The Americans with Disabilities Act and Testing & Licensing

The Americans with Disabilities Act of 1990 (ADA) and its subsequent amendments and implementing regulations protect persons with disabilities by requiring that tests and licensure requirements administered by public or private entities do not screen out persons with disabilities, based on their disability.

Persons with disabilities who are protected by the ADA are persons who have a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment; or who are regarded as having such an impairment. State laws protecting the rights of persons with disabilities may define disability more broadly than this federal definition.

Sec. 12132 of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. The term "public entity" includes but is not limited to any State or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. The phrase “services, programs, or activities” includes courses and examinations.¹

Sec. 12189 addresses examinations and courses administered by private entities that are related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. As with examinations and courses offered by public entities, this section requires that examinations or courses offered by private entities be provided in a place and manner accessible to persons with disabilities, or by alternative accessible arrangements.

As with the definition of disability, both Sections 12132 and 12189 may have corollaries in state statutes that provide for greater protection, but state laws cannot provide for less protection than set forth above.

¹ see Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services: “Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate”
The ADA’s implementing regulations elaborate on the above protections and what specifically is required of public and private entities administering professional licensing and certification programs. A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. §35.130 (b)(6). A public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. 2 Similarly, any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes are required to offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals. 28 C.F.R. § 36.309(a).

In order to be clear that private as well as public entities must modify their examination practices when necessary in order to provide persons with disabilities the opportunity to have their aptitude, and not their disability, measured, the Title III regulations state that any private entity that offers examinations must select and administer the examination so as to “best ensure” that, when 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). The regulations for private testing entities go on to specify that if an exam is designed specifically for individuals with impaired sensory, manual, or speaking skills, it is to be offered at equally convenient locations, as often, and in as timely a manner as are other examinations. The examination must be administered in facilities that are accessible to individuals with disabilities, or alternative accessible arrangements are to be made. 28 C.F.R. § 36.309(b)(1)(i-iii).

The regulations also prescribe the process by which entities are to provide modifications, accommodations, or auxiliary aids or services needed in order to take the exam. Examiners may request documentation in support of a request for a modification, accommodation, or auxiliary aid or service, if the request is “reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.” When considering requests for modifications, accommodations, or auxiliary aids or services, the entity is required to give “considerable weight” to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services

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2 Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services
provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred as a Section 504 Plan). The entity is required to respond “in a timely manner” to requests for modifications, accommodations, or aids to ensure equal opportunity for individuals with disabilities. 28 C.F.R. § 36.309(b)(1)(iv-vi).

The regulations provide examples of the types of modifications that may be required, including: changes in the length of time permitted for completion of the examination, and adaptation of the manner in which the examination is given. Appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills must be provided, unless it can be demonstrated that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test, or would result in an undue burden. Examples of auxiliary aids and services that may be required include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and “other similar services and actions.” Required alternative accessible arrangements include provision of an examination at an individual’s home with a proctor if accessible facilities or equipment are unavailable. Such arrangements must provide comparable conditions to those provided for other test takers. 28 C.F.R. § 36.309(b)(2-4).

Therefore, while individual state bars, testing entities, and attorney licensing entities will have their own processes and procedures for responding to and providing modifications, accommodations, auxiliary aids and services, and alternate testing arrangements, these federal requirements establish a floor of protection and the threshold requirements that must be observed in every state.