No.

IN THE

Supreme Court of the United States

NATIONAL BOARD OF MEDICAL EXAMINERS,

Petitioner

v.

JESSICA RAMSAY,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Americans with Disabilities Act ("ADA"), a "disability" is "a physical or mental impairment," 42 U.S.C. § 12102(1)(A), that "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population," 28 C.F.R. § 36.105(d)(1)(v).

This case applies that standard in the context of requests for accommodations on high-stakes standardized tests. The Third Circuit held that Jessica Ramsay—who, among other academic accomplishments, achieved a top-3% score on the reading-intensive ACT college-admission test, outscoring over a million other college-bound examinees—has a reading disability entitling her to significant extra testing time on a medical licensing exam, based on a diagnosis from a private evaluator who advertises his specialty as securing extra time on standardized tests.

The question presented is whether the Third Circuit erred in holding—in conflict with decisions by eight other circuits and contrary to this Court's precedent—that the "substantial limitation" standard requires (1) disregarding evidence of real-world academic and standardized testing performance, and (2) giving greater weight to a claimant's evaluator than to the opinions of independent medical professionals whose expertise is not contested, but who did not personally evaluate the examinee.

PARTIES TO THE PROCEEDINGS

Petitioner National Board of Medical Examiners was the Defendant-Appellant below.

Respondent Jessica Ramsay was the Plaintiff-Appellee below.

CORPORATE DISCLOSURE STATEMENT

NBME is a nonprofit corporation. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Ramsay v. Nat'l Bd. of Med. Exam'rs, No. 20-1058 (3rd Cir.) (opinion issued and judgment entered July 31, 2020; petition for rehearing *en banc* denied Sept. 1, 2020).

Ramsay v. Nat'l Bd. of Med. Exam'rs, No. 19-cv-2002 (E.D. Pa.) (memorandum and order issued Dec. 30, 2019).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The National Board of Medical Examiners ("NBME") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion is reported at 968 F.3d 251 and reproduced in Appendix A (App.1a-24a); its order denying NBME's petition for rehearing *en banc* is unreported and reproduced at Appendix C (App.80a-81a). The district court's unreported memorandum and order granting Ramsay's motion for a preliminary injunction is available at 2019 WL 7372508, and reproduced at Appendix B (App.25a-79a).

JURISDICTION

The Third Circuit issued its opinion on July 31, 2020. App.1a. That judgment became final on September 1, 2020, when the court denied NBME's petition for rehearing *en banc*. App.80a-81a. Pursuant to this Court's March 19, 2020 Order extending deadlines, this petition is timely. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 12102(1) provides that "[t]he term 'disability' means … a physical or mental impairment that substantially limits one or more major life activities[.]"

28 C.F.R. § 36.105(d)(1)(v) provides that "[a]n impairment is a disability … if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability[.]"

28 C.F.R. § 36.105(d)(3)(iii) provides that "someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population."

28 C.F.R. § 36.105(d)(1)(vi) provides that "[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment."

28 C.F.R. § 36.105(d)(1)(ii) provides that "the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis."

INTRODUCTION

This appeal concerns the intersection of the ADA and high-stakes testing, a controversial crossroads contributing to recent high-profile college admissions scandals. At issue is the ADA's substantial-limitation requirement as applied to students who claim to be legally disabled based on diagnosed learning or attention disorders—identified late in life by evaluators hired to help secure testing accommodations—despite an academic record revealing decades of above-average performance without accommodations.

It would seem reasonable that an individual scoring in the top percentiles of national tests like the ACT or SAT without accommodation, or repeatedly receiving high grades in high school and college without accommodation, most likely is not substantially limited in the activity of reading compared to most people in the general population—the applicable standard. The Third Circuit, however, ruled that NBME acted "contrary to the regulations" by relying on such evidence and discounting inconsistent results from certain easily-manipulated diagnostic tests taken specifically to secure accommodations. Further, the Third Circuit ruled that the opinions of the evaluator personally selected by the applicant necessarily outweigh those of the testing agency's independent professionals, simply because only the former conducted an in-person evaluation.

Those conclusions conflict with decisions by eight other circuits, which recognize the relevance and importance of real-world academic performance in evaluating whether someone is "substantially limited" by a learning or attention disorder. Nor can they be squared with this Court's ruling that, absent a statutory or regulatory requirement, there is no basis for according special weight to the opinions of a "treating physician." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831 (2003).

Here, the Third's Circuit's outlier interpretation of the amended ADA led to the remarkable conclusion that Jessica Ramsay—who, without any accommodation, scored in the top 3% on the ACT exam, was near the top of her high-school class, and did extremely well on the Medical College Admission Test ("MCAT"), App.82a-85a—is legally disabled and entitled to twice the testing time on medical licensing exams as her peers.

Ramsay sought multiple evaluations in her quest to secure testing accommodations in medical school and on the United States Medical Licensing Examination ("USMLE"), and was eventually diagnosed by a chosen professional, for the first time, with dyslexia. The psychologist who diagnosed her was recommended to her lawyer as having helped other students obtain extra time on medical licensing exams and advertises his specialty as "EXTENDED TIME & ACCOMMODATIONS FOR STANDARDIZED EXAMS." Dkt. 25 at 104.

The Third Circuit's opinion would seem to be a well-intentioned attempt to "help" someone with a diagnosed impairment succeed. But giving unwarranted advantages to non-disabled students in challenging post-secondary programs so they can maximize their performance is not the goal of the ADA, and in fact harms the truly disabled.

This Court's review is needed to bring the Third Circuit's interpretation of the ADA in line with a proper understanding of the statute, and with decisions by its sister circuits and this Court. Left unaddressed, unwarranted disability requests related to high-stakes academic and licensing tests will increase in the Third Circuit and likely elsewhere, and many will be granted, to the detriment of other test-takers—including those who properly deserve accommodation.

STATEMENT OF THE CASE

A. NBME and the USMLE

NBME is a nonprofit organization that provides assessment services for physicians and other health professionals. Dkt. 23 at 45. NBME sponsors the USMLE—a standardized test designed to assess an individual's ability to apply the knowledge, concepts, and principles necessary for safe and effective patient care. *Id.*; App.2a. Medical licensing authorities rely on USMLE scores as part of their licensure process. Dkt. 23 at 46. Medical residency programs also rely on USMLE

scores in evaluating residency program applications. Dkt. 22 at 51.

The USMLE includes three multiple-choice "Step" exams: Step 1, Step 2 (Clinical Knowledge), and Step 3. App.2a.

All examinees take the USMLE under the same conditions except individuals who are disabled within the meaning of the ADA. Dkt. 23 at 46. NBME evaluates each request for accommodations—often (as here) with the assistance of external experts—and provides accommodations to disabled examinees. *Id.* at 47, 79. NBME's "procedures are designed to ensure that individuals with *bona fide* disabilities receive accommodations, and that those without disabilities do not receive accommodations that they are not entitled to, and which could provide them with an unfair advantage when taking the medical licensing examination." *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 88 (2d Cir. 2004).

B. Jessica Ramsay

Jessica Ramsay, a medical student at Western Michigan University, claims to be disabled based on diagnoses of dyslexia and Attention Deficit Hyperactivity Disorder ("ADHD") and entitled to twice the standard testing time on the USMLE. App.2a-3a.

1. Ramsay reports "a history of academic struggle that began [her] first day in school" (Dkt.

22 at 96), "[t]hat timed tests" have been her "downfall" (Dkt. 24 at 120), and that she "rarely got an exam grade that accurately reflected how much [she] knew" (*id.* at 56). As part of one evaluation, she reported suffering from 17 of 18 ADHD symptoms to the maximum severity (Dkt. 25 at 53-54)—consistent with someone who cannot "function in school or work settings" (Dkt. 22 at 302)—and to have received intensive, daily support "in her earliest school years" for her "severe problems" (*id.* at 96-98, 106, 110).

But the objective record paints an entirely different picture. *See* App.82a-85a (summary of Ramsay's academic and testing history).

Ramsay excelled academically starting in kindergarten—when she earned a top-4% standardized reading score and, according to her teacher, did "well in all areas."[1] Dkt. 23 at 150, 153. In elementary school, Ramsay earned mostly As, a "mastery" notation in reading, and above-average standardized test scores. *Id.* at 162; App.82a-85a. Her third, fourth, and fifth grade report cards did not mention any extra assistance, despite a specific section for noting "Specialized Reading Support" or "Grades based on intensive teacher assistance." Dkt. 23 at 163, 170, 172. As Ramsay herself repre-

[1] Learning disorders and ADHD are lifelong neurodevelopmental impairments that manifest during childhood. *See* Robert Weis et al., *When Average Is Not Good Enough: Students With Learning Disabilities at Selective, Private Colleges*, J. of Learning Disabilities 1, 5 (2016); Dkt. 22 at 289.

sented to NBME pre-litigation, the *only* assistance she received in her K-12 years consisted of limited informal accommodations from a single teacher—"not the school"—during first grade. Dkt. 24 at 54.

Ramsay received all As in middle school without accommodations and tested into an accelerated program. *Id.* at 57; Dkt. 23 at 175. According to her longtime physician, Ramsay had "no problems" in high school (Dkt. 23 at 218), during which she participated in extracurricular activities and earned As in Honors and AP classes without accommodations or any ADHD-related medications. *Id.* at 178; Dkt. 22 at 126, 170-74. Ramsay's middle and high school records do not reflect a single instance of extra support, and the only "accommodation" Ramsay pointed to from those years was being allowed to retake an accelerated algebra test after forgetting a calculator. Dkt. 24 at 57.

Ramsay received a top-3% score on the ACT college-admission test under standard time conditions, including a reading sub-score in the top 1% (Dkt. 23 at 192); earned As and Bs in college before receiving accommodations (*id.* at 205); and, without accommodations, scored in the top 21% of aspiring, highly capable medical students on the MCAT, which includes a reading-intensive section (*id.* at 245; Dkt. 22 at 144, 311-12).

2. In college, Ramsay was "tipped … off" she "might have a problem" when she "could not get above an A- on [Spanish] tests." Dkt. 24 at 59-60.

That prompted her to visit her primary care physician, who did not formally diagnose her (according to his records of the brief visit) but prescribed Ritalin and later submitted a form to her college saying she had ADHD. Dkt. 23 at 217-27.

In medical school, Ramsay sought out an evaluation from Charles Livingston, a social worker and limited-license psychologist, to help her secure accommodations and "meet the increased curricular demands" of medical school. *Id.* at 129, 249. He found that Ramsay's reading comprehension was not only "above average," but in the top 1%, and that she performed in the average range on an attentional-functioning test. *Id.* at 59, 246, 251. Nevertheless, he diagnosed Ramsay with ADHD based on "biographical information," *i.e.*, Ramsay's self-reported severe symptoms and struggles in school. *Id.* at 246-47.

Ramsay then sought extra testing time on the USMLE. Dkt. 24 at 49-63. NBME determined, after seeking review of her documentation from an independent outside expert, that Ramsay had not shown a substantial limitation as compared to most people, and denied her request for extra time. *Id.* at 99-107.

Ramsay took Step 1 without accommodations and missed passing by one point. *Id.* at 9-10. She testified that she did not have time to read a third of the questions, but her computer test records show that she spent time on every question and

that her score reflected relatively poor performance on certain subjects, not a shortage of time. *Id.* at 10-19; Dkt. 22 at 168, 588-95.

Instead of retaking Step 1, Ramsay sought out the testing she "thought was needed to show that she did have these disabilities"—this time from Alan Lewandowski, Ph.D.—which she submitted with a second request for accommodations. Dkt. 22 at 61-62; Dkt. 23 at 289; Dkt. 24 at 108-123. Although the new testing resulted in a "high average" reading score and largely normal scores from "attention testing," Dr. Lewandowski diagnosed her with ADHD and a learning disability other than dyslexia. Dkt. 23 at 295-99. NBME again concluded, based on the report of an independent expert, that Ramsay was not substantially limited and thus not entitled to extra time. Dkt. 25 at 34-45.

Ramsay then "got additional testing" from Robert Smith, Ph.D. Dkt. 22 at 65-66; Dkt. 24 at 334. Dr. Smith testified that he has "a reputation" among students (Dkt. 22 at 449), and advertises himself as specializing in getting clients extra testing time on standardized tests. (Dkt. 25 at 104-05). For $2,030, Dr. Smith offers "evaluations" to individuals seeking "documentation as part of their application to request more time" on "high-stakes" tests. *Id.*

After concluding that Ramsay's earlier professionals, including Dr. Lewandowski (*see, e.g.*, Dkt. 22 at 466), had misdiagnosed Ramsay (profession-

als to whom the panel said NBME should have deferred, App.15a-17a), Dr. Smith diagnosed her with dyslexia based on 1st or 2nd percentile scores on certain reading sub-tests he acknowledged are easily manipulated (Dkt. 22 at 459-61; Dkt. 25 at 97-99), and which contain sentences like "[o]ur cat Mimi likes to sit on the roof" (Dkt. 26 at 151). If accurate, Ramsay's results would reflect the reading level of a child in elementary or middle school. Dkt. 25 at 150. Dr. Smith also diagnosed Ramsay with ADHD based on inaccurate background information reported by Ramsay and her mother (Dkt. 22 at 458), and Ramsay's poor performance on a computerized test he admitted was of little value. *Id.* at 494; Dkt. 23 at 86-88; Dkt. 25 at 101.

Ramsay then submitted the Smith evaluation—which she and her lawyer helped draft (Dkt. 22 at 481)—as part of her third request for accommodations. NBME again concluded, after considering an external report from a second independent expert, that the aberrationally low subscores from the Smith evaluation were not credible, and that Ramsay had not shown a substantial limitation compared to most people. Dkt. 25 at 149-54. After NBME denied her reconsideration request (*id.* at 175), Ramsay sued NBME.

C. Proceedings Below

1. The district court granted Ramsay's motion for a mandatory preliminary injunction and ordered NBME to provide double testing time—relief

that would otherwise be warranted only if she prevailed on the merits—on all three Steps of the USMLE (one of which she would not take for at least two years). Dkt. 21 at 68-69; App.79a.

The district court did not find that Ramsay is "substantially limit[ed] … as compared to most people in the general population." 28 C.F.R. § 36.105(d)(1)(v). Instead, the district court conceded that, "in comparison to the average individual in the general population, [Ramsay] appears to have been and continues to be quite successful in her endeavors." App.60a-61a. The district court also acknowledged that the diagnostic test results relied upon by Dr. Smith "are not supported by—and are often inconsistent with—other important evidence, including her performance on real-world timed tests that required significant amounts of reading." App.72a; *see also* App.33a (referring to Ramsay's "overall strong academic performance throughout her educational career and on the earlier standardized ACT and MCAT").

Yet the district court did not consider that objective, real-world evidence, finding itself "constrained" to defer to Dr. Smith based on "provisions of the ADA and the guidance and directives set forth in the implementing regulations." App.73a. The court noted that, although "eminently qualified," neither of NBME's independent experts "evaluated or even met [Ramsay]," and both "focused primarily on [her] record of academic [and standardized testing] performance" and "the pau-

city of documentation of disability in her primary and secondary school years." *Id.* Because NBME and its experts "analyze[d] the results of [Dr. Smith's] various tests themselves," they had, in the district court's view, committed "blatant error." *Id.* at 73a-74a.

2. The Third Circuit affirmed in a precedential opinion. As a threshold matter, the Third Circuit "inferr[ed]" the critical substantial-limitation determination—recognizing that the district court never made one. App.13a & n.9.

The Third Circuit then issued several sweeping interpretations of the ADA and its implementing regulations. *First*, despite the substantial-limitation inquiry's inherent focus on a person's ability to perform the major life activities at issue (compared to the general population), the Third Circuit ruled that NBME's "reliance on Ramsay's academic achievement was contrary to the regulations." App.17a. *Second*, the Third Circuit held that NBME and its external experts "contradicted applicable regulations by … substituting their own opinions for those of experts who met with Ramsay." App.7a. And *third*, the Third Circuit concluded that NBME had, through these purported errors, "engaged in too demanding an analysis of whether Ramsay had a disability" and "plac[ed] too demanding a burden on Ramsay." App.7a, 15a. The court thus ignored that it was *Ramsay's* burden to prove that she is disabled under the ADA and entitled to double the testing time received by

other examinees. Nor did it adequately consider that a mandatory preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" with respect to all four preliminary-injunction factors. *Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 22 (2008).

REASONS FOR GRANTING THE PETITION

Tens of thousands of individuals seek extra testing time and other accommodations on high-stakes exams every year—most because of need, but some to obtain an unwarranted advantage or because of an incorrect understanding of what it means to be legally "disabled." The Third Circuit's precedential opinion effectively guts the ADA's "substantial-limitation" requirement, replacing it with an approach that compels courts and testing companies to (1) disregard an individual's history of successfully performing the major life activities at issue without accommodations if contradicted by diagnostic test results, and (2) defer to the opinions of an applicant's hired professionals, even if flawed (and, as here, prepared to get accommodations and edited by the applicant and her lawyer), simply because they are based on an in-person evaluation.

That interpretation of the ADA cannot be squared with the law of other circuits or this Court. It will also inevitably—and perversely—force testing companies (and other regulated entities, such

as colleges and universities) to grant accommodations to many non-disabled students, seriously undermining the integrity of the exam in question, basic principles of fairness in education and professional advancement, and the equal opportunity goals underlying the ADA. Every year, thousands of ADA cases are filed in federal courts, many involving the threshold question of whether plaintiff is disabled under the ADA, but only a relative handful work their way to appellate courts. This Court's review is warranted to correct the Third Circuit's improper dilution of the ADA's "substantial-limitation" requirement and to restore consistency and clarity to a regularly encountered standard of exceptional importance.

I. The Third Circuit's interpretation of the "substantial-limitation" standard conflicts with decisions by eight other circuits and this Court.

A. The ADA and "substantial limitation"

Congress enacted the ADA "to remedy widespread discrimination against disabled individuals," *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001), and "to provide clear, strong, consistent, enforceable standards" addressing that discrimination, 42 U.S.C. § 12101(b)(2). The ADA bars discrimination against disabled individuals "in major areas of public life," including employment (Title I),

public services (Title II), and public accommodations and testing (Title III). *PGA*, 532 U.S. at 675.

This appeal concerns a provision in Title III that requires testing entities to offer their exams "in a place and manner accessible to persons with disabilities." 42 U.S.C. § 12189.

Because NBME does not dispute that it must provide accommodations on the USMLE, including extra time, to individuals with demonstrated disabilities, "the only question … is whether [Ramsay] is disabled within the meaning of the ADA," *i.e.*, substantially limited in a major life activity. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 626 (6th Cir. 2000).

Under implementing Department of Justice ("DOJ") regulations, a "major life activity" includes "learning, reading, concentrating, [and] thinking," and a "physical or mental impairment" includes specific learning disorders and ADHD. 28 C.F.R. § 36.105(b)(2), (c)(1). But "[m]erely having [a physical or mental] impairment," or being professionally diagnosed with one, "does not make one disabled for purposes of the ADA." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002). Rather, the impairment must "substantially limit[]" the person's ability to perform the relevant major life activity, "as compared most people in the general population." 28 C.F.R. § 36.105(d)(1)(v); *see* 42 U.S.C. § 12102(1)(A).

When it enacted the ADA Amendments Act ("ADAAA") in 2008, Congress rejected this Court's interpretation of "substantial limitation" in *Toyota* as "requir[ing] a greater degree of limitation than was intended by Congress." Pub. L. No. 110-325 § 2(a)(7), 122 Stat. 3553 (2008). But Congress retained the "substantial-limitation" requirement and the core principle that "not every impairment will constitute a disability." 28 C.F.R. § 36.105(d)(1)(v). The substantial-limitation requirement "serv[es] to focus the statute on the class of persons Congress aimed to protect—those who, by virtue of their disability, may experience discrimination impairing their 'right to fully participate in all aspects of society.'" *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 160-61 (2d Cir. 2016) (quoting 42 U.S.C. § 12101(a)(1)).

Relative to "most people" means to a greater degree than the majority of people. *See Mancini v. City of Providence ex rel. Lombardi*, 909 F.3d 32, 42 (1st Cir. 2018).[2] Thus, in assessing substantial limitation, the point of comparison is not high-performing groups—future doctors or college

[2] *See also Doherty v. Nat'l Bd. of Med. Exam'rs*, 791 F. App'x 462, 464 (5th Cir. 2019) (vacating preliminary injunction granting extra time on the USMLE because the district court "did not compare [plaintiff's] reading ability to the general population"); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 (1st Cir. 1998) ("Impairment is to be measured in relation to ... what the average person does.").

graduates, or a person's innate potential—but members of the general population:

> [A]ny measure of substantial limitation that might change based on a plaintiff's particular educational environment—e.g., a comparison of "medical students to their fellow students"—would make disabled status vary with a plaintiff's current career choices, and would fail to achieve the ADA's additional purpose of providing "clear, strong, *consistent*, and enforceable standards" to address discrimination.

Singh v. George Wash. Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1103 (D.C. Cir. 2007) (Williams, J.) (citations omitted); *see Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763, 770 (8th Cir. 2004) ("It can be a harsh reality for an individual to discover he is unable to accomplish that which he hoped to accomplish. Individuals possess varying levels of academic potential.").[3]

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[3] *See also* Michael Gordon et al., *The LD Label for Relatively Well-Functioning Students: A Critical Analysis*, 32 J. of Learning Disabilities 485, 488 (1999) ("Diagnosticians are now routinely identifying learning disabilities in postsecondary students who never encountered meaningful impairments in high school or, in many cases, even college. … [B]y this logic, of course, human nature is a disability waiting to happen [and] all of us are potentially disabled if we pursue educational options that eventually outstrip our particular

B. The Third Circuit effectively eliminated the "substantial-limitation" requirement.

The Third Circuit held that courts and covered entities (1) may not rely upon real-world evidence of academic performance in determining whether a person with a diagnosed learning disorder or ADHD is substantially limited compared to most people, and (2) must defer to the opinions of an applicant's professional if based on an in-person evaluation. To do otherwise, the Third Circuit concluded, would impose too demanding a burden on the individual seeking to prove a disability.

The Third Circuit's sweeping (and incorrect) interpretations of the ADA and its implementing regulations cannot be squared with case law from this Court and other circuits.

1. The Third Circuit's treatment of real-world evidence conflicts with eight other circuits.

1. The Third Circuit broadly stated that "reliance on … academic achievement [is] contrary to the regulations." App.17a. On that basis, the Third Circuit held that the district court had "reasonably discounted" Ramsay's substantial "academic accomplishments" achieved over two decades, with-

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array of abilities.").

out any accommodation. App.18a. Future claimants will read the Third Circuit as saying that just *considering* objective evidence of academic performance (*e.g.*, grades and standardized test scores) violates the ADA.

DOJ's regulations provide that "someone with a learning disability may achieve a high level of academic success but may nevertheless be substantially limited in one or more major life activities." 28 C.F.R. § 36.105(d)(3)(iii). But just because "Ramsay's high academic performance does not *foreclose* her from having a disability" (App.18a (emphasis added)), does not mean that Ramsay's long history of academic success is *irrelevant* or cannot be credited over inexplicably conflicting diagnostic test results (*see* App.82a-85a) without violating the ADA.[4]

To the contrary, such evidence is essential to determining whether a *learning* disorder constitutes a "substantial limitation." Real-world evidence of academic performance provides courts

[4] The Third Circuit thought the district court "could appropriately consider and discount that [Ramsay] compensated for her very weak reading and writing abilities" because she purportedly "devot[ed] more effort to her assignments than most students." App.11a n.7. Although NBME does not dispute that an individual could succeed academically despite a substantial impairment, working hard is not a mitigating measure that must be disregarded—much less (as the Third Circuit suggested) evidence of a disability. Otherwise, any hard-working, successful individual with a diagnosed impairment would qualify as disabled.

and covered entities valuable, objective evidence on which they routinely and properly rely in evaluating a claimed need for and entitlement to accommodations. As one expert examining the high rate of learning disabilities at selective colleges explained:

> Objective evidence of normative deficits in academic skills is a critical component of most contemporary conceptualizations of learning disabilities[,] … [which] interfere with the acquisition of academic skills, limit academic achievement, and impair academic or occupational functioning.

Weis, *supra* note 1, at 2, 8. Even Ramsay's testifying expert conceded that tests like the ACT and MCAT "provide relevant information regarding someone's ability to think, read and concentrate[.]" Dkt. 22 at 476.

Unsurprisingly, then, the Third Circuit's opinion conflicts with the decisions of eight other circuits, all of which relied on objective, real-world evidence of academic achievement in addressing the ADA's substantial-limitation requirement—oftentimes to discount the plaintiff's inconsistent testimony and implausible diagnostic test scores.

For example, the Sixth Circuit highlighted the plaintiff's academic achievement in affirming the lower court's denial of extra time on the USMLE:

> In high school, Plaintiff qualified for advanced placement classes and graduated with a grade point average of 4.3/5.0. He had no formal accommodations for learning disabilities during high school. Plaintiff scored 1050, an average score, on the SAT. He took the test without accommodations. … He took the MCAT twice without accommodations. … His second MCAT score was high enough that [his medical school] admitted him[.]

Gonzales, 225 F.3d at 630. The plaintiff's "testimony regarding his history of reading problems" and his "clinical evidence" were "inconsistent with his success on the SAT and MCAT"—both of which "are timed, and [which] Gonzales took … without accommodation." *Id.* at 627 & n.13.[5]

In *Bercovitch v. Baldwin School*, the First Circuit concluded that the plaintiff's school records did not reflect a "substantial limitation" compared to the average person. 133 F.3d 141, 156 (1st Cir. 1998). "[T]he record shows," the First Circuit rea-

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[5] Although *Gonzales* and certain other cases discussed herein were referenced in the ADAAA's legislative history as applying a "substantial-limitation" standard that was too demanding, Congress did not alter the basic, commonsense principle applied in *Gonzales* that courts and covered entities may consider real-world evidence of a person's reading and concentration abilities, from directly analogous contexts, when applying the substantial-limitation standard. *See infra*, Part I(B)(3).

soned, that the plaintiff "never experienced significant academic difficulties, and in fact has excelled academically for most of his years at [school]." *Id.* at 155. Based on this analysis, the court reversed a preliminary injunction that had granted accommodations based on an ADHD diagnosis. *Id.* at 156.

Similarly, the Ninth Circuit held—in a lawsuit by a medical student seeking accommodations for a learning impairment—that the plaintiff's "claim to be 'disabled' was contradicted by his ability to achieve academic success ... without special accommodations." *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1065 (9th Cir. 2005). He had, without accommodation, completed the first two years of medical school on a normal schedule with a GPA "slightly above a 'B,' and [had] passed the required national board examination." *Id.* Although the Ninth Circuit rejected the notion "that a successful student by definition cannot qualify as 'disabled,'" it stressed that "a student cannot successfully claim to be disabled based on being substantially limited in his ability to 'learn'" if his ability to learn has not, in fact, been substantially limited. *Id.; cf. Weaving v. City of Hillsboro,* 763 F.3d 1106, 1112 (9th Cir. 2014) (carefully evaluating plaintiff's job-performance history where he was diagnosed with ADHD and claimed to be substantially limited in the major life activities of working and getting along with others).

The D.C. Circuit also relied on objective performance evidence in holding that a medical stu-

dent's learning disorder did not rise to the level of a "substantial impairment." *Singh*, 508 F.3d at 1099. Despite "Singh's inferior performance—as she sees it—on [certain] timed multiple-choice tests," the court said, she "began her medical studies after a high school and undergraduate career that both parties describe as illustrious." *Id.* Because the "comparison [is] to the general population, rather than to persons of elite ability or unusual experience," the plaintiff was not substantially limited. *Id.* at 1100.

The Fourth, Eighth, Tenth, and Eleventh Circuits, as well as an earlier decision of the Third Circuit, are in accord. *See, e.g.*, *Palotai v. Univ. of Md.*, 38 F. App'x 946, 955 (4th Cir. 2002) (affirming dismissal of ADA claim based on a purported learning disability, and emphasizing plaintiff's "demonstrated record of academic achievement"); *Ristrom*, 370 F.3d at 769 (considering plaintiff's academic history in determining whether ADHD substantially limited his ability to learn); *Rhodes v. Langston Univ.*, 462 F. App'x 773, 778 (10th Cir. 2011) (noting that plaintiff "was a successful student" in nursing school and that his "neuropsychological evaluation does not answer … whether his impairment substantially limits [his] ability to learn as a whole … compared to most people"); *Hetherington v. Wal-Mart, Inc.*, 511 F. App'x 909, 912 (11th Cir. 2013) (considering plaintiff's academic history in determining whether he was substantially limited in his ability to learn); *Collins v.*

Prudential Inv. & Ret. Servs., 119 F. App'x 371, 378 (3d Cir. 2005) ("[Plaintiff's] testimony about her work, academic, and community involvement contradicts her claim that her ADHD/ADD substantially limits her abilities to think, learn, remember and concentrate.").

District courts, too, have routinely looked to how a person has performed academically and on other high-stakes standardized tests, without accommodations, in determining if the person is substantially limited in his or her reading, learning or attentional abilities. *See, e.g.*, *Black v. Nat'l Bd. of Med. Exam'rs*, 281 F. Supp. 3d 1247, 1249-51 (M.D. Fla. 2017) (relying on plaintiff's average performance on the MCAT and other standardized tests without accommodations in holding that she was not disabled, despite an ADHD diagnosis from a qualified professional); *Bibber v. Nat'l Bd. of Osteopathic Med. Exam'rs*, No. 15-4987, 2016 WL 1404157, at *8 (E.D. Pa. Apr. 11, 2016) (individual who scored in the 71st percentile on the GRE and in the "average" range on the MCAT's reading section without accommodations was not substantially limited in reading); *Healy v. Nat'l Bd. of Osteopathic Med. Exam'rs*, 870 F. Supp. 2d 607, 621 (S.D. Ind. 2012) ("Matthew's above-average standardized testing scores, ACT scores, and SAT scores, during which he received no accommodation, ... stand as testament to his ability to read, learn, think, and concentrate just as well, if not better, than the general population.").

2. For so-called "invisible" impairments, such as reading disabilities and ADHD, an individual's academic and standardized-testing record will likely be the only real-world evidence of functional limitations available. That objective evidence reflects an individual's performance when motivated to succeed. This is not true of diagnostic testing performed by a private evaluator for the specific purpose of securing accommodations on a high-stakes exam. The record here is illustrative.

First, Ramsay's own expert acknowledged that the testing he administered can be manipulated—for a reading disability, by simply reading more slowly. Dkt. 22, at 459-60; *see* Allyson Harrison, *An Investigation of Methods to Detect Feigned Reading Disabilities*, Archives of Clinical Neuropsychology 89, 89-90 (2010); Benjamin Lovett, *Disability Identification & Educ. Accommodations: Lessons from the 2019 Admissions Scandal*, 49 Educ. Researcher 125, 126 (2020) ("The recent [college admissions] scandal should draw attention to deliberate underperformance on diagnostic tests—a phenomenon that has been documented in adolescents in a variety of contexts").

As relevant to ADHD, Dr. Smith testified that diagnoses can be manipulated by reporting attention-deficit symptoms. Dkt. 22 at 460-61. Here, Ramsay reported suffering from 17 of 18 ADHD symptoms to the maximum degree, struggling in school from a young age, and receiving intensive support—all "facts" that were accepted and relied

upon by her various evaluators. *See, e.g.*, *id.*, at 495; *see also* Will Lindstrom, *Postsecondary ADHD Documentation Requirements: Common Practices in the Context of Clinical Issues, Legal Standards, & Empirical Findings*, 19 J. of Attention Disorders 655, 661 (2015) ("Standardized self-report instruments of ADHD symptoms are particularly susceptible to symptom exaggeration and intentional distortion, with up to 93% of college students being able to successfully endorse the necessary number and pattern of symptoms on such instruments to meet ADHD criteria."); B. Sullivan, *Symptom Exaggeration by College Adults in Attention-Deficit Hyperactivity Disorder & Learning Disorder Assessments*, 14 Applied Neuropsychology 189 (2007); Weis, *supra* note 1, at 14 ("Although these students may believe their academic abilities and test-taking skills are impaired compared to their intellectually talented and high-achieving classmates, there is often little evidence that they experience substantial limitations in academic skills compared to most people.").

Indeed, "private evaluators tend to focus on diagnostic test scores and other information gathered during the evaluation rather than reporting data from objective records of the student's performance in school," often being "satisfied with vague descriptions of scholastic 'difficulties' and 'struggles.'" Lovett, *supra*, at 126. Also, private evaluators may not have "easy access" to records that might call diagnostic test scores into question.

Id. at 128. Here, for example, Dr. Smith acknowledged that Ramsay had not shared some important test records with him. Dkt. 22 at 474-76.

Second, there is no incentive for an individual seeking unwarranted accommodations to "perform well" on diagnostic testing because, if they do, "they're not going to get a recommendation for accommodations." *Id.* at 298; *id.* at 459-60 (testimony by Ramsay's expert that "individuals sometimes exaggerate or [do] not perform to their maximum" in order "to obtain accommodations"). For obvious reasons, that issue does not arise in the context of grades and high-stakes standardized test scores.

2. Requiring deference to in-person evaluations conflicts with this Court's precedent.

The Third Circuit ruled that "discount[ing] [NBME]'s experts because they … never met with Ramsay" was "supported by the regulation[]" requiring an "individualized assessment." App.15a-17a. That deference to evaluators who personally met with Ramsay—which was dispositive here—is *not* supported by the regulations and conflicts with precedent from this Court.

1. Setting aside that Ramsay's hired expert was not her "healthcare provide[r]" (App.17), there is nothing in the statute or regulations that justifies giving extra weight to evaluators simply be-

cause they met personally with the individual seeking accommodations. And this Court ruled in *Black & Decker Disability Plan v. Nord* that—absent such a requirement—there is no basis for "accord[ing] special deference to the opinions of treating physicians." 538 U.S. 822, 831 (2003).

In *Black & Decker*, the Ninth Circuit gave "special weight" to the "opinions of the claimant's treating physician" in an ERISA disability determination. *Id.* at 825. This Court unanimously reversed. Because nothing in the statute or regulations "suggests that plan administrators must accord special deference to the opinions of treating physicians," courts "have no warrant to require administrators automatically to accord special weight to [those] opinions." *Id.* at 831, 834. Nor can "courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." *Id.* at 834.

The Third Circuit's reasoning here is irreconcilable with *Black & Decker*. Because neither the ADA nor DOJ's implementing regulations require courts or covered entities to "accord special deference to the opinions of treating physicians" (much less professionals hired solely to obtain documentation for accommodations), there is no basis for "judicial imposition of a treating physician rule"—particularly one that appears to bar covered entities from *even considering* conflicting evidence. *Id.* at 831, 834 & n.3.

And just as ERISA regulations requiring "full and fair" assessment did not "command plan administrators to credit the opinions of treating physicians over other evidence" (*id.* at 825), the DOJ's analogous regulation—that "determin[ing] whether an impairment substantially limits a major life activity requires an individualized assessment"—does not require deference either. *See* App.16a (quoting 28 C.F.R. § 36.105(d)(1)(vi)). Both regulations simply require courts and covered entities to assess the facts on a case-by-case basis specific to each individual; they say nothing about how the assessment should—or must—be conducted. The district court therefore could not properly "discount[] [NBME]'s experts" simply because they "never met with Ramsay."[6] App.15a.

"In short, whatever benefit the treating physician rule might have in social security disability cases, it is inappropriate to apply it as a presumption in ADA cases of this type." *Bartlett v. N.Y.*

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[6] The panel pointed to DOJ's statement in a rulemaking that "reports from experts who have personal familiarity with the candidate should take precedence over those from reviewers for testing agencies." App.16a (quoting 75 Fed. Reg. 56,236, 56,297 (Sept. 15, 2010)). That statement, however, does not have the force of law, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015), and DOJ itself subsequently advised (post-ADAAA) that NBME is "not required to defer to the conclusions or recommendations of an applicant's supporting professional." Settlement Agreement Between United States & NBME, No. 202-16-181 ¶ 17 (Feb. 11, 2011), *available at* www.ada.gov/nbme.htm.

State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1119 (S.D.N.Y. 1997) (Sotomayor, J.), *aff'd in part, vacated in part*, 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated*, 527 U.S. 1031 (1999), and *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000).

2. The panel's ruling that the opinions of evaluators who conducted in-person evaluations must be given more weight is also illogical, unworkable in practice, and would create significant problems for courts and covered entities seeking to apply the ADA evenhandedly. Again, the circumstances of Ramsay's case demonstrate why that is so.

First, Ramsay's expert testified that earlier professionals whom she consulted (and whose opinions the panel credited, App.3a-4a) failed to diagnose her properly. *See, e.g.*, Dkt. 22 at 466, 469. That Ramsay's *own* evaluators reached inconsistent conclusions after personally evaluating her—*compare* Dkt. 23 at 251 (finding by one evaluator that she reads in the top 1%), *with* Dkt. 25 at 91 (reading sub-test score in bottom 1% per testifying expert)—underscores the irrationality of compelling deference to an evaluator because he or she sees the individual in person.[7]

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[7] *See also* W. Mehrens, *Accommodations for Candidates with Disabilities*, 63 The Bar Exam'r, No. 4, 33, 36 (1994) ("[I]t is well known that many [learning disability diagnoses] are done … in error."); J. Joy, *Assessment of ADHD Documentation from Candidates Requesting [ADA] Accommoda-*

Second, Ramsay's testifying expert was, as noted, *not* her treating physician; he was someone recommended to her lawyer as having helped other students obtain accommodations on the USMLE. Even if a long-time treating physician might provide persuasive, unbiased evidence about an individual's impairment, there is no reason to believe the same is true for an evaluator who met with someone for the sole purpose of generating a report to support an accommodation request. *See Black & Decker*, 538 U.S. at 832 ("[T]he relationship between the claimant and the treating physician" might have "been of short duration," and "a treating physician, in a close case, may favor a finding of 'disabled.'").[8]

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tions for the Nat'l Bd. of Osteopathic Med. Exam'rs COMLEX Exam, 12(2) J. of Attention Disorders 104, 106 (2010) (finding that only 7 out of 50 individuals who sought accommodations based on an ADHD diagnosis "provided sufficient clinical information to meet the [diagnostic] criteria").

[8] *See also* Lindstrom, *supra*, at 661 (noting that "qualified evaluators" for students seeking accommodations often fail to "meet basic diagnostic criteria" and rely excessively on "self-reported academic struggles (*e.g.*, needing to reread information to understand it, difficulty finishing timed tests) [that] are common experiences for college students and not specific to disability").

3. The ADAAA did not eliminate the substantial-limitation requirement.

The Third Circuit believed that its truncated substantial-limitation inquiry, described above, was "supported by the regulations" (App.15a) and that NBME had been "too demanding in what they required to prove a disability" (App.17a) because "whether an impairment substantially limits a major life activity [under the ADAAA] should not demand extensive analysis." App.17a (quoting 28 C.F.R. §36.105(d)(1)(ii)).

But the notion that the substantial-limitation inquiry "should not demand extensive analysis"—language drawn from Congress's statement of purpose in the ADAAA, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (2008)—does not expand the ADA's scope beyond the "terms of [the statute]." 42 U.S.C. § 12102(4)(A); *see* 28 C.F.R. § 36.105(a)(2)(i) (broad construction "to the maximum extent permitted by the terms of the ADA").

Congress adopted the ADAAA to overturn this Court's decision in an employment case that, "to be substantially limited," "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota*, 534 U.S. at 198. The revised statute clarifies that impairments need not rise to the level of "prevent[ing] or severely restrict[ing] the individ-

ual" from doing such activities. Pub. L. 110-325, § 2(b)(4).[9] But Congress's rejection of a judicially-*heightened* substantial-limitation requirement does not mean that Congress jettisoned the statutory standard. It did not:

> By retaining the essential elements of the definition of disability including **the key term 'substantially limits'** we reaffirm that not every individual with a physical or mental impairment is covered by the ... definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability[.] That will not change after enactment of the ADA Amendments Act[.]
>
> Thus, we believe that the term "substantially limits" as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test for determining whether an individual has a disability.

Statement of the Managers, 154 Cong. Rec. S8840, S8841-42 (Sept. 16, 2008) (emphasis added).

Congress also "explicitly recognized that it had always intended that determinations of whether

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[9] The ADAAA also clarified that "mitigating measures" may not be considered when determining "whether an impairment substantially limits a major life activity." Pub. L. 110-325, § 2(b)(2).

an impairment substantially limits a major life activity should be based on a comparison to most people in the population." 81 Fed. Reg. 53,204, 53,230 (Aug. 11, 2016). Those determinations "should not demand extensive analysis" (28 C.F.R. § 36.105(d)(1)(ii)) and, "in most cases, people with impairments will not need to present scientific, medical, or statistical evidence," and can rely on "other types of evidence that are less onerous to collect," *including* "*school records*." 81 Fed. Reg. at 53,231 (emphasis added). School records are relevant precisely because they reflect the functional impact of a neurodevelopmental, lifelong disorder such as dyslexia or ADHD.

At least seven circuits have meaningfully acknowledged that Congress retained the substantial-limitation requirement in the ADAAA, in contrast to the Third Circuit's approach. The Second Circuit, for example, reasoned "that the ADAAA rejected the Supreme Court's construction of 'substantial[]' as requiring a 'severe' or 'significant' limitation," yet "Congress … retained the term 'substantially limits' in this amendment." *See Mount Vernon*, 837 F.3d at 161 n.10.

Other circuits agree. *See, e.g.*, *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 n.10 (4th Cir. 2012) (while the ADAAA "requires a lesser 'degree of limitation' than that imposed by *Toyota*," it still "retains the 'substantial limitation' language" (citation omitted)); *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013) ("Although the

text of the ADAAA expresses Congress's intention to broaden the definition and coverage of the term 'disability,' it in no way eliminated the term from the ADA or the need to prove a disability on a claim of disability discrimination."); [10] *Neely v. Benchmark Fam. Servs.*, 640 F. App'x 429, 434-35 (6th Cir. 2016) ("Though the [ADAAA] undoubtedly eased the burden required for plaintiffs to establish disability, we note that Congress expressly chose to retain the 'substantially limits' modifier."); *Richardson v. Chi. Trans. Auth.*, 926 F.3d 881, 889 (7th Cir. 2019) ("The ADAAA's general policy statement cannot trump [its] plain language."); *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016) (same); *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014) ("The 2008 amendments to the ADA relaxed the standard for determining whether a plaintiff is substantially limited … but Weaving cannot satisfy even the lower standard under current law."); *cf. Ellenberg v. N.M. Military Inst.*, 572 F.3d 815, 821 (10th Cir. 2009) (rejecting interpretation of the ADA, pre-amendment, that negated the "substantial limitation requirement").

The Third Circuit's focus on broad introductory language from the ADAAA came at the expense

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[10] *See also Doherty v. NBME*, 791 F. App'x at 464 (although the ADA "provide[s] for expansive construction," courts "must still analyze [the ADA's definition of disability] logically" and with due regard for the statute's express requirements).

of the statute's clear standards—which, as discussed, permit (and, indeed, compel) consideration of real-world evidence relative to an individual's alleged functional limitations and do not require deference to the evaluator of the person claiming to have a disability. Although the ADAAA lowered the *quantity* of evidence required to establish a "substantial limitation," Congress did not change, as relevant here, the categories of evidence that may be *considered*. The Third Circuit's contrary interpretation of ADAAA conflates a diagnosis with a disability and impermissibly "reads the … substantial limitation requirement … out of th[e] statute." *Mount Vernon*, 837 F.3d at 159-60.

II. The Court's review is warranted given the exceptional importance of this commonly applied standard.

At its essence, the Third Circuit was asked to decide whether courts and covered entities must conclude that an individual is disabled if she and her expert say so—even if the plaintiff's testimony, diagnostic tests, and professional evaluations cannot be squared with a lifetime of objective evidence of academic performance using the very abilities that are purportedly limited. In an unprecedented expansion of the ADA and its implementing regulations, and in conflict with case law from other circuits and this Court, the Third Circuit says the answer is "yes."

The precedential nature of the Third Circuit's opinion ensures its impact far beyond Ramsay, NBME, and medical-licensing exams. Millions of standardized tests are administered yearly—for licensure, certification, and admission purposes (among others).[11] Every year, tens of thousands of individuals seek accommodations on such tests—most often extra time, and most often based on an asserted learning disorder or ADHD.[12]

High-stakes testing programs routinely deny some of these requests because their external reviewers (who have not personally evaluated the examinee) conclude based on the written record—and despite a diagnosed impairment—that the examinee is not disabled within the meaning of the ADA. Often, as here, that is because results from diagnostic assessments cannot be reconciled with a lifetime of objective evidence reflecting high academic achievement and no meaningful functional limitations when taking exams without accommodations. *See* App.82a-85a.

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[11] V. R. Johnson, *Standardized Tests, Erroneous Scores, & Tort Liability*, 38 Rutgers L. J. 655, 660-61 (2007).

[12] *See, e.g.*, Laura A. Miller*, Effects of Extended Time for College Students with and without ADHD,* 19 J. of Attention Disorders 678 (2015); Craig S. Lerner, *Accommodations for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites*, 57 Vand. L. Rev. 1043, 1044 (2004) ("From 1987 to 2000, the number of students receiving accommodations on the SATs quadrupled, and approximately 90 percent of th[ose] test takers … were diagnosed with a 'learning disability.'").

Requiring deference to an applicant's professional makes it virtually pointless for testing agencies to exercise their undisputed right to review whether an accommodation request is actually warranted. That is grossly unfair to other examinees and score users and directly contrary to the ADA's individualized-assessment requirement. Testing agencies were criticized in the college admission scandal for not reviewing students' alleged need for extra testing time more closely, but have now been told by the Third Circuit that they should just defer to the professionals who recommend extra time or other accommodation for students on high-stakes exams.

An untenable alternative for a testing agency would be asking examinees to undergo an in-person examination by an independent medical expert paid for by the testing agency when they request accommodations, to ensure that the views of the independent expert stand on the same footing as the views of the examinee's professional. That approach, however, would be challenged by examinees as unreasonable and discriminatory.

Testing programs will inevitably be inclined simply to grant requested accommodations, regardless of their impact on the integrity of the resulting scores or the unfairness to examinees who test under standard conditions or with accommodations they legitimately need.[13] In other words,

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[13] Giving extra time to non-disabled students on a time-

despite a testing agency's "duty to ensure that [its] examination is fairly administered to all those taking it," the Third Circuit's opinion will induce testing programs to reconsider or eliminate the reasonable safeguards they have implemented "to ensure that individuals with *bona fide* disabilities receive accommodations, and that those without disabilities do not[.]" *Powell*, 364 F.3d at 88-89.

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limited, standardized test is unfair. *See* Miller, *supra* note 12, at 683 (noting that "studies ... have generally shown that all students benefit from extended time," and that "double time" appears to give students with a learning disability or ADHD "an unfair advantage over their typical peers," which is "not what test accommodation policies hope to achieve"); G.E. Zuriff, *Extra Examination Time for Students with Learning Disabilities: An Examination of the Maximum Potential Thesis*, 13 J. Applied Measurement 99, 101, 114 (2000) (refuting "hypothes[is] that non-disabled students would not in fact benefit from extra time on most examinations"). Unsurprisingly, then, "most students—with and without disabilities—perceive accommodations and modifications to be helpful and desirable as they pursue advanced degrees." Weis, *supra* note 1, at 3. *See also* N. Leong, *Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 Stan. L. Rev. 2135, 2136 (2005) ("In an era when admission to elite colleges and universities has never been more competitive, a puzzling trend has emerged. Across the country, many bright and ambitious students are anxiously competing to display their cognitive imperfections, practically begging psychologists to label them with dyslexia or attention deficit hyperactivity disorder (ADHD), while their parents unhesitatingly hand over thousands of dollars in fees to pay for such diagnoses.").

Nothing in the ADA, its implementing regulations, or basic principles of fairness supports that result. *Weis*, *supra* note 1, at 4 ("[T]he unsupported or indiscriminate provision of accommodations can yield test scores that overpredict knowledge and performance, give students an unfair advantage over their classmates, expend limited resources, and erode academic standards.").

Studies show "that students requesting and receiving a [learning disability] diagnosis are disproportionately from affluent communities." Lerner, *supra* note 12, at 1108. For example, one study found that "[c]hildren and adolescents with [actual] learning disabilities disproportionately come from families of lower socioeconomic status," but that *over 54%* "of the 50 top-ranked private liberal arts colleges in the United States have more than *double* the average percentage of students receiving accommodations[.]" Weis, *supra* note 1, at 2 (emphasis added); *id.* at 3 ("Many students at selective, private colleges may lack evidence supporting their disability diagnoses and receive accommodations that do not reflect either objective test data or real world limitations in academic functioning"). Similarly, the California State Auditor found that seniors at private schools were receiving SAT accommodations at four times the rate of their publicly educated peers,[14] and, in a

[14] Elaine Howle, Bureau of State Audits, *Standardized Tests* (2000), www.bsa.ca.gov/pdfs/reports/2000-108.pdf.

more recent investigation, the Chicago Tribune found that in some affluent and high-performing districts, between 17% and 20% of students received accommodations, many of whom obtained some of the highest scores possible on the ACT.[15]

Paradoxically, the individuals the ADA is meant to protect will be among those disadvantaged by the Third Circuit's overreaching and outlier effort to make it easier to get ADA accommodations. *See* Gordon, *supra* note 3, at 489.

The untoward impact of the Third Circuit's opinion—which will inevitably be cited by examinees in every circuit when seeking accommodations on a high-stakes exam—does not end there. Although this case involves the ADA provision that applies to testing entities, 42 U.S.C. § 12189, the definition of "disability"—and, more specifically, the "substantial-limitation" requirement of that

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[15] D. Rado, *Many Illinois High School Students Get Special Testing Accommodations for ACT*, Chi. Tribune (Apr. 29, 2012), www.chicagotribune.com/news/ct-met-testing-accommodations-20120429-58-story.html; *see also* D. Belkin, *Many More Students, Especially the Affluent, Get Extra Time to Take the SAT*, Wall Street Journal (May 21, 2019) www.wsj.com/articles/many-more-students-especially-the-affluent-get-extra-time-to-take-the-sat-11558450347 ("At Scarsdale High School north of New York City, one in five students is eligible for extra time or another accommodation such as a separate room for taking the SAT or ACT college entrance exam. At Weston High School in Connecticut, it is one in four. At Newton North High School outside Boston, it's one in three.").

definition—is the same under all three ADA titles. The Third Circuit's opinion is thus equally applicable to employers, state and local governments, and public accommodations (*e.g.*, educational institutions, hotels, sports facilities, and movie theatres) accused of violating Titles I, II, or III of the ADA for failing to provide accommodations to individuals who claim to be disabled.

* * * *

The Third Circuit's opinion inappropriately dilutes a central and essential statutory term of the ADA, as amended by the ADAAA. Its sweeping ruling conflicts with case law of its sister circuits and this Court, thereby undercutting the statute's "purpose of providing clear, strong, consistent, and enforceable standards to address discrimination." 42 U.S.C. § 12101(b)(2). In the end, the Third Circuit's opinion is a win for students who are not disabled within the meaning of the ADA but who have the means to gain an unwarranted advantage in their education or professions at the expense of their peers, including the truly disabled.

CONCLUSION

The Court should grant certiorari.

RESPECTFULLY SUBMITTED, this 28th day of January, 2021

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 31, 2020

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1058

JESSICA RAMSAY,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-19-cv-02002)
District Judge: Honorable J. Curtis Joyner

July 1, 2020, Argued;
July 31, 2020, Filed

Before: GREENAWAY, JR., SHWARTZ,
and RENDELL, *Circuit Judges.*

OPINION

SHWARTZ, *Circuit Judge.*

Appendix A

Medical student Jessica Ramsay sought testing accommodations for dyslexia and attention deficit hyperactivity disorder ("ADHD") from the National Board of Medical Examiners ("the Board"). The Board denied her requests, and she sued under the Americans with Disabilities Act ("ADA"). The District Court granted a preliminary injunction, requiring the Board to provide her accommodations. We will affirm.

I

A

The Board administers the United States Medical Licensing Examination ("USMLE"). The USMLE has three components, or "Steps," that medical students must pass before they can apply for a medical license. Step 1 is a computer-based, multiple choice exam that assesses a student's grasp of scientific concepts. Students typically take Step 1 before their final year of medical school. Step 2 has two parts: Clinical Knowledge ("CK"), a computer-based, multiple choice exam that assesses medical knowledge and clinical science, and Clinical Skills ("CS") that assesses students in a clinical setting. Step 2 must be taken before graduation. Step 3 is a computer-based exam that assesses the application of medical and scientific knowledge to the practice of medicine. Step 3 must be taken before applying for a medical license.

Ramsay, while a third-year medical student at Western Michigan University ("WMed"), requested an accommodation, namely extra testing time, for Step 1

and Step 2 CK. The basis of her request was that she had ADHD and dyslexia. She submitted to the Board:

- a diagnosis of ADHD and probable dyslexia by her family physician, Dr. Alan Smiy, made when she was an undergraduate;

- records of accommodations provided by her undergraduate institution and by WMed;

- evaluations from Charles Livingston, a licensed social worker, who administered several assessments that supported a diagnosis of ADHD and a likelihood of dyslexia and showed, in his opinion, that Ramsay had "relatively low attention and concentration and very low processing speed," although "[h]er native intelligence has been some compensation for low abilities in the identified areas";

- her MCAT scores, taken without accommodations, placing her in the 67th and 31st percentiles for verbal reasoning and writing, respectively;

- academic records and other standardized test scores, taken without accommodations, showing a high level of achievement; and

- a personal statement attesting that she struggled from an early age with maintaining concentration, reading, and writing, but that she achieved academic success through mitigating strategies, informal accommodations from teachers, and

> accommodations from her undergraduate and medical schools.

The Board provided Ramsay's materials to an outside reviewer, Dr. Stephen Zecker, who opined that Ramsay was not "substantially limited in functioning in a manner that warrants accommodations." App. 766. The Board also reviewed Ramsay's documentation and, noting her record of achievement without accommodations, concluded that the documents did not "demonstrate a record of chronic and pervasive problems with inattention, impulsivity, behavioral regulation, or distractibility that has substantially impaired [her] functioning during [her] development or currently." App. 1126. Based on Dr. Zecker's recommendation and the Board's review of Ramsay's materials, the Board denied her request.

Thereafter, Ramsay took Step 1 without accommodations in her third year, but she failed by one point. Because WMed requires students to pass Step 1 by the beginning of their fourth year, she took a leave of absence.

Ramsay renewed her request for extra testing time and submitted an evaluation and test data from neuropsychologist Dr. Alan Lewandowski. Dr. Lewandowski met with Ramsay, conducted assessments, found that she had abnormal functionalities in thinking, processing speed, attention, and sequencing, and concluded that she had ADHD. Ramsay also submitted a letter from her treating psychiatrist, Dr. Bruce Ruekberg, who concurred with Mr. Livingston's and Dr. Lewandowski's

assessments, stating that she had abnormal scanning and processing speed that impaired her reading and written expression. The Board denied her request for extra testing time, again concluding that she had not shown she was substantially limited in any functions as compared to most people.[1]

Ramsay sought reconsideration of the Board's denial. As additional support, she provided an evaluation by Dr. Robert D. Smith, a psychologist and neuropsychologist. Dr. Smith met with Ramsay, reviewed her records, and performed similar assessments. He reported that the assessments revealed that she had abnormally low abilities in processing information, writing, and reading, indicating dyslexia and ADHD. Among other things, his testing revealed that Ramsay, as compared to others in her age group, was in the fourth percentile in reading comprehension and fluency, second percentile in word reading speed, and first percentile in oral reading fluency.

The Board provided Ramsay's file to outside expert Dr. Benjamin Lovett, who concluded that Ramsay did not show poor academic skills or impairments compared to the general population and thus lacked a condition that would warrant accommodations. Based on Dr. Lovett's recommendation and further review, the Board denied Ramsay's request for reconsideration.

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1. The Board granted Ramsay's requests for additional break time and a separate testing room as accommodations for migraines and deep vein thrombosis.

B

Ramsay sued the Board in May 2019, alleging that it had violated the ADA.[2] The next month, WMed informed Ramsay that it could extend her leave only until March 2020, "with the expectation that [she] will sit for the USMLE Step 1 exam in a manner that allows [her] to return to the WMed curriculum by that date." App. 1520. WMed informed Ramsay that if she did not pass Step 1 and return by March 2020, she would be dismissed or could voluntarily withdraw, but readmission would not be guaranteed.[3] Ramsay accepted WMed's conditional extension of leave.

Because Ramsay had to pass Step 1 to avoid dismissal, she sought a preliminary injunction to require the Board to grant her accommodations. The District Court held a three-day evidentiary hearing featuring testimony from, among others, Ramsay, Dr. Smith, Dr. Zecker, and Dr. Lovett.

For the reasons explained in its careful and thorough opinion, the District Court granted Ramsay a preliminary injunction and required the Board to provide Ramsay with double the testing time on Step 1, Step 2 CK, any

2. Ramsay also alleged a Rehabilitation Act claim, 29 U.S.C. § 794, but the parties agree that only her ADA claim is relevant to the preliminary injunction.

3. The Board contends that Ramsay only had to take, not pass, Step 1 to remain enrolled in school. Given that WMed students must pass Step 1 by the beginning of their fourth year, however, Ramsay could not continue into her fourth year at WMed without passing Step 1.

written or reading portions of Step 2 CS, and Step 3. *Ramsay v. Nat'l Bd. of Med. Exam'rs,* No. 19-CV-2002, 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019). The Court found that all the experts were qualified, but that the testimony and reports of the experts who met with Ramsay were more persuasive. 2019 U.S. Dist. LEXIS 222782, [WL] at *17. Those experts stated that their assessments and evaluations all showed that Ramsay had low reading, writing, and processing abilities. 2019 U.S. Dist. LEXIS 222782, [WL] at *15-16. The Court also found that the Board's experts' analyses contradicted applicable regulations by focusing too much on Ramsay's academic achievements, substituting their own opinions for those of experts who met with Ramsay, and placing too demanding a burden on Ramsay. 2019 U.S. Dist. LEXIS 222782, [WL] at *17-18. Based on this evidence and the governing law, the Court found that Ramsay had a disability under the ADA. 2019 U.S. Dist. LEXIS 222782, [WL] at *18.

The Court also found that: (1) Ramsay established irreparable harm because she would likely be forced to withdraw from WMed if she could not take Step 1 with accommodations and pass, (2) the balance of equities tipped in her favor because granting her accommodations would not undermine the Board's interests in fair and accurate testing, and (3) it was in the public interest for the ADA to be followed and to increase the number of physicians. 2019 U.S. Dist. LEXIS 222782, [WL] at *18-19. The Board appeals.[4]

4. After the Board filed its appeal, Ramsay passed Step 1 with accommodations. This appeal, however, is not moot because (1) the District Court's injunction extends to Steps 2 and 3, which Ramsay

Appendix A

II[5]

In issuing a preliminary injunction, a district court considers four factors:

> (1) the likelihood that the plaintiff will prevail on the merits at final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) [that] the public interest [weighs in favor of granting the injunction].

Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116, 133 (3d Cir. 2020) (alterations

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has not yet taken, and (2) as to Step 1, if we vacated the injunction, the Board could invalidate her score or prevent her from submitting the score to residency programs. *See Chafin v. Chafin,* 568 U.S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013) (explaining that a case is not moot if the parties "'continue to have a personal stake' in the ultimate disposition of the lawsuit" (quoting *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 478, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990))).

5. The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1292(a)(1). "We employ a tripartite standard of review for . . . preliminary injunctions. We review the District Court's findings of fact for clear error. Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.,* 910 F.3d 106, 114 (3d Cir. 2018) (omission in original) (quoting *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.,* 710 F.3d 99, 105 (3d Cir. 2013)).

in original) (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994)).

A

We first address Ramsay's likelihood of success on the merits of her ADA claim. "On this factor, a sufficient degree of success for a strong showing exists if there is a reasonable chance or probability, of winning" on her ADA claim. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.,* 910 F.3d 106, 115 (3d Cir. 2018) (internal quotation marks and citation omitted). The ADA provides in relevant part:

> Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional . . . purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189. The issue here is whether Ramsay has a "disability" that entitles her to an accommodation. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *8.

The ADA defines "disability" in relevant part as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). We construe the term "disability" broadly. *Id.* § 12102(4)(A). As to the term "impairment,"

the applicable Department of Justice ("DOJ") regulations[6] provide that the term "physical or mental impairment" includes ADHD and "dyslexia and other specific learning disabilities." 28 C.F.R. § 36.105(b)(2). As to "life activities," the ADA provides that "major life activities include . . . reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). Finally, the regulations explain that "[a]n impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 28 C.F.R. § 36.105(d)(1)(v). Accordingly, "'[n]ot every impairment will constitute a disability . . . ,' but [an impairment] will meet the definition [of disability] if 'it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.'" *J.D. by Doherty v. Colonial Williamsburg Found.,* 925 F.3d 663, 670 (4th Cir. 2019) (quoting 28 C.F.R. § 36.105(d)(1)(v)).

1

The Board argues that the District Court did not determine that Ramsay is substantially limited in

6. In 42 U.S.C. §§ 12186(b) and 12205a, the ADA authorizes DOJ to issue regulations implementing the public accommodations provisions of the ADA. Such regulations have "the force and effect of law." *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.,* 139 S. Ct. 2051, 2055, 204 L. Ed. 2d 433 (2019) (quoting *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 97, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015)); *accord Pa. Dep't of Human Servs. v. United States,* 897 F.3d 497, 505 (3d Cir. 2018). The regulations "are entitled to substantial deference." *Helen L. v. DiDario,* 46 F.3d 325, 331 (3d Cir. 1995).

comparison to most people in the general population.[7] We first address the concept of "most people in the general population" in the learning disability context. In general,

> [t]he comparison to most people in the general population . . . mean[s] a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees. This does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement, taking into account the person's chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially

7. Relatedly, the Board argues that the District Court improperly considered Ramsay's work ethic and study habits, which the Board argues are improper considerations because "working hard does not show that [Ramsay] is substantially impaired." Appellant's Br. at 47. However, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 28 C.F.R. § 36.105(d)(1)(viii). Accordingly, in deciding whether Ramsay was disabled, the Court could appropriately consider and discount that she compensated for her very weak reading and writing abilities by devoting more effort to her assignments than most students.

> limited in performing activities such as learning, reading, and thinking when compared to most people in the general population . . . .

Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,009 (Mar. 25, 2011) (explanation by the Equal Employment Opportunity Commission ("EEOC")); *see* Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204, 53,230 (Aug. 11, 2016) (DOJ "concur[ring] with" EEOC's "view").[8] Thus, a clinical diagnosis of a learning disability is typically based upon a comparison between the individual and others in the general population who are of similar age and have received age-appropriate education.

Here, the District Court relied on such diagnostic information to conclude that Ramsay had ADHD and dyslexia that caused her to read and write with more difficulty than most people. For example, Dr. Smith's and Dr. Lewandowski's diagnostic assessments showed

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8. "[T]he preamble to a regulation may be used as an aid in determining the meaning of a regulation." *Conn. Gen. Life Ins. Co. v. Comm'r,* 177 F.3d 136, 145 (3d Cir. 1999) (quoting *Pennsylvania Dep't of Pub. Welfare v. United States HHS,* 101 F.3d 939, 944 n.4 (3d Cir. 1996)); *see also Helen Mining Co. v. Dir. OWCP,* 650 F.3d 248, 257 (3d Cir. 2011) (holding that an administrative law judge's "reference to the preamble to the regulations . . . unquestionably supports the reasonableness of his decision to assign less weight to [an expert's] opinion").

that Ramsay had abnormal functionalities in thinking, processing speed, attention, and sequencing. Indeed, some of the reading tests Dr. Smith administered placed Ramsay in less than the fifth percentile as compared to individuals her age. This is exactly the type of data DOJ contemplates as showing a learning disability that substantially limits an individual as compared to others in the general population. Equal Employment Provisions, 76 Fed. Reg. at 17,009; Title II and Title III Regulations, 81 Fed. Reg. at 53,230. Further, Ramsay explained in her personal statement that she had struggled with reading and writing tasks in comparison to her classmates since elementary school. Thus, the Court's finding that Ramsay's ADHD and dyslexia constituted a disability was based on evidence that these conditions substantially limit her reading and writing in comparison to most people. *See Pryer v. C.O. 3 Slavic,* 251 F.3d 448, 453 n.4 (3d Cir. 2001) (inferring the district court's reasoning where it was "otherwise apparent from the record").[9]

Moreover, the regulations provide that the "substantially limits" inquiry "should not demand extensive analysis," 28 C.F.R. § 36.105(d)(1)(ii), and that "[t]he comparison of an individual's performance of a major life activity to the performance of the same major

9. We further disagree with the Board's contention that the District Court never found that Ramsay was substantially limited as compared to the general population because when the Court concluded that Ramsay was disabled, it defined disability as a substantial limitation as compared to most people in the general population. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *7-8.

life activity by most people in the general population usually will not require scientific, medical, or statistical evidence," *id.* § 36.105(d)(1)(vii). Accordingly, the District Court›s reliance on evidence that Ramsay›s reading, processing, and writing skills were abnormally low by multiple measures provided a sufficient comparison of her abilities to those of the general population to support the finding of disability.[10]

2

Next, the Board argues that the District Court erred by giving "considerable weight" to Ramsay's past accommodations when determining that she has a disability. Appellant's Br. at 45 (quoting 28 C.F.R. § 36.309(b)(1)(v)). According to the Board, a court should consider past accommodations only after finding the individual is disabled. This argument fails.

The regulation defining disability, § 36.105, does not bar consideration of past accommodations. Indeed, § 36.309(b)(1)(v) provides that "[w]hen considering

10. The Board relies on *Bibber v. National Board of Osteopathic Medical Examiner, Inc.*, Civ. A. No. 15-4987, 2016 U.S. Dist. LEXIS 48181, 2016 WL 1404157 (E.D. Pa. Apr. 11, 2016), but it is distinguishable. There, the district court held that the plaintiff was not disabled because "a mountain of evidence," including some of the same diagnostic assessments that Ramsay took, "suggest[ed] that Bibber's reading and processing abilities [were] average when compared to the general population." 2016 U.S. Dist. LEXIS 48181, [WL] at *8. In contrast, Ramsay's scores on the same assessments were lower, and she explained at the hearing how she reads in a manner that is different from the average person.

requests for . . . accommodations . . . the [testing] entity gives considerable weight to documentation of past . . . accommodations." Moreover, as the preamble to the applicable regulations states, "a recent history of past accommodations is critical to an understanding of the applicant's disability and the appropriateness of testing accommodations." Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,298 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36). Thus, the District Court did not err in considering Ramsay's past accommodations.

3

The Board also argues that the District Court wrongly believed that the statute and regulations compelled it to defer to experts who met with and tested Ramsay. While the Court viewed Ramsay's experts more favorably and found the Board's experts unpersuasive, there is no indication that the Court believed that it was compelled to defer to Ramsay's experts. Rather, the Court discounted the Board's experts because they (1) never met with Ramsay, (2) engaged in too demanding an analysis of whether Ramsay had a disability, and (3) focused too much on Ramsay's academic achievements. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *17-18. The Court's reasoning was within its discretion and supported by the regulations.

First, it is within the trial judge's discretion to credit a physician with firsthand observations of a patient over one who only reviewed the patient's records. *See United States*

v. Olhovsky, 562 F.3d 530, 548-49 (3d Cir. 2009). Such a professional has the benefit of seeing how the patient actually acts and speaks and provides a perspective not limited to the cold record. This principle is not unlike the deference an appellate court gives to a trial court who physically sees a witness. *Cooper v. Harris,* 137 S. Ct. 1455, 1474, 197 L. Ed. 2d 837 (2017). This is why we rarely second-guess a district court's weighing of evidence, *see, e.g., United States v. Turner,* 718 F.3d 226, 231 (3d Cir. 2013), and why it makes sense for the District Court to credit the professionals who personally met with Ramsay.

Second, the regulations mandate that "[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment." 28 C.F.R. § 36.105(d)(1)(vi). Such assessments benefit from the reports of professionals who know or have personally examined the individual. Because such examinations allow the professional to evaluate the individual's behavior, effort, and candor, DOJ understandably has stated that "[r]eports from experts who have personal familiarity with the candidate should take precedence over those from . . . reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment." Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 56,297. As a result, DOJ has directed that testing entities "shall generally accept" "documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation, or aid requested . . . and provide the accommodation." *Id.* Thus,

the Court's decision to weigh Ramsay's experts more favorably than those of the Board was consistent with DOJ regulations.[11]

Third, "the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis." 28 C.F.R. § 36.105(d)(1)(ii). The Court could reasonably have concluded that the Board's experts were too demanding in what they required to prove a disability, for example, by demanding evidence of a lifetime of academic struggles, and "substituting their own opinions" for those of Ramsay's healthcare providers. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *17. In fact, the Board's reliance on Ramsay's academic achievement was contrary to the regulations that explain that "someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional

11. The Board argues before us that a 2011 settlement agreement between it and DOJ eliminates the preference to be given to professionals who personally examined the individual. The Board did not make this argument before the District Court, so we do not fault the Court for not considering it. In any event, the Board is wrong. First, the settlement addresses the Board's obligations and not a court's considerations under the regulations when deciding whether an individual has a disability. Second, while the agreement states that the Board need not defer to the conclusions of such professionals, that does not mean it is relieved of showing in litigation why those professionals are unworthy of credence. Third, even if the agreement had any bearing on the regulations, which it does not, it expired in 2014.

time or effort he or she must spend to read, write, speak, or learn compared to most people." 28 C.F.R. § 36.105(d)(3)(iii).[12] Because Ramsay's high academic performance does not foreclose her from having a disability, the Court reasonably discounted the Board's experts' opinions, which focused mostly on Ramsay's academic accomplishments and ignored evidence of her limitations. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *18.

In sum, nothing in the District Court's discussion indicates that it held that the statute and regulations "compel" deference to Ramsay's experts. Rather, the Court found that Ramsay's experts provided facts more probative to the relevant inquiries under the ADA, and its decision to view these witnesses more favorably is consistent with the regulations. Thus, we will not disturb how the Court chose to weigh evidence.

4

The additional errors the Board identifies in the Court's factual findings do not amount to clear error. "A finding of fact is clearly erroneous when it is completely

12. When discussing this proposition, the Court quoted 29 C.F.R. § 1630.2(j)(4)(iii), promulgated by the EEOC, which does not implement the operative ADA title here. 42 U.S.C. § 12116 (providing EEOC authority to implement the employment provisions of the ADA). Nonetheless, DOJ has issued an identical regulation. *Compare* 28 C.F.R. § 36.105(d)(3)(iii), *with* 29 C.F.R. § 1630.2(j)(4)(iii). Thus, there was no legal error "infecting" the Court's weighing of experts. *Bedrosian v. United States,* 912 F.3d 144, 152 (3d Cir. 2018) (quoting *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt., LLC v. Vill. at Lakeridge, LLC,* 138 S. Ct. 960, 968 n.7, 200 L. Ed. 2d 218 (2018)).

devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 283 (3d Cir. 2014) (internal quotation marks and citation omitted). We examine the entire record to determine whether there is evidentiary support for a finding, not just the evidence a district court cites. *See N.J. Rifle,* 910 F.3d at 120 n.24.

First, the Board argues that the District Court erred in finding that the Board's consultants found that Dr. Smith's assessments were valid and credible. Contrary to the Board's assertion, the record supports the Court's finding. Both of the Board's consultants testified that they had no reason to doubt that the assessments were properly administered, that the results were accurate, and that the data could be useful, although they disagreed with Dr. Smith's interpretation of the results. The credibility of evidence is different from the inferences a factfinder can draw from that evidence, so the Court's finding that all experts agreed the assessments were credible was supported by the consultants' testimony, even if the Board's consultants reached different conclusions from the test results themselves.[13]

13. In making this finding, the District Court misquoted one piece of evidence, a letter from the Board. The Court stated that the Board found Ramsay's expert assessment to be valid. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *4 (quoting App. 1512). The letter, however, was referring to Ramsay's expert accepting the assessments as valid. Accordingly, the letter does not support the Court's finding because it does not embody the Board's view. Nonetheless, other evidence in the record supports the finding,

Second, the Board argues that the District Court erred in finding that Ramsay could not finish reading and had to guess on about a third of the questions on Step 1 because the time Ramsay spent on each question shows that "she had time to read every question." Appellant's Br. at 61 (emphasis omitted) (citing *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *3). The record does not contradict the Court's finding. The Board's evidence does not indicate how much time Ramsay spent reading each question. Rather, it shows only that she spent, on average, seventeen seconds more on the questions she got incorrect. Further, Ramsay testified that she took a pass through the questions before answering them, answered the ones she felt she could, and repeated that strategy until she was left with a few questions she could not answer even after multiple reads. Her strategy provides a reasonable explanation for why the time spent on correct versus incorrect answers was similar. The Court was free to credit Ramsay's testimony over the inferences that the Board argued should be drawn from its measurements. *See Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.,* 462 F.3d 249, 271 (3d Cir. 2006) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (quoting *Scully v. US WATS, Inc.,* 238 F.3d 497, 506 (3d Cir. 2001))).

Finally, the Board argues that the District Court erred in finding that Ramsay had received informal

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as explained above, so there is no clear error. *N.J. Rifle,* 910 F.3d at 120 n.24.

accommodations in her early school years. Ramsay testified about, and her mother relayed to Dr. Smith information concerning, these informal accommodations. While the Board asserts that there is no written record of these informal accommodations, Ramsay's corroborated testimony provided "minimum evidentiary support" for the Court's finding, so there was no clear error.[14] *VICI Racing,* 763 F.3d at 283 (citation omitted).

B

We next determine whether Ramsay proved irreparable harm. "[T]o show irreparable harm a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Acierno v. New Castle County,* 40 F.3d 645, 653 (3d Cir. 1994) (internal quotation marks and citation omitted). The harm must be "likely" to occur "in the absence of an injunction." *Ferring Pharms., Inc. v. Watson Pharms., Inc.,* 765 F.3d 205, 217 n.11 (3d Cir. 2014) (emphasis omitted) (quoting *Winter v. NRDC, Inc.,* 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)).

The District Court had a basis to conclude that Ramsay would be irreparably harmed absent an injunction. The Court could reasonably conclude that given Ramsay's disability and that she had previously failed Step 1, she

14. Aside from her mother's statements to Dr. Smith, Ramsay's report cards from elementary school are also consistent with her testimony because her teachers noted she needed "help . . . with the switching of letters," App. 871, and "to focus on getting her work done on time," App. 875.

likely would fail again and be forced to leave medical school.[15] *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *18. Her termination from medical school and its consequences could not later "be redressed by a legal or an equitable remedy." *Acierno,* 40 F.3d at 653 (citation omitted). No damages remedy is available under the ADA. 42 U.S.C. § 12188(a)(1) (providing that the only remedies available in an ADA action are those in § 2000a-3(a)); *id.* § 2000a-3(a) (providing for injunctive relief). Furthermore, because WMed is not a party to this case, the Court could not require it to reinstate her, and the Board presents no theory for how the Board could redress the termination of Ramsay's medical education. Moreover, an examiner's refusal to provide accommodations can cause the exam-taker irreparable harm because doing so jeopardizes her "opportunity to pursue her chosen profession." *Enyart v. Nat'l Conf. of Bar Exam'rs,* 630 F.3d 1153, 1166 (9th Cir. 2011); *accord Doe v. Pa. State Univ.,* 276 F. Supp. 3d 300, 313-14 (M.D. Pa. 2017) (holding that gap in medical school education and likelihood that the student could not gain acceptance to another school constituted irreparable harm). Accordingly, the District Court correctly concluded that Ramsay established she would be irreparably harmed absent an injunction.

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15. The letter from WMed provided a basis for the District Court to conclude that she would be dismissed from the medical school if she did not pass Step 1. The letter offered to extend Ramsay's leave until "March 2, 2020, with the expectation that [she] will sit for the USMLE Step 1 exam in a manner that allows [her] to return to" WMed. App. 1520. As noted above, WMed students must pass Step 1 by the beginning of their fourth year. Thus, to return to school, Ramsay had to pass Step 1.

C

We next consider how the District Court "balanc[ed] the parties' relative harms; that is, the potential injury to the plaintiff[] without this injunction versus the potential injury to the defendant with it in place." *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017). In balancing the harms, the Court noted the Board's "concern for the fulfillment of its mission to provide [qualified] physicians," *Ramsay*, 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *19, and that accommodations "can affect the comparability of the resulting scores and scores achieved under standard testing conditions," 2019 U.S. Dist. LEXIS 222782, [WL] at *4 (quoting App. 931). Nonetheless, the Court appropriately reasoned that granting a preliminary injunction would not undermine the Board's mission because the injunction would give Ramsay only "the opportunity to move forward" in her medical career "should she succeed in passing her examinations with appropriate accommodations." 2019 U.S. Dist. LEXIS 222782, [WL] at *19 (emphasis omitted). Moreover, the Board's concerns regarding impacts from undeserved accommodations do not apply here because Ramsay has shown a reasonable likelihood that she deserves accommodations. *Cf. Issa*, 847 F.3d at 143 (holding that a defendant could not assert an interest in continuing to violate a civil rights statute).

D

Finally, we consider the District Court's finding that "the public interest favors this preliminary injunction."

Id. The Court concluded that an injunction furthers the public interest in ADA compliance and serves to increase the number of qualified physicians. *Ramsay,* 2019 U.S. Dist. LEXIS 222782, 2019 WL 7372508, at *19. We agree. "In enacting the ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication of discrimination on the basis of disabilities." *Enyart,* 630 F.3d at 1167; *see Issa,* 847 F.3d at 143 (concluding that it was in the public interest for covered entities to comply with a civil rights statute). Further, the injunction allows Ramsay to continue her medical education and therefore serves the public interest in training more physicians. "Although it is true that the public also has an interest in ensuring the integrity of licensing exams," *Enyart,* 630 F.3d at 1167, Ramsay has shown a reasonable likelihood that the ADA affords her accommodations, and there is no evidence that providing her the requested accommodations will jeopardize the test's integrity. Thus, the public interest weighs in favor of an injunction.

III

For the foregoing reasons, we will affirm the District Court's preliminary injunction.[16]

16. Given our conclusion that the District Court correctly held that Ramsay has shown a likelihood of success on the merits of her claim that she has a disability for which she is entitled to accommodations, we will affirm the preliminary injunction requiring the Board to provide the accommodations on Step 2 CK, any written or reading portions of Step 2 CS, and Step 3.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED DECEMBER 31, 2019

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 19-CV-2002

JESSICA RAMSAY,

Plaintiff

vs.

NATIONAL BOARD OF MEDICAL EXAMINERS,

Defendant

December 30, 2019, Decided;
December 31, 2019, Filed

MEMORANDUM AND ORDER

JOYNER, J.

This case has been brought before this Court on Motion of the Plaintiff, Jessica Ramsay, for Preliminary Injunction (Doc. No. 7). Following three full-day evidentiary hearings on December 3, 4, and 5, 2019, the matter is now ripe for disposition and we therefore hereby make the following:

Appendix B

FINDINGS OF FACT

1. Plaintiff Jessica Ramsay is a citizen of the State of Michigan residing at 6862 Tall Oaks Drive, Apt. 3B, Kalamazoo, Michigan.

2. Defendant National Board of Medical Examiners ("NBME") is a non-profit corporation organized and existing under the laws of the District of Columbia, with its principal place of business at 3750 Market Street, Philadelphia, Pennsylvania.

3. Plaintiff is a medical student in the M.D. program at the Homer Stryker M.D. School of Medicine of Western Michigan University ("WMed").

4. NBME develops a series of standardized timed examinations that are known collectively as the United States Medical Licensing Examination ("USMLE") and which are largely in written format. NBME administers these examinations through a third-party-vendor throughout the United States and these examinations are relied upon by states throughout the country in making decisions regarding medical licensure. In order to receive the degree of Doctor of Medicine (*i.e.* M.D.), to apply and/or be considered for medical residency training programs, and to become licensed as a physician, medical students must first take and pass all of the USMLE "Step" examinations.

5. Plaintiff was required by Western Michigan Medical School to take and pass the USMLE Step 1

examination at or near the end of her third year of medical school. In addition to being pre-requisite to continuation of their medical school educations, scores on the Step 1 examination are also significant in that they are used by medical residency training programs throughout the United States to rank student candidates in the very-competitive residency match process. Consequently, even if a student passes the Step 1 examination but with a low score, they may be unable to compete or may be significantly hindered in competing for a residency match with the possible result that they are not selected at all for admission to any residency program upon graduation from medical school.

6. Step 2 of the USMLE consists of two parts: Step 2 CK (Clinical Knowledge) and Step 2 CS (Clinical Skills). These examinations must also be taken and passed by M.D. medical students prior to graduation from medical school.

7. Step 3 of the USMLE must generally be taken and passed by graduates of M.D. degree programs, prior to licensing as physicians.[1]

8. Only students of accredited medical schools are eligible to take the USMLE Step examinations.

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1. As noted by NBME in its Answer to paragraph 18 of Plaintiff's Complaint, this process generally applies to medical students seeking to be licensed as allopathic (M.D.) physicians. Although similar, the process for testing and/or the examinations necessary for licensure as osteopathic (D.O.) physicians may be somewhat different.

9. Plaintiff entered Western Michigan University Medical School in 2014 and had a projected graduation date of May, 2018.

10. In March 2009, during her sophomore year at Ohio State University, Plaintiff was diagnosed with Attention Deficit Hyperactivity Disorder, Migraine Headaches and probable dyslexia by her family physician, Dr. Alan Smiy. She was prescribed Ritalin to treat the ADHD and granted educational/testing accommodations by and through the University's Office of Disability Services ("ODS"), including additional time to complete examinations (1 1/2 time), taking examinations in a distraction-reduced space (typically a separate room), use of visual aids such as colored pencils and markers and access to scrap paper, along with access to an ODS counselor throughout the balance of her college career. These and additional accommodations were also granted to Plaintiff by her medical school such that she had up to twice (2X) the time to complete examinations, access to text-to-speech software and calculator during exams, was permitted to have a granola bar or other snack and water with her during testing in her separate exam room, an additional free print allowance, and written examinations on paper (so she could mark them up). Among the examinations for which Plaintiff has received these accommodations during her medical school career are a number of subject matter examinations developed by NBME.

11. In or around late November/early December, 2016 while a third-year medical student and in anticipation of having to sit for the Step 1 USMLE, Plaintiff applied to

NBME for test accommodations, seeking many of the same accommodations that she had been receiving from Western Michigan University Medical School and Ohio State University. Earlier that year, Plaintiff had also suffered a deep vein thrombosis in her leg causing her to miss some three weeks from classes. Plaintiff was subsequently diagnosed with a clotting disorder and prescribed Xarelto. In support of her application for accommodations, Plaintiff provided the supporting documents sought by NBME, including medical and psychological evaluation reports and records, school reports and a Personal Statement describing her impairments and how they affect her current, everyday functioning. Specifically, in addition to her Personal Statement, Plaintiff had provided copies of her school records from St. Joseph's High School, Ohio State University and Western Michigan University Medical School, and records/reports from the following medical/psychological providers and/or evaluators: Dr. Mary Alice Tanguay, Therapeutic Optometrist, Katherine Turner, M.D., Alan N. Smiy, M.D., and Charles A. Livingston, M.A., a Licensed Masters Social Worker and Limited Licensed Psychologist.

12. NBME did not provide a decision on Plaintiff's request until more than three months later - on or about March 10, 2017. At the time it denied Plaintiff's request for accommodations, NBME stated: "Overall, the documents you provided do not demonstrate a record of chronic and pervasive problems with inattention, impulsivity, behavioral regulation, or distractibility that has substantially impaired your functioning during your development or currently." In reaching this conclusion,

NBME noted that "[d]espite your reported history of difficulties, your documentation shows that you progressed through primary and secondary school without grade retention, evaluation, or services and with an academic record and scores on timed standardized tests sufficient to gain admission to college, all without accommodations."

13. Faced with an NBME requirement that she submit new information as a pre-requisite for reconsideration or an appeal of its denial, Plaintiff took the Step 1 examination in July 2017 without accommodations with the hope that she could pass and enter into her fourth year of medical school. In so doing, Plaintiff was unable to read all of the questions in each testing "block" which required her to guess at the answers to those remaining questions that she did not have time to read. Plaintiff failed the examination by one point.

14. As a consequence of her failure of the USMLE Step 1 exam and in order to afford Plaintiff the opportunity to take the exam with accommodations, Western Michigan Medical School permitted Plaintiff to take a leave of absence which effectively commenced in August 2017. That leave of absence has been extended several times such that it continues to the present. However, Plaintiff has been advised by the school that no further extensions will be granted and she will be required to withdraw from the medical school if she does not take and pass the Step 1 examination by March 2, 2020.

15. On June 6, 2018, Plaintiff re-applied to NBME for accommodations on her re-take of the Step 1 USMLE,

after having submitted to additional evaluations by Alan Lewandowski, Ph.D., a Neurologist/Clinical Psychologist and Bruce Reukberg, M.D. a psychiatrist, both of whom found that Plaintiff met the DSM-5 and the ICD-10[2] criteria for Attention Deficit and Hyperactivity Disorder - Combined Type, and the Specific Learning Disorders of Abnormal Scanning and Processing Speed with Impairments in Reading and Written Expression. In addition to providing these records/reports and all of the other materials that she had previously submitted as well as an updated Personal Statement, Plaintiff also provided letters of support from Jennifer N. Houtman, M.D., her then-primary care physician and her medical school mentor and Clinical Skills course instructor, and David Overton, M.D., the Associate Dean and Chair of the Essential Abilities Committee at Western Michigan University Medical School attesting to Plaintiff's diagnoses of ADHD, Learning Disorders, Migraine Headaches and Clotting Disorder with recent Deep Vein Thrombosis and Post-Thrombotic Syndrome and to her need for accommodations on the Step 1 USMLE.

16. On September 11, 2018, NBME again found that Plaintiff's "documentation does not demonstrate that 100% additional testing time is an appropriate modification of your USMLE Step 1 administration," reasoning that since Ms. Ramsay's performance on the Conners Continuous

2. The DSM-5 is the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition of the American Psychiatric Association and the ICD-10 is the 10th revision of the International Statistical Classification of Diseases and Related Health Problems from the World Health Organization.

Performance Test was normal, she had attained a 3.8 Grade Point Average in high school, an ACT score between 27 and 30 and a 30 M on the MCAT all under standard conditions, the data did not "demonstrate a developmental history of impaired cognitive or academic functioning or that standard testing time is a barrier to your access to the USMLE." Nevertheless, recognizing that Plaintiff's clotting disorder required some accommodation, NBME granted Plaintiff additional break time and testing over two days, a separate testing room to permit her to stand, walk or stretch during the exam and permission to read aloud in that room.

17. On or about September 25, 2018, Plaintiff consulted Robert D. Smith, Ph.D., another Psychologist/ Neuropsychologist and the Michigan Dyslexia Institute for yet another evaluation, this time targeted at her dyslexia in anticipation of an appeal of the NBME's September 11, 2018 denial. Dr. Smith administered a battery of tests, some of which were the same as those which had been previously administered by Dr. Lewandowski and Charles Livingston. At the conclusion of testing, Dr. Smith determined that Plaintiff did indeed have the specific learning disorder of developmental dyslexia which impaired her reading, reading comprehension and severely impaired her reading rate and fluent word recognition. Dr. Smith concluded that "Jessica's pattern of reading and writing scores is typical of the intelligent dyslexic reader who struggles with efficient decoding and processing of the printed words, but can use her intelligence to substantially compensate and extract seemingly adequate comprehension from passages." In also

diagnosing Plaintiff with Attention Deficit Hyperactivity Disorder - Combined Presentation and finding her level of reading impairment to be severe such that it could be "expected to significantly and substantially interfere with education efforts without accommodations such as extended time," Dr. Smith also recommended a series of testing accommodations including 100% additional time.

18. Plaintiff thereafter sought reconsideration of the NBME's September 11, 2018 decision by way of an appeal letter sent on her behalf by her attorney, Lawrence Berger, on December 12, 2018. Once again, in reliance on Plaintiff's overall strong academic performance throughout her educational career and on the earlier standardized ACT and MCAT test scores, NBME denied Plaintiff's appeal and her renewed request for the extended testing time accommodation on February 14, 2019.

19. On March 19, 2019, Plaintiff's counsel sent another letter to the NBME requesting reconsideration of its September 11, 2018 and February 14, 2019 denials. In an email addressed to Plaintiff by NBME's Director of Disability Services and ADA Compliance Officer for Testing Programs, Catherine Farmer, dated March 27, 2019, NBME denied the request for further reconsideration. In the email, Dr. Farmer reiterated that, in view of Plaintiff's "average and above average performances on timed standardized tests taken for the purpose of gaining admission to college and medical school," NBME had concluded that Plaintiff's "skills are better than most people in the general population." NBME made this determination notwithstanding that

its evaluator had accepted that Plaintiff's "exceptionally low scores on timed reading tests administered for the purpose requesting test accommodations [was] valid and credible."

20. In making its decision to deny Plaintiff's requests for accommodations, NBME referred Ms. Ramsay's applications and supporting documentation to two of its outside, independent contractor-evaluators, Steven G. Zecker, Ph.D. and Benjamin J. Lovett, Ph.D. for their opinions. Dr. Zecker is presently an Associate Professor in the Department of Communication Sciences and Disorders at Northwestern University and has been employed by NBME as an outside consultant/evaluator for the past 16 years. Dr. Lovett is now currently an Associate Professor of Psychology and Education at Teachers College, Columbia University[3] and has been employed as an outside consultant/evaluator since 2010. Both Drs. Zecker and Lovett are paid at the rate of $200 per hour for their reviewing services. Drs. Zecker and Lovett reviewed only the written materials submitted by Plaintiff; neither ever interviewed or met her prior to giving their opinions to NBME and to testifying as expert witnesses before this Court.

21. Prior to the enactment of the ADA Amendments Act of 2008, NBME, along with seven other standardized

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3. At the time of his review of Plaintiff's accommodations request, Dr. Lovett was an Associate Professor of Psychology at the State University of New York (SUNY) Cortland and an Adjunct Professor of Psychology at Syracuse University. Dr. Zecker has held his position at Northwestern University since 1991.

testing organizations[4], sent a letter dated July 14, 2008 to various U.S. Senators opposing the passage of the Act as it was written. Among the "significant concerns" expressed by these organizations were the "significant costs in complying with the ADA," and "the important implications beyond just the substantial costs incurred by testing organizations to provide such accommodations." It was the expressed opinion of the testing organizations that "[t]hese requests [for accommodations] involve, in some way, the very cognitive skills (such as thinking and concentrating) that a standardized exam is attempting to measure," and that "[t]he provision of such accommodations - especially extra testing time - can affect the comparability of the resulting scores and scores achieved under standard testing conditions.... Accommodations can thus undermine the very purpose of a 'standardized' examination" such that they could "also affect the interests of the general public if the exams in question are licensing exams or exams that are taken to gain access to professional schools such as medical school or law school."

22. Some six years later, in response to the ADA Notice of Proposed Rulemaking concerning the drafting of the implementing Regulations by DOJ for the ADA Amendments Act, Defense counsel Robert Burgoyne wrote a lengthy letter on behalf of four standardized

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

testing organizations which he represented, including NBME.[5] In that letter, the four organizations took exception to and opposed, *inter alia*: (1) the inclusion of the directive 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 whether discrimination has occurred, not whether the individual meets the definition of disability" in 28 C.F.R. §36.101(b); (2) the notation that "[t]he question of whether an individual meets the definition of disability under this part should not demand extensive analysis" in 28 C.F.R. §36.101(b) and 28 C.F.R. §36.105(d)(1)(iii); (3) the language that "[s]ubstantially limits is not meant to be a demanding standard" proposed for inclusion in 28 C.F.R. §36.105(d)(1)(i); (4) the inclusion in the discussion of the proposed rules of examples of "self-mitigating measures or undocumented modifications or accommodations for students with impairments that affect learning, reading, or concentrating" as possibly including "measures such as devoting a far larger portion of the day, weekends and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts, receiving extra time to complete tests, receiving modified homework assignments, or being permitted to take exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether

5. Mr. Burgoyne represents NBME in this case and the organizations which he represented in the drafting of this letter, in addition to NBME were the Association of American Medical Colleges ("AAMC"), the Graduate Management Admission Council ("GMAC") and the National Conference of Bar Examiners ("NCBE").

formal or informal, documented or undocumented, can lessen the impact of, and improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. Nevertheless, these are only temporary supports; the individual still has a substantial limitation in a major life activity and would be a person with a disability under the ADA." In that same letter Mr. Burgoyne, on behalf of the testing organizations asked that DOJ "add a regulation which notes that, although mitigating measures are not to be considered in assessing whether a person has a disability, it is appropriate to consider such measures in determining whether accommodations are needed." He suggested: "The purpose of accommodations is to address an individual's functional limitations. If mitigating measures already address an individual's functional limitations, there is no need for accommodations."

23. On or about December 5, 2016, Defense counsel Burgoyne gave a power point presentation in the course of a training seminar to NBME's outside consulting reviewers such as Drs. Zecker and Lovett, among others, which was entitled "*ADA Legal Update for NBME and its Outside Consultants*." In addition to reviewing the relevant provisions of the ADA applicable to entities offering examinations related to licensing and credentialing for secondary or post-secondary education, professional or trade purposes, the presentation included a discussion of the process underlying the Department of Justice's ("DOJ") Title II and Title III Rulemaking. In the course of that discussion, the power point presentation

included the following observations on the DOJ's Notice of Proposed Rulemaking (dated 1/30/14 and found at 79 Fed. Reg. 483):

- ... **many ADHD diagnoses may not "meet the clinical definition ...** and thus **would not qualify for an accommodation** under the revised definition of disability" (prompting DOJ to reduce its estimate of the # of individuals with ADHD by 30%)

- In response to comments on the proposed rule, DOJ added ADHD as an example of a physical or mental impairment that can constitute a covered disability

- ... that, in estimating the cost impact of the new regulations on testing entities and colleges when it published its Notice of Proposed Rulemaking, DOJ "had assumed based on some available research that 30 percent of those who self-identify as having ADHD as their primary disability would not need additional testing time because they would not meet the clinical definition of the disability."

- DOJ retreated from that approach in the final rule, because of concerns raised by some commenters

- "One commenter raised concern about presenting a specific percentage of students

with ADHD who would not meet that clinical definition, because that number might inadvertently become a benchmark for postsecondary institutions and national testing entities to deny accommodations to a similar percentage of applicants requesting additional exam time because of their ADHD."

- "The Department did not intend for this percentage to establish a benchmark. Covered entities should continue to evaluate requests for additional exam time by all individuals with disabilities on an individualized basis. In direct response to these concerns, the Department has decided not to reduce the number of individuals with ADHD who could now receive testing accommodations as a direct result of the ADA Amendments Act in estimating the financial impact of the new regulations." (emphasis in original)

DISCUSSION

On May 8, 2019, Plaintiff filed her Complaint commencing this action alleging violations and seeking relief under the Americans with Disabilities Act, 42 U.S.C. §12101, *et. seq.* ("ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. §794 ("Section 504") . Following the filing of Defendant's Answer to the Complaint, Plaintiff filed the Motion for Preliminary Injunction which is now before

us. By this motion, Plaintiff asks this Court to enter an injunction in her favor preliminarily enjoining and restraining NBME and all others acting in concert with it from refusing to grant her the accommodation of 100% extended testing (double) time for the USMLE Step 1 and all subsequent Step USMLE examinations.

A. Standards for Ruling on Preliminary Injunction Motions

Fed. R. Civ. P. 65(d) outlines the "Contents and Scope of Every Injunction and Restraining Order" by way of the following language:

> (1) *Contents.*
>
> Every order granting an injunction and every restraining order must:
>
> > (A) state the reasons why it issued;
> >
> > (B) state its terms specifically; and
> >
> > (C) describe in reasonable detail - and not by referring to the complaint or other document - the act or acts restrained or required.
>
> (2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Of course, under Rule 65(a)(1), a preliminary injunction may only issue on notice to the adverse party. "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed.2d 162 (1997)(emphasis in original). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "The grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequence of immediate irreparable injury." *GlaxoSmithKline Consumer Healthcare, L.P. v. Merix Pharmaceutical Corp.*, No. 05-4566, 2006 U.S. App. LEXIS 16377, 197 Fed. Appx. 120, 123 (3d Cir. 2006)(quoting *U.S. Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d

Cir. 1970)). Indeed, "[i]n each case courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24, 129 S. Ct. at 377 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed.2d 542 (1987)).

It should also be noted that in order to make the required showing of irreparable harm, it is incumbent upon the plaintiff to demonstrate that he is threatened by a harm "which cannot be redressed by a legal or equitable remedy..." "The preliminary injunction must be the *only* way of protecting the plaintiff from [the] harm." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992) (quoting *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)). Moreover, "a party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 219, n. 13 (3d Cir. 2014)((quoting *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *See also, Doe v. Law School Admission Council, Inc.*, Nos. 17-3230, 17-3357, 791 Fed. Appx. 316, 2019 U.S. App. LEXIS 32784 at * 10 (3d Cir. Nov. 1, 2019)(same).

B. Plaintiff's Entitlement to Accommodations under the Americans with Disabilities Act and/or the Rehabilitation Act

As stated, Plaintiff here is alleging that NBME violated Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12182 and Section 504 of the Rehabilitation Act

("§504" and/or "RHA"), 29 U.S.C. §794 by failing to grant her repeated requests for accommodations in the taking of Step 1 of the USMLE.[6] In general, these Acts provide the following in pertinent part:

> **§12182. Prohibition of discrimination by public accommodations.**
>
> **(a) General rule**. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods,

6. It should be noted that Defendant long ago conceded that its services constitute a public accommodation covered by title III of the ADA. *See, e.g., Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004). Defendant also does not dispute that it is subject to this portion of the ADA here, though it denies that it is the recipient of Federal financial assistance such as is required to be subject to §504 of the RHA. (Def's Ans. to Pl's Compl., Doc. No. 3, ¶s 3-4). Insofar as it appears that no discovery has been taken and no record evidence on the matter of NBME's receipt of federal funds has been presented, however, we cannot and do not address that issue at this time. Indeed, it is not necessary that we do so now given that the standards adopted by titles II and III of the ADA are generally the same as those required under the RHA and that for this reason, Courts typically consider the merits of claims under both statutes together. *Powell, supra*, (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003)); *K.N. v. Gloucester City Board of Education*, 379 F. Supp. 3d 334, 354-355 (D.N.J. 2019). *See also, Bragdon v. Abbott*, 524 U.S. 624, 631-632, 118 S. Ct. 2196, 2202, 141 L. Ed.2d 540, 553 (1998)("The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, ... and the definition of "handicap" contained in the Fair Housing Amendments Act of 1988." (internal citations omitted).

> 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.
>
> ....
>
> **§794. Nondiscrimination under Federal grants and programs**
>
> **(a) Promulgation of rules and regulations**. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. §725(20)], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. ...

Under the ADA, "[t]he term 'disability means, with respect to an individual -

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or

> (C) being regarded as having such an impairment...

42 U.S.C. §12102(1). "Major life activities," in turn, "include but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. §12102(2). Under Section 504 of the RHA, an "[i]ndividual with a disability" is defined to mean in general "any individual who-

> (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and
>
> (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to title I, III, or VI [29 U.S.C. §§720, *et. seq.* 771, *et. seq.* or 795 *et. seq.*]

29 U.S.C. §705(20)(A).

Title III of the ADA renders testing entities such as Defendant here subject to its anti-discrimination mandates. In this regard, 42 U.S.C. §12189 provides:

> **§12189. Examinations and courses**
>
> Any person that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes

> shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

To show a violation of the ADA based on a failure to accommodate, a Plaintiff must prove: (1) that she is disabled; (2) that her requests for accommodation are reasonable; and (3) that those requests have been denied. *Rawdin v. American Board of Pediatrics*, 985 F. Supp. 2d 636, 647 (E.D. Pa. 2013); *Mahmood v. National Board of Medical Examiners*, No. 12-1544, 2012 U.S. Dist. LEXIS 86837, 2012 WL 2368462 at * 4 (E.D. Pa. June 21, 2012)). In this case, there is no dispute as to the reasonableness of Plaintiff's requested accommodations nor is there any question but that her request has been denied.[7] Consequently, the threshold issues before us for adjudication are whether or not the Plaintiff truly is disabled and, of course, whether the pre-requisites for issuance of a preliminary injunction have been satisfied.

In determining the question of Plaintiff's disability, we must examine the evidence presented at the hearing

7. As set forth above in our factual findings, Plaintiff initially sought 100% additional exam time (double time), a separate, distraction-reduced room for testing, colored dry-erase markers to use on the laminated paper, an alarm or timer (either in the room, visible on the computer screen or a visual signal or reminder from a proctor), water and a snack in the room to facilitate taking needed medications at the appropriate times. Following Plaintiff's second application, NMBE granted Plaintiff all of her requested modifications with the exception of additional time, although they did permit added break time and testing over 2 days. Accordingly, the only accommodation still being sought is that of additional (double) testing time.

under the lens of the ADA Amendments Act of 2008 which took effect on January 1, 2009. As clearly reflected in Section 2, the Findings and Purpose Notes to the text of the Amendments Act, the Statute was a direct response to what Congress believed was the improper narrowing of the "broad scope of protection intended to be afforded by the ADA" by the Supreme Court decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) which had the effect of "eliminating protection for many individuals whom Congress intended to protect." *See, e.g.*, 122 Stat. 3553; 110 P.L. 325; Enacted S. 3406; 110 Enacted S. 3406 (Sept. 25, 2008). Specifically, Congress took exception with what it characterized as lower courts' incorrect findings "in individual cases that people with a range of substantially limiting impairments are not people with disabilities," and with the then-current EEOC ADA regulations defining the term "'substantially limits' as 'significantly restricted'" for the reason that that definition was "inconsistent with congressional intent, by expressing too high a standard." *Id.* In so doing, Congress meant to convey that its intent was "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 "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* The Amendments Act further clarified that:

> "[t]he 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 (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications."

42 U.S.C. §12102(4)(E)(1).

The implementing regulations promulgated by the Department of Justice[8] are similar[9]. Indeed, 29 C.F.R. §1630.1(c)(4) and 28 C.F.R. §36.101(b) both provide:

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8. "Congress directed the DOJ to promulgate regulations implementing Title III, 42 U.S.C. §12186(b), and, as a result, such regulations are 'entitled to substantial deference,' and 'given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Rawdin v. American Board of Pediatrics*, No. 13-4544, 582 Fed. Appx. 114, 118, n.9, 2014 U.S. App. LEXIS 17002, 2014 WL 4345834 (3d Cir. Sept. 3, 2014)(quoting *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) and *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995)).

9. In fact, the language of 29 C.F.R. §1630.2 and 28 C.F.R. §§ 36.105 and 36.301 outlining the purpose and broad coverage goal and setting forth key definitions nearly mirrors that contained in the statute itself at §§12101, 12102, 12103 and 12111.

> Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

29 C.F.R. §1630.2(j) is particularly instructive with regard to the meaning to be ascribed to the term "substantially limits" and provides as follows in relevant part:

> **(1)** Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:
>
> > **(i)** The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However,

in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would

substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in §1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

...

(4) Condition, manner, or duration --

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may useful in appropriate cases to consider, as compared to most

people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of"

prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) Examples of mitigating measures -- Mitigating measures include, but are not limited to:

> **(i)** Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;
>
> **(ii)** Use of assistive technology;
>
> **(iii)** Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. §12103(1);
>
> **(iv)** Learned behavioral or adaptive neurological modifications; or
>
> **(v)** Psychotherapy, behavioral therapy, or physical therapy.
>
> **(6)** Ordinary eyeglasses or contact lenses -- defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

It is particularly noteworthy for purposes of this case that specific learning disabilities such as dyslexia and

Attention Deficit Hyperactivity Disorder are included within the definition of "physical or mental impairment" for purposes of the Act(s). 28 C.F.R. §36.105(b)(1)(ii); (b)(2). Furthermore, 28 C.F.R. §36.309, the regulation which specifically governs the giving of "Examinations and Courses" states the following in relevant part:

> **(a)** General. Any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.
>
> **(b)** Examinations. (1) Any private entity offering an examination covered by this section must assure that --
>
> > **(i)** The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual or speaking skills, the examination accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual

or speaking skills (except where those skills are the factors that the examination purports to measure);

(ii) An examination that is designed for individuals with impaired sensory, manual, or speaking skills is offered at equally locations, as often, and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(iv) Any request for documentation, if such documentation is required, is reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.

(v) When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, 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 Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).

(vi) The entity responds in a timely manner to requests for modifications, accommodations, or aids to ensure equal opportunity for individuals with disabilities.

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

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

> examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.
>
> (4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.
>
> ....

In applying the foregoing to the case at hand, we note that insofar as the above-quoted regulations are "the equivalent[s] of a 'legislative rule' ... issued by an agency pursuant to statutory authority," they thus have the 'force and effect' of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055, 204 L. Ed.2d 433 (2019)(quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303, 99 S. Ct. 1705, 60 L. Ed.2d 208 (1979) and *Batterton v. Francis*, 432 U.S. 416, 425, n.9, 97 S. Ct. 2399, 53 L. Ed.2d 448 (1977)). At the very minimum, the regulations are "entitled to substantial deference" and "given controlling weight" unless "it can be shown that they are arbitrary, capricious, or manifestly contrary to the statute." *See*, n. 8, *supra. See also, Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-598, 119 S. Ct. 2176, 2185-2186, 144 L. Ed.2d 540 (1999)("Because the Department

[of Justice] is the agency directed by Congress to issue regulations implementing Title II, ... its views warrant respect") and *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S. Ct. 2196, 141 L. Ed.2d 540 (1998)("It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'"(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)).

Defendant NBME does not disagree that the regulatory language addressing the type of accommodations sought by Plaintiff is appropriately applied here ***if*** Plaintiff is found to be disabled within the meaning of the statutes. *See e.g.*, *Defendant NBME's Opposition to Plaintiff's Motion for Preliminary Injunction* at p. 22. Thus, the threshold question in this matter for purposes of assessing the correctness of NBME's decisions to deny accommodations to Plaintiff and determining Plaintiff's likelihood of success on the merits, is whether or not Ms. Ramsay truly is disabled within the meaning of the ADA and/or the RHA.

In resolving this question, we note at the outset that Defendant is right that the documentary evidence of Plaintiff's ADHD and dyslexia in her early years is indeed sparse and that for the most part, Plaintiff performed exceedingly well overall academically during this time with little help. Likewise, Ms. Ramsay scored quite well on several standardized tests without accommodations, including the ACT and the MCAT examinations. Certainly, in comparison to the average individual in the general

population, Plaintiff appears to have been and continues to be quite successful in her endeavors.

Nevertheless, while performance is unquestionably an important factor to consider, the Regulations make clear that it is not the *only* consideration. And, the record here does reflect that Plaintiff has a history of having struggled with reading, visual perception, focus and attention beginning at least in the first or second grade[10]. While there is no evidence that her elementary school itself ever formally provided accommodations, Plaintiff's classroom teachers did. These informal accommodations/interventions included providing an alphabet board to assist in reading and writing letters, a distraction-reduced space (*i.e.* plaintiff was often seated at the "time-out" desk), being kept in the classroom during recess so she could finish the classwork that she couldn't

10. Some examples of the evidence of such struggles from the record include Plaintiff's second and third grade school reports from Sunset Oaks Academy wherein her teachers noted "I will help her with the switching of letters" and "Jessica needs to focus on getting her work done on time;" her Stanford Achievement Test Record from first grade reflecting that Plaintiff scored in the 13th percentile in Word Reading, a score that was in stark contrast to her next lowest score in the 69th percentile for mathematics computation; and the notation on the report of Plaintiff's scores on the Iowa Tests of Basic Skills and Cognitive Abilities Test from the sixth grade that despite "seem[ing] to be high in overall cognitive ability" "Jessica's actual achievement is lower than expected in seven test areas. These are Vocabulary, Reading Comprehension, Spelling, Capitalization, punctuation, Social Studies and Math Computation. These represent areas in which Jessica is not doing as well as she might be expected. Jessica might do better in these areas with additional effort and with continued encouragement."

finish during regular class time, being given extra time to complete assignments and tests and spending extra time with her teachers, provided a quiet environment, and altered grading such that many of her elementary, middle and high school teachers agreed to grade her on the portions of examinations completed in lieu of the tests in their entirety and affording her opportunities to re-do work that were not afforded to all other students. In addition, at or about age 7 and at the recommendation of her classroom teacher because of "reversals in her school work," Plaintiff was evaluated by a therapeutic optometrist, Dr. Mary Alice Tanguay, who performed testing of Plaintiff's visual perceptual and spatial skills. Dr. Tanguay found "substantial deficits in the areas of visual-spatial relationships, visual discrimination and was also lacking in visual memory." Dr. Tanguay prescribed eyeglasses and perceptual skills training which took place over a three-month period from February - May, 1998. When Dr. Tanguay saw Plaintiff again in January 2000, she found her comprehension and perceptual skills to be excellent but that "[s]he still has the original vision problem, which may slightly reduce her reading speed."

Plaintiff testified that fourth and fifth grades became far more difficult for her because she had to do a lot more writing. Her homeroom teacher was also her language arts teacher, was very strict and became angry with her because she would often forget things, had trouble handing in her homework and had a lot of difficulty with writing and spelling. Only after her mother went to see her teacher did Plaintiff's teacher begin spending more time with her to help her get her work done. Throughout

Plaintiff's middle and high school years, she spent far more time completing her homework assignments and studying for tests than her peers, usually receiving late-night help from her mother to finish her work and proof-read her papers. Her friends thought she was exaggerating because she was always working on her homework and could only hang out with them in the summer and occasionally on the weekends. Plaintiff's hard work evidently paid off as she graduated from high school with a 3.747 grade point average, a class ranking of 28 out of a class of 225 and an acceptance to Ohio State University. Throughout her high school years, Plaintiff was also a multi-sport athlete in swimming and soccer, and played junior varsity volleyball her freshman and sophomore years. She took the ACT in her sophomore and junior years in high school without accommodations and scored well (27 and 30) overall.

In college, Plaintiff testified that she had a very hard time keeping up with the workload because of all of the required reading. Since she had lived in Texas when she was young where Spanish is a much-spoken language, Plaintiff had always done well in Spanish class in high school. In her college Spanish class oral examinations, she always had high scores. However, her overall grades would suffer because she had difficulty on the written portions of the tests. She asked her instructor if it was possible to disregard the written parts of the exams and consider only the oral portions, but her instructor told her that she could not do that unless plaintiff had a diagnosed disability. Plaintiff had a similar experience in organic chemistry and her professor in that class suggested that she go to the University's Office of Disability Services

("ODS"). ODS referred her to an advisor who in turn recommended that she be formally evaluated.

Plaintiff then went to see her primary care doctor, Dr. Alan Smiy who, after listening to her describe her life-long struggles, evaluated and subsequently diagnosed her with ADHD and told her that she probably also had dyslexia. The record does not evince what tests, if any, Dr. Smiy administered to Plaintiff in making his ADHD diagnosis, though Plaintiff testified that he told her that the testing for dyslexia was long and costly and he wasn't qualified to administer those tests or diagnose that. In any event, Dr. Smiy said that the accommodations for dyslexia were probably the same as for ADHD. He prescribed and Plaintiff then began a trial course of Ritalin for ADHD and the record demonstrates that she has taken medication for ADHD since that time, although the actual medications have varied over the years and have included Adderall and Vyvanse. She did not pursue testing for dyslexia at that time.

Subsequent to her formal diagnosis of ADHD from Dr. Smiy and his completion of the necessary forms, Plaintiff received testing accommodations from Ohio State midway through her sophomore year. Those accommodations included receiving additional time (1 1/2 time) on tests, being able to take exams on paper instead of on the computer, being permitted to use colored pens, markers or pencils, having access to scrap paper, taking examinations in a distraction-reduced space (typically a separate room), and having access to an ODS counselor throughout the balance of her college career. Plaintiff took the MCAT

examination while still in college but, as she did not know that she could receive accommodations for the test, she did not ask for them and thus took the exam without any. Plaintiff scored reasonably well nonetheless, receiving a score of 30M.

At the end of her senior year in college, Plaintiff applied to medical schools, but did not get in. After graduating in June 2012 *cum laude* with a 3.562 grade point average with a degree in Molecular Genetics from Ohio State, Plaintiff took some time off, worked doing autism research, bartending and dancing with a modern dance company and re-applied to medical schools for admission in 2014. She was accepted to Western Michigan University Medical School and matriculated in the Fall of 2014.

Upon entry to medical school, Plaintiff sought to continue receiving the accommodations that she had received in college. In support of the Request for Reasonable Accommodation that Plaintiff made to Western Michigan in 2014, Plaintiff was evaluated by Charles Livingston, M.A., a licensed social worker and psychologist in the fall of that year. Mr. Livingston administered several assessment batteries, notably the Wechsler Adult Intelligence Scale (WAIS-IV) and the Wechsler Individual Achievement Test (WIAT) which resulted in a "broad range in the results, compared to other people of a similar age. Composite scores for verbal comprehension and perceptual (non-verbal) reasoning were both at the 96th percentile. Strengths included abstract verbal reasoning, practical comprehension, visual spatial

reasoning, and long-term memory. The composite score for working memory attention, and concentration was at the 63rd percentile. The composite score for processing speed was at the 10th percentile." Mr. Livingston went on to observe:

> Individuals with similar scores spend so much time and energy in basic data entry tasks, so to speak, that there is little left for higher order fluid reasoning and synthesizing. Jessie's exceptionally bright reasoning abilities and long-term memory stand in contrast to relatively low attention and concentration and very low processing speed. Her native intelligence has been some compensation for low abilities in the identified areas.

And he further concluded:

> The diagnosis of ADHD, predominantly inattentive, severe, 314.00 is supported by the written records, self-report, 11 and objective test results. There has been a persistent pattern of careless mistakes in daily activities and schoolwork, difficulty sustaining attention in tasks and academics, lapses in focus when spoken to directly, incomplete follow-through on instructions and tasks of daily living, being easily sidetracked, struggling to meet deadlines, trouble keeping materials and belongings in order, avoiding reading and writing tasks requiring sustained mental effort,

> losing things, and being easily distracted by extraneous stimuli. The symptoms are not better described or indicated by a neurotic or psychotic disorder or substance abuse. There is historical information that suggests a likelihood of dyslexia.

Plaintiff was subsequently granted accommodations by her medical school which included having up to twice the time to take examinations, taking examinations in a distraction-reduced space (typically a separate room), use of visual aids such as colored pencils and markers and access to scrap paper[11], access to text-to-speech software and calculator during exams, having a granola bar or other snack and water with her during testing, an additional free print allowance, and written examinations on paper (so she could mark them up). Again, included among the examinations for which Plaintiff has received these accommodations during her medical school career are a number of the subject matter examinations developed by NBME.

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11. At the hearing before the undersigned, Plaintiff testified that she uses different colored pencils in her notetaking, among other endeavors, giving different types of diseases, conditions, etc. different colors so that they stand out in her notes and make them easier to locate while studying. She prefers to use pencils because she often makes mistakes. She explained that it is difficult and time-consuming for her to decode each word separately and read through text so she uses her finger or another object to keep her place as she goes through the decoding/reading process. Plaintiff also testified that she usually needs to read through sentences and paragraphs several times usually aloud, in order to comprehend the meaning of the text.

Appendix B

In addition to providing reports and records from Dr. Tanguay, Dr. Smiy and Mr. Livingston, following NBME's initial denial of her accommodations request, Plaintiff also underwent evaluations and/or produced the results of her examinations by several other providers, all of whom agreed with the diagnoses that she had been previously given of, *inter alia*, Attention Deficit Hyperactivity Disorder and Dyslexia. Specifically, Plaintiff produced a report of her neurocognitive examination by Alan Lewandowski, Ph.D, a board certified neuropsychologist, who administered a broad series of assessments to Plaintiff including the WAIS-IV, the Wide Range Achievement Test (4th ed.), Sensory Perceptual Examination, Tactile Finger Recognition Test, Finger-tip Number Writing Test, Tactile Form Recognition Test, the California Verbal Learning Test (2d ed.), the Rey Osterrieth Complex Figure Test, a Grip Strength Test, Finger Oscillation Tactile Performance Test, Trail Making Tests A and B, Category Test, the Seashore Rhythm Test, the Speech Sounds Perception Test, a Personality Assessment Inventory and an Aphasia Screening Test. In reviewing the results of the tests administered, Dr. Lewandowski found that while Plaintiff's achievement studies were normal, her intellectual, neurocognitive and psychological studies were abnormal/ borderline abnormal and it was his clinical impression that Plaintiff indeed had attention deficit hyperactivity disorder and a nonverbal learning disability characterized by abnormal scanning and processing speed.

Additionally, Plaintiff also produced an 8-page report from her treating psychiatrist, Dr. Bruce Ruekberg,

M.D., a 5-page report from Jennifer N. Houtman, M.D., Plaintiff's then-primary care physician and medical school mentor, a letter of support from David Overton, M.D., the Associate Dean of WMed, and a 30-page report from Robert D. Smith, Ph.D. a licensed psychologist and neuropsychologist with the Michigan Dyslexia Institute. For his part, Dr. Ruekberg gave his professional opinion that Plaintiff had functional limitations due to ADHD, Combined type and the Specific Learning Disorder of abnormal scanning and processing speed with impairments in reading and written expression and that she thus was "without question, ... a qualified person with disabilities under the ADA..."

Dr. Houtman confirmed "from ... personal observation of [plaintiff] as a patient, and as a student, that she has the following diagnoses that require accommodations: attention deficit/hyperactivity disorder, Combined presentation..., Learning disability, nonverbal (abnormal scanning and processing speed... [w]ith impairment in reading..., [w]ith impairment in written expression..., Migraines with aura, without status migranosis..., [c]lotting disorder with recent Deep Venous Thrombosis.../ Post-thrombotic syndrome." (diagnostic codes from DSM-5 and ICD-10 omitted).

Dr. Smith, who also testified at the hearing in this matter, reported that he diagnosed Ms. Ramsay with Specific Learning Disorder with impairment in reading (developmental dyslexia), reading comprehension, severely impaired reading rate and fluent word recognition and with ADHD Combined after interviewing her and her mother

and administering the following battery of tests: the Test of Memory Malingering (TOMM), Adult ADHD Rating Scale-IV with Adult Prompts, Nelson-Denny Reading Test, Wechsler Individual Achievement Test (3d ed.) (WIAT-III), Woodcock-Johnson IV Test of Achievement, Gray Oral Reading Tests (5th ed.)(GORT), the Integrated Visual & Auditory Continuous Performance Test (IVA + Plus) and reviewing the Symptom Checklist-90 Revised (SCL-90-R).

Despite this evidence and primarily in reliance on the opinions of its two outside-contracted reviewing experts, NBME concluded that Plaintiff is *not* disabled and it has therefore denied her requests for accommodations. NBME's first outside reviewing expert, Steven G. Zecker, Ph.D. is an Associate Professor of Communication Sciences and Disorders at Northwestern University and is licensed in Illinois as a Registered Clinical Psychologist. He testified that he specializes in Learning Disorders and ADHD and that he supervises the clinic run by Northwestern University graduate students. As a clinician, Dr. Zecker primarily sees young, school-age children aged around 6-7 years of age through young adults. He rarely sees adults. Dr. Zecker has been employed as an external consultant for NBME and other testing providers for the past 16 years and he reviewed both Plaintiff's first and second requests for accommodations on the Step 1 USMLE. Although he did not doubt that the tests administered by her providers had been appropriately given or that the scores were as reported, in reviewing the documentation submitted by Plaintiff including her personal statement, and the reports and records outlined above, Dr. Zecker

took exception with the conclusions reached in that he did not believe that the tests results supported the other providers' findings of ADHD and LD. In any event, Dr. Zecker stated:

> Ms. Ramsay's academic history prior to medical school and her exceptional unaccommodated standardized test performance, in my professional opinion, provide strong evidence that Ms. Ramsay is not substantially impaired in a major life function in a manner that warrants accommodations on the USMLE under the ADA.

In addition to Dr. Zecker, NBME also referred Plaintiff's file to Benjamin Lovett, Ph.D, who is an Associate Professor at Teacher's College of Columbia University and who has also been employed as an external consultant/ reviewer by NBME and other testing providers since 2010. Dr. Lovett attested that his professional expertise is in the diagnosis and management of neurodevelopmental disorders, including Learning Disabilities and ADHD and he has published numerous articles and book chapters on these subjects. As part of his work, he often meets with young adults who have learning and attention problems and assesses their self-reported symptoms and their objective performances on various tests of cognitive, academic and behavioral functioning. Dr. Lovett testified that ADHD and Learning Disorders are considered under the DSM-V to be neurodevelopmental disorders because they begin early in childhood and thus, in the absence of symptoms during childhood, the criteria for

diagnosing those conditions is not satisfied. Since he did not see any evidence that Ms. Ramsay's symptoms had presented during childhood, he did not believe that she had a disorder.

In reviewing the documentation submitted by Plaintiff, Dr. Lovett also did not find the scores or the conclusions of those providers who had evaluated and diagnosed Plaintiff to be credible. Rather, he testified that he looks primarily at what he characterized as "real-world" test scores, *i.e.* those standardized tests actually taken and under what conditions, in assessing the strength of a diagnosis. According to Dr. Lovett,

> Here, there is insufficient evidence that Ms. Ramsay is substantially limited in her ability to read or engage in any other activity that is relevant to taking the USMLE, when she is compared to most people in the general population, at least with regard to LD/ADHD issues. There are no historical school or work records reflecting such limitations. Although at times Ms. Ramsay has obtained scores during diagnostic evaluations that would superficially suggest possible substantial limitations, those scores (and other evidence from the diagnostic evaluations) are not supported by - and are often inconsistent with - other important evidence, including her performance on real-world timed tests that required significant amounts of reading.

Appendix B

In many ways, the outcome of this case is best achieved by resolving a "battle of experts" and we note our finding that all of the experts who examined Plaintiff and/or reviewed the documents on behalf of the Defendant and who testified at the preliminary injunction hearing appear eminently qualified. In undertaking this resolution, however, we are constrained to follow the provisions of the ADA and the guidance and directives set forth in the implementing regulations. In conjunction with those directives, we first note that unlike Mr. Livingston and Drs. Tanguay, Smiy, Ruekberg, Lewandowski, Houtman, and Smith, neither Dr. Lovett nor Dr. Zecker evaluated or even met Plaintiff before testifying before this Court at the hearing. In rejecting the findings of all of the aforesaid doctors and psychologists who interviewed and administered educational and neuropsychological testing to Plaintiff in the process of diagnosing her, Drs. Lovett and Zecker focused primarily on Plaintiff's record of academic performance throughout her school years and her performance on standardized tests and on the paucity of documentation of disability in her primary and secondary school years. To be sure, it is certainly possible that they did not have the benefit of seeing all of the early school records which were produced to this Court. However, in their rejection of the conclusions of those providers who actually *did* evaluate Plaintiff, Drs. Lovett and Zecker instead undertook to analyze the results of the various tests themselves, substituting their own opinions regarding how those test results should be interpreted. In thus adopting the findings of Drs. Zecker and Lovett, NBME did likewise.

This was a blatant error in light of the language of both the statute and the relevant provisions of the Code of Federal Regulations. Indeed, it was the stated goal of Congress in enacting the ADA Amendments Act to make it easier for individuals with disabilities to obtain protection under the Act and to mandate that the definition of "disability" "be construed broadly in favor of expansive coverage." *See*, 29 C.F.R. §1630.1(c)(4), 1630.2(j), and 28 C.F.R. §36.101(b). The Regulations clearly state that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, **not** whether the individual meets the definition of disability." And, "[t]he question of whether an individual meets the definition of disability under this part should **not** demand **extensive analysis**." *Id.* (emphasis added). In re-analyzing the results of the numerous diagnostic tests that were administered, Drs. Zecker and Lovett did just that. They thus focused on whether Plaintiff met the definition of disability, rather than whether the covered entity had complied with their obligations under the Act(s). Indeed, although NBME may not have liked the terminology used in the implementing regulations, despite its registered objections, the foregoing language is what was enacted and it is this language which must be followed in assessing accommodations requests under the ADA. It decidedly did not do so in this case.

It further appears that NBME either discounted or disregarded entirely the admonition to focus on "how a major life activity is substantially limited, and not on what outcomes an individual can achieve" and apparently

ignored the example that "someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. §1630.2(j)(4)(iii). NBME's exclusive focus on Plaintiff's prior academic successes and her performance on the ACT and MCAT standardized examinations without accommodations was therefore improper, particularly given that we can discern that no consideration was given to the other evidence produced by Plaintiff, including her lengthy personal statement[12].

Finally, we also find that Defendant ran afoul of 28 C.F.R. §36.309(b)(v) which requires that "[w]hen considering requests for ... accommodations ... the [testing] entity give[]considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations..." Again, it does not appear from the record that NBME gave any consideration, much less the "considerable weight" required to Ms. Ramsay's past record of having received accommodations.

In view of all of the evidence provided by Plaintiff both in the form of the materials and supporting documentation submitted to NBME pursuant to her numerous requests

12. It should be noted that the Personal Statement was required by NBME to be submitted along with all of the other required documentation in order for the request for accommodations to be considered.

for accommodations and requests for reconsideration of the denials thereof and at the three-day hearing before the undersigned, we find that Plaintiff has sufficiently established that she is indeed a qualified individual with a disability within the meaning of the ADA despite her prior academic successes and her performances on standardized tests. Indeed, we find that the evidence as outlined above supports the conclusion that, despite having Attention Deficit/Hyperactivity Disorder and Dyslexia/Learning Disorder of reading/scanning/processing speeds, Ms. Ramsay has been able through her high intelligence and remarkably hard work habits to achieve great academic success. Thus, Plaintiff has shown the requisite likelihood of success on the merits of her Complaint in this matter.

We also find that the evidence supports the finding that Plaintiff will suffer irreparable harm unless granted preliminary relief. Again, the record evidence reflects that unless Plaintiff takes and passes her Step 1 USMLE by March 2, 2020, she will be forced to withdraw from medical school and that it is highly unlikely that she would be able to transfer to another school, given what has transpired. That enrollment in a medical school is a pre-requisite to being allowed to sit for the Step 1 exam is further evidence of the "Catch 22" in which Plaintiff finds herself and further supports the conclusion that her medical career will effectively end if she cannot satisfy WMed's mandate by March 2, 2020. The element of irreparable harm is thus satisfied.

Finally, we also find the record evidence supportive of a finding that the balance of equities and the public

interest both militate in favor of granting injunctive relief here. It is obviously in the public interest that the dictates of the ADA and the RHA be followed - Congress so decreed by passing both statutes. Further, one need only to read the myriad newspaper and magazine articles or watch television documentaries, among other news sources, to learn that there remains a great need for qualified and capable physicians throughout the United States, particularly in rural, economically-depressed areas of the Country. While we share NBME's concern for the fulfillment of its mission to provide such physicians, we feel certain that granting this plaintiff the relief which she seeks here does not run afoul of this goal. In granting preliminary relief, we are granting Plaintiff only the *opportunity* to move forward should she succeed in passing her examinations with appropriate accommodations. This Court is not a licensing or credentialing body and by this decision we do not assume that mantle.

In furtherance of all of the preceding findings, we now enter the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action pursuant to 28 U.S.C. §§1331 and 1343.

2. Plaintiff is disabled within the meaning of the Americans with Disabilities and the Rehabilitation Acts by virtue of her diagnoses of Attention Deficit Hyperactivity Disorder, Specific Learning Disorder with

impairments in reading (developmental dyslexia), and reading comprehension, Migraine Headaches and Deep Vein Thrombosis/Post-Thrombotic Syndrome.

3. As a disabled individual under the foregoing federal statutes, Plaintiff is entitled to reasonable accommodations in sitting for examinations given by any person or entity relating to applications, licensing, credentialing, or certification for secondary or post-secondary education, professional or trade purposes.

4. Defendant NBME, by virtue of its status as the testing organization responsible, along with the Federation of State Medical Boards, for the administration of, *inter alia*, the United States Medical Licensing Examination ("USMLE"), is obligated to offer its exams in such place and manner as would make those exams accessible to persons with disabilities or to offer alternative accessible arrangements for such individuals, *i.e.* to provide reasonable accommodations where necessary.

5. Plaintiff's request for additional (2X or double) time to complete the USMLE was reasonable, as were her requests for a separate, distraction-reduced room for testing, colored dry-erase markers to use on the laminated paper, an alarm or timer (either in the room, visible on the computer screen or a visual signal or reminder from a proctor), water and a snack in the room to facilitate taking needed medications at the appropriate times, given the nature of her disabilities.

6. Defendant's continued denial/refusal to grant Plaintiff's request for double time to take the USMLE

was unreasonable and constitutes a violation of her rights under the ADA.

7. Plaintiff has demonstrated a strong likelihood that she will succeed on the merits of the claims raised in her Complaint were this case to proceed to trial.

8. Plaintiff has demonstrated that, in the absence of the issuance of a preliminary injunction directing Defendant to refrain from refusing to provide her with the reasonable accommodation of 100% extended testing time on the USMLE Step 1 examination, she will suffer and will continue to suffer immediate irreparable harm for which there is no adequate remedy at law.

An Order follows.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED SEPTEMBER 1, 2020

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1058

JESSICA RAMSAY,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,

Appellant.

(E.D. Pa. No. 2-19-cv-02002)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and RENDELL*, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

* Hon. Marjorie O. Rendell vote limited to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Patty Shwartz
Circuit Judge

Date: September 1, 2020

APPENDIX D — RAMSAY ACADEMIC AND TESTING SUMMARIES

JESSICA RAMSAY PRE-MEDICAL SCHOOL STANDARDIZED TESTS TAKEN WITHOUT ANY ACCOMMODATIONS

Kinder-garten (DX 24)	Stanford Early School Achievement Test	**Complete Battery: 96th%** **Total Reading: 96th%**
First Grade (DX 25)	Stanford Achievement Test	**Complete Battery: 87th%** **Total Reading: 70th%**
Second Grade (DX 27)	Stanford Achievement Test	**Complete Battery: 92nd%** **Total Reading: 88th%**
Sixth Grade (DX 27)	Iowa Tests of Basic Skills and Cognitive Abilities Test	**Composite: 86th%** **Reading Total: 74th%**
Tenth Grade (DX 29)	ACT Plan exam	**Composite: 97th%** **English: 98th%** **Reading: 73rd%**

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Tenth Grade (DX 28)	PSAT/ NMSQT	**Composite: 71st%** **Critical Reading: 71st%**
Eleventh Grade (DX 28)	PSAT/ NMSQT	**Composite: 82nd%** **Critical Reading: 70th%**
Eleventh Grade (DX 30)	ACT Exam	**Composite: 90th%** **English: 96th%** **Reading: 87th%**
Twelfth Grade (DX 31)	ACT Exam	**Composite: 97th%** **English: 94th%** **Reading: 91st%**
College (DX 32)	MCAT Exam	**Composite: 79th%** **Verbal Reasoning: 67th%** **Physical Sciences: 79th%** **Biological Sciences: 88th%**

JESSICA RAMSAY PERFORMANCE ON DIAGNOSTIC ASSESSMENTS

Dr. Smith Evaluation Report (11/6/2018) (DX 3, Ex. B)	WIAT-III Oral Reading Fluency	**1st%**
	WJ-4 Reading Rate Cluster	**1st%**
	GORT-5 Reading Rate	**1st%**
	GORT-5 Comprehension	**1st%**
	GORT-5 Fluency	**2nd%**
	Nelson-Denny Reading Rate	**1st%**

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JESSICA RAMSAY ACADEMIC HISTORY

Kinder-garten (DX 9)	Sunset Oaks Academy	**Grades: All E's and S+'s**
First grade (DX 10)	Sunset Oaks Academy	**Grades: All E's and S+'s (plus a 94 in phonics, 93/ spelling and 98/math)**
Second grade (DX 11)	Sunset Oaks Academy	**Grades: All E's and S+'s (plus a 94/phonics, 97/ spelling, 97/math)**
Third grade (DX 13)	Carrolton-Farmers Branch	**Grades: All A's (final grades)** **No "Specialized Reading Support" or "Grades based on intensive teacher assistance"**
Fourth grade (DX 14)	Carrolton-Farmers Branch	**Grades: All A's (final grades)** **No "Specialized Reading Support" or "Grades based on intensive teacher assistance"** **Participated in gifted & talented program**

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Fifth grade (DX 15, DX 16)	Carrolton-Farmers Branch	**Grades: Mostly A's, two B's** **No "Specialized Reading Support" or "Grades based on intensive teacher assistance"** **Participated in gifted & talented program**
	Brown Elementary School	**Grades: All A's (final grades)**
Sixth Grade (DX 17)	Upton Middle School	**Grades: All A's**
High School (9th - 12 grades) (DX 18)	Saint Joseph's High School	**Cumulative GPA: 3.747** **Class rank: 28 out of 225 (top 12%)**
College (DX 22)	Ohio State University (No accomm-odations approved until May of second year)	**Cumulative GPA: 3.57** **First Year GPA: 3.53** **Second Year GPAs, Autumn & Winter: 3.925 & 3.641**