Administering Credentialing Exams under the ADA

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Typically, credentialing organizations require their candidates pass an examination as a condition of receiving the organization's credential. Usually, these examinations are administered by the organization and/or a third party vendor. Often testing administrators are uncertain about how best to respond to the protected class of candidates that request accommodations under the American with Disabilities Act (ADA). This uncertainty is due to a lack of consistency and clarity on this subject, leading to uneven results. Unfortunately, recently, this problem has been exacerbated.

Title III of the ADA (42 U.S.C. §12189) relates to the administration of credentialing and licensing examinations ("Act"). This section states, in pertinent part, that the exam administrator must offer the exam in a "place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." This has been interpreted to mean that the administrator must reasonably accommodate the disability. Until recently, it was commonly thought that, after taking into account the type of, and costs associated with, the accommodation, the administrator met the ADA requirements if the administrator's proposed accommodation was reasonable. The uncertainty usually revolved around whether the candidate was part of the "protected class" and, more commonly, what was meant by the term "reasonable"? By its nature, "reasonable" is a subjective definition. Therefore, it is no surprise that courts throughout the US interpreted "reasonable" differently.

Things may have greatly changed in 2011. The applicable Federal regulations which supplement the Act state that the examination must be "selected and administered so as to best ensure that… the results accurately reflect the individual's aptitude or achievement level." (28 C.F.R. §36.309(b)(i), emphasis added) Courts have begun to interpret these regulations and we have started to see a change in emphasis of required remedial behavior. Previously, courts focused their attention on ensuring that the accommodations provided by the administrator reasonably allowed candidates to take the exam. Simply put, the focus was on accommodating the disability. As long as the accommodation was reasonable, not necessarily the best, the accommodation was acceptable.

In 2011, some courts dramatically shifted the emphasis of their inquiry to "best ensuring" that exam results reflected the candidate's aptitude of the subject matter. Under this reasoning, it isn't sufficient to provide a reasonable accommodation. Rather, the exam administrator now must best ensure that the administration of the exam

measures the ability of the candidate. This change likely will lead to more uncertainty and significant additional costs for test administrators and test venues.

There were several Federal cases in 2011 on this subject. Notably, Enyart v. National Conference of Bar Examiners, Inc. (630 F.3d 1153, 2011) and Jones v. National Conference of Bar Examiners, Inc. (Case no. 5:11-cv-174, U.S. District Court, D. Vermont, 2011). Enyart, a Ninth Circuit Case (California) and Jones, a Federal District Court case (Vermont), both involved test applicants whom had visual impairment issues and sued NCBE in connection with the California and Vermont Bar exams respectively. In both instances, the complainants properly notified NCBE about their respective disabilities. In both cases, NCBE offered accommodations that were consistent with how they handled such requests in the past and, as discussed in Enyart, were approved in a settlement agreement with the Department of Justice (DOJ). Relying on the fact that these accommodations had been considered reasonable in the past, NCBE felt that it had complied with the ADA's "reasonable accommodations" standard.

Both Enyart and Jones disagreed. They felt that, among other reasons, the offered accommodations were insufficient because (i) their disabilities had progressed and the accommodations they used in the past for other exams no longer applied or helped, (ii) technology had changed and better accommodations were now available, and (iii) the Federal regulations required that NCBE "best ensure" that the administration of the exam measured their ability, not their disability.

The courts in both cases agreed with the complainants. Thus, at least in those jurisdictions, exam administrators now are on notice that they must shift their focus and attention to best ensure that each protected class candidate is tested on her ability and achievement level. The emphasis no longer is on whether the disability was reasonably accommodated. Rather, exam administrators must assess how to best ensure that candidates have their abilities assessed, taking into account technology advances and their respective needs. It is worth noting that, in another similar case in the District of Columbia, Bonnette v. District of Columbia Court of Appeals (796 F. Supp2d 164, 2011) the Court disagreed with NCBE's argument that the "best ensure" requirement exceeded the clear limits of the ADA. It stated that Bonnette was likely to succeed on the merits of her claim, and granted her a preliminary injunction against NCBE. This again demonstrates a trend that the utilization of the "best ensure" standard is spreading throughout the country.

What does this mean for exam administrators? First, we must keep a watchful eye on current and future court cases to have a better understanding whether the "best ensure" standard will become the nationally recognized standard. NCBE has appealed the Ninth Circuit's decision to the United States Supreme Court. If the Supreme Court hears the matter, we may have a better idea of how to best implement the ADA and applicable regulations. Second, if you are in the Ninth Circuit (Arizona, Arkansas, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) Vermont and/or

the District of Columbia (and perhaps more states in the future), then you need to consider revising your policies to reflect the "best ensure" standard. This will require a change in assessment, process and implementation, not to mention cost. It will also create, at least in the near future, complications arising from uncertainty about how best to apply this standard, since there are no real guidelines about what is best for each covered disability. Additional and substantive research and training will be needed. Third, review your third party exam administrator contracts. They may need to be modified and/or renegotiated to insist that exam administrators and testing venues have procedures that will meet the "best ensure" standard. Test administrators no longer will be able to rely on the fact that they handled similar requests in the past a certain way. Technology has changed and the remedial efforts may have to change as well. Fourth, when you are faced with this problem, don't delay. Review your policies, do your research, assess the requested accommodation, and contact your attorney to quickly best understand your legal obligations and their financial implications. Exam administration and compliance with the ADA is quickly changing. You need to be on top of the issues and anticipate your obligations before it becomes a prohibitively expensive situation.

Questions, please feel free to contact Rich Bar at rbar@gkglaw.com.