnotes-

n4 It is important to underscore that bar examinations, like many other licensing examinations, purport to test technical knowledge and expertise and not reading speed or fluidity. This Court has specifically found, and the Bar Examiners conceded at trial, that neither reading speed or automaticity are tested on the New York Bar Examination. See Opinion at 74, 78-79. Often, one scholar has noted, concerns that the integrity of examinations may be compromised by granting accommodations to the learning disabled are premised on the fallacy shared by many licensing examiners that "applicants with learning

disabilities are either slow readers without any real impairment -- and therefore not disabled -- or not bright enough to pass the pertinent exam." Deborah Piltch et al., *The Americans With Disabilities Act & Professional Licensing*, 17 *Mental & Physical Disability L. Rep.* 556, 558 (Sept./Oct. 1993). This fallacy appeared to affect the attitudes of some of the defendants in the instant case. See Opinion at 91-92. Unlike the Price Court, however, this Court has found that the plaintiff before it is not a slow reader but rather is a person with an impairment that affects her ability to read with the automaticity and speed of the average person with comparable training, skills and abilities. See Opinion at 69-70. Care must be taken by courts (as Dr. Hagen noted is taken by trained psychologist in diagnosing learning disabilities) not to equate the legal effects of slow reading that arises from an impairment with the legal effects of slow reading arising from intelligence, educational, or emotional problems. The law does not protect the latter but it does require accommodation for the former.

- - - - -End Footnotes- - - - -
 [*19]

By measuring a disability for purposes of a professional examination against a reference population that would otherwise be totally unprepared and unqualified to take such an examination, the findings of such applicants' disability is automatically skewed against a finding of disability. The ADA and its dictates are highly context-specific. See, e.g., 29 C.F.R. Part 1630 App., @ 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Therefore, one can not look to whether an individual is disabled, without considering in what context the individual might be "substantially limited." For example, the EEOC Technical Assistance Manual provides:

An individual who had been employed as a reception-clerk sustained a back injury that resulted in considerable pain. The pain permanently restricted her ability to walk, sit, stand, drive, care for her home and engage in recreational activities. Another individual who had been employed as a general laborer has sustained a back injury, but was able to continue [*20] an active life, including recreational sports, and had obtained a new position as a security guard. The first individual was found by a court to be an individual with disabilities. The second individual was found not significantly restricted in any major life activity and therefore not an individual with a disability.

EEOC Technical Assistance Manual at II- 4 to 5. Because context is a very important part of the ADA, it would be incongruous to examine a person's impairments outside of the context in which the impairment affects their lives or livelihoods.

Hence, by failing to measure an applicant's disability against the appropriate reference group -- those engaging in that particular activity, or, in the words of the EEOC, those with "comparable training, skills and abilities" -- applicants are placed in a horrific Catch 22. If an applicant strives hard enough to prove him or herself a "qualified individual" who has completed the prerequisites for sitting for an examination and who is otherwise capable of performing within the profession, he or she is -- almost by definition and by the very nature of his or her accomplishments in graduate work -- "average" when compared [*21] to the general population.

The bar and medical licensing examinations are not "average" tests geared to "average" persons, however. These sophisticated, professional tests are designed to challenge the analytical abilities of generally above-average achievers. Hence, by failing to employ the major life activity of working standard when a person's entrance into a profession is at stake, n5 courts deny applicants the opportunity to compete on a level playing field when there is no doubt that once the applicants were employed within the profession their disabilities would have to be recognized and accommodated under Title I.

-Footnotes-

n5 The argument could be made that many, if not most, standardized tests such as the LSAT, or even the SAT, have an effect on a person's ability to enter a profession to the extent they affect a person's ability to gain the other credentials necessary to enter that profession. Those tests, however, are more generic intelligence tests, and, therefore, are more geared to the average population. Even more importantly, those tests are a considerably less proximate cause for denial of employment in any given area and hence the major life activity of working standard is much less appropriate in that context. Nevertheless, the Court does not have before it such a case. In the instant case, the plaintiff has already successfully achieved all of the requirements for being a lawyer; she merely lacks the license to practice. On any level, the bar examination at issue is a much more appropriate context for employing the major life activity of working than other standardized tests.

-End Footnotes-

[*22]

This result is contrary to the remedial nature of the statute, and to Congress' unequivocal desire to employ disabled individuals up to their full potential. See S. Rep. No. 101-116, at 9 (1989) ("Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Lou Harris poll not working is perhaps the truest definition of what it means to be disabled in America."). Although it can not be said that Dr. Bartlett is unemployed or unemployable, this does not assuage Congress' apparent concern for the employment difficulties of the disabled in America. n6 It is little consolation to tell disabled individuals that they can seek other forms of employment, but cannot seek employment in fields in which they studied for years. Understanding as it did the employment obstacles that the disabled face in this country, it could not have been Congress's intent to exclude the disabled from participating in large classes of customary professions, such as medicine and the law, merely because they can not receive the accommodations on a licensing exam -- accommodations which the law would require them to be given once they began work for an employer. [*23] Such a result would be abhorrent -- the disabled would be relegated to some form of an underclass -- able to practice in jobs that do not require licensing, but wholesale excluded from some of the most prestigious, lucrative, and rewarding professions in our society which do require licensing. Hence I find that the use of the major life activity of working standard and its comparison to the average person of comparable training, skills and abilities was appropriate and consistent with the spirit and letter of the Act.

-Footnotes-

n6 See S. Rep. No. 101-116, at 10 (noting among other employment obstacles, disabled individuals' "under-employment"); 135 Cong. Rec. S10712, (daily ed. September 7, 1989) (Statement of Sen. Harkin)(providing that "people with disabilities as a group occupy an inferior status . . . vocationally . . ."); 135 Cong. Rec. S10717 (daily ed. September 7, 1989) (Statement of Sen. Kennedy) ("Disabled citizens deserve the opportunity to work for a living, . . . and do all the other things that the rest of us take for granted."); 135 Cong. Rec. S10789 (daily ed. September 7, 1989) (Statement of Sen. Kennedy) ("With the challenge facing our country, we cannot afford to ignore the talent of the disabled, or neglect the skills they have to offer."); 135 Cong. Rec. S10791 (daily ed. September 7, 1989) (Statement of Sen. Riegle) (explaining that "our economy can no longer afford not to enlist the unique abilities and talents of people with disabilities."); 135 Cong. Rec. S10792-92 (daily ed. September 7, 1989) (Statement of Sen. Biden) ("Too many disabled persons have been locked out of the American workplace, excluded from jobs for which they are more than capable. . . . Too many people fail to see the intelligence, energy, and potential of millions of Americans. Disabled Americans are not asking for pity or for a handout. They are asking for a fair chance to compete and take part on an equal basis") (emphasis added); 136 Cong. Rec. H2433 (daily ed. May 17, 1990) (Statement of Rep. Luken) ("In short, this bill will help our country use an immense amount of talent, intelligence, and other human resources which heretofore have been underestimated, underdeveloped, and underutilized."); 136 Cong. Rec. H2446 (daily ed. May 17, 1990) (Statement of Rep. Gallo) ("For too long, Americans with mental and physical disabilities have been prevented from performing many daily activities of living and from fulfilling dreams of employment, prosperity, and full participation in our communities. Not only has this been a great loss to our communities and to our economy, it has also been an added hardship to the individuals who have struggled so valiantly to overcome the obstacles imposed by their disabilities and for their families who have been by their side all along."); 135 Cong. Rec. S4997 (daily ed. May 9, 1989) (statement of Sen. Cranston) (providing that the "single purpose" of the ADA is "to help ensure that persons with disabilities have the opportunity -- freed of the shackles of discriminatory practices -- to participate in our society as fully as possible and, thus, to achieve their full potential."); 136 Cong. Rec. H2427 (daily ed. May 17, 1990) (Statement of Rep. Hoyer) ("This bill does not guarantee a job -- or anything else. It guarantees a level playing field; the qualified individuals won't be discriminated against because of their disability."); 136 Cong. Rec. H2440 (daily ed. May 17, 1990) (Statement of Rep. Fish) ("This bill aims at opening up opportunities for all persons with disabilities.").

- - - - -End Footnotes- - - - -
 [*24]

II. Plaintiff's Purported Failure to State on Her Accommodation Application that She Was Impaired in Her Ability to Work

Finally, defendants argue that in order to recover damages under the Act, plaintiff was required to state on her accommodation application that she was disabled in the major life activity of working. Clearly, the law imposes no such obligation on the plaintiff in order to receive a remedy under the ADA. The major life activity of working is only part of a legal analysis which helps courts and investigators determine whether a given plaintiff is "substantially limited" and therefore "disabled" as that term is defined under the law. It is not a prerequisite to filing a complaint or to recovery. n7 What these forms,

and the ADA, require is that plaintiff list her impairment, not what it substantially limits. n8 Plaintiff's impairment is a learning disability that manifests itself in a difficulty in reading and understanding the written word with automaticity; plaintiff expressed this clearly on her application. She was under no obligation to tell defendants more or to explain to defendants that they should consider some of her marginal reading skills [*25] in the context of the type of test at issue and the nature of the skills of the population taking the test. By relying exclusively upon an expert whose approach rejects the generally accepted discrepancy theory in identifying learning disabilities, defendants themselves chose to ignore the full context specific dictates of the ADA and Rehabilitation Act.

- - - - -Footnotes- - - - -

n7 Defendants argue that plaintiff should not recover her expenses expended on at least three of the bar examinations because she did not timely apply for accommodations on two of them, and she was granted accommodations on the third. As for the two examinations in which plaintiff's application for accommodations may have been untimely, the Court finds defendants' argument to be specious. The defendants have consistently through the years considered untimely applications. Moreover, the letters denying accommodations for these two tests made clear that the Board considered the lack of merit in plaintiff's application as the primary reason for denying an accommodation. And, as for the third examination on which the Board actually did grant accommodations, recovery is merited given that the accommodations granted were neither those that the plaintiff requested nor those to which the Court has deemed plaintiff was entitled. [*26]

n8 The Court notes that there is no such thing as a per se working disability, and certainly none has been recognized by the ADA. Therefore, virtually every impairment that substantially limits the major life activity of working will have, in actuality, some other form of impairment at its root, such as asthma, reading, walking, writing, etc.

- - - - -End Footnotes- - - - -

CONCLUSION

For the reasons discussed, defendants' motion for reconsideration is DENIED.

n9

- - - - -Footnotes- - - - -

n9 Because I find that defendant's motion, while perhaps in poor judgment, is not frivolous, I hereby deny plaintiff's motion for sanctions under Rule 11.

- - - - -End Footnotes- - - - -

SO ORDERED.

Dated: New York, New York

August 15, 1997

SONIA SOTOMAYOR

U.S.D.J.

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