

ACT, Inc.
Association of American Medical Colleges
Federation of State Medical Boards of the United States, Inc.
Graduate Management Admission Council
Law School Admission Council
National Board of Medical Examiners
National Conference of Bar Examiners
National Council of Examiners for Engineering and Surveying

July 14, 2008

The Honorable Edward Kennedy
Chairman, Health, Education, Labor
and Pensions Committee
United States Senate
Washington, D.C. 20515

The Honorable Thomas Harkin
United States Senate
Washington, D.C. 20515

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20515

The Honorable Ted Stevens
United States Senate
Washington, D.C. 20515

cc:

The Honorable Michael B. Enzi
Ranking Member, Health, Education, Labor
and Pensions Committee
United States Senate
Washington, D.C. 20515

Re: S. 1881/The ADA Restoration Act of 2007; and H.R. 3195/ADA Amendments Act of 2008

Dear Senators:

As the leaders of eight organizations involved in standardized testing and higher education, we write to express our strong concern regarding S. 1881, the ADA Restoration Act of 2007 (“ADARA”), which each of you has sponsored.

A bill similar to S. 1881 was introduced in the House of Representatives last year as H.R. 3195. On June 25, 2008, the House passed a substitute version of H.R. 3195, now titled the “ADA Amendments Act of 2008” (the “ADAMA”). While the substitute version is an improvement, we still have significant concerns about the ADAMA. We would like to share those concerns with you, as we understand that the Senate will now consider whether S. 1881 should be amended or replaced along the lines reflected in the ADAMA.

S. 1881 is a proposed legislative response to decisions of the United States Supreme Court that are viewed as interpreting the Americans with Disabilities Act (“ADA”) too narrowly. The Supreme Court decisions in question all arose in the employment context and involved Title I of the ADA; as a result, the discussions that have occurred to date regarding the ADARA and the ADAMA have focused on its likely impact on employers and employees. There has been very little consideration of the proposed legislation’s impact relative to obligations that are imposed under Titles II and III of the ADA. Title II applies to services provided by state and local governments. Title III applies to public accommodations such as hotels, restaurants, and “places of education.” It also applies to organizations that administer certain types of examinations.

The ADAMA apparently resulted from informal “compromise negotiations” between representatives of certain employer advocacy groups on the one hand and certain disability advocacy groups on the other. We do not know how these groups came to be identified as appropriate proxies for the traditional deliberation by committee members. In all events, entities that are covered by other Titles of the ADA, such as state governments (Title II), colleges and universities (II and III), testing organizations (Titles II and III), and public accommodations (Title III) were not included in those negotiations—even though they, too, would be directly affected by the changes contemplated in the proposed legislation. Representatives of the testing and higher education communities were able to provide only limited input when they learned about the ongoing negotiations between employer and disability representatives, and the concerns raised by these communities were not addressed in the language of the ADAMA.

The purpose of this letter and its attachments is to share some significant concerns regarding the adverse impact that the ADAMA would have—outside the Title I employment context—on public and private entities that administer or rely upon standardized tests; on higher education institutions and their students; and on the public that is served by the physicians, lawyers, engineers, and other professionals whose certification and licensing depends, in part, on the results achieved on such examinations. (The adverse impact would be even greater under the ADARA.) The concerns arise in large part because the ADA imposes affirmative obligations on covered entities to provide accommodations to individuals who fall within the statute’s reach. These affirmative obligations make the ADA very different from other civil rights laws, such as the ADEA and Titles VI and VII of the Civil Rights Act. Those statutes prohibit covered entities from taking adverse actions against individuals based upon their protected status, but they do not impose a duty to provide (and to incur the costs of) benefits, aids, services, and other accommodations to individuals in the protected class.

Because of the ADA’s accommodation requirements, testing entities and higher education institutions have to deal with ADA issues on a daily basis. They routinely have departments and personnel dedicated to handling ADA matters, and they incur significant costs in complying with the ADA. In contrast, some employers may never have to deal with an ADA issue, and most employers will do so only episodically. The ADAMA is thus of particular interest and concern to the testing and higher education communities.

The ADA and Standardized Tests

Millions of standardized examinations are administered every year in a variety of contexts, including admission to colleges, universities, and professional schools; professional licensure; and skills certification. In each context, the standardized examinations provide an objective and important means of comparing candidates or evaluating the competency of an individual.

Under Titles II and III of the ADA, testing organizations and public entities that administer standardized examinations must make the exams accessible to all examinees. The Department of Justice (“DOJ”) has interpreted this statutory obligation to require not just physical access, but also exam modifications or auxiliary aids in certain situations. As a result, many individuals who take standardized exams request testing accommodations under the ADA. The number of individuals requesting accommodations would increase even further if the ADARA or ADAMA were enacted.

Testing accommodations raise three main areas of concern: score comparability, fairness, and issues of public health and welfare. When examinees request accommodations, they are asking to take an exam under conditions that are different from the conditions under which all other examinees must test. This has important implications beyond just the substantial costs incurred by testing organizations to provide such accommodations. These requests often involve, in some way, the very cognitive skills (such as thinking and concentrating) that a standardized exam is attempting to measure. The provision of such accommodations—especially extra testing time—can affect the comparability of the resulting scores and scores achieved under standard testing conditions. Research has shown that scores from nonstandard administrations often do not have the same meaning as scores from a standard administration. Accommodations can thus undermine the very purpose of a “standardized” examination. Compromising the standardized nature of these exams raises fairness issues for individuals who test without accommodations and compromises the ability of entities that rely upon test scores to assess an individual’s achievement, competency, or aptitude. It can also affect the interests of the general public if the exams in question are licensing exams or exams that are taken to gain access to professional schools such as medical school or law school. Attachment B to this letter discusses in more detail the reasons why the undersigned organizations strongly oppose the proposed legislation.

The ADA and Higher Education

With regard to the negative financial and programmatic impacts that the ADAMA would have on the higher education community, the American Council on Education (“ACE”) has previously communicated its concerns to members of the House, and we understand that ACE has or soon will communicate with members of the Senate. These concerns, which are shared by AAMC’s medical school members and the business schools that are members of GMAC, are summarized in Attachment B to this letter.

July 14, 2008

Page 4

On the assumption that the Senate will now consider whether it is appropriate to amend the ADARA in a manner similar to the ADAMA, which was recently passed by the House, we have included as Attachment C a discussion of the ADAMA provisions that are of particular concern to us. Attachment C also provides suggested language for a further amendment to the ADA that would help address these concerns. Additional amendments may be appropriate.

CONCLUSION


Neither the current version of S. 1881 nor the House version reflected in the ADAMA should be enacted. If the ADA is amended because of concerns relating to its application in the employment context, the final version of that legislation should address the concerns noted in this letter relating to the ADA's application in the testing and higher education contexts.

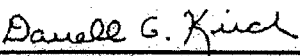
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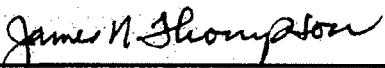
July 14, 2008


Page 5

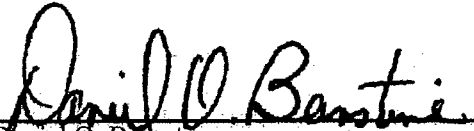
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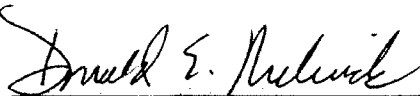

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TESTING ORGANIZATIONS OPPOSED TO S. 1881 AND H.R. 3195

For the reasons discussed in the accompanying letter, the following organizations strongly oppose S. 1881 (the ADA Restoration Act of 2007) and H.R. 3195 (the ADA Amendments Act of 2008):

ACT, Inc.: Founded in 1959 and headquartered in Iowa City, Iowa, ACT is a non-profit educational organization that provides assessments and assessment-related services. ACT is perhaps best known for the ACT examination, a standardized, multiple-choice test that is used for admission and placement purposes by colleges and universities across the United States. The ACT test assesses high school students' general educational development and their ability to reason, analyze, solve problems, and integrate learning. It covers four skill areas—English, mathematics, reading, and science—and has an optional writing test. More than 2.4 million ACT examinations are administered each year.

Association of American Medical Colleges: AAMC is a not-for-profit organization whose mission is to improve the nation's health by supporting academic medicine. Founded in 1876, AAMC represents all 129 accredited U.S. medical schools, 17 accredited Canadian medical schools, nearly 400 major teaching hospitals and health systems, faculty members in various academic and scientific centers, 68 VA medical centers, and thousands of medical students and resident physicians. Among other activities, AAMC develops and administers the Medical College Admission Test ("MCAT"), which is used by medical school admission committees around the country to help fill the limited number of seats that are available each year in medical schools. The MCAT is a standardized, multiple-choice examination that is designed to assess an examinee's critical thinking, problem solving, writing skills, and knowledge of science concepts and principles that are prerequisite to the study of medicine. Approximately 70,000 MCAT exams are administered each year.

Federation of State Medical Boards of the United States, Inc.: Established in 1912 and located in Dallas, Texas, the FSMB is a national not-for-profit organization representing the 70 medical boards of the United States and its territories. FSMB's mission is to support continual improvement in the quality, safety, and integrity of health care through the development and promotion of high standards for physician licensure and practice. As a dynamic organization of state medical boards, the FSMB strives to initiate and strengthen cooperation among medical licensing boards, facilitate collaborative efforts between boards and other entities, develop unified policy positions, and act as a trusted advocate for these positions. Together with the National Board of Medical Examiners, the FSMB co-sponsors the United States Medical Licensing Examination ("USMLE"). The USMLE is recognized and accepted by all allopathic (M.D.) and composite (M.D. and D.O.) medical licensing boards in the United States in meeting their statutory requirement to assess physicians before issuing an initial medical license. Over 130,000 USMLE examinations are administered each year.

Graduate Management Admission Council: GMAC is a not-for-profit educational organization that assists business schools and graduate business programs around the world, as well as their students and prospective students. GMAC was founded in 1953 and, among other activities, develops and administers the Graduate Management Admission Test ("GMAT"). The GMAT is a standardized test, delivered in a computer-based format, which measures an individual's

verbal, mathematical, and analytical writing skills. GMAT scores are used by admission officers as one predictor of academic performance in business and graduate management programs. Approximately 250,000 GMAT exams are administered each year.

Law School Admission Council: LSAC is non-profit corporation that was founded in 1947 to facilitate and enhance the law school admission process. LSAC provides programs and services related to legal education and is best known for developing and administering the Law School Admission Test (“LSAT”). The LSAT helps laws schools make sound admission decisions by providing a standard measure of reading and verbal reasoning skills that law schools can use as one of several factors in evaluating applicants. Approximately 140,000 prospective law students take the LSAT each year.

National Board of Medical Examiners: The NBME is an independent, not-for-profit organization whose mission is to protect the health of the public through state-of-the-art assessment of health professionals. It was founded in 1915 because of the need for a nationwide examination that medical licensing authorities could use to evaluate candidates. NBME continues to provide high-quality examinations for this purpose, and is also a sponsor (with the Federation of State Medical Boards) of the United States Medical Licensing Examination (“USMLE”). The USMLE is a three-step examination for medical licensure in the United States. It is designed to assess a physician’s ability to apply knowledge, concepts, principles, and fundamental patient-centered skills that constitute the basis of safe and effective patient care. Over 130,000 USMLE examinations are administered each year.

National Conference of Bar Examiners: NCBE is a not-for-profit corporation, founded in 1931, whose mission includes providing high-quality standardized examinations for the testing of applicants for admission to the practice of law. Two such exams are the Multistate Bar Examination (“MBE”) and the Multistate Professional Responsibility Examination (“MPRE”), both of which are used by jurisdictions across the United States as part of their attorney licensure process. Approximately 72,000 MBEs and 62,000 MPREs are administered each year.

National Council of Examiners for Engineering and Surveying: NCEES is a national non-profit organization composed of the engineering and surveying licensing boards of all states and U.S. territories. NCEES develops standardized examinations that help assess the competency of professional engineers and surveyors. Approximately 80,000 NCEES exams are administered each year.

**CONCERNS REGARDING THE ADARA AND ADAMA IN THE CONTEXT OF
STANDARDIZED TESTING AND HIGHER EDUCATION**

I. The ADA’s Applicability to Testing Organizations

The ADA includes a separate provision that applies to testing organizations. Under Title III of the ADA, any private entity “that offers examinations ... related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations ... in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” 42 U.S.C. § 12189. Public entities that administer such examinations have been found to have similar obligations by virtue of the general prohibition on discrimination that Title II of the ADA imposes upon public entities.

The language in 42 U.S.C. § 12189 appears to focus on ensuring that all examinees have physical access to examinations; that is, that all examinees are able to take the exams. However, the Department of Justice (“DOJ”) has interpreted the language more broadly in its implementing regulations. According to the DOJ, testing entities might have to provide “modifications” or “auxiliary aids” as part of their duty to make the exams accessible:

(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.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

28 C.F.R. § 36.309(b).

Millions of standardized examinations are administered every year in a variety of contexts. In the educational context, standardized examinations are used by undergraduate colleges and universities and professional schools across the country to help make admissions

decisions. Standardized examinations provide an objective means of comparing candidates who have vastly different educational backgrounds. Examples of such admission tests include the SAT, ACT, LSAT, MCAT and GMAT exams. Standardized examinations are also used in other educational contexts.

In addition, standardized examinations are used by a broad range of state entities in the licensure context. The licensure process protects the public by evaluating the competency of doctors, lawyers, engineers, nurses, and other professionals. Standardized examinations, which assess the minimum competency of examinees, play an important role in that process, particularly when many persons seeking to be licensed have not attended U.S.-accredited educational institutions. Examples of these exams are the USMLE exams, the MBE and MPRE exams, and the NCEES exams.

Standardized tests are also used for certification purposes as a means of demonstrating a particular level of competency in an employment field that is not subject to state licensing requirements. For example, the Automotive Service Excellence (“ASE”) exams enable automotive mechanics to demonstrate their skills and qualifications.

II. Issues Raised by Requests for Testing Accommodations Under the ADA

Many individuals who take standardized exams request testing accommodations under the ADA. Relatively speaking, accommodation requests involving physical impairments have not been difficult to evaluate or particularly controversial. But most testing accommodation requests are not based upon physical impairments. They are instead based upon mental impairments, such as Attention Deficit/Hyperactivity Disorder (“ADHD”) and learning disabilities (“LDs”). For all of the entities submitting this letter, the vast majority of accommodation requests have been based upon LD and/or ADHD diagnoses. In most cases, it is far more complicated to confirm the existence of such mental impairments and to evaluate the resulting functional limitations than it is when dealing with physical impairments. It is also more difficult to determine whether the requested accommodations are reasonable and appropriate.

The accommodations requested on standardized examinations for mental impairments have included extended testing time, readers, scribes, calculators, additional rest periods, separate testing rooms, changes to the grading process, and modification of the exam format. Additional testing time, however, is by far the most frequently requested accommodation. It is also a benefit that almost every examinee—with or without disability—would like to have, in the belief that it will assist him or her to attain a higher score.

The number of individuals requesting accommodations based upon a diagnosis of LDs and/or ADHD has increased dramatically over the past 20 years. It would increase even further if the ADAMA were enacted. These requests raise complex issues at many levels. First, the requests often involve, in some way, the very cognitive skills that a standardized exam is attempting to measure. Second, the provision of such accommodations—especially extra testing time—can affect the comparability of the resulting scores and scores achieved under standard testing conditions. Third, these requests are based upon diagnoses that are often poorly documented and as to which considerable room for professional disagreement is possible.

Although it has been largely discredited, the so-called “discrepancy” model has been a common method for diagnosing LDs and remains widely used. Researchers report that an “astute diagnostician can qualify between 50% and 80% of a random sample of the population as having a learning disability” by employing discrepancy-based diagnostic models. J. Brackett & A. McPherson, “Learning Disabilities Diagnosis in Postsecondary Students: A Comparison of Discrepancy-Based Models,” in *Adults with Learning Disabilities: Theoretical and Practical Perspectives*, at 70 (1996).¹ As a result, a significant percentage of LD diagnoses are likely to be unfounded.

“Diagnosticians are now routinely identifying learning disabilities in postsecondary students who never encountered meaningful impairment during high school or, in many cases, even college,” even though LDs are lifelong conditions that should become manifest in childhood. M. Gordon, L. Lewandowski & S. Keiser, “The LD Label for Relatively Well-Functioning Students,” *J. Learning Disabilities*, Vol. 32, No. 6, 485, 488 (1999). The functional limitations associated with ADHD likewise should become evident in childhood, but many ADHD diagnoses also arise for the first time when someone is requesting accommodations on a standardized test or in college.

The risk of misdiagnoses resulting from flaws in the diagnostic models and from incomplete or inadequate professional evaluation is compounded by the fact that some individuals have been found to exaggerate their symptoms in order to obtain the desired diagnosis. “Motivated by what they view as attractive benefits associated with diagnoses of ... [ADHD or LDs], particularly in academic settings, adults undergoing diagnostic evaluations ... might exaggerate symptomatology on self-report measures and tests of neurocognitive functioning” because of the “considerable secondary gain potentials,” which include “academic accommodations (*e.g.*, extended test time, private testing environments, alternative courses) and other forms of assistance available ... [under the IDEA, Section 504 and the ADA].”²

¹ See also S. Dombrowski, C. Reynolds & R. Kamphaus, “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 approach has become inextricably linked to the LD definition and has become a generally accepted diagnostic heuristic.... Unfortunately, the 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 Report 185, 108th Cong., 1st Sess. (Nov. 3, 2003) (“There is no evidence that the IQ-achievement discrepancy formula can be applied in a consistent and educationally meaningful (*i.e.*, reliable and valid) manner”).

² B. Sullivan, K. May & L. Galbally, “Symptom Exaggeration by College Adults in Attention-Deficit Hyperactivity Disorder and Learning Disorder Assessments,” *Applied Neuropsychology*, Vol. 14, No. 3, 189 (2007) (examining LD and ADHD diagnoses for students at a mid-size college over a four-year period, and concluding that “significant numbers of college students demonstrate poor effort in the context of ADHD and LD evaluations, and that such poor effort is an indication of symptom magnification motivated by secondary gain potentials”); see also A. Harrison, “Adults Faking ADHD: You Must Be Kidding!,” *ADHD Report*, Vol. 14, No. 4, 1, 3 (“Recent studies demonstrate that it is very easy to fake symptoms of ADHD, especially when filling out self-report checklists.... Over the past two years, we evaluated 127 students referred for an [ADHD] assessment.... Of these 127 referrals, we estimate that approximately 20% significantly exaggerated their symptoms or in fact willfully malingered concerning ADHD in order to receive some secondary gain.”).

When examinees request accommodations, they are asking to take an exam under conditions that are different from the conditions under which all other examinees must test. This has important implications beyond just the substantial costs incurred by testing organizations to provide such accommodations. Research has shown that scores from nonstandard administrations often do not have the same meaning as scores from a standard administration. Accommodations can thus undermine the very purpose of a “standardized” examination. This raises fairness issues for individuals who test without accommodations, and for the many entities that rely upon test scores as reliable indicators of an individual’s achievement, competency, or aptitude.

In this regard, it is helpful to understand what it means to say that a test is “standardized,” and why it matters if a given examinee asks to have such a test administered under non-standard conditions:

When directions to examinees, testing conditions, and scoring procedures follow the same detailed procedures, the test is said to be standardized. Without such standardization, the accuracy and comparability of score interpretations would be reduced. For tests designed to assess the examinee’s knowledge, skills, or abilities, standardization helps to ensure that all examinees have the same opportunity to demonstrate their competencies.

Standards for Educational and Psychological Testing, at 61 (1999) (published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education). From a testing perspective, accommodations raise concerns that scores from non-standard administrations may not have the same meaning as scores from standard administrations. “Comparability of scores may be compromised, and the test may ... not measure the same constructs for all test takers.” *Standards for Testing* at 61. Extra testing time is the accommodation of greatest concern to testing organizations because of its impact on the resulting scores. Research involving various standardized exams has shown that scores achieved with extra testing time are not comparable to scores achieved under standard time conditions.

Scores achieved with extra testing time tend to overpredict subsequent performance. Providing additional testing time to an individual could thus give that individual “an undue advantage over those tested under regular conditions.” *Standards for Testing* at 105. In the context of a test used for admissions purposes, this would have a negative impact on students who are competing with that individual for a limited number of positions in, say, a given college or professional school. It would also have a negative impact on the schools themselves, because they rely upon the test scores to provide an objective means of comparing candidates who attended different educational institutions, from across the country if not around the world, teaching different courses and using different grading systems.³

³ Additional fairness concerns have been expressed in light of the demographics of individuals who tend to make up a large percentage of the pool of individuals who request accommodations on high-stakes tests. A report by the California State Auditor, for example, found that students in California who received extra testing time on the SAT “were more likely to come from an affluent family or attend a private school,” and that many of those students

In the context of licensure and certification tests, the inappropriate provision of extra testing time or other accommodations could affect the general public. “Diploma tests and licensure tests are designed to protect the public from those who have not mastered minimum skills.” S.E. Phillips, “High Stakes Testing Accommodations: Validity Versus Disabled Rights,” *Applied Measurement in Education*, 7(2), 93-120 at 98 (1994). When it comes to a licensing exam for, say, physicians, lawyers, nurses, or engineers, the public welfare is obviously affected if someone passes an exam because of an inappropriate alteration of the standard exam conditions.

III. The ADAMA’s Adverse Impact on Testing Organizations and on Those Who Rely Upon Standardized Test Scores

The ADAMA would compound all of the concerns noted above by increasing the number of requests for testing accommodations, particularly those that are based upon cognitive impairments such as LDs and ADHD; the ADARA would do so to an even greater extent. The proposed legislation would inevitably result in more test scores for which meaning is uncertain, thereby undermining the substantial benefits provided by the exams. In addition, providing accommodations to individuals who qualify as disabled under an expanded definition of disability—including individuals who would qualify as disabled because of substantial limitations in their ability to think or concentrate—could have profound public welfare implications with regard to licensure and certification examinations. The proposed legislation would also impose additional financial costs on testing organizations, and it would result in more disputes and more litigation. Although they provide accommodations to many individuals who request them, licensing boards and testing organizations have had to defend many lawsuits under the ADA. The ADAMA would inevitably increase the number of such lawsuits.

IV. The ADAMA’S Adverse Impact on Colleges and Universities

The American Council on Education and other higher education associations have previously communicated their concerns regarding the ADAMA’s impact on colleges and universities. See Letter dated June 17, 2008 from American Council on Education to the Honorable George Miller, Chairman of the House Committee on Education and Labor, and the Honorable Howard P. McKeon, Ranking Member of the House Committee on Education and Labor. AAMC’s medical school members have the same concerns, as do the business schools

(perhaps as high as 18.2% of the sample) “may have received unwarranted extra time on standardized tests, possibly giving them an unfair advantage over other students taking the same tests.” Audit Report 2000-108, California State Auditor, “Standardized Tests.” See also C. Lerner, “‘Accommodations’ for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?,” 57 *Vand. L. Rev.* 1041 (2004); ABC News, “Does Loophole Give Rich Kids More Time on SAT?” (March 30, 2006); LA Times, “New Test-Taking Skills: Working the System” (Jan. 9, 2000). The demand for documentation to support requests for accommodations on college admission tests and professional licensure tests has even prompted one service to offer “fly-in testing” in hotel rooms for out-of-state students who cannot be evaluated in one of the service’s nine locations. See www.privatetesting.com.

that are members of GMAC. Briefly summarized, by increasing the number of students who qualify as “disabled” under the ADA, the ADAMA would result in:

- **Additional requests for services from the schools’ disability support offices, with attendant financial costs.** In the zero-sum world of school budgets, colleges and universities are already “overwhelmed by requests for support services and find themselves unable to provide special programs and services to every student claiming to be learning disabled.” *Learning Disabilities Diagnosis in Postsecondary Students* at 69. This situation would be exacerbated if the ADAMA were enacted. “One of the risks inherent in broad definitions of disability is that monies, energies, and services will be spread too thin...” *The LD Label for Relatively Well-Functioning Students* at 489.⁴ And these additional costs would come at a time when most colleges and universities are confronting budgetary pressures across the board.⁵
- **Additional requests for academic accommodations, with attendant disruptions of the school’s normal academic curriculum.** Examples of such accommodations include different exam formats, exemptions from certain course requirements, assistive technology, note takers, extended testing time, and various other auxiliary aids and services.
- **Additional instances of students challenging unfavorable academic results or adverse academic decisions on the basis of a claimed disability.** Colleges and universities already confront frequent instances of after-the-fact claims of LDs, ADHD, or other cognitive impairments by students seeking to avoid the normal consequences of a failure to meet applicable academic requirements.
- **More lawsuits.** Hundreds of lawsuits have been filed against colleges and universities under the ADA. Most involve a refusal to provide requested accommodations rather than actions that were purportedly taken for discriminatory reasons. These lawsuits can be very expensive to defend and extremely disruptive. *See, e.g., Singh v. George Washington University School of Medicine*, 508 F.3d 1097 (D.C. Cir. 2007) (lawsuit brought by student challenging her dismissal from medical school; the student, who had an “illustrious” high school and undergraduate career, first presented an LD diagnosis after twice failing to meet the school’s academic requirements, and then sued when the school would not reconsider its dismissal decision; the lawsuit lasted more than four years and required both a trial and an appeal).

⁴ One state system, for example, has disability offices in all five of its institutions with annual estimated operating budgets that range from \$365,000 to \$2.1 million. These offices have full-time staff who already serve between 300 and 1,500 students annually. According to representatives from one college, it costs approximately \$1,115 per student served to provide accommodations to students with disabilities other than deafness, and approximately \$20,000 per student to provide accommodations for deaf students.

⁵ *See, e.g., “As Campuses Crumble, Budgets are Crunched,” The Chronicle of Higher Education*, at A1 (May 23, 2008) (noting that the estimated cost of repairs needed at the College Park campus of the University of Maryland is \$620 million, and that the State University of New York has \$3.2 billion in deferred maintenance expenses).

**H.R. 3195, THE ADA AMENDMENTS ACT OF 2008:
PROVISIONS OF PARTICULAR CONCERN AND PROPOSED NEW LANGUAGE IF THE
ADARA OR ADAMA MOVES FORWARD**

I. ADAMA Provisions of Particular Concern to Testing and Higher Education Communities

The ADAMA reflects important improvements over the original language in the House and Senate versions of the ADARA. However, it remains employment-focused and fails to address issues of significant concern to the testing and higher education communities. The provisions in the ADAMA that are of particular concern are as follow:

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

“(3) MAJOR LIFE ACTIVITIES-- (A) In General – For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, *concentrating*, *thinking*, communicating and working.”

The new definition of “major life activities” adds several activities beyond those found in the definition of “major life activities” that is contained in the implementing regulations of the ADA or in the implementing regulations of Section 504 of the Rehabilitation Act, which also uses the term “major life activities” in defining “disability.” We are particularly concerned about the addition of the terms “thinking” and “concentrating” as independent major life activities. These activities should be excluded from the bill. Including elements such as “thinking” and “concentrating” as major life activities in defining whether a person has a disability is extremely problematic in an instructional or testing context. For example, individuals who have an LD or ADHD diagnosis but have not experienced substantial limitations in the long-recognized major life activity of learning will nonetheless claim to be entitled to course waivers, note-takers, additional testing time, or other accommodations because of purported limitations in their ability to “think” or “concentrate.” This could easily lead to a significant increase in the number of individuals seeking special accommodations in the academic and testing contexts, which would not be fair to the students who do not receive such benefits or to the students whose limitations actually result in substantial limitations in their ability to learn. It would also be unfair to the testing and educational organizations, from both a cost perspective and from the perspective of undermining the services that they provide.

Providing accommodations to individuals who qualify as disabled under the proposed ADAMA because of substantial limitations in their ability to think or concentrate would also have public welfare implications relative to licensure and certification examinations. The concerns are obvious if an individual passes his or her medical licensure examination, for example, because he or she received accommodations to address limitations in his or her ability to think or concentrate.

Finally, there is no consensus about how to measure ability to concentrate, and “difficulty concentrating” is a recognized symptom of many impairments. It should not be treated as a separate and distinct major life activity.

“(4) REGARDED AS HAVING SUCH AN IMPAIRMENT -- (B) Paragraph (1)(C) [(the “regarded as” component of the definition of “disability”)] shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”

It is unclear why this provision applies only with respect to the “regarded as” component of the definition of “disability.” It should instead apply to all elements of the disability definition. If an impairment is transitory or minor, it should not be viewed as a disability under the ADA.

“(5) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY-- ... (D)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as -- (IV) *learned behavioral or adaptive neurological modifications.*”

The phrase “learned behavioral or adaptive neurological modifications” should not be included in the list of mitigating measures. In the first place, part of this phrase – “adaptive neurological modifications” – has no readily apparent meaning. How does one “adapt” his or her “neurological” functions? More importantly, at least in the testing and educational contexts, if someone has adapted his or her behaviors or neurological functions so as not to experience functional limitations in the major life activity of learning, it would not be appropriate to view that person as disabled. Virtually everyone modifies his or her behaviors in some form or fashion in order to perform more effectively.

Colleges and testing organizations often receive LD-based or ADHD-based accommodation requests from individuals who have done well academically all their life without accommodations. The individual requesting the accommodations will often state that he has only recently been diagnosed with a learning disability or ADHD, and that he was able to do so well academically only because he worked particularly hard, studied longer than other students, underlined or highlighted text to help him read, or made other behavioral changes in order to succeed academically. This sort of behavioral “mitigation measure” is a normal part of life for everyone. Therefore, requiring institutions of higher education and testing organizations to disregard such modifications in determining whether someone is disabled is not appropriate. It would shift the analysis from the “is the individual covered by the statute” stage to the “need for accommodations” stage, thereby imposing on schools and testing organizations the obligation to prove that the requested accommodations would cause an undue burden (which is virtually impossible to do under the ADA as currently worded and interpreted) or cause a fundamental alteration to the school’s academic program or to what the test is measuring. In other words, it would inappropriately shift the burden of proof from the party who is requesting special treatment on the basis of a claimed disability to the party from whom the accommodations are being requested. The practical implications of such an inappropriate shifting of the burden of proof are significant.

SEC. 6. RULES OF CONSTRUCTION.

“(g) REASONABLE ACCOMMODATION AND MODIFICATIONS -- A covered entity under Title I, a public entity under Title II, and any person who owns, leases (or leases to), or operates a place of public accommodations under Title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C).”

Although presumably drafted to ensure that this provision applies to all covered entities under the ADA, this language omits reference to testing organizations. Testing organizations are not “public

accommodations,” which is why Congress included a separate statutory provision in Title III of the ADA that specifically applies to testing organizations. To address this problem, the proposed language should be revised to read as follows: “A covered entity under the ADA need not provide a reasonable accommodation or a reasonable modification to policies, practices or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C).”

II. Statements That Were Inappropriately Included in a House Report

Despite the ADAMA’s clear focus on employment-related concerns, language relating to accommodations requested under the ADA by students who claim to have learning disabilities was inserted into a House Report:

The Committee also seeks to clarify how the bill’s concept of “materially restricts” should be applied for individuals with specific learning disabilities who are frequently substantially limited in the major life activities of learning, reading, writing, thinking, or speaking. In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to “most people.” When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price v. National Board of Medical Examiners*, *Gonzales v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*.

See H.R. Report 110-73, “ADA Amendments Act of 2008,” at 10 (June 23, 2008). This language suggests that the referenced lower-court cases were wrongly decided. We respectfully disagree. The holdings in those cases are supported by the legislative history of the original ADA, the DOJ’s implementing regulations, and numerous other court decisions. Therefore, this purported legislative history should be disavowed in any Conference Report that results from future action on the proposed legislation.

III. Proposed New Language

To help alleviate the concerns noted above, and to minimize the untoward consequences that the ADARA or ADAMA would otherwise have on public and private entities that administer examinations or rely upon the results of such examinations, the following language should be included in the proposed legislation:

[New] SEC. 6. EXAMINATIONS.

Section 309 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12189) is amended to add the following two sentences at the end of Section 309:

Nothing in this Section or any other section of this Act shall be construed to require the provision of any accommodations or auxiliary aids that would (a) affect (i) the comparability of the resulting examination scores with scores obtained under standard

testing conditions or (ii) the measurement of a skill or construct that the examination is intended to measure, as determined by the person that offers the examination; (b) jeopardize the security of an examination; or (c) impose an undue burden on the person that offers the examination. In resolving any disputes relating to accommodations on a standardized examination, courts shall give deference to decisions that have been made in good faith by the person who offers or administers the examination.

Additional changes might also be warranted and appropriate.