IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDI L. ROSENTHAL,	:	
Plaintiff,	:	92 Civ. 1100 (JSM)
V.	:	
NEW YORK STATE BOARD OF LAW EXAMINERS, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW BY AMICUS CURIAE, UNITED STATES OF AMERICA, STATING THE GOVERNMENT'S VIEWS ON ISSUES PENDING BEFORE THE COURT

I. PRELIMINARY STATEMENT

This is a suit brought against the New York State Board of Law Examiners and its members (collectively, "the Board"), alleging that they have violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101-12213, by discriminating against plaintiff, Randi L. Rosenthal ("plaintiff" or "Rosenthal") on account of her disability in their administration of the New York State bar exam. The case is before the Court on the Board's motion for judgment on the pleadings. The Board asserts five grounds in support of its motion. In this memorandum as amicus curiae, the United States will address two of those grounds: (1) whether a state court decision issued prior to the effective date of the ADA collaterally estops plaintiff from challenging, under the ADA, actions of the Board occurring after the effective date; and (2) whether plaintiff's suit is barred because she failed to conply with a Board rule requiring persons with disabilities to

request testing accommodations 60 days prior to the date when general applications to take the exam must be filed. For the reasons that follow, the Court should reject the Board's arguments that Rosenthal's claim is barred on either of these grounds.

II. STATUTORY FRAMEWORK

The central controversy in this case is whether the Board has imposed a discriminatory barrier limiting the professional opportunities of plaintiff Randi Rosenthal to obtain a license to practice law. In setting forth its findings to support the enactment of the ADA, Congress stated, among other things, that:

> (The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. §12101(a)(9).

The applicable provisions of the ADA and its implementing regulations took effect on January 26, 1992. The statute and regulations prohibit discrimination on the basis of disability in professional licensing examinations. Section 309 of Title III provides that:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary 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.

42 U.S.C. §12189.

Because the Board is a state instrumentality, the provisions of Title II of the ADA also apply. Title II generally prohibits discrimination on the basis of disability by public entities such as the Board:

> [No] qualified individual with a disability shall, by reason of such disability,'be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

On July 26, 1991, the Attorney General promulgated regulations implementing both Titles II and III that specifically address the obligations of entities that administer professional licensing exams. See 56 Fed. Reg. 35694-35723 (Title II) and 35544-35691 (Title III).[1] The Title II regulations provide, in pertinent part:

> (6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.
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> (7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

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[1] Because Congress explicitly delegated authority to the Department of Justice to construe the ADA by regulation, the Department's regulations are legislative and should be accorded "controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984). See also Chevron USA, Inc. v. Natural Resources Council. Inc., 467 U.S. 837, 842-45 (1984).

28 C.F.R. §35.130(b)(6) and (7).

The Title III regulations provide:

> (1) Any private entity offering an examination covered by this section must assure that --
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> > (ii) An examination that is designed for individuals with'impaired sensory, manual, or speaking skills is offered . . . in as timely a manner as are other examinations.
>
> [and]
>
> (2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

28 C.F.R. §36.309(b)(1)(ii) and (b)(2).[2]

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[2] Section 309 of Title III of the ADA covers "any person" who administers professional licensing exams, which includes public entities such as the Board. The Title III regulations address specifically the obligations of private entities. The Preamble to the Title III regulations explains:

> Section 309 is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 of the Rehabilitation Act or title II of the ADA. Any such authority that is covered by section 504, because of the receipt of Federal money, or by title II, because it is a function of a State or local government, must make all of its programs accessible to persons with disabilities, which includes physical access as well as modifications in the way the test is administered, e.g., extended time, written instructions, or assistance of a reader.

56 Fed. Reg. 35572 (1991). See also H.R. Rep. No. 485, 101st Cong., 2d Sess. 68. The Title III regulations, because they address testing in some detail, are useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations under both Titles II and III.

III. ARGUMENT

A. Plaintiff's Claim Under the ADA Is Not Barred by Collateral Estoppell

Rosenthal first requested testing accommodations for the July 1991 bar exam. The Board denied the request on the ground that Rosenthal had not submitted sufficient proof of her disability.[3]

Rosenthal then filed an Article 78 petition in the New York State Supreme Court, Albany County, challenging the Board's refusal to afford accommodations. In a two-page letter opinion dated January 8, 1992, the state court denied the petition. Letter Opinion of Joseph P. Torraca, Justice, Supreme Court, Albany County, New York (January 8, 1992).

The Court noted that Rosenthal had submitted information to the Board purporting to document her disabilities, and that the Board had, in turn, submitted that information to professionals who concluded that Rosenthal did not have a disability sufficient to merit receipt of special accommodations. The Board adopted these opinions. The Court declined to substitute its own judgment on the data, finding that the Board's decision that Rosenthal is not disabled was based on a rational examination of the information it possessed. Accordingly, the Court concluded that the Board's actions were not arbitrary and capricious.

The ADA and its implementing regulations took effect several weeks later, on January 26, 1992. On February 7, 1992, Rosenthal

[3] Rosenthal took the July exam without special accommodations and failed.

requested special accommodations to take the February bar exam. The request was denied on February 12, 1992. (Compl. at para. 30). Rosenthal then initiated this suit, alleging that the Board's refusal to afford accommodations for the February exam violated the ADA.[4] In its motion now before the Court, the Board argues that Rosenthal is estopped from arguing that she has a disability. Because the existence of a disability is a prerequisite to a claim under the ADA, the Board argues that Rosenthal has failed to state a claim.

1. Defendant's Collateral Estor)T)el Theory Would Vitiate Implementation of the ADA and is Contrary to Public Policv

It would be cruel irony, indeed, if the Court were to accept the Board's collateral estoppel argument. The ADA promised to open doors to the mainstream of American life for persons with disabilities. The Act provides new avenues of redress and remedies to strike down the barriers to equal opportunity. The Board's collateral estoppel theory destroys this promise for persons with disabilities who have previously failed to prevail on their discrimination claims under laws and in forums that

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[4] The Board does admit that Rosenthal, who holds a law degree from Stanford University, has met the eligibility requirements to take the examination. (Answer at para. 17).

Pursuant to a stipulation entered into after this suit was filed, the Board agreed to, and apparently did, afford the requested accommodations to Rosenthal for the February 1992 exam. However, the Board continues to challenge her entitlement to the accommodations and asserts that the results of the test "will become a nullity" should the defendants prevail in the litigation. (Mem. of Law in Supp. of Defs.' Mot. for J. on the Pleadings at pp. 2-3, n. 1 [hereinafter Def. Mem.]).

congress specifically found to be inadequate to the task of protecting their interests. The Board's theory would mean that persons who have once unsuccessfully litigated similar issues under other laws cannot now seek to employ the new remedies of the ADA to redress new acts of discrimination. This Court should reject such an unjust result as contrary to the ADA and not mandated by collateral estoppel principles.

2. Collateral Estoppel Principles do not Support Defendant's Position

Under New York law.,[5] "application of the doctrine of collateral estoppel requires a finding of the identicality of an issue necessarily decided in the prior action and a full and fair opportunity to contest the issue in the prior action." Temple of the Lost Sheep, Inc. v. Abrams, 930 F.2d 178, 183 (2d Cir. 1991), cert. denied, 112 S.Ct. 119 (1991), (quoting Benjamin v. Coughlin, 905 F.2d 571, 575 (2d Cir. 1990), cert. denied, 111 S.Ct. 372 (1990); accord Gilbera v. Barbieri, 441 N.Y.S.2d 49, 51 (Ct. App. 1981); Schwartz v. Public Administrator of the Bronx, 298 N.Y.S.2d 955, 960 (Ct. App. 1969). The failure to satisfy either of these requirements would make the instant case

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[5] Pursuant to the federal full faith and credit statute, 28 U.S.C. §1738, "a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren Citv School District Board of Education, 465 U.S. 75, 81 (1984); see also Benjamin v Coughlin, 905 F.2d 571, 575 (2d Cir. 1990), cert. denied, 111 S.Ct. 372 (1990). Because defendants seek to give preclusive effect to a New York State court decision, the standards developed under New York State law apply.

inappropriate for the application of the collateral estoppel doctrine.

a. The Board Cannot Establish that the Identical Issue Was Previously Litigated

The party seeking the benefit of collateral estoppel bears the burden of proving that an identical issue has been previously litigated and decided. Kaufman v. Eli Lilly and Co., 492 N.Y.S.2d 584, 588 (Ct. App. 1985); Capital Telephone Co. v. Pattersonville Telephone Co., 451 N.Y.S.2d 11, 14 (Ct. App. 1982). The Board argues that Rosenthal is precluded from asserting that she "is disabled" because that issue was decided against her in the Article 78 proceeding. However, Rosenthal's instant claim is that she is disabled within the meaning of the ADA, which contains a specific definition of individuals with disabilities.[6] By contrast, the Board has no written definition

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[6] The ADA defines "disability"as

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. §12102(2). Learning disabilities are included in this definition. See 28 C.F.R. §35.104(l)(i)(B)(ii)).

The legislative history of the ADA provides that the term "disability," under all titles of the Act, is to be interpreted in accordance with the analysis used to interpret the term "individual with handicaps" under regulations issued by the Department of Health, Education, and Welfare (HEW) at 42 Fed. Reg. 22676, 22685 (1977) implementing section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 50-51; see also

of "disability" applicable to its decisions on whether persons are entitled to special accommodations. Deposition of James T. Fuller at 24 (April 6, 1992), attached as Exhibit B to Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Judgment on the Pleadings. Without written standards, the Board simply cannot carry its burden to establish that its standards are "identical." Moreover, a mere similarity in the definitions used by the Board and the ADA would not preclude this action. Where "issues overlap but are not

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H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 3, at 26-27. Section 504 prohibits discrimination on the basis of "handicap" against any "otherwise qualified individual with handicaps" in programs or activities receiving Federal financial assistance or in programs or activities conducted by Federal Executive agencies or the United States Postal Service. 29 U.S.C. §794.

The HEW regulations, as currently codified by the Department of Health and Human Services, define the term "physical or mental impairment" to include "any mental or psychological disorder, such as ... specific learning disabilities." 45 C.F.R. § 84-3(j)(2)(i)(B). The preamble to that rule explicitly interprets the term "specific learning disabilities" to include dyslexia. See, e.g., 45 C.F.R. pt. 84, app. A at 377 (1991).

Section 204 of the ADA also requires that regulations issued under title II be consistent with 28 C.F.R. pt. 41, which is the Department of Justice's coordination regulation for the implementation of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, as it applies to federally assisted programs. The Department of Justice coordination regulation, like the earlier HEW regulation, defines the term "physical or mental impairment" to include "any.mental or psychological disorder, such as ... specific learning disabilities." 28 C.F.R. § 41.31(b) (1) (ii).

Court decisions under section 504 have also recognized dyslexia as a disability. see, e.g., Stutts v. Freeman, 694 F. 2d 666 (11th Cir. 1983).

identical," collateral estoppel cannot be applied. Capital Telephone Co., 451 N.Y.S.2d at 15.

The ADA's definition of "disability" differs most notably from the Board's in the manner in which it is applied. In this case, for example, the Board refused to credit the voluminous documentation of Rosenthal's disabilities and previous accommodations in academic and other test settings. This documentation was provided from reputable authorities and evidences a longstanding history of disability. In fact, the State of New York, through the New York State Office of Vocational and Educational Services with Disabilities, recognized, based on its own testing, that Ms. Rosenthal had a learning disability and was eligible for state services while she attended college.[7]

[7] Rosenthal's application included her own letter of March 28, 1991, describing her history of diagnosis and accommodations made in academic settings and the following additional documentation: (1) Letter of November 30, 1990, from Harold N. Levinson, M.D., Great Neck, New York, describing his testing of Rosenthal in 1984 and 1985 and his diagnosis of her dyslexia, described as a "severe degree of disability"; (2) Letter of July 8, 1990, from Leon I. Charash, M.D., Wantagh, New York, concluding that Rosenthal had "learning disturbances which are due to a neurologic impairment," and would benefit from special educational assistance and a program for learning disabled students at Adelphi University; (3) Letter of March 1, 1981, from Leo Schechter, Ph.D., District Office Manager of the New York State Office of Vocational and Educational Services for Individuals with Disabilities, concluding that Rosenthal was eligible for services "because of a learning disability which was supported by a neurological examination which we provided" and therefore received funding for training at Adelphi University's Program for Learning Disabled College Students from 1980-1982; (4) Letter of November 28, 1990, from Harris C. Faigel, M.D., Director of University Health Services, Boston University School of Medicine, stating that Rosenthal had been under his treatment

We submit that the Board's process of determining Rosenthal's disability status would likely not pass muster under the ADA. It is certainly appropriate for a testing entity to require appropriate documentation of a test applicant's disability. Such requirements must be reasonable, however. See 56 Fed. Reg. 35573 (1991). A testing entity should accept without further inquiry documentation establishing a disability and the need for special accommodations where that documentation represents the judgment of a qualified professional who has made an individualized assessment of the test candidate based on expertise relating to the disability in question. Especially where, as here, the documentation is recent and demonstrates a

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while a student at Brandeis University, and that she had a learning disability and attention deficit disorder, "handicaps which do not change, alter or disappear during life." Faigel recommended that Rosenthal receive the accommodations she had requested for taking the bar exam; (5) Letter of February 10, 1991, from M. Kay Runyan, M.A., describing Rosenthal's performance on various diagnostic tests, concluding that she has "significant learning disabilities, specifically dyslexia compounded by attention deficit disorder," and recommending that Rosenthal receive the accommodations she had requested for taking the bar exam; (6) Letter of November 27, 1990 from Sandra M. Holzinger, Director of the Program for Learning Disabled College Students at Adelphi University, noting that Rosenthal had received testing accommodations while a student there from 1980 to 1982; (7) Letter of March 6, 1991, from Marion Doxey, Test Administration, Law School Admissions Services, indicating that Rosenthal was afforded special accommodations to take the LSAT exam in 1985; (8) Letter of November 30, 1990 from Madeleine Harvey, Director of Programs in Public Policy, Harvard University, indicating that Rosenthal had been afforded special testing accommodations while earning her Master's Degree in Public Policy; and (9) Letter of January 31, 1991, from Sally M. Dickson, Associate Dean for Student Affairs, Stanford Law School, indicating that Rosenthal had been tested at the school and diagnosed as having dyslexia and attention deficit disorder and had received special testing accommodations while a student.

long history of consistent diagnosis, there is no need for further inquiry. In this situation, it is contrary to the purpose of the ADA to require a person with disabilities to be recertified as having disabilities.

In Capital Teleohone, supra, the New York Court of Appeals ruled that if a second proceeding is to adjudge the same activity under a different legal standard than the first, no preclusion will occur if that activity could be found lawful under one standard and unlawful under the other. Capital Telephone, 451 N.Y.S.2d at 14. This case creates just such a situation because the newly implemented standards of the ADA provide greater protection for persons with disabilities. Although the Board found that under its standards Ms. Rosenthal was not "disabled," the result may well be different under the ADA. In instances where, as here, issues may "bear the same label," but are governed by different standards, the courts have ruled that those issues are in fact, not identical. Jim Beam Brands Co. v. Beamish & Crawford Ltd.., 937 F.2d 729, 734 (2nd Cir. 1991), cert. denied, 112 S.Ct. 1169 (1992).

b. Rosenthal Did Not Have a Full and Fair Opportunity to Litigate the Issue in the Article 78 Proceeding

The party opposing collateral estoppel bears the "burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action." Kaufman, 492 N.Y.S.2d at 588; Ryan v. New York Telephone Co., 478 N.Y.S.2d 823, 827 (Ct. App. 1984). Rosenthal has met that burden here.

A number of factors should be examined in determining whether such an opportunity was afforded:

> the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law, and the foreseeability of future litigation.

Rvan, 478 N.Y.S.2d at 827 (emphasis added). Here, plaintiff's litigation in state court was necessarily limited by the deferential standard of review applicable in the Article 78 proceeding and by a lack of availability of an action pursuant to the ADA. The law relevant to the issues raised by Rosenthal's complaint has undeniably changed since the Article 78 proceeding.

Plaintiff could not fully litigate her claim in state court because Article 78 permitted only limited review of the Board's determination. The state court reviewed the Board's determination that Rosenthal was not "disabled", limiting its inquiry to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." N.Y. Civ. Prac. L. & R. § 7803 (McKinney's). The Article 78 proceeding was not a suit to vindicate nondiscrimination rights under a civil rights statute. The state court only reviewed the prior factual finding of the Board that Rosenthal is not disabled using the deferential "arbitrary and capricious" standard. The court did not consider

the validity of the criteria used by the Board nor did it make a de novo evaluation of Ms. Rosenthal's disability. Application of collateral estoppel principles is inappropriate in a case in which the prior proceeding was so limited in scope and the court previously hearing the action applied a standard of review significantly more deferential than that applicable in the later action.

More importantly, Rosenthal could not previously have challenged the Board's action as violative of the ADA, because at the time the Article 78 proceeding took place, the ADA was not yet in effect. Before January 26, 1992, Ms. Rosenthal therefore did not have the opportunity to challenge the Board's decision, as she rightly does now, as running afoul of the Act's requirements. In such a situation, a party cannot be said to have had a full and fair opportunity to litigate an issue. Even under New York's res judicata doctrine, which gives broad preclusive effect to prior actions, this caveat applies. If the first proceeding was decided by a court which could not consider the claim made in the second proceeding, no preclusion can occur. Heimbach v. Chu, 744 F.2d 11, 14-15 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

Nowhere is this caveat more applicable than the case at hand. For collateral estoppel to preclude the litigation of a federal civil rights claim "[t]he court in which the first action was brought must have been willing and able to consider the theory that is advanced in the second action." Bottini v. Sadore

Management Corp., 764 F.2d 116, 119 (2d Cir. 1985). In Bottini, an action similar to that at issue here, the United States Court of Appeals for the Second Circuit ruled that an Article 75 proceeding in state court conducted under a motion to review an award made by an arbitrator in an employment dispute did not have res judicata effect. The Court based its decision on two factors: First, that the federal civil rights claim (Title VII), like the ADA claim adjudicated here, was outside the scope of the arbitration proceeding and therefore did not contain the same cause of action as the subsequent federal court proceeding. Second, that the Article 75 proceeding, like the Article 78 proceeding at issue here, provided the Court with only a narrow review of the arbitration and did not afford him the right to make his discrimination claim. Id. at 121.

The ADA has imposed new standards of conduct on the Board and similar entities, that, in their power to license, hold the valuable keys to professional careers for persons with disabilities. The state court's decision upholding the Board's July disability determination under the "arbitrary and capricious" standard should not preclude a challenge to the Board's February decision when the prior decision was not subject to scrutiny under the new statutory definitions and standards. This Court is the only forum in which plaintiff may fully litigate the issues of whether she is disabled and entitled to accommodations under the ADA.

B. Rosenthal's Claim Is Not Barred for Failure to Comply with the Board's 90-day Rule for Recruesting Accommodations

The Board's rules for the bar exam require the submission of applications at least 30 days prior to the test date. Board Rule @6000.4. However, persons with disabilities needing special accommodations must inake such requests **90** days prior to the test date. Id. Rosenthal requested special accommodations for the February 25-26 exam on February **7,** and thus failed to meet the Board's 90-day rule. The Board suggests, therefore, that plaintiff has failed to state a claim because the Board had a legitimate basis in state law for refusing accommodations. The Court should reject this argument because the 90-day rule itself is subject to challenge under the ADA.

The 90-day rule requires persons with disabilities to complete the application process **60** days prior to the deadline imposed for non-disabled persons. In enacting the ADA, Congress recognized that persons with disabilities face many obstacles to becoming part of the mainstream. See 42 U.S.C. § 12101. Congress intended to ease the burdensome requirements often imposed on persons with disabilities and to allow them the opportunities non-disabled persons routinely enjoy to demonstrate their knowledge, skills, and abilities.

The Attorney General's regulations interpreting Section 309 of Title III provide that examinations must be offered to persons with disabilities "in as timely a manner **as** other examinations." 28 C.F.R. §36.309(b)(1)(ii). The Board relies (Def. Mem. at 21 ,

n. 6) on the Preamble to the regulations that recognizes that it is reasonable for test-givers to require notice of accommodation requests. 56 Fed. Reg. 35573. However, the Board ignores other language in the same paragraph of the Preamble that points out that only reasonable requirements for requesting accommodations and providing documentation of disabilities are permitted and, further, that those requesting accommodations should not have to meet earlier deadlines than other applicants.

> Requiring individuals with disabilities to file earlier applications would violate the requirement that examinations designed for individuals with disabilities be offered in as timely a manner as other examinations.

56 Fed. Reg. 35573.

The Board asserts that its 90-day requirement is not unreasonable (Def. Mem. at 21 n.6) but it points to no evidence to support such a conclusion.[8] Under the ADA's requirement to make reasonable modifications in policies and procedures, the Board is required to modify its rule unless it can establish that making the modification would be unreasonable or would "fundamentally alter" its program. 28 C.F.R. §35.130(b)(7). While we doubt such a showing can be made, it is a factual matter that should not be resolved at this stage of the litigation.

[8] Substantial time would not be required to implement the accommodations requested here -- a separate room, extra time, and marking letters for answers to multiple choice questions rather than filling in an answer grid.

IV. CONCLUSION

The Court should reject the Board's arguments that either collateral estoppel or the 90-day rule bar Rosenthal's claims.

Dated: Washington, D.C.

April 13, 1992

Respectfully submitted,

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