

Invisible Victims: Combatting the Consequences of the College Admissions Scandal for Learning-Disabled Students

SUSANNAH G. PRICE*

In a recent college admissions bribery scheme, a network of wealthy parents paid entrance exam proctors, admissions insiders, and medical providers to rig the system that enables students with disabilities to receive testing accommodations. By purchasing false disability diagnoses, these parents procured testing accommodations and facilitated cheating on standardized tests — all in an effort to gain admission to top-tier universities. As a result, disability rights advocates fear a backlash against students with legitimate needs for disability accommodations in the college admissions process.

The purposes of this Note are to explore the practical consequences of the scandal for students with learning disabilities and to present a legal framework for preserving disability rights. This Note proposes: (1) adopting a purposive statutory interpretation of the Americans with Disabilities Act (ADA) as amended in 2008 to ensure that the rights of learning-disabled students are not violated; and (2) implementing this interpretation through legislative and regulatory amendments as well as judicial construction. The Note begins with a summary of the college admissions scandal and its exploitation of disability accommodations. Part II examines the legislative framework and case law that govern testing accommodations, including the ADA and its 2008 amendments (ADAAA). Part III outlines the trend of treating prior receipt of accommodations as a quasi-prerequisite for future accommodations, and how this trend discriminates against disabled students with recent diagnoses. Part III also details how the emphasis on prior receipt of accommodations is contrary to the purpose of the ADAAA

* J.D. Candidate 2021, Columbia Law School; A.B. 2018, Georgetown University. The author would like to thank Professors Emily Benfer and Elizabeth F. Emens for providing invaluable insight and guidance. The author also extends her gratitude to her family for their endless support, and to the staff of the *Columbia Journal of Law and Social Problems* for their diligence and care in preparing this Note for publication.

and proposes adopting a purposive statutory and regulatory interpretation to ensure that first-time applicants for accommodations are not unduly penalized. Part IV identifies concrete methods to implement this interpretation and adequately safeguard the rights of learning-disabled students, including legislative amendment of 42 U.S.C. § 12102, regulatory amendment of 28 C.F.R. § 36.309, and corresponding judicial construction.

I. INTRODUCTION

In a highly publicized scandal uncovered by an FBI investigation dubbed “Operation Varsity Blues,” a network of wealthy parents bribed exam proctors, college admissions insiders, and medical providers to gain their children admission to top-tier universities.¹ The investigation resulted in criminal charges against fifty-three individuals² and sent shockwaves through universities nationwide. Perhaps more startling than the unapologetic exploitation of wealth³ was the particular mechanism by which

1. See Indictment ¶¶ 18–25, 38, *United States v. Ernst*, No. 19-CR-10081 (D. Mass. Mar. 5, 2019), <https://www.justice.gov/file/1142881/download> [<https://perma.cc/8LQD-TQJH>] [hereinafter “Indictment”]. The universities listed in the indictment include Georgetown University, Stanford University, University of California Los Angeles, University of San Diego, University of Southern California, University of Texas at Austin, Wake Forest University, and Yale University.

2. See Smith Affidavit in Support of Complaint ¶¶ 2, 6, *United States v. Ernst*, No. 19-CR-10081 (D. Mass. Mar. 11, 2019), <https://www.justice.gov/file/1142876/download> [<https://perma.cc/H5NM-ZJRK>] [hereinafter “Smith Aff.”].

3. The exploitation of wealth embedded within the instant case is not unfamiliar. That various forms of inequity and discrimination impede equal access to higher education has long been known and scrutinized. See, e.g., L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN’S J. OF LEGAL COMMENT. 297 (2005); Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367 (2013); Britton Kovachevich, Note, *Making It to Class: Socioeconomic Diversity and the Statutory Authority of the Department of Education*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 757 (2013); David Orentlicher, *Economic Inequality and College Admissions Policies*, 26 CORNELL J.L. & PUB. POL’Y 101 (2016); Shannon Chaffers, Opinion, *The Problem With College Admissions: A System That Perpetuates Economic Inequality*, DAILY PRINCETONIAN (Apr. 1, 2019, 10:12 PM), <https://www.dailyprincetonian.com/article/2019/04/the-problem-with-college-admissions-a-system-that-perpetuates-economic-inequality> [<https://perma.cc/D2UM-C4YU>]. The preference given to legacy applicants and children of generous donors, for example, fosters the longstanding notion that schools “cater to the elite.” Sarah Jones, *Colleges Can’t Fix Their Unfair Admissions Process on Their Own*, N.Y. MAG. (Mar. 14, 2019), <https://nymag.com/intelligencer/2019/03/college-admissions-scandal-inequality.html> [<https://perma.cc/2FGT-59R3>]; see also Expert Rep. of Peter S. Arcidiacono at 21, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2018), *aff’d*, 2020 U.S. App. LEXIS 35549 (1st Cir. Nov. 12, 2020) (noting that the acceptance rate for Harvard legacies is 33.6 percent, compared with an overall acceptance rate of under 6 percent); Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), <https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/>

participants in the scandal perpetuated their privilege: abuse of disability rights. According to federal prosecutors, the scheme functioned in large part by manipulating the system that provides testing accommodations to students with disabilities.⁴ College admissions advisor Rick Singer facilitated cheating on the Scholastic Aptitude Test (SAT)⁵ and the American College Testing examination (ACT)⁶ by instructing parents to have their children feign learning disabilities.⁷ This strategy enabled the children to gain eligibility for testing accommodations such as extended time, frequent or extended breaks, division of testing over a multiple-day period, or placement in a small group or private setting.⁸

To obtain the medical documentation that ACT, Inc. and the College Board typically require before granting requests for accommodations, the defendants brought their children to a psychologist

[<https://perma.cc/6NK4-8DW5>] (discussing evidence of the “significantly inflated acceptance rate” for children of generous donors to Harvard University revealed during the Harvard admissions lawsuit trial); Scott Jaschik, *Quantifying the Advantage for Legacy Applicants*, INSIDE HIGHER ED (Aug. 21, 2017), <https://www.insidehighered.com/admissions/article/2017/08/21/data-provide-insights-advantages-and-qualifications-legacy-applicants> [<https://perma.cc/R746-VU6D>] (noting that preference for legacies exists at colleges across the country, according to data gathered by education software company Naviance indicating that the acceptance rate across sixty-four institutions is 31% higher on average for legacy applicants than the universities’ published acceptance rate for all students).

4. See Indictment, *supra* note 1, ¶ 43. As defined by the Department of Justice in an informal guidance document interpreting the ADA, “testing accommodations” are “changes to the regular testing environment and auxiliary aids and services that allow individuals with disabilities to demonstrate their true aptitude or achievement level on standardized exams or other high-stakes tests.” U.S. DEP’T OF JUST., C.R. DIV., ADA REQUIREMENTS: TESTING ACCOMMODATIONS 2 (2014), https://www.ada.gov/regs2014/testing_accommodations.pdf [<https://perma.cc/2JUM-Z7JM>].

5. The SAT is a standardized college entrance examination developed and administered by the College Board, a non-profit organization headquartered in New York, New York, and Educational Testing Service (ETS), a non-profit organization headquartered in Lawrence Township, New Jersey. See Smith Aff., *supra* note 2, ¶ 10. The SAT includes sections on writing, critical reading, and mathematics. See Indictment, *supra* note 1, ¶ 30.

6. The ACT is a standardized college entrance examination developed and administered by ACT, Inc., a non-profit organization headquartered in Iowa City, Iowa. See Smith Aff., *supra* note 2, ¶ 9. The ACT includes sections on English, mathematics, reading, and science. See Indictment, *supra* note 1, ¶ 29.

7. See Indictment, *supra* note 1, ¶ 43. “Learning disabilities” refer to a type of neurodevelopmental disorder that hinders an individual’s ability to process, store, and/or communicate information. AM. PSYCH. ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 66–70 (5th ed. 2013). These disabilities refer to ongoing difficulties in reading, writing, or math, which are “foundational to one’s ability to learn.” *Id.* Although learning disabilities typically develop during “school-age,” they may evade detection in some individuals until late in one’s academic career or beyond. *Id.*

8. See Indictment, *supra* note 1, ¶ 30; see also *Other Accommodations*, COLL. BD., <https://accommodations.collegeboard.org/typical-accommodations/other> [<https://perma.cc/YC97-8MX8>].

— often one designated by Singer himself — for neuropsychological evaluations.⁹ Singer coached students to pretend “to be stupid, not to be as smart as [they are]” during evaluations in order to procure learning disability diagnoses.¹⁰ In a phone call, Singer told one defendant, “[t]he goal is to be slow, to be not as bright, all that, so we show discrepancies,” and characterized the ploy as increasingly prevalent, extending beyond his own enterprise.¹¹

Once the students’ requests for accommodations were approved,¹² Singer instructed the defendants to change their children’s exam location to one of two test centers that he “controlled”: a public high school in Houston, Texas, or a college preparatory school in West Hollywood, California.¹³ At these test centers, Singer had established relationships with exam proctors who agreed to accept bribes to permit cheating.¹⁴ Singer directed the defendants to “fabricate a reason — such as a bar mitzvah or a

9. See Smith Aff., *supra* note 2, ¶¶ 49, 51–52, 224–25, 334–35.

10. *Id.* ¶ 49.

11. *Id.* (“[K]ids are getting extra time all the time . . . everywhere around the country. What 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[.]”).

12. Despite the seemingly swift success of defendants in obtaining approval for accommodations, this process is quite arduous and slow. See, e.g., Abigail Sullivan Moore, *Accommodations Angst*, N.Y. TIMES (Nov. 4, 2010), <https://www.nytimes.com/2010/11/07/education/edlife/07strategy-t.html> [<https://perma.cc/6MCP-ZPYD>] (describing the process of requesting accommodations as “a journey of angst”). To receive any testing accommodation on the SAT and ACT, a student must obtain approval from the College Board and ACT, Inc., respectively. This multi-step process begins with a formal application to the relevant testing entity for specific accommodations prior to the date of the test. To request accommodations on the SAT, for example, a student’s formal application should provide documentation showing evidence of the following: (1) the disability, (2) the degree to which the student’s activities are affected, and (3) the need for the specific accommodations requested. See *Providing Documentation Overview*, COLL. BD., <https://accommodations.collegeboard.org/documentation-guidelines/overview> [<https://perma.cc/ZH5K-PJ6X>]. The College Board then would review the documentation and evaluate how the student’s reported impairment relates to the skills and functions involved in taking the SAT. The College Board may then determine that additional documentation is needed and request supplementary documentation if necessary. Review of all of the information provided can take “approximately seven weeks,” according to the College Board. *Requesting Accommodations*, COLL. BD., <https://accommodations.collegeboard.org/request-accommodations/requesting-accommodations> [<https://perma.cc/F7MZ-327F>]. Although testing entities such as the College Board and ACT, Inc. have made efforts to ensure equal opportunity for individuals with disabilities, the Department of Justice (DOJ) notes that it receives “questions and complaints relating to excessive and burdensome documentation demands, failures to provide needed testing accommodations, and failures to respond to requests for testing accommodations in a timely manner.” U.S. DEPT OF JUST., *supra* note 4, at 1.

13. Smith Aff., *supra* note 2, ¶ 30(b).

14. *Id.*

wedding,” justifying their children’s need to take the exam at these centers.¹⁵

After the location of the exams had been successfully changed to a “controlled” site, Singer arranged for a third party to take the exams in the students’ place, to provide students with correct answers during the exam, or to review and correct the students’ answers after they had completed the exams themselves.¹⁶ Because many of the students involved in the scheme had been approved for distraction-free testing in a private room, these cheating tactics were successfully hidden from fellow students and proctors. In some instances, even the students involved were unaware of the fraud.¹⁷ For example, Singer guaranteed one defendant that his daughter “won’t even know that it happened.”¹⁸ Instead, he assured, “she will think that she’s really super smart, and she got lucky on a test.”¹⁹

Because fraudulently obtained accommodations were central to this scheme, disability rights advocates fear adverse consequences for disabled students who legitimately need testing accommodations.²⁰ The scandal has already wrought expressive harm;²¹ for

15. *Id.*

16. *Id.* ¶ 30(d).

17. *Id.*

18. *Id.* ¶ 48.

19. *Id.*

20. See, e.g., Clare Lombardo, *Why the College Admissions Scandal Hurts Students with Disabilities*, NAT. PUB. RADIO (Mar. 14, 2019, 8:02 AM), <https://www.npr.org/2019/03/14/703006521/why-the-college-admissions-scandal-hurts-students-with-disabilities> [<https://perma.cc/RG2S-87AR>]; Lauren Camera, *The Price of an Unfair Advantage: Disability Advocates Worry the College Admissions Scandal Will Spark a Backlash Against Students Who Need Accommodations to Level the Playing Field*, U.S. NEWS & WORLD REP. (Mar. 15, 2019), <https://www.usnews.com/news/the-report/articles/2019-03-15/a-victim-in-the-college-admissions-scandal-students-with-disabilities> [<https://perma.cc/X6TX-TD4Z>]; Ailsa Chang, *College Admissions Scandal Could Make it Harder to Get Testing Accommodations*, NAT. PUB. RADIO (Mar. 20, 2019, 4:24 PM), <https://www.npr.org/2019/03/20/705252708/college-admissions-scandal-could-make-it-harder-to-get-testing-accommodations> [<https://perma.cc/F6TW-CHRJ>]; S. E. Smith, Opinion, *Why the College Admissions Scandal Threatens the Disability Community*, TRUTHOUT (Mar. 27, 2019), <https://truthout.org/articles/why-the-college-admissions-scandal-threatens-the-disability-community/> [<https://perma.cc/2EYY-MZDK>]; Christina A. Samuels, *Students With Disabilities Fear Blowback From College Admissions Scandal*, EDUC. WK. (Mar. 13, 2019), <https://www.edweek.org/teaching-learning/students-with-disabilities-fear-blowback-from-college-admissions-scandal/2019/03> [<https://perma.cc/25QU-XMQT>].

21. “Expressive harms,” a term coined by Professors Richard Pildes and Richard Niemi, refers to a type of injury that “results from the ideas or attitudes expressed . . . rather than from the more tangible or material consequences” of an action. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–507 (1993). The “primary effect” of expressive harms “is not as much the tangible burdens they impose

example, the Learning Disabilities Association of America (LDA) lamented the stigmatizing effect of the scandal on individuals with disabilities.²² As the LDA has noted, the scandal promotes the misconception that testing accommodations are a luxury, “bestowing an unfair advantage” on their recipients.²³ According to Lindsay Jones, CEO of the National Center for Learning Disabilities, this “myth’s” perpetuation is “the biggest harm” to come from the scandal.²⁴ In reality, accommodations serve to equalize opportunity by demonstrating a test taker’s true ability.²⁵ But despite legislative²⁶ and judicial²⁷ recognition of the necessity of accommodations for individuals with disabilities, stigma and scandal obscure this truth.

Perhaps more harmful than fueling false narratives, however, is the increased burden that learning-disabled students may face when seeking future accommodations. Jones expressed fear that

on particular individuals, but the way in which they undermine collective understandings.” *Id.* at 507. Although expressive or stigmatic harms “are not material (physical or economic) injuries,” these types of consequences “can coincide with traditional injuries because expressive injuries may lead to other kinds of injuries.” Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1314–15 (1999). Thus, expressive harms are not only significant in and of themselves, but also in their causal link to more tangible negative consequences. *Id.*; see also Allyson G. Harrison, *U.S. College Admissions Scandal Means More Skepticism of Genuine Invisible Disabilities*, CONVERSATION (May 13, 2019), <https://theconversation.com/u-s-college-admissions-scandal-means-more-skepticism-of-genuine-invisible-disabilities-115502> [<https://perma.cc/L649-S4QA>].

22. See *LDA Condemns Fraud in College Admissions Testing Accommodations*, LEARNING DISABILITIES ASS’N OF AM. (Mar. 12, 2019), <https://ldaamerica.org/lda-condemns-fraud-in-college-admissions-testing-accommodations/> [<https://perma.cc/D78Y-5N4C>] (“These actions hurt all individuals with disabilities, including those with learning disabilities, by perpetuating the misperceptions that many students who obtain accommodations on college admissions do not have disabilities and that this abuse is widespread[.]”).

23. *Id.*

24. Camera, *supra* note 20.

25. LEARNING DISABILITIES ASS’N OF AM., *supra* note 22 (“Accommodations are about leveling the playing field and not about bestowing an unfair advantage.”); see also Harrison, *supra* note 21 (“Accommodations . . . are supposed to ensure that those with disabilities have an equal opportunity to participate; they ensure access, not success.”).

26. See, e.g., 42 U.S.C. § 12189 (providing, in relevant part, that any entity offering “examinations or courses related to applications . . . for secondary or post-secondary education . . . shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals”); 28 C.F.R. § 36.309(b)(i) (2021) (providing that covered entities must administer examinations in a manner that “accurately reflect[s] the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [impairment]”).

27. See, e.g., LEARNING DISABILITIES ASS’N OF AM., *supra* note 22 (citing *Enyart v. Nat’l Conf. of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011) (stating that accommodations are necessary “so as to best ensure that exam results accurately reflect aptitude rather than disabilities”)).

the scandal “will make people who have the power to determine who gets an accommodation and who doesn’t more skeptical.”²⁸ This added skepticism may lead to more stringent requirements for proving one’s disability, such as requests for an unreasonable quantity or quality of documentation. Enhanced requirements may, in turn, prove prohibitively expensive and cumbersome for many students with valid needs.²⁹

Intensified doubt may also cause test administrators to unduly limit eligibility criteria for accommodations, leaving some otherwise-qualified students unaccommodated. Stricter eligibility standards may manifest officially — for example, through formal policy changes such as a rule that testing entities will only grant students’ requests for accommodations if those students have been similarly accommodated in the past — or, perhaps, unofficially — for example, through informal resolve or even unconscious biases. Because publicly available data on the approval rate for accommodation requests is limited,³⁰ an unofficial change in eligibility criteria may be difficult or impossible to prove and challenge.³¹ Even worse, compliance with the laws governing testing accommodations is largely enforced through private complaints,³² which means that learning-disabled students who have been improperly denied accommodations may have to choose between accepting discrimination in anonymity or “outing” themselves in an effort to advocate for their rights.

28. Camera, *supra* note 20.

29. Proving one’s disability in order to obtain the requisite documentation for testing accommodations is already an expensive endeavor, with applicants for accommodations reporting costs ranging from \$500 to \$9000 as early as 2011. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-40, HIGHER EDUCATION AND DISABILITY: IMPROVED FEDERAL ENFORCEMENT NEEDED TO BETTER PROTECT STUDENTS’ RIGHTS TO TESTING ACCOMMODATIONS 19 (2011), <https://www.gao.gov/assets/590/587367.pdf> [<https://perma.cc/L88N-B73F>].

30. See *id.* (performing an analysis of data on the percentage of testing accommodations requested and granted in the previous year, 2010, based on information provided by testing companies solely at the GAO’s request); see also Nick Anderson, *Abuse of ‘Extended Time’ on SAT and ACT Outrages Learning Disability Community*, WASH. POST (Mar. 29, 2019), https://www.washingtonpost.com/local/education/abuse-of-extended-time-on-sat-and-act-outrages-learning-disability-community/2019/03/29/d58de3c6-4c1f-11e9-9663-00ac73f49662_story.html [<https://perma.cc/5KQK-VXPR>] (“Publicly available data on the use of testing accommodations is limited[.]”).

31. See, e.g., Samuels, *supra* note 20 (“[T]he people who will be hurt by this will be the ones who need the accommodations. . . . And it’s not going to be in the news when they’re hurt by this. It will be in those quiet moments, where they’re sitting in the disability office[.]”).

32. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 22–25 (noting that enforcement of laws governing testing accommodations is largely complaint-driven).

Despite the protections provided by the Americans with Disabilities Act (ADA),³³ recent events validate the foregoing concerns. Take, for example, the College Board's official statement in response to the scandal;³⁴ recent lawsuits against testing entities for allegedly discriminatory conduct in denying accommodations;³⁵ and the trend of treating prior receipt of accommodations as a prerequisite for accommodations.³⁶ These cases and patterns demonstrate a concerning trajectory of discriminatory testing requirements affecting learning-disabled students. Individuals with learning disabilities have long encountered issues with proving

33. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (protecting disabled individuals by: prohibiting discrimination against them on the basis of their disability by all public entities and by private entities that provide services to the general public, such as standardized testing companies; guaranteeing equality of opportunity for disabled individuals; and providing legal recourse for victims of disability-based discrimination by covered entities).

34. In a statement responding to the scandal, the College Board announced:

The two test proctors who were indicted in the Varsity Blues case took advantage of a process we have in place to ensure that students with disabilities can receive the accommodations they need. . . . To prevent this abuse of the system, the College Board will ensure students with school-based accommodations test at their home schools whenever possible. Going forward, in the very rare cases in which students request to receive school-based accommodations at a school other than their own, the College Board will require verifiable justification and implement additional enhanced security processes. . . . We're doing more today than ever to ensure the test scores we report to colleges are accurate and valid.

Press Release, Coll. Bd., Statement on Information Regarding the College Admissions Fraud Case (Mar. 27, 2019), <https://newsroom.collegeboard.org/pages/information-regarding-college-admissions-fraud-case> [<https://perma.cc/UG69-SKSB>] [hereinafter "Press Release"].

35. See, e.g., Complaint ¶¶ 1, 21–27, *L.S.F. v. Coll. Bd.*, No. 3:19-CV-06560 (N.D. Cal. Oct. 11, 2019), <https://www.courtlistener.com/recap/gov.uscourts.cand.349683/gov.uscourts.cand.349683.1.0.pdf> [<https://perma.cc/B3W9-GFU3>] (alleging violation of Plaintiff's rights under the ADA through The College Board's denial of disability accommodations to Plaintiff, which was allegedly "arbitrarily and capriciously implemented and determined" by the College Board's Senior Director of Services to Students with Disabilities, who "has untethered power to 'judge' a student's disability" despite the fact that Plaintiff provided the requisite documentation demonstrating her need for accommodations); see also Complaint ¶¶ 31, 66, *S.C. v. ACT, Inc.*, No. 3:20-CV-00623 (N.D. Tex. Mar 11, 2020), <https://www.courtlistener.com/recap/gov.uscourts.txnd.329769/gov.uscourts.txnd.329769.1.0.pdf> [<https://perma.cc/FCJ9-WPXF>] [hereinafter "S.C. Complaint"] (alleging violation of Plaintiff's rights under the ADA through ACT, Inc.'s allegedly discriminatory and capricious denial of Plaintiff's request for testing accommodations despite Plaintiff's provision of ample documentation of diagnosis, history of receiving accommodations, and neuropsychological evaluations demonstrating the need for accommodations).

36. See *infra* Part III.A for an in-depth explanation of this trend and Part III.B for an argument against its legality.

credibility³⁷ and overcoming administrative hurdles³⁸ when requesting accommodations. But now, the College Board's vague assurance that it is "doing more today than ever"³⁹ to deter fraud post-scandal warrants fear of even more onerous requirements and eligibility conditions for disabled students.

The allegations in recent lawsuits,⁴⁰ if true, crystallize these fears. For example, one plaintiff in Texas alleged, among other discriminatory practices,⁴¹ that ACT, Inc. failed "to conduct a proper review and apply appropriate legal standards to Plaintiff's request for appropriate accommodations," and placed "an extreme burden of proof, beyond what is required by the ADA, to establish

37. See Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 165–66 (2003) (citing Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 19, 21 (1999)) ("Because learning disabilities are 'invisible,' 'not subject to the same level of scientific verification and understanding as physical and medical disabilities,' sometimes diagnosed relatively late in a student's academic career at 'what may appear to be opportunistic times,' and 'difficult for the layperson to distinguish from simple lack of ability, lack of discipline, or laziness,' it is imperative that a student seeking relief . . . carefully document his or her diagnosis.").

38. See discussion *supra* note 12 (discussing the arduous process of requesting accommodations on college entrance exams); see also Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1412–13, 1425–26 (2015) (describing the phenomenon of "admin," which is "all of the office-type work that people do to manage their lives, work that is generally thought to be a means to an end, rather than an end in and of itself," and its disproportionate effect on those with disabilities); Christina A. Samuels, *Students With Disabilities Fear Fallout From College Admissions Scandal*, EDUC. WK. (Mar. 20, 2019), <https://www.edweek.org/ew/articles/2019/03/20/students-with-disabilities-fear-scandals-fallout.html> [<https://perma.cc/AZ59-347H>] (noting that "unsympathetic" teachers and testing administrators "already make it hard on students with disabilities, particularly disabilities that are 'invisible,' such as dyslexia or attention deficit hyperactivity disorder").

39. See Press Release, *supra* note 34.

40. See cases discussed *supra* note 35.

41. See S.C. Complaint, *supra* note 35, ¶¶ 66(a)–(i) (alleging that ACT, Inc.'s discriminatory practices included: (a) "[f]ailure to grant accommodations when Plaintiff submitted the requisite documentation and provided documentation of a history of comparable accommodations on standardized examinations and other academic examinations"; (b) "[f]ailure to give considerable weight to Plaintiff's [neuropsychological] evaluators"; (c) "[f]ailure to provide a clear explanation for denial"; (d) "[f]ailure to offer examination in a place and manner that is accessible to individuals with disabilities and best ensures that the examination accurately reflects Plaintiff's aptitude, achievement level, or whatever other factor the examination purports to measure"; (e) "[f]ailure to engage in good faith in the interactive process to consider and implement effective accommodations to Plaintiff's disability"; (f) "[f]ailure to give considerable weight to Plaintiff's prior approval and use of accommodations in school and on standardized examinations"; (g) "[f]ailure to consider Plaintiff's request for accommodations without regard to the ameliorative effects of mitigating measures"; (h) "[f]ailure to conduct a proper review and apply appropriate legal standards to Plaintiff's request for appropriate accommodations"; and (i) "[p]lacing an extreme burden of proof, beyond what is required by the ADA, to establish Plaintiff's disability or need for accommodations").

Plaintiff's disability or need for accommodations."⁴² Plaintiff further alleged that ACT, Inc.'s stated reason for denying her request was grounded in serious skepticism of her invisible disability,⁴³ as ACT, Inc. justified denial on the basis that

[t]here really is no learning disability for speed, in part because there are so many reasons why certain people perform some tasks more slowly than others. These reasons could be related to one's work style, fatigue, depression, medication use, unconscious or conscious malingering, anxiety, or any number of disorders. . . .⁴⁴

These claims exemplify the tendency among testing entities to focus on *whether* to accommodate an individual rather than determining *which* accommodation is required based on the individual's needs.⁴⁵ The former approach — i.e., focusing on *whether* to accommodate an individual with a disability recognized under the ADA — improperly negates the legal protections that the drafters of the ADA and its 2008 amendments intended to provide.⁴⁶

To adequately preserve the rights of learning-disabled students, protect against discriminatory responses to the scandal, and address testing entities' failure to give proper weight to the diagnoses and evaluations of qualified professionals, this Note

42. *Id.*

43. The term "invisible disability" refers to any physical, mental, emotional, or neurological impairment that is "not always obvious to the onlooker, but can sometimes or always limit daily activities, range from mild challenges to severe limitations, and vary from person to person." *What Is An Invisible Disability?*, INVISIBLE DISABILITIES ASS'N, <https://invisibleabilities.org/what-is-an-invisible-disability/> [<https://perma.cc/3BMF-9SSU>] (last accessed Mar. 19, 2021). People with invisible disabilities often experience skepticism of the validity of their diagnoses or symptoms. *See id.* ("Unfortunately, the very fact that these symptoms are invisible can lead to misunderstandings, false perceptions, and judgments."); *see supra* note 37 and accompanying text.

44. *Id.* ¶ 42. Malingering is defined as "pretend[ing] or exaggerat[ing] incapacity or illness (as to avoid duty or work)." *Malinger*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/malinger> [<https://perma.cc/9RJJ-GQH8>] (last accessed Mar. 3, 2021).

45. *See* discussion *infra* Part III.A (detailing testing entities' treatment of past accommodation as a "quasi-prerequisite" for future accommodation and noting the consequent harm to students diagnosed later in their academic careers).

46. *See* discussion *infra* Part II (detailing a series of judicial decisions that improperly limited the ADA's scope, Congress' rejection of those decisions and attempt to reinstate broad protection through the passage of the ADAAA, and the relevant legislative history of the ADAAA); ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, 3553 (An Act to Restore the Intent and Protections of the Americans with Disabilities Act of 1990).

proposes adopting a purposive statutory and regulatory interpretation⁴⁷ of the ADAAA and amending its regulations to realize this interpretation. A purposive construction of the statute and its regulations requires recognizing that its drafters sought to shift the focus of cases brought under the ADA from *whether an individual has a disability* under the Act to *whether the covered entity has engaged in discrimination*.⁴⁸ Adhering to this legislative intent thus requires testing entities to accept that an individual with a covered disability is entitled to reasonable accommodation as a matter of course. Accordingly, this Note argues that once an applicant for testing accommodations establishes that she has a disability within the meaning of the ADA, the role of a testing entity is not to consider *whether* to approve her request for accommodation, but rather, to determine *which* accommodation is most appropriate given her individual needs. Thus, as this Note demonstrates, testing entities' tendency to treat prior receipt of accommodations as a prerequisite for obtaining future accommodations violates the ADA as amended and is antithetical to its goals.

Part II of this Note examines the framework of legislation and case law governing testing accommodations, including the ADA and its 2008 amendments. Part III outlines an increasingly prevalent way that testing entities limit access to accommodations on standardized exams: the treatment of prior receipt of accommodations as a de facto prerequisite when determining whether to grant a student's request for accommodations. Part III then illustrates how requiring past accommodation to qualify for future accommodation discriminates against disabled students with recent diagnoses. Part III also details how this result is contrary to the purpose of the ADA, as amended, and proposes adopting a purposive statutory and regulatory interpretation to ensure that first-time applicants for accommodations are not unduly penalized.⁴⁹ Part IV identifies concrete methods to implement this interpretation and adequately safeguard the rights of learning-disabled students,

47. Purposive statutory interpretation refers to "a theory of statutory interpretation which holds that a court should consider the purpose behind a piece of legislation when interpreting its meaning." *Purposive Approach*, TRANSLLEGAL, <https://www.translegal.com/dictionary/en/purposive-approach/noun/> [<https://perma.cc/G7DV-BZ8E>] (last accessed Mar. 3, 2021).

48. See discussion *infra* Part II.C.

49. Part III.B also addresses anticipated counterarguments to this proposed interpretation, such as the notion that a purposive reading of the statute fails to adequately deter students of typical ability from "buying" false diagnoses. See discussion *infra* at Part III.B.

including legislative amendment of 42 U.S.C. § 12102, regulatory amendment of 28 C.F.R. § 36.309, and corresponding judicial construction.

II. THE ADA, ITS AMENDMENTS, AND RELEVANT CASE LAW

This Part analyzes the framework of legislation, regulations, and case law governing the provision of reasonable testing accommodations for individuals with disabilities. Part II.A provides a brief overview of the Americans with Disabilities Act (ADA), its provisions relating to reasonable accommodations in the context of standardized testing, and the basic elements of a discrimination claim brought pursuant to those sections. Part II.B then describes the Supreme Court's subsequent dismantling of the ADA through a series of overly narrow judicial interpretations,⁵⁰ which prompted Congress to restore the original intent of the ADA through clarifying amendments.⁵¹ Following this examination of the original ADA and its interpretation, Part II.C provides an introduction to the ADA Amendments Act of 2008 (ADAAA).⁵²

A. THE AMERICANS WITH DISABILITIES ACT (ADA) OF 1990

In 1990, President George H.W. Bush signed the Americans with Disabilities Act (ADA) into law, marking “the world’s first comprehensive declaration of equality for people with disabilities.”⁵³ The ADA is a comprehensive civil rights law prohibiting discrimination against people with disabilities on the basis of their

50. See generally Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187 (2008).

51. See ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 § 2(b), 122 Stat. 3553, 3554.

52. This Note uses the terms “ADAAA,” “amended ADA,” and “ADA as amended” interchangeably to refer to the same piece of legislation. This language reflects the fact that the ADA has not been replaced by the ADAAA, but rather has incorporated the ADAAA into its revised form. See 42 U.S.C. § 12101 (codifying and incorporating the ADAAA into the ADA).

53. EMILY A. BENFER, AM. CONST. SOC’Y, *THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT 1* (2009), https://www.acslaw.org/wp-content/uploads/2018/05/Benfer_ADAAA.pdf [<https://perma.cc/RQ9D-Q8LT>] (quoting President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), https://www.ada.gov/ghw_bush_ada_remarks.html [<https://perma.cc/4UDJ-2ZJA>]).

disabilities.⁵⁴ To qualify for ADA protections, an individual must demonstrate the presence of a disability.⁵⁵ The ADA contains a three-pronged definition of “disability,”⁵⁶ which was retained by the ADAAA: (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”; (2) “a record of such impairment”; or (3) “being regarded as having such an impairment.”⁵⁷ The statutory drafters borrowed this language directly from the definition of “handicap” in the Rehabilitation Act of 1973,⁵⁸ which prohibits discrimination on the basis of disability in programs receiving federal funding.⁵⁹ Because courts had broadly construed “handicap” to encompass an expansive range of physical and mental impairments,⁶⁰ disability rights advocates believed that preserving this definition would provide similarly comprehensive coverage.⁶¹

54. See 42 U.S.C. § 12101. Congress passed the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Id.* § 12101(b)(1).

55. *Id.* § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”); see also *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (citing 42 U.S.C. §§ 12182(a)–(b)) (“To prevail on a Title III discrimination claim, the plaintiff must show that (1) she is disabled within the meaning of the ADA[.]”).

56. 42 U.S.C. § 12102(a)(1).

57. *Id.* The purpose of defining disability to include one who is “regarded as having such an impairment” was to “combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities.” *Knutson v. Ag Processing, Inc.*, 394 F.3d 1047, 1050 (8th Cir. 2005). An individual bringing a discrimination claim on the basis of being “regarded as having” a disability might allege that he or she has been “subjected to a prohibited action [i.e., discrimination] because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.” 28 C.F.R. § 36.105(f)(1) (2021). The ADA’s implementing regulations note, however, that successfully demonstrating that an individual is “regarded as having” a disability does not, by itself, establish liability. See *id.* § 36.105(f)(3) (noting that a “regarded as” disabled plaintiff must still establish that a covered entity discriminated “on the basis of disability within the meaning of title III of the ADA”).

58. See Feldblum et al., *supra* note 50, at 203 (discussing the borrowing).

59. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (codified as amended at 29 U.S.C. § 706(20)) (defining “handicap” with the same language later used to define “disability” under the ADA).

60. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91–92 (2000) (“[‘Handicap’] was understood to include any medical condition that was non-trivial[.]”).

61. See *id.* (“[D]isability rights advocates felt comfortable that the same individuals with the wide range of impairments who had been covered under existing disability anti-discrimination law would be covered under the ADA[.]”); see also Feldblum et al., *supra* note 50, at 187–88 (“[A]dvocates believed that the terms of the ADA, based as they were on [the

The ADA's implementing regulations make plain that learning disabilities and Attention Deficit Hyperactivity Disorder (ADHD) are impairments within the meaning of the Act.⁶² For example, the Code of Federal Regulations (CFR) explicitly defines "physical or mental impairment" to include "specific learning disabilities."⁶³ The CFR also defines "[m]ajor life activities" to include "learning, reading, concentrating, thinking, [and] writing."⁶⁴ Prior to the 2008 amendments, the CFR construed the phrase "substantially limits" under the ADA to mean that the individual is "[u]nable to perform a major life activity" or that the person is "[s]ignificantly restricted as to the condition, manner, or duration under which [they] can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."⁶⁵

An individual with a disability as defined by the ADA is entitled to reasonable accommodation by covered entities, unless the requested modification would result in an "undue burden" or "fundamentally alter" the nature of the provided service.⁶⁶ Because the College Board and ACT, Inc. offer services that are open to the general public, they are subject to this mandate under Title III of the Act.⁶⁷ Title III provides, in relevant part, that any entity offering "examinations or courses related to applications . . . for secondary

Rehabilitation Act] . . . would provide clear instructions to the courts that the ADA was intended to provide broad coverage prohibiting discrimination against people with a wide range of physical and mental impairments[.]""); ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 § 2(a)(3), 122 Stat. 3553, 3553 ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled[.]").

62. See 28 C.F.R. § 36.105(a)(2)(i) (2021) ("The definition of 'disability' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA."); *id.* § 36.105(b)(1)(i) ("Physical or mental impairment means . . . [a]ny physiological disorder or condition . . . affecting one or more body systems, such as: Neurological[.]"); *id.* § 36.105(b)(1)(ii) ("Physical or mental impairment means . . . [a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.").

63. *Id.* § 36.105(b)(1)(ii) ("Physical or mental impairment means . . . [a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.").

64. *Id.* § 36.105(c)(1)(i) ("Major life activities include, but are not limited to: . . . learning, reading, concentrating, thinking, writing, . . . and . . . [t]he operation of a major bodily function, such as the functions of the . . . neurological [system and] . . . brain. . .").

65. 29 C.F.R. § 1630.2(j)(1)(ii) (2008). *But see* discussion *infra* at Part II.C (outlining changes to this construction in the ADAAA's express rejection of overly restrictive judicial decisions).

66. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.309 (2021).

67. 42 U.S.C. §§ 12181–89.

or post-secondary education . . . shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”⁶⁸ The CFR further specifies that entities such as The College Board and ACT, Inc. must administer examinations in a manner that “accurately reflect[s] the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [impairment].”⁶⁹

By offering reasonable testing accommodations to disabled individuals, testing entities satisfy their legal obligations and thereby enable all students to demonstrate their true abilities. For example, reasonable accommodations on college entrance exams may include braille or large-print exam booklets; screen-reading technology; scribes to transfer answers to Scantron bubble sheets or record dictated notes and essays; permission to bring and take medications⁷⁰ during the exam; wheelchair-accessible testing stations; extended time; and distraction-free rooms.⁷¹ Unless a testing entity demonstrates that the requested modification would cause an “undue burden” or “fundamentally alter” the nature of its exams, failure to accommodate a covered individual is discrimination in violation of the ADA.⁷²

68. *Id.* § 12189.

69. 28 C.F.R. § 36.309 (2021); *see also* BARRY C. TAYLOR & ALAN M. GOLDSTEIN, GREAT LAKES ADA CTR., BRIEF NO. 11, HOT TOPICS IN ADA TITLE III LITIGATION (2009), http://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo011_Title3Litigation.pdf [<https://perma.cc/36UY-SKJ8>].

70. For example, individuals with diabetes may be permitted to bring medication or medical devices into the exam room in order to monitor their blood sugar and administer insulin. *See, e.g.*, U.S. DEP’T OF JUSTICE, *supra* note 4, at 2.

71. *See* 28 C.F.R. §§ 36.303(b), 36.309(b)(3) (providing non-exhaustive lists of auxiliary aids and services); *see also* U.S. DEP’T OF JUSTICE, *supra* note 4, at 2.

72. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.309.

B. PRE-ADAAA JUDICIAL CONSTRUCTION OF “SUBSTANTIAL
LIMITATION” FOR STUDENTS SEEKING TESTING
ACCOMMODATIONS

Despite the ADA’s explicit mandate against discrimination on the basis of disability,⁷³ the intended recipients of this protection have not always prevailed in court.⁷⁴ Contrary to expectations of broad coverage,⁷⁵ the courts steadily and severely reduced the ADA’s scope.⁷⁶ In what came to be known as the “*Sutton* trilogy,”⁷⁷ the Supreme Court held that the ameliorative effects of mitigating measures⁷⁸ should be taken into account in determining whether an individual has a disability under the ADA.⁷⁹ In other words, the *Sutton* ruling and its companion cases directed lower courts determining whether or not an individual had a disability as defined by the ADA — and thus, by extension, whether or not that individual was entitled to the ADA’s protection — to consider whether the individual was capable of offsetting the limitations caused by their impairment through coping mechanisms or other adaptive strategies.⁸⁰ When an individual demonstrated the capacity to reduce, through mitigation of some sort, the limitations caused by her disability, the *Sutton* trilogy placed the burden of doing so thereafter on the disabled individual herself, rather than on otherwise ADA-covered entities.⁸¹ As a result, a number of courts found that students with histories of academic success due to adaptive strategies were not “substantially limited” enough to warrant accommodations — despite having a valid learning disability — simply because of their prior success.⁸²

In *Price v. National Board of Medical Examiners*,⁸³ for example, three medical students sought injunctive relief compelling the

73. See generally 42 U.S.C. § 12101(b)(1) (“It is the purpose of this Act . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]”); see also *id.* at § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [covered entities.]”).

74. See, e.g., ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 § 2(a)(4), 122 Stat. 3553, 3553 (“[T]he holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.* . . . and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect[.]”); *id.* § 2(a)(5) (“[T]he holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* . . . further narrowed the broad scope of protection intended to be afforded by the ADA[.]”); *id.* § 2(a)(6) (“[A]s a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities[.]”).

defendant to provide each of them with additional time for the United States Medical Licensing Examination (USMLE) and separate rooms in which to take the examination.⁸⁴ The fundamental issue in *Price* was whether each plaintiff had a disability within the meaning of the ADA, which turned on the court's interpretation of "substantially limits."⁸⁵ The court held that for an individual to prove substantial limitation in a major life activity, he or she must demonstrate such limitation "*in comparison to most people in the general population.*"⁸⁶ To establish the existence of their disabilities, each student provided medical reports signed by multiple licensed professionals as well as documentation of their diagnoses made by treating physicians at the National Center of Higher Education for Learning Problems.⁸⁷ But despite *medical* recognition of the students' disabilities from "competent and accomplished"⁸⁸

75. See *id.*; see *supra* note 61 and accompanying text (noting disability rights advocates' expectation that the ADA would provide a broad scope of protection for individuals with a wide range of impairments).

76. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

77. Feldblum, *supra* note 50, at 192 (noting that this series of Supreme Court cases "became known as the Sutton trilogy").

78. Mitigating measures refer to adaptive strategies that lessen the impact of one's disability. The ADA's rules of construction list "learned behavioral or adaptive neurological modifications" as examples of mitigating measures that students with disabilities might take to "ameliorate" or overcome any limitations that their impairment causes. 42 U.S.C. § 12102(4)(E)(i)(IV).

79. *Sutton*, 527 U.S. at 488 ("[D]isability under the Act is to be determined with reference to corrective measures[.]"); *Murphy*, 527 U.S. at 521 ("[T]he determination of petitioner's disability is made with reference to the mitigating measures he employs."); *Albertson's, Inc.*, 527 U.S. at 565 ("[M]itigating measures must be taken into account in judging whether an individual possesses a disability.").

80. See *Sutton*, 527 U.S. at 488; *Murphy*, 527 U.S. at 521; *Albertson's, Inc.*, 527 U.S. at 565.

81. For an argument that mitigating measures should not only be excluded from the determination of disability status, but also from the determination of whether a disabled individual is entitled to reasonable accommodation under the ADA, see *infra* Part III.B.

82. See, e.g., *Price v. Nat'l Bd. of Med. Exam'rs*, 966 F. Supp. 419 (S.D. W. Va. 1997); *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005); *Love v. Law Sch. Admissions Council, Inc.*, 513 F. Supp. 2d 206 (E.D. Pa. 2007); see also ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 § 2(a)(6), 122 Stat. 3553, 3553 ("[A]s a result of [the *Sutton* trilogy], lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities[.]").

83. 966 F. Supp. 419.

84. *Id.* at 421.

85. *Id.* at 422.

86. *Id.* (emphasis in original).

87. *Id.* at 422–24. Each student was diagnosed with ADHD, and two of the three students were additionally diagnosed with specific learning disabilities. *Id.*

88. *Id.* at 423.

physicians, the court found that the plaintiffs each could learn “at least as well as the average person” due to their respective histories of “significant scholastic achievement” and, consequently, that they did not have *legally* cognizable disabilities under the ADA.⁸⁹ Exemplifying the skepticism that students with learning disabilities encounter,⁹⁰ the court cautioned, “[i]f a court were to grant testing accommodations to persons that do not have disabilities *within the meaning of the ADA*, it would allow persons to advance to professional positions through the proverbial back door.”⁹¹

This narrow construction of “substantial limitation” was also applied in *Wong v. Regents of the University of California*.⁹² In *Wong*, a medical student sued his university for denying his request for accommodations and subsequently discharging him from the program for failure to meet its academic requirements.⁹³ The Ninth Circuit adopted the *Price* court’s construction of “substantially limits,” requiring comparison to the average person in the general population.⁹⁴ The court also relied on the “demanding standard for qualifying as disabled”⁹⁵ as set forth in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*⁹⁶ — a decision that has since been expressly overturned by the ADAAA.⁹⁷ According to the

89. *Id.* at 427–428.

90. *See supra* note 37 and accompanying text.

91. *Price*, 966 F. Supp. at 422 (emphasis added).

92. 410 F.3d 1052 (9th Cir. 2005).

93. *Id.* at 1055.

94. *Id.* at 1059 (noting that the plaintiffs in *Price* were not “disabled” under the ADA because they were able to learn as well or better than the average person in the general population, and espousing the district court’s definition of the question to be answered as “whether [the *Wong* plaintiff] can demonstrate that most people, or the average person, would not have difficulty with the third and fourth years of medical school”).

95. *Id.* at 1064 (emphasis deleted) (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2000)).

96. *Toyota*, 534 U.S. at 197, 201–02 (defining “substantially limits” as “prevents or severely restricts” in a decision subsequently overturned by the ADAAA).

97. The court further explained its reliance on *Toyota*’s “demanding standard for qualifying as disabled” in a footnote stating that

As a unanimous Supreme Court made explicit in *Toyota* . . . having an impairment does not necessarily mean that a person is “disabled” for purposes of the Acts. The Acts establish a “demanding standard.” To be “disabled” under the Acts, a person has to be substantially limited in a major life activity, and that is measured by “most people’s daily lives,” not unique needs of a particular position. Although he may have a learning disability, Wong is not substantially limited in the life activity of “learning” as compared to most people. The law compels accommodations for some-one who is “disabled” as that term is used in the Acts, but not for every-one who may have a condition described as a “learning disability.”

Wong, 410 F.3d at 1066 n.6. As Part II.C discusses, however, the ADAAA expressly rejects “the standards enunciated by the Supreme Court in *Toyota*” and establishes that *Toyota*’s

Wong court, the issue was not whether the plaintiff had a clinically diagnosed learning disability, but instead “whether a person who has achieved considerable academic success . . . can nonetheless be found to be ‘substantially limited’ in reading and learning, and thus . . . entitled to claim the protections afforded under the [ADA] to a ‘disabled’ person.”⁹⁸ Although the university’s Disability Resource Center diagnosed the plaintiff with a learning disability,⁹⁹ the court deemed his prior academic accomplishments “fatally inconsistent with his claim to be disabled.”¹⁰⁰ By developing mitigating measures and receiving informal accommodations earlier in his academic career,¹⁰¹ the plaintiff achieved scholastic success “beyond the attainment of most people.”¹⁰² Due to the plaintiff’s academic record and his failure to request formal accommodations until his second year of medical school, the court found that he was not “substantially limited” under the ADA.¹⁰³ As a result, the court held that he did not qualify for the ADA’s protections.¹⁰⁴

Similarly, in *Love v. Law School Admission Council, Inc.*,¹⁰⁵ a student with ADHD and a learning disability contended that he was erroneously denied extended time on the Law School Admission Test (LSAT).¹⁰⁶ Relying on two Supreme Court cases that

standard for “substantially limits . . . has created an inappropriately high level of limitation necessary to obtain coverage under the ADA.” ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 §§ 2(b)(5)–(7), 122 Stat. 3553, 3553.

98. *Wong*, 410 F.3d at 1055, 1065–66.

99. *Id.* at 1063.

100. *Id.* at 1059; *see also id.* at 1065–66 (“Wong’s claim to be ‘disabled’ was contradicted by his ability to achieve academic success, and to do so without special accommodations.”).

101. *See id.* at 1056 (“While attending high school and college, he regularly requested extra time on assignments and essay examinations. To keep up with his college classes, he said that he spent all of his extra time outside of school reading for his classes. The effort paid off[.]); *see also id.* at 1070 (Thomas, J., dissenting) (“[T]he apparent problem in this case is that Wong worked too hard and succeeded too well. As with many students with learning disabilities, Wong developed alternative strategies to compensate for his disability and received special assistance throughout his elementary, secondary, and under-graduate education. As the result of his diligence, coupled with accommodations, Wong achieved sufficient academic success to be admitted to medical school.”).

102. *Id.* at 1055 (majority opinion).

103. *Id.* at 1065 (“The level of academic success Wong achieved during the first two years of medical school, without any special accommodation provided to him by the school, made that proposition [that his impairment substantially limited his ability to learn] implausible.”).

104. *See id.* at 1067 (“By the demanding standards of the Acts, Wong is not substantially limited in a major life activity, so he does not qualify for the special protections the Acts provide for someone who is ‘disabled.’”).

105. 513 F. Supp. 2d 206 (E.D. Pa. 2007).

106. *Love*, 513 F. Supp. 2d at 207. The LSAT is the standardized test used for admission purposes by all ABA-accredited law schools and Canadian common-law law schools. *See*,

were later overturned by the ADA, the District Court required that plaintiffs seeking relief under the ADA prove that their impairment “prevents or severely restricts [them] from doing activities that are of crucial importance to most people’s daily lives.”¹⁰⁸ The court held that a plaintiff’s clinical diagnosis of a learning impairment does not automatically translate to a disability under the ADA.¹⁰⁹ In finding that the student was not “substantially limited” in the activity of learning, the court stressed his elementary, secondary, undergraduate, and graduate record of academic success, as well as the fact that he had never requested formal accommodations at his undergraduate university.¹¹⁰

According to disability rights advocates, “*Love* demonstrates how courts may look for predictable or typical limitations that should have manifested at certain grade levels based on the plaintiff’s impairment and often dismiss claims where a person has only anecdotal or patchy evidence of limitations.”¹¹¹ But as Part III of this Note explains, possessing only anecdotal evidence of limitations should not disqualify individuals from the ADA’s protection, as disabilities often bypass formal assessment and diagnosis for a number of valid reasons.¹¹²

C. THE ADA’s CLARIFICATION AND EXPANSION OF THE ADA’S COVERAGE

The narrow interpretations of “substantial limitation” described in Part II.B barred numerous students with legitimate

e.g., *The LSAT*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat> [<https://perma.cc/U8D9-ZSX2>]. The LSAT’s administrating entity, the Law School Admissions Council (“LSAC”), describes the test as “designed specifically to assess critical reading, analytical reasoning, logical reasoning, and persuasive writing skills — key skills needed for success in law school.” *Id.* On its website, the LSAC advises law school applications to take the LSAT in order to “maximize their chances for admission” because “[i]t is the only test accepted by all ABA-accredited law schools, and it is the only test that helps the test taker to determine if law school is right for them.” *Id.*

107. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

108. *Love*, 513 F. Supp. 2d at 223.

109. *Id.* at 228.

110. *Id.*

111. BARRY C. TAYLOR ET AL., GREAT LAKES ADA CTR., BRIEF NO. 16, POST SECONDARY EDUCATION AND LICENSING UNDER THE ADA (2011), http://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo016_POST_SECONDARY_EDUCATION_AND_LICENSING_UNDER_THE_ADA.pdf [<https://perma.cc/XNV4-TVW5>].

112. See discussion *infra* at notes 142–152.

learning disabilities from accessing accommodations,¹¹³ spurring amendments to the legislative regime.¹¹⁴ Over objections from ACT, Inc.,¹¹⁵ Congress rejected these overly restrictive perceptions of disability and amended the ADA in 2008.¹¹⁶ The result was “An Act to Restore the Intent And Protections of the Americans with Disabilities Act of 1990,” otherwise known as the ADA Amendments Act of 2008 (ADAAA).¹¹⁷ These amendments clarify and expand the scope of the ADA’s coverage. The ADAAA went into effect on January 1, 2009.¹¹⁸

Some of the advocates driving the passage of the ADAAA were “involved in the drafting of the original ADA” and applied their grasp of Congress’ original intent to the amended legislation.¹¹⁹ The ADAAA provides, in relevant part, that the purpose of the Act is to “carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.”¹²⁰ In particular, drafters of the ADAAA

113. See, e.g., *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1067–71 (9th Cir. 2005) (Thomas, J., dissenting) (noting that the majority’s holding — that, “as a matter of law, academic success definitively disproves the existence of a learning disability” — “effectively bars the entire class of learning-disabled students from receiving ADA accommodations in graduate school”).

114. See, e.g., ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325 § 2(a)(6), 122 Stat. 3553, 3553 (finding that “lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities”); see also *id.* at § 2(b)(2)–(5) (explicitly stating as among the Act’s purposes the following: “to convey congressional intent that the standard . . . for ‘substantially limits’ . . . applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis”).

115. See Moore, *supra* note 12.

116. See ADAAA § 2(b)(1).

117. *Id.*

118. *Id.*

119. BENFER, *supra* note 53, at 1. In fact, Representative Steny Hoyer — who served an integral role in drafting the ADA of 1990 — stated in an op-ed: “Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word.” Feldblum et al., *supra* note 50, at 193 (quoting Steny Hoyer, Opinion, *Not Exactly What We Intended, Justice O’Connor*, WASH. POST (Jan. 20, 2002), <https://www.washingtonpost.com/archive/opinions/2002/01/20/not-exactly-what-we-intended-justice-oconnor/41a55301-0d4d-4bfd-8746-37e8f17999a8/> [<https://perma.cc/HHY2-CDKG>]).

120. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554.

sought *inter alia* to effect a shift in focus of cases brought under the ADA from *whether an individual has a disability* under the Act to *whether the covered entity has engaged in discrimination*.¹²¹

To facilitate the fulfillment of these objectives, the ADAAA contains precise rules of construction regarding the definition of “disability.”¹²² Although the statutory language defining the term is essentially the same as in the original,¹²³ the ADAAA’s rules of construction dictate that “the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of th[e] Act”;¹²⁴ that “the term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act”;¹²⁵ and that “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”¹²⁶ The ADAAA also expands the definition of “major life activities” to include the major bodily functions of “learning, reading, concentrating, thinking, communicating, and working” as well as “neurological [and] brain . . . functions.”¹²⁷

These changes are especially relevant to individuals with learning disabilities, as the expanded definition of “major life activities” includes the precise skills and functions affected by learning impairments.¹²⁸ The rule against considering mitigating measures

121. See *id.* § 2(b)(5) (“[T]he primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis[.]”); see also EMILY C. BARBOUR, CONG. RSCH. SERV., TESTS AND TESTING ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT 5 (2011), https://digital.library.unt.edu/ark:/67531/metadc810144/m2/1/high_res_d/R41280_2011Sep20.pdf [<https://perma.cc/38YT-HKFM>].

122. See ADAAA § 4(a); see also NANCY LEE JONES, CONG. RSCH. SERV., THE ADA AMENDMENTS ACT: JUDICIAL DECISIONS RELATING TO TESTING ACCOMMODATION 1 (2010), https://digital.library.unt.edu/ark:/67531/metadc810111/m2/1/high_res_d/R41280_2010Jun03.pdf [<https://perma.cc/GU6N-LDKT>].

123. Compare ADAAA § 4(a), with Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329–30.

124. ADAAA § 4(a).

125. With respect to “substantial limitation,” the ADAAA’s findings and purposes provide that: the Supreme Court interpreted the term “substantially limits” to “require a greater degree of limitation than was intended by Congress”; the EEOC’s ADA regulations defining the term “substantially limits” as “significantly restricted” are “inconsistent with congressional intent, by expressing too high a standard”; and Congress expects the EEOC to revise its definition of “substantially limits” as “significantly restricted” to be consistent with this Act. *Id.* §§ 2(a)(7)–(8), 2(b)(6).

126. *Id.* § 4(a).

127. *Id.*

128. *Id.*

thus applies to the determination of whether a learning disability is substantially limiting. Accordingly, courts are required to evaluate whether plaintiffs have learning disabilities as defined by the Act without regard to any mitigating measures, such as medications, learned behaviors, or other adaptive mechanisms that reduce the effects of their disabilities.¹²⁹

In addition to this textual directive, the legislative history of the ADAAA also reflects the intention to protect learning-disabled students who have engaged in mitigating measures. In the House debate, for example, Representatives Pete Stark and George Miller addressed the meaning of “substantially limits” in the context of learning, reading, writing, thinking, or speaking.¹³⁰ Representative Stark stated:

Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration. This legislation will reestablish coverage for these individuals by ensuring that the definition of this ability is broadly construed and the determination does not consider the use of mitigating measures.¹³¹

Representative Miller further indicated that the proposed legislation should make plain that “an individual with an impairment that substantially limits a major life activity should not be penalized . . . simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.”¹³²

The legislative history and rules of construction demonstrate a clear attempt to revive the original intended scope of the ADA. Commentators predicted that the ADAAA would especially benefit people with learning disabilities, attention deficit disorders, and cognitive disorders, making them “more likely” to receive testing

129. *Id.*

130. 154 CONG. REC. 19,435 (2008) (statements of Reps. Stark and Miller).

131. *Id.* (statement of Rep. Stark).

132. *Id.* (statement of Rep. Miller).

accommodations.¹³³ But as Professor Emily Benfer notes, “these adjustments will never be fulfilled without an adequate focus on proper interpretation of [the ADA’s] terms.”¹³⁴ While the passage of the ADAAA indeed represents a major triumph for people with disabilities, “it is extremely important that the ADAAA be implemented consistently with Congress’s intent to allow for individuals with disabilities to fully participate in a society free from discrimination.”¹³⁵

As Part III explains, however, the legislative intent behind the passage of the ADA and its amendments is yet to be fully realized. Part III builds upon the foregoing legislative history in arguing that students whose disabilities evade immediate detection — whether due to mitigation or other causes — are intended to fall within the ADA’s ambit. Despite this objective, many students’ experiences reveal the tendency of testing entities to effectively treat past receipt of accommodations as a prerequisite for obtaining accommodations.¹³⁶ Drawing upon the legislative history and congressional intent discussed in this Part, Part III explains why such a result violates the ADA.

III. PURPOSIVE STATUTORY & REGULATORY INTERPRETATION OF THE ADAAA AS APPLIED TO STANDARDIZED TESTING ACCOMMODATIONS

Although the ADA covers individuals with learning disabilities, history shows that learning-disabled students do not always receive the protections to which they are entitled, or often face

133. *Id.*; see also John P. Heekin, *ADHD and the New Americans with Disabilities Act: Expanded Legal Recognition for Cognitive Disorders*, 2 WM. & MARY POLY REV. 171, 172 (2010) (“Given the significantly broader scope of protection afforded by the ADA Amendments Act of 2008, requests for better accommodations made by students . . . diagnosed with ADHD may be more likely to receive judicial support.”); *Learn the Law: ADAAA*, NAT’L CTR. FOR LEARNING DISABILITIES, <https://www.nclد.org/get-involved/learn-the-law/adaaa/> [<https://perma.cc/PAL6-ZLZN>] (last accessed Mar. 5, 2021) (“Under the law, learning, reading, thinking and concentrating are all considered major life activities among others listed in the law. The ADAAA requires a broader interpretation of disability by schools, testing agencies and employers than the original law. As a result, individuals with LD should have an easier time qualifying for accommodations.”).

134. BENFER, *supra* note 53, at 18.

135. *Id.*

136. See discussion *infra* Part III.A.

stigma when they do.¹³⁷ The credibility issues¹³⁸ familiar to those with invisible disabilities are only exacerbated by stories of fraud and deceit like the college admissions scandal.¹³⁹ Because the scandal's participants were first-time applicants for accommodations, credibility concerns have intensified for this category of students.¹⁴⁰ Thus, students who have not been diagnosed or accommodated until late in their academic careers may encounter increased skepticism from peers, teachers, parents, and, perhaps most consequentially, the entities responsible for determining whether or not to grant a student's request for accommodations. As a result, these students are more likely to be labeled "opportunistic" or accused of falsifying a disability at an especially crucial academic moment.¹⁴¹ The timing of one's diagnosis, however, has no bearing on its legitimacy, as a wide array of variables — including increased academic rigor,¹⁴² classroom policies,¹⁴³

137. See, e.g., Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043 (2004) (questioning the propriety of testing accommodations in general, challenging the premise that the ADA requires educational institutions to provide learning-disabled students with any accommodations at all, and likening accommodations for learning-disabled students to affirmative action for the wealthy and elite).

138. See, e.g., Denbo, *supra* note 37, at 166 (discussing how the invisibility of learning disabilities leads to increased skepticism of their validity).

139. See, e.g., Harrison, *supra* note 21 ("Abuses of disability diagnoses like these cheat students with genuine disabilities who may now be more likely to face skepticism about their diagnoses or be forced to revisit struggles they faced regarding accommodations.")

140. *Id.*; see also discussion *supra* Part I.

141. See Denbo, *supra* note 37, at 166; see also S.C. Complaint, *supra* note 35, ¶ 42 (alleging that ACT, Inc. explained its reasoning for denying Plaintiff the requested accommodations as based, in part, on ACT Inc.'s belief that processing speed issues, in general, may stem from "conscious malingering," and therefore does not qualify as a disability under the ADA).

142. The increased rigor of academics upon entrance to the next tier of one's education may cause once-latent disabilities to become suddenly apparent. See, e.g., Moore, *supra* note 12 ("[M]any students' conditions aren't diagnosed until they begin the demands of high school."). For example, children who get by fine in elementary school may suddenly encounter much more challenging curricula, expectations, and stress on their executive functioning skills once they enter high school. Similarly, the drastically increased academic demands of college may manifest a learning disability that went undetected in high school.

143. Due to a lack of adequate screening programs or funds, many primary and secondary schools refuse to pay for testing if a child is doing well in class. See Smith, *supra* note 37, at 20 ("Many K-12 schools still do not have comprehensive and effective screening programs or remediation programs; thus, some learning-disabled students are not identified until they enter college or law school[.]"); Kenneth R. Weiss, *Audit Confirms Disparities in SAT Testing*, L.A. TIMES (Dec. 1, 2000, 12:00 PM), <https://www.latimes.com/archives/la-xpm-2000-dec-01-mn-59734-story.html> [<https://perma.cc/VQR3-6RVP>] ("At many public high schools, auditors determined that some deserving students might not be getting the accommodations because of a lack of awareness of their rights under disability laws or weaknesses in their schools' procedures for identifying and screening students with suspected

socioeconomic economic status,¹⁴⁴ racial¹⁴⁵ and gender¹⁴⁶ bias, mitigating measures,¹⁴⁷ global perceptions of ability,¹⁴⁸ emotional

disabilities.”). This outcome-based approach to defining disability erroneously excludes those students whose intelligence, diligence, persistence, or mitigation enables them to surpass the expected limitations of their impairments. *Id.*

144. When primary and secondary school educators are unable or reluctant to provide more diagnostic testing, the only alternatives are to ignore the issue or pay for a comprehensive private evaluation on one’s own accord. But because of the steep cost of these evaluations, ranging between \$500 and \$9000, individuals from low socioeconomic status households may lack the financial resources to be evaluated in the first place. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 19. Even for those who can afford to get tested, the additional medical care that accompanies a diagnosis may be prohibitively expensive, deterring low-income individuals from seeking an evaluation.

145. Low-income students of color with disabilities are disciplined — rather than given disability screenings — at much higher rates than their peers. *See, e.g.*, U.S. COMM’N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 4 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [<https://perma.cc/E3YZ-A6QZ>] (“[S]tudents of color with disabilities face exclusionary discipline pushing them into the ‘school-to-prison pipeline’ at much higher rates than their peers without disabilities[.]”). In addition to increasing the likelihood that these students will drop out of school or fall into the juvenile justice system, this pipeline issue diverts attention from the students’ disabilities.

146. *See, e.g.*, Kristen G. Anderson, *Gender Bias and Special Education Referrals*, 47 ANNALS DYSLEXIA 151 (1997) (noting the disproportionately low representation of females in special education programs and arguing that a major factor causing this disparity is gender bias amongst classroom teachers and other individuals authorized to refer students to special education).

147. *See* discussion *supra* note 78 (defining “mitigating measures” and explaining their relevance to the legal framework regarding reasonable accommodations). By employing independent tactics and coping mechanisms to mitigate the effects of a learning disability, students may manage to “pass”: literally passing their classes in school and/or figuratively “passing” as non-disabled. JEFFREY A. BRUNE & DANIEL J. WILSON, DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY 1–12 (2013) (defining the concept of “passing” as “the way people conceal their impairments to avoid the stigma of disability and pass as ‘normal’”).

148. A global perception of ability is the tendency to focus on the totality of one’s capabilities rather than the different components, disregarding the wide range of gradation in ability, intellectual giftedness, etc. *See* Smith, *supra* note 37, at 40 (“[W]e view people as being athletic, artistic, musical, or intellectually gifted, or not . . . [but] a person may be quite gifted intellectually and still suffer from a specific learning disability which makes her appear inept, uninterested, or unintelligent[.]”).

processes,¹⁴⁹ stigma,¹⁵⁰ informal accommodations,¹⁵¹ and late on-set¹⁵² — can delay or entirely preclude a formal diagnosis.

This Part demonstrates that skepticism toward students with “eleventh hour” disabilities¹⁵³ not only mischaracterizes the vast

149. Practitioners and scholars have applied Kübler-Ross’s model of the stages of grief to parental responses to disability. See Dennis Drotar et al., *The Adaptation of Parents to the Birth of an Infant with a Congenital Malformation*, 55 PEDIATRICS 710, 717 (1975); Patricia McGill Smith, *You Are Not Alone: For Parents When They Learn Their Child Has A Disability*, CTR. FOR PARENT INFO. & RES. (Oct. 11, 2010), <https://www.parentcenterhub.org/notalone/> [<https://perma.cc/FX25-TNEZ>]. When parents “griev[e] the loss of their expectation of raising a typical child, the apparent loss of their child’s potential, and other losses known and imagined,” they may engage in prolonged denial of their child’s disability. A *Closer Look*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 14, 2019), <https://www.cdc.gov/ncbddd/actearly/autism/case-modules/communicating/11-closer-look.html> [<https://perma.cc/2EUJ-KEU5>]. For example, a parent may think, “My son does not have processing issues. He is just being lazy,” or “My daughter does not have ADHD. I just need to discipline her more when doing homework.” This impedes seeking accommodations, resulting in late diagnoses.

150. Individuals with learning disabilities may fear the stigma associated with disclosing differences and difficulties, or, alternatively, fear false accusations that they are lying to obtain special treatment. See, e.g., Michael West et al., *Beyond Section 504: Satisfaction and Empowerment of Students with Disabilities in Higher Education; Section 504 of the Rehabilitation Act of 1973*, 59 EXCEPTIONAL CHILD. 456, 462 (1993) (“A barrier identified by a large number of students with disabilities centered on the social isolation, ostracism, or scorn they felt from their instructors and fellow students, either because of their disabilities or because they requested accommodations to which other students were not entitled.”); Peter D. Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER RACE & JUST. 33, 54 (1998) (describing how stigma may discourage learning-disabled individuals from disclosing their disabilities, and thus also from receiving accommodations). Parents’ fears of stigma may also inhibit children with learning disabilities from obtaining diagnoses or requesting needed accommodations. See, e.g., Anne Ford with John-Richard Thompson, *The Stigmatized Child*, SMART KIDS WITH LEARNING DISABILITIES (2017), <https://www.smartkidswithld.org/getting-help/emotions-behaviors/the-stigmatized-child/> [<https://perma.cc/6QB3-5X4V>] (noting that “parents’ sense of stigma is most acute when the child is newly diagnosed . . . when parents do all they can to avoid labeling the child . . . [which can] lead a child to believe he or she has something to be ashamed of”); Elizabeth P. Cramer & Stephen F. Gilson, *Queers and Crips: Parallel Identity Development Processes for Persons with Nonvisible Disabilities and Lesbian, Gay, and Bisexual Persons*, 4 INT’L J. SEXUALITY & GENDER STUD. 23 (1999) (likening the experiences of parents of children with learning disabilities to those of heterosexual parents of bi- or homosexual children in that they feel the need to “come out” with respect to their child’s disability after first remaining “closeted”).

151. In place of a formal evaluation, diagnosis, and Individualized Educational Plan (IEP) or Section 504 Plan, some teachers may accommodate students off-the-record by giving extra time to finish a test during lunch or recess. These types of informal accommodations often fail to establish the requisite documentation to be eligible for accommodations on college entrance exams or other kinds of standardized testing.

152. Practitioners suggest that some individuals simply do not acquire their cognitive or learning disabilities until later in life. *Adults with Learning Disabilities: An Overview*, LEARNING DISABILITIES ASS’N OF AM., <https://ldaamerica.org/adults-with-learning-disabilities-an-overview/> [<https://perma.cc/EL3K-LGLE>] (last accessed Mar. 11, 2021).

153. Allison Hertog, *Why are the ACT, College Board Denying Your Request for Accommodations and How to Turn That Around*, COLL. UNMAZED (Mar. 7, 2018),

majority of students with late diagnoses, but also contributes to the deprivation of their legal rights. Part III.A highlights the trend of treating prior receipt of accommodations as nearly a prerequisite for receiving accommodations in the future and illustrates how this trend unduly penalizes students with valid yet late diagnoses. Part III.B then explains how testing entities defend this trend by pointing to a textual ambiguity in the ADAAA — namely, that while the ADAAA explicitly prohibits covered entities from considering mitigating measures in determining *whether an individual has a disability*,¹⁵⁴ it is silent as to whether mitigating measures may factor into the determination of *whether to provide accommodations*.¹⁵⁵ But because an excessive emphasis on an established history of receiving accommodations is antithetical to the legislative intent underlying the Act, Part III.B argues for a purposive reading of the Act to prevent the exploitation of this textual ambiguity as a shield against discrimination claims.

A. PAST ACCOMMODATION AS A QUASI-PREREQUISITE FOR FUTURE ACCOMMODATION & THE CONSEQUENT HARM TO STUDENTS WITH RECENT DIAGNOSES

This Subpart highlights how testing entities increasingly require applicants to show long-documented histories of diagnoses and prior receipt of accommodations before approving requests for testing accommodations. Whether a student has been accommodated in the past is certainly one factor that standardized testing entities may consider when reviewing requests for accommodations.¹⁵⁶ But to the detriment of students with late diagnoses, demonstrating prior receipt of accommodations has practically become a necessity in the eligibility calculus.¹⁵⁷

<http://www.unmaze.me/community/2018/3/7/why-are-the-act-college-board-denying-your-request-for-accommodations-and-how-to-turn-that-around> [https://perma.cc/V34X-YSWB] (noting that some testing entities see late diagnoses as illegitimate and derisively characterize students with late diagnoses as having “eleventh hour” disabilities).

154. See 42 U.S.C. § 12102(4)(E)(i).

155. See, e.g., JONES, *supra* note 122, at 5.

156. See U.S. DEP’T OF JUSTICE, *supra* note 4, at 5 (listing examples of documentation that may be requested, including “[r]ecommendations of qualified professionals,” “[o]bservations by educators,” “[r]esults of psycho-educational or other professional evaluations,” “[p]roof of past testing accommodations,” “[a]n applicant’s history of diagnosis,” and “[a]n applicant’s statement of his or her history regarding testing accommodations”); see also 28 C.F.R. § 36.309(b)(1)(v) (2021).

157. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 21 (“One testing company official told us that greater scrutiny is applied to requests from applications without a

When an individual requests testing accommodations for the SAT or ACT, The College Board and ACT, Inc. are required to comply with the legal framework governing reasonable accommodations in standardized testing.¹⁵⁸ According to this framework, after identifying the presence of a disability, the proper analysis shifts from *whether* an individual is entitled to accommodation to *which* accommodation is required based on the individual's needs.¹⁵⁹ According to the disability rights community,¹⁶⁰ however, testing entities often do not apply the requisite shift in focus, making overly burdensome demands for documentation¹⁶¹ and failing to properly consider accommodation requests.¹⁶² To address this erroneous application of the law, the Department of Justice (DOJ) issued regulations clarifying the parameters of testing companies' roles as the initial gatekeepers of test accommodations.¹⁶³ Of particular relevance to the eligibility approach requiring past receipt of accommodations is 28 C.F.R. § 36.309(b)(v), which obliges testing entities to give considerable weight to documentation of past accommodations received in similar testing situations, as well as

history of accommodations because they question why the applicant was not previously diagnosed and suddenly requests accommodations for the test"); *see also* Karen Sloan, *Can You Bribe Your Way Into Law School?*, LAW.COM (Mar. 14, 2019), <https://www.yahoo.com/lifestyle/bribe-way-law-school-042137255.html> [<https://perma.cc/3BRT-F3F5>].

158. *See* 42 U.S.C. § 12189 (“[E]xaminations or courses related to applications . . . for secondary or post-secondary education . . . shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals[.]”); *see also* 28 C.F.R. § 36.309(b)(1) (“Any private entity offering an examination covered by this section must assure that . . . [t]he examination is selected and administered so as best to ensure that . . . the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [impairment.]”).

159. *See* U.S. DEP’T OF JUSTICE, *supra* note 4. This inquiry into the proper accommodation seeks to ensure that the individual’s aptitude will be accurately reflected, if in the context of an exam, or that the individual will be able to access the information, if in the context of classroom learning. *See* 42 U.S.C. § 12189; 28 C.F.R. § 36.309.

160. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 25.

161. *See id.* at 6, 25.

162. *See* 28 C.F.R. § 36 app. A (noting that testing entities “often discounted and ignored” important information contained within requests for accommodations).

163. *See id.* § 36.309(b)(1)(iv)–(vi) (mandating that: (1) testing entity’s requests for documentation be reasonable and limited to the need for the requested accommodation; (2) testing entities must give considerable weight to documentation of past accommodations received in similar testing situations, as well as those provided under an IEP or Section 504 plan; and (3) the testing entity must respond in a timely manner to requests for accommodations).

those provided under an IEP¹⁶⁴ or Section 504 Plan.¹⁶⁵ In non-binding guidance on the revised regulations, the DOJ clarified that mandating the accordance of proper weight to past accommodations does *not* suggest that individuals without such history are not also entitled to receive testing accommodations.¹⁶⁶ Testing entities, however, have not heeded that guidance, as they often prioritize — if not demand — proof of prior accommodations in reviewing requests.¹⁶⁷ In fact, Anna Ivey, former Admissions Dean at the University of Chicago Law School, notes, “[I]ncreasingly what has happened is the eligibility decision is very much governed by the question: Have you been accommodated before in college, in high school, on other standardized tests? So that precedent really matters in being considered going forward.”¹⁶⁸

Disability law scholars have also commented on this trend, noting that “students with ADHD or processing speed conditions must produce medical records demonstrating how the impairment affected their educational performance from elementary school to high school, and, if applicable, college or graduate school.”¹⁶⁹ As one legal expert noted, “[p]erhaps the biggest red flag is a late diagnosis. If a student’s condition is diagnosed in high school or just before, that tends to raise questions.”¹⁷⁰ And according to Nora Belanger, a disability rights and special-education lawyer in Norwalk, Connecticut, “[t]he presumption is that if you’re not [already] using it, you don’t need it.”¹⁷¹

Even the testing companies themselves have admitted as much. For example, the Government Accountability Office (GAO) revealed in a 2011 report that one testing company official divulged

164. An “IEP,” or Individualized Educational Plan, dictates the specialized instruction, services, accommodations, and academic goals that must be provided to an eligible student with a disability under Part B of the IDEA, 20 U.S.C. §§ 1400–91, and 34 C.F.R. pt. 300.

165. A “504 Plan” is a blueprint for providing appropriate service and supports for students with disabilities, as required of schools by Section 504 of the Rehabilitation Act. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794).

166. *See* § 36 app. A (“It is important to note, however, that the inclusion of this weight does not suggest that individuals without IEPs or Section 504 Plans are not also entitled to receive testing accommodations. Indeed, it is recommended that testing entities must consider the entirety of an applicant’s history to determine whether that history . . . indicates a need for accommodations.”).

167. *See, e.g.*, Moore, *supra* note 12.

168. *See* Sloan, *supra* note 157.

169. TAYLOR ET AL., *supra* note 111, at 4.

170. Moore, *supra* note 12.

171. *Id.*

that “greater scrutiny is applied to requests from applicants without a history of accommodations because they question why the applicant was not previously diagnosed and suddenly requests accommodations for the test.”¹⁷² The College Board also notes the importance of demonstrating history of prior receipt of accommodations:

[S]tudents who request an accommodation on College Board exams receive that accommodation on tests that they take in school. . . . The student’s history of receiving accommodations in school and information provided by the school are important in the College Board’s review of requests for accommodations. . . . In most cases, when a student is requesting the same accommodations that are included in a current Individualized Education Program (IEP), 504 Plan, or other formal, school-based plan that meets College Board criteria, and is using the requested accommodations for school testing, no additional information will be needed.¹⁷³

The practically dispositive emphasis on whether a student has been previously accommodated discriminates against those students who, for any number of valid reasons, have not received or sought accommodation for their disability until late into their academic careers. If the history of accommodations is what matters, then only those with the resources, knowledge, and opportunity to notice and seek diagnoses early on will be the recipients of accommodations going forward.¹⁷⁴ Simply due to their lack of prior accommodation, recently diagnosed students may be denied the opportunity to demonstrate their true aptitude through the use of accommodations on standardized tests. This, in effect, penalizes those who discover or seek accommodations for their disability late in the game.

172. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 21.

173. *Who Is Eligible?*, COLL. BD., <https://accommodations.collegeboard.org/eligibility> [<https://perma.cc/NA2C-BKVY>] (last accessed Mar. 10, 2021).

174. Even with the de facto requirement of previous accommodations, students of typical ability can still manipulate the system; they just have to begin doing so early. Thus, assuming testing entities’ rationale behind requiring a history of accommodations is to prevent abuse by non-disabled students, the current system is not even effective at what it aims to do. This, in turn, further supports the proposal to eliminate past accommodation as a quasi-prerequisite for future accommodation.

B. PROPOSAL TO SAFEGUARD DISABILITY RIGHTS THROUGH PURPOSIVE CONSTRUCTION OF THE ADA & ITS REGULATIONS

As outlined in Part II, testing entities have a legal obligation to fulfill the ADA's mandates,¹⁷⁵ which were designed to broaden the Act's protection.¹⁷⁶ But as demonstrated in Part III.A, the Act has provided only hollow protection to some learning-disabled students in the face of discriminatory practices by standardized testing entities.¹⁷⁷ The college admissions scandal exacerbates this issue by increasing skepticism toward learning-disabled students with no history of accommodations.¹⁷⁸ The existence of some fraudulent diagnoses, however, should not deter testing entities from accommodating students who possess real impairments. To combat the excessive emphasis on eligibility and adequately protect learning-disabled students with recent diagnoses, this Subpart proposes adopting a purposive reading of the ADA and its regulations. A purposive construction of the statute and its regulations compels the conclusion that learning-disabled students who have not been previously accommodated should not be precluded from receiving accommodations in the future, regardless of whether they have engaged in mitigating measures that minimized the effect of their disability on their performance.

A purposive interpretation of the Act is especially instructive with respect to deciding what factors a testing entity may consider when determining whether an applicant for accommodations has a disability within the meaning of the ADA and, if so, what accommodations are warranted. To be clear, an extensive record of being accommodated for a learning disability should generally satisfy the documentation requirement in requesting SAT or ACT accommodations; however, the absence of such a record should not automatically preclude a finding of a disability. The DOJ's guidance accompanying its 2011 regulations fortifies this reading:

It is important to note . . . that the inclusion of this weight [given to documentation of past accommodations] does not suggest that individuals . . . [without a history of test accommodations or formal plans documenting such] are not also

175. See *supra* text accompanying notes 66–68.

176. See *supra* text accompanying notes 114–120.

177. See *supra* text accompanying notes 156–157.

178. See *id.*

entitled to receive testing accommodations. Indeed, it is recommended that testing entities must consider the entirety of an applicant's history to determine whether that history, even without the context of a[n] IEP or Section 504 Plan, indicates a need for accommodations. In addition, many students with learning disabilities have made use of informal, but effective, accommodations. For example, such students often receive undocumented accommodations such as time to complete tests after school or at lunchtime, or being graded on content and not form or spelling of written work. Finally, testing entities shall also consider that . . . students at private schools may have a history of receiving accommodations in similar settings that are not pursuant to an IEP or Section 504 Plan.¹⁷⁹

It is clear from this guidance that a student's lack of accommodations in the past should not preclude future accommodations. Such an approach is antithetical to the ADA's purpose. Accordingly, to decide whether a student has a disability and thus is entitled to reasonable accommodation, the College Board and ACT, Inc. must fairly evaluate each request and refrain from penalizing students who were diagnosed or requested accommodations late in the game.

The legislative history and congressional intent behind the treatment of "mitigating measures" in reasonable accommodation claims bolster this reading. However, while the amended ADA specifies that mitigating measures or devices cannot be considered in determining whether an individual has a disability,¹⁸⁰ it is silent as to whether mitigating measures may be considered in determining whether to provide accommodations.¹⁸¹ Testing administrators have utilized this textual silence to justify analyzing whether one is "disabled" and whether one is "eligible for accommodations" according to two distinct standards.¹⁸² In determining whether an

179. See 28 C.F.R. § 36 app. A (2021).

180. See 42 U.S.C. § 12102(4)(E)(i).

181. See, e.g., Jones, *supra* note 122, at 5.

182. See S.C. Complaint, *supra* note 35, ¶ 66 (alleging discrimination by ACT, Inc. for, among other things: failure to consider Plaintiff's request for accommodations without regard to the ameliorative effects of mitigating measures; capricious denial of Plaintiff's request for testing accommodations despite Plaintiff's provision of ample documentation of diagnosis and neuropsychological evaluations demonstrating the need for accommodations; and placing an extreme burden of proof, beyond what is required by the ADA, to establish Plaintiff's need for testing accommodations).

applicant has a disability within the meaning of the ADA and, if so, whether accommodating that disability would be reasonable, decision-makers seek to impose a higher burden on plaintiffs in establishing the latter and cite the literal language of the statute as justification for doing so.¹⁸³

According to this logic, if the plain text of the statute does not expressly forbid considering mitigating measures to determine the reasonableness of accommodations, it permits it. But this reasoning is flawed, as the legislative history demonstrates. The colloquy between Representatives Stark and Miller clarifies that “an individual with an impairment that substantially limits a major life activity should not be penalized . . . simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.”¹⁸⁴ Accordingly, mitigating measures should never justify denial of protection to covered individuals. Doing so would “penalize” people simply for “manag[ing] their own adaptive strategies or receiv[ing] informal” help; such a penalty is directly contrary to the purpose of the ADAAA.¹⁸⁵

Testing and educational entities have opposed this interpretation, arguing that individuals who have mitigated should not be entitled to accommodations because they have already minimized the effect of their disability on their performance.¹⁸⁶ But this argument misses the mark.¹⁸⁷ Rather than fulfilling the ADAAA’s mandates, acceptance of the testing entities’ position would effectively neutralize the broader scope envisioned by its drafters. Moreover, the DOJ explicitly declined to endorse the testing

183. *Id.*

184. *See* 154 CONG. REC. 19,435 (2008) (statements of Reps. Stark and Miller) (detailing the colloquy between Reps. Stark and Miller, in which Rep. Stark stated that the ADAAA would “reestablish coverage” for learning-disabled individuals who had mitigated).

185. *Id.*

186. Amendment of Americans With Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204, 53,232 (Aug. 11, 2016).

187. To put this in perspective, consider the following example: A soccer player has sprained her ankle. She is able to play through her injury and somewhat lessen the pain by adjusting her playing style. Instead of relying on certain athletic movements that place added stress on her ankle, such as cutting and swiftly pivoting, she mitigates the effect of her injury on her performance by relying on other skills, such as positioning, timing, placement, and overall knowledge of the game. But just because she can do this does not mean that she should be prohibited from wearing an ankle brace to further alleviate her injury; to do so would be to punish her for coping. In the same vein, a student who has lessened the impact of her learning disability through certain adaptive strategies should not be denied the right to an accommodation that will further alleviate the impact of her disability.

entities' view upon their requests to add language to the regulations codifying their interpretation.¹⁸⁸

Common sense also supports this purposive statutory interpretation. It is logically inconsistent to say that an individual falls within a law's intended scope of protection but at the same time is not entitled to that law's stipulated remedies. Yet this paradoxical construction is precisely the rationale behind the trend described in Part III.A: that individuals with a disability covered by the ADAAA may nonetheless be denied the ADAAA's protection. Especially in light of the ADAAA's explicit intention to expand coverage for individuals who have mitigated, this logically inconsistent construction cannot stand.

Opponents of this proposed interpretation may argue that its protection for learning-disabled students comes at the cost of over-inclusivity in eligibility standards for testing accommodations, thereby failing to adequately prevent against the sort of abuse revealed in the college admissions scandal. Of course, implementing this proposed solution still runs the risk that some students of typical ability will attempt to manipulate the system by "buying" false diagnoses. But when reacting to instances of corruption, it is imperative to remember that exploitation, not accommodation per se, is the issue to be remedied. Although testing fraud is a problem worthy of attention, students with genuine disabilities should not suffer as a result. As noted by one advocate, "[i]t's legitimate to be furious at people who faked disabilities to get an advantage — but the issue here isn't the accommodations, it's the people."¹⁸⁹ Thus, should testing entities seek to deter future abuse, countermeasures should not penalize the exercise of long-established rights.

To ensure compliance with the ADAAA and avoid rights violations, testing entities might consider adopting prophylactic measures that remain entirely separate from the accommodations-eligibility calculus. By divorcing deterrents from the eligibility decision, testing companies can ensure that their solutions do not incidentally implicate receipt of accommodations by disabled students. Potential institutional responses that meet this criterion might include reducing "speededness" on college entrance exams¹⁹⁰

188. 81 Fed. Reg. at 53,232.

189. Smith, *supra* note 20.

190. Speededness refers to a test characteristic in which a test taker's score is dependent on the rate at which he or she performs. See *Speededness*, WICKIONARY, <https://en.wiktionary.org/wiki/speededness> [<https://perma.cc/32AT-72YD>] (last accessed Mar. 11, 2021). A

or implementing stronger vetting policies for test proctors.¹⁹¹ Although the precise form of such deterrents is beyond the scope of this Note, adherence to the ADAAA requires avoiding the further penalization of disabled students.

IV. METHODS OF IMPLEMENTATION

This Note thus far has analyzed the inclusionary aim of the ADA as amended in 2008 and has provided a glimpse into the various causes of delay in seeking or obtaining diagnoses. Because of the skepticism surrounding late diagnoses, however, many students with legitimate needs encounter excessive resistance to, and even rejection of, their requests for accommodations. As Part III discussed, this result unduly and illegally penalizes students with legitimate yet late diagnoses. Part III showed how such an outcome is counter to the legislative intent of the ADAAA, which sought to widen the scope of protection under the ADA's ambit and rectify its overly narrow interpretation in prior judicial decisions. Adopting and implementing a purposive reading of the statute and its regulations is therefore necessary to ensure that this important legislation does not become a hollow protection for those it was intended to aid. To give practical effect to this interpretation, Part IV.A proposes amending the ADAAA and its regulations to explicitly instruct that an absence of prior accommodations should not

greater level of speed results in higher test scores due to the time constraints. *Id.* If the SAT and ACT no longer score students' exams based on how quickly they can answer questions, then there is no incentive to feign disability to obtain extra time. Because speed is often the single variable necessitating accommodations for many students with certain types of learning disabilities, this solution may bring the additional benefit of mooted eligibility concerns discussed in Part III. For example, if speed is no longer a determinant of test performance, then there would no longer be a disadvantage to those with disabilities that are erroneously denied accommodations due to any under-inclusivity in the eligibility standards. An in-depth evaluation of this option is beyond the scope of this Note, but for a thorough argument against speededness on the SAT, see Nancy Leong, Comment, *Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 STAN. L. REV. 2135, 2141 (2005).

191. Although a thorough evaluation of this potential solution is beyond the scope of this Note, reexamining the college admissions scandal will demonstrate why increased vetting of test proctors could be a key way to combat the exploitation of disability accommodations without affecting the rights of those genuinely entitled to receive them. Some Operation Varsity Blues defendants cheated by bribing proctors to correct the students' answers or to take the tests for them. If testing entities ramp up their vetting processes of test proctors, they can address and hopefully reduce one of the avenues through which the college admissions scam succeeded. Additionally, because this measure is wholly independent of the eligibility decision for accommodations, it does not implicate the rights of students with disabilities.

be counted against an applicant's present request for accommodations. In addition to statutory and regulatory amendment, Part IV.B argues for judicial construction of the ADAAA in harmony with the proposed regulatory language.

A. PROPOSED STATUTORY & REGULATORY AMENDMENTS TO
IMPROVE TESTING ENTITY COMPLIANCE

To implement a purposive interpretation of the ADAAA, this Subpart proposes amending (1) the statute's rules of construction governing the weight of mitigating measures and (2) the DOJ's regulations circumscribing the parameters of testing entities' roles in evaluating requests for accommodations. Specifically, this Subpart recommends clarifying that learning-disabled students who have not been accommodated in the past should not be precluded from receiving accommodations in the future, regardless of whether they have engaged in mitigating measures that minimized the effect of their disability on their performance. This proposed clarification can best be achieved through codification in both 42 U.S.C. § 12102 and 28 C.F.R § 36.309.

As amended in 2008, 42 U.S.C. § 12102 prohibits covered entities from considering mitigating measures, such as learned behaviors, when determining whether an impairment substantially limits a major life activity.¹⁹² 42 U.S.C. § 12102(4)(E)(i) currently reads:

Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following: . . . 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 . . . [non-exhaustive list of mitigating measures].¹⁹³

This language explicitly asserts the irrelevance of mitigating measures for purposes of determining the existence of a disability, but, as discussed in Part III.B,¹⁹⁴ is silent as to their relevance, or lack thereof, in determining whether to provide accommodations.

192. 42 U.S.C. § 12102(4)(E)(i).

193. *Id.*

194. *See supra* notes 181–183 and accompanying text.

To codify the purposive interpretation laid out in Part III, this Note recommends that the legislature once again amend the ADA to fill the textual void and prevent testing agencies from using it as a shield against discrimination claims. The proposed language to be inserted into 42 U.S.C. § 12102(4)(E)(i) should read as follows: “The determination of whether an impairment substantially limits a major life activity *and whether an individual is entitled to reasonable accommodation* shall be made without regard to the ameliorative effects of mitigating measures.”¹⁹⁵

Regulatory amendment of 28 C.F.R § 36.309 would also bolster this purpose. Initially issued in 1991, 28 C.F.R § 36.309 mandates that private entities offering examinations related to applications for postsecondary education must do so in a way that is accessible to individuals with disabilities.¹⁹⁶ In response to reports of overly burdensome¹⁹⁷ requests for documentation and failure to properly consider¹⁹⁸ applications for accommodations, the DOJ amended § 36.309 in 2011 to define the proper role of testing entities in evaluating the need for accommodations.¹⁹⁹ The additional language, in part, instructed testing entities to accord “considerable weight” to documentation of prior accommodations.²⁰⁰ Thus, 28 C.F.R. § 36.309(b)(v) currently reads:

When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the

195. Proposed language is in italic typeface, whereas existing language is in ordinary roman typeface.

196. 28 C.F.R § 36.309(a) (2021).

197. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 29, at 25.

198. See 28 C.F.R. § 36 app. A (noting that testing entities “often discounted and ignored” important information contained within requests for accommodations).

199. See *id.* § 36.309(b)(1)(iv)–(vi).

200. *Id.* § 36.309(b)(1)(v).

Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).²⁰¹

In guidance accompanying its final regulations, the DOJ explained that giving “considerable weight” to evidence of past accommodations should not entail requiring it.²⁰² For example, the DOJ expressly noted that “the inclusion of this weight does not suggest that individuals without . . . [past accommodations] are not also entitled to receive testing accommodations.”²⁰³ But guidance documents are not legally binding on external entities,²⁰⁴ and as Part III.A shows,²⁰⁵ the absence of equally explicit language in the binding, formal regulations has led to discrimination.

To correct this issue, the DOJ should once again amend 28 C.F.R. § 36.309 to explicitly note that while the presence of precedent deserves considerable weight, the absence of such must not disqualify a disabled individual from being reasonably accommodated. The proposed language to be inserted into 28 C.F.R. § 36.309(b)(v) should read as follows:

*Nothing in this section should be construed to suggest that a history of prior accommodations is necessary in order to approve an applicant’s request for testing accommodations. Individuals without IEPs, Section 504 Plans, or other documentation of prior accommodation may also be entitled to receive testing accommodations. When considering requests for modifications, accommodations, or auxiliary aids or services, the entity must consider the entirety of an applicant’s history to determine whether that history, even without prior accommodation, indicates a need for accommodation.*²⁰⁶

By incorporating this language from the DOJ’s guidance into § 36.309(b)(v), the DOJ would give it legally binding authority. This, in turn, may incentivize greater compliance by testing

201. *Id.*

202. *See id.* § 36 app. A.

203. *Id.*

204. *Guidance Documents from Federal Agencies*, GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/assets/670/669721.pdf> [<https://perma.cc/D3CG-29BP>] (last accessed Mar. 11, 2021) (noting that guidance documents from federal agencies are not legally binding).

205. *See supra* text accompanying notes 156–174.

206. Proposed language is in italic typeface, whereas existing language is in ordinary roman typeface.

entities. This amendment would also make plain that while past accommodations may buttress a student's request for accommodations on the SAT or ACT, the inverse is not true: that is, the absence of prior accommodations is not, by itself, reason to disqualify the applicant from consideration. By unequivocally codifying this intent, the proposed amendment would insulate learning-disabled students with late diagnoses while also leaving in place the current guarantee of "considerable weight." And by preserving the "considerable weight" language, this amendment can aid those who have been erroneously denied accommodations without erasing the administrative relief owed to students who have extensively documented their disability.

This amendment may also pave the way for institutional action that further protects students with valid needs for accommodations. Expressly requiring testing entities to properly consider the entirety of an applicant's history may encourage these entities to take action that ensures greater compliance with the law. For example, the proposed amendment's plain prohibition on taking shortcuts based on speculative "red flags"²⁰⁷ may disincentivize testing entities from glossing over or otherwise discrediting requests from first-time applicants. To adhere to the clearer directives, testing entities may take additional precautions to certify that they fulfil their statutory duties. This could take the form of hiring more employees to evaluate requests for testing accommodations, thereby guaranteeing a sufficient quantity of personnel to achieve the required quality of review.

In addition to protecting learning-disabled students, the proposed amendment may also benefit the DOJ. If clearer regulatory language leads to fewer erroneous denials of accommodation, the DOJ may receive fewer complaints alleging discrimination. Because compliance with the laws governing testing accommodations is largely enforced via complaints to the DOJ,²⁰⁸ increased

207. See Hertog, *supra* note 153 ("Testing boards get hundreds of applications for extended time for every test sitting and they often don't have time to carefully review each application. Naturally, they tend to skim for what they consider red flags that can disqualify an applicant. One such red flag is a late diagnosis[.]").

208. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 29 ("Federal enforcement of laws and regulations governing testing accommodations primarily occurs in response to citizen complaints that are submitted to federal agencies. . . . Justice has overall responsibility for enforcement of Title III of the ADA, which includes Section 309 that is specifically related to examinations offered by private testing companies[.]").

compliance at the outset reduces the burden of enforcement.²⁰⁹ And a lesser workload for the DOJ may, in turn, allow the Department to have a greater impact with the broad range of complaints the agency receives.²¹⁰

B. JUDICIAL CONSTRUCTION AS A SUPPLEMENTARY MEASURE

An alternative method of implementation — though ultimately unsatisfactory on its own — would be to look to the federal judiciary to provide constructions of 42 U.S.C. § 12102 and 28 C.F.R. § 36.309 that correspond with the purposive reading outlined in Part III.B.²¹¹ On an individual level, a judicial solution may be regarded as more efficient in safeguarding the rights of learning-disabled students, as it does not entail the administrative process required of regulatory amendment. From a collective standpoint, however, a judicially crafted solution may prove less economical, efficient, and predictable in the long run, as ad hoc evaluations can get tied up in a given case's particularized facts, preventing the courts from sorting out a uniform standard.

The benefits of a judicially crafted solution would also necessarily come at the expense of learning-disabled students, who must wait to be discriminated against to sue. In contrast to an exclusively litigant-driven solution, statutory and regulatory amendment places the burden of clarifying the law on the legislature and DOJ. For the foregoing reasons, the legislative and regulatory solutions proposed in Part IV.A are therefore preferable.

V. CONCLUSION

The recent college admissions bribery scheme has greatly impacted students with disabilities. Because of the integral role of testing accommodations in this highly publicized scam, students with genuine disabilities — especially those who are first-time applicants for accommodations — have encountered increased skepticism. As noted in Part I, this expressive harm has paved the way

209. *See id.* (“After Justice reviews the complaint at in-take, it advises complainants that it might not make a determination about whether or not a violation has occurred in each instance. Justice officials explained that the department does not have the resources to make a determination regarding each complaint given the large volume and broad range of ADA complaints the agency receives.”).

210. *Id.*

211. *See supra* text accompanying notes 178–189.

for more concrete consequences, such as exacerbated administrative burdens and more stringent eligibility criteria for accommodations. In this story's wake, it is reasonable to be concerned about testing fraud and seek to implement effective deterrents against abuse. But in responding to the egregious conduct perpetrated by defendants, it is important to remember that the problem to be addressed is not the accommodations themselves, but rather their misuse by wrongdoers.

To counteract the deleterious effect of the scandal on learning-disabled students, this Note set forth a purposive legal framework for preserving disability rights. It provided an overview of the legislation, regulations, and case law governing testing accommodations, including the Americans with Disabilities Act of 1990 (ADA) and its 2008 amendments (ADAAA). Despite this patchwork of legal protections, however, this Note demonstrated the trend of treating prior receipt of accommodations as practically a prerequisite for accommodations going forward, and the ways in which this discriminates against disabled students with late diagnoses. To ensure that first-time applicants for accommodations will not be unduly penalized, this Note proposed adopting a purposive statutory and regulatory interpretation of the ADA as amended, and identified concrete methods of implementing this interpretation. Through legislative amendment of 42 U.S.C. § 12102, regulatory amendment of 28 C.F.R. § 36.309, and corresponding judicial construction, this Note has taken a purposive approach to adequately safeguard the rights of learning-disabled students.