Accommodation in Testing

Is a "Level Playing Field" Unfair?

By Daniel B. Tukel and Katherine Donohue Goudie

Archie Bunker once said, "Tell ya something else, equality is unfair!"[1] It seems axiomatic that nothing can be more fundamentally fair than equality, and that one cannot violate any civil rights laws by treating people equally. But all is often not as it seems in the realm of discrimination laws. Was Archie right? Is equality unfair?

Typically, one important factor in determining what accommodation is reasonable and effective is to consider the actual accommodation requested by the individual.

Consider the following scenario: A college student with a documented learning disability asks, as an accommodation, for extra time to take the final exam. The request is granted, and the student is given four hours to take the exam, which had been scheduled for two hours. The professor, in an effort to "level the playing field," then decides to give all the students in the class, whether disabled or not, four hours to take the exam. Has the professor "undone" the accommodation and thereby violated the Persons With Disabilities Civil Rights Act (PWDCRA)[2] or the Americans with Disabilities Act (ADA)?[3]

How to properly and effectively provide testing accommodations is important not only to educational institutions, for which testing is a common practice, but also to licensing and admissions organizations, as well as for employers who have testing requirements either for hiring or for promotional opportunities. Since enactment of the ADA, the number of testing accommodation requests has increased substantially.[4] Most requests for testing accommodation are from individuals with learning disorders and with attention-deficit/hyperactivity disorder, and the most common accommodation request from individuals with such conditions is for extra testing time.[5]

The issue of whether granting similar extra time to non-disabled students negates the accommodation to the disabled student can be considered from a variety of perspectives. There are arguments both for the proposition that there has been no violation, and for the proposition that by granting the additional time to non-disabled students, the disabled student has been discriminated against. A proper analysis of the issue requires consideration not only of disability discrimination accommodation issues, but also consideration of testing issues as well.

Determining a reasonable and effective accommodation for one who is entitled to accommodation is an "interactive" process.[6] Generally, that interactive process requires discussion with the individual requesting an accommodation.[7] Typically, one important factor in determining what accommodation is reasonable and effective is to consider the actual accommodation requested by the individual.[8] In the scenario at issue, therefore, it may be important to consider the specific accommodation requested. Was the request for additional time or for double time? If it is the former, an argument can be made that the reasonableness of the accommodation should be measured against the request itself, without consideration of how others are treated. However, if it is the latter request, the reasonableness—and effectiveness—of the accommodation requires a consideration of the treatment of the disabled individual *relative to* the treatment of others.

The Essential Nature of the Test

Accommodation in testing is unlike typical accommodation in the employment setting. In the employment setting, an individual's performance is typically measured against a set of standards, independent of the performance of others. Such is not always the case with testing, and therefore, to gauge the reasonableness and effectiveness of a testing accommodation, consideration of the test itself is necessary. Some tests measure performance against an objective set of standards, while other tests are a competition among test takers, such that performance is judged and measured only against the performance of others.

Therefore, one issue to consider when determining if it is fair to grant additional time to non-disabled test takers, or whether doing so negates the extra time accommodation to a disabled test taker, is the manner in which a test is scored. Is the test graded or scored against an objective standard, such that the scores of other test takers do not affect the score of a disabled student, or is the test scored on a "curve," such that the grade one receives is directly related to how well other students performed? If performance is measured against an objective standard (e.g., any score above 90 percent is an "A" regardless of how many individuals score above 90 percent), then providing additional time to non-disabled students does not appear to "undo" the accommodation to the disabled student.[9] If, however, scores depend on the performance of all test takers—such as standardized tests, which are scored on "percentiles"—giving extra time to non-disabled individuals would place disabled test takers at a relative disadvantage if that extra time has the effect of raising non-disabled test takers' scores.

In the employment context, the essential functions of the job must often be considered in determining whether a requested accommodation is reasonable. In considering accommodation in testing, the essential nature of the test itself is inextricably tied to the analysis of whether an accommodation is reasonable and effective. The United States Supreme Court considered an analogous issue in the context of competitive sports in *PGA Tour v Martin*.[10] In that case, a disabled professional golfer asked, as an accommodation, to be allowed to use a motorized cart, which was prohibited by the rules. It was undisputed that the individual had a disabling condition, and that he could not compete without use of the cart. The PGA Tour argued that fatigue was an important element of the golf

competition, and that permitting use of a cart would give the individual a competitive advantage over other players and therefore fundamentally alter the nature of the game and the competition. The Supreme Court disagreed. The Court engaged in a careful analysis of exactly what constituted the essential nature of the game of golf and professional golfing tournaments. Despite the argument that allowing use of a cart would give a competitive advantage, the Court found that waiver of the no-cart rule would not fundamentally alter the nature of the golf tournament. Accordingly, Martin was permitted to use a cart as a reasonable accommodation for his disability.

The "Power" Test vs. the "Speeded" Test

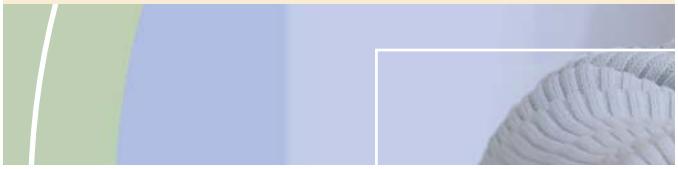
Similarly, the essential nature of the test at issue must be considered to determine whether granting additional testing time to a disabled individual is a reasonable accommodation or would give an unfair advantage over others, and whether granting similar extra time to non-disabled individuals would "undo" such an accommodation. A preliminary inquiry, in considering the essential nature of the test, is to determine what the test itself is intended to measure. Tests typically attempt to measure two elements: substantive knowledge and speed. A test that is intended to measure substantive knowledge and is independent of time constraints is sometimes referred to as a "power" test.[11] A test that measures the speed at which an examinee can perform or provide information is known as a "speeded" test.[12] Most examinations fall on a continuum between a purely "power" and a purely "speeded" test, but have some aspects of each.[13]

At one end of the continuum is a purely power test. The essential nature of a purely power test is substantive knowledge, not speed. Therefore, in a purely power test that has no "speeded" component, giving additional time to a disabled student that he or she needs (or requested) would be a reasonable accommodation regardless of the amount of time given to non-disabled students. That is, if a disabled student needed only four hours to impart the substantive knowledge being measured by the test, giving other students that same four hours should have nothing to do with the reasonableness of the accommodation and would not "undo" the accommodation.[14]

On the other hand, the essential nature of a test may be speed; either speed itself is being measured, or the quantity of substantive knowledge that could be imparted in a given amount of time is being measured. When speed alone is being measured, a threshold issue to address is whether granting extra time to a disabled individual fundamentally alters the nature of the test. If so, extra time is not a reasonable accommodation. If extra time is determined to be reasonable, the amount of time being given to non-disabled students relative to the amount of time being given to disabled students is an important element in considering the reasonableness of an accommodation. In such a situation, whatever the amount of time granted to the disabled student, granting the same amount of time to non-disabled students permits an argument that the accommodation was "undone," i.e., it still puts the disabled student at a relative disadvantage in relation to a non-disabled student because a disabled student simply cannot perform as quickly.

Fast Facts

- **Since passage of the ADA, requests for testing accommodations have increased substantially.**
- **If a requested accommodation would alter the fundamental nature of the test or lower academic standards, it is not reasonable.**
- **Under certain circumstances, granting the same additional time to non-disabled test takers may "undo" the required accommodation.**



The Effect of Extra Time on Test Scores

The issue of whether a disabled student is at a disadvantage *relative to* a non-disabled student who is also given additional testing time assumes that non-disabled students who are given additional testing time will improve their scores. Is that assumption valid? If, as a matter of empirical fact, a non-disabled student who is given four hours to take an exam for which he or she needs only two hours does not improve his or her score in a statistically significant way, then giving the additional time to all students would not place the non-disabled student at a relative disadvantage. Again, whether additional time given to a non-disabled student significantly improves scores in a statistically meaningful way may well depend on the extent to which speed is an essential component of the test. If, in a purely speeded test, extra time is given to *both* a disabled individual and to non-disabled students, it clearly would result in additional benefit to the non-disabled student relative to the disabled student, and accordingly undo the accommodation.

Most tests have some component of speed; therefore, a determination must be made as to the essential nature of the test. The importance of the speed component must be considered before it can be determined whether additional time is reasonable as an accommodation and, if so, whether giving additional time to all test takers is fair. This determination is not always clear-cut. For example, several studies have examined the bar exam and whether speed is a legitimate testing component to measure legal competence. New York's highest court commissioned a study specifically to evaluate

the effect of extra time accommodations on the validity of the bar exam. The study consisted entirely of surveys of practitioners, who it was presumed knew what skills were important to the practice of law. That study concluded that the ability to respond quickly is a valid essential element of the bar exam.[15] If that conclusion is accurate, altering the time requirement would not only be inappropriate for non-disabled students, but might also be unreasonable as an accommodation even for individuals with learning disabilities. A competing study concluded that the bar exam does not test for minimal competency, and that accordingly speed was not an essential component.[16] Which conclusion is more accurate is less important than recognizing that determining the degree to which speed is an essential, and valid, component of any given test is not always clear-cut.

Some empirical evidence suggests that additional testing time increases the average scores for both disabled and non-disabled students when there is a speed component to the tests. As might be expected, the increase in score is more significant for learning-disabled individuals.[17] These findings suggest that test results for learning-disabled individuals are more adversely affected by speed than the scores of non-disabled test takers. Thus, when there is a significant speed component to a test, granting additional time to non-disabled students would tend to continue, at least to some extent, the relative disadvantage to disabled students.

Conclusion

Was Archie right? Is equality unfair? As with virtually all accommodation questions, in the test-taking context, it is not possible to answer this question in the abstract. Whether an accommodation is reasonable and effective will depend on a variety of factors, which must be considered on a case-by-case basis. Those factors will include: the specific nature of the accommodation actually requested; the essential nature of the test itself; the extent to which it is "speeded"; the manner in which the test is being scored, whether objectively or against the other test takers; and whether as an empirical matter, non-disabled students increase their scores in a statistically meaningful way when given more testing time.

It is certainly important to consider these issues when assessing whether a request for a testing accommodation is reasonable and effective, because failure to provide a properly requested and required testing accommodation can leave an employer or educational institution liable for disability discrimination. However, the desire to "level the playing field" for non-disabled individuals may itself reveal a perspective that is contrary to the main objective of the disability laws. Seeking to "level the playing field" for non-disabled students suggests an inherent concern that disabled students who receive an accommodation—in this case, additional testing time—obtain an unfair advantage to the detriment of non-disabled students. That assumption is prevalent. See, for example, *Rothberg v Law School Admission Council:* "[T]he parties should put on evidence regarding the amount of extra time needed to put [plaintiff] on an equal footing, but not give her an unjustified advantage *on a test for which every student would benefit from extra time.*";[18] "The underlying societal concern is whether an accommodation such as extra time is truly fair—does it level the playing field or tilt it for a select few who qualify as disabled? . . . Fairness ultimately involves allowing any test taker the same accommodation."[19]

To make this assumption begs the very question, because a reasonable accommodation by definition is an accommodation that permits the disabled the same opportunity as, but not greater opportunity than, non-disabled individuals. That is, giving double testing time to a learning-disabled student who takes twice as long as a non-learning-disabled student to process and respond to written material, by definition places the disabled student on an equal, but not greater, footing as the non-disabled student. To assume that such a scenario gives the disabled student an *unfair* advantage is to reject the concept of a reasonable accommodation. Indeed, to be eligible for an accommodation, an individual must be "otherwise qualified" for the educational program; that is, can meet the program requirements with reasonable accommodation. An institution is not required to lower its academic standards or fundamentally modify its program.[20] If the accommodation does not permit the disabled individual to meet the same standards as non-disabled students in the program, then the individual requesting the accommodation is not otherwise qualified and accordingly does not have a protected "disability."

If one accepts, whether philosophically or as a matter of legal obligation, that a reasonable accommodation is one that provides a disabled individual with an equal opportunity but not an unfair advantage over non-disabled individuals, then there may be situations in which, depending on a consideration of all the factors, a disabled student is entitled to more testing time than a non-disabled student.

If one accepts, whether philosophically or as a matter of legal obligation, that a reasonable accommodation is one that provides a disabled individual with an equal opportunity but not an unfair advantage over non-disabled individuals, then there may be situations in which, depending on a consideration of all the factors discussed above, a disabled student is entitled to more testing time than a non-disabled student. In such a situation, giving the same additional time to non-disabled students could operate to "undo" the required accommodation. Does this mean that equality is unfair? It may be a matter of perspective, but perhaps it is more appropriate to say equality is fair (and legally

required), but sometimes it is necessary to have an unlevel playing field to have equality of opportunity. ◆

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Footnotes

1. *All In the Family,* from the episode "Archie's Helping Hand," which originally aired on October 19, 1974.
2. MCLA 37.1101 et seq.
3. 42 USC 12101 et seq. For purposes of this article, the requirements of other federal civil rights laws that may apply to educational institutions, such as the Rehabilitation Act, will be treated in the same manner as requirements under the ADA, because claims under the ADA and the Rehabilitation Act are largely the same. *Kaltenberger v Ohio College of Podiatric Medicine,* 162 F3d 432, 435, n 4 (CA 6, 1998).
4. John Ranseen and Gregory Parks, *Test Accommodations For Postsecondary Students,* 11 Psychology, Public Policy and Law, 83, 84 (2005).
5. Id at 84, 90, 101.
6. See, e.g., *Tobin v Liberty Mutual Ins,* 428 F3d 54 (CA 1, 2005); *Taylor v Phoenixville School District,* 184 F3d 296 (CA 3, 1999); *Moorehead v Comerica, Inc,* ___ Mich App ___, 2000 Mich App LEXIS 1684 (2000).
7. See EEOC Technical Assistance Manual, §3.7, III-9.
8. However, an accommodation is not necessarily reasonable and effective merely because an employer or institution grants the requested accommodation. See *Feliberty v Kemper Corp,* 98 F3d 274 (CA 7, 1996) ("the employer's proferred accommodation is not reasonable simply because it fulfills the employee's request.").
9. This appears to be the case even if that additional time would have the effect of raising the scores of non-disabled test takers.
10. 532 US 661 (2001).
11. See *Doe v National Board of Medical Examiners,* 199 F3d 146, 150 (CA 3, 1999).
12. Id.
13. Id.
14. At least this is so if the test is scored against objective standards and not measured against the performance of others.
15. Mehrens, Millman & Sackett, *Accommodation for Candidates with Disabilities,* 63 B Examiner, Nov 1996.
16. Report on Admission to the Bar in New York in the Twenty-First Century—A Blueprint for Reform, 47 The Recommendations of the Association of the Bar of the City of New York, June 1992.
17. Id at 95, citing a 1988 study of SAT scores, Willingham, et al, "Testing Handicapped People," Boston: Allyn & Bacon.
18. 102 Fed Appx 122, 127 (CA 10, 2004), McConnell, J., concurring. The test at issue was the Law School Admission Test.
19. See Ranseen and Parks, supra at 101–102.
20. *Kaltenberger v Ohio College of Podiatric Medicine,* 162 F3d 432, 435, n 4 (CA 6, 1998).