EXTRA TIME IS A VIRTUE: HOW STANDARDIZED TESTING ACCOMMODATIONS AFTER COLLEGE THROW STUDENTS WITH DISABILITIES UNDER THE BUS

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I. INTRODUCTION

Picture a college senior diligently preparing to take the standardized entrance examination to get into law school, better known as the Law School Admissions Test ("LSAT"). He was diagnosed with Asperger Syndrome[1] and will graduate with his bachelor's degree from a four-year university in several months. He participated in college student organizations, earned good grades, lived independently, and is certainly an eligible candidate for admission to a professional program after graduation. He contacts Law School Admission Council ("LSAC"), the organization that governs LSAT administration, to secure extra time on the test because of certain challenges he confronts as a

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[1] Asperger Syndrome is a form of autism, often marked by difficulty with social interactions, troubles with nonverbal communication, impulsivity, and issues with motor skills, or attention. Each person presents differently, so the symptoms used in this hypothetical reflect only this particular student's experiences. *See Autism Spectrum Disorder*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/autism-spectrum-disorder/symptoms-causes/syc-20352928 (last visited Oct. 9, 2019) ("Autism spectrum disorder is a condition related to brain development that impacts how a person perceives and socializes with others, causing problems in social interaction and communication.").

student with Asperger Syndrome. He may easily lose the ability to focus for crucial increments of time due to the hum of the fluorescent lights in the examination room, or the blur of other students filling in their multiple-choice answer sheets at a quicker pace. The organization grants him extra time on the test to accommodate his disability. After test day, he is pleased with his score. Or, maybe he isn't. Either way, he continues with his plans to apply to law school.

He does not intend to disclose his Asperger Syndrome diagnosis on his law school applications. However, he may disclose after he is admitted if he needs accommodations from the school's disability services. The law schools to which he applied receive his application materials and his test score; however, the test score arrives with a written annotation indicating he received extra time on the test and the test was taken under special conditions, so the score might not be indicative of his ability. Federal regulations prohibit law schools from directly asking if students are disabled.[2] However, admissions officers at colleges and universities have a tendency to assume that a standardized test being taken under "special conditions" means that the student has a disability.[3] The law school's admissions committee considers this assumption in its admission decision for this particular candidate.

This specific scenario where a student's disability status is inferred is not based on the facts of a specific case, but it was the reality for thousands of students with disabilities who took the LSAT in its current format for over two decades. The first instinct might be to believe that this college senior was not discriminated against, because he was not overtly denied admission based on the fact that he received extra time to take the LSAT. However, the concern in this scenario is that his test score was annotated with a marker indicating he received an accommodation for a disability. This situation used to be the norm – a student with a disability at the university or postgraduate level would receive a reasonable accommodation for standardized or high-stakes testing, and the test score would be sent with an addendum indicating that the student's

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[2] *See* 34 C.F.R. § 104.42(b)(4) (2019) (providing, with few exceptions, that schools may not make inquiries prior to admission as to whether or not an applicant is disabled).

[3] *See* Nancy Leong, Comment, *Beyond Breimhorst*, 57 STANFORD L. REV. 2135, 2145 (2005).

accommodation should be considered when evaluating the score. Further, issues of annotated scores, outright denial of accommodations, or test-taking waivers occurred in cases where students are blind or have other more noticeable impairments than the student with Asperger Syndrome.

However, I chose to describe the college student with Asperger Syndrome rather than a different disability, and facts selected from a past court decision, because the student with Asperger Syndrome could have easily been me. I was a college student with a disability who took the LSAT in 2015 and did not seek an accommodation because of the practice of disclosing information that I was uncertain about sharing. The idea of disclosing or allowing others to make inferences about my disability status felt invasive – that would be a decision I would have preferred to make on my own terms. I later learned that around the time that I was studying for and taking the LSAT, the governing organization reached a nationwide settlement to stop marking the test scores of disabled test takers who received extra time or other accommodations.[4] As a relatively recent law school graduate with a disability, it seems especially worthwhile to explore the implications of this annotated score practice and the long-awaited ending – and perhaps more importantly, our society has reached a point of awareness concerning discrimination against people with disabilities.

This Article explores the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and how these key pieces of legislation interact with high-stakes, standardized testing in postgraduate education. Part II explains how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act utilize the Individuals with Disabilities Education Act as a guideline and a supplement to help students with disabilities of all ages. Part II also summarizes case law relating how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act affect adult students with disabilities in high-stakes testing environments to receive graduate school admission and accommodations, Part III explains the de-escalation of annotated standardized test scores (known as "flagging") across all educational levels, and provides a critical view of *Department*

[4] Consent Decree, Dep't of Fair Emp't. and Hous. v. Law Sch. Admissions Council, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014).

of Fair Employment and Housing v. Law School Admission Council, Inc., which is the largest disability discrimination settlement pertaining to high-stakes standardized testing.[5] Part IV argues that while the *Department of Fair Employment and Housing v. Law School Admission Council, Inc.* settlement paved the road for the absolute end to discriminatory practices in high-stakes standardized testing for graduate school admissions, enforcement may be problematic for professional licensure examinations and determining accommodations for future test-takers. Additionally, Part IV argues that while the ending of the discriminatory annotation practice helps place students with disabilities on equal footing, the testing organizations have greater responsibility than ever to both ensure that accommodation services are granted to those who need them, and that accommodated services are not abused by nondisabled students who seek to gain an unfair advantage when taking their exams. To conclude, Part V offers final reflections on high-stakes testing for postgraduate studies and professional licensures, and suggests additional steps that could be taken going forward.

II. HOW DID WE GET HERE IN THE FIRST PLACE?

In order to establish how standardized testing organizations, students with disabilities, and colleges and universities nationwide reached the tip of the iceberg where a major governing organization administering standardized admissions tests was forced to settle and compensate over 6,000 test-takers,[6] it is important to understand the definition of disability, the accommodations provided, the landmark cases in which courts had to determine whether accommodations were appropriate, and the court's primary focus in those decisions. It is important to note that if the parties involved in analyzing the fairness of standardized testing adhered to the social model of disability rather than the medical model of disability,[7] then high-stakes

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[5] *Id.*

[6] *Id.*

[7] John C. Bricout et al., *Linking Models of Disability for Children with Developmental Disabilities*, 3 J. SOC. WORK DISABILITY & REHABILITATION, 45–52 (2004). The social model of disability says that disability is normal and the world is inaccessible to people with disabilities. The medical model says disabilities are to be treated and cured. Disability activists and people with disabilities often prescribe to the social model and believe that the environment is more disabling than the disability itself. *See id.*

testing could be seen as inaccessible and should be modified accordingly to make testing accessible, or the testing should be eliminated. High-stakes testing does not blame disability or see it as something to be cured while offering accommodations, but the systems in place are a barrier to disabled students seeking opportunities in higher education.

A. Disability: A Pertinent Part of the Human Experience

If people with disabilities were a formally recognized minority group, they would be the largest minority group in the United States.[8] In 2012, the United States Census estimated about 56.7 million Americans have disabilities.[9] Yet, in issues of diversity, disability is often disregarded or forgotten.[10] When President George H.W. Bush signed the Americans with Disabilities Act[11] into law in 1990, it was not a partisan issue, but rather it was a wide-reaching piece of civil rights legislation that crossed both sides of the political aisle. In fact, The Individuals with Disabilities Education Act explicitly states, "[d]isability is a natural part of the human experience[.]"[12] People with disabilities, like those who fall elsewhere on the diversity spectrum, were finally afforded greater protections under the law. Other minorities received protection under the Civil Rights Act of 1964,[13] and the beginnings of disability rights slowly followed

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[8] Charles Drum, et al., *Health Disparities Chart Book on Disability and Racial and Ethnic Status in the United States* 3 (2011), https://iod.unh.edu/sites/default/files/media/Project_Page_Resources/HealthDisparities/health_disparities_chart_book_080411.pdf (People with disabilities account for about twenty percent of the United States population); Kathy Caprino, *The World's Largest Minority Might Surprise You, and How We Can Better Serve Them*, FORBES (Apr. 14, 2016), http://www.forbes.com/sites/kathycaprino/2016/04/14/the-worlds-largest-minority-might-surprise-you-and-how-we-can-better-serve-them.

[9] *See Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

[10] *See* Doris Z. Fleischer & Frieda Zames, *Disability Rights: The Overlooked Civil Rights Issue*, 25 DISABILITY STUD. Q. (2005), http://dsq-sds.org/article/view/629/806.

[11] 42 U.S.C. § 12101 (2018).

[12] 20 U.S.C. § 1400 (2018).

[13] 42 U.S.C. § 2000(a) (2018) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color,

with the Rehabilitation Act of 1973;[14] the Americans with Disabilities Act was a long-awaited step towards equality in civil rights.

Disability advocates and scholars continue to argue that disability is an often disregarded civil rights issue,[15] is a form of diversity, is part of the human experience as it was set forth in the Americans with Disabilities Act, and that the environment is inaccessible and hinders people with disabilities more than the disabilities do.[16] The idea that the environment is more disabling than a disability falls under the social model of disability, and the practices regarding standardized testing explored in this Article are viewed from a social model of disability standpoint.[17]

The Americans with Disabilities Act defines a disability as "a physical or mental impairment that substantially limits one or more a major life activit[y]."[18] Under this definition, a person with a disability is not someone who simply meets the stereotype of a person in a wheelchair or who needs to use a handicapped parking space, but it could be the student with Asperger Syndrome, a war veteran with Posttraumatic Stress Disorder, a person with a heart condition, or a person with an autoimmune disease or chronic pain, which would be invisible to the casual observer. This definition began to apply to all aspects of the Americans with Disabilities Act with amendments that took effect on January 1, 2009.[19]

The Americans with Disabilities Act is divided into five titles.[20] Title I regulates access to employment opportunities for people with disabilities.[21] Title II handles nondiscrimination on the basis of disability in state and local government services.[22] Title III, which is about public accommodations and commercial facilities, prohibits private places from discriminating against people with disabilities and sets standards for accessibility on

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religion, or national origin.").

14 29 U.S.C. § 701 (2018).

15 *See* Fleischer & Zames, *supra* note 10.

16 Bricout et al., *supra* note 7, at 50.

17 *See id.* at 50.

18 42 U.S.C. § 12102 (2018).

19 42 U.S.C. § 12102(4)(A).

20 Americans With Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (2018); ADA National Network, *What Is the Americans with Disabilities Act (ADA)?*, https://adata.org/learn-about-ada (last visited Sep. 20, 2019).

21 42 U.S.C. § 12112 (2018).

22 42 U.S.C. § 12132 (2018).

facilities and businesses.[23] Title IV requires that telecommunications services be accessible to individuals with speech and hearing disabilities to communicate via telephone.[24] Finally, Title V provides miscellaneous information as to how the Americans with Disabilities Act interacts with other laws, and which conditions are not considered disabilities.[25]

Under the Americans with Disabilities Act, high-stakes standardized testing issues should apply under Title III. Title III is specifically enforced by the United States Department of Justice, and holds forth a standard of "reasonable modification."[26] With the reasonable modification standard, businesses, organizations, and other private entities and places should make accommodations and modifications reasonable for their services and locations to be accessible to people with disabilities without substantially altering the content or goals.[27]

If reasonable modification is the standard, then why is it test scores would get annotated through the practice of "flagging" if the test-takers with disabilities are provided reasonable modifications to the services provided, such as extra time or large print? Annotation and flagging of test scores did not begin to cease until well over a decade after the Americans with Disabilities Act was signed into law.[28] Title III of the Americans with Disabilities Act specifically covers providers of educational testing and applications in the following:

> 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.[29]

Therefore, individuals with disabilities are specifically entitled to accommodations and access to applications and examinations

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[23] 42 U.S.C. § 12182 (2018).
[24] 47 U.S.C. § 225 (2018).
[25] *See* 42 U.S.C. §§ 12201, 12211 (2018).
[26] 42 U.S.C. § 12182.
[27] 42 U.S.C. § 12182.
[28] *See* Breimhorst v. Educ. Testing Serv., No. C-99-CV-3387, 2000 WL 34510621 (N.D. Cal. Mar. 27, 2000).
[29] 42 U.S.C. § 12189 (2018).

for professional schools under the Americans with Disabilities Act. But why is it that discriminatory practices were taking place even if the Americans with Disabilities Act provided that people with disabilities have the right to examinations in places and versions accessible to them?

B. Leveling the Playing Field

i. Legislation Outside of the Americans with Disabilities Act

On the surface, accommodations sound as if they have the potential to grant advantages to students with disabilities that their nondisabled peers may not receive. However, educators consider accommodations to be "leveling the playing field" for students with disabilities, likening them to students who wear glasses to assist with vision problems: "[g]lasses help 'level the playing field' for those of us who need them so that the test can measure our *ability* rather than our *disability*."[30] Similarly, extra time on a test, or being in a quiet space, provides the same level of support that a pair of glasses might. An accommodation can be as simple as extra time, the problems being read to someone who is blind, or testing in a wheelchair-accessible room – anything that makes the test accessible to a person with a disability without substantially modifying its contents and format or compromising the integrity of the test.[31]

Accommodations in postsecondary education grapple with various pieces of legislation outside of the Americans with Disabilities Act. While the Americans with Disabilities Act regulates public and private spaces and organizations, it does not completely govern discrimination outside of government services or the educational opportunities and rights of people with disabilities. The Individuals with Disabilities Education Act ("IDEA")[32] and Section 504 of the Rehabilitation Act of 1973 ("Section 504")[33] both expand upon education and civil rights.

Students in elementary and secondary schools are often able to receive the help they need through individualized education plans

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[30] MARTHA L. THURLOW ET AL., TESTING STUDENTS WITH DISABILITIES: PRACTICAL STRATEGIES FOR COMPLYING WITH DISTRICT AND STATE REQUIREMENTS 30 (2d ed. 2003).

[31] *See* 28 C.F.R. §§ 36.303(b), 36.309(b)(3) (2017) (providing non-exhaustive lists of auxiliary aids and services).

[32] *See* 20 U.S.C. § 1400 (2018).

[33] 29 U.S.C. § 701 (2018).

("IEPs") covered under IDEA,[34] or Section 504 of the Rehabilitation Act ("Section 504").[35] IDEA entitles students with disabilities to a free and appropriate education from kindergarten through twelfth grade, but its coverage ends when the student either receives a high school diploma or reaches age twenty-two, whichever comes first.[36] Accommodations are often written into IEPs, where the student's parents, educators, and the student form goals and learning objectives as well as ideas to best achieve them.

The rights that IDEA guarantees as well as IEPs lay down the framework for granting accommodations beyond elementary and secondary school at the university and professional level. Once the student either graduates from high school or turns twenty-two, whichever occurs first, IDEA no longer covers the student's education planning and accommodations and IEPs cease to exist. In private schools and postsecondary education, Section 504 and the Americans with Disabilities Act reign supreme – in schools and universities that follow Section 504, an informal version of an IEP may be in place.[37]

IDEA fails to protect students with disabilities at the university and postgraduate level because those students lose their IDEA protections and formalized IEPs upon receiving their high school diplomas or equivalent. However, IDEA still plays a significant piece in determining whether or not a student with a disability will receive an accommodation because a testing organization may consider a student's entire history of accommodations in school and on examinations, beginning in early childhood.[38] Those accommodations are often afforded to students under IDEA and through IEPs if the student went to public schools until high school graduation; private school students began grappling with the Americans with Disabilities Act and Section 504 before college and continue to do so well into adulthood. In the cases of private school students, informal

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[34] 20 U.S.C. § 1400.

[35] 29 U.S.C. § 701.

[36] 20 U.S.C. § 1401 (2018).

[37] Marty Beech, ACCOMMODATIONS ASSISTING STUDENTS WITH DISABILITIES, 7 (2010).

[38] *See ADA Requirements: Testing Accommodations*, U.S. DOJ, CIVIL RIGHTS DIVISION, *DISABILITY RIGHTS SECTION*, https://www.ada.gov/regs2014/testing_accommodations.pdf (last visited Oct. 10, 2019).

accommodations and learning plans are considered under Section 504 of the Rehabilitation Act of 1973.

Unlike the IDEA, Section 504 of the Rehabilitation Act of 1973 resembles the Americans with Disabilities Act. Under Section 504, "[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."[39]

In contrast to Section 504, the IDEA applies to public schools, and the Americans with Disabilities Act applies whether the entity is privately owned or receives state or federal funds.[40] Part of the premise of Section 504 is that students with disabilities at postsecondary schools are entitled to accommodations in education that reflect their abilities in the classroom rather than reflect the extent and nature of their disabilities.[41] The ways in which accommodations are granted and contain educational information for students with disabilities in private school and postsecondary institutions are known as Section 504 Plans.[42]

ii. When Courts Intervene: Deciding Upon Accommodations

While the widespread protections under the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act of 1973 seem comprehensive and inclusive of the varying issues that arise under test-taking, it is not quite so clear where the line is to be drawn.

A 1993 court decision aptly stated that "the purpose of the [Americans with Disabilities Act] is to place those with disabilities on an equal footing and not to give them an unfair advantage."[43] Since its inception in 1990, courts have been grappling with interpreting the Americans with Disabilities Act as it relates to granting accommodations for students with

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39 34 C.F.R. § 104.4 (2000).

40 *See* 29 U.S.C. § 794 (2018).

41 *See* 34 C.F.R. § 104.44 (2019).

42 *See* 29 U.S.C. § 794; 34 C.F.R. § 104 (2019) (These are the only statutes and regulations under the Rehabilitation Act of 1973 that govern Section 504 Plans and guarantee students with disabilities the rights to related aids and services).

43 D'Amico v. N.Y. State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993).

disabilities in high-stakes standardized testing. Courts are also tasked with the balancing act of leveling the playing field and avoiding granting unfair advantages to either people with disabilities or their nondisabled counterparts.

Courts have held that the Americans with Disabilities Act applies to people who have at least one major life activity which is substantially limited because of a disability.[44] The 2008 amendments to the Americans with Disabilities Act have given a non-exhaustive list of major life activities in its definition of the term, stating that "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."[45] For the purposes of education, major life activities that directly interfere with test-taking are learning, reading, concentrating, thinking, and communicating.

In addition, courts primarily rely on diagnostic criteria to determine whether or not a person has a disability. Courts steadily hold that in order to access accommodations for mental impairments, such as learning disabilities, psychiatric disabilities, and neurological disabilities, that the person needs a current diagnosis made in accordance with the DSM.[46]

In *Rothberg v. Law School Admission Council*, Abby Rothberg was a college senior applying to law school and intended to take the Law School Admissions Test ("LSAT") that Fall.[47] Rothberg had significant reading and learning disabilities since elementary school, and required extensive tutoring.[48] She requested additional time to take the LSAT, and despite her disabilities, she was denied the accommodation.[49] The court held that Rothberg had disabilities that impacted major life activities

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[44] *See* Rothberg v. Law Sch. Admission Council, Inc., 300 F. Supp. 2d 1093, 1104 (D. Colo. 2004), *rev'd on other grounds*, 102 Fed. App'x 122 (10th Cir. 2004). *See also* Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 223 (E.D. Pa. 2007).

[45] 42 U.S.C. § 12102(2)(A) (2018).

[46] *See* Ashley Yull, *The Impact of Race and Socioeconomic Status on Access to Accommodations in Post-Secondary Education*, 23 AM. U. J. GENDER, SOC. POL'Y & LAW 353, 364–65 (2015).

[47] *See Rothberg*, 300 F. Supp. 2d at 1095–96.

[48] *See id.* at 1095.

[49] *See id.* at 1098–99.

under the Americans with Disabilities Act,[50] and the Law School Admission Council violated Title III of the Americans with Disabilities Act through its denial of extra time.[51] However, the Tenth Circuit reversed Rothberg's claim for injunctive relief.[52]

Contrary to the decision in *Rothberg*, the Eastern District of Pennsylvania held in *Love v. Law School Admission Council, Inc.*, that major life activities were not substantially limited in the case of Jonathan Love, a student with Attention Deficit Hyperactivity Disorder ("ADHD") and another learning disability who requested time-and-a-half as an accommodation for the LSAT.[53] ADHD is a neurological condition that interferes with a person's functioning or development, and is marked by severe inattention, unfocused motor activity, and hyperactivity that occur more often than in the general population and interferes with performance socially and in employment and educational settings.[54] Students with ADHD benefit from receiving accommodations for quiet spaces or extra time when taking tests in schools.

The *Love* court denied Love the additional 17.5 minutes per section on the LSAT because his supporting documentation, which included two psychological reports, did not "demonstrate a substantial limitation related to taking the LSAT."[55] The court did not dispute that ADHD was a disability or impairment, nor did it question that Love had ADHD, but rather, it did not find how it met the "substantial limiting" of a major life activity. The Supreme Court considers the substantial limitation of a life activity to be "considerable"[56] and the determination of a substantial limit on a major life activity is "not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[57] The approach that the *Love* court took is that the

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[50] *See id.* at 1104.

[51] *See id.* at 1106.

[52] Rothberg v. Law School Admission Council, 102 F. App'x 122, 126–27 (10th Cir. 2004).

[53] Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 228 (E.D. Pa. 2007).

[54] *See Attention-Deficit/Hyperactivity Disorder*, NATIONAL INSTITUTE OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd/index.shtml (last visited Oct. 2019).

[55] *Love*, 513 F. Supp. 2d. at 208.

[56] *See id.* at 225 (quoting Sutton v. United Airlines, 527 U.S. 471, 491 (U.S. 1999)).

[57] *Id.* (quoting *Sutton*, 527 U.S. at 483).

plaintiff did not establish a deep-rooted history of ADHD based on his educational background, and that his inattention was not significant enough to warrant accommodation.[58] Under this approach, a disability has to have been present and significantly impairing an individual for a large portion of a person's life. *Love* does not address recent onsets or impairments changing throughout the lifespan.

Courts, however, have rarely grappled with flagging practices, except in *Doe v. National Board of Medical Examiners*.[59] The plaintiff in *Doe* had multiple sclerosis, and alleged that flagging accommodated scores violated Title III of the Americans with Disabilities Act.[60] The court did not view a flag as a denial of access under Title III,[61] nor did the Americans with Disabilities Act mandate that the scores are comparable to those achieved under standard testing conditions.[62]

Courts have not specifically ruled again on flagging since the *Doe* decision; rather, a series of settlements between testing organizations, plaintiffs, and the United States Department of Justice began to take the place of appellate court battles over discrimination in test results.[63]

iii. Disproportionate Accommodation Awards & The Potential for Abuse

As seen in the court's decision in *Love*, conditions like ADHD often come under intense scrutiny when granting accommodations. While in *Love* it could be argued that the Jonathan Love did indeed have inattention and issues relating to ADHD, the court erred on the side of caution given his educational history and to prevent abuse of the accommodation system. Critics and popular media argue that ADHD is a disorder is over-diagnosed, while the science says otherwise.[64]

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58 *Id.* at 225–26.

59 Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146 (3d Cir. 1999).

60 *Id*. at 148.

61 *Id*. at 149.

62 *Id*. at 156.

63 *See*, *e.g.*, Breimhorst v. Educational Testing Service, No. C-99-CV-3387, 2000 WL 34510621, at *1, *1 (N.D. Cal. Mar. 27, 2000) (settlement that ended flagging for the GRE, GMAT, and TOEFL examinations).

64 *See*, *e.g.*, Mark J. Sciutto & Miriam Eisenberg, *Evaluating the Evidence for and Against the Overdiagnosis of ADHD*, 11 J. OF ATTENTION DISORDERS 106

However, part of the disorder's diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") is that symptoms be present since childhood,[65] which was not the case in *Love*.[66] The childhood documentation requirement and courts' eagerness for a full accommodation and lifespan disability history opens the doors to other questions about access to healthcare providers, diagnoses, and how this approach drastically discriminates against people with disabilities who are also members of minority groups and lower socioeconomic status than their peers who are granted accommodations and also are not minorities and have higher socioeconomic status.

a. Race and Socioeconomic Status as Determining Factors for Receiving Accommodations

While the approach taken in *Love* seems as if it is combating abuse of the accommodation system by requiring the history of a diagnosis made in accordance with DSM criteria, that approach could set a dangerous precedent that could be discriminatory to those unable to access psychiatric providers and receive necessary accommodations. Accessing healthcare professionals requires a certain level of competence, education, and in some cases, wealth. Students that are racial and ethnic minorities are far less likely to receive diagnoses during their early school years, despite presenting symptoms of disability. For instance, autism occurs evenly between racial groups, but the diagnostic rates for marginalized and minority groups are lower regardless of socioeconomic status.[67] Black and Latino school-aged students are more likely to experience the hallmarks of ADHD, but are less likely to receive a diagnosis of ADHD than their white peers.[68] While this denies students the help they need at early ages and to receive medication or learn appropriate coping mechanisms, it ultimately hurts them further down the road when it comes to postsecondary and graduate school admission examinations.

(2000).

[65] *See* AM. PSYCHIATRIC ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 314.01 (5th ed. 2013) [hereinafter DSM-V].

[66] *See* Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 210 (E.D. Pa. 2007).

[67] *See* Yull, *supra*, note 46, at 368–69.

[68] *See* Tumaini R. Coker et. al., *Racial and Ethnic Disparities in ADHD Diagnosis and Treatment*, 138 PEDIATRICS Sept. 2016, at 4, 7.

A 2000 audit in California demonstrated that socioeconomic status and race came into play when granting accommodations for standardized testing for college admissions: testing accommodations were given to students who "were disproportionately white, or were more likely to come from an affluent family or to attend a private school."[69] Considering that a history of a disability diagnosis and symptoms are necessary to receive accommodations at the postsecondary level, it appears that students of color and students who do not come from affluent backgrounds are less likely to have a history of receiving accommodations (even if they do display signs akin to a specific disability such as ADHD) and will be less likely to receive the diagnoses and accommodations necessary to succeed the way that their affluent, white peers would.

The socioeconomic and racial considerations make the decision from *Love* concerning – if a history from elementary school onwards is necessary in cases regarding diagnoses that require DSM diagnostic criteria along with a history of disability, and there are weaknesses in identifying learning and psychiatric disabilities in low-income school districts, then where does that leave students who need help later in life who are unable to get it early on because of the schools they attended or the socioeconomic status of their parents?

b. Potential for Abuse: How Affluent Students Receive Unneeded Extra Time

On the opposite side of low-income and minority discrimination is an overwhelming amount of affluent, white students receiving accommodations for standardized tests. The 2000 California audit[70] was a response to concern that too many students were using accommodations, whether or not they were needed. Critics of accommodation and the removal of discriminatory annotation and score flagging practices all expressed concern over excessive accommodation regardless of level of need.

The concerns for potential abuse were not unsounded; as

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[69] ELAINE M. HOWLE, BUREAU OF STATE AUDITS, STANDARDIZED TESTS: ALTHOUGH SOME STUDENTS MAY RECEIVE EXTRA TIME ON STANDARDIZED TESTS THAT IS NOT DESERVED, OTHERS MAY NOT BE GETTING THE ASSISTANCE THEY NEED 15 (2000), https://www.bsa.ca.gov/pdfs/reports/2000-108.pdf.

[70] *See id.*

recently as March 2019, wealthy families were indicted for abusing the accommodation and high stakes testing system in a college admissions cheating scandal.[71] Parents falsely had their children diagnosed with learning disabilities in order to receive extra time. The Justice Department transcript in the indictment over this scandal included the direct quote: "[w]hat happened is, all the wealthy families that figured out that if I get my kid tested and they get extended time, they can do better on the test. So most of these kids don't even have issues, but they're getting time. The playing field is not fair."[72]

Testing organizations have consistently expressed concern over the potential for abuse, citing it as a key argument for keeping a score flagging system in place to deter frivolous granting of accommodation.[73] As seen in the 2019 college cheating scandal, the flagging removal did indeed lead to abuse amongst society's richest families in order to have a competitive advantage in high-stakes testing. The socioeconomic and minority arguments further demonstrate evidence about the concern for abuse – students from high socioeconomic statuses would be able to access healthcare providers willing to diagnose them with ADHD or a learning impairment (the truthfulness and extent of such impairments is questionable) in order to receive an advantage of extra time on an admissions test. This goes against the spirit of accommodations, which are made available to truly level the playing field for those who need them most, not to help lower-scoring, nondisabled students score higher for the purposes of gaining admission to more prestigious postsecondary education programs. Students and their parents from affluent areas or private schools are able to find a psychologist or education specialist willing to give a learning disability diagnosis, in the absence of a learning disability, in order to receive accommodation, while students in low-income school districts, often from minority backgrounds, are unable to access necessary specialists and healthcare providers to receive the disability diagnoses, assessments, and services that are so desperately

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71 *See* David M. Perry, *College Cheating Scandal is the Tip of the Iceberg*, CNN (Mar. 12, 2019), https://www.cnn.com/2019/03/12/opinions/college-cheating-scandal-privilege-disability-perry/index.html.

72 Affidavit in Support of Criminal Complaint at 25, United States v. Abbott, MJ, No. 1:19-cr-10117 (D. Mass Mar. 11, 2019).

73 *See* Tamar Lewin, *Abuse Feared as SAT Test Changes Disability Policy*, N.Y. TIMES (Jul. 15, 2002), https://www.nytimes.com/2002/07/15/us/abuse-feared-as-sat-test-changes-disability-policy.html.

needed, which leads to uphill battles for, or denial of, services in adulthood.[74]

III. THE END OF DISCRIMINATORY TESTING PRACTICES

In order to safeguard the integrity and validity of standardized high-stakes tests for admissions to all forms of postsecondary and graduate school education, the testing organizations would either annotate or flag test scores achieved under special conditions or nonstandard administration. Special conditions and nonstandard administration almost always referred to scores from tests taken by students with disabilities who received accommodations, whether it be extra time, a quiet room, a screen reader, or anything else that would put a student with a learning, physical, or psychiatric disability, on equal footing as a nondisabled peer when taking a standardized test. In the overwhelming majority of admissions offices, postsecondary program admission officers inherently believed that a flag was indicative of a disability, or in the minority view, a learning disability.[75] In college admissions, over twenty three percent of admission officers believed that a flag on a test score (which meant the officers consciously or subconsciously assumed the student had a disability) would negatively affect a student's chance of admission.[76]

As a result of this bias and discrimination against students with disabilities, disabled students and advocates began challenging the practice of flagging. Flagging has been slowly disappearing from each of various standardized admissions examinations beginning in 2000, but flagging once again gained widespread attention in 2014 when the largest discrimination lawsuit falling under Title III of the Americans with Disabilities Act was settled for millions of dollars across thousands of test-takers.[77]

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74 *See* Yull, *supra* note 46, at 357–58. *See also* Coker et al., *supra* note 68, at 7.

75 *See* Leong, *supra* note 3, at 2143–45.

76 *See id.* at 2145.

77 *See* Press Release, Dep't of Justice, Law School Admission Council Agrees to Systematic Reforms and $7.73 Million Payment to Settle Justice Department's Nationwide Disability Discrimination Lawsuit (May 20, 2014) [hereinafter Press Release, LSAC $7.73 Million Settlement], https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice.

A. The Beginning of the End of Flagging

Flagging began coming to its abrupt end in 2000 with the landmark case *Breimhorst v. Educational Testing Service*.[78] In *Breimhorst*, the plaintiff did not have hands and received accommodations for the computer-based GMAT examination as well as twenty-five percent extra time on the exam.[79] The Educational Testing Service ("ETS") administers the GMAT, and ETS branded Breimhorst's score report with "SCORES OBTAINED UNDER SPECIAL CONDITIONS."[80] Breimhorst's requests were denied, and he felt as if his GMAT scores were less valuable because of the annotation. Test-takers with disabilities who receive the flag "are automatically cast under a cloud of suspicion."[81] As a result of *Breimhorst*, ETS announced that it would end flagging across its three graduate school admissions exams: the GRE, the GMAT, and the TOEFL.[82]

For high school students with disabilities who were dreaming about attending college, the fall of 2003 was a time of swift change and made realizing the dream more realistic. On July 15, 2002, the College Board, which governs the SAT for college admissions, the PSAT, and Advanced Placement exams, announced that it would put an end to its flagging practice of the scores of disabled test-takers in order to settle a lawsuit.[83] The flags would disappear beginning in the fall of 2003.[84] Prior to the lawsuit and announcement, test results from students with disabilities who took tests that the College Board administered would be sent to colleges and universities with a marked notation that the scores were "Obtained Under Special Conditions."

Following the College Board's decision, ACT announced that it would also stop flagging disabled test-takers' scores beginning in the fall of 2003.[85] ACT's decision affects about 30,000 high school

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78 *See* Breimhorst v. Educational Testing Service, No. C-99-CV-3387, 2000 WL 34510621, at *1, *1 (N.D. Cal. Mar. 27, 2000).

79 *See id*. at *2.

80 *Id.*

81 *Id*. at *3. *See also* Leong, *supra* note 3, at 2137.

82 Kenneth R. Weiss, *Firm Agrees to Stop Flagging Disabled Students' Test Scores*, L.A. TIMES (Feb. 8, 2001), https://www.latimes.com/archives/la-xpm-2001-feb-08-mn-22757-story.html.

83 Tamar Lewin, *Abuse Feared as SAT Test Changes Disability Policy*, N.Y. TIMES (July 15, 2002), http://www.nytimes.com/2002/07/15/us/abuse-feared-as-sat-test-changes-disability-policy.html.

84 *Id.*

85 Tamar Lewin, *ACT Ends Flags on Test Scores of the Disabled*, N.Y. TIMES

students per year.[86] ACT decided independently of the SAT lawsuit to stop the flagging practices, but it also increased the standards necessary to receive accommodations in order to reserve them for individuals who truly needed them and to prevent abuse of the system in order to illegitimately receive extended time.[87] The ACT has a reputation for being the more difficult of the two tests to obtain accommodations for.[88]

B. Law School Admissions: The Final Battleground

The Law School Admissions Test ("LSAT") is considered a rite of passage for the over 100,000 students each year[89] who take the test in hopes of gaining admission to law school. The LSAT examination is a half-day standardized test containing five multiple choice sections with time constraints of thirty-five minutes each.[90] All potential candidates for admission to American Bar Association accredited law schools in the United States are required to take the LSAT examination for consideration.[91] Law School Admission Council, Inc. ("LSAC") is a nonprofit member organization based out of Newtown, Pennsylvania.[92] LSAC previously administered the LSAT examination four times per year, but as of 2018, the LSAT is administered six times per year.[93] LSAC oversees the law school

(July 28, 2002), http://www.nytimes.com/2002/07/28/us/act-ends-flags-on-test-scores-of-the-disabled.html.

86 *Id.*

87 *Id.*

88 Abigail Sullivan Moore, *Accommodations Angst*, N.Y. TIMES (Nov. 4, 2010), http://www.nytimes.com/2010/11/07/education/edlife/07strategy-t.html.

89 *LSAT Trends: Total LSATs Administered by Admin & Year*, LAW SCHOOL ADMISSION COUNCIL, http://www.lsac.org/lsacresources/data/lsats-administered (last visited Sept. 11, 2019).

90 Dep't of Fair Empl. and Hous. v. Law Sch. Admission Council, Inc., 896 F. Supp. 2d 849, 852 (N.D. Cal. 2012) ("The test consists of a battery of five sections labeled as either reading comprehension, analytical reasoning, or logical reasoning . . . [Consisting] of multiple-choice type questions . . . test-takers are allotted thirty-five minutes to complete each section." There is also "an unscored thirty-five minute written component, which LSAC forwards to law schools along with a test-taker's scores.").

91 *The LSAT*, LAW SCH. ADMISSION COUNCIL, http://lsac.org/lsat (last visited Sept. 7, 2019).

92 *See About the Law School Admission Council*, LAW SCH. ADMISSION COUNCIL, http://lsac.org/about (last visited Sept. 6, 2019).

93 *LSAC Expands LSAT Schedule*, LAW SCH. ADMISSION COUNCIL (June 1, 2017), https://www.lsac.org/about/news/lsac-expands-lsat-schedule.

application process, and simplifies internal processes for applications to its member law schools such as sending letters of recommendation and academic transcripts from applicants' undergraduate and graduate programs.[94]

Testing accommodations for the LSAT are granted on a case-by-case basis. LSAC receives about 1,000 requests per year for accommodations.[95] Most, if not all, individuals who request accommodations on LSAT test day are required to submit proper documentation, such as medications being taken, psychological evaluations, and proof of specific disabilities.[96] This requirement for documentation is in place to prevent individuals without disabilities from receiving accommodations that may give them an unfair advantage on the examination.

LSAC has had a policy similar to other standardized testing organizations that annotates test scores of disabled test takers who receive extra time, which explains that the score may not be representative or accurate of a law school candidate's abilities since it was not taken under standard timing conditions.[97] This annotation is also sent along with the LSAT score report should a law school candidate apply for admission to member law schools.[98] The practice of notating accommodated tests is colloquially known as "flagging."[99]

Critics of "flagging" accommodated LSAT scores noted that the practice allowed law schools to particularly identify students with disabilities during the admissions process, which is prohibited under federal regulations.[100] LSAC disagreed with the critics, but reviewed its flagging policy for the first time in 2003.[101] The

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94 *See About the Law School Admission Council, supra* note 92 at *Credential Assembly Service*.

95 Laura A. Lauth, et. al, *Accommodated Test-Taker Trends and Performance for the June 2012 Through February 2017 LSAT Administrations (TR 17-03)*, LAW SCH. ADMISSION COUNCIL, https://www.lsac.org/data-research/research/accommodated-test-taker-trends-and-performance-june-2012-through-february (last visited Oct. 8, 2019).

96 *See* Dep't of Fair Empl. and Hous. v. Law Sch. Admission Council, Inc., 896 F. Supp. 2d 849, 852 (N.D. Cal. 2012); *Statement of Need for Testing Accommodation*, LAW SCH. ADMISSIONS COUNCIL (2019), http://lsac.org/sites/default/files/media/statement-of-need.pdf.

97 Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J. L. & EDUC. 31, 46–47 (1997).

98 *See id.* at 46.

99 *See id.*

100 34 C.F.R. § 104.42(b)(4) (2018).

101 *See* Tanya Roth, *ADA Accommodations and 'Flagging' on the LSAT*,

decision to review the practice followed pressure from the *Breimhorst* and College Board decisions to stop similar flagging practice. Upon its review of flagging, LSAC's report in February 2003 stated that "the Board strongly affirmed the current practice of 'flagging' given its concern for the integrity of the test and the LSAC's psychometric research finding that scores earned with additional time are not comparable to standard scores."[102] In effect, LSAC was more concerned with how scores earned with extra time have the ability to be higher given the test's time regular constraints and the potential for dishonesty than the legitimate discrimination concerns of students with disabilities.

LSAC continued flagging scores of disabled test-takers until May 2014, when LSAC entered into a settlement with the California Department of Fair Employment and Housing and the United States Department of Justice.[103] One of the key terms of the settlement was that the practice of flagging end immediately.[104]

i. Rooted in California Civil Rights

The California Department of Fair Employment and Housing ("DFEH") initially filed suit representing seventeen individuals in the State of California who requested LSAT disability accommodations between 2009 and 2013.[105]

In 2010, the California Department of Fair Housing and Employment launched an investigation into the denial of reasonable test taking accommodations that prospective LSAT takers had experienced.[106] The results of this investigation were filed as an accusation with the California Fair Housing and Employment Commission in 2012, where the Law School Admissions Council elected to have the case brought to the

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FINDLAW (Sept. 13, 2010, 9:56 AM), https://blogs.findlaw.com/greedy_associates/2010/09/ada-accommodations-and-flagging-on-the-lsat.html.

102 *Id.*

103 *See* Press Release, LSAC $7.73 Million Settlement, *supra* note 77.

104 *Department of Fair Employment and Housing v. Law School Admission Council, Inc.,* CAL. DEP'T OF FAIR EMP'T & HOUS., https://www.dfeh.ca.gov/legal-records-and-reports/dfeh-v-lsac (last visited Sept. 17, 2019).

105 *See* Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., 941 F. Supp. 2d 1159, 1161 (N.D. Cal. 2013).

106 *See id.*

California Superior Court.[107]

The case began with the issue of whether the claim could be filed as a class action suit or the claim had to follow the necessary steps to be certified as class action; the court ruled in favor of DFEH as the population being represented was too large to necessarily account for each member of the suit who was discriminated against by LSAC.[108] DFEH represents all Californians in regards to the Unruh Civil Rights Act.[109] A disability violation of the Unruh Civil Rights Act is also a violation of the Americans with Disabilities Act; the guidelines set forth by the Americans with Disabilities Act are codified within the 1992 amendments to the Unruh Civil Rights Act.[110] However, in order to have an Unruh Civil Rights Act violation, the discrimination must be intentional, unless the violation is premised on an ADA violation.[111] Flagging test scores is considered intentional.

The United States Department of Justice intervened because of concerns regarding Title III of the Americans with Disabilities Act, which goes beyond the protections afforded to Californians under the Unruh Civil Rights Act. Under Title III of the Americans with Disabilities Act, private entities, like LSAC, "must assure that [an] examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made."[112] The Department of Justice announced its involvement in September 2012, citing the Title III concerns and in order to add additional plaintiffs outside of California to the class of test takers.[113]

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107 *See id.*

108 Dep't of Fair Emp't and Hous. v. Law Sch. Admission Council Inc., 896 F. Supp. 2d 849, 873–74, 875 (N.D. Cal. 2012).

109 *See* CAL. CIV. CODE § 51(b) (Deering 2016) ("All persons within the jurisdiction of [California] are free and equal, and no matter what their . . . disability, medical condition, genetic information . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.").

110 CAL. CIV. CODE § 51(f) (Deering 2016).

111 *See* Munson v. Del Taco, Inc., 522 F.3d 997, 1001 (9th Cir. 2008); Lentini v. Cal. Ctr. for the Arts, 370 F.3d 837, 846–47 (9th Cir. 2004) (holdings where an Americans with Disabilities Act violation is enough to show an Unruh Civil Rights Act violation).

112 28 C.F.R. § 36.309 (2018).

113 Press Release, U.S. Dep't of Justice, Justice Dep't Seeks to Intervene in Lawsuit Against Law School Admission Council to Protect Rights of Individuals with Disabilities (Sept. 6, 2012), https://www.justice.gov/opa/pr/justice-department-seeks-intervene-lawsuit-against-law-school-admission-council-protect.

ii. The Long-Awaited Settlement

Almost two years after the Department of Justice announced its involvement in the lawsuit it finally had a favorable resolution for students with disabilities. On May 20, 2014, the parties filed a proposed consent decree in which LSAC was found in violation of California's Unruh Act as well as Title III of the Americans with Disabilities Act.[114] U.S. District Judge Edward M. Chen ordered a payment from LSAC in the sum of $8.73 million. $6.73 million of the settlement would be divided to compensate the 6,300 individuals nationwide who applied for LSAT testing accommodations between January 1, 2009 and May 20, 2014.[115] The federal court approved the consent decree on May 29, 2014.[116]

The terms of the consent decree included that the practice of discriminating against disabled test takers and "flagging" scores was forbidden, effective immediately after the consent decree was approved:

> LSAC shall permanently discontinue all forms of the practice of annotating score reports of candidates who receive the testing accommodation of extended test time due to disability. For candidates applying to law school after the Effective Date of this Decree, LSAC shall henceforth provide the same information on test score reports for all candidates for whom score reports are provided.[117]

The discontinuation of flagging scores placed each law school admissions candidate on equal footing regardless of the score report and allowed the disabled test-takers the freedom to disclose their disabilities on their own terms, rather than indirectly disclose their disability status through an involuntarily annotated score.[118]

In addition to ending flagging, LSAC also agreed to streamline the accommodation process. The new streamlining system would almost automatically grant accommodations to any disabled test-

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114 Consent Decree, Dep't of Fair Emp't and Hous. v. Law Sch. Admission Council, Inc., No. CV 12-1830-EMC (N.D. Cal. May 29, 2014).

115 *See* Press Release, LSAC $7.73 Million Settlement, *supra* note 77.

116 *See* Consent Decree, *Dep't of Fair Emp't and Hous.*, No. CV 12-1830-EMC.

117 *Id.*

118 *See* Eichhorn, *supra* note 97, at 46–47.

taker who had previously received an accommodation on another standardized test relating to postsecondary school admissions, such as the SAT and ACT.[119] This eliminates the need for the comprehensive investigation and history that previously denied test-takers, such as Abby Rothberg,[120] reasonable accommodations.

Finally, LSAC consented to implementing and reviewing best practices as recommended by a panel of five experts created jointly by the parties.[121] LSAC selected two experts, the Department of Justice and DFEH together selected two experts, and the fifth expert was selected by the other four experts from a jointly created list.[122] Each expert had to have experience in standardized testing accommodations for students with disabilities or had to be an expert in the field of cognitive disability.[123]

The settlement did not remain unchallenged. LSAC challenged parts of the consent decree, and a magistrate judge had to rule on whether or not LSAC's arguments had merit.[124] LSAC argued that some of the best practices determined by the expert panel, such as granting disabled test-takers with proper documentation fifty percent extra time, went beyond the scope of the consent decree.[125] The court held that "the guidance that LSAC shall presumptively grant testing accommodation requests that do not involve requests for extra time does not dictate outcomes, but merely establishes a default presumption that may be overcome if the reviewer determines . . . that the accommodation is not warranted."[126] The court also held that LSAC did not have to unreasonably burden itself with accommodation request turnarounds, and grant them within one business day, for instance. Most of the reversals of the expert

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119 *See* Press Release, LSAC $7.73 Million Settlement, *supra* note 77.

120 *See* Rothberg v. Law Sch. Admission Council, 300 F. Supp. 2d 1093, 1098, 1107 (D. Colo. 2004) (A student with lifelong learning disabilities was denied reasonable accommodations on the LSAT).

121 *See* Consent Decree, *Dep't of Fair Emp't and Hous.*, No. CV 12-1830-EMC.

122 *See id.*

123 *Id.*

124 Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., No. 12-cv-01830-JCS, 2015 WL 4719613, at *5 (N.D. Cal. Aug. 7, 2015).

125 Y. Peter Kang, *LSAT Test-Taking Changes in Disability Suit Backed by Judge*, LAW360 (Aug. 10, 2015), https://www.law360.com/articles/689076/lsat-test-taking-changes-in-disability-suit-backed-by-judge.

126 *Dep't of Fair Emp't & Hous.*, 2015 WL 4719613 at *13 (internal quotation omitted).

recommendations were administrative, rather than substantive, changes to the consent decree.[127]

IV. IS THE PLAYING FIELD TRULY LEVELED?

The DFEH settlement made the LSAT the second-to-last of the postgraduate standardized admissions examinations to end the flagging practice. Of course, the *DFEH* settlement's nondiscrimination terms only applied to the LSAT for Law School Admissions Test-takers after May 20, 2014. However, since May 2014, hundreds of thousands of students have taken the LSAT, applied to law school, and received admissions decisions.[128] The accommodation process still requires that students with disabilities request accommodations within a certain time frame and submit corresponding documentation to support their need for extra time, or another modification, in order to continue to level the playing field for test-takers with disabilities.[129]

However, following the *DFEH* consent decree has proven to be a problem for LSAC. A California federal magistrate judge held LSAC in contempt of court for partial violation of the consent agreement based on LSAC internal policies for determining accommodations and offers for partial accommodations.[130] The ruling further extended the consent decree an additional two years, meaning it is set to be in effect until 2020.[131] What comes for LSAC and law school admissions testing accommodations following the expiration of the consent decree is to be determined.

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127 Kang, *supra* note 125.

128 *See Current Volume Summary by Region, Race/Ethnicity, Sex & LSAT Score*, LAW SCH. ADMISSIONS COUNCIL, https://www.lsac.org/data-research/data/current-volume-summaries-region-raceethnicity-sex-lsat-score (last visited Sept. 19, 2019).

129 *LSAC Policy on Accommodations for Test Takers with Disabilities*, LAW SCH. ADMISSIONS COUNCIL, https://www.lsac.org/lsat/lsac-policy-accommodations-test-takers-disabilities (last visited Sept. 19, 2019).

130 Debra Cassens Weiss, *Council that Administers the LSAT is Held in Contempt; ADA Consent Decree is Extended*, ABA JOURNAL (Mar. 6, 2018), http://www.abajournal.com/news/article/council_that_administers_the_lsat_is_held_in_contempt_ada_consent_decree_is.

131 *See* Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., No. 12-cv-01830-JCS, 2018 WL 1156605, at *26 (N.D. Cal. Mar. 5, 2018).

A. Following the Law School Admissions Lead

While the *DFEH* settlement only applies to law school and the LSAT, other high-stakes tests and their governing organizations either previously did not discriminate, or changed their accommodation granting processes and prohibited score flagging to contribute to ending discrimination in higher education against students with disabilities. The last to adapt to the prohibition on flagging was the Medical College Admissions Test ("MCAT").[132] Considered to be more of a hurdle for students with disabilities, medical schools were found to violate the Rehabilitation Act by assigning negative treatment to flagged scores when making admissions decisions.[133] The MCAT did not stop annotating test scores of test-takers with disabilities until 2015 for the following year's examination dates.[134] The MCAT has similar practices to the LSAT, but in other ways, is more accommodating to all test-takers. The MCAT requires that accommodation applications be complete with medical information for an accommodation as large as extra time or breaks, but pre-approves certain accommodations such as needing an insulin pump in the examination room.[135] However, noise-reduction headphones are available to all test-takers and it is a computer-based test, which makes accommodations for visually impaired individuals far more accessible.[136] The MCAT no longer annotates test scores or results of any test-takers.[137]

B. The Failed Plan to Petition the Supreme Court

A 2011 disability discrimination lawsuit regarding the LSAT and admission is gaining traction after it failed in the trial and

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[132] *See MCAT Exam with Accommodations FAQ*, ASS'N AM. MED. COLLS., https://students-residents.aamc.org/applying-medical-school/faq/mcat-exam-accomodations-faq (last visited Sept. 8, 2019).

[133] *SUNY Health Sciences Center at Brooklyn – College of Medicine (NY)*, 5 NAT'L DISABILITY L. REP. ¶ 77 (1993), 1993 NDLR (LRP) LEXIS 1340.

[134] Emilia Jordan, *History of My Battle for Accommodations – MCAT 2015*, EMILIA JUDITH JORDAN (May 4, 2015), https://emiliajordan.com/2015/05/04/history-of-my-battle-for-accommodations-mcat-2015.

[135] *See MCAT Exam Testing Conditions: What You Need to Know*, AM. ASS'N OF MED. COLLS., https://students-residents.aamc.org/applying-medical-school/article/mcat-exam-test-conditions/ (last visited Oct. 15, 2019).

[136] *See id.*

[137] *MCAT Exam with Accommodations FAQ*, ASS'N AM. MED.COLLS., https://students-residents.aamc.org/applying-medical-school/faq/mcat-exam-accomodations-faq (last visited Sept. 20, 2019).

intermediate appellate courts, and is ripe for a certiorari petition to the Supreme Court. Angelo Binno, a blind man in Michigan, sued the American Bar Association because his disability made the visual and spatial reasoning of the LSAT logic games virtually impossible, and thus his scores were too low to be admitted to law school.[138] The American Bar Association has the ability to endorse a different admissions test, but the American Bar Association responded that Binno should be suing the individual law schools, not their accrediting organization.[139] The Sixth Circuit agreed that the American Bar Association was the incorrect party in the lawsuit.[140] The Supreme Court denied certiorari. If *Binno* was granted certiorari, a reversal of the Sixth Circuit's decision had the potential to disrupt the entire world of standardized testing, if an examination can be waived on a case-by-case basis. A reasonable modification to a test, such as having assistance with spatial reasoning, differs from a complete waiver of the test. Waiving the test on this basis for blind test-takers may be considered an unfair advantage to all test-takers; including others with disabilities, who would not be able to have the test waived on the basis of their disabilities or a failure to grant accommodation. Waiving the test would then trickle down to other standardized tests, and could completely destroy the viability of standardized testing. The idea of standardized testing is to level the playing field, not exempt and create enumerated exceptions to the extent that some may be excused from taking the test. The test levels the playing field outside of educational and personal experiences leading up to the examination – those factors are independently considered in admissions decisions for college and beyond.[141] Despite the Supreme Court's denial of certiorari, at least the LSAT will feel the impacts of *Binno*. Following a settlement between Binno and the Law School Admissions Council, the contested logic games section will be removed from the LSAT, which is also being moved to an entirely

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138 Anne Runkle, *Blind West Bloomfield Man Asks Supreme Court to Hear Case Involving 'Discriminatory' Law School Test*, OAKLAND PRESS (Dec. 20, 2016), http://www.theoaklandpress.com/20161220/blind-west-bloomfield-man-asks-supreme-court-to-hear-case-involving-discriminatory-law-school-test.

139 *See* Binno v. ABA, 826 F.3d 338, 344–45 (6th Cir. 2016).

140 *Id.* at 345.

141 Eichhorn, *supra* note 97, at 45.

digital format.[142]

To do away with standardized testing for students with disabilities only opens the door to further discrimination because of the absence of a test score and being granted or denied admission based on subjective factors. However, a more holistic admissions approach based on grades and subjective factors such extracurricular activities or work experience could benefit all students, especially those who are typically poor test-takers or are unable to receive necessary accommodations. Yet, a student with a disability could still face discrimination based on his or her disability status at all admissions offices regardless of high grades and other subjective factors.

C. The End of the Road: Professional Licensing Examinations

Standardized admissions examinations and admission itself are only the first of many obstacles that students with disabilities face once they reach postgraduate education. Often, another final standardized test is required once students receive their graduate or professional degrees in order to be able to practice in their respective professions.

While licensure examinations ask for history of prior accommodations, the flagging practices for those who were members of the *DFEH* class or opted not to receive accommodations in fear of discrimination prior to 2014 may alter the course of accommodations for those students. Should a student not have received necessary accommodation on the LSAT, it may affect his or her chance at receiving accommodations for a State Bar Exam. In this case, the bar examiners should take a comprehensive approach and look at the student's documentation from law school, college, medical professionals, and other sources in order to determine whether or not the accommodations should be granted rather than basing the decisions on the standardized tests where discrimination was a valid fear or reason to forgo the necessary leveling of the playing field.

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142 *See* Staci Zaretsky, *Major Changes Coming to the LSAT with Removal of Logic Games Section*, ABOVE THE LAW (Oct. 8, 2019), https://abovethelaw.com/2019/10/major-changes-coming-to-the-lsat-with-removal-of-logic-games-section/.

D. Combating Accommodation Abuse

While flagging has been repeatedly found to be a violation of Title III of the Americans with Disabilities Act, the concerns of accommodation abuse continue even as the scores that are no longer marked as being achieved with extra time or other aid that is necessary for students with disabilities. Since the end of flagging and its bias against students with disabilities, there is increased incentive for the potential abuse by students seeking extra time in order to possibly boost their standardized test scores. Increased amounts of students are requesting accommodations, likely because of the new policies from standardized tests to streamline the accommodations process.[143] In addition, studies have shown that extra time accommodations assist students with disabilities far more than the questionable benefit that accommodations may provide to students without disabilities.[144]

Combating the abuse is a tricky balancing act. The testing organizations have generally reviewed accommodation requests on a case-by-case basis, and under the general approach that the various organizations use, each case is reviewed holistically based on a student's individual composite of documentation, letters from specialists, and history of prior accommodations in school. Certain standardized testing organizations require that the documentation go further back than a few months in order to combat the abuse from those who are seeking accommodations and diagnoses exclusively for a testing scenario.[145] Additionally,

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[143] *Accommodated Test-Taker Trends and Performance for the June 2012 through February 2017 LSAT Administrations (TR 17-03)*, LAW SCH. ADMISSIONS COUNCIL, https://www.lsac.org/data-research/research/accommodated-test-taker-trends-and-performance-june-2012-through-february (last visited Sept. 20, 2019); Deena Yellin, *Growing Number of Students Seeking Accommodations for SAT*, NORTHJERSEY.COM (Jan. 26, 2017), https://www.northjersey.com/story/news/education/2017/01/26/record-numbers-students-seeking-accommodations/96162464.

[144] Aleta A. Gilbertson Schulte et al., *Effects of Testing Accommodations on Standardized Mathematics Test Scores: An Experimental Analysis of the Performances of Students With and Without Disabilities*, 30 SCH. PSYCHOLOGY REV. 527, 537 (2001) (finding that students with disabilities benefitted significantly more on standardized multiple-choice tests than their nondisabled peers who received extra time).

[145] *See*, *e.g.*, *Quick Start Guide for Requesting Accommodations and/or English Learning Supports*, ACT, http://www.act.org/content/dam/act/unsecured

the type of disability should also make a difference in the standards and determinations – it may require far less comprehensive history to determine a person has been blind since birth than it may for someone with a learning disability or a condition with a later onset, or someone who did not begin seeking accommodation for a condition such as ADHD until college or postgraduate admissions.

However, even with applications from students with visible and well-documented impairments and LSAC's improvements for reviewing accommodation requests, the requirements of a widespread history and various specialists cause difficulties in the cases of minority and low-income students who may not have had access to the same healthcare and educational testing as their peers. With the new streamlining of requests to include previous accommodations from postsecondary admissions, the burden increases to identify students with learning disabilities and other impairments before they take tests such as the SAT and ACT in order to establish the need for accommodations. Therefore, a more comprehensive approach is necessary in order to level the playing field beyond simply granting accommodations to every student who claims he or she has a disability.

At the postgraduate level, with few exceptions, nearly every candidate has attended a four-year college or university and had access to specialists and reduced cost services. In order to make disability rights more accessible, university disability services offices can step up to the plate and offer free or low-cost assessments to students if a student is questioning or is aware that he or she has learning or psychiatric disability symptoms based on self-reporting measures. Increased university disability services could help protect the legitimacy and integrity of the standardized tests, and best assist students looking to eventually receive accommodations throughout college, graduate school, or employment the equal footing necessary to succeed. Universities are required to comply with both the Americans with Disabilities Act and Section 504, so expanding disability services to postsecondary students should assist those who are truly in need while also minimizing the potential for abuse in competitive environments. College students would be able to establish a history of accommodation – even if it is after postsecondary

/documents/QuickStartGuideforRequestingAccomsSupports.pdf (last visited Sept. 20, 2019).

admissions – and have a chance to obtain reasonable accommodation for postgraduate admissions.

V. CONCLUSION

While flagging was a controversial practice in standardized testing, and the beginning of its end was highly controversial, the end of the flagging practice gave rise to new questions about how to best accommodate and protect students with disabilities while not further disadvantaging them by providing their peers with the incentive to obtain unfair advantages on standardized tests. Testing organizations continue to provide accommodations considered reasonable and make the testing areas and the tests accessible per Title III of the Americans with Disabilities Act.

The end of the flagging practice also highlights the need for the education system to evaluate students earlier in a child's life if he or she is suspected to have an early-onset learning, physical or psychological disability. Perhaps it would best benefit all students to be evaluated in elementary and at the end of middle school so students with and without disabilities could best understand their abilities and limitations. Instead of denying students with disabilities the help that they need because of inaccessibility to healthcare, or minority or socioeconomic status, it is imperative that we begin to identify children with disabilities at early ages in order to help lay the framework to allow them to succeed as adults no matter what dreams and aspirations they may have – and so the glass ceiling no longer exists if they want to pursue higher education and postgraduate opportunities because of an inability to receive a necessary, reasonable accommodation. The United States prides itself on leaving no children behind – going forward, it is not only in the best interest of students with disabilities, but the best interest of everyone, to make sure that no person with a disability is left behind in obtaining what he or she needs in order to succeed on a level, equal playing field. Students like the one in the opening hypothetical will no longer have to fight for rights and equality, similar to how a person who wears glasses does not have to fight for permission to wear his glasses or contacts in order to read. If everything remains open and accessible, then diversity will be easier to achieve, and the dream to see more disabled professionals and graduates entering the workforce and changing

the status quo remains alive.