HIGH STAKES TESTING ACCOMMODATION DENIALS

TEMPLATE LANGUAGE TO CRAFT STRONGER APPEALS USING LEGAL CITATIONS

USING THIS DOCUMENT

This handout lists common justifications that high stakes testing agencies use to deny student disability related accommodation requests. For each denial reason, potential responses informed by legal citations, case law, and regulations under the 2008 Americans with Disabilities Act, as amended are provided with text and citations that you can use to draft a letter in support of a student's appeal.

The denial reasons and response headers are provided in an overview table to assist you in identifying which response templates apply your specific student's denial and case. Please note that each response header in the table is a link that will allow you to navigate to the full response template language. The response header text can be used as headings in your appeal letter with the full response text. **Be sure to replace placeholder text (i.e. [Applicant]) with the individual's name or specific documentation citation as prompted.**

OPENING PARAGRAPH SAMPLE

[Applicant] has satisfied their legal burden by providing the Board with full documentation of their disability and need for accommodations from a qualified professional.

The federal ADA regulations require that requests for documentation be "reasonable" and "limited" to the need for the accommodations and that licensing entities must give considerable weight to documentation of past accommodations in similar testing situations. (28 C.F.R. § 36.309(b)(1)(iv) (2011).) In addition, the DOJ states that *"when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation or aid request, they shall generally accept such documentation and provide the accommodations."* (Appendix A to Part 36: Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities.)

[Applicant]'s requests for accommodations were supported by a report provided by [Tester], a qualified professional who made an individualized assessment of [Applicant], in accordance with both the DSM-5 guidelines and the ADA Amendments Act language and regulations.

DENIAL REASONS AND RESPONSE OVERVIEW

DENIAL REASON	RESPONSE HEADER
TESTING AGENCY CONSULTANT INTERPRETS ASSESSMENT RESULTS DIFFERENTLY THAN THE STUDENT'S OWN PROVIDER	**Testing entities should defer to qualified experts who individually evaluated the applicant, over their own consultants.** 📎
"NOT DISABLED ENOUGH" **REVEWER STATES THAT STUDENT DOES NOT HAVE A DISABILITY BECAUSE THEY ARE NOT SUBSTANTIALLY LIMITED COMPARED TO MOST INDIVIDUALS/GENERAL POPULATION**	**Board/Reviewer Incorrectly Concluded the Student Does Not Have a Disability** 📎
USING THE DSM DIAGNOSTIC GUIDANCE AS A LEGAL TEST	**The Board is improperly using the DSM diagnostic guidance as a legal test.** 📎
STUDENT HAS BEEN SUCCESSFUL WITHOUT ACCOMMODATIONS AND THEREFORE IS NOT SUBSTANTIALLY LIMITED	**A Substantial Limitation May be Based on the Extent to Which the Impairment Affects the Condition, Manner, or Duration in which the Individual Performs the Major Life Activity** 📎
STUDENT HAS PERFORMED WELL ACADEMICALLY OR ON OTHER STANDARDIZED EXAMS WITHOUT ACCOMMODATIONS	**Past Record of Achievement** 📎
STUDENT SCORES ARE AVERAGE IN COMPARISION TO OTHERS IN THE GENERAL POPULATION	**Comparison to Others in the General Population** 📎
STUDENT HAS PERFORMED WELL ACADEMICALLY OR ON OTHER STANDARDIZED EXAMS WITHOUT ACCOMMODATIONS	**Mitigating Measures/Self-Accommodation** 📎
STUDENT WAS NOT DIAGNOSED IN CHILDHOOD; THEREFORE, THEY DO NOT HAVE A DISABILITY	**The Board is still relying on obsolete DSM-4 diagnostic criteria relating to childhood ADHD diagnosis, and therefore erroneously concluded that they had no evidence of childhood onset.** 📎
STUDENT WAS NOT DIAGNOSED IN CHILDHOOD; THEREFORE, THEY DO NOT HAVE A DISABILITY	**In reviewing [STUDENT NAME] previous accommodation request, the Board also ignored well-documented evidence that cultural background can prevent an individual from having a disability diagnosed during childhood.** 📎
ACCOMMODATIONS AREN'T NEEDED BECAUSE THE EXAM IS PASS/FAIL	**Consultants are creating an artificial distinction between letter graded and pass-fail exams; The bar exam is more than a pass-fail exam.** 📎

Testing entities should defer to qualified experts who individually evaluated the applicant, over their own consultants.

Under the Department of Justice's (DOJ) 2010 Regulations for the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), requests for documentation must be "reasonable" and "limited" to the need for the accommodations, and that licensing bodies/testing entities are to give "considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations[1]" Furthermore, the DOJ in Appendix A to Part 36--Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities, restate their "longstanding position" that:

> *[g]enerally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, or accommodation, or classification, such as eligibility for a special education program.**[2]***

The Department carefully considered comments, requests for clarification, and objections by some testing entities to phrases such as "without further inquiry," and reiterated that

> *[w]hen an applicant's documentation demonstrates a consistent history of a diagnosis of a disability, and is prepared by a qualified professional who has made an individualized evaluation of the applicant, there is little need for further inquiry into the nature of the disability and generally testing entities should grant the requested modification, accommodation, or aid.**[3]***

The DOJ further clarified what they meant by their emphasis on "individualized assessment." Their intent is to ensure that documentation is not only submitted by the appropriate qualified professional, but by one who has "individually and personally evaluated the candidate." Notably, the Department states that:

> ***[r]eports from experts who have personal familiarity with the candidate should take precedence over those from, for example, reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment.[4]*** (emphasis added)

[1] 28 C.F.R. § 36.309(b)(1)(iv) and (v) (2011)

[2] 28 C.F.R. § 36.309, App. A (2011)

[3] *Id*.

[4] *Id*.

Board/Reviewer Incorrectly Concluded the Student Does Not Have a Disability or The Board incorrectly concluded that [Applicant] does not have a disability.

A stated basis for denying [Applicant]'s reasonable accommodation request was that their ["application fails to establish an impairment that substantially limits a major life activity, as compared to most individuals/general population." – NOTE: use direct quote from denial here, one provided is the common statement.] The Americans with Disabilities Act Amendments Act of 2008 added reading, concentrating, and thinking to the list of major life activities. The Amendments Act also clarified that "substantially limits" must be interpreted to require a lesser degree of functional limitation than that provided prior to the ADA Amendments Act. Among other relevant clinical assessments, [Applicant]'s diagnostic report included numerous observations of their difficulty [insert functional limitation], going back to age [__]. It concluded that [cite specifics from report]. The report also found that [further findings from report]. All of this indicates that [Applicant]'s major life activities of [insert major life activities impacted] are substantially limited.

A significant discrepancy between ability and achievement can be sufficient to establish a disability that warrants accommodations. [name]'s evaluations show that type of discrepancy, stating, "[relevant quotation from psych-ed evaluation report]" (Evaluation, page __).

Note: If the lowest score(s) on a neuropsychological report are average, but the majority of scores fall in the superior range or greater – you can cite intracognitive discrepancies as record of the impairment. To accomplish this, you need to determine the difference between the student's outlier and uniformed score(s) and calculate the number of standard deviations between the lowest (outlier) score, and the more consistent higher scores. More than 1.5 standard deviation is considered an impairment.

Past Record of Achievement

It should be noted that **[NAME]** past record of achievement is not evidence that they are not substantially limited in a major life activity. In fact, federal regulations implementing the ADA Amendments Act state:

In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

29 CFR §1630.2(j) (4) (iii).

Comparison to Others in the General Population

The comparison to others in the general population under the ADA is expressly related to the amount of effort expended, not in the outcomes achieved after expending considerably more effort than peers to achieve the same results.

Mitigating Measures/Self-Accommodation

One of the primary changes in disability law codified by the ADA Amendments Act was the establishment that mitigating measures, including self-accommodation, do not remove one from the protected class under the ADA. The analysis included in the federal regulations implementing the ADA Amendments Act specifically states:

Self-mitigating measures or undocumented modifications or accommodations for students with impairments that affect learning, reading, or concentrating, may include measures such as devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; [and] teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts[.] … Each of these mitigating measures, whether formal or informal, documented or undocumented, can lessen the impact of, and improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. Nevertheless, these are only temporary supports; the individual still has a substantial limitation in a major life activity and would be a person with a disability under the ADA.

www.regulations.gov/#!documentDetail;D=DOJ_FRDOC_0001-0140.

The Board is improperly using the DSM diagnostic guidance as a legal test.

The DSM-5 expressly cautions against equating the clinical diagnostic criteria (intended as guidance for diagnosis and treatment) with legal criteria for presence of a disability. The Board is doing exactly what the DSM advised against when it categorically stated in its rejection letter, ["An impairment does not substantially limit a major life activity if it results in only mild limitations."] Whether a limitation experienced by an individual is "mild" is a clinical judgment—not a legal one. Further, the ADA requires that assessments of disability and reasonable accommodations must be done on an individual basis. The Board is impermissibly substituting its judgment for the diagnosis of a qualified professional.

A Substantial Limitation May be Based on the Extent to Which the Impairment Affects the Condition, Manner, or Duration in which the Individual Performs the Major Life Activity

[1] Namely, an individual who has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102 (1)(A) (2008).

[2] *See* H.R. Rep. No. 110-739, pt. 1 (2008).

[3] 29 C.F.R. § 1630.2

[4] *See* H.R. Rep. No. 110-739, pt. 1 (2008).

[5] *Id.* at 3

[6] *Id.* at 10

Furthermore, in rules codified by the DOJ, a substantial limitation in a major life activity may be based on the extent to which the impairment affects the condition, manner, or duration in which the individual performs the major life activity.[1] Here, the condition (quiet environment), manner (reading aloud) and duration (taking a much longer time) under which [applicant] reads is indicative that they are substantially limited in the major life activity of reading, as well as concentrating.

[1] *See* Department of Justice Technical Assistance Publication on Testing Accommodations at: https://www.ada.gov/regs2014/testing_accommodations.html

---

Consultants are creating an artificial distinction between letter graded and pass-fail exams; The bar exam is more than a pass-fail exam.

In the denial letter, the consultant primarily seems to deny the request [insert amount] additional time on the basis that "the bar is a pass fail test, and all that one might need to shoot for one's highest possible grade would have little pertinence to an exam that has but a best possible score – of a pass."[1] The consultant is creating an artificial distinction between exams that award a letter grade and pass-fail tests. The Bar exam is more than a "pass-fail" exam. It is the gateway to the legal profession, a high stakes, difficult, extremely time pressured exam wherein failure to pass on the first attempt often has serious negative repercussions to one's professional reputation and job prospects. More importantly, each portion of the exam requires copious reading, reading that must be careful and accurate, yet it is not a reading test. It is an exam that tests one's ability "to analyze legal issues arising from fact situations," to distinguish between material and immaterial facts, to "demonstrate [one's] knowledge and understanding" of legal theories and principles, "to apply the law . . . and to reason in a logical, lawyer-like manner," one's ability to demonstrate "proficiency in using and applying" legal principles, to "recognize and resolve ethical issues arising in practical situations," to "apply problem solving skills to diagnose a problem, generate alternative solutions, and develop a plan of action," and to "communicate effectively"[2] as a lawyer. In order for [STUDENT] to have a fair chance, an equal playing field, to demonstrate such knowledge and skills, they must be sufficiently accommodated.

[2] See Description and Grading of the California Bar Exam, p. 1-2

Using Obsolete DSM4 Diagnostic Criteria Related to Childhood Diagnosis of ADHD

The Board is still relying on obsolete DSM-4 diagnostic criteria relating to childhood ADHD diagnosis, and therefore erroneously concluded that they had no evidence of childhood onset.

The [Testing agency's materials—cite to website] continue to reference the now obsolete DSM-4 diagnostic criteria. The DSM-4's criteria emphasized the need for a diagnosis of ADHD to be made by age 7. However, the DSM-5 changed the diagnostic criteria: ADHD symptoms should first be observed before **age 12.**

Relying on the old DSM-4 criteria, as prescribed by the Board's Guidelines, the Board's consultant cites only [Applicant]'s [insert relevant oversight] The consultant appears to have not considered at all the portions of the report that include information up through age 12. Had the Board been relying on the *current* DSM criteria, the substantial evidence of childhood onset prior to age 12 provided by [Applicant] would have been considered by its consultant, and their ADHD diagnosis would likely have been recognized as valid.

The Committee, through its consultants, is using an outdated and unduly restrictive standard with respect to the definition of a person with a disability under the ADAAA[1]. Specifically, requiring the applicant to demonstrate a history of academic failure is not contained in the diagnostic criteria, is not included in the definition of a person with a disability under the law, and most importantly, is contrary to Congress' intent in passing the ADAAA.[2]

The Amendments Act added reading to the list of major life activities, and further clarified that "substantially limits" must be interpreted to require a lesser degree of functional limitations than that provided prior to the ADAAA.[3] Moreover, the legislative history of the ADAAA[4] includes rules of construction requiring the definition of disability to be "broadly construed" to "achieve the remedial purpose of the Act."[5] Additionally, the House Committee on Education and Labor for the 110th Congress specifically rejected the findings in a line of cases that had seriously narrowed the definition of disability in cases involving state licensing boards, and asserted that

it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, *or speaking.*[6] (emphasis added)

Culturally Appropriate Practices/Cultural Reasons for Late Diagnosis

In reviewing [STUDENT NAME] previous accommodation request, the Board also ignored well-documented evidence that cultural background can prevent an individual from having a disability diagnosed during childhood.

The DSM-5 now explicitly recognizes that culture-based differences in attitude toward or understanding of children's behavior directly affect diagnosis of ADHD. For reasons relating to cultural background, members of minority communities often have biases against the diagnosis of cognitive disabilities and don't have their

children evaluated for psycho-educational difficulties. Research has established that minority children are less likely to be identified as having ADHD symptoms than non-minority children.

(Helen Schneider & Daniel Eisenberg, Who Receives a Diagnosis of Attention-Deficit/Hyperactivity Disorder in the United States Elementary School Population? 117 PEDIATRICS 601, 601–09 (2006); Jane D. McLeod et al., Public Knowledge, Beliefs, and Treatment Preferences Concerning Attention-Deficit Hyperactivity Disorder, 58 PSYCHIATRIC SERVICES 626, 626 (2007).

The DSM-5 thus explicitly recommends "culturally appropriate practices" in assessing ADHD and other disabilities. In [Applicants name] communications with the Board regarding their disability accommodations request, it was disclosed that they are a member of a racial minority and described the culture-based reason for receiving such a late diagnosis. Per the DSM-5's recommendation, the Board should have considered the significance of [STUDENT NAME] cultural explanations for why they were not diagnosed until adulthood, even though they exhibited symptoms as early as [enter earliest notable signs of disability].

CLOSING STATEMENT SAMPLES

Reasonable Accommodations Under the ADA and 2008 Amendments

As you know, the ADA Amendments Act of 2008 mandates that requests for disability documentation be "reasonable" and "limited to the need" for the accommodation. **[STUDENT NAME]** has submitted a personal statement outlining the functional limitations created by their disabilities, a current letter from their provider(s) and **[PROVIDERS AND DOCUMENT LIST]** and my evaluation of their academic and disability related needs. Together, these items support the need for the requested accommodations and point to a substantiated history of receiving and requiring accommodations.

The final regulations require that [STUDENT] be presumptively deemed to meet the definition of a person with a disability under the ADAAA, due to the nature of [specifically included psychological disabilities], which inherently imposes a substantial limitation on various major life activities associated with cognitive functioning.

Although there is no "per se" disability, the DOJ regulations recognize that certain impairments will almost always result in a determination of disability. Given the intent and principles of broad and expansive coverage, and rules of construction, the regulations include a section entitled "Predictable Assessments," wherein the DOJ states of certain disabilities that, "[g]iven their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward."[1] (emphasis added) Major Depressive Disorder (MDD), Post-Traumatic Stress Disorder (PTSD), Schizophrenia, Bipolar Disorder, and Obsessive-Compulsive Disorder (OCD) are included along with other disabilities as specific examples.

[1] 29 C.F.R. 1630.2(j)(3)(ii) & (iii)

Acknowledgements

Document compiled by G. Clifford and L. Noshay Petro. Citations compiled through personal and professional resources, including The Coalition for Disability Access in Health Science and Medical Education, Lisa M. Meeks, PhD and Elisa Laird, JD. Assistance with formatting and organization from Jennifer Gossett, MSE.