

# New Regulations Under Titles II and III of the ADA Address Disability Standards Under the ADA Amendments Act

by Caroline M. Mew and Robert A. Burgoyne

In August 2016, the United States Department of Justice (DOJ) issued new regulations to implement the changes that were made to the Americans with Disabilities Act by the ADA Amendments Act of 2008.<sup>1</sup> Effective on October 11, 2016, the new regulations apply to entities governed by Titles II (state and local governments) and III (private testing entities and public accommodations) of the ADA,<sup>2</sup> and thus are relevant to the testing-related activities of state bar examiners, and, in particular, requests for testing accommodations.<sup>3</sup> The Department of Justice also issued new informal guidance with the new regulations (“Appendix C to Part 35”).<sup>4</sup>

Two primary questions are raised when reviewing requests for testing accommodations: (1) Is the individual disabled within the meaning of the ADA and, (2) if so, are the requested accommodations reasonable? The new DOJ regulations focus on the first question.<sup>5</sup> Following the amended statute, they emphasize that the definition of disability “shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA,”<sup>6</sup> and they offer various “rules of construction” for making disability determinations that were not found in the prior regulations.

A person is disabled within the meaning of the ADA if he or she has a *physical or mental impairment*

that *substantially limits* his or her ability to perform one or more *major life activities*. As described by the DOJ, the new regulations address three primary topics with respect to these statutory terms:

- “The revised language clarifies that the term ‘disability’ shall be interpreted broadly and explains that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations not to discriminate based on disability and that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”<sup>7</sup>
- “The revised regulations expand the definition of ‘major life activities’ by providing a non-exhaustive list of major life activities that specifically includes the operation of major bodily functions.”<sup>8</sup>
- “The revisions also add rules of construction to be applied when determining whether an impairment substantially limits a major life activity.”<sup>9</sup>

Because the regulations implement provisions of the ADA Amendments Act that have been effective since January 1, 2009, bar examiners’ current accommodation practices likely conform already to the new regulations. The regulations nevertheless

serve as a reminder of the ADA's broader reach as amended.

In addition, the preamble to the final rules provides a sense of how the DOJ believes the ADA Amendments Act and the DOJ's implementing regulations will affect entities that provide testing accommodations. (More accurately, the preamble to the new regulations provides the views of the DOJ as it was staffed under President Obama. It remains to be seen how President Trump's Department of Justice and Civil Rights Division will apply the ADA. Almost certainly, there will be a change in the DOJ's enforcement priorities, and a reduced budget for the agency is likely.) As part of its obligation to consider the cost impact of its new regulations, the DOJ concluded (somewhat remarkably) that there was only one "category of measurable compliance costs that the ADA Amendments Act will impose and [that the DOJ] was able to assess"—namely, the "costs for processing and providing reasonable modifications and testing accommodations to individuals with learning disabilities and ADHD for extra time on exams . . . ."10

The DOJ's estimate of the likely financial cost for schools and testing entities to provide accommodations to more individuals than would have been entitled to accommodations prior to the ADA Amendments Act is subject to question, as it relies upon premises that are often inaccurate or incomplete. Also subject to question is the DOJ's estimate that anywhere from 50 percent to 90 percent of test takers who were not receiving extra exam time as an accommodation prior to passage of the ADA Amendments Act are now eligible to receive this accommodation.<sup>11</sup> That estimate seems far too high, particularly with regard to individuals who are seeking accommodations for the first time on a licensing exam based on a diagnosis of either ADHD or a learning disability (both of which have childhood onset and presumably would have resulted in

significant functional limitations much sooner, with a corresponding need for accommodations).<sup>12</sup>

In all events, determining whether accommodations are warranted remains a case-by-case inquiry, for which the documentation submitted by each candidate is appropriately evaluated to determine whether the candidate has an impairment that substantially limits the candidate's ability to perform any major life activities as compared to that of most people in the general population.

## Purpose and Broad Coverage

The DOJ's new Title II and Title III regulations implement the broader coverage that Congress envisioned when it enacted the ADA Amendments Act. Because state bar examiners are governed by Title II of the ADA (state and local governments), the discussion that follows refers to the new provisions in the DOJ's Title II regulations. Similar provisions are found in the Title III regulations (which apply to private testing entities), and citations to the corresponding Title III regulations are included in the endnotes.

### **28 C.F.R. § 35.101 Purpose and broad coverage.**

*(a) Purpose. The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 . . . , as amended by the ADA Amendments Act of 2008 . . . , which prohibits discrimination on the basis of disability by public entities . . . .*

*(b) Broad coverage. The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of 'disability' in this part shall be construed broadly in favor of expansive coverage*

to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of 'disability.' The question of whether an individual meets the definition of 'disability' under this part should not demand extensive analysis.<sup>13</sup>

Although this provision calls for broad coverage, individuals requesting testing accommodations must still establish their entitlement to testing accommodations, and testing entities must still conduct an individualized assessment of each such request. While the question of disability might not require extensive analysis in many cases, the DOJ acknowledges in its accompanying guidance that this "neither precludes nor is inconsistent with conducting an individualized assessment of whether an individual is covered by the ADA."<sup>14</sup>

## Definition of "Disability"

"Disability" is defined as follows:

### 28 C.F.R. § 35.108 Definition of "disability."

**(a)(1) Disability** means, with respect to an individual:

*(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;*

*(ii) A record of such an impairment; or*

*(iii) Being regarded as having such an impairment . . . .<sup>15</sup>*

The new regulations and the accompanying guidance expand upon and explain key terms in this definition ("physical or mental impairment," "disability," "major life activities," "substantially

limits") through explicit "rules of construction" and other commentary; they also expand the list of examples of "physical or mental impairments."

### "Physical or Mental Impairment"

The definition of "physical or mental impairment" was slightly modified in the new regulations, by adding examples of two additional body systems—the immune system and circulatory system—that may be affected by a physical or mental impairment, and including "dyslexia and other specific learning disabilities" and Attention Deficit Hyperactivity Disorder (ADHD) as specific examples of physical or mental impairments.

### 28 C.F.R. § 35.108(b)(1) Physical or mental impairment means:

*(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or*

*(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.*

**(2) Physical or mental impairment** includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus

*infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.*

**(3) Physical or mental impairment** *does not include homosexuality or bisexuality.*<sup>16</sup>

In its accompanying guidance, the DOJ also addresses pregnancy, which is not a physiological disorder and therefore is not an impairment. However, a pregnancy-related impairment may substantially limit a major life activity and thus constitute a disability.<sup>17</sup> According to the DOJ, “pregnancy-related impairments may include, but are not limited to: Disorders of the uterus and cervix, such as insufficient cervix or uterine fibroids; and pregnancy-related anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms, limited circulation, or depression.”<sup>18</sup>

#### **“Major Life Activities”**

The new regulations include a definition of “major life activities” that follows the ADA Amendments Act. They also expand the list of examples of major life activities (including the addition of “writing” as a major life activity).<sup>19</sup>

**28 C.F.R. § 35.108(c)(1) Major life activities** *include, but are not limited to:*

*(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and*

*(ii) The operation of a major bodily function, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive*

*systems. The operation of a major bodily function includes the operation of an individual organ within a body system.*<sup>20</sup>

Some commenters on the DOJ’s proposed rules had requested that the DOJ include test taking as a specific example of a major life activity. The DOJ declined to do so. It noted, however, that “one or more already-included major life activities—such as reading, writing, concentrating, or thinking, among others—will virtually always be implicated in test taking.”<sup>21</sup>

The new regulations set out two “rules of construction” relevant to identifying major life activities: (1) “[i]n determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard” and (2) “[w]hether an activity is a *major life activity* is not determined by reference to whether it is of *central* importance to daily life.”<sup>22</sup>

#### **“Substantially Limits”**

##### **Rules of Construction**

The new regulations set out nine “rules of construction” applicable to “determining whether an impairment substantially limits an individual in a major life activity,”<sup>23</sup> certain of which are more relevant than others in the review of testing accommodation requests:

**28 C.F.R. § 35.108(d)(1)(i)** *The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.*<sup>24</sup>

**28 C.F.R. § 35.108(d)(1)(ii)** *The primary object of attention in cases brought under Title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which*

*an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.*<sup>25</sup>

As discussed above, although the regulation states that the question of “substantial limitation” should not demand “extensive” analysis, an individualized assessment as to whether a candidate is indeed “substantially limited” is still expected and appropriate under the ADA.<sup>26</sup> Also, although the regulation suggests that the focus should be on whether discrimination has occurred, not on whether an individual has a substantially limiting impairment, that concept cannot be meaningfully operationalized, at least not in the context of non-obvious disabilities, such as ADHD, learning disabilities, or other mental impairments. There can be no discrimination unless the individual in question is disabled within the meaning of the ADA. Therefore, you cannot reach the question of discrimination without first addressing whether the individual has an impairment that substantially limits a major life activity.

*28 C.F.R. § 35.108(d)(1)(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.*<sup>27</sup>

According to this rule of construction, an individual seeking testing accommodations who demonstrates, for example, that she has an impairment that substantially limits her in the major life activity of reading would not also have to prove that she has an impairment that substantially limits her in the major life activity of writing, in order to be entitled to accommodations. It is unclear why the DOJ perceived a need to provide this rule of construction, given the ADA Amendment Act's unambiguous reference, in defining “disability,” to

impairments that “substantially limit *one or more* major life activities.”

*28 C.F.R. § 35.108(d)(1)(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.*<sup>28</sup>

Although an individual whose impairment is episodic or in remission may be considered “disabled” under this provision, it does not mean that testing accommodations would be reasonable or appropriate for such an individual.<sup>29</sup> Instead, testing accommodations would be warranted only if the individual was experiencing functional limitations as a result of the impairment at the time of testing.

*28 C.F.R. § 35.108(d)(1)(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity **as compared to most people in the general population**. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, **not every impairment will constitute a disability within the meaning of this section.***<sup>30</sup>

This is an important provision. First, the regulation makes clear that, in determining whether an individual is “substantially limited,” the governing comparison is “to most people in the general population.”<sup>31</sup> Thus, an individual seeking extra time accommodations on a bar examination based on a claimed reading impairment must show a substantial limitation in his or her reading abilities as compared to *most people* in the *general population*—not as compared to the advanced abilities of other law school graduates who are also taking the bar examination.<sup>32</sup> Second, the regulation explicitly states that “not every impairment will constitute a disability.”<sup>33</sup> While this seems self-evident, many individuals assume that if they have a diagnosed impairment,

they are disabled under the ADA and entitled to accommodations. That is not correct. In every case, “substantial limitation” must be established.

*28 C.F.R. § 35.108(d)(1)(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.<sup>34</sup>*

As this provision makes clear, and as the DOJ “emphasized” in the preamble to the final rule, “individuals seeking accommodations for their disabilities in testing situations under the ADA will still undergo an individualized assessment to determine whether they have disabilities covered by the statute.”<sup>35</sup>

*28 C.F.R. § 35.108(d)(1)(vii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph . . . is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.<sup>36</sup>*

In the guidance accompanying the regulation, the DOJ opines that “other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes, should, in most cases, be considered adequate to establish that an impairment is substantially limiting.”<sup>37</sup> This guidance is not part of the regulations, however. In any given case, this type of material may or may not be sufficient to show impairment<sup>38</sup> or to establish the need for any

particular type of testing accommodation. Under 28 C.F.R. § 36.309(b)(1)(iv), Examinations and courses, a Title III regulation which courts also look to when considering the need for accommodations under Title II, testing entities may require reasonable documentation to support the need for the modification, accommodation, or auxiliary aid or service requested.

*28 C.F.R. § 35.108(d)(1)(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. . . .<sup>39</sup>*

Although mitigating measures<sup>40</sup> cannot be considered in determining whether an individual is disabled, they may be taken into consideration in determining what accommodations, if any, are warranted.<sup>41</sup>

*28 C.F.R. § 35.108(d)(1)(ix) . . . The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section . . . .<sup>42</sup>*

This provision addresses the question of temporary impairments, such as a broken arm. While such impairments were generally found not to qualify as covered disabilities prior to the ADA Amendments Act, they may qualify now if they substantially limit a person’s ability to perform a major life activity.<sup>43</sup>

### **Predictable Assessments**

The new regulations also provide for certain “predictable assessments” where “the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage[.]”<sup>44</sup> The DOJ “predicts,” for example, that in virtually all cases “[d]eafness substantially limits hearing” and “blindness substantially limits seeing[.]”<sup>45</sup> As additional (and, in certain cases,

more debatable) examples, the DOJ “predicts” that “[m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.”<sup>46</sup> Even in the case of these “predictable” disorders, however, the DOJ recognizes that individualized assessments are still warranted—there are no “per se” disabilities.<sup>47</sup> Furthermore, a finding of disability does not necessarily mean that accommodations are needed or justified.<sup>48</sup>

### **Condition, Manner, or Duration**

The new DOJ regulations explain that it “may” be appropriate to consider the condition, manner, or duration under which an individual performs a major life activity in determining whether an individual is disabled.

#### **28 C.F.R. § 35.108(d)(3) Condition, manner, or duration.**

*(i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.*

*(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment*

*affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.*

*(iii) 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.*

*(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section [“Predictable assessments”], which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.<sup>49</sup>*

As these regulations make clear, even if it “may be useful” in a given case to consider the “condition, manner, or duration” in which an individual performs a major life activity, the issue remains whether

the condition, manner, or duration of the individual's performance is substantially limited compared to that of *most people* in the *general population*.

On this point, the DOJ notes as follows in its guidance: "While testing and educational entities may, of course, put forward any evidence that they deem pertinent to their response to an assertion of substantial limitation, testing results and grades may be of only limited relevance."<sup>50</sup> There is no basis for this generalized dismissal of relevant objective evidence. "Outcomes" such as scores on other standardized tests taken with no accommodations may well be highly relevant when considering whether someone's impairment causes substantial limitations in a major life activity such as reading, for purposes of obtaining extra time on the bar exam. The scores are an objective indication of performance and a reflection of the functional impact of the candidate's diagnosed impairment. For example, the fact that an individual scores in the 90th percentile on the Law School Admission Test (LSAT) should be highly relevant when the same individual is seeking accommodations on the Multistate Professional Responsibility Examination (MPRE), if the LSAT scores were attained under standard time conditions without accommodations. Likewise, an individual's "outcomes" or performance in other testing or academic environments is relevant to whether that individual, even if disabled within the meaning of the ADA, needs testing accommodations in order to test on a level playing field.

## Conclusion

The DOJ's new ADA regulations emphasize the broad coverage of the ADA and an expansive concept of disability. Nevertheless, the statutory and regulatory standards are not without bounds. Individuals who seek disability-based testing accommodations still must show that they are "substantially limited" in a major life activity compared to most people

in the general population. Likewise, testing entities are still entitled to conduct an individualized assessment of any claim of disability. They are not required simply to defer to the diagnosis or recommendations of a candidate's professional. ■

## Notes

1. *Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008*, 81 Fed. Reg. 53,204 (Aug. 11, 2016). Congress enacted the ADA Amendments Act in order to revise the ADA definition of "disability" and to ensure that the definition is broadly construed. For an overview of the ADAAA's changes pertinent to the bar exam, see Judith A. Gundersen, "The ADAAA and the Bar Exam," 78(2) *The Bar Examiner* (May 2009) 40–45. References in this article to the ADA are to the ADA, as amended.
2. The Equal Employment Opportunity Commission (EEOC), which is responsible for implementing regulations relating to Title I of the ADA (employment), published its final rule implementing the ADA Amendments Act in March 2011. See 76 Fed. Reg. 16,978 (Mar. 25, 2011). The DOJ explained that, "[b]ecause the ADA's definition of 'disability' applies to title I as well as titles II and III of the ADA, the [DOJ] has made every effort to ensure that its proposed revisions to the title II and III regulations are consistent with the provisions of the EEOC final rule." 81 Fed. Reg. at 53,208.
3. There is a provision in Title III of the ADA that deals specifically with testing accommodations, found at 42 U.S.C. § 12189. The statute provides: "Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." The DOJ has taken the position that this provision applies equally to public and private entities that offer examinations. See 75 Fed. Reg. 56,164, 56,236 (Sept. 15, 2010), notwithstanding the fact that Title III is captioned "Public Accommodations and Services Operated by Private Entities," and 42 U.S.C. § 12189 has generally been understood as being directly applicable only to *private* testing entities. See, e.g., U.S. Department of Justice, Title II Technical Assistance Manual § II-1.3000 ("Public entities are not subject to Title III of the ADA, which covers only private entities."). Nevertheless, courts are likely to look to this statutory provision and its implementing regulation, found at 28 C.F.R. § 36.309, in all non-employment cases involving testing accommodation requests.
4. See 81 Fed. Reg. at 53,225–53,240.
5. See generally, e.g., 81 Fed. Reg. at 53,230 ("[T]he determination of what is an appropriate modification is separate and distinct from the determination of whether an individual is covered by the ADA . . .").
6. 28 C.F.R. § 35.101(b); 28 C.F.R. § 36.101(b).



7. 81 Fed. Reg. at 53,204.
8. *Id.*
9. *Id.*
10. 81 Fed. Reg. at 53,205.
11. See 81 Fed. Reg. at 53,217 (Table 9—Calculation of Number of Test Takers Who Are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time from National Testing Entities).
12. The DOJ had noted in its Notice of Proposed Rulemaking for the new rules that “nearly 25%–50% of students self-identifying with ADD may not necessarily meet the clinical definition of the disorder and thus would still not qualify for an accommodation under the revised definition of disability.” See 79 Fed. Reg. 4839, 4852 n.11 (Jan. 30, 2014) (citing research by professionals in the field). Based upon this consideration, the DOJ reduced its estimate of the number of individuals who actually have “ADD (as a primary disability) by 30 percent” for purposes of estimating compliance costs in the Notice. *Id.* at 4852. The DOJ abandoned that approach in its final rules—not because the research findings were unsound, or because the DOJ’s prior approach was unwarranted, but because “[o]ne commenter raised concern about presenting a specific percentage of students with ADHD who would not meet that clinical definition,” as that might “inadvertently become a benchmark for postsecondary institutions and national testing entities to deny accommodations to a similar percentage of applicants requesting additional exam time because of their ADHD.” See 81 Fed. Reg. at 53,212. The stated concern was unsupported and ignored the fact that accommodation requests must be decided on a case-by-case basis. Nevertheless, apparently based on that one comment, the DOJ “decided not to reduce the number of individuals with ADHD who could now receive testing accommodations as a direct result of the ADA Amendments Act.” *Id.* In other words, despite having acknowledged in the Notice of Proposed Rulemaking that at least 30% of ADHD diagnoses do not meet the clinical definition of the disorder and thus would not support a request for accommodations, the DOJ decided to assume for purposes of estimating compliance costs that the individuals receiving those diagnoses would, in fact, be entitled to accommodations under the ADA. While the only consequence of this is a less reliable estimate of compliance costs, it is unclear why the DOJ reacted to what amounts to unsupported speculation from a single commenter by making a substantive change to its underlying, research-based factual assumptions.
13. See also 28 C.F.R. § 36.101.
14. 81 Fed. Reg. at 53,226.
15. See also 28 C.F.R. § 36.105(a)(1).
16. See also 28 C.F.R. § 36.105(b)(1).
17. See 81 Fed. Reg. at 53,227.
18. 81 Fed. Reg. at 53,227 n.4 (citing EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, June 25, 2015, available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)).
19. 81 Fed. Reg. at 53,228.
20. See also 28 C.F.R. § 36.105(c)(1).
21. 81 Fed. Reg. at 53,228.
22. 28 C.F.R. § 35.108(c)(2); see also 28 C.F.R. § 36.105(c)(2).
23. 28 C.F.R. § 35.108(d)(1); see also 28 C.F.R. § 36.105(d)(1).
24. See also 28 C.F.R. § 36.105(d)(1)(i).
25. See also 28 C.F.R. § 36.105(d)(1)(ii).
26. 81 Fed. Reg. at 53,226.
27. See also 28 C.F.R. § 36.105(d)(1)(iii).
28. See also 28 C.F.R. § 36.105(d)(1)(iv).
29. See 81 Fed. Reg. at 53,230 (“[T]he determination of what is an appropriate modification is separate and distinct from the determination of whether an individual is covered by the ADA . . .”).
30. Emphasis added. See also 28 C.F.R. § 36.105(d)(1)(v).
31. 28 C.F.R. §§ 35.108(d)(1)(v) and 36.105(d)(1)(v); see also 81 Fed. Reg. at 53,230 (“In the legislative history of the ADA Amendments Act, Congress explicitly recognized that it had always intended that determinations of whether an impairment substantially limits a major life activity should be based on a comparison to most people in the population.”). Nevertheless, the DOJ also endorses in its guidance the following analysis from the EEOC’s interpretive guidance regarding a hypothetical individual with a learning disability: “[E]vidence gathered to demonstrate the impairment of a learning disability showed a discrepancy between the person’s age, measured intelligence, and education and that person’s actual versus expected achievement. The EEOC noted that such individuals also likely would be able to demonstrate substantial limitations caused by that impairment to the major life activities of learning, reading, or thinking, when compared to most people in the general population, especially when the ameliorative effects of mitigating measures were set aside. The Department concurs with this view.” 81 Fed. Reg. at 53,230. To the extent that the DOJ is endorsing the so-called “discrepancy” model for diagnosing learning disabilities with this comment, its views are at odds with the current views of most experts in the field, and with statements Congress itself has made regarding the discrepancy model. See, e.g., S. Dombrowski, R. Kamphaus & C. Reynolds, “After the Demise of the Discrepancy: Proposed Learning Disabilities Diagnostic Criteria,” *Professional Psychology: Research and Practice*, Vol. 35, No. 4, 364, 366 (2004) (“[T]he discrepancy model represents an assessment heuristic that appears to lack validity and reliability. Research indicates that it cannot distinguish those who have LD from those who do not in actual diagnostic practice . . . . Even though it lacks diagnostic validity, it is still used ubiquitously but in an idiosyncratic and perhaps even haphazard fashion.”); U.S. Senate Rep. 185, 108th Cong., 1st Sess. (Nov. 3, 2003) (noting that, although the discrepancy model is widely used to diagnose learning disabilities, there is “no evidence” that it can be applied in a consistent and educationally meaningful—i.e., reliable and valid—manner). The discrepancy model looks at whether there is a discrepancy between a person’s general intellectual ability, or IQ, and his or her academic achievement, as measured by various psychoeducational assessments.
32. See generally 81 Fed. Reg. at 53,230 (“The Department has . . . clarified that it does not endorse reliance on similarly situated individuals to demonstrate substantial limitations.”).

33. This is important given, among other things, that certain disorders may be diagnosed in the absence of significant functional impairment. For example, under current *DSM-5* criteria, an individual may be diagnosed with a “mild” case of ADHD, described as “[f]ew, if any, symptoms in excess of those required to make the diagnosis are present, and symptoms result in no more than minor impairments in social or occupational functioning.”
34. See also 28 C.F.R. § 36.105(d)(1)(vi).
35. 81 Fed. Reg. at 53,214; see also 28 C.F.R. §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi).
36. See also 28 C.F.R. § 36.105(d)(1)(vii).
37. 81 Fed. Reg. at 53,231.
38. See 81 Fed. Reg. at 53,231 (“[C]ommenters appear to conflate proof of the existence of an impairment with the analysis of how an impairment substantially limits a major life activity. These provisions address only how to evaluate whether an impairment substantially limits a major life activity, and the Department’s proposed language appropriately reflects Congress’s intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of overbroad, burdensome, and generally unnecessary evidentiary requirements.”).
39. See also 28 C.F.R. § 36.105(d)(1)(viii).
40. “Mitigating measures” are separately defined under the regulation to include “(i) Medication, medical supplies, equipment, appliances, low-vision devices . . . , prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies; (ii) Use of assistive technology; (iii) Reasonable modifications or auxiliary aids or services as defined in this regulation; (iv) Learned behavioral or adaptive neurological modifications; or (v) Psychotherapy, behavioral therapy, or physical therapy.” 28 C.F.R. § 35.108(d)(4); see also 28 C.F.R. § 36.105(d)(4).
41. See 81 Fed. Reg. at 53,232 (“[T]he Department agrees that the Act’s prohibition on assessing the ameliorative effects of mitigating measures applies only to the determination of whether an individual meets the definition of ‘disability.’”).
42. See also 28 C.F.R. § 36.105(d)(1)(ix).
43. See also *Summers v. Altarum Institute Corp.*, 740 F.3d 325, 333 (4th Cir. 2014) (“Under the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary.”) (applying similar EEOC regulation under Title I of the ADA, as amended by the ADA Amendments Act of 2008 [ADAAA]).
44. 28 C.F.R. §§ 35.108(d)(2)(ii) and 36.105(d)(2)(ii).
45. 28 C.F.R. §§ 35.108(d)(2)(iii)(A)–(B) and 36.105(d)(2)(iii)(A)–(B).
46. 28 C.F.R. §§ 35.108(d)(2)(iii)(K) and 36.105(d)(2)(iii)(K).
47. See 81 Fed. Reg. at 53,233 (“The Department does not believe that the predictable assessment provision constitutes a ‘per se’ list of disabilities and will retain it. . . . Such impairments still warrant individualized assessments, but any such assessments should be especially simple and straightforward.”).

48. 81 Fed. Reg. at 53,234 (“The Department agrees with these commenters that the determination of disability is a distinct determination separate from the determination of the need for a requested modification or a testing accommodation.”).
49. Emphasis added. See also 28 C.F.R. § 36.105(d)(3).
50. 81 Fed. Reg. at 53,237.



**Caroline M. Mew** is a senior counsel in the Washington DC office of the international law firm Norton Rose Fulbright. Her litigation practice includes representation of national testing programs in a variety of matters, including matters arising under the Americans with Disabilities Act. She is licensed to practice law in North Carolina and the District of Columbia and is admitted to practice before numerous federal district and appellate courts. Mew received a B.A. (with distinction) from the University of North Carolina and a J.D. (with honors) from the University of North Carolina School of Law. While attending law school, Mew was elected to the Order of the Coif and was a Note and Comment Editor for the *North Carolina Journal of International Law and Commercial Regulation*.



**Robert A. Burgoyne** is a partner in the Washington DC office of the international law firm Norton Rose Fulbright. His practice involves civil litigation on a nationwide basis, investigations by the U.S. Department of Justice and other federal agencies, and general counseling. He represents a variety of clients, including several national testing programs, and he regularly provides advice and representation on the Americans with Disabilities Act, test security, copyright, and other matters that confront such testing programs. He is admitted to practice in the U.S. Supreme Court, numerous federal appellate courts, and the federal and local courts in the District of Columbia. Burgoyne received a B.A. from Ohio Wesleyan University and a J.D. from the University of North Carolina School of Law, where he was Note and Comment Editor of the *North Carolina Law Review*.