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970 F. SUPP. 1094:

CITATION YOU ENTERED:

Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094,
1997 U.S. Dist. LEXIS 9669, 24 A.D.D. 1013, 6 A.D. Cas. (BNA) 1766 (S.D.N.Y.
1997)

SUBSEQUENT APPELLATE HISTORY:

recons. denied, mot. denied, Bartlett v. New York State Bd. of
Law Examiners, 1997 U.S. Dist. LEXIS 12227 (S.D.N.Y. Aug. 15, 1997) *

CITATION YOU ENTERED MAKES NEGATIVE REFERENCE TO:

Wilder v. New York, 568 F. Supp. 1132, 1983 U.S. Dist. LEXIS 14787
(E.D.N.Y. 1983)

DeLeo v. City of Stamford, 919 F. Supp. 70, 1995 U.S. Dist. LEXIS
11564, 9 A.D.D. 632, 4 A.D. Cas. (BNA) 427 (D. Conn. 1995)

Sharp v. Abate, 887 F. Supp. 695, 1995 U.S. Dist. LEXIS 8481, 10 A.D.D.
612, 4 A.D. Cas. (BNA) 902 (S.D.N.Y. 1995)

SARAH,



- GREG

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

970 F. Supp. 1094; 1997 U.S. Dist. LEXIS 9669; 6 Am.
Disabilities Cas. (BNA) 1766

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: [*1098] 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 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]

[*1099] 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-

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6 Am. Disabilities Cas. (BNA) 1766

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 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 [*1100] 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."

[*1101] 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 [*1102] 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 plaintiffs request for accommodations was Dr. Massad's 1989 Psychoeducational Evaluation, previously submitted [*1103] 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.

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

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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 [*1104] 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

[*1105]

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 [*1106] 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 %ile (age)	Form H %ile (age)	G & H %ile (age)	G & H %ile (age)
(grade) *				
Visual-Auditory Learning	46			
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.

[*1107] 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 [*1108] 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)
Comprehension	50th %ile	98th %ile
Speed	4th %ile (195 wpm)	>1st %ile (156 wpm)

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

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ranked against that group.

[**34]

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

[*1109]

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 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 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 [*1110] 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., "managment" 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 [*1111] 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 [*1112] 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 [*1113] 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,

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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. [**1114] 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,

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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 [**1115] 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 impairments 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:

[*1116] 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 [**1117] 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--

[*1118] (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 [**1119] 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 [*1120] 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

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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.

[*1121] 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.

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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, [**1122] 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**]

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 [*1123] 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.

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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).

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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 Forrissi 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 [*1124] 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 [*1125] 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 [*1126] "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 [*1127] 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 [**1128] 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 [**1129] 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*

970 F. Supp. 1094, *1129; 1997 U.S. Dist. LEXIS 9669, **105;
6 Am. Disabilities Cas. (BNA) 1766

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.

[*1130] 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 [**1131] 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 [**1132] 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.

970 F. Supp. 1094, *1132; 1997 U.S. Dist. LEXIS 9669, **118;
6 Am. Disabilities Cas. (BNA) 1766

-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 [*1133] 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 [*1134] 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 [**1135] 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 [*1136] 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 [*1137] 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 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." *Schwartz 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 [*1138] 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 [**1139] 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 [*1140] 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." 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 *Burtneiks 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).

- - - - -End Footnotes- - - - -
[**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, 110 S. Ct. 975, 108 L. Ed. 2d 100. 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.").

970 F. Supp. 1094, *1140; 1997 U.S. Dist. LEXIS 9669, **146;
6 Am. Disabilities Cas. (BNA) 1766

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, [**1141] 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 [**1142] 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 Schware 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 [*1143] 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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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 [*1144] 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.)

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

[**158]

Recognizing the lack of "concordance" in defining a learning disability, Dr. Vellutinò 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

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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 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 [*1145] 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.

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, [*1146] 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." [*1147] (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 word processor 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.)

- - - - -End Footnotes- - - - -
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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 the 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.

- - - - -Footnotes- - - - -

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.)

- - - - -End Footnotes- - - - -
[**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. [*1148] 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

970 F. Supp. 1094, *1148; 1997 U.S. Dist. LEXIS 9669, **173;
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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 [*1149] 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) 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, 105 S. Ct. 712, 83 [**1150] L. Ed. 2d 661 (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 [*1151] 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]

[*1152] 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 3%).

- - - - -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 [*1153] (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

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(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.

The Souter Strategy

As Paul Gigot reported in his *Potomac Watch* column, one of the names on President Clinton's list of possible Supreme Court nominees is Sonia Sotomayor, a liberal district court judge from New York. The "Souter strategy" is what's being talked about here: Get her on to the Second Circuit, then elevate her to the Supreme Court as soon as an opening occurs. This is what happened with David Souter, who in the space of six short months found himself first on the First Circuit and then, faster than you can say "original intent," on the Supreme Court.

If this is Mr. Clinton's game plan, so far the Senate Judiciary Committee has obliged. Her nomination, made last June, breezed through Senate Judiciary in March with only Senators Kyl and Ashcroft objecting, and is now awaiting a full Senate confirmation vote. And waiting and waiting. Chester Straub and Rosemary Pooler were both confirmed to the Second Circuit last week, even though they were nominated months after Judge Sotomayor.



Sonia Sotomayor

We'd like to think the Republicans may be having second thoughts about Judge Sotomayor and are deliberately delaying her confirmation until seeing whether Justice Stevens announces his retirement when the current Court term ends this month. Perhaps someone took the trouble to look at an opinion she issued just a few days after winning the approval of the Judiciary Committee. In it, she ordered a Manhattan business coalition to pay back wages to homeless workers who claimed they were being exploited as slave labor. The workers were being paid less than minimum wage.

The defendants were two Midtown business improvement districts known as the Grand Central Partnership and the 34th Street Partnership. Their president, Dan Biederman, discussed the case with us recently.

One of the Partnerships' most impressive accomplishments was helping the vagrants who used to hang around and sleep on area streets develop the everyday coping skills necessary for holding down a job. Many of the unfortunate men and women who found themselves adrift in Grand Central Terminal had a history of drug or alcohol abuse.

One thing they didn't have was a history of employment—at least not a history that would look good on any resume. Before the Partnerships would recommend them for permanent jobs with the local businesses that had been painstakingly persuaded to take a chance on the homeless, they had to prove they'd mastered such basic skills as showing up on time and taking direction. To that end, the Partnerships placed them in a social-service program called Pathways to Employment, which provided temporary sanitation, security, office and laundry jobs. "We were the last resort for these people," says Mr. Biederman.

Note the past tense in the previous paragraph. That program is now virtually defunct, thanks to Judge Sotomayor, whose ruling priced it out of existence. She said that participants in Pathways to Employment didn't qualify as trainees because some of them eventually performed "productive work," even occasionally filling in for permanent employees who were paid the minimum wage. She was particularly galled that some of the Pathways to Employment jobs were part of programs that generated revenue for the defendants—a recycling program, for example, and a homeless-outreach program—and that Mr. Biederman earned a salary of \$335,000. "The economic reality," she wrote, "is that the PTE participants benefited from the defendants' efforts, but the defendants benefited more."

At Judge Sotomayor's order, a magistrate judge is now tallying up the damages to the plaintiffs and, of course, the legal expenses, which were provided by the white-shoe firm of Cleary, Gottlieb, Stein & Hamilton. Some victory. In the meantime, the Partnerships are planning an appeal to the Second Circuit, the same court to which Judge Sotomayor's nomination is pending.

The Second Circuit is currently considering an appeal to another Sotomayor opinion. The judge ruled last summer that a would-be lawyer whose learning disabilities made it impossible for her to read well enough to distinguish between "indicted" and "indicated" and caused her to write backward at times was entitled to special accommodation under the Americans With Disabilities Act in taking the New York State bar exam.

By now New Yorkers are accustomed to this sort of antic judicial thinking. But why impose it on the whole country? The Senate Judiciary Committee should take another look at Judge Sotomayor's nomination.

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KEITH ARCHIE; RUDY ASKEW; RAYMOND DEL VALLE; PERCIVAL DENNIS; CYNTHIA DILBERT; JOYCE DORSEY; WILLIAM FARRIOR; CARLTON FORD; FITZROY FREDERICK; MILES HARP; FELICIA HART; WARREN HARTSHORN; JAY HEMPHILL; DERRICK JOHNSON; WILLIAM JOHNSON; WILLIAM J. JOHNSON; MONA LISA LARRY; GREGORY LLOYD; FREDERICK MACK; RONALD MANNING; MARK MCMILLAN; REGINA MILLER; ERNEST MONTGOMERY; JAMES MOORE; DENNIS NOVAK; NINA PAUL; NATHAN RHAMES; JOSE RODRIGUEZ; WILLIAM SCOTT; DAVID SOLOMON; LEE SPRINGER; ZACHARY SUDDITH; ARNOLD THORNTON; STANLEY TURNER; TONY TURNER; THELMA WALL; JAMES WHITMAN; EARL WILLIAMS; JEROME WILLIAMS; and OSCAR WILLIS; on behalf of themselves and all others similarly situated, Plaintiffs, - against - GRAND CENTRAL PARTNERSHIP, INC.; GRAND CENTRAL PARTNERSHIP SOCIAL SERVICES CORPORATION; AND 34TH STREET PARTNERSHIP, INC., Defendants.

95 Civ. 0694 (SS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

1998 U.S. Dist. LEXIS 3284

March 18, 1998, Decided
March 19, 1998, Filed

COUNSEL: [*1] For KEITH ARCHIE, RUDY ASKEW, RAYMOND DEL VALLE, RAYMOND DENNIS, CYNTHIA DILBERT, JOYCE DORSEY, WILLIAM FARRIOR, CARLTON FORD, FITZROY FREDERICK, MILES HARP, FELICIA HART, WARREN HARTSHORN, JAY HEMPHILL, DERRICK JOHNSON, WILLIAM JOHNSON, WILLIAM J. JOHNSON, MONA LISA LARRY, GREGORY LLOYD, FREDERICK MACK, RONALD MANNING, MARK MCMILLAN, REGINA MILLER, ERNEST MONTGOMERY, JAMES MOORE, DENNIS NOVAK, NINA PAUL, NATHAN RHAMES, WILLIAM SCOTT, DAVID SOLOMON, LEE SPRINGER, ZACHARY SUDDITH, ARNOLD THORNTON, STANLEY TURNER, TONY TURNER, THELMA WALL, JAMES WHITMAN, EARL WILLIAMS, OSCAR WILLIS, JEROME WILLIAMS, JOSE RODRIGUEZ, plaintiffs: Mitchell A. Lowenthal, Martha A. Lees, Yves P. Denize, Jennifer L. Kroman, Of counsel, Cleary, Gottlieb, Steen & Hamilton, New York, NY USA.

For GRAND CENTRAL PARTNERSHIP, INC., GRAND CENTRAL PARTNERHIP SOCIAL SERVICES CORPORATION, defendants: Geoffry Best, LeBoeuf, Lamb, Leiby & MacRae, New York, NY.

For Defendant: Molly S. Boast, Kenneth Moltner, Helen Marie Sweeney, Tracey Tiska, Of counsel, Leboeuf, Lamb, Greene, & MacRae, LLP, New York, NY.

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

OPINIONBY: SONIA SOTOMAYOR

OPINION: OPINION AND ORDER

SONIA SOTOMAYOR, [*2] U.S.D.J.

Plaintiffs, formerly homeless and jobless individuals, allege that the defendants -- the Grand Central Partnership, Inc. ("GCP"), the Grand Central Partnership Social Services Corporation ("SSC"), and the 34th Street Partnership, Inc. ("34th SP") -- unlawfully paid them sub-minimum wages to perform clerical, administrative, maintenance, food service, and outreach work in the defendants' Pathways to Employment ("PTE") Program. Plaintiffs argue that the payment of sub-minimum wages allowed the defendants unfairly to underbid competitors who compensated their employees at lawful rates. Defendants maintain that the plaintiffs were not employees of the PTE Program, but were instead trainees receiving essential basic job skills development and counseling, and thus were not entitled to minimum wage payment.

Plaintiffs claim that the defendants violated the Federal Labor Standards Act ("FLSA"), 29 U.S.C. @ 201, and the New York State Minimum Wage Act, N.Y. Labor Law @ 650. They seek judgment that the plaintiffs were employees of the defendants and damages in the amount of back wages, liquidated damages, and reasonable attorneys' fees and costs.

For the reasons to be discussed, [*3] the Court finds that the defendants' program did provide the plaintiffs with some meaningful benefits. Nonetheless, despite the defendants' intent, they did not structure a training program as that concept is understood in case law and regulatory interpretations but instead structured a program that required the plaintiffs to do work that had a direct economic benefit for the defendants. Therefore, the plaintiffs were employees, not trainees, and should have been paid minimum wages for their work.

The work the plaintiffs performed competed with other business enterprises paying minimum wages. Despite the attractive nature of the defendants' program in serving the needs of the homeless, the question of whether such a program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make. The defendants had the right to apply for an exemption from the minimum wage requirements of the FLSA and the New York Minimum Wage Act, and should have done so. The Court, however, cannot grant an exemption where one does not exist in law.

FINDINGS OF FACT

I adopt as findings the following facts agreed upon by the parties in their [*4] Joint Pre-Trial Order:

AGREED FINDINGS OF FACT

1. Plaintiffs in this action are all homeless or formerly homeless persons. When this case was filed on February 1, 1995, forty individuals had signed consent forms to become Plaintiffs and are named in the caption of this case: Keith Archie; Rudy Askew; Raymond Del Valle; Percival Dennis; Cynthia Dilbert; Joyce Dorsey; William Farrior; Carlton Ford; Fitzroy Frederick; Miles Harp; Felicia Hart; Warren Hartshorn; Jay Hemphill; Derrick Johnson; William Johnson; William J. Johnson; Mona Lisa Larry; Gregory Lloyd; Frederick Mack; Ronald Manning; Mark McMillan; Regina Miller; Ernest Montgomery; James Moore; Dennis Novak; Nina Paul; Nathan Rhames; Jose Rodriguez; William Scott; David Solomon; Lee Springer; Zachary Suddith; Arnold Thornton; Stanley Turner; Tony Turner; Thelma Wall; James Whitman; Earl Williams; Jerome Williams; and Oscar Willis.

2. Defendants have taken the depositions of nine Plaintiffs. They have received responses to interrogatories from an additional 33 Plaintiffs. They have received affidavits from seven Plaintiffs, all of whom submitted interrogatory responses and four of whom were deposed.

3. Defendant Grand [*5] Central Partnership ("GCP") is a New York not-for-profit corporation organized and existing under the New York State Not-For-Profit Corporation Law with its principal place of business at 6 East 43rd Street.

4. Defendant Grand Central Partnership Social Services Corporation ("SSC") is a not-for-profit corporation organized and existing under the New York State Not-For-Profit Corporation law, and has its principal place of business at 152 East 44th Street, New York, New York.

5. Defendant 34th Street Partnership ("34th Street") is a business improvement district ("BID") organized and existing under the New York State Not-For-Profit Corporation law.

6. The SSC runs a multi-service drop-in center for the homeless (the "drop-in center," the "Multi-Service Center," the "Center"), for which it receives funding from New York City pursuant to contract (the "City Contract"), among other funding sources. The SSC was formed in 1989 to take over from the Moravian Church the running of the Center. At the Center, the SSC operates the Pathway to Employment ("PTE") program.

7. Plaintiffs became homeless for a range of reasons. All of the Plaintiffs eventually learned of and visited the Center [*6] for homeless persons operated by the SSC.

8. The SSC's current City Contract mandates that the SSC "operate the Center to [serve] the target population." An average of 200 clients are to be served per day, and the Center is to "operate 24 hours a day, 7 days per week." Pursuant to the contract, the SSC provides counseling, referrals, clothing, showers, and mail access, to those clients wishing such services. The SSC contracts that its delivery of these services will meet the social service standards established by the City. The contract also requires the SSC to operate an outreach program to serve homeless people outside the Center and, if possible, help bring them in for additional services. The SSC is required to "operate the Center with the purpose of resocializing clients, providing social services and rehabilitation services for clients with the goal of allowing clients to become appropriate for placement into alternative living arrangements."

9. The City Contract requires the SSC to "implement a Work Experience Program which will assist clients in developing alternate living skills for independent living." The Contract states that the "program shall aid clients in developing [*7] vocational skills for the purpose of future employment."

10. The City Contract provides funds for services to about 200 clients per day.

11. Homeless persons who visited the Center were known as "contacts" or "clients:"

12. The Center allows any adult homeless person to become a client.
13. Upon arriving at the Center, clients usually were interviewed in a process known as "intake." The intake interviewer completed an Intake Interview form that asked where the client spent the last five nights, how he or she heard about the center, and what services the client requested.
14. Clients typically would also undergo another interview called an Assessment Interview. The form used with this interview asked for the client's family history, education, employment history, resources, legal history, medical history, mental health history, substance abuse history and housing history. The form also called for the interviewer to elicit the client's goals and asked the interviewer to provide an overall assessment and treatment plan for the client.
15. The SSC maintained a Self-Help Center at the Center, which contained various materials to assist clients in seeking a job.
16. The SSC identified [*8] individuals who had severe or chronic medical or mental health problems, or who otherwise needed to enter therapeutic programs or undergo intensive case management. Those individuals were referred to outside programs for certain services.
17. The SSC provided those clients who requested it counseling regarding substance abuse rehabilitation, housing, employment, entitlements, mental health, educational /vocational training, and family issues.
18. Some plaintiffs had mental health, physical health, or substance abuse problems, and some had limited work histories. Some had experienced periods of unemployment before coming to SSC.
19. The program that became known as PTE was started in 1989, and its structure has changed in some respects over time, but its basic elements and methods have remained consistent.
20. The PTE program was operated through the SSC and out of the SSC's offices.
21. Some SSC clients opted to join the PTE program. PTE participants were required to make arrangements for stable housing before entering PTE.
22. Once a participant entered the PTE program, he or she was assigned to one of five areas, all of which, directly or indirectly, contributed to the overall [*9] operation and goals of the Center. The five areas were maintenance, food services, administration, outreach and recycling (the recycling area was added in January 1993).
23. The PTE program required that an individual participate in the program for 40 hours per week. The target length of the program was 700 hours, but certain participants participated in the program for more than 700 hours.
24. SSC staff conducted various workshops, including workshops called "job readiness" and "motivational" workshops, designed for an audience that included PTE participants. Some such workshops covered areas such as how to prepare a resume, how to search help-wanted advertising, and how to interview for a job.

25. When individuals at the Center, including PTE participants, attended workshops, they were required to sign in.

26. Over the life of the PTE program, PTE participants received amounts ranging between \$ 40 and \$ 60 per week.

27. The maintenance department was responsible for the sweeping, mopping, occasional painting, repairing and cleaning of the Center.

28. The Food Services department was responsible for operating the drop-in center's kitchen, which served over 400 meals per day. [*10]

29. PTE participants in the administration department answered the telephone, filed, made intra-office deliveries, maintained lists, dispensed mail, and recorded information.

30. On one occasion a PTE participant in the administration department performed administrative duties for an entity outside the Center. From November 1990 to April 1991, Terence Weaver ("Weaver") -- who became an Outreach supervisor in October 1994 and then coordinator of PTE from March 1995 to January 1996 -- was a PTE participant in administration. His participation took place at the Jewish Board of Family and Children's Services (the "Jewish Board"), an entity in the same building as the drop-in center. Among other things, Weaver compiled a resource list of 65 single room occupancies and information related thereto.

31. PTE participants were among those who performed outreach for the SSC.

32. Some PTE participants participated in the outreach program after midnight and before 6 a.m. because homeless individuals to whom outreach was directed were sleeping in public and private properties during those hours.

33. The SSC has a contract with the Port Authority of New York and New Jersey to provide recycling [*11] services at the World Trade Center. This contractual relationship, which began in 1993, provided another area where PTE participants could participate.

34. Outreach and recycling both generated revenues for the SSC. According to an SSC income statement for the fiscal year ending June 30, 1994, the SSC received around \$ 950,000 from outreach and recycling contracts. These monies were used to cover the costs of performing outreach and recycling as well as to fund various SSC expenses, including those associated with the programs and activities of the Center.

35. At some point, the SSC began requiring PTE participants to produce three vouchers, each demonstrating attendance at a workshop, before they could receive their weekly amount.

36. Some PTE participants did not attend workshops even when such participation was required.

37. Staff members at the SSC maintained notes on some PTE participants on sheets with titles such as "Progress Notes."

38. In July 1993, the SSC began a video resume program, pursuant to which individuals seeking employment, including PTE participants and staff members, were videotaped and the tapes aired on television.

39. Between July 1993 and 1995, Lisa [*12] Davis, as the SSC's Employment Coordinator, sent a number of PTE participants on interviews for jobs outside the Center. Ms. Davis assisted clients in finding jobs outside the center, including by conducting practice interviews and contacting prospective employers. Ms. Davis maintained a report regarding her job placement efforts.

40. Some PTE participants were hired at minimum wage by the SSC as staff members following their participation in PTE.

41. Some PTE participants signed a document entitled "Pathway to Employment Enrollment Contract." Some PTE participants signed a printed document entitled "Grand Central Partnership Social Services Corporation Multi-Service Center PTE Letter of Agreement" which included the statement "I understand that I am not an employee of GCPSSC, and any stipend I receive for personal expenses related to my training is not considered a wage."

42. Both Daniel Biederman, the president of the GCP, and Ira Mandelker, a former Program Director of the SSC and a former Associate Director of the 34th SP, testified that PTE participants were not volunteers.

43. PTE does not constitute a "Work Experience Program" under New York City's "WEP" regulations. PTE [*13] is not a recipient of Job Training Partnership Act funds.

44. During 1990-1995, neither the GCP nor 34th Street possessed any document authorizing either BID to operate a training or a rehabilitation program.

ADDITIONAL FINDINGS OF FACT

On the basis of the testimony n1 presented at the bench trial held on April 16 and 17, 1997, and the Exhibits admitted at trial, which are made a part of the record in this case, I find pursuant to Fed. R. Civ. P. 52, the following additional facts:

-----Footnotes-----

n1 At trial, witnesses provided their direct testimony in the form of affidavits. " Aff. P " refers to the paragraph in the affidavit of direct testimony of the designated witness. "Dep. at " refers to the page of the designated witnesses' deposition. "PE" refers to a plaintiffs' trial exhibit and "DE" to a defendants' trial exhibit. Defendants in their pretrial submissions objected either to the entire testimony of some witnesses or to portions thereof. If the Court cites an affidavit or deposition, it has overruled the defendants' objections.

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

[*14]

I. The Parties

45. At one time or another between 1990 and 1995, each plaintiff participated in a work program that the defendants call the PTE program. Some of the defendants' officers and most plaintiffs referred to it as a "work program" or simply as a job. See Mandelker Dep. at 310 ("The term 'work program' has been regularly used as a shorthand for the Pathway to Employment Program."); Flynn Dep. at 54 ("[The PTE Program] was a work program."); Springer Aff. P 2; Hart Aff. PP 2, 27.

46. As noted, defendant, 34th Street Partnership ("34th SP"), has its principal place of business at 6 East 43rd Street. See PE 62; PE 76 P 11. 34th SP is an association of property owners of businesses located in the vicinity of Pennsylvania Station in Manhattan ("Penn Station"). Like the GCP, it assesses its members a fee and uses the proceeds to provide services within the Penn Station district.

47. The GCP, SSC, and 34th SP are all closely affiliated. The defendants share employees -- including key executives -- office space, and operations. Indeed, the GCP and 34th SP's controller consolidated the financial statements of the GCP and SSC and described the SSC as a "subsidiary" [*15] of the GCP. See Schaly Dep. at 28-30, 43-44 [David Schaly is the Controller and Assistant Treasurer for the GCP and the 34th SP]; Biederman Dep. at 195; Mandelker Dep. at 546. Robert Hayes, an agent of the defendants who was commissioned by them to issue a report describing the SSC's activities, concluded that the SSC was a "subsidiary" of the GCP and that "the SSC has become an entity resembling a department of the Grand Central Partnership." PE 32 (Hayes Report) at 14, 32 (emphasis added).

II. The Work Program

48. For a period of time in 1994, participants in the PTE Program worked from the offices of the 34th SP. See Weaver Dep. at 154-55.

49. One element of the PTE Program that varied during the program's existence was the amount of time required to complete the program. Until early 1994 or early 1995, the program had a completion requirement of 700 hours of work over an indeterminate number of weeks ("the Completion Requirement"). See Crain Dep. II at 112-13; Mandelker Dep. at 113-14; Hart Aff. P 53; Moore Aff. P 10. Starting in or around March 1995, the Completion Requirement changed to approximately 40 hours per week for 20 weeks. Prior to [*16] that time, the Completion Requirement was 25 weeks. See Weaver Dep. at 104. Notwithstanding the various Completion Requirements, however, the SSC has always knowingly permitted many PTE participants to continue working in the Program indefinitely. See PE 33 (setting forth total accumulated hours of some PTE workers in the Program); PE 34 (same); Mandelker Dep. at 499-504 (explaining PE 34); West Aff. P 1; Del Valle Aff. P 31; Flynn Dep. at 175-78 (explaining PE 33). As a result, several plaintiffs accumulated over 700 hours of work in the program. See PE 34.

50. The PTE Program enabled the SSC to obtain significant revenue-generating contracts with outside corporations by underbidding businesses who compensated their employees at higher rates. See Anderson Dep. at 19-20, 48-59 (Chase Manhattan Bank representative); Haddock Dep. at 29-30, 43-50 (Fleet Bank representative); PE 22 (contract between SSC and Fleet Bank); As agreed upon in paragraph 34 supra and according to an SSC income statement for the fiscal year ending June 30, 1994, the SSC generated over \$ 950,000 in revenues from contracts to provide "outreach" and recycling services. It generated an

additional [*17] \$ 45,000 by providing laborers to The New York City Parks Department to work in Bryant Park in Manhattan. See PE 46; Schaly Dep. at 78-79 (explaining certain line items of SSC income statements), 99-100 (explaining SSC's services to Parks Department). These revenues were used not only to pay certain expenses incurred by the drop-in center, but also to pay the salaries of some of defendants' officers. See Schaly Dep. at 83-35; Grunberg Dep. at 132-34; PE 47 (Transcript of the Minutes of the Committee on General Welfare of the New York City Council ("City Council Transcript")) at 130-31 (testimony of SSC Executive Director Jeffrey Grunberg). Daniel Biederman, President of the GCP and 34th SP, is paid \$ 335,000 per year for heading the GCP, 34th SP, and one other BID, the Bryant Park Restoration Corporation. See Biederman Dep. at 209. Jeffrey Grunberg, Executive Director of the SSC and 34th SP's Vice President of Social Services, is paid over \$ 127,000 per year. See Grunberg Dep. at 188-89. In addition, the PTE Program permitted the GCP and 34th SP to meet their designated business objectives of keeping the midtown Manhattan area safe and clear of homeless persons. [*18] See Biederman Dep. at 57-59, 74; PE 35 (letter of Jeffrey Grunberg).

A. Operation of the Work Program

i. Pre-Hearing Events

51. Most clients discovered the PTE Program soon after arriving at the drop-in center. See Hart Aff. PP 19-24, Springer Aff. P 8; Moore Aff. P 10.

52. The intake interview with new clients usually lasted only a few minutes. See Hart Aff. P 28; Del Valle Aff. P 10. Among other things, clients were asked about any specific services they wished to obtain from agencies outside the SSC. No meaningful assessment of the client's employment history or job training needs was made during the intake interview. See Hart Aff. P 28; Brown Aff. P 33 ("I. asked the contact whether they needed any services. No assessment of the client's employment history or job training needs was made during the intake interview.")

53. Within a few days of the initial intake interview, clients were expected to have a second interview lasting no more than one hour. During the second interview clients typically were asked about their personal goals. Some clients were asked about their general work history, and whether they were interested in a training [*19] program or a job program. See Hart Aff. PP 26-29.

54. During the second interview, some clients also were asked what they sought from the SSC. Several plaintiffs responded that they were seeking a job. See Hart Aff. P 29; Brown Aff. P 6; Del Valle Aff. P 11; Springer Aff. P 8.

55. Some plaintiffs were not interviewed, but nevertheless learned about the Program through word of mouth. In or around November 1993, for example, plaintiff Lee Springer arrived at the SSC's center, where he was "hoping to find another job." Soon thereafter, Springer learned from others at the center that there were positions available in the SSC's kitchen. Springer, who already had substantial experience in cooking and general kitchen work, approached the SSC's kitchen supervisor, Ivan Anthony, and "told him that [he] was looking for a job." Anthony acknowledged that there were job openings in the SSC's kitchen, and stated that after 20 hours of unpaid service, Springer would receive a kitchen job that paid \$ 50 per week. See Springer Aff. PP 8-9, 12.

56. Not every homeless client who arrived at the drop-in center was qualified to work in the Work Program. The SSC routinely screened out individuals [*20] who had severe or chronic medical or mental health problems, or who otherwise needed to enter therapeutic programs or undergo intensive case management. Those individuals were referred to outside programs. See Mandelker Dep. at 142-43. In addition, such clients received a yellow card that allowed them to be in the center for only limited periods of time. See Hart Aff. P 20.

57. By contrast, clients who were deemed mentally and physically fit for work and who expressed an interest in obtaining a job in the PTE Program were permitted to remain in the center and obtain a "blue card" identifying them as members of the center. See Hart Aff. P 20; Moore Aff. P 11. Clients who displayed initiative and an intention to "go back to work" were qualified to participate in the PTE Program. See Flynn Dep. at 122-23; Brown Aff. P 35.

58. In the PTE Program's early years, participants were asked to sign a document that described the Program as a twelve-week program divided into three phases, each lasting four weeks. According to the document, PTE participants were to work 40 hours each week during the first phase followed by phases that would involve some "training" component and [*21] seminars. See PE 20 ("Throughout the first phase, [the PTE participant] will be given a 40 hour work week. Throughout the second phase, [the PTE participant] will be given a 32 hour work week and 8 hours of required training. Throughout the third phase, [the PTE participant] will be given a 24 hour work week and 16 hours of required training; seminars; interviews; and interview feedback meetings.")

ii. Post-Hiring Events

59. The SSC recorded the "date of hire" of PTE participant, and in some cases created a special list of hiring dates for PTE workers. See PE 72; Flynn Dep. at 181. Thereafter, a PTE participant was assigned to a specific work location within one of the departments. Each PTE participant was expected to work the next day on his or her assigned shift. In general, PTE participants were assigned to departments based on the needs of the SSC rather than the needs of the participant. See Brown Aff. PP 10, 56; Springer Aff. P 8; Archie Aff. P 13; Del Valle Aff. P 12.

60. PTE participants in all departments were assigned to work 8-hour shifts. Their regular workweek was five days per week, for a total of 40 hours. See Moore Aff. P 17; Brown [*22] Aff. P 13; Hart Aff. P 35; Springer Aff. P 10; Flynn Dep. at 77, 125-26.

61. In addition to registering their hiring dates, the SSC and the 34th SP attempted to record the total number of hours that PTE participants worked. According to plaintiffs' recollections and defendants' own calculations, several plaintiffs worked well over 700 hours -- and some for more than 1000 hours -- in the PTE program before leaving, being terminated or being promoted to a staff position. See Springer Aff. P 19 (1,500 hours); West Aff. P 1 (1,400 hours); Hart Aff. P 52; Del Valle Aff. P 31; see PE 33, 34 (defendants' calculations of the total number of hours worked by PTE participants as of June 1994).

62. At all relevant times, PTE participants who were unable to work on their assigned shifts were required to provide a bona fide excuse and to complete a PTE excused absence sheet. See Hart Aff. P 48; PE 5 (PTE excused absence sheet); PE 36 (memorandum describing "Administrative PTE Procedures"); PE 17 ("PTE

enrollment contract").

63. As noted, the SSC generally compensated PTE participants at a rate ranging from \$ 40 to \$ 60 per week for a 40-hour work week, or \$ 8 to \$ 10 per eight-hour [*23] day. This amounts to approximately \$ 1 to \$ 1.50 per hour worked. PTE participants were paid no more than \$ 1.50 per hour, however, for the work they performed in each of the PTE departments. See Mandelker Dep. at 192-94, 200.

64. PTE participants who worked fewer than 40 hours in one week had their pay reduced by a corresponding amount. See Moore Aff. P 20; Hart Aff. PP 45, 48-49; Brown Aff. P 44.

B. Job Tasks In The Work Program's Departments

65. According to several PTE participants and the defendants' own documents, virtually all of the drop-in center's day-to-day maintenance and outreach, much of the food preparation, and some of the clerical work was done by PTE participants. See PE 37; PE 38; Moore Aff. PP 13-14, 16, 24; Brown Aff. P 14; Hart Aff. PP 33, 37-38; Archie Aff. P 17.

66. PTE participants in the maintenance department performed almost all the basic janitorial and maintenance work needed for the SSC's offices, including repairs, fixing light fixtures, painting, mopping floors, cleaning hallways, offices and bathrooms, removing garbage, stacking and unstacking chairs in the drop-in center gym and washing the uniforms worn by staff and PTE [*24] participants. See Archie Aff. PP 16-17; Hart Aff. P 62; Moore Aff. P 24; Biederman Dep. at 103. PTE maintenance participants also performed tasks for the GCP. See Biederman Dep. at 49. PTE maintenance participants were assigned to all three 8-hour shifts, including the "graveyard shift" from midnight to 8 a.m. See Hart Aff. P 64; PE 39 (PTE maintenance participant's time card and overtime slips indicating work on midnight to 8 a.m. shift). To the extent that staff worked in the maintenance department, PTE participants performed the same job tasks as those staff members, who were paid minimum wage or more. See Hart Aff. PP 62-63; Archie Aff. P 17; Moore Aff. P 23.

67. PTE participants in the food service department helped prepare over 400 meals each day in the SSC's kitchen, traveled to the market to help purchase food products, loaded and unloaded food, assisted the food services director with general chores around the kitchen, cooked, washed dishes and removed garbage from the kitchen. See Springer Aff. P 14. PTE participants performed the same job tasks as staff members -- other than the department head who worked in food preparation and were paid [*25] minimum wage or more. See id. at P 15.

68. PTE participants in the administration department performed various clerical tasks at the drop-in center, including general office work. See Grunberg Dep. at 85-86. At the drop-in center's Assessment and Referral Center or "self-help center," PTE administrative participants assisted homeless clients -- who were not PTE participants -- in finding resource materials on file and distributed paper and pencils. See Mandelker Dep. at 313. Some performed even more substantive work. For example, James Moore was a PTE administrative participant from Spring through Fall of 1994. Moore's administrative duties included significant interaction with homeless clients at the drop-in center who were not participants in the Work Program. Among other things, Moore ran

orientation sessions, informed homeless clients who had arrived at the center about welfare and social security benefits, and helped clients look for temporary or permanent jobs outside the center. See Moore Aff. PP 13-14, 16.

69. PTE participants also worked in a clerical capacity at the 34th Street SP. See Mandelker Dep. at 541, 543-44.

70. PTE participants in the outreach [*26] department acted as either stationary or roving patrol guards for ATM vestibules in and around the Grand Central Station area and the Pennsylvania Station area in midtown Manhattan, as well as many other parts of Manhattan, and parts of Queens. See Flynn Dep. at 64; Brown Aff. P 14; Del Valle Aff. PP 25-26; Hart Aff. P 32.

71. Stationary patrol guards stayed inside the same site -- either a vestibule, a building or premises such as Penn Station -- for an entire shift. By contrast, roving or "mobile" guards were responsible for monitoring several ATM vestibules in one shift. See Del Valle Aff. PP 25-26; Hart Aff. P 32; Brown Aff. PP 14, 27. In addition to their monitoring and protection duties, PTE outreach participants were responsible for monitoring and cleaning ATM vestibules. See Hart Aff. P 33; Brown Aff. P 18.

72. Vincent Flynn, the Director of Outreach, testified that the terms "stationary guards" and "regular patrol guards" in Plaintiffs' Exhibit 40 refer to PTE participants. PE 40; see Flynn Dep. at 158-60. The schedule lists each Chemical Bank branch location outreach participants were responsible for guarding, whether the location was to be guarded by stationary [*27] guards or mobile patrol guards, and the hours and days of coverage. See PE 40.

73. As explained in marketing letters sent out by senior SSC officers Grunberg and Schiazza, the objective of the outreach program was to "present a safe environment" for customers at these premises. See PE 31; PE 35.

74. The SSC monitored premises in addition to bank ATM vestibules. It contracted to perform similar monitoring services for, among others, the National Railroad Passenger Corporation at Penn Station, the Tudor City Residents Association, the New York Community Trusts Parks Projects and certain corporations, such as the Philip Morris building, and buildings managed by the Edward S. Gordon Company. See Answer P 25; Berger Aff. PP 7-10. The SSC assisted these and other corporations with their "homeless problems" by hiring PTE participants and staff workers to clear homeless persons from their vestibules and buildings. See PE 35. PTE participants were instructed to clear homeless people out. PTE participants were told to ask homeless persons to voluntarily leave ATM vestibules and buildings. Nevertheless, if a homeless person refused to leave voluntarily, the PTE participant was [*28] to remove the homeless person "by any means necessary" including through physical intimidation and violence. See Brown Aff. P 25; Del Valle Aff. PP 25-26; PE 77 (Review of Findings of U.S. H.U.D. Investigation of the SSC) at 9 (H.U.D. noted, among other things, that defendants' "outreach efforts were carried out by formerly homeless individuals with minimal training. Supervision was also seriously lacking. The GCP's outreach methodology evidenced a reckless disregard for the inherent dangers resulting from this type of operation").

75. PTE participants in "mobile" outreach were responsible for approaching homeless persons and informing them that they could obtain shelter at a drop-in center operated by the SSC. If a homeless contact at first refused to leave,

the outreach participant called for additional outreach participants to persuade the homeless person into leaving. See Brown Aff. PP 17, 25, 57. On the other hand, if the guard's first approach proved successful, the homeless contact was escorted to the drop-in center. See Brown Aff. P 30.

76. PTE outreach participants sometimes drove the vans used to transport homeless contacts from the mobile site to the SSC's [*29] offices. See Brown Aff. P 30; Flynn Dep. at 71.

77. Some PTE participants worked in the outreach base office, located at the SSC's headquarters. Those PTE participants helped to coordinate the outreach routes for PTE participants and staff members. They also were responsible for ensuring that all routes were adequately covered by SSC personnel, including PTE participants, and for keeping track of work hours, overtime, and absences of both participants and staff. See Del Valle Aff. P 17-18; Hart Aff. PP 37-41, 47-49; Brown Aff. P 32.

78. A few PTE participants, including Tracey Randall, Leonard West, Crystal Henderson and Walter Brown, also worked as base supervisors in the outreach base office. According to Mandelker, "[a] base supervisor was an employee that was stationed at the home base of the Outreach Program." See Mandelker Dep. at 414. PTE participants in the outreach base office also took calls on a "hotline" from banks and stores that had a "homeless problem of people hanging out inside or hanging in front of their place." See Flynn Dep. at 68.

79. In addition to distributing uniforms to outreach participants, quartermaster room PTE participants cleaned, [*30] ironed, and issued uniforms and retrieved them at the end of each shift. See Flynn Dep. at 88; Hart Aff. P 34.

80. Most of the outreach participants employed by the SSC were PTE participants. According to a November 1993 memorandum from Vincent Flynn, then Director of Outreach, to Frank Schiazza, PTE participants constituted 63 of the 85 outreach participants responsible for guarding ATM vestibules and the like. See PE 41; Flynn Dep. 186-94 (explaining PE 41). Sixty to seventy percent of outreach participants were trainees. See PE 32 at 40. There were not enough staff participants to cover all the outreach locations. Accordingly, PTE outreach participants were assigned to all three 8-hour shifts, including the "graveyard shift" from midnight to 8 a.m. See Flynn Dep. at '83-84; Del Valle Aff. PP 25, 28; Brown Aff. PP 37, 55; Hart Aff. P 67.

81. PTE participants who performed stationary and patrol outreach and who worked at the outreach base office performed the same job tasks as their co-participants who were staff members in the outreach program. See Hart Aff. P 57-58; Del Valle Aff. P 27; Brown Aff. P 51.

82. PTE participants also worked at the World Trade Center [*31] recycling program. Like staff workers who worked in the recycling program, their responsibilities included collecting and sorting papers that were to be picked up for recycling. See West Aff. P 8.

83. On occasion, PTE participants were employed to work on non-outreach and non-administrative "special assignments" for outside companies. These special assignments arose out of agreements pursuant to which the GCP, the SSC or the 34th SP agreed to provide temporary laborers at a per hour rate. For example,

in 1993 and 1994, the SSC entered into an agreement with Seventh on Sixth, Inc. ("7th on 6th"), a corporation that sponsors biannual fashion shows in Bryant Park in Manhattan. Each year 7th on 6th requested, and the SSC agreed to provide, "homeless outreach participants" to employ before and during the fashion show. See PE 42 (1993); PE 43 (1994); PE 44. The laborers' tasks involved "heavy labor," including unloading chairs, setting up barricades for the show and unloading and transporting boxes of fashion products. See PE 42, 43; Hart Aff. P 40. Most of the laborers who performed these tasks were PTE participants. See Hart Aff. P 40; Brown Aff. P 47. The SSC also provided [*32] two outreach participants both before and during each show who were responsible for clearing the park of homeless persons. See Brown Aff. P 47; PE 42; PE 43. In 1993 and 1994, the SSC paid PTE participants only \$ 1 per hour for providing services to 7th on 6th in connection with the fashion show. In at least one case in 1994, the SSC had assured PTE participants that they would be paid \$ 4.25 per hour, the then minimum wage, on the fashion show assignment but later reneged and paid them the lesser PTE wage. See Hart Aff. P 40; PE 2. By contrast, according to a letter from the SSC to 7th on 6th which sets forth billing rates for providing services, the SSC was paid \$ 5.50 per hour per participant by 7th on 6th in 1994. See PE 44.

84. PTE participants were sometimes sent on special assignments in circumstances unrelated to their regular departmental work. For example, some PTE participants were sent to work at Bryant Park in Manhattan to pick up garbage. See Mandelker Dep. at 322-23; PE 45 (expense signature sheet for PTE participant dated 6/15/93 stating that participant "worked six days this week in Bryant Park taking out garbage"). One PTE participant worked as a [*33] doorman/outreach guard for the Oyster Bar. See Archie Aff. PP 10-16.

C. Supervision of PTE Participants

85. According to both PTE participants and SSC's staff members, PTE participants often received little or no supervision while they performed their tasks. In testimony before the City Council of the City of New York's Committee on General Welfare in May 1995, Jeffrey Grunberg, the SSC's executive director, stated the following with regard to supervision and training of participants engaged in outreach: "Once they were out in the street, they would be supervised or monitored by someone. They would stick with someone for two or three days, depending on the person. That would be it." PE 47 (City Council Transcript) at 137-38.

86. Vincent Flynn, the Director of the Outreach Program, testified that PTE outreach participants typically were accompanied and supervised by either a staff member or another PTE outreach participant for their first three tours before they conducted outreach alone. See Flynn Dep. at 76-79. PTE outreach participants confirm that they received supervision from a staff member or another PTE participant for at most the first few days of their [*34] outreach work. Thereafter, other than periodic short visits from shift or "field" supervisors once or twice each shift, they were left alone. See Brown Aff. PP 18, 25; Del Valle Aff. PP 21-24, 27-28.

87. PTE outreach participants in the base office and the quartermaster room received little oversight from staff. See Hart Aff. P 37; Brown Aff. P 32.

88. Robert Hayes, the agent retained by the defendants to evaluate the PTE program, concluded that "the recruitment, training and supervision of SSC

outreach participants was inadequate." Hayes Report at 4 (PE 32). He also conceded that "detailed training was not provided in specific methods of engaging individuals," id. at 38, and that "training for [SSC's] outreach participants was often rudimentary . . . and at times was partially sacrificed because of the need to have sufficient numbers of outreach participants to satisfy bank contracts." Id. at 45. Hayes even quoted an "outreach director" as admitting that "the pressure to fill outreach posts under contract with banks at times forced reliance on untested trainees to work one-on-one with homeless persons" and that "training was haphazard." Id. at 46.

89. PTE [*35] participants in maintenance similarly received little supervision from staff members. See Archie Aff. P 17. Several PTE participants in other departments observed PTE participants in maintenance working alone in the center without a supervisor. See Hart Aff. PP 62, 65; Moore Aff. P 24; Brown Aff. P 54.

90. Defendants also provided PTE participants in food service and administration with little meaningful, close supervision. See Springer Aff. P 15; Moore Aff. P 19.

91. Some staff members received extensive supervision and "training," and received minimum wages. For example, as a staff member in the summer of 1994, Felicia Hart received considerable supervision from Lisa Davis, then the SSC's Church Bed Coordinator and Employment Coordinator and Hart's immediate superior. See Davis Dep. at 67-68. Hart was also taught how to use a computer. Both experiences were in stark contrast to Hart's experience in the PTE program. See Hart Aff. PP 59, 61. Although Davis testified that she provided "training" when Hart was a PTE participant, see Davis Dep. at 85-88, Hart was in fact a staff participant by that summer. See Hart Aff. P 56.

D. Evaluation of PTE [*36] Participants

92. Each PTE participant was to receive a written performance evaluation variously entitled a "Pathway to Employment Weekly Personnel Evaluation," "Work Program Weekly Personnel Evaluation" or a "Pathway to Employment Monthly Participant Performance Rating." See PE 48 (miscellaneous evaluations); Mandelker Dep. at 467, 469-71. In or around May 1993, the PTE participant evaluations were required to be completed on a biweekly rather than a weekly basis due to the large number of PTE outreach participants. See PE 51. Despite the formal requirement, several PTE participants never or rarely received a written job performance evaluation. See Brown Aff. P 48.

93. PTE personnel evaluations were completed by departmental managers. Tellingly, the evaluation form referred to the PTE member as a "worker," and the form called for an evaluation of the "worker's" job performance. The evaluation required the manager to note the department in which the PTE participant worked. Each PTE participant was rated based on seven categories. The performance categories included "attendance," "compliance with rules and authority," and "productivity." See PE 48. With respect [*37] to each category PTE participants could be rated as either "below," "fair," "average," or "excellent." Each of these ratings in turn had a corresponding range of numerical scores. A rating of "fair" warranted a score of five to seven, while a rating of "excellent" in any category corresponded to a score ranging from 15 to 20. The highest possible total performance score was 140. Later, the form was changed to reflect the point average. The highest possible point average was

20. See PE 50.

94. The evaluations for PTE participants make no reference to training or to the PTE participant's ability to learn new skills. Although the evaluations provided for additional written comments, none of the comments on the evaluations produced by the defendants refer to "training" of PTE participants or to a PTE participant's ability to develop new skills necessary to function in jobs with outside entities or at the SSC. See PE 48.

E. Time Cards and Time Sheets

95. Typically, the PTE Program day was divided into three eight-hour shifts. PTE participants were expected to work on an assigned shift at least eight hours per day, five days per week, for a total of forty hours per [*38] week. PTE participants were paid based on their total number of hours of work each week. As noted, for the first 40 hours of work per week, all PTE participants were paid \$ 1 per hour, although for a time PTE participants were paid \$ 1.25 per hour, or \$ 50 per week. As a general matter from 1992 until the late fall of 1993, PTE participants were paid "time and a half" -- or \$ 1.50 -- for overtime hours beyond 8 hours per day. See Brown Aff. P 36; Del Valle Aff. P 15. After 1993, however, the overtime was credited to the total hours needed to be promoted to a staff job paying minimum wage.

96. Since PTE participants' weekly pay was based on the number of hours worked, the SSC attempted to record accurately the number of hours that each PTE participant worked each day. In order to do so, the SSC distributed weekly time cards to PTE participants in each department. PTE participants were informed that they were required to use the time cards while they worked in the Work Program. See Hart Aff. P 43; Del Valle Aff. PP 17, 19; Brown Aff. P 11; Springer Aff. PP 10-11; Moore Aff. P 18.

97. Each time card noted the PTE participant's name, department and shift. At the start of a shift, [*39] each PTE participant was required to use his or her time card to "punch in" to a time clock, which noted the date and time the PTE participant arrived. Similarly, PTE participants "punched out" using a time clock at the end of their shift. The date, start time and end time were noted on the card's right-hand column. When the time clock malfunctioned, departmental managers were responsible for writing in the start time and end time. They were supposed to initial each entry to verify that the PTE participant had in fact arrived for his or her shift. The PTE participants' total hours for the week were usually written down and circled in the left column. In some instances, time cards indicated the number of hours that were "overtime" with "O.T." next to those hours. See Hart Aff. P 47; Brown Aff. P 41; PE 12 (Walter Brown time card indicating "OT 8" on bottom left corner).

98. It was the SSC's policy and practice to have a departmental supervisor and the senior supervisor -- for example, Ira Mandelker -- review and initial the time card at the end of the week. The supervisors' initials cleared the way for the PTE participant to be paid for his or her regular hours and overtime hours [*40] as reflected on the time card. See Brown Aff. P 42; Hart Aff. P 47.

99. Some PTE departments also required that supervisors complete weekly "Work Program Time Sheets" to record the time PTE participants worked each week. See Mandelker Dep. at 250-51; PE 4; PE 9; PE 15.

100. Time sheets reflected the total number of hours worked by a PTE participant in any given week, as well as the number of hours worked each day, including the participant's "time in" and "time out." The time sheets also had a space entitled "work performed" by the PTE participant. In addition, departmental managers were responsible for initializing each day's time sheet entry. In the outreach department in 1992 and 1993, plaintiffs Tracey Randall and Crystal Henderson, both PTE participants, often undertook these duties in place of the base supervisor. See Del Valle Aff. P 17. Similarly, as a PTE participant, plaintiff Felicia Hart signed the "supervised by" line of time sheets for fellow PTE participants. See Hart Aff. P 48; PE 4.

101. Time cards and time sheets were also used by staff members who worked for the GCP, SSC and 34th SP in the areas of food preparation, outreach, maintenance, administration [*41] and recycling. In one instance, for a staff worker, the term "work" in the "work program time sheets" was crossed or whited out and replaced with the term "staff." See Springer Aff. P 20; PE 25.

102. Although the SSC claims that using time cards and time sheets for staff members and using them for PTE participants had different purposes, the purposes were in fact the same: to obtain "[an] actual accounting of the time an individual expends working for the [SSC or 34th Street] to produce a payroll that reflects that person's records [and] that reflects that person's work." Mandelker Dep. at 252-53 (describing purpose of staff time cards). As PTE participants were told at the start of their employment, PTE Program time cards and time sheets permitted the SSC to "record the time" and "verify the[] hours" of PTE participants to ensure that they received full payment for those hours. Flynn Dep. at 199, 206; Brown Aff. P 22; Del Valle Aff. P 17; Moore Aff. P 18; Hart Aff. P 43-45.

F. Displacement of Regular Employees: Overtime and Back-To-Back Shifts

103. PTE participants often performed the same tasks as staff employees. The SSC was aware of and routinely approved [*42] of PTE participants working overtime hours -- that is, hours worked beyond 8 hours in a single day or 40 hours in a single week -- in order to fill in for staff employees who failed to appear for their shift. In short, the SSC frequently used both overtime and back-to-back shifts by PTE participants to cover for absent staff participants, to do additional work as needed by the SSC, and in general to compensate for a shortage of personnel both inside and outside the center. The hours that counted as overtime were noted on a PTE participant's time card and time sheet. At all relevant times, overtime "slips" were attached to these time cards and time sheets to indicate a PTE participant's overtime. See Mandelker Dep. at 384-85; Hart Aff. P 47-48; Brown Aff. P 40. Vincent Flynn completed overtime slips for PTE outreach participants "when they worked an extra tour" on outreach. See Flynn Dep. at 117; Brown Aff. P 41.

104. Unlike time cards and time sheets, however, overtime slips recorded not only the hours of overtime a PTE participant worked any given day, but also the "reason for the overtime." Each overtime slip had to be authorized by a supervisor and approved by a senior [*43] supervisor with authority to approve overtime. In some cases, the same supervisor signed the overtime slip twice if he or she had authority to do so. See Hart Aff. P 47-48; Brown Aff. P 40.

105. PTE participants worked overtime when the need arose for more participants either at the SSC's center or in outreach. See Hart Aff. P 41; Brown Aff. PP 37-38; Moore Aff. P 20; Springer Aff. P 17; Del Valle Aff. PP 29-30.

106. According to overtime slips produced by the defendants, overtime hours often were due to a "shortage of personnel" or because a department was "short of help." See PE 52. Flynn testified that these stated reasons for PTE overtime were plain, namely, that the SSC "had a shortage of personnel. If you wanted to work, you worked." Flynn Dep. at 199. Plaintiff Walter Brown testified that "shortage of personnel" as it appeared on his overtime slips "meant that a staff member or PTE program participant was absent on a route for another shift, and [he] was asked to replace the absent participant." Brown Aff. PP 40; see id. PP 37-38.

107. Some overtime slips were more specific about the reason for the overtime. For example, the overtime slips for plaintiff [*44] Floyd Johnson state that overtime was needed because there was a "no show for bathroom staff" and "extra work needed in bathroom." PE 52. Johnson was a PTE participant at the time the overtime slips were completed, during the week ending March 23, 1993. See Mandelker Dep. at 362-63. According to a chart listing PTE participants on that date, plaintiff Timothy Wise was a PTE maintenance participant on or around September 29, 1993. See PE 53. Wise worked eight hours of overtime on the midnight to 8 a.m. shift. See PE 39. The handwritten notation next to "reason for overtime" on the slip states "coverage for participant that did not show." Id. According to Ira Mandelker, the supervisor who signed Wise's slip, the "worker" for whom Wise covered on September 29, 1993, could have been either a staff member or a PTE participant. See Mandelker Dep. at 418-19.

108. Plaintiff Tracey Randall was an outreach participant in the PTE program from at least March 1993 to approximately January 1994. See Flynn Dep. at 184-85. In 1993, Randall worked primarily at the outreach base office, where she coordinated routes and ensured that outreach participants had the necessary equipment [*45] and documents to perform their outreach work. See Brown Aff. P 38. According to her time cards and time sheets, her regular shift was alternately from 8 a.m. to 4 p.m. and from 4 p.m. to midnight, Tuesday through Saturday. See PE 74 (Randall PTE Program time cards); PE 75 (Randall Work Program time sheets). Her regular days off -- or "R.D.O.'s," as the outreach office referred to them -- were Mondays and Sundays. However, she often worked on the midnight shift. See Hart Aff. P 41. Vincent Flynn, Randall's immediate superior at the base office, considered her an "excellent" participant. Flynn Dep. at 184. According to the SSC's own records, between January 1, 1993 and November 1993, Randall accumulated a total of 1,131 hours in outreach. See PE 33 (at Bates stamp number D22666); Flynn Dep. at 184-85 (explaining that plaintiffs' Exhibit 33 indicates Randall's total accumulated hours in outreach as an outreach participant starting from March 6, 1993).

109. According to her time card for the week ending August 3, 1993, Randall worked 81 hours from Wednesday, July 28 to Tuesday, August 3, 1993. See PE 54 (time card). Randall's overtime slips for that week were signed [*46] by Flynn. See PE 55 (overtime slips). Her overtime slips corroborate the hours of work that appear on Randall's time card for that week. First; her regular forty hours of work as a PTE outreach participant plus the total hours of overtime indicated on the overtime slips adds up to 81 hours. Moreover, according to her time card, Randall had the following schedule from July 30 through July 31:

she worked back-to-back shifts from 3:44 p.m. to midnight on July 30 and from midnight on July 30 to 8:42 a.m. on July 31; she was credited for an extra hour of work on the morning of July 31 because the staff member at the base office who was supposed to relieve her arrived late for his shift; she returned to the base office at 11:44 p.m. on July 31 to work on the midnight to 8 a.m. shift. See PE 54. Her overtime slip dated July 30, 1993 shows that she was credited for nine hours of overtime work, and corresponds to the midnight to 8 a.m. shift from July 30 to July 31. Her overtime slip dated July 31, 1996, reflects the overtime for which she was credited for working the midnight to 8 a.m. shift on Sunday, her day off. Her overtime slip dated August 2, 1996, reflects the eight hours of [*47] overtime she received for working on Monday, her other day off. See PE 55.

110. Randall's overtime hours often came about because she was asked to replace a staff person who was absent in the base office. On more than one occasion, the absent staff person on a shift was the outreach base supervisor, whose duties Randall assumed for that shift because she was familiar with the supervisor's work. See Brown Aff. P 31. As a result, one of Randall's overtime slips states "No base supervisor" as the reason for overtime. PE 55.

111. Walter Brown's testimony confirms that "shortage of personnel," as the reason for overtime on overtime slips, refers to the situation in which either a PTE participant or a staff member was absent, and he was asked to replace the absent participant. See Brown Aff. P 40. In summary, although the defendants at trial argued that most PTE participants voluntarily chose to work overtime to have a place to stay and socialize, the Court finds that the work performed was necessary work for the functioning of the program and not to satisfy the desires of the participants.

G. PTE Payrolls: Contemplation of Compensation

112. At all relevant [*48] times from 1991 through 1994, PTE participants were placed on a payroll. In 1991, the payrolls listed the name and department of each PTE participant, followed by his or her total pay for the week. See PE 56 (payroll sheets). The payroll form changed after 1991, but its gist remained the same. Work program or "WP" payrolls for each week listed the name and department of each PTE participant, the regular and overtime (or "additional") hours worked by each participant, any additional amount owed due to a "special assignment," and the participant's total pay for that week. See PE 57-59. Defendants also prepared department by department payrolls. See PE 60.

112. PTE participants were paid each Friday. Before they were paid they attended a short meeting during which they signed a PTE payroll "signature" sheet that indicated their total pay, including overtime. See, e.g., PE 53. PTE participants who failed to "pick-up" their payment the previous week were required to sign a "pick up" sheet the following week. See Hart Aff. P 51. Both staff and PTE participants routinely called Fridays "pay day" and referred to the money PTE participants received for their work as "pay." [*49] See Hart Aff. P 51; Archie Aff. P 6; Moore Aff. P 22. The SSC has routinely and consistently used the term "pay" to refer to PTE participants' weekly wages. Thus, the "Work Program Enrollment Form" the SSC used in or around 1991 for plaintiff Keith Archie clearly refers to his \$ 40 per week wage as "pay." See Archie Aff. P 9; PE 19.

113. None of the plaintiffs who have testified believed that he or she was a volunteer. Plaintiffs worked in contemplation of compensation for the work they performed in the defendants' Work Program. Plaintiffs believed that the Work Program was a job, and they expected to be paid for it. See Moore Aff. P 22; Brown Aff. P 12; Hart Aff. P 52; Springer Aff. P 12; Archie Aff. P 5.

114. Vincent Flynn, the former Director of Outreach, himself referred to PTE participants as "employees" in a document that described the outreach program and welcomed new PTE hires. See PE 61; Flynn Dep. at 173-75. The document was distributed to new PTE hires in outreach. Flynn Dep. at 167. It outlines the outreach program's "objectives for it's [sic] employees." The document states that non-PTE participants could "volunteer" to do outreach without pay. Thereafter, [*50] however, the PTE "employee" was expected to "elevate to our Work Program status for twelve weeks" and "complete all job task[s] successfully." PE 61; Flynn Dep. at 171-72.

115. In the fall of 1994, after the defendants learned of the possibility of litigation in this case, senior staff employees began requiring PTE participants to sign a letter stating that they were not participating in a job and that any payment that they received was a stipend to reimburse them for expenses, rather than a salary. See Moore Aff, P 26; PE 27. For example, Philip Oberlander, a supervisor at the SSC, approached plaintiff Lee Springer, a PTE kitchen participant, and asked him to sign a document which essentially stated that the PTE work program was a training program. Oberlander allegedly threatened to fire Springer if he did not sign the document. See Springer Aff. P 18; PE 24.

116. Oberlander and another senior SSC supervisor also asked plaintiff James Moore to sign the same document in the fall of 1994. Moore refused to sign the document, even though both supervisors allegedly "put considerable pressure" on him to sign the letter and warned him that he might be fired from the program if [*51] he failed to sign. See Moore Aff. P 27.

III. Defendants' Status

117. The defendants have at all relevant times been controlled by a common core of individuals. Peter Malkin is the chair of both the GCP and the 34th SP, and Daniel Biederman is President of both the GCP and the 34th SP. See Schaly Dep. at 43-44; Biederman Dep. at 195; Mandelker Dep. at 546.

118. The GCP's controller, David Schaly, has described the SSC as a "subsidiary" of the GCP. See Schaly Dep. at 28-29. The defendants' agent, Robert Hayes, has concluded that "the executive staff of these Partnerships [GCP and 34th SP] control[] the Grand Central Partnership Social Services Corporation." PE 32 at 10 n.4.

119. The board of directors of the SSC for much of the period relevant to this action was composed of Biederman, Andrew Manshel, and Grunberg. See Biederman Dep. at 17, 19 (SSC board composed of Biederman, Manshel, and Grunberg between approximately 1992 or 1993 and Spring 1996). All three also hold positions with the GCP: Biederman as President of the GCP, Manshel as General Counsel of the GCP, and Grunberg as Vice President, Social Services of the GCP, a position he also held [*52] at the 34th SP. See Biederman Dep. at 8, 20, 98; Grunberg Dep. at 10.

120. GCP incorporated SSC, see PE 79 at 5, 6, and did so because the GCP wished to receive a grant from the City and the City "told [the GCP] that to receive a grant for the operation of the Center at 44th street [they] would have to set up an independent corporation." Biederman Dep. at 50-51.

121. In a stipulation of facts jointly prepared and submitted to the court in *Kessler v. Grand Central District Management Association, Inc.*, No. 95 Civ. 10029 (SAS) (S.D.N.Y.), by GCP and its adversaries, the SSC is described as "a not-for-profit corporation under the control of GCP until May 1996." PE 78.

122. On at least one occasion, the GCP rather than the SSC signed a contract with Chase to provide Chase with outreach services using PTE participants. See PE 80 (Letter Agreement signed by Jeffrey Grunberg as "Vice President, Grand Central Partnership"); compare PE 81 (Letter Agreement between Fleet Bank and SSC signed by Biederman as President of "Grand Central Partnership Social Services, Inc.") with Biederman Dep. at 8, 10, 14 (testifying that he is the President of GCP and the 34th Street [*53] SP but never held any position at SSC except as a board member).

123. The defendants' operations also overlap to a significant degree. For example, the defendants maintain executive offices at 6 East 43rd Street that are used by officers of all three defendants. See Biederman Dep. at 30-33; Crain Dep. at 11. In addition, for a time the defendants maintained an outreach office in the 34th Street area that served outreach administrators and participants for both the GCP and the 34th SP. See Weaver Dep. at 154; Flynn Dep. at 43; Mandelker Dep. at 544.

124. The defendants used the same pool of PTE participants to perform outreach and other activities in both the GCP and the 34th SP areas. See Schaly Dep. at 68-69; Mandelker Dep. at 26, 516, 541-42; Weaver Dep. at 126-29; Crain Dep. at 163-65. Moreover, both the SSC and the 34th SP use the drop-in center as a location to which clients are referred. See Crain Dep. at 26-27.

125. The defendants shared financial and executive services. The GCP and 34th SP held common budget meetings, see Biederman Dep. at 182, and shared the same controller (David Schaly), Vice President for Social Services (Jeffrey Grunberg), Program [*54] Director (Brady Crain), and Associate Director (Ira Mandelker). See Schaly Dep. at 7, 140; Mandelker Dep. at 23, 25.

126. Every time the SSC desired funds to pay its PTE participants, it made a request to GCP or 34th Street. See Schaly Dep. at 37, 39, 41, 68-70. David Schaly, controller for GCP and 34th SP, also was "responsible for the accounting of SSC," Schaly Dep. at 28, and testified that it was GCP's practice to cover any debts of the SSC. See Schaly Dep. at 74-75, 122-24.

127. To obtain a HUD grant to be used by the SSC for additional homeless service provision, the GCP rather than the SSC submitted a proposal and handled the funds. See PE 83 P 6 (Complaint in *Grand Central Partnership, Inc. v. Cisneros*, 96 Civ. 8238 (LLS) (S.D.N.Y.)); HUD Report (PE 77).

128. All three defendants used a common form for payroll changes. See PE 84 (Employee Payroll and Authorization form) (for allocation of salary, form permits choice of GCP, SSC, 34th SP, or Bryant Park Restoration Corporation and provides space for Biederman's authorization as "President"); see also PE 85 (Salary Inception/Adjustment Chart) (same).

129. Robert Hayes has acknowledged that "administrative [*55] and management services are shared by the Grand Central Partnership and the 34th Street Partnership" and that the "Grand Central Partnership Social Services Corporation provides its services in association with both BIDs." Hayes Report at 9 (PE 32).

130. The GCP, SSC, and 34th SP all perform their related activities for the common business purpose of protecting the investments of Grand Central area property owners and enhancing business opportunities for local merchants. See Biederman Dep. at 36-42, 57-59, 74; PE 62 (34th SP Certificate of Incorporation at P 4) (purposes of 34th Street Partnership include "to restore and promote business activity in the district" and "generally to stimulate economic growth in the City of New York").

131. Biederman, the President of the GCP and 34th SP, is among those who have stated that the GCP and 34th SP provide security, sanitation, capital improvements, and similar services in order to improve business for area merchants. See Biederman Dep. at 37; Anderson Dep. at 46-47 (purpose of GCP is "to keep the area . . . business viable," to render it "clean and a good place to do work and do business").

132. Biederman has also admitted that [*56] the SSC uses its outreach participants to remove homeless people from the streets, and that it uses the drop-in center, which is supported by the maintenance, food service, and administrative activities performed by the plaintiffs, as a magnet to keep them off the streets, so that potential customers for area businesses feel safer and are thus more likely to patronize shops in the area. See Biederman Dep. at 41, 57-59, 124; Hayes Report at 13 (PE 32) (quoting Biederman as stating that interest of homeless advocates who work to bring people in off the streets is compatible with the interests of the business community). Grunberg also advertised the outreach department's ability to "clear the homeless" from area premises. PE 35. Moreover, Peter Malkin, chair of the GCP and 34th SP, has stated that in addition to being "part of business's 'social responsibility,'" the homeless constitute "a business problem." Hayes Report at 13 (PE 32) (quoting J. Barbanel, Plan Seeks to Reduce Homeless at Terminal, N.Y. Times, July 25, 1986).

133. GCP's own District Plan, the master plan required by law for every proposed BID that, inter alia, describes the services the BID plans to provide, [*57] lists as one of GCP's purposes the providing of "Social Services for Homeless Persons," PE 86 (District Plan for the Grand Central Business Improvement District ("GCP District Plan")) at 14, and describes the provision of services such as showers, social service referrals, and food -- those that GCP uses SSC to provide -- as part of GCP's purpose. See GCP District Plan at 14-15 (PE 86). The 34th Street District Plan similarly describes the provision of "social services, including aid to the homeless" -- for which the 34th SP uses SSC -- as among the 34th SP's purposes. See District Plan for the 34th Street Business Improvement District ("34th Street District Plan") at 12 (PE 87). Furthermore, in a separate lawsuit GCP has emphasized that the services provided by SSC are intended to further 34th Street and GCP's goals of enhancing their districts, and that these goals were explicitly business related. See PE 88 (Grand Central District Management Association, Inc.'s Memorandum in Support of its Cross-Motion for Summary Judgment in Kessler ("Kessler Summary Judgment Memorandum") at 19 ("Each of GCDMA's functions, "including providing services to the homeless, is "related [*58] to attracting customers to the area's

businesses, and making them want to return.") (quoting District Plan); see also 34th Street District Plan at 12 (PE 87) (34th Street's funding for homeless aid is provided "with the aim of improving the business environment in the District.").

134. The SSC also serves the public in competition with typical commercial entities. The SSC has marketed its outreach work to and performed such work for any number of corporations, from Chase Manhattan Bank ("Chase"), Fleet Bank and Citibank to the Blarney Stone pub to the Edward S. Gordon management company. See Paul Dep. at 13 (Lyn Paul is the second vice president of Chase Manhattan Bank); Anderson Dep. at 19-20, 48-59; Haddock Dep. at 29-30, 43-50; PE 22 (contract between SSC and Fleet Bank); PE 63; PE 31; Berger Aff. PP 7-8. The SSC has also contracted with 7th on 6th, the corporation that manages the biannual fashion show held in Bryant Park, to perform various tasks. See Biederman Dep. at 115-16, 120; PE 42-44. It also contracted with the Port Authority for PTE participants to perform recycling services at the World Trade Center. See Biederman Dep. at 66-67.

135. If not for the [*59] SSC contract, many of the above entities would undoubtedly have hired security companies to clear homeless individuals from their vestibules, front steps, and building overhangs, and temporary agencies or day laborers to provide services such as recycling or the setting up and removal of chairs for performances. In fact, Robert Anderson of Chase, formerly a substantial SSC outreach customer, testified that Chase used outside security guards to handle homeless vestibule occupants before contracting with the SSC, and that it resumed using such guards as soon as it terminated its contractual relationship with the SSC. See Anderson Dep. at 14-27.

136. Both the GCP's president and the SSC's former program director and present associate director, Mandelker, have conceded that both the outreach and recycling programs constitute revenue-generating business enterprises. See Mandelker Dep. at 536-37.

137. Outreach was a particularly lucrative activity for the SSC. At the May 1995 Committee on General Welfare session before the New York City Council, Grunberg testified that the SSC's outreach contracts for 1995 were expected to generate revenues of approximately \$ 840,000. See City [*60] Council Transcript at 130 (PE 47).

138. While some of the funds the SSC generated through its contracting activities were used to cover the expenses of the drop-in center, much of these revenues paid the salaries of the staff and officers of the SSC, including Grunberg. See Schaly Dep. at 83-85; City Council Transcript at 130-31 (PE 47) (SSC salaries consume "almost all" of the outreach funds).

139. According to Biederman, GCP sanitation crews used a number of items -- "bags, brooms, shovels, pails, scrapers," "radios, books . . . [and] flashlights" -- some of which undoubtedly were moved from outside to within New York state in commerce. Biederman Dep. at 44. Similarly, SSC outreach participants all wore uniforms from the ATC Uniform Company, and used radios, clipboards, and similar supplies, some of which must also have moved in commerce. See Mandelker Dep. at 244, Flynn Dep. at 229.

140. As demonstrated by their annual filings with the State Attorney General's office, the GCP, 34th SP, and SSC each have earned revenues well in

excess of \$ 500,000 for nearly every year of their existence. For example, between 1989 and 1995, the GCP had annual revenues of between \$ 2,448,477 [*61] and \$ 8,342,205, see PE 64-68; between 1990 and 1994, the SSC had annual revenues of between \$ 823,408 and \$ 3,071,930, see PE 69-71; and in 1992, the 34th SP had annual revenues of \$ 2,995,494, with its 1993 revenue rising to \$ 6,174,215, see PE 72-73.

CONCLUSIONS OF LAW

This Court has jurisdiction over this action pursuant to 28 U.S.C. @ 1331; 29 U.S.C. @ 216; 28 U.S.C. @@ 2201 & 2202; and 28 U.S.C. @ 1367.

I adopt herein any Finding of Fact previously set forth that might more properly be deemed a Conclusion of Law.

I. FAIR LABOR STANDARDS ACT COVERAGE

Defendants essentially claim that they are not covered by the FLSA because: (1) they are not an enterprise engaged in interstate commerce or in the production of goods for interstate commerce; and (2) the plaintiffs are not employees of the defendants. For the reasons to be discussed, I disagree. First, the defendants acted as a common enterprise and engaged in interstate commerce. Second, the defendants treated the plaintiffs as classic employees for a classic employer purpose, i.e., to make money. Under these circumstances, the plaintiffs were employees for purposes of the FLSA. To the [*62] extent that the defendants claim that the plaintiffs are trainees, they are asking this Court to disregard the Secretary's regulations and relevant case law.

The defendants are asking this Court to find ex post facto that the value of their program warrants an exemption from the obligations imposed by the FLSA. As noted in the beginning of this Opinion, Congress must create a statutory exemption or the defendants must persuade the Executive Branch to grant an exemption. It is not the function of this Court to legislate an exemption for the GCP, SSC, and 34th SP that does not otherwise exist in the statute, relevant case law or the Secretary's regulations.

A. Enterprise Theory of Coverage

Plaintiffs' contention that the defendants are covered by the FLSA is premised upon the enterprise theory, i.e., that the plaintiffs are covered because during the relevant time period, they were employed in an enterprise "engaged in commerce or in the production of goods for commerce." 29 U.S.C. @ 203(s), @ 206(a), and 207(a)(1). Such an enterprise:

has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise [*63] working on goods or materials that have been moved in or produced for commerce by any person; and . . . [its] annual gross volume of sales made or business done is not less than \$ 500,000

29 U.S.C. @ 203(s)(1)(A)(i) & (ii).

The FLSA provides, in relevant part, that the term, "enterprise means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes

all activities whether performed in one or more establishments" 29 U.S.C. @ 203(r). The three elements to be satisfied are: (1) related activities, (2) unified operation or common control, and (3) common business purpose. See *Brennan v. Arnheim & Neely*, 410 U.S. 512, 518, 35 L. Ed. 2d 463, 93 S. Ct. 1138 (1973). The defendants meet all three elements.

1. Related Activities

Related activities are those which are "the same or similar," S. Rep. No. 145, 87th Cong., 1st Sess. 41, reprinted in 1960 U.S. Code Cong. & Ad. News 1620, or are "auxiliary or service activities." 29 C.F.R. @ 779.206(a) (quoting *id.*). Auxiliary and service activities include generally "all activities which are necessary to the [*64] operation and maintenance of the particular business," such as warehousing, bookkeeping, or advertising. *Id.*; see also *id.* at @ 779.208. When different business entities are involved, the critical inquiry is whether there is "'operational interdependence in fact.'" *Donovan v. Easton Land & Dev., Inc.*, 723 F.2d 1549, 1551 (11th Cir. 1984) (quoting *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1367 (5th Cir. 1973)). Entities which provide mutually supportive services to the substantial advantage of each entity are operationally interdependent and may be treated as a single enterprise under the Act. *Dole v. Odd Fellows Home Endowment Bd.*, 912 F.2d 689, 692-93 (4th Cir. 1990) (citing *Easton Land & Dev.*, 723 F.2d at 1551-52; *Veterans Cleaning Serv.*, 482 F.2d at 1366-67 (operational interdependence and shared public image of three separate corporations involved in the "cleaning business"))).

Despite defendants' claim to the contrary, the defendants engaged in related activities. PTE participants performed outreach services in bank vestibules and private properties in both the Grand Central and 34th Street areas. See PE 82 (This GCP document states [*65] that "two of the [GCP's] many successful programs are the Outreach Program and the more recent Recycling Program. The Outreach Program employs homeless and formerly homeless people to reach out to their homeless peers in bank vestibules, private properties, and public spaces throughout New York City, to bring them indoors and connect them with social services Outreach is offered in the public spaces of the [GCP] and 34th Street Partnership catchment areas, and on a fee-for-service basis on private properties throughout New York City The income realized from these two services is in turn used to provide the many social services offered at the [GCP] Multi-Service Center and 34th Street Partnership Day Room."). PTE participants performed services for both GCP and 34th SP activities. See *Biederman Dep.* At 49 ("There have been times when members of the PTE program performed tasks for GCP, like moving chairs for a concert."); *Mandelker Dep.* At 541-544 ("Some of the [SSC] outreach staff members were on the payroll of the 34th Street Partnership There were [PTE participants] doing outreach in the 34th Street area The [PTE] program was moved out [*66] of our building at 44th Street and to 34th Street They used offices at 34th Street and Eight Avenue for all of our outreach program"). The defendants' activities have a dual mission of business improvement and homeless services. See PE 77 at 15 (HUD Report stating that there are "inherent conflicts in GCP's dual mission of business improvement and services to the homeless."). The GCP and the 34th Street Partnership sought to benefit the businesses within their area and provide social services. The SSC had "the same or similar function" and the PTE Program was often a means of aiding the GCP and the 34th Street Partnership in providing these same services. Finally, and for the reasons set forth in paragraphs 117-140 *supra*, the SSC was dependent on the

GCP and the 34th SP for a substantial part of the funds needed to operate the SSC. Consequently, the defendants provided mutually supportive services and were operationally interdependent.

2. Unified Operation or Common Control

The Secretary's regulations define "unified operation" as "combining, uniting, or organizing [related activities'] performance so that they are in effect a single business unit or [*67] an organized business system which is an economic unit directed to the accomplishment of a common business purpose." 29 C.F.R. @ 779.217. "Control" is the power to "direct, restrict, regulate, govern, or administer the performance" of the related activities, and "common control" exists "where the performance of the described activities are controlled by one person or by a number of persons, corporations, or other organizational units acting together." Id. @ 770.221. While ownership may be an important factor in determining common control, the focus of the inquiry is the performance of the related activities. *Old Fellows Home Endowment Bd.*, 912 F.2d at 693. Common control of performance may be established in the absence of common ownership. See id. @@ 779.222, 779.244.

Again, despite defendants' claim to the contrary, the defendants clearly constitute a unified operation, and there is a core group of individuals that control the three entities -- the GCP, the 34th Street Partnership, and the SSC. See paragraphs 117-140 supra. As noted, the GCP incorporated the SSC. See PE 79 at 5, 6. In an action before another judge of this Court, the GCP admitted control [*68] over the SSC. See PE 78 ("The . . . [SSC,] . . . a not-for-profit corporation under the control of GCP until May 1996 is a not-for-profit corporation partially funded by GCP."). Judge Schira Scheindlin found in *Kessler v. Grand Central District Management Association, Inc.*, 960 F. Supp. 760 (S.D.N.Y. 1997), that the "GCP itself, or through the Grand Central Neighborhood Social Services Corporation ("GCNSSC"), provides various social services to the homeless in the District, including outreach services, drop-in centers, and job training. The predominate concern . . . in providing social services, is to help the business environment in the District, although these services also serve the purpose of helping the homeless." Id. at 764 (citations omitted). Thus, the defendants themselves have admitted that for the relevant period, the SSC was controlled and partially funded by the GCP. See also paragraphs 118, 120, 121 and 126 supra.

This control is also evidenced by the manner in which contracts with the SSC were handled. For example, the GCP, rather than the SSC, signed the contract with Chase Manhattan Bank ("Chase") to provide Chase with outreach services using [*69] PTE workers. See PE 80 (Agreement signed by Jeffrey Grunberg in his capacity as Vice President of the GCP). The Agreement between the SSC and the Fleet Bank to provide outreach services is signed by Daniel A. Biederman, in his capacity as President of the SSC. Biederman has stated, however, that he was the president of the GCP and the 34th SP, but that he never held any position at the SSC except as a board member. See Biederman Dep. at 8, 10, 14.

As described more fully in paragraphs 117-140 supra, the defendants also shared executive and financial services. Daniel Biederman was the President of the GCP and the 34th Street Partnership, and a board member of the SSC. Jeffrey Grunberg was the Vice President of the GCP and the Executive Director of the SSC. See Grunberg Dep. at 10-11 ("My first position with [GCP] was as vice president, when the [SSC] was formed I was named as executive director

But as a vice president, it was my understanding that should the [SSC] not be in existence, I would continue to oversee social services as a vice president for the [GCP].") The GCP and the 34th SP shared the same controller (David Schaly), Program Director (Brady [*70] Crain), and Associate Director (Ira Mandelker). See Schaly Dep. at 7, 140; Mandelker Dep. at 23, 25.

Robert Hayes, the defendants' agent, has stated that "administrative and management services are shared by the [GCP] and the [34th SP]" and that the "[SSC] provides its services in association with both BIDs." PE 32 at 9. For example, the GCP and the 34th SP held common budget meetings. See Biederman Dep. at 182. In addition, the defendants shared office space. The office of the GCP is located at Six East 43rd Street. See Biederman Dep. at 30. Jeffrey Grunberg, the Executive Director of the SSC, "used an office in the GCP offices at 43rd Street." Id. at 32. The 34th SP "pays a share of the rent for the [GCP] Six East 43rd Street office." Id. at 33. Further, if need arose, the SSC would make requests to the GCP or 34th SP in order to pay PTE participants. Schaly, controller for the GCP and 34th SP, was also "responsible for the accounting of SSC," Schaly Dep. at 28, and testified that the GCP and the 34th SP contributed to the payment of PTE participants. See Schaly Dep. at 37, 39, 41, 68-70 ("[34th SP contributed to the SSC] in the same way that GCP [*71] [sic]. I have a request for payment of PTE and I make the payment."). The GCP would also cover the debts of the SSC. See Schaly Dep. at 74-75 ("[SSC] has a deficit and GCP contributes not only the intended amount but by default it covers all the expenses of Social Service Corporation, including the deficit.").

As another Court has noted, "the test is not the day-to-day control of the [establishments] but whether there is a common control center with the ultimate power to make binding decisions for all the units of the enterprise. 'Common control' may exist . . . despite the separate management of the individual establishments." *Dole v. Bishop*, 740 F. Supp. 1221, 1225 (S.D. Miss. 1990) (citing *Shultz v. Morris*, 315 F. Supp. 558, 564 (M.D. Ala. 1970), *aff'd sub nom.*, *Hodgson v. Morris*, 437 F.2d 896 (5th Cir. 1971)). In this action, although there may have been separate management of the three entities, there was a common control center consisting of the few individuals who held executive positions in one or more of the entities and had the ultimate power to make binding decisions for the GCP, 34th SP, and SSC. Under these circumstances, I conclude that this portion [*72] of the test for a common enterprise is met.

3. Common Business Purpose

In *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295, 85 L. Ed. 2d 278, 105 S. Ct. 1953 (1985), the Supreme Court stated: "Activities of [an] eleemosynary . . . organization may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities . . . the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise." (citing 29 C.F.R. @ 779.214).

Defendants claim that the SSC, GCP, and 34th SP do not share a common business purpose because "the PTE program is not intended to enhance the district in which activities are performed." However, the entities did share a common business purpose, for the services provided by the SSC were intended to further the 34th SP and GCP's goals of improving and enhancing the conditions of their districts, and these goals, therefore, are business related. See PE 32 9 (Robert Hayes concluded that the SSC provided "services in association with [the GCP and the 34th SP]."). The GCP's express purpose is "attracting customers to

the area's businesses, [*73] and making them want to return." See PE 88 (Grand Central District Management Association, Inc.'s Memorandum in Support of its Cross-Motion for Summary Judgment in Kessler) at 19. The GCP's District Plan sets forth various objectives such as: (1) a supplemental security plan in order to "improve the business environment." PE 86 (GCP District Plan) at 11, (2) additional sanitation services "to make the district's streets and sidewalks . . . the cleanest of any commercial district in New York." Id. at 13 (emphasis added), and (3) offering services "such as showers, social service referrals, legal and medical assistance, warm drinks and some food" so that the district can "assist both the homeless and the neighborhood's business environment." Id. at 15 (emphasis added). The 34th SP District Plan has similar objectives including using special assessments from property owners to fund services -- "including aid to the homeless" -- "with the aim of improving the business environment in the District." PE 87 (34th SP District Plan) at 12. Daniel Biederman testified that he was "totally sold on the fact that helping the homeless . . . would help the neighborhood." [*74] Biederman Dep. at 57.

In that manner, the SSC, the GCP, and 34th SP shared a common business purpose -- providing service at a fee to improve business operating conditions. The SSC regularly entered into contracts and solicited business from private corporations promising that it would supply formerly homeless persons to act in a security capacity. See PE 31 (Letter from Frank Schiazza, Associate Director of the SSC, to Citibank) ("The most important task we can perform for Citibank is to provide an outreach/security professional that is well trained and motivated to perform their duties Our goal is to immediately assist you with the homeless problems in your ATMS [sic]. Currently, we are performing these services for: Chemical Banking, Chase Banking, Marine Midland, Commercial Banking, Republic Banking, Bankers Federal, Dime Savings Bank, Philip Morris Inc., and E.S. Gordon & Company. Our program will give you the level of protection that we have come to understand you must have in your ATMS [sic] to present a safe environment to customers." (emphasis added); PE 35 (Letter from Jeffrey Grunberg to Olympia & York ("Our standard service for outreach is \$ [*75] 5.50 per hour Our monthly fee for this service would be \$ 1,906.00 Our goal is to immediately clear up the plaza area and future encampments of homeless Our program will give you the level of protection that we have come to understand you must have in the plaza to present a safe environment to the tenants of your building." (emphasis added). Based upon the foregoing, I conclude that the SSC, the GCP, and the 34th SP shared a common business purpose.

Because the plaintiffs have satisfied all three elements of 29 U.S.C. @ 203(r), I find that the SSC, the GCP, and the 34th SP constitute a common enterprise for purposes of the FLSA.

B. The Interstate Commerce Requirement

The FLSA states that its requirement that the enterprise be "engaged in commerce or in the production of goods for commerce" is met by a showing that the enterprise has employees "engaged in commerce or in the production of goods for commerce or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and . . . [has] annual gross volume of sales made or business done [] not less than \$ 500,000." [*76] 29 U.S.C. @ 203(s). The term "commerce" refers to interstate commerce. See 29 U.S.C. @ 203(b). Under an "enterprise" application, a plaintiff need not himself or herself be involved in an

activity which affects interstate commerce. See *Radulescu v. Moldowan*, 845 F. Supp. 1260 (N.D. Ill. 1994). If the gross volume requirement is met, all employees are covered under the Act if some are (1) engaged in commerce, (2) engaged in the production of goods for commerce, or (3) engaged in handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. See *id.*

Defendants argue that the plaintiffs claims fail because the SSC is not engaged in interstate commerce. See Def.'s Tr. Mem. at 12. The question is, however, whether the enterprise consisting of the SSC, the GCP, and the 34th SP is an enterprise with employees engaged in commerce or in the production of goods for commerce within the provisions of the FLSA.

1. Engaging in Commerce

In *Tony and Susan Alamo Found.*, the Supreme Court further observed that "the statute contains no express or implied exception for commercial activities conducted by religious or other nonprofit [*77] organizations." *Tony and Susan Alamo Found.*, 471 U.S. at 297 (footnote omitted). It noted further that there was "broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations." *Id.* at 298 (footnote omitted). The Court focused on the fact that the Foundation's businesses

served the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that the Act was intended to prevent, and the admixture of religious motivations does not alter a business's effect on commerce.

Id. at 299 (citations omitted).

In this instance, it is clear that the defendant's outreach programs in the security and recycling areas serve the general public in competition with ordinary commercial enterprises, and that the payment of substandard wages gives them an unfair advantage in commercial activity. Because the defendants paid the PTE participants only \$ 1 an [*78] hour, they were able to offer security services to banks and other private corporations at a significant discount. The defendants entered the economic arena and competed against other organizations for economically beneficial contracts. Compare *Wagner v. Salvation Army*, 660 F. Supp. 466, 468 (E.D. Tenn. 1986) (holding that a transient lodge did not enter the economic arena because it did not serve the general public and compete with other private entrepreneurs). If not for the SSC's use of PTE participants, some banks, like Chase had before and after its contract with SSC, would have selected other organizations to provide security services. See *Anderson Dep.* at 14-27; see also paragraph 135 *supra*. Similarly, the non-for-profit organizations that had contracted with the Port Authority for recycling services before the SSC had also paid their workers minimum wages. Thus, I find that the defendants were an enterprise that engaged in commerce.

2. Engaged in Handling, Selling, or Otherwise Working on Goods or Materials that Have Been Moved in or Produced for Commerce

A clear understanding of this issue requires an examination of prior congressional interpretation [*79] of @ 203(s), the specific statutory provision at issue in this case. Prior to the 1974 amendment, the section provided:

Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . . is an enterprise . . . whose annual gross volume of sales is not less than \$ 250,000.

As amended, Pub. L. No. 93-259, now reads:

Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which ... is an enterprise ... whose annual gross volume of sales is not less than \$ 250,000. n2

- - - - -Footnotes- - - - -

n2 The annual gross volume requirement was amended in 1989 and is now \$ 500,000.

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

[*80]

The issue is what Congress intended by substituting the word "or" for "including," by adding the words "or materials," and by consisting using the word "handling." Most courts addressing this issue have relied on the Senate Report on the Fair Labor Standards Amendments of 1974. They quote the Report as evidence of Congress's intent to include within the definition of "enterprise engaged in commerce or in the production of goods for commerce," businesses whose employees use materials that have at some point moved in interstate commerce. See Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982); Marshall v. Davis, 526 F. Supp. 325 (M.D.Tenn. 1981); Marshall v. Baker, 500 F. Supp. 145 (N.D.N.Y. 1980); Marshall v. Whitehead, 463 F. Supp. 1329 (M.D.Fla. 1978).

The Report states:

In addition to expanding coverage, the bill amends section 3(s) by changing the word "including" to "or" to reflect more clearly that the "including" clause was intended as an additional basis of coverage. This is, in fact, the interpretation given to the clause by the courts. The bill also adds the word "or materials" after the word "goods" to make clear the Congressional intent to include [*81] within this additional basis of coverage the handling of goods consumed in the employer's business, as, e.g., the soap used by a laundry. The "handling" language was added based on a retrospective view of the effect of substandard wage conditions.

Senate Report No. 93-690, 93rd Congress, 2d Session at 17 (1974). The Report concludes that:

Although a few district courts have erroneously construed the "handling" clause as being inapplicable to employees who handle goods used in their employer's own commercial operations, the only Court of Appeals to decide this question, and the majority of the district courts, have decided otherwise, and the additions of the words "and materials" will clarify this point.

Id.

The court in *Brennan v. Jaffey*, 380 F. Supp. 373 (D.Del.1974), faced with the applicability of the 1974 amendment to an apartment complex whose maintenance personnel used supplies that had moved in interstate commerce, stated:

The 1974 Report however, is of considerable significance in ascertaining what was intended when the amendment became effective on May 1, 1974, by inserting the word "materials" in section 203(s). It clearly discloses [*82] a legislative purpose to make ... the provisions of the Act applicable to employers, such as the defendants, after its effective date. Its actual effect was therefore to expand its future coverage

Brennan v. Jaffey, 380 F. Supp. at 379.

This legislative history clearly demonstrates that Congress intended to extend the coverage of the FLSA to companies that use products that have moved in interstate commerce. As the court in *Marshall v. Baker* observed:

Senate Report No. 93-690 makes clear that the addition of "materials" after the word "goods" signified the congressional intent to bring within that additional basis of coverage those businesses which handle products consumed in the course of their operations. The example provided by the Senate itself puts to rest any question of the applicability of the statute to the defendants: if a local laundry is covered because the soap which it uses moved in interstate commerce, then an apartment complex is covered because the materials used by its maintenance personnel moved in interstate commerce.

Marshall v. Baker, 500 F. Supp. at 151 (emphasis added).

Furthermore, "this amendment adding the [*83] words 'or materials' leads to the result that virtually every enterprise in the nation doing the requisite dollar volume of business is covered by the FLSA." *Dunlop v. Industrial America Corp.*, 516 F.2d 498, 501-02 (5th Cir. 1975).

Since 1974, courts facing the issue presented here have unanimously come to the same conclusion: local business activities fall within the reach of the FLSA when an enterprise employs workers who handle goods or materials that have moved or been produced in interstate commerce. See *Dole v. Odd Fellows Home Endowment Board*, 912 F.2d 689, 695 (4th Cir. 1990); *Donovan v. Pointon*, 717 F.2d 1320, 1322-23 (10th Cir. 1983); *Marshall v. Brunner*, 668 F.2d 748, 752 (3rd Cir. 1982); *Donovan v. Scoles*, 652 F.2d 16 (9th Cir. 1981), cert. denied, 455 U.S. 920, 71 L. Ed. 2d 460, 102 S. Ct. 1276 (1982); *Dole v. Bishop*, 740 F. Supp. 1221, 1225 (S.D.Miss. 1990); *Conway v. Takoma Park Volunteer Fire Dept.*, 666 F. Supp. 786, 791 (D.Md. 1987); *Marshall v. Davis*, 526 F. Supp. 325, 328 (M.D.Tenn. 1981); *Marshall v. Baker*, 500 F. Supp. 145, 151 (N.D.N.Y. 1980); *Marshall v. Whitehead*, 463 F. Supp. 1329, 1336-38 (M.D.Fla. 1978).

In this [*84] instance, GCP sanitation crews used a number of items -- "bags, brooms, shovels, pails, scrapers . . . radios, books . . . [and] flashlights", Biederman Dep. at 44, some of which undoubtedly moved in interstate commerce to New York City. Similarly, SSC outreach participants wore uniforms, and used radios, clipboards, and similar supplies, some of which must also moved in interstate commerce. See Mandelker Dep. at 244; Flynn Dep. at 229. Thus, I find that this prong of the FLSA is satisfied because the plaintiffs engaged in handling goods or materials that have moved in or were produced for commerce -- by using these materials while working in the different program areas.

3. Gross Volume Requirement

The final requirement for finding that an enterprise is engaged in commerce or the production of goods for commerce is that the enterprise has an "annual gross volume of sales made or business done [that] is not less than \$ 500,000." 29 U.S.C. @ 203(s). The GCP, the 34th SP, and the SSC each have earned revenues well in excess of \$ 500,000 for nearly every year of their existence. As noted previously, between 1989 and 1995, the GCP had annual revenues of between \$ 2,448,477 [*85] and \$ 8,342,205, see PE 64-68; between 1990 and 1994, the SSC had annual revenues of between \$ 823,408 and \$ 3,071,930, see PE 69-71; and in 1992, the 34th SP had annual revenues of \$ 2,995,494, with its 1993 revenue rising to \$ 6,174,215, see PE 72-73. These amounts for business done by the defendant clearly exceed the statutory requirement of \$ 500,000, and thus satisfy the gross volume requirement.

Based upon the foregoing, I find that the plaintiffs have satisfied the interstate commerce requirement of the FLSA.

C. Employees Under the FLSA

The term "employee" is defined in the FLSA as "any individual employed by an employer." 29 U.S.C. @ 203(e)(1). The term "'employ' includes to suffer or permit to work." 29 U.S.C. @ 203(g). At base, "the test of employment under the Act is one of 'economic reality.'" *Tony & Susan Alamo Found.*, 471 U.S. at 301 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33, 6 L. Ed. 2d 100, 81 S. Ct. 933 (1961)). The question in this case is whether the plaintiffs were employees of an enterprise consisting of the SSC, the GCP, and the 34th SP, and thereby are covered by the minimum wage and overtime provisions [*86] of the FLSA, or are trainees and not entitled to such protection.

While the FLSA does not define "trainees," nor specifically provide that trainees are not employees for minimum wage purposes, the Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 91 L. Ed. 809, 67 S. Ct. 639 (1947), held that trainees are not employees under the Act during their training period. Concluding that the trainees' employment in *Walling* did not "contemplate . . . compensation," and that the employer did not receive any "'immediate advantage' from any work done by the trainees," the Court ruled that the trainees did not fall within the definition of an "employee." *Id.* at 153.

After *Portland Terminal*, the Wage and Hour Division of the Department of Labor issued a six-part test to guide the determination of whether a trainee is in fact an employee. The test, in relevant part, states:

Whether trainees or students are employees of an employer under the Act will

depend upon all of the circumstances surrounding their activities on the premises of the employer. If all of the following criteria apply, the trainees or students are not employees within the meaning of the [*87] Act:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees or students;
- (3) the trainees or students do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
- (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

Wage & Hour Manual (1980); see also *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 273 n. 7 (5th Cir. 1982).

These factors are not exhaustive and are intended to be consistent with *Portland Terminal* and the companion case of *Walling v. Nashville Chattanooga & St. Louis Ry.*, 330 U.S. 158, 91 L. Ed. 816, 67 S. Ct. 644 (1947). *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989). [*88] Under the *Portland Terminal* and the Wage and Hour test, the findings a court must make before reaching the legal question of whether trainees are employees are virtually identical. *Id.* Neither approach relies exclusively on a single factor, but instead requires consideration of all the circumstances. *Id.* The Wage and Hour Test is therefore a reasonable application of the FLSA and *Portland Terminal* and entitled to deference by this court. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).)

According to an expert report by Burt Barnow, "the PTE program did not constitute training for its participants . . . instead, PTE participants were employees of the defendants." PE 29 at 1. Barnow concluded that in none of the PTE Program areas -- outreach, food services, maintenance, or administration -- was training similar to what would take place in a vocational school. See PE 29. He also concluded that the outreach program probably did not meet the requirement that the employer that provides the training derive no immediate advantage from the activities of the trainees or students, [*89] and that the evidence was mixed on whether the PTE participants displaced regular employees, and whether the SSC and the PTE participants understood that the participants were not entitled to wages for the time spent in training. See *id.* at 16. With regard to the food services area, Barnow concluded that the evidence was mixed on whether the PTE participants displaced regular employees and whether the SSC did not receive any immediate advantage from the PTE Program. See *id.* at 18-20. With regard to the maintenance and administration departments, Barnow concluded that training was not for the benefit of the participant, but rather was "more of a work experience program with informal on-the-job

training provided only as needed," Id. at 22, and that PTE participants displaced regular employees. See id. at 23.

Eric Roth, an additional expert for the plaintiffs, concurred with Barnow's findings. Roth found that:

PTE participants, like prevocational workers, did not receive close supervision. For example, several plaintiffs who performed outreach as PTE participants testified that they were often left alone to perform their duties, and at least one of defendants' [*90] employees has testified that outreach supervisors were not always present when PTE participants were doing outreach work. While PTE participants in the administration department sometimes worked in the presence of a supervisor, they sometimes did not, as Jeffrey Grunberg has testified. For example, Ira Mandleker testified that the GCPSSC drop-in center's front desk was manned solely by a PTE participant. Similarly, according to defendants' testimony, PTE participants in food service and maintenance sometimes performed their work outside the presence of a single staff member.

Unlike pre-vocational program participants, however, who are paid \$ 5 to \$ 6 per hour, PTE participants were paid at most \$ 1.50 per hour, as explained earlier. Another difference, as discussed, is that PTE participants often stayed in the program for well over the six month maximum period prescribed for pre-vocational training I have seen no evidence in the plaintiff files I reviewed that specific, individualized goals were charted, as they would be in a pre-vocational training program, nor have I seen evidence of the systematic monitoring of progress, in light of the individual's goals, that should be [*91] performed in a proper pre-vocational program.

PE 30 at 13-14.

Defendant's expert report -- prepared by William J. Grinker -- devotes only three pages to the PTE Program, discusses the Program only in the most general terms, and fails to apply the Wage and Hour Test to the Program. See DE 4.

There is no doubt that the PTE participants would have had great difficulty in obtaining jobs in the private sector and as such, benefitted enormously from the work opportunities provided by the defendants. As homeless individuals, many of the plaintiffs needed to be instructed on the most basic of job skills: including avoiding absenteeism, being prompt for work, working a full day, and punching a time clock. Counseling provided by the defendants helped some of the plaintiffs obtain housing and employment outside the program. Unfortunately, determining that the training benefits the participants is only one part of the Wage and Hour Test. Despite counseling, orientation packets, and progress reports, in none of the departments -- outreach, food service, maintenance, or administration -- did the defendants receive training that is similar to or even close to that which would be provided [*92] in a vocational school. In addition, the Court finds that PTE participants did displace regular employees, and often did not work under any meaningful supervision. At times, PTE participants even supervised other PTE participants. PTE participants often worked significant overtime hours, and the defendants have admitted that their contracts could not have been fulfilled without the work of PTE participants.

Thus, even though the PTE participants received a benefit, the defendants gained an immediate and greater advantage from the PTE Program: the ability to offer security and other services at below market rates. The defendants gained

further advantage because the SSC, the GCP, and the 34th SP all utilized the services of PTE participants. Also, for reasons to be discussed below, I find that the participants did not understand that they were not entitled to wages for the time spent in the Program. Although the defendants assert that the Wage and Hour Test is not determinative of whether a person is an employee under the FLSA, it is a factor to be weighed in the analysis, and the defendants have failed to show that under the six-factor test, the PTE participants were trainees rather [*93] than employees.

Two important elements in determining the "economic reality" of an employment situation are whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from any work done by the individuals. See *Tony & Susan Alamo Found.*, 471 U.S. at 300 (citing *Portland Terminal*, 330 U.S. 148 at 153). For example, in *Tony & Susan Alamo Found.*, the individuals who worked in the Foundation's businesses, like the trainees in *Portland Terminal*, expected no compensation for their labors. *Id.* The District Court in *Tony & Susan Alamo Found.* found that the Secretary had "failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than 'volunteering' his services to the Foundation." *Id.* (citing *Donovan v. Tony & Susan Alamo Found.*, 567 F. Supp. 556 (W.D. Ark. 1982)). In this case, instead, the record clearly reflects that the plaintiffs expected compensation for their services. In contrast to *Tony & Susan Alamo Found.*, in which none of the individuals expected compensation for their services, and were [*94] true volunteers, the defendants are unable to find any PTE participant to testify that she did not expect compensation for his or her work. In fact, the defendants were well aware that the PTE participants were keenly interested in the compensation, for one of their proposed findings states: "Some clients fear losing their stipends, and having to rely solely on public benefits to pay for their housing, and therefore have asked and been permitted to remain in the PTE program. A per diem program was also created to permit graduates to work in the Center on an as-needed basis at minimum wage to provide income until a graduate found full-time employment." *Defendants Proposed Findings at P 45* (citing *Grunberg Dep. at 108-109*). As noted previously, testimony from the plaintiffs clearly states that they participated in the program because they thought it was a job.

Defendants' documents indicate that the plaintiffs' expectation of compensation was not unfounded. While the defendants now characterize the PTE participants as trainees who received a stipend, a memorandum from Vincent Flynn to PTE participants in the Outreach program, relates the "Objectives for it's [sic] employees," and [*95] refers to the PTE participants as employees. PE 61 ("Upon completion of the volunteer entry [of a least three weeks], the employee will elevate to our Work Program status for twelve weeks."). Performance evaluations for the PTE participants refer to them as workers and do not mention "training" or refer to the individuals as "trainees." See PE 48-50.

A former director of the Outreach program testified that he informed the outreach workers that they were to be paid on a weekly basis for their work. See *Flynn Dep. at 120*. The periods of time that the plaintiffs were required to work were called "shifts," and they had to "clock in and out" in order to get paid. See PE 7. Plaintiffs kept detailed payroll sheets to calculate the plaintiffs' hours, identical to records kept for staff employees. See PE 57-60. When the plaintiffs worked in excess of an eight hour shift or more than forty hours per week, the additional time was called "overtime." See PE 52. Overtime slips

indicate that the plaintiffs worked overtime hours when an individual failed to show or additional coverage was needed, and that there were times when these overtime hours were worked during the "graveyard [*96] shift" (Midnight to 8 a.m.). See *id.* A PTE participant received time-and-a-half -- \$ 1.50 -- for an overtime hour.

Defendants assert that the plaintiffs had no expectation of compensation because some of the plaintiffs signed a "Letter of Agreement," stating that the signee would

attend at least three (3) training and/or motivational workshops per week understand that [she is] not an employee of GCPSSC, and any stipend [she] receive[s] for personal expenses related to [her] training is not considered a wage understand that [her] participation in the PTE program is voluntary and does not guarantee future employment with the Grand Central Partnership Social Services Corporation.

DE 17.

In addition to the testimony by certain plaintiffs that they were coerced into signing the Letter of Agreement, the Supreme Court has clearly stated that: "protestations, however sincere, cannot be dispositive If an exception to the [FLSA] were [sic] carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive [*97] their protections under the [FLSA]." *Tony & Susan Alamo Found.*, 471 U.S. at 301-02 (citations omitted). Further, the Agreement itself is dubious on its face, because there is no space indicating the date on which the Agreement was signed between the parties. This factor undermines the persuasiveness of the Letter Agreements because there appear to be no letter agreements from PTE participants who left the program before 1994, when the defendants first learned that a lawsuit was being contemplated.

As a result, any reliance the defendants place on the "Letter of Agreement" or an earlier "agreement" stating that an individual's "stipend for the entire 12 weeks is \$ 40.00 per week," PE 20, is not appropriate in this case. Under the Supreme Court's analysis, neither are the Agreements dispositive in this case. The "Letter of Agreement" bears a strong resemblance to certain factors of the Wage and Hour Test, and appears to have been instituted after the possibility of a lawsuit became real. The prior "agreement" contains none of the relevant language that is present in the "Letter of Agreement." See PE.20. Further, the prior "agreement" instead supports the plaintiffs' expectation [*98] of weekly compensation as part of a job. See *id.* ("[The] stipend for the entire 12 weeks is \$ 40.00 per week I understand that if my [the participant's] attendance is 95% or better, I will be awarded a bonus of \$ 160.00.") (emphasis added).

If a defendant gains an immediate advantage from a plaintiff's labor, courts have held that the plaintiff is an employer for purposes of the FLSA. See *McLaughlin v. Ensley*, 877 F.2d at 1209-10 ("In sum, this court has concluded that the general test used to determine if an employee is entitled to the protections of the [FLSA] is whether the employee or the employer is the primary beneficiary of the trainees' labor The trainees were taught only simple specific job functions related to [defendant's] own business The skills learned were either so specific to the job or so general to be practically no

transferable usefulness."); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 (11th Cir. 1982) (stating that the district court in the case found that mental patients did work which was of "economic benefit" to the defendants and that the individuals were employees for purposes of the FLSA and entitled [*99] to back wages for their work).

In examining whether the defendants here received an immediate advantage from any work done by the plaintiffs, the Court does not disregard the fact that the plaintiffs received certain advantages as well -- such as basic job skills and the ability to create an employment history. But, it is also clear that the defendants could not have met their contractual obligations without the PTE program. As noted, without the PTE program, the defendants would have had great difficulty in meeting the obligations of the district plans of the GCP and the 34th SP. Further, the defendants would have not met the requirements of their contract with New York City -- a contract which requires the defendants to handle food services for clients and provide maintenance at the drop-in center. See Findings of Fact P 8. In addition, without the PTE participants, the defendants would not have been able to service the recycling and outreach contracts. According to a former director of the Outreach Program, there were only twenty-two staff members, but sixty-three program workers. See PE 41. The director stated that: "even if they [PTE participants] all showed up to work [*100] we did not have enough personnel to cover every location. Even the overtime did not -over [sic] all the locations." PE 41.

Finally, while the defendants did offer counseling sessions, it is difficult to envision that someone who is working a forty-hour week and also working the "graveyard shift" for overtime would be able to attend and benefit from those sessions. If the defendants truly intended primarily to provide a training program for the defendants, they would have either not allowed such overtime or scheduled counseling sessions to better accommodate those whose overtime included such shifts.

The plaintiffs have presented voluminous evidence that they performed productive work for the defendants, expected to be paid by the defendants, and produced more benefits for the defendants than they received through training provided by the PTE Program. Considering all the factors -- including the Wage and Hour Test, expectation of compensation, and immediate advantage to the employer -- the economic reality is that the PTE participants benefitted from the defendants' efforts, but the defendants benefitted more. The plaintiffs have satisfied each of the factors required to prove that [*101] they were employees and not trainees as that term is understood in case law. As a result, I conclude that the plaintiffs were employees of the defendants for purposes of the FLSA.

II. New York Minimum Wage Act

The New York State Minimum Wage Act "constitutes remedial legislation designed to relieve the financial hardship experienced by persons employed in occupations 'at wages insufficient to provide adequate maintenance for themselves and their families.'" *In re Settlement Home Care, Inc.*, 151 A.D.2d 580, 581, 542 N.Y.S.2d 346, 347 (2d Dep't 1989) (citing N.Y. Labor Law @ 650). It is to be liberally construed so as to permit as many individuals as possible to take advantage of its benefits. *Id.* at 581, 404 N.Y.S.2d at 347-48. Under the Act, an employee includes any "individual employed or permitted to work by an employer in any occupation," with the exception of a few narrow categories.

N.Y. Labor Law @ 651(5). An employer includes any "individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as employer." N.Y. Labor Law @ 651(6). Defendants do not assert that they are covered by any of the exemptions [*102] under the Act.

Defendants place special emphasis on Albany College of Pharmacy v. Ross, 94 Misc. 2d 389, 404 N.Y.S.2d 779 (Sup. Ct. 1978), for their claim that the plaintiffs are not entitled to the minimum wage under the New York Labor Law. In Ross, the issue was whether pharmacists who supervised students placed with them by a college-administered professional practice program were "employers." Relying on the four common-law elements of a master-servant relationship -- selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant's conduct -- the court held that the individual pharmacists were not employers because the colleges, not the pharmacists, "directed, controlled, monitored and evaluated" the students. Id. at 390, 404 N.Y.S.2d at 780.

Apart from the fact that in the instant case the PTE participants worked for the defendants and thus Ross is not applicable, Ross is instructive because it states that the element of control is part of an employment relationship. See id. at 391, 404 N.Y.S.2d at 781. Defendants exercised control over the plaintiffs, selecting which persons participated in [*103] the program. See Grunberg Dep. at 111-15. Further, the defendants have stated that "anyone found under the influence of drugs and/or alcohol . . . [would] be dismissed automatically from the program." DE 18. As a result, even under the Ross analysis, the plaintiffs are employers for purposes of the New York State Minimum Wage Act. Thus, I conclude that the defendants have violated the New York State Minimum Wage Act.

III. Statute of Limitations Argument

In their trial memorandum, defendants asked leave to amend their answer to assert the statute of limitations as a defense in this action under FRCP 15(a). At trial, the Court ruled upon one part of defendants' arguments. See Trial Transcript at 13 (denying "the motion to amend as futile, to the extent that all of this [revolves] around the one and only issue, i.e., are you an employer."). Here, the Court addresses the remaining defense arguments.

"The contention that all or part of an action is barred by the statute of limitations is an affirmative defense. If not raised by the defendant in his answer, it is waived." Wade v. Orange County Sheriff's Office, 844 F.2d 951, 955 (2d Cir. 1988) (citing Fed. [*104] R. Civ. P. 8(c)); see also Brock v. Wackenhut Corp., 662 F. Supp. 1482, 1487 (S.D.N.Y. 1987) (statute of limitations period in the FLSA is a "procedural limitation on relief that must be pleaded as an affirmative defense"). Generally, permission to amend a complaint should be freely granted. See Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). A court plainly has discretion, however, to deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the other party. See Tokyo Marine & Fire Insurance Co. v. Employers Insurance of Wausau, 786 F.2d 101, 103 (2d Cir. 1986). The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay. See Sanders v. Thrall Car Mfg. Co., 582 F. Supp. 945, 952 (S.D.N.Y. 1983), aff'd, 730 F.2d 910 (2d Cir. 1984).

The defendants' request to amend their complaint here was made after inordinate delay, in a memorandum on the eve of trial. Further, while raising the affirmative defense of statute of limitations, defendants have given no explanation whatsoever for their delay. Finally, [*105] I find that this amendment is not in the interest of justice because litigating this question at such a late date would cause the plaintiffs hardship and force them to spend additional resources. As a result, I deny the defendant's request to amend their complaint and find that the plaintiffs' claims are not barred by the statute of limitations.

CONCLUSION

For the reasons discussed, I conclude that the defendants' practices violated the FLSA and the New York State Minimum Wage Act. I hereby order the Clerk of the Court to enter judgment for the plaintiffs on liability. I also award damages in the amount of the back wages to which the plaintiffs are lawfully entitled -- i.e., the difference between the subminimum hourly rate at which the defendants compensated the plaintiffs and the lawful minimum wage for every hour worked up to 40 hours a week, and time-and-a-half for every hour worked beyond 40 hours a week. In addition, I award plaintiff liquidated damages in an amount equal to the back wages due plaintiffs pursuant to 29 U.S.C. @ 216(b). Finally, I order the defendants to pay plaintiffs their reasonable attorneys' fees and costs connected with this action. This [*106] matter is referred to the magistrate judge for an inquest on damages for each individual plaintiff consistent with his Order.

SO ORDERED.

Dated: New York, New York

March 18, 1998

SONIA SOTOMAYOR

U.S.D.J.

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SEND TO: CHILDRESS, MARK
 WHO - GEN. COUNSEL
 RM 308
 OLD EXECUTIVE OFFICE BLDG
 WASHINGTON, DISTRICT OF COLUMBIA 20502

1997 U.S. Dist. LEXIS 12227 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.

(Def's. 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.

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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.

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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.

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 [*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.

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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.

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[*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.

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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.").

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[*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.

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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.

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CONCLUSION

For the reasons discussed, defendants' motion for reconsideration is DENIED.
n9

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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.

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SO ORDERED.

Dated: New York, New York

August 15, 1997

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U.S.D.J.

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AUGUST 25, 1997

SECTION: Pg. 16

LENGTH: 6633 words

HEADLINE: DEFINING DISABILITY DOWN

BYLINE: Ruth Shalit

HIGHLIGHT:

Why Johnny can't read, write or sit still.

BODY:

In July of 1995, Jon Westling, the provost of Boston University, traveled to Australia to attend the Winter Conversazione on Culture and Society, a highbrow tete-a-tete for globetrotting pundits and savants. Westling, a protege of former B.U. President John Silber, is an avowed conservative; and the subtitle of his speech, "The Culture Wars Go to School," seemed to portend the usual helping of red meat for the faithful. But instead of decrying deconstruction, or puncturing the pretensions of tenured radicals, Westling took aim at an unexpected target--the learning-disabled. He told the story of a shy yet assertive undergrad, "Somnolent Samantha," who had approached him one day after class and presented him with a letter from the Office of Disability Services. The letter explained that Samantha had a learning disability "in the area of auditory processing" and would require certain "accommodations," including time-and-a-half on quizzes, double time on the midterm, examinations administered in a room separate from all other students, copies of Westling's lecture notes and a reserved seat at the front of the class. Samantha also notified Westling that she might doze off in class, and that he should fill her in on any material she missed while snoozing.

The somnolent undergrad, Westling contended, was not alone. A new, learning-disabled generation was coming of age in America, a generation "trained to the trellis of dependency on their special status and the accommodations that are made to it." Citing a Department of Education estimate that 'up to 20 percent of Americans may be learning-disabled, Westling mused on the evolutionary ramifications of such a diagnosis. "There may be as many as 50 million Americans," he observed. "What happened? Did America suffer some silent genetic catastrophe?"

Westling's speech, it turns out, was a prelude to action. Shortly after returning from Melbourne, the aggrieved provost took a cleaver to B.U.'s bloated Office of Learning Disabilities Support Services, a half-million dollar fiefdom whose policies had, in the words of The New York Times, earned B.U. a "national reputation" as a haven of support for the learning-impaired. He stepped up standards for documentation, and he issued a blanket prohibition on waivers of the school's math and foreign language requirements, contending that there was no medical proof that students with learning disabilities are unable to learn these subjects. Henceforth, he declared, all requests for learning-disabled accommodations would be routed through his office. Westling then made a final announcement. In 1996, he said, he would become president of the university.

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The learning-disability establishment was dumbfounded. "Here was someone coming in with no knowledge, taking the national model and destroying it," says Anne Schneider, the Park Avenue fund-raising doyenne who spearheaded the creation of B.U.'s program a decade ago, after her learning-disabled daughter Andrea nearly washed out of the university--due, Schneider says, to a lack of services. Schneider, whose personal fund-raising efforts have kept the office flush with cash, sees Westling's assault on her brainchild as analogous to "taking a seeing-eye dog away from a blind person." Janet Cahaley, mother of learning-disabled sophomore Michael, agrees: "These kids are the most vulnerable people on campus. Before, they were treated with humanity and decency and kindness. Now, they're hopeless and helpless."

Well, maybe not so helpless. Westling's putsch brought howls from disabled-rights advocates and from the media, which pounced upon the revelation that Somnolent Samantha was a fictitious composite--a "rhetorical trope," as Westling somewhat sheepishly admitted. And on July 15, 1996, ten students filed a lawsuit against Westling, claiming his unkind words and arduous new requirements amounted to illegal discrimination under the 1990 Americans With Disabilities Act. In their complaint, the students alleged that Westling's new standard for documentation--requiring applicants to submit an evaluation that is less than three years old and prepared by a physician or licensed psychologist--amounted to an "unduly burdensome prerequisite" that would screen out learning-disabled students from receiving their legally mandated accommodations. Also unlawful, the students contended, was Westling's prohibition on waivers of academic requirements. Finally, in their most enterprising claim, the students accused Westling of creating a "hostile learning environment" for the disabled, inflicting needless "emotional distress" and crushing their hopes of collective advancement. A ruling by Judge Patti B. Saris of Boston Federal District Court is expected by the end of August.

Recent rulings by other judges suggest that the learning-disabled students may well prevail in court. But even then the questions begged by Somnolent Samantha will remain. Westling and B.U.'s new guard insist that they have no animus against those with "genuine" learning impairments; they simply want to weed out the impostors. Yet, in holding up a trendy diagnosis to the bright light of public scrutiny, B.U. officials have raised issues that go to the core of a debate that has grown as civil rights law has expanded to cover not merely the halt, the lame and the blind, but the dysfunctional, the debilitated and the drowsy.

Should "learning-disabled" even be a protected category under federal law? What, exactly, is a learning disability? Are the B.U. plaintiffs at the vanguard of a new generation of civil rights warriors, as their supporters contend? Or is their lawsuit the reductio ad absurdum of identity politics and tort madness--Harrison Bergeron meets Perry Mason in The Case of the Litigious Lollygaggers?

The recent announcement by the Equal Employment Opportunity Commission that the Americans With Disabilities Act covers not only physically but mentally handicapped individuals has occasioned a flurry of hand-wringing editorials. Worried employers have painted a scary scenario of a law that will coddle murderous lunatics, endanger the welfare of unsuspecting customers and transform America's factories and foundries into dystopias of dementia. In some ways, however, it is the entrenchment of learning disability-- a comparatively undersung, and seemingly more benign, "hidden impairment"--that poses the more

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subversive challenge to basic notions of fair play, professionalism and equal protection under the law.

No one would deny that an individual who is unfortunate enough to be afflicted with one of the classically defined mental disorders--schizophrenia, paranoia, manic depression, and so on--suffers from a clearly defined and clearly recognizable infirmity, one that is likely to impair significantly her educational achievements and career prospects. (Whether employers should be legally compelled to overlook these mental disabilities is another matter.) The diagnosis of a learning disability, in contrast, is a far more subjective matter. For many of the more recently discovered learning maladies--math disability, foreign-language disability, "dysrationalia"--there are no standard tests. To be sure, real and debilitating learning disabilities do exist. But there are no good scientific grounds to believe that some of the more exotic diagnoses have any basis in reality. Yet, thanks to the interlocking protections of three powerful federal disability laws, refusal to accommodate even the most dubious claims of learning impairment is now treated by the courts and by the federal government as the persecution of a protected minority class.

Modern disability law was inspired by the most humane of motives, to protect the disabled from prejudices that deprived them of equal opportunities in the workplace and in the classroom. From the outset, however, this grand aspiration was framed in the fuzziest of terms. The statutory framework for modern disability law was established in the Rehabilitation Act of 1973, which mandated assistance measures for the disabled in federal facilities. Here is how Section 504 of the act defined a learning disability: "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written ... which may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations." This remarkably broad definition is echoed in all subsequent disability laws, notably the 1975 Individuals With Disabilities Education Act, which mandated an array of services for disabled public school students, and the 1990 Americans With Disabilities Act, which extended the protections of the Rehabilitation Act into the private sector. All three laws are equally vague in their description of how people with disabilities must be treated. As the ADA puts it, in the case of any individual possessing a "disability" that results in "substantial impairment" of a "major life activity," schools and employers cannot "discriminate" and must provide "reasonable accommodation." The meaning of these legal appellations, as interpreted by the courts and the regulatory agencies, would turn out to be remarkably expansive.

There were some limits written into the disability laws. For instance, only "otherwise qualified" individuals are entitled to protection; accommodations are only mandated if they do not result in "undue hardship." But recently a number of rulings by federal courts and government enforcement agencies have revealed how flimsy these limits are.

Although compliance with federal disability law is not supposed to come at the expense of education or job performance standards, the Department of Education's Office of Civil Rights has delivered stinging rebukes to schools that refuse to exempt learning-disabled students from academic requirements. Last May, a student afflicted with dyscalculia--math disability--filed a complaint with the San Francisco Office for Civil Rights after her college declined to waive the math course required of all business majors in paralegal studies. Despite the college's earnest attempts to accommodate her

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impairment--the student would receive extensive tutoring and extra time on tests--OCR issued a finding of discrimination anyway, writing on May 30 that " absolute rules against any particular form of academic adjustment or accommodation are disfavored by the law." When the school asked if they could require learning-disabled students to at least try to pass a required course, OCR said no way, arguing that "it is discriminatory to require the student to consume his or her time and jeopardize his or her grade point average taking a particular mathematics course when the person qualified to administer and/or interpret the psychometric data has determined that the student, due to his or her disability, is highly unlikely to pass the course with any of the accommodations the institution can identify and/or deliver." OCR added that this rule should apply even to borderline dyscalculics, that " substantial group of students for whom interpretation of psychometric measures provide no clear prediction of success in a particular mathematics course."

This is the new frontier, the learning disability as an opportunistic tautology. The fact that one displays a marked lack of aptitude for a particular intellectual discipline or profession establishes one's legal right to ensure at least a degree of success in that discipline or profession. That is not a fanciful conceit, but an adjudicated reality. Several judges have recently ventured the enterprising claim that any person who is not performing up to his or her abilities in a chosen endeavor suffers from a learning disability within the meaning of the ADA.

Consider the lawsuit filed in 1993 by an aspiring attorney named Marilyn J. Bartlett. Bartlett graduated in 1991 from Vermont Law School, where she received generous accommodations of her reading disability and disability in " phonological processing." Nonetheless, Bartlett did not do well, graduating with a GPA of 2.32 and a class standing of 143 out of 153 students. She then went to work as a professor of education at Dowling College, where, according to court documents, 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."

When it came time to take the bar exam, Bartlett petitioned the New York Board of Law Examiners for special arrangements. She wanted unlimited time for the test, access to food and drink, a private room and the use of an amanuensis to record her answers. Acting on the advice of its own expert, who reported that Bartlett's test data did not support a diagnosis of a reading disorder, the board refused Bartlett's demands. Three times, Bartlett attempted the exam without accommodation. After her third failure, she sued the board.

On July 3, 1997, Judge Sonia Sotomayor ruled in Bartlett's favor. Ordering the board to provide the accommodations Bartlett had requested, she also awarded Bartlett \$12,500 in compensatory damages. Judge Sotomayor did not challenge the board's contention that Bartlett was neither impaired nor disabled, at least not in the traditional sense. In an enterprising new twist, however, she declared that Bartlett's skills ought not to be compared to those of an "average person in the general population" but, rather, to an " average person with comparable training, skills and abilities"--i.e., to her fellow cohort of aspiring lawyers. An "essential question" in the case, said the judge, was whether the plaintiff would "have a substantial impairment in performing the job" of a practicing lawyer. The answer to this question was "yes," the judge found. And this answer--the fact that Bartlett would have a very hard time meeting the job requirements of a practicing lawyer--was, in the judge's opinion, precisely

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the reason why Bartlett had a protected right to become a practicing lawyer. Thus, Judge Sotomayor ruled that Bartlett's "inability to be accommodated on the bar exam--and her accompanying impediment to becoming bar-admitted--exclude her from a class of jobs' under the ADA," and could not be permitted.

To drive home her point, Judge Sotomayor triumphantly cited Bartlett's performance during a courtroom demonstration of her reading skills. "Plaintiff read haltingly and laboriously, whispering and sounding out some words more than once under her breath before she spoke them aloud," the judge recalled. "She made one word identification error, reading the word 'indicted' as 'indicated.'"

It could, of course, be argued that the ability to read is an essential function of lawyering; that any law school graduate who cannot distinguish "indicated" from "indicted," who cannot perform cognitive tasks under time constraints, is incapable of performing the functions of a practicing lawyer and therefore, perhaps, should not be a practicing lawyer. But one would be arguing those things in the teeth of the law. Thanks to the Americans With Disabilities Act, the Individuals With Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973, Bartlett and her fellows among the learning-disabled are now eligible for a lifelong buffet of perks, special breaks and procedural protections, a web of entitlement that extends from cradle to grave.

Jon Westling is a crusty chainsmoker with owlsh glasses and a stuffy, rotund manner, an easy figure to mock. But, as it turns out, his portrait of Somnolent Samantha was hardly a wild flight of fancy. Before beginning his formal audit of ldss's practices, Westling asked its director, Loring Brinckerhoff, whether the office had ever turned down a single request for special dispensation on the grounds that the student hadn't presented enough evidence. When Brinckerhoff answered no, Westling asked to see folders and accommodation letters for the twenty-eight students who had most recently requested and received adjustments to their academic program. Of these twenty-eight, Westling pronounced no fewer than twenty-seven to be insufficiently documented. And, indeed, copies of the students' files, exhumed during the discovery phase of the lawsuit and now available as courthouse exhibits, seem to provide some support for this harsh assessment.

For starters, some of the diagnosticians themselves appeared somewhat impaired. One evaluator wrote that "taking notes and underlying sic while reading" would help a student "maintain her attention." Another student, a female, was erroneously referred to as "Joe" by the evaluator who pronounced her to be learningdisabled. Even more troubling, though, was ldss's seemingly reflexive acquiescence to students' wish lists. Michael Cahaley, one of the plaintiffs in the lawsuit, was, according to Westling's affidavit, described by his doctor as having "minimal" deficits: "this very intelligent youngster should do well in high school and college." Nonetheless, Cahaley had requested--and was granted--double time on all of his examinations. In another case, the clinical psychologist who examined a student reported that his "skill deficits" were "not severe enough to be a learning disability"; but a learning specialist misread the report and recommended accommodation anyway, on the grounds that "the student was evaluated and found to have a learning disability."

Sometimes the evaluator's recommendations seemed just bizarre. In one case, a student's psychologist opined that a student who "appears to have subtle verbal processing difficulties" should not be "asked to recall very specific data or information." As Westling dryly observed in his affidavit, requests for "very

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specific data or information" constituted "an essential element of every course and academic program offered by Boston University."

At the trial, the student plaintiffs came off as something other than inspiring champions for disabled rights. Elizabeth Guckenberger, a third-year law student who was diagnosed as having "a visual and oral processing disability" while a freshman at Carleton College, admitted she had received every accommodation she had ever requested under the Westling regime, including extra time on exams, a reduced course load and priority registration in the law school section of her choice. Benjamin Freedman, a senior with dysgraphia ("really, really bad handwriting," he says), also got everything he wanted, including double time on exams, the option to be tested orally and the services of a professional note-taker.

Plaintiff Jordan Nodelman, who claimed he suffered from Attention Deficit Disorder (ADD), also had received every accommodation he ever requested, including the right to take all tests in a distraction-free environment with extra time. At trial, he admitted that his attention deficit waxed and waned. When "something's very important to me," he explained at trial, he "forced himself to concentrate." Nodelman had a 3.6 GPA, had made the Dean's List and had taken his tests untimed in every class except Zen Guitar.

Perhaps the least compelling plaintiff was sophomore Scott Greeley, who testified that he suffers from an "audio-visual learning processing deficit." At B.U., Greeley had been provided with a note-taker, time-and-a-half on tests and an open-ended right to have any test question "clarified" by the instructor. But the perks didn't help much--as Greeley explained at trial, after the accommodations were provided his GPA improved to a less-than-stellar 1.9. Over the course of the trial, B.U. attorneys established that this shoddy showing was perhaps not wholly attributable to societal persecution of the disabled. Queried about his spotty attendance record in a science course for which he received a "D" grade, Greeley explained that "part of my disability is that I need a structured schedule." "Would you say you missed over half the classes?" persisted the judge. "Probably around that, yes," replied the undergrad.

It would be comforting to think that B.U.'s "disabled" plaintiffs represent an exception to the norm, but this does not seem to be the case. Over the years, proposed reforms to disability law have been effectively vanquished by televised testimony from sobbing children in wheelchairs. Increasingly, however, individuals with grave physical handicaps comprise only a small portion of the people who claim special privilege under the federal disability laws. As Manhattan Institute fellow Walter Olson points out in *The Excuse Factory*, complaints by the traditionally disabled--the deaf, blind and paraplegic--have accounted for only a tiny share of ADA lawsuits. According to 1996 eeoc figures, only 8 percent of employment complaints have come from wheelchair users and a mere 6 percent from the deaf or blind, bringing the total for these traditional disabilities to a skimpy 14 percent.

The diagnosis of learning disability, by contrast, is experiencing something of a boom. In the space of only a few years, the number of children diagnosed with Attention Deficit Disorder, reading disability and math disability has swollen by hundreds of thousands. Of the 5.3 million handicapped children currently on Individual Education Programs (specially tailored, often costly regimens of technology, therapy and one-on-one tutoring that public schools are mandated to provide to every child with a disability), the U.S. Department of

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Education estimates that just over half (51 percent) are learning-disabled. According to the authors of the book Promoting Postsecondary Education for Students with Learning Disabilities, up to 300,000 students currently enrolled in college have proclaimed that they are learning-disabled and need special accommodations.

The National Collegiate Athletic Association, meanwhile, is under intense legal pressure from the Justice Department to relax the initial eligibility standards that require student athletes to get a cumulative score of 700 on their SATs and to maintain at least a 2.0 grade point average in core courses. These standards are meant to offer a slight safeguard against the tendency of universities to enroll and graduate young men and women whose ability to pass a ball exceeds their ability to pass their courses. Not so fast, said Justice Department lawyer Christopher J. Kuczynski. In a March 1996 letter to the ncaa, Kuczynski warned that the association's academic standards may "have the affect sic of excluding students with disabilities from participation in college athletics." ncaa spokesman Kevin Lennon says the association is in the process of revising its policy "to accommodate students with learning disabilities."

The most common estimate cited by advocacy groups and frequently repeated in government documents is that between 15 and 20 percent of the general population have learning disabilities. Any hypochondriac can test himself: in a recent booklet, the American Council on Education supplies a checklist of symptoms for adults who suspect they may be learning-disabled. Some of us will be disturbed to recognize in the checklist possible symptoms of our own: according to the council, telltale signs of adult learning-disablement include "a short attention span," impulsivity, "difficulty telling or understanding jokes," "difficulty following a schedule, being on time, or meeting deadlines" and "trouble reading maps."

As the ranks of the learning-disabled swell, so too do the number of boutique diagnoses. Trouble with numbers could signal dyscalculia, a crippling ailment that prevents one from learning math. Lousy grammar may stem from the aforementioned dysgraphia, a disorder of written expression. Dozing in class is evidence of latent ADD; perhaps even adhd (Attention Deficit/Hyperactivity Disorder). Many tykes also exhibit the telltale symptoms of ODD--Oppositional Defiant Disorder. According to the American Psychiatric Association, the defining feature of ODD is "a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior ... characterized by the frequent occurrence of at least four of the following behaviors: losing temper, arguing with adults, actively defying or refusing to comply with the requests or rules of adults, deliberately doing things that will annoy other people, blaming others for his or her own mistakes or misbehavior." Rates of up to 16 percent have been reported.

A tongue-tied toddler could have dysphasia, otherwise known as a "difficulty using spoken language to communicate." Boorish behavior may be a sign of dyssemia, defined as a "difficulty with signals and social cues." (According to the Interagency Commission on Learning Disabilities, social skills are a domain in which a learning disability can occur.) An even more sinister malady is dysrationalia, defined in an October 1993 issue of The Journal of Learning Disabilities as "a level of rationality, as demonstrated in thinking and behavior, that is significantly below the level of the individual's intellectual capacity:" A checklist of childhood precursors include "premature closure, belief perseverance ... resistance to new ideas, dogmatism about beliefs, and

lack of reflectiveness."

These neo-disabilities are likely to strike the nonspecialist as an exercise in pathologizing childhood behavior, and the nonspecialist would be on to something. Increasingly, scholars and clinicians in the field of learning disability are speaking out against the dangers of promiscuous diagnosis of disablement. "In the space of twenty years, American psychiatry has gone from blaming Johnny's mother to blaming Johnny's brain," says Dr. Lawrence Diller, an assistant clinical professor of behavioral pediatrics at the University of California at San Francisco. The problem, says Dr. Diller, is that in a variant of the Lake Woebegone effect, "Bs and Cs have become unacceptable to the middle classes. Average is a pejorative." And yet, as he points out, "someone has got to be average."

Some scholars have even begun to question the notion that there is such a thing as a learning disability. In a recently published book, *Off Track*, one of its authors, Robert Sternberg, a Yale professor of psychology and education, presents a powerful case for why the concept of learning disability ought to be abandoned. Drawing on the latest research into the physiology of the human brain, Sternberg argues that there is no evidence to support the view that children who are labeled as learning-disabled have an immutable neurological disability in learning. From a medical standpoint, he writes, there is no scientific proof that children labeled as learning-disabled actually have a discernible biological ailment "in terms of the underlying cognitive abilities related to reading." Says Sternberg: "I'm not denying that there are dramatic disparities in the speed with which people learn... But, most of the time, what you're talking about here is a garden-variety poor reader. You're talking about someone who happens to be not very good in math."

To be sure, there is no question that children who are intellectually normal, and sometimes even unusually bright, can have genuine, serious difficulties in learning how to read or to do math; and that educators should do everything in their power to put these students back on track developmentally. But as their clinics swarm with hordes of pushy parents and catatonic collegians, all hankering for a diagnosis of intractable infirmity, a growing number of diagnosticians are crying foul. "The way the diagnoses of Attention Deficit Disorder and learning disabilities are being used right now, a backlash against the conditions is inevitable," says Diller. "We've created a paradox where the more problems you have, the better off you may be. That's a prescription for societal gridlock."

It's no puzzle, of course, why the learning-disability movement insists that learning disability is an immutable, brain-based disorder--a malady that is "fundamentally neurological in origin," according to the National Center for Learning Disabilities. For it is this understanding of learning disability that justifies its inclusion as a protected category under the ADA. If learning disability is an innate neurological defect that "artificially" lowers test performance, then it follows that learning-disabled individuals should be able to take tests under special conditions that will neutralize the effects of this handicap. In *Help Yourself: Advice for College-Bound Students With Learning Disabilities*, author Erica-lee Lewis stresses that asking for an untimed administration of your SATs "does NOT give you an unfair advantage; it just reduces the unfair disadvantage by providing you with equal access and opportunity. You deserve that and the law protects you against anything short of that fairness!"

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There's just one tiny problem: the two major studies on the subject say that precisely the opposite is true. As Dr. Warren W. Willingham, a psychometrician with the Educational Testing Service, points out in his widely respected textbook *Testing Handicapped Students*, institutions have long relied on standardized tests because such tests, for all their faults, tend to be highly reliable in their estimation of how well a particular applicant will actually perform in college or on the job. The case of learning-disabled students, in contrast, "presents a very different picture," writes Willingham. When students diagnosed with learning disabilities were allowed to take the SAT on an untimed or extended-time basis, the "college grades of learning-disabled students were substantially overpredicted," suggesting that "providing longer amounts of time may raise scores beyond the level appropriate to compensate for the disability." The other study--by Marjorie Ragosta, one of ETS's own researchers--confirms Willingham's pessimistic diagnosis.

Both researchers raise a troubling question: whether, as Willingham puts it, "the nonstandard version of the SAT is seriously biased in favor of learning-disabled students." The concern is not just theoretical. There is reason to suspect that fast-track students, and their parents, have figured out that a little learning disability can be an advantageous thing--can make the difference, in a hypercompetitive setting, between getting into (and getting successfully out of) the right school. The privilege of taking the SAT on an untimed basis raises students' scores by an average of 100 points, according to the College Board. In the last couple of years, testing agencies have been bombarded with requests from students who proclaim that they are learning-disabled and will therefore need additional time. According to Kevin Gonzales, a spokesman for the Educational Testing Service, 18,000 learning-disabled examinees received "special administration" for the SAT in 1991-92. By 1996-97, that number had more than doubled, to 40,000. Requests for accommodation on Advanced Placement exams, meanwhile, have quadrupled--in 1996, 2,244 learning-disabled eggheads took their A.P. tests untimed. To reap the benefits of this particularly useful perk, ETS requires only a letter of verification from a school special education director or a state-licensed psychologist or psychiatrist.

Certification and licensure exams--long, carefully standardized examinations that function as gatekeepers into the professions--are also under assault. In 1995, the National Board of Medical Examiners administered over 450 untimed Medical College Admissions Tests--a fivefold increase from 1990. Lawyers, too, are requesting special dispensation. This year, in New York alone, more than 400 aspiring attorneys have asked to take the bar exam untimed. "The requests have increased tremendously," says Nancy Carpenter, who heads up the New York Board of Legal Examiners. "ADD is becoming much more common. We have a lot of dysgraphia. Some dyscalculia.... Most applicants just say, unspecified learning disability.' They are all over the lot."

ETS officials do not like to talk about the Willingham and Ragosta studies. Indeed, far from planning to toughen up its accommodations policy, the agency seems poised to eliminate its only check on spurious claims--the marking, or "flagging" of a score to indicate that an applicant took the test under nonstandard conditions. For years, the learning-disability industry has railed against the asterisk, arguing that it violates a student's right to keep his or her disability a secret. Now ETS seems prepared to agree. "We are taking a good, hard look at the whole issue of flagging," says ETS's newly appointed director of disability services, Loring Brinckerhoff. "I'm not prepared to say it's

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going to go away overnight.... My gut feeling is that it may well be a Section 504 violation." Yes, that's the same Loring Brinckerhoff who recently resigned under pressure by Jon Westling from his B. U. sinecure. "Isn't it ironic," muses Brinckerhoff. "I'm told by Boston University that I'm unqualified to do my job. Yet here I am--at the biggest testing agency in the world--determining accommodations for hundreds of thousands of people with disabilities."

Of course, a legally recognized disability means more than just extra time on tests--or even extra privileges in the classroom. Under the Individuals With Disabilities Education Act, a diagnosis of L.D. also qualifies a child for an Individual Education Program--a handcrafted educational program, replete with techno-goodies and other kinds of specialized attention. The law, which states that "all children with disabilities" ought to have available to them "a free and appropriate public education," encourages parents to be bound not by what the school district can offer, but by what they think their child needs. It specifies that, in the event that the parents don't care for their child's IEP, the local school district must convene a "an impartial due process hearing"--a trial-like proceeding in which both parties have the right to be represented by a lawyer, the right to subpoena, confront and cross-examine witnesses, and the right to present evidence. If a school district loses the due process hearing, it must pay the parents' attorneys' fees. The result, says Raymond Bryant, director of special education for Maryland's Montgomery County public schools, has left school districts vulnerable to parental tactics bordering on extortion. "It used to be that kids didn't try hard enough, or didn't work hard enough," says Bryant. "Now, it's ADD or L.D.... They want their child to read half the material. They want him to do half the homework. They don't want him to take the same tests. But guess what? They want him to get the same grades!"

In prosperous, sun-dappled school districts around the country, exotic new learning disabilities are popping up, each requiring its own costly cure. In Orange County, where "executive function disorder" (difficulty initiating, organizing and planning behavior) reigns, parents have begun demanding that schools foot the bill for horseback riding lessons. "This is now supposed to be the way to help kids with EFD," says Peter Hartman, superintendent of the Saddleback Unified School District. "There's some stable in the area that they all go to." In Holliston, Massachusetts, parents of children with Attention Deficit/Hyperactivity Disorder hanker for a trendy new treatment called "educational kinesthesiology," a sort of kiddie Pilates for angst-ridden tots. "Unfortunately, the treatment can only be done by a, quote, 'licensed educational kinesthesiologist,'" sighs Margaret Reed, special-ed administrator for Holliston Public Schools. "And it seems there's only one in the district. And she charges \$50 an hour."

Sometimes, it seems, the problem is less inattentive children than overattentive parents, many of whom are unwilling to believe their progeny is less than perfect. Consider the case of Michael F., whose plight was thrashed out at length at a 1996 hearing after his parents expressed discontent with his Individual Education Program. Michael, then a ninth grader, was thriving at his high school--earning As in honors courses and demonstrating "overall cognitive functioning in the very superior range (99th percentile)." He had also written a book, played in the school band and, according to the hearing officer, "successfully completed bar mitzvah training."

At the hearing, it emerged that Michael did all of this while fighting off the ravages of "attention deficit disorder, language-based specific learning

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disabilities, neuro-motor dysfunction, and tactile sensitivity." These numerous handicaps had made Michael eligible for a generous dose of special- education services. Under the terms specified in his IEP, Michael received three and three-eighths hours a week of special tutoring; extra time on homework assignments and tests; "allowance of standing up, stretching and/or walking around in class"; "permission to chew gum or hard candy to help him concentrate and focus"; "seat assignments in close proximity to the teacher"; and "access to a tape recorder, transcripts of lectures, outlines and notes and/or a laptop computer if needed." Now Mr. and Mrs. F. wanted even more. Michael's low grade on his Honors Geometry midterm, they argued at the hearing, revealed evidence of a new, previously unsuspected disability "with the concepts of quadratic equations and the Pythagorean theorem." They blamed the school for numerous "procedural violations," including "failure to pursue a math reevaluation of Michael" after he received a 65 on his midterm. Now, they said, their son would experience "substantial regression" over the summer, unless his high school saw fit to furnish him with "extended summer programming in the form of math tutoring."

This, the hearing officer would not do. True, she wrote, Michael's poor showing on his geometry midterm might well be "related to his learning disability and/or ADD." On the other hand, she boldly ventured, it could also be that "math remains a subject where Michael will not receive As in an Honors track."

Ensnconced in his pleasantly stuffy office, an Anglophile's fantasy of elephant ear plants and bas-relief cornucopias in carved wood, Jon Westling awaits the decision of Judge Patti B. Saris. He is resigned to the knowledge that, whatever is decided, the learning-disabled activists and their supporters will regard him as a villain. "This is a cause where the support and commitment verges almost on fanaticism," he says, puffing on one Marlboro Light, then another. "And whenever you have less than ideal science coupled with something close to fanaticism, you can move beyond appropriate use into areas of abuse."

The students say that, whatever the outcome, the litigation has salved their faltering self-esteem. Ben Freedman, a 21-year-old senior who has maintained a 3.6 GPA despite a reading and writing disability and dysgraphia, likens his crusade to the civil rights movement of the 1960s. "I don't want to compare myself to Dr. King, but there are great similarities," he says.

Anne Schneider, too, says she's achieved closure on the whole regrettable incident. To the true believers, it seems, there's an explanation for everything; and it's usually the same explanation. "I've been thinking about Jon Westling," she tells me one evening. "For all his bragging about his Rhodes scholarship, he didn't do the final paper. He's not a finisher." Schneider lets out a reflective sigh. "To tell the truth," she says, "I've always thought: learning disability."

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