

COMPLAINT OF DISCRIMINATION

U.S. Department of Justice

Complainants:

██████ A ██████
JR
Rosa Rico
RC

Complainants' Representatives:

Claudia Center
Malhar Shah
Disability Rights Education and Defense Fund
Ed Roberts Campus
3075 Adeline Street, Suite 210
Berkeley, CA 94703
415-531-2874 (cell)
ccenter@dredf.org

Jinny Kim
Amelia Evard
Disability Rights Advocates
2001 Center Street, Third Floor
Berkeley, CA 94704
Phone: (510) 519-9790
jkim@dralegal.org

Respondent:

State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Attention:

Audrey Ching
Assistant Director, Admissions
Audrey.Ching@calbar.ca.gov

Ellin Davtyan
General Counsel
Ellin.Davtyan@calbar.ca.gov

Discrimination Alleged:

Systemic disability-based discrimination and failure to accommodate test takers with disabilities, in violation of Title II of the Americans with Disabilities Act (ADA) and 42 U.S.C. § 12189.

Applicable Law

The ADA requires testing providers like the State Bar of California to provide appropriate testing accommodations needed to ensure test takers an equal opportunity to demonstrate their skills and knowledge. 42 U.S.C. §§ 12132 & 12189; 28 C.F.R. § 35.130(b)(1)(iii), (3)(i), (6), (7), (8); *see also* 28 C.F.R. Part 35, App. A, Other Issues (provisions of 28 C.F.R. § 36.309, implementing 42 U.S.C. § 12189, are “useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations”); 28 C.F.R. § 36.309(b)(1)(i) (examination must be “selected and administered so as to best ensure that . . . the examination results accurately reflect the individual’s aptitude or achievement level” rather than their disability), (b)(1)(iii) (accessible facilities), (b)(2) (required accommodation may include additional time), (b)(3) (required accommodation may include auxiliary aids and services).

Through guidelines, litigation against the Law School Admissions Council, and regulations, the DOJ has addressed testing entities’ obligations under the ADA and have emphasized the following:

Automatic grants of prior accommodations: “If a candidate requests the same testing accommodations he or she previously received on a similar standardized exam or high-stakes test [and] documents having received the previous testing accommodations, . . . then a testing entity should generally grant the same testing accommodations without requesting further documentation.” U.S. Dep’t of Justice, ADA Requirements: Testing Accommodations (Testing Accommodations Guidance);¹ *accord Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal.), Consent Decree (May 29, 2014), at Injunctive Relief, ¶ 5(a), (c), (d)(ii);² *DFEH v. LSAC*, Best Practices Report;³ 28 C.F.R. § 36.309(b)(1)(v).

Deference to professionals who have made individualized assessments: “Testing entities should defer to documentation from a qualified professional who has made an individualized assessment of the candidate that supports the need for the requested testing accommodations. . . . A testing entity should generally accept such documentation and provide the recommended testing accommodation without further inquiry.” Testing Accommodations Guidance; *accord* Best Practices Report.⁴ Similarly, “[t]he determination of whether an individual has a disability generally should not demand extensive analysis” Testing Accommodations Guidance.

¹ Testing Accommodations Guidance, https://www.ada.gov/regs2014/testing_accommodations.html.

² *DFEH v. LSAC* Consent Decree (N.D. Cal. May 29, 2014), <https://calcivilrights.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/>; <https://clearinghouse.net/doc/69024/>.

³ *DFEH v. LSAC* Best Practices Report, <https://calcivilrights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>, 2015 U.S. Dist. LEXIS 104751, at **45, 53 (N.D. Cal. Aug. 7, 2015, deciding challenges).

⁴ 2015 U.S. Dist. LEXIS 104751, at *46.

Limited documentation requirements: “Any documentation if required by a testing entity . . . must be reasonable and limited to the need for the requested testing accommodations. Requests for supporting documentation should be narrowly tailored to the information needed[.]” Testing Accommodations Guidance; *accord* Consent Decree, at Injunctive Relief, ¶ 5(b); Best Practices Report;⁵ 28 C.F.R. § 36.309(b)(1)(iv).

Timely responses: “A testing entity must respond in a timely manner to requests for testing accommodations so as to ensure equal opportunity for individuals with disabilities. . . . The process should provide applicants with a reasonable opportunity to respond to any requests for additional information . . . [and still] take the test in the same testing cycle. Failure by a testing entity to act in a timely manner, coupled with seeking unnecessary documentation, could result in such an extended delay that it constitutes a denial of equal opportunity[.]” Testing Accommodations Guidance; *accord* 28 C.F.R. § 36.309(b)(1)(ii), (vi).

The DOJ has also recognized the role of personnel and leadership in implementing effective testing accommodations. The resolution of the *DFEH v. LSAC* litigation required LSAC to increase in number and diversify in expertise the expert consultants it uses to review and evaluate accommodations requests. Consent Decree, at Injunctive Relief, ¶ 6; Best Practices Report.

The outcome in the LSAC litigation systemically altered the pipeline for the legal profession nationwide and opened the doors to law school for candidates who now need accommodations to take the bar exam on an equal playing field.

The California State Bar

Contrary to the foregoing obligations and principles, the California State Bar (“State Bar”) imposes unnecessary standards for testing accommodations that effectively require applicants to overcome a presumption that they fail to qualify. The State Bar effectuates this presumption through five systemic policies and/or practices:

First, the State Bar refuses to grant or defer to prior accommodations applicants received on similar high stakes exams. Second, even when applicants support their requests with documentation from qualified professionals who made individual assessments, the State Bar instead defers to its consultants who employ a stingy and skeptical review. These consultants routinely second guess reasonable judgments from qualified professionals while reaching for conclusions inconsistent with the weight of evidence. They also demand extensive analysis of disability inconsistent with the ADA.

For example, the Bar denied complainant ██████ A ██████’s request for voice activated software and time to stand and stretch to accommodate pain from prolonged typing and handwriting. Ms. A ██████ had been granted these accommodations for 18 years, including in graduate school, law school, and the 2018 First-Year Law Students’ Examination (administered by the State Bar itself). And the supporting documentation from her primary care physician of 19 years confirmed Ms. A ██████’s pain. Nevertheless, the State Bar consultant found “no

⁵ *DFEH v. LSAC*, 2015 U.S. Dist. LEXIS 104751, at *31

evidence” that Ms. A [REDACTED] needed accommodations because her pain levels “should” have subsided from previous medical treatment. This dismissive response typifies the State Bar’s unlawful approach to assessing requests for testing accommodations.

Third, the State Bar requires onerous documentation including assessments and scores that cost thousands of dollars and are not covered by insurance. For example, the State Bar requires applicants requesting accommodations for ADHD or psychological disabilities to submit expensive comprehensive evaluation reports and all underlying records and test results.⁶

Fourth, the State Bar denies accommodations based on its policy that it “does not grant an accommodation in order to compensate for another accommodation,” such as additional testing days needed to accommodate additional testing time. The State Bar takes the position that disabled candidates granted additional time must endure over-long testing days. But the ADA requires such accommodations, including to ameliorate the typical impact of lengthy testing days on disability symptoms, and to afford disabled candidates equal benefits of the State Bar’s services, programs and activities.⁷

Fifth, the State Bar routinely fails to respond to accommodations requests in a timely way, which deprives applicants of the opportunity to secure additional documentation, file an appeal, and prepare for the exam. For example, in anticipation of the February 2022 bar exam, Ms. A [REDACTED] appealed the State Bar’s November 23, 2021 denial letter on December 7, 2021. But the State Bar did not respond until February after intervention by counsel and a two-week wait.

As the following representative narratives demonstrate, the State Bar’s accommodations process deprives applicants of time and energy that should be spent studying for the bar examination. The barriers have created a two-tiered system wherein disabled applicants must spend exceptional resources to access opportunities equal to their non-disabled peers.⁸

Statement of Facts by Complainants:

[REDACTED] A [REDACTED]

On October 21, 2021, [REDACTED] A [REDACTED] applied for permission to use voice recognition software (Dragon), 50% extra time on essays, 5-minute breaks between MBEs, and a private room for the February 2022 administration of the California Bar Exam. She submitted documentation that she

⁶ Form C re Specific Learning Disorder, Form D re ADHD, and Form E re Psychological Disabilities, <https://www.calbar.ca.gov/Admissions/Examinations/RequestingTesting-Accommodations>.

⁷ See, e.g., *D’Amico v. New York State Bd. of L. Examiners*, 813 F. Supp. 217, 222 (W.D.N.Y. 1993); *Bartlett v. New York State Bd. of L. Examiners*, 970 F. Supp. 1094, 1147 n. 37 (S.D.N.Y. 1997); *Spinella v. Town of Paris Zoning Bd. of Appeals*, 194 Misc. 2d 232, 236, 752 N.Y.S.2d 795, 799 (Sup. Ct. 2002).

⁸ In January 2023, State Bar’s proposed amendments to its testing accommodations rules that purport to comply with the DOJ’s guidelines. See State Bar of California, *Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations*, <https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2023-Public-Comment/Proposed-Amendments-to-the-Rules-of-the-State-Bar-Pertaining-to-Testing-Accommodations>. But these rules in fact entrench and codify the State Bar’s discriminatory system. See Disability Rights Education and Defense Fund, Legal Aid at Work, & Disability Rights Advocates, *Opposition to Proposed Amendments to the Rules of the State Bar*, <https://dredf.org/wp-content/uploads/2023/01/2023.01.31-DREDF-LAAW-DRA-Comments-w-Exhs-A-and-B.pdf>.

was previously granted the use of Dragon and extra time in graduate school, law school and the 2018 First-Year Law Students' Examination.

Ms. A [REDACTED] also provided medical documentation showing her orthopedic disabilities are exacerbated by handwriting, typing, and other repetitive motions that use her hands and fingers. She is substantially limited in major life activities, including performing manual tasks, writing, and the musculoskeletal body system.

For almost 20 years, including at work, Ms. A [REDACTED] has relied exclusively on voice recognition software to complete written exams and other writing assignments. On an exam, this writing method requires a private room and extra time to account for the planning, composition, editing, and correction inherent to the text-to-speech writing process.

Ms. A [REDACTED] was notified on November 23, 2021, that her request was denied in its entirety. She secured additional medical documentation including a costly MRI and submitted an appeal on December 7, 2021. She heard nothing from the Bar through late January. She knew her disability prevented her from taking the February 2022 exam without accommodations.

After intervention by counsel, and a two-week wait, Ms. A [REDACTED] received in substantial part the requested accommodations (permission to use Dragon, private room, and 25% extra time on essays and 5-minute breaks between MBEs). She took and passed the February 2022 bar exam.

JR

On December 23, 2022, JR applied for 50% extra time on essays, permission to use voice recognition software (Dragon), an ergonomic chair, and periodic breaks to stand and stretch for the February 2023 administration of the California Bar Exam. He submitted documentation showing his approved accommodations for timed exams throughout law school, including extra time (1.67x), voice recognition software (Dragon), and an ergonomic chair.

JR also provided extensive medical documentation showing his disabilities of lumbar intervertebral disc disease (with disc lesions affecting the nerves to the legs), cervical intervertebral disc disease (with disc lesions at multiple levels in his neck), and carpal tunnel syndrome. After 30 minutes of sitting, he experiences leg pain and numbness that gets worse the longer he sits. Similarly, after 30 minutes of sitting with his head flexed forward (as in an exam setting), he experiences neck pain and tingling, pain, and reduced strength in his arms that gets worse without breaks to stand and stretch. After 15 to 30 minutes of keyboarding activity, he experiences hand tingling, numbness, and weakness which worsens the longer he tries to use his hands. JR is substantially limited in several major life activities including performing manual tasks, sitting, standing, bending, concentrating, and thinking. He requires frequent breaks during exams to stand up, stretch, and walk around for several minutes, as well as voice recognition software and an ergonomic chair.

On February 6, 2023, well past the deadline to appeal and one day before the deadline to withdraw from the examination, JR was notified that his request was denied in its entirety. The State Bar sent a generic denial letter that failed to analyze or engage with JR's specific facts, and sought additional "comprehensive documentation of the functional impact of [the] condition, and evidence that [the] condition rises to the level of a disability."

JR took the February 2023 administration of the bar examination without accommodations. He had to sit in a flimsy metal folding chair which was dangerous for and exacerbated his disabilities. He was not permitted to stand in the examination area. He lost significant time repeatedly walking to the bathroom located some distance away to stand to get some pain relief. His legs became numb and wobbly and he felt a constant urgent need to urinate. He feared he was developing cauda equina syndrome (a compression of the nerve roots that can cause permanent damage to critical bodily functions including bladder and bowel). He was unable to complete his answers to the essays without Dragon and with the pain and limitations of keyboarding.

During lunch on the first day, JR met with his wife and told her that he might need to stop taking the exam and go to the emergency room because his legs and buttocks area were completely numb, and he had a constant urge to urinate, which meant his nerves were being dangerously compressed. For the rest of the lunch break, he laid down on his back on the floor of the hotel lobby connected to the convention center to get some pain relief. The only reason he continued with the exam was that he wanted to receive feedback on the portions he was able to complete.

Throughout the days of the exam, without accommodations, JR experienced intense back pain, numbness in his legs, buttocks and hands, and the urgent need to urinate. He lost substantial time trying to find relief from the symptoms he was experiencing by taking repeated bathroom breaks. This experience of pain, disruption, and anxiety prevented JR from thinking, reading, concentrating, and writing, all activities which were necessary for him to demonstrate his legal skills and knowledge. He did not pass the exam. His scores were high enough for him to receive a second read. His scores show that the essay portions, which required more keyboarding, were particularly negatively impacted by the denial of accommodations.

On April 28, 2023, JR appealed the accommodations denial related to the February 2023 bar exam and requested that the accommodations be granted for the July 2023 bar exam. He was forced to obtain additional medical documentation from his physician. JR's appeal is currently pending.

Rosa Rico

On June 31, 2022, Rosa Rico applied for 75% extra time, extended testing days, 5-minute stop-the-clock breaks every 30 minutes, a private room, testing in an alternative format, the use of voice recognition software (Dragon), enlarged print, permission to circle answers in question booklet, permission to stand and stretch for the July 2022 administration of the California Bar exam. Ms. Rico submitted documentation that she was granted similar accommodations in law school and on the LSAT and MPRE.

Ms. Rico also submitted extensive documentation from medical professionals including an optometrist and physician who had examined and treated her for a visual impairment (congenital nystagmus) and bilateral upper extremities impairments (epicondylitis, carpal tunnel, and repetitive strain injury). These professionals attested to the daily symptoms caused by the disability, including a feeling that objects are moving or shaking and pain during prolonged typing, writing, and other repetitive activities.

On July 8, 2022, the State Bar granted Ms. Rico 33% extra time and denied all other accommodations. The State Bar’s consultant characterized the optometrist report as “speculat[ive]” and averred that the optometrist lacked qualification to conclude that the visual symptoms could impact reading ability. The consultant also failed to weigh the impact of Ms. Rico’s physical pain and concluded that Ms. Rico could type using her hands (without voice recognition software). Because Ms. Rico received the decision after the deadline to appeal, she was unable to appeal the denial. Ms. Rico took and did not pass the July 2022 bar exam.

On December 21, 2022, Ms. Rico submitted a new request for accommodations for the February 2023 administration of the bar exam—75% extra time, testing over four days capped at six hours per day, 20-minute stop-the-clock breaks for every 30 minutes of typing, 20-minute stop-the-clock breaks between essays, 20-minute stop-the-clock breaks after every hour of the MBE, the use of voice recognition software (Dragon), testing in an alternative format (large print and test in digital form), a private room, permission to circle answers in question booklet, permission to stand and stretch, an ergonomic testing station, and the ability to take medication and have instant ice packs.

The State Bar treated Ms. Rico’s renewed request as an appeal. On January 27, 2023, Ms. Rico submitted additional medical documentation including evaluation of her reading skills based on her congenital nystagmus and an evaluation of her pain by a physiatrist.

On February 9, 2023, the State Bar granted Ms. Rico 50% extra time for each session, extended testing schedule and testing days for the essays portion of the exam, enlarged font, permission to circle the MBE in the test booklet, and permission to bring ice packs. Without explanation, the State Bar denied several accommodations including breaks, alternative formats, private room, permission to use Dragon, and an extended testing schedule and testing days for the multiple choice portion of the exam.

Ms. Rico took and passed the February 2023 bar exam.

RC

RC timely applied for 50% extra time, permission to bring water into the exam, and a private room for the July 2022 bar exam. RC submitted documentation that she was previously granted those same accommodations in law school and was granted 50% extra time on the MPRE. RC explained that because the MPRE was administered in separate carrels and she was allowed to use headphones, she did not require a private room for the MPRE.

RC submitted supporting documentation from her therapist as well as neuropsychological testing documentation from her psychologist. These professionals attested to the hypervigilance, anxiety, and other symptoms caused by RC’s disability – and exacerbated in a timed test-taking environment.

On June 30, 2022, the State Bar partially denied her application, granting only 25% extra time and a semi-private room. The appeal deadline was the next day, on July 1, 2022. This left her without time to prepare an appeal or any additional documentation. RC took the July 2022 bar with partial accommodations and did not pass.

On January 11, 2023, the State Bar notified RC that she would receive the previous partial accommodations of 25% extra time and a semi-private room for the February 2023 exam.

On January 19, 2023, RC submitted an appeal, again requesting 50% extra time and testing in a private room. She provided a more detailed personal narrative, a letter from the Director of the Disability Resource Program at her law school, and a new letter from her neuropsychological evaluating psychologist.

In their response, the State Bar consultant disregarded the major life activities of reading, concentrating, thinking, writing, and communicating, and instead emphasized that “test taking is not a major life activity.”

On February 9, 2023, the State Bar stated that there was no new evidence submitted, but that it would now approve her request of 50% extra time based on the accommodations granted to her on the MPRE. The State Bar continued to deny a private room.

RC took the February 2023 bar exam with partial accommodations and did not pass.

Relief Requested:

Complainants and their counsel seek relief requiring that the State Bar come into full compliance with the ADA through policies, practices, procedures, training, personnel, and leadership.

Complainants seek:

- Training, policies, and practices for State Bar staff members regarding compliance with the ADA;
- Diversification of reviewing consultants;
- Automatic grants of accommodations provided previously on standardized tests including the MPRE and the First Year Law Students’ Examination;
- Automatic grants of accommodations provided previously on timed closed-book tests in law school;
- Substantial weight to a history of testing accommodations;
- Deference to treating professionals who have examined a candidate over State Bar reviewers; and
- Additional changes.

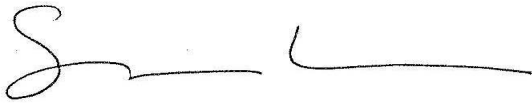
Respectfully submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND



Claudia Center

DISABILITY RIGHTS ADVOCATES



Jinny Kim