



Candidate Fired Up For Exam

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With the enactment of the Americans with Disabilities Act (ADA) in 1992 and the regulations promulgated thereafter, many examination entities like the Federation of State Boards of Physical Therapy (FSBPT) have addressed requests for accommodations by otherwise qualified examination candidates entitled to modifications in the examination experience. The ADA is intended to ensure that all examinees are provided with an equal opportunity to substantiate the knowledge, skills and abilities intended to be tested on the assessment instrument.

In 2009, the Americans with Disabilities Act Amendments Act (ADAAA) was enacted in response to the judiciary interpreting the ADA in a manner that did not fully recognize persons with disabilities. The ADAAA also impacted testing entities like FSBPT by broadening the definition of disability and, perhaps, broadening the pool of persons entitled to accommodations during the exam administration. (The collective Act and amendments will be referred to as the ADA.) Of course, FSBPT strives to ensure that its examinations are administered in a consistent manner to all otherwise eligible persons while considering the legal defensibility and security needs of its constituent member boards of physical therapy. The state boards are ultimately responsible for determining licensure eligibility under applicable law and on some occasions, confusion reigns over the application of the ADAAA and what constitutes a “state actor” for purposes of propounding certain legal theories. Consider the following.

A medical student (Plaintiff) at the University of Illinois at Chicago sought to take the United States Medical Licensing Examination CK-II (exam or examination) as successful completion of the exam was required as a condition of graduation. The Plaintiff, who is legally blind, registered for the exam and apparently requested certain accommodations. The judicial opinion did not specify the accommodations requested. However, when she showed up at the test center, the National Board of Medical Examiners (NBME) “did not have the proper disability accommodations under the ADA” according to the Plaintiff.

The Plaintiff proceeded to start a small fire in the restroom of the examination building that resulted in her arrest. The Plaintiff pled guilty to malicious destruction of property. Based upon this criminal conviction that formed the basis for “irregular behavior” during a test administration, the NBME suspended the Plaintiff from taking the examination for a period of three years. In March 2012, the Plaintiff filed a complaint in Federal District Court for the Eastern District of Pennsylvania. In her complaint, the Plaintiff maintained that the NBME violated her constitutional rights to be “free from cruel and unusual punishment.” She also alleged that the NBME violated her Fourteenth Amendment right to procedural and substantive due process and violated her civil rights by “comingling the investigative and adjudicative functions” involving the charges against her. Finally, the Plaintiff argued that the NBME violated the ADA by failing to reasonably accommodate her blindness. The Plaintiff asked for a preliminary and permanent injunction requiring the NBME to permit her to take the exam.

The NBME argued that it is not a state actor and thus not subject to suit under the counts related to cruel and unusual punishment, procedural and substantive due process and civil rights. Further, the NBME stated that the Plaintiff did not state a claim upon which relief could be granted pursuant to the ADA. These defenses were propounded by the NBME through a motion to dismiss the lawsuit.

The District Court first addressed the legal standard in assessing a motion to dismiss. Basically, all factual allegations are accepted as true and construed in a light most favorable to the Plaintiff with a determination of whether the Plaintiff is entitled to relief under any reasonable reading of the complaint.

Next, the court examined the Plaintiff’s request for a preliminary injunction. To succeed in a request for a preliminary injunction, a moving party must establish a likelihood of success on the merits, that irreparable harm will be suffered in the absence of an award, that the balance of the equities tip in favor of the Plaintiff, and that an injunction is in the public interest. As noted by the court, injunctive relief is an extraordinary remedy that may only be awarded “upon a clear showing that the plaintiff is entitled to such relief.”

Turning its attention to the legal arguments, the court examined the alleged constitutional violations. In order for constitution and federal law claims to apply, the defendant must have acted under “color of state law.” In other words, the party alleged to have violated such rights must be a state actor. The Plaintiff argued that the prohibition from sitting for the exam precluded the Plaintiff from obtaining a state license, thus implicating the actions of the NBME under color of state law. When assessing whether an entity is a state actor, the courts look to whether a state delegated a power traditionally reserved for the state; or whether there is a joint participation between the state and a private entity such that the state insinuated itself into a position of interdependence; or whether there is a close nexus between the state and the private entity such that the private entity may be fairly treated as the state.

Analyzing previous case law, the court determined that the NBME is not a state actor and is, thus, not subject to constitutional scrutiny or conclusions that it acted under color of state law. The court noted that NBME does not license physicians, nor does it maintain a symbiotic relationship with the states. The court also found that the services provided by NBME are not exclusive functions. Accordingly, the court dismissed the first three counts of the complaint.

Next, the court examined the ADA and noted that organizations that offer “examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional or trade purposes shall offer such examinations or course in a place and manner accessible to persons with disabilities or offer alternative accessible arrangement... .” However, the Plaintiff in this case alleged few details to support her claim that NBME did not reasonably accommodate her disability. The Plaintiff merely noted that she is legally blind and in need of special equipment to take the exam. Her complaint was not supported by any factual background and, as noted by the court, was just a “recitation of the elements” of a cause of action. “The paucity of factual allegations supporting the ADA claim makes determination of its plausibility difficult.” Based upon her recognition of the preliminary position of the court, the Plaintiff asked for leave to file an amended complaint. The court sympathized with this position and granted the Plaintiff the right to file an amended complaint and denied NBME’s motion to dismiss the ADA related count.

Finally, the court denied the Plaintiff’s motion for a preliminary injunction related to the provision of accommodations under the ADA. The court quickly concluded the Plaintiff cannot show a likelihood of success on the merits, ending the need for the court to address the other factors relevant to a request for injunctive relief. However, the court recognized the potential for irreparable harm in that University of Illinois at Chicago students have a seven-year window to pass the exam and graduate. Failure to pass the exam within the seven-year period will preclude graduation and the Plaintiff argued that the three-year prohibition from access to the exam creates irreparable harm. But, the Plaintiff failed to address issues of whether the school would provide an extension of time or whether her opportunities to transfer were extinguished. Based upon these factors and the public interest at stake, the court denied the Plaintiff’s request for a preliminary injunction.

The ADA provides examination candidates with a legal basis for requesting and receiving accommodations to ensure that the examination experience truly reflects knowledge, skills, and abilities. Regulatory boards, in conjunction with the applicant and testing organizations, effectively handle the negotiation and implementation of accommodations. Disputes over the accommodations seem to be rare, but circumstances may arise where accommodation requests are either unreasonable or, as in this case, not specifically delineated.

Mahmood v. National Board of Medical Examiners, 2012 U.S. Dist. LEXIS 86837 (District Ct. PA 2012)



Dale J. Atkinson, who received his law degree from Northwestern School of Law, Portland, Oregon, is the sole, managing member of the Northbrook, Illinois law firm of Atkinson & Atkinson, LLC which represents various associations of regulatory boards.

Mr. Atkinson represents the referenced associations in all matters relating to their operations as not for profit corporations, including regulatory activities, education and accreditation, disciplinary actions, model legislation and applications, and all phases of the development and administration of licensure examination programs, licensure transfer programs, licensure credentials verification and storage. He is a frequent speaker before these association clients as well as other regulatory groups and also produces numerous writings on these subjects for publications.

Mr. Atkinson also serves as Executive Director of FARB, a not for profit association whose full members consist of associations of regulatory boards, which facilitates cross- profession interaction, provides educational programs for board members, staff, investigators, and attorneys related to regulation in the interest of public protection.