Legal Aspects of Certification
Katharine Meyer, Esq.
Complying with the New ADA Legal Standard
Review of the Americans with Disabilities Act of 1990 ("ADA")

- Title I: Employment
- Title II: Public Entities
- Title III: Private Entity Services/Testing Accommodations
- Title IV: Telecommunications
Review of the ADA

- Definition of a disability under the ADA:

The term “disability” means a physical or mental impairment that **substantially limits** one or more **major life activities** of an individual.

“Major life activities” include, but are not limited to: seeing, hearing, eating, sleeping, walking, breathing, learning, concentrating, thinking and working.
Title I, which addresses employment, states that:

“Recipient of federal funds must “make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual. . . .”
Review of the ADA

➢ Until 2011, U.S. Courts used the “reasonable accommodation” standard when deciding testing accommodation cases

  o Jaramillo v. Professional Examination Services, Inc. (2008)

  “...the Americans with Disabilities Act requires only reasonable accommodations, not necessarily the particular accommodations an individual would prefer.”
Review of the ADA

- Reasonable accommodation language is not contained in Title III of the ADA.

- Instead it states:

  “A person that offers examinations . . . related to applications, licensing, certification or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities.”

- Congress did not define the term “accessible”
Review of the ADA

- However, in 1999, the Department of Justice, under its regulatory authority, issued interpretations of the term “accessible”:

“All private entity offering an examination covered by this section must assure that . . . the examination is selected and administered so that 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 reflects the individual’s aptitude or achievement level. . . rather than reflecting the individual’s impaired sensory, manual or speaking skills.”
The Change to the Best Ensure Standard

In 2011, four court cases redefined the ADA playing field:

- Bonnette v. D.C. Court of Appeals
- Jones v. National Conference of Bar Examiners
The Change to the Best Ensure Standard

- In the Jones case, the U.S. Department of Justice submitted a Statement of Interest stating that the “best ensure” standard should be used for testing accommodations.

- Accommodation should keep pace with emerging technology.
The Change to the Best Ensure Standard

- Under this new standard the question becomes:
  - Is the requested accommodation the person’s best chance of taking an examination what will test her aptitude and not disadvantage her due to her disability? (the best ensure standard)

- As opposed to:
  - Is the accommodation reasonable in light of the person’s disability? (The reasonable accommodation standard)
Accommodations must be provided unless they would:

1. fundamentally alter the measurement of the skills or knowledge the examination is intended to test, or

2. would result in an undue burden.
Limits of the “Best Ensure Standard”

- Accommodations requested:
  - Extended time
  - A quiet setting
  - Short breaks every ½ hour of the Exam
  - **Advance knowledge of the material covered on the Exam**
  - Access to reference materials while taking the Exam
  - An essay format instead of multiple choice questions
What qualifies as a “disability”? 

“Disability” is defined as a physical or mental impairment that substantially limits one or more major life activities of an individual.

The term “substantial” is measured in comparison to “most people.”

- Rawdin test taking abilities were not lower than those of a average person.
What qualifies as a “disability”? 

- Did Dr. Rawdin have an actual disability?
  - Is test-taking a major life activity? Courts are split.
  - Do you have a disability when your “disability” makes you average?
    - Appeal court failed to address this issue.
How to Review ADA Requests

1. Does the applicant have a disability?
   - Err on the side of caution
2. Has the disability been properly documented?
3. Do the requested accommodations rationally relate to the disability?
4. Do accommodations create an undue burden?
5. Do the accommodations fundamentally alter the test?
Recommendations

- Make sure your organization’s policies reflect the “best ensure” standard
- Ensure that your test administrator is willing and able to meet this new standard, and keep pace with new technology
- Review each request on a case-by-case basis
- Handle requests in a timely manner
- Seek legal counsel before denying test accommodations
How to Create a Legally Defensible Discipline Process
How to Create Legally Defensible Discipline Process

- Create Standards that are reasonably related to the practice of the profession
- Draft Rules and Procedures that are fair and provide proper due process
- Ensure that the organization adheres to its Rules and Procedures
- Conduct timely but complete and impartial investigations
- Make reasonable decisions that are consistent with past precedent
What is Due Process?

What is Due Process?

- **Substantive** – Whether decision is rationally related to a legitimate organization purpose
- **Procedural** – A proceeding must be carried out fairly, and in accordance with Rules and Procedures. Parties who are affected have a right to be given notice, and to be heard

Why is due process required?

- Certification may have economic value
- May be viewed as a property right
What Decisions Require Due Process?

- Required for both the administration and enforcement of the certification
  - Application denials
  - Disciplinary Actions
  - Recertification Denials
Factors that Determine the Level of Due Process

Due Process is a Balance Between the Parties:

- **Certificant** – A right to be heard
- **Public Interest** – Certification board must be able to make a decision on a timely basis or the public interest can be harmed
- **Organization** - Process cannot be so cumbersome that it overwhelms the certification board
  - Staffing
  - Cost
  - Time
Factors that Determine the Level of Due Process

The Value of the Certification

- **Lowest Duty** – Certification essentially a “feather in one’s cap”
  - Hurts reputation, loss of prestige
  - Courts are less likely to review such a case

- **Moderate Duty** – Certification provides substantial economic or professional advantages

- **Highest Duty** – Certification required for state licensure
  - When certification is an economic necessity
  - A property right
Standards of Conduct

Documents that help ensure due process is met:

- Code of Ethics/Standards of Practice/Code of Conduct
  - Standards a certificant must adhere to in order to maintain certification
    - Act within your scope of practice
    - Obey all laws
    - Self disclosure
  - Must be publicly available
  - Must be reasonably related to the practice of the profession
  - Should have applicants agree to abide by these standards when they submit an application for certification
Rules and Procedures

- Rules and Procedures
  - Sets forth the organization’s procedures for application denials and disciplinary proceedings
  - Also must be publicly available
Rules and Procedures

- Rules and Procedures should provide each certificant with:
  - Sufficient notice of the action against him or her
  - The opportunity to review the evidence
  - The right to be heard and to respond
  - A reason for the action taken against him
  - A right to appeal to a higher body (i.e., the Board of Directors)

- Procedures do not have to adhere to a court-like standard
Rules and Procedures

Rules and Procedures must also create an organizational structure for how cases will be reviewed

1. Initial Review (sometimes done by staff)
2. Ethics or Professional Disciplinary Committee
3. Investigative Group
   - A peer review process
4. Appeal Board
Rules and Procedures

- The organization’s rules and procedures must be followed.
  - Be flexible
    - Timelines should be guidelines
- If proper procedures are followed, courts show deference to a certification board’s knowledge in its specialized area.
- Try to always provide more due process not less.
Conducting Investigations

- Prompt and competent investigation necessary

- Requirements for Investigators:
  - Impartiality
  - No conflict of interest
  - Expertise

- Duty of Confidentiality
  - Facts must remain confidential
  - Confidentiality agreements for interviewers
  - Court orders or valid subpoenas for records
  - Can publish sanctions, not facts
Conducting Investigations

- Investigating Complaints
  - At least two (2) investigators
  - Do not disclose names or details
  - Each interviewer should take notes

- Documentation/Independent evidence
  - May use affidavits
  - Prior court records
  - Experts

- Ideally, investigators should not be involved in the final decision
Conducting Investigations

Investigative Reports

- Inferences and opinions should be kept out of investigative report

- Focus on facts, not “gut feeling”
  - Many times, certificants “appear” to be guilty based on their hostility or offenses unrelated to certification
  - Make sure that decisions are made based on the evidence, and not because a decision making group “believe he is guilty”
Adhere to Past Precedent

- Keep record of past decisions
- Make decision based on organization’s past decisions
  - Don’t mimic decisions of a regulatory board or court.
- Take into account and acknowledge mitigating circumstances
  - Time elapsed since an event
  - Was certificant truthful and not misleading
  - Has certificant taken steps to ensure action does not occur again
  - References/letters of recommendation
Questions?