SIXTH CIRCUIT REVIEW

Berger v. National Board of Medical Examiners: Granting Accommodations in High-Stakes Testing Situations

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For testing entities, striking a balance between providing appropriate accommodations and maintaining the integrity of the test can be difficult. The National Board of Medical Examiners will once again have to defend its decision to deny testing accommodations to a student applying to take the United States Medical Licensing Examination (USMLE)—this time before the Sixth Circuit in *Berger v. Nat'l Bd. of Med. Exam'rs*, a case arising from the District Court for the Southern District of Ohio. No. 1:19-cv-99, 2019 U.S. Dist. LEXIS 145666 (S.D. Ohio Aug. 27, 2019).

Standardized examinations have become a familiar element of the educational landscape in the United States—elementary and middle school proficiency exams, high school graduation exams, college entrance exams, professional school entrance exams, and professional licensure exams mark the educational path from early childhood education to a professional career. For individuals with disabilities, these time-pressured, high-stakes tests can be a significant roadblock to future success. The Individuals with Disabilities Education Act (IDEA) guarantees children with eligible disabilities in K-12 public schools appropriate accommodations to allow fair access to these assessments. 20 U.S.C. § 1412(a)(16)(A)–(B). But these protections are not so clear once a student moves beyond the world of compulsory public education.

Once an individual moves on to college or professional school, they are no longer covered by the IDEA; he or she now falls strictly under the purview of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12113. If the individual qualifies as a person with a disability under the definition provided in the Act, he or she can still qualify for reasonable testing accommodations. As outlined in 42 U.S.C. § 12189:

> 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.

What exactly constitutes "a place and manner accessible to persons with disabilities" and who qualifies for those accommodations are not as clear as the plain language would suggest when applied to the world of postsecondary entrance and professional licensure examinations—a field in which testing entities are hesitant to accommodate test-takers in any way and require extensive documentation to justify the granting of accommodations.

The National Board of Medical Examiners (NBME) has come under fire for refusing accommodations yet again in the case of Brendan Berger, a medical student at the American University of the Caribbean School of Medicine (AUC) with a twenty-one-year history of disability identification and educational accommodations dating back to second grade. The District Court for the Southern District of Ohio granted Berger a preliminary injunction to enforce the ADA, finding that there was a substantial likelihood that Berger would prevail on the merits. *Berger v. Nat'l Bd. Of Med. Exam'rs*, No. 1:19-cv-99, 2019 U.S. Dist. LEXIS 145666 (S.D. Ohio Aug. 27, 2019). The NBME appealed to the Sixth Circuit, with briefings of both parties to be submitted by early April.

The issue in this case is whether Mr. Berger fits the definition of "disabled" under the ADA and is thus entitled to testing accommodations on his licensure examinations. More specifically, the case centers on how much deference testing entities like NBME must give to outside medical professionals who have determined that an applicant falls within the ADA definition of "disabled." The NBME has an independent review process for accommodation requests. If a person is disabled under the ADA, and that disability is relevant to a particular test, the NBME will grant appropriate accommodations. The NBME consults with its own medical professionals when making the final determination to approve or reject accommodation requests like Berger's. The NBME doctor considers, among other things, evaluations done by outside doctors and past testing accommodations.

A person is disabled under the ADA if he has "a physical or mental impairment that substantially limits one or more major life activities," including learning, reading, concentrating, thinking, and communicating. 42 U.S.C. § 12102(1)–(2). Mr. Berger has undergone a series of seven psycho-educational evaluations beginning in early elementary school, which revealed that he struggled with reading speed, memory, and attention. *Berger*, 2019 U.S. Dis. LEXIS 145666, at *13–*36. One of these evaluations resulted in the doctor diagnosing Mr.

Berger with a reading disorder, a disorder of written expression, and Attention Deficit/Hyperactivity Disorder (ADHD). *Id.* at *35–*36. Mr. Berger had also consistently received testing accommodations throughout his education, such as extended time and reduced-distraction testing environments. *Id.* at *6–*9.

However, the NBME repeatedly denied him testing accommodations in his pursuit of becoming a doctor. *Id.* at *13–*36. While applying to take the Medical College Admissions Test (MCAT), the NBME denied Mr. Berger accommodations three separate times. *Id.* at *15–*31. After receiving accommodations throughout his time in medical school, the NBME again denied him testing accommodations when applying to take the USMLE Step 1 examination despite another evaluation that included diagnoses of learning and reading disabilities as well as ADHD. *Id.* at *32–34.

The most recent hurdle, and the subject of this litigation, is the NBME's third denial of Mr. Berger's request for accommodations on the USMLE Step 2 Clinical Knowledge examination. *Berger*, 2019 U.S. Dis. LEXIS 145666, at *39–*49. The NBME found insufficient evidence of deficits in Mr. Berger's submitted records that would warrant testing accommodations and called into question his motivation and the credibility of his most recent evaluation. *Berger*, 2019 U.S. Dis. LEXIS 145666, at *47–*48. Because of these concerns, Mr. Berger's request for accommodations was denied.

The NBME has a history of denying extended time requests on USMLE examinations. In 2011, NBME was party to a settlement agreement with the Department of Justice (DOJ) when it similarly denied another student accommodations on the same examination. In the settlement agreement, the DOJ clarified that NBME is not required to provide testing accommodations "that would fundamentally alter what the USMLE is intended to test," but it is required to "give[] considerable weight to documentation of past . . . accommodations" and "carefully consider the recommendation of qualified professionals who have personally observed the applicant in a clinical setting . . . ." Settlement Agreement Between United States of America and National Board of Medical Examiners, DJ# 202-16-181, Feb. 23, 2011, at notes 18, 19(v), 14. Many of the stipulations in the agreement echo the requirements set forth in the ADA's implementing regulations. 28 C.F.R. § 36.309(b)(1).

In Mr. Berger's case, NBME is not arguing that the requested accommodations fundamentally alter what it intends to assess through the examination. Rather, they argue that the doctors who conducted Mr. Berger's evaluations "are not entitled to deference." *Berger*, 2019 U.S.

Dis. LEXIS 145666, at *64. The NBME doctors questioned the timing of the evaluations and formal diagnoses, which occurred after Mr. Berger was first denied accommodations on the MCAT. *Id.* at 65.

However, the lower court noted that DOJ guidance provides that "[t]esting 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." The guidance emphasizes that individual assessment is especially important in the context of learning disabilities, as is the case with Mr. Berger, because face-to-face interaction is a critical component of accurate evaluation and "determination of appropriate testing accommodations." The guidance notes that a formal diagnosis is not required; it is also enough to have a strong record of prior testing accommodations—even if those accommodations were provided by a private school under a formal policy rather than through a special education programs regulated by the IDEA.

The District Court for the Southern District Ohio granted deference to the individualized assessments, finding that the results from numerous evaluations demonstrated Mr. Berger's impairments in reading fluency, processing speed, and ADHD, which "substantially limit the major life activity of reading as compared to the general population"—enough to qualify him as an individual with a disability under the ADA. *Berger*, 2019 U.S. Dis. LEXIS 145666, at *63–*64. These evaluations, along with Mr. Berger's extensive history of accommodations, the fact that his accommodation requests were reasonable, and NBME's denial of his request, led the court to conclude that he established a substantial likelihood of success on the merits of his ADA claim.

Now, the Sixth Circuit will hear the appeal. Whatever its decision, the potential impact will be significant. In the 2015–2016 school year, there were nearly 6.7 million students with disabilities served under IDEA (13.2% of all students)—that is 6.7 million potential future doctors, attorneys, dentists, and other professionals who may one day be looking to sit for a professional licensure exam. That figure does not include those students with disabilities who are served outside of the IDEA in our nation's private schools and institutions.

The DOJ guidance is clear. The NBME and other testing organizations owe deference to the evaluations done by qualified professionals and must give strong weight to histories of accommodations.

The NBME's skepticism toward the validity of these results and the actual need for accommodations is valid in light of numerous recent

testing scandals. But as long as the NBME is going to continue to deny accommodations by disregarding the determinations of qualified medical professionals without valid grounds for doing so, their decisions are going to conflict with DOJ guidance. The conversation would be different if they argued that extended time and similar accommodations fundamentally alter what they are trying to assess through the USMLE—perhaps the true underlying reason. However, that is not the argument they have put forth nor the reason given for the present denials. In this case, DOJ guidance appears clear: deference is owed to the professional determination that Brendan Berger needs accommodations.