Association on Higher Education And Disability

Everyone Reading, Inc.

March 31, 2014

Sent Via Electronic Submission

Zita Betts-Johnson
Deputy Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Ave, N.W.
Washington, DC 20005

Re: AHEAD, et al Comments on Proposed DOJ ADAAA Regulations
RIN 1190-AA59, DOJ-CRT 2101-0112; 79 Fed. Reg. 4839

Dear Ms. Betts-Johnson:

Thank you for the opportunity to submit these comments in response to the Department of Justice's (hereinafter "the Department") Notice of Proposed Rulemaking to amend its regulations enforcing Titles II and III of the Americans with Disabilities Act, as amended in 2008 ("ADAAA"). The undersigned organizations appreciate the Department's effort to produce regulation and guidance in accordance with Congress' clear direction that the standards for determining disability be construed in favor of broad coverage and not demand an extensive analysis.

The ADAAA of 2008 was passed with the intent that the original purpose and scope of the ADA be restored. We supported the passage of the ADAAA and we appreciate the Department's care in implementing regulation to competently further Congressional intent. We believe that the Department is very close to achieving this objective. However, we urge the Department to consider the recommendations offered in our comments; we believe their adoption is necessary to ensure complete regulatory compliance with Congressional intent.

Our Organizations

Founded in 1979, the **Association on Higher Education And Disability (AHEAD)**[1] is the premiere professional association committed to full participation of persons with disabilities in postsecondary education. It has played a significant role in promoting equal access to standardized testing and print media. As an international resource, AHEAD values diversity, personal growth and development, and creativity; promotes leadership and exemplary practices;

[1] 107 Commerce Center Drive, Suite 204, Huntersville, NC 28078, http://www.ahead.org/

and dynamically addresses current and emerging issues with respect to disability, education, and accessibility to achieve universal access.

Founded in 1973, the **Everyone Reading, Inc. (f/k/a NY Branch of the International Dyslexia Association)**[2] is a non-profit organization that promotes literacy through research, education and advocacy. It provides information, referrals, training and support to professionals and families regarding the impact and treatment of people with dyslexia and related learning disorders, serving thousands of parents, adults with learning disabilities and professionals. It regularly participates in collaborative state, local and national policy initiatives to positively impact protections available under the applicable laws.

We support the general principles that are advanced by the Department's proposed rules and join other organizations in urging that the Department finalize its regulations so as to provide for the maximum possible protection of individuals with disabilities as intended by Congress.[3] To that end, we respectfully offer the following comments and recommendations[4] to clarify the proposed rules to more fully implement congressional intent.

As an initial matter, we wish to bring to the Department's attention to those proposed rules that we believe must be modified in order to fully enforce the ADAAA as congress clearly intended.

The ADA was amended nearly 6 years ago, but many national testing companies and institutions of higher education have continued to engage in policies, practices and procedures that misinterpret congressional mandates and continue to deprive individuals with disabilities equal access to education, testing, and the professions. Common practices include:

- Relying on outcomes achieved as evidence that an individual does not have a disability nor need testing accommodations.
- Assuming that a formal diagnosis of learning or attention disorder in adolescence or adulthood is too late to evidence that the individual is substantially limited in a major life activity, when in new diagnoses are in fact common in high school and early adulthood).[5]

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[2] 71 West 23rd Street, Suite 1527, New York, New York 10010, http://everyonereading.org/

[3] See Pub. L. 110-325, § 2(b)(5), 42 U.S.C. § 12101 note ("… it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis".)

[4] We support and acknowledge the comments submitted by the Disability Rights Education and Defense Fund (DREDF), Children and Adults with ADD (CHADD) the National Center for Learning disabilities, the Learning Disabilities Association of America (CCD), the Bazelon Center for Mental Health Law, and other organizations comprising the Coalition of Citizens with Disabilities. We acknowledge and look to their expertise in relevant areas and urge the Department to do so as well.

[5] This has been the case even where the individual has been previously diagnosed with a physical disability to which difficulties with reading have been attributed, such as the plaintiff in Bigby v LSAC (Civ. No.: 13-1347), who was an individual with cerebral palsy and learning disabilities.

- Use of recently provided or informal accommodations or self-mitigating measures as evidence that an individual is disqualified from the protections of the ADAAA.[6]
- Demanding a severe level of impairment inconsistent with the clear language of the ADAAA,[7] in order to receive accommodations (for example: asserting that an individual does not need a reader so long as they can read, no matter how laborious and time consuming the process of reading is for them; or an individual who finds the process of writing by hand painful, cumbersome, or fatiguing is not entitled to use a computer because they are capable of writing for brief periods of time).
- Finding that an individual's participation in extra-curricular activities is evidence that the individual is not substantially limited in a major life activity.

The above examples reflect current practices of many national testing companies and institutions of higher education who are undoubtedly aware of the ADAAA's rules of construction[8] and have nevertheless failed to revise their policies, practices, and procedures so as to implement the ADAAA with fidelity and continue to apply eligibility criteria that screen out or tend to screen out individuals with disabilities. Our collective experience with these practices inform our comments to this NPRM and we ask that the Department consider the comments and concerns of other commenters with pertinent expertise and experience.

I. Summary of Benefits and Costs

The Department has indicated that it has removed students (whose coursework is exclusively online) from its cost estimate under the assumption that if their entire program is online, it is unlikely they will have timed tests at a physical location. While this will undoubtedly be the case in most instances today, we are concerned that there may be a danger in focusing the analysis on extended time in a physical location, as accommodations may nevertheless be needed by individuals with disabilities for online courses and exams. We believe that on-line examinations will only be increasing in use in the future. Many of today's software programs used by educational institutions and national testing companies limit the timeframes in which students may access and complete exams or submit assignments. In many or most circumstances, the timing features of these programs are exclusively controlled by the testing

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[6] The U.S. Department of Education has indicated this to be inconsistent with the law in its informal guidance to public schools. *See* "Dear Colleague Letter", dated January 19, 2012, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html.

[5] Neither a significant or severe restriction is not required under the ADAAA, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *See* 154 Cong. Rec. S8840–42 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110–730, pt. 1, at 9–10 (2008). ("While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity in order to qualify as a disability.").

[8] *See* 42 U.S.C. § 12102(a)(4)("(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.

company or institution of higher education, and a formal request for accommodations must be made.[9] Further, many individuals with disabilities may need for these programs to made accessible through other means, such as screen readers (an accommodation used by individuals with vision disabilities as well as learning disabilities) and captioning of online educational videos for individuals with hearing impairments or those whose disabilities substantially limit their ability to read and are accommodated by multisensory communications.

We appreciate that the Department has attempted to assess the impact of its regulation on individuals with learning disabilities and ADHD, but we are concerned that the applicability of the Department's regulations and guidance may be narrowly construed by covered entities to exclude individuals with other physical or mental disabilities who are substantially limited in their ability to read, write, learn, concentrate, communicate and/or take tests, etc., such as individuals with a traumatic brain injury.

In addition, we are concerned that the Department in its cost analysis cited as a reference an article which purports to demonstrate that a large percentage of postsecondary students who are receiving accommodations on the basis of ADHD do not really have ADHD and further that they may in fact be malingering. This is quite a dramatic charge and one which we caution the Department to take with a large grain of salt.

First, the article cited in footnotes 4 and 11[10] of the NPRM focuses on those who are purported to have had no previous evaluation or history of receiving accommodations or of having a disability at all, some of whom for purposes of such studies were instructed to feign ADHD-like symptoms. Most often, individuals without documented histories of impairment have experienced limitations for which they have used self-mitigating measures, often not realizing that the difficulties they experienced were indicative of disability. Still others' requests for assistance may have gone unaddressed in their primary and secondary school years because the school inappropriately believed that good grades were inconsistent with disability or because of parental fears of stigma associated with disability.[11] There are many legitimate reasons why an individual might not have received accommodations or special education services before college where the demands on their time and executive functioning rendering their use of self-mitigations no longer effective. Assuming malingering is not only harsh, it ignores reality in the field.

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[9] Notwithstanding the above, it is not uncommon for students whom a national testing company or post-secondary institution claims to have "accommodated" to have received test modifications insufficient to accommodate their disabilities, denying the student equal access, but permitting the covered entity to claim to have provided accommodations in its reporting.

[10] Lindsey Jasinski and John Ranseen, Malingered ADHD Evaluations: A Further Complication for Accommodation Reviews, The Bar Examiner, December 2011.

[11] Although the NPRM assumes that most students with disabilities are served in K-12 under the IDEA, it has been our experience that public schools are often resistive to classifying students with disabilities, especially those who are "getting by" grade wise, a practice that is inconsistent with the ADA and Section 504 of the Rehabilitation Act of 1973. *See* fn.4, *supra*.

Second, malingering is a serious charge. It reflects specific intent, as opposed to poor effort. The latter may occur because the person does not like the test (computer based continuous performance tests are deliberately boring and long so as to help identify those with difficulty attending) or due to poor executive functioning. Another reason for skepticism of tests purporting to identify malingering is that it is almost impossible to do a study validating a true malingerer, i.e., getting a group of people known to have malingered on a test. We have found no such studies. Unless a test is validated on the group in question, one cannot say it applies, and certainly not dispositive as the authors here imply. In fact, symptom validity tests are validated on individuals with brain injuries; none were validated on people with ADHD.[12]

In sum however, we agree with the Department that the enactment of the ADA Amendments Act of 2008 and the Department's amendments to its ADA regulations will yield benefits to individuals with disabilities, and society at large that are in many respects non-quantifiable. But as organizations concerned with the rights of students in post-secondary education and national examinations, we are concerned that a significant percentage of individuals with disabilities have been denied the protections of the laws protecting students with disabilities by schools, national testing companies, and licensing and certification institutions, and are consequently prohibited from completing their degrees and denied access to their chosen professions despite their competency. Students with disabilities who complete degree programs whose access to the professions is foreclosed by actions of standardized testing companies pay a steep price, both in immediate dollars as well as with their financial futures. Many of these individuals have incurred large amounts of non-dischargeable student loan debt, and the effects of this discrimination are tangible and dramatic. These individuals are saddled with student loan debt that they cannot pay, becoming a barrier to employment, to personal savings and home ownership, amongst other things, and increasing the inequities that have historically depressed opportunities for individuals with disabilities and their families, leading to significant societal impacts of un- and underemployment. Diversity on the basis of race and national origin in the professions has long been a goal of the Federal government and numerous advocacy organizations. There is no less a need for diversity with regard to individuals with disabilities in the professions. Thus it is imperative that the final regulations take into consideration the myriad ways in which individuals with a variety of disabilities have been, and will continue to be affected, by the Department's regulations and guidance.[13]

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[12] Tombaugh, T. (2996). Test of Memory Malingering. North Tonawanda, NY: Mental Health Systems, Inc. (the TOMM was not validated with ADHD adults, but with traumatic brain injury patients both "at-risk" and "not at-risk," referring to whether they were seeking some disability insurance benefits or personal injury award with regards to the evaluation.); Slick, D., Hopp, G., Strauss, E., & Thompson, G. B. (1997). Victoria Symptom Validity Test: Professional manual. Odessa, FL: PAR, Inc. at 49-51, 57 (this test was validated on brain injury patients, both "compensation-seeking," "non-compensation-seeking," as well as "feigning," i.e., people told to act as if they were malingering, and a control group. "Even when adjunct normative data also suggest that scores on the VSVT are more likely reflective of malingering than of CNS dysfunction, the clinician is obligated to explore and rule out any plausible alternative explanations."); Frederick, R. I. (2003). Validity Indicator Profile Manual, Second Edition. Minneapolis, MN: Pearson, Inc. at 7 (validated on brain injury patients; limitations of using this test data are noted, and "clinical judgment remains a requirement for interpreting VIP results.... Although clear-cut indications of feigning sometimes result, in many cases a finding of invalidity reveals only that the test-taker's performance was inconsistent or not reflective of good effort.")

[13] The Department should also indicate that its reasoning applies to Section 504 of the Rehabilitation Act as well.

II. Physical or mental impairment – Sections 35.108 (b) and 36. 105 (b)

The Department proposes to identify dyslexia as an example of specific learning disability. See 79 Fed. Reg 4858 ("(including but not limited to dyslexia)"). We recommend that the Department include additional specific learning disabilities as examples, because we are concerned that the inclusion of "dyslexia" as the only illustration will lead to the exclusion of individuals with dysgraphia, dyscalculia, dyspraxia and slowed processing speed, for example.

We thank the Department for recognizing that many national testing companies and educational institutions continue to assert that dyslexia is not a clinically diagnosable impairment and commend the Department for taking action in this NPRM to correct this misperception about a large population of individuals with a specific learning disability that has been scientifically demonstrated to be real and persist over the life-span.[14] Nevertheless, we are concerned that individuals with other diagnoses who may be classified in the K-12 context as having learning disabilities for purposes of IDEA, but may nevertheless carry different clinical diagnoses albeit ones with similar symptoms, may be excluded from the ADAA's protections by a covered entity who reads the Department's guidance too narrowly. This would include individuals with learning disabilities such as dysgraphia and dyscalculia, as well as non-specific learning disabilities such as slowed processing speed), mixed expressive-receptive language disorders as well as those disorders which in common parlance may be referred to as learning disabilities, such as Cognitive Disorder-NOS, post concussive disorders, and ADHD. These brain-based disorders also fall within the meaning of "physical or mental impairment" in that they too cause difficulties with brain and neurological functions, as well as reading, writing, speaking, communicating, executive functioning and test-taking unrelated to intelligence and education.

III. Major Life Activities – §§ 35.108(c) and 36.105(c)

We propose that the Department include "writing," test-taking, and "executive functioning" in its illustrative list of major life activities.[15] According to the Department of

[14] Psychol Sci. 2010 Jan;21(1):93-101. doi: 10.1177/0956797609354084. Epub 2009 Nov 23. Uncoupling of reading and IQ over time: empirical evidence for a definition of dyslexia. Ferrer E, Shaywitz BA, Holahan JM, Marchione K, Shaywitz SE.

[15] The NPRM implicitly acknowledges the major life activity of test-taking by its focus on national testing companies and others subject to Section 309 of the ADA in this NPRM. Courts are increasingly finding this to be the case. *See*, Doe v. Samuel Merritt University, 2013 WL 428637, at *5-6 (N.D.Cal., Feb. 1, 2013) ("Plaintiff correctly notes … that test-taking [has been found to be] a major life activity. *See* Bartlett v. N.Y. State Bd. of Law Examiners (*internal citations omitted*). Then Judge Sotomayor found that test-taking met the EEOC's definition of "major life activities," which at the time was defined as "those basic activities that the average person in the general population can perform with little or no difficulty." Id. (quoting 29 C.F.R. Pt. 1630, App. § 1630.2(i) (1991)) (*internal quotation marks omitted*). She reasoned that while test-taking "could arguably not be 'basic[,]' ... in the modern era, where test-taking begins in the first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of 'major life activity.' " Id. Since 1997, the central role of test-taking in our society has only increased…*Given the state of the case law, the recent directives of Congress, and the importance of test-taking in our society, the Court finds that Plaintiff has, at a minimum, raised "serious questions" as to whether test-taking is a major life activity under the ADA. In addition, Defendant does not dispute that Plaintiff's limitation "substantially limits" her ability to take tests").* (*emphasis added*). In Bartlett, *supra*, then Judge Sotomayor also found that "Writing is also indisputably a major life activity." 970 F. Supp. 1095 at 1117 (SDNY 1997).

Health and Human Services: "Executive Function (EF) refers to a constellation of cognitive abilities that include the ability to plan, organize, and sequence tasks and manage multiple tasks simultaneously."[16]

Disabilities that manifest, at least in part, as executive function weaknesses include a variety of learning disabilities, ADHD, anxiety, depression, PTSD, certain TBIs, and OCD. Individuals who have sustained traumatic brain injury (such as through concussion, surgery, or the presence of tumors or lesions or other brain-based injuries, such as those common to sports injuries and to the wounded warrior population), as well as those individuals with physical disabilities that can cause any combination of pain and/or fatigue (such as that experienced by individuals with, for example, Diabetes, Fibromyalgia, and Multiple Sclerosis) can also be substantially limited in executive functioning. We believe that such illustrative examples are necessary to clarify the Department's intent.

IV. Comparison to most people in the population - §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii)

We are deeply concerned of the unintended consequences that could flow from one significant aspect of the Department's discussion of the proposed amendments to this section. The Department writes "For example, when a person is diagnosed with the impairment of a learning disability, one accepted method of arriving at that diagnosis is the administration of specific tests to determine whether there is a significant discrepancy between the individual's intelligence or aptitude and the individual's academic achievement. Having established the existence of the impairment (here, a learning disability), *the individual must still demonstrate that his or her impairment substantially limits a major life activity as compared to most people in the general population*." (emphasis added)

Indeed, a not uncommon rationale asserted for denying the protections of the ADA is that a diagnosis (an impairment), in and of itself, does not necessitate a finding that the individual has a substantial limitation in a major life activity. While this may be the case for certain minor disorders, in the case of learning disabilities and ADHD the diagnosis is not made *unless* the individual's function are limited compared to most people, and this explanation by the Department would lead to the inexorable increase in the limitation to be demonstrated in contravention to the clear intent of the ADAAA. National testing companies and educational institutions often rely on psychometric scores to demonstrate many qualitative aspects of learning and attention disorders. This problem is further compounded by covered entities' relying on scores on subtests from various psychometric instruments that by design cannot reflect the condition, manner or duration in which an individual performs one or more major life activities.

For example, in Bartlett, *supra*, a case whose reasoning by the Second Circuit was expressly endorsed by Congress as being consistent with the purposes of the ADA Amendments Act of 2008, the board's expert witness created an admittedly arbitrary cut-off score (30th percentile) on an untimed subtest of single word decoding as the arbiter of whether an applicant

[16] https://www.fbo.gov/index?id=0c666579d31b3ed3a6f8d58cf187fd92

would be considered to have a learning disability. Bartlett demonstrated that the use of a cut-off score could not demonstrate whether the individual read with automaticity, a characteristic of most readers, and that it was only through a comprehensive clinical evaluation and the clinical judgment of the individual's evaluator that the proper determination of the individual's protection by the ADA could be made. The Department's characterization is problematic in that a discrepancy that would satisfy generally accepted diagnostic criteria for a learning disability reflects a discrepancy that is not present in most people – because most people do not have significant discrepancies between intellectual ability and achievement test scores. In fact, unexpected discrepancies are meaningful, occur infrequently, and do not occur with most people. Whatever may be said about implementation errors among school personnel that have led to a lack of services for such students under IDEA, they are individuals who should be identified as protected under §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii). Individuals with a magnitude of discrepancy greater than most people in the general population should qualify as individuals with disabilities.

Moreover, the Department's characterization of the analysis can and has been misconstrued historically. *See* Bartlett VI, 2001 WL 930792, *41 (S.D.N.Y, August 15, 2001) ("*research shows that over one-third of adult dyslexics score above the 30th percentile (and thus, a fortiori, an even higher number score within the average range of the 16th to 84th percentiles) on this test… In practical terms, Dr. Flanagan is attempting to do the same thing that I found "seriously infirm" in the first trial-setting a cut-off for the existence of disability. Bartlett I, 970 F.Supp. at 1113. In fact, Dr. Flanagan's suggested cut-off-below the 16th percentile-is even more conservative than Dr. Vellutino's cut-off-below the 30th percentile. To the extent that I found a cut-off of the 30th percentile on tests like the Woodcock and the WRAT to be under-inclusive based on research showing that one-third of dyslexics score above the 30th percentile on those tests, I find a 16th percentile cut-off to be even more problematic*.").

The approach found to be "even more problematic" in Bartlett persists however. Recently a member received the following explanation denying a request for accommodations from a national testing company: "Average standard scores range from 85 ("16th%ile") to 115 (84th%ile)… Scores that are in the average range do not establish that a student has a "substantial limitation" to a major life activity as compared to "most people" as required for a designation of an ADA disability." Covered entities need specific direction that such practices are prohibited by the ADAAA.

In addition, establishment of other physical or mental impairments for which intra-individual comparisons may be part of a diagnostic approach to diagnosis, treatment and/or accommodation strategies ought not to be constrained by attempts to statistically compare the conditions, manner, or duration in which such individuals read, write, learn, think or concentrate, for example. These individuals also should be considered individuals with disabilities protected by the ADA without further analysis.[17] How an impairment effects the activities of an individual

[17] Noted ADHD expert Russell Barkley states: "While neuropsychological testing may have some value for other learning disabilities or evaluating the extent of cognitive impairment from brain injuries, it is of little or no value in making the diagnosis of A.D.H.D. Interviews with the patient and family, rating scales, the history of the patient and the use of diagnostic criteria from the Diagnostic and Statistical Manual, along with the professional's expert knowledge of differential diagnosis of disorders, are all essential parts to an evaluation. The only testing that may

may be part of the diagnostic process and goes to the heart of how (condition, manner or duration) an individual is limited in one or more major life activities.

V. Predictable Assessments - §§ 35.108(d)(2) and 36.105(d)(2)

We endorse the Department's addition of Traumatic Brain Injury to the illustrative list of disorders which will virtually always be found to substantially limit brain function. We again [18] urge the Department to include in its list of impairments that will virtually always be found to substantially limit a major life activity "specific learning disabilities," including, but not limited to, dyslexia, dysgraphia, dyscalculia and dyspraxia. These neurologically-based impairments—which make the basic mechanics of learning, reading and writing cumbersome, painful, deliberate, and slow—by their nature, should easily be found to be disabilities that substantially limit major life activities including learning, reading, writing, and neurological function. *See, e.g.*, 29 C.F.R. Part 1630 App., § 1630.2(j(1)(v) ("Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act."). *See also* Cong. Rec. H8286 (Sept. 17, 2008) (Stark) ("*Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration.*").

Moreover, in light of the extensive attention that the Department gives to the ADAAA's application to learning disabilities and its repeated references to these disabilities throughout the proposed regulation, the absence of specific learning disabilities such as dyslexia from the "virtually always" list seems to raise an inference that they are not impairments that should easily be found to be disabilities. Such an inference would be incorrect.

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be needed in such cases is to rule out limited intelligence or learning disabilities as possible coexisting problems that could explain some of the performance difficulties the person may be having in school settings. Otherwise, there are no psychological, medical or neurological tests that are useful for diagnosing A.D.H.D." http://consults.blogs.nytimes.com/2011/02/15/when-the-diagnosis-is-a-d-h-d/

[18] As we noted in our November 23, 2009 comments to the EEOC's proposed regulations implements the ADAAA at fn.9, "Unequivocal scientific evidence demonstrates that LD (such as specific reading disability/dyslexia) is chronic, affects speaking and reading, and persists throughout life. There is now incontrovertible neurobiological evidence demonstrating that individuals with the most common learning disability, specific reading disability/dyslexia, take longer to process written language. The results of functional brain imaging studies of dyslexics demonstrate that whereas non-disabled readers use brain systems differentiated for the speedy recognition and automatic processing of sounds and symbols, the brains of dyslexics are unable to activate those same areas of the brain necessary for the automatic processing of words and as a result are unable to automatically and quickly read words (the way most people read) and must read slowly and with great effort. This manner of processing is inherently slower than that of most people. Thus, studies of brain function in dyslexics indicate that the limitations experienced are physiologically-based, life-long, and *always* impair the manner in which an individual performs certain major life activities."

In addition, as we proposed in our November 23, 2009 comments to the EEOC's proposed regulations, we also believe that ADHD should be included in the category of "predictable assessments" – those that will virtually always be found to substantially limit a major life activity - for reasons that parallel our reasons stated above for specific learning disabilities. In 2009, we noted

> When the diagnostic criteria for AD/HD, LD, and psychiatric disorders such as panic disorder and anxiety disorders *(footnote omitted)* are compared to the Commission's descriptions of each of the three categories of impairments in (j)(5), (j)(6), and (j)(8), it becomes apparent that AD/HD, LD, and these psychiatric disorders belong with the list of impairments in (j)(5) that will consistently meet the definition disability. *(footnote omitted)*
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> Furthermore, our strong recommendation that these disorders be included in (j)(5) because they are neurobiological disorders that, by definition, substantially limit a major bodily function was recognized by Congress in the colloquy between Representatives Stark and Miller.[19] If, as directed by Congress, we were to use a common sense standard and forego extensive medical analysis, it should follow that a diagnosis of any of the aforementioned impairments by an appropriately credentialed professional, using the DSM-IV-TR criteria, would amount to a substantial limitation of a major bodily function or major life activity and would *consistently* meet the definition of disability.

Moreover, as our colleague organization CHADD points out in its comments to this NPRM, scientific studies into ADHD confirms that these disorders are brain based and that executive functioning – the brain's "conductor" of myriad activities is indeed a major life activity that is substantially limited in individuals with ADHD. The fact that roughly 50% of individuals with ADHD also have learning disabilities means that covered entities may well be serving these individuals already. To the extent that individuals do not have co-morbid learning disabilities, they are entitled to the full protections of the ADAAA.

VI. Modifications to Policies Practice and Procedures

The NPRM correctly notes that the statute includes a reference to "academic requirements in postsecondary education" that was included "solely to provide assurances that the [ADAAA] does not alter current law with regard to the obligations of academic institutions under the ADA." *See* 79 Fed. Reg. 4849, *citing* 42 U.S.C. § 12201(f) and 154 Cong. Rec. S8842

[19] In a September 17, 2008 colloquy between Representatives Stark and Miller, Representative Stark commented that "Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or *the time it takes to perform such activities often referred to as the condition, manner, or duration*. This legislation will reestablish coverage for these individuals…" Cong. Rec., Sept. 17, 2008, p. H8286 (emphasis added).

(daily ed. Sept. 16, 2008)(Statement of the Managers). We strongly urge the Department to clarify that such "academic deference" is limited to *only* to educational institutions, and *not* to testing and licensure entities subject to Section 309 of the ADA, 42 U.S.C. § 12189.[20] Even as to educational institutions, the rule should make clear that "academic deference" is limited to academic freedom-related decisions that implicate U.S. Constitutional First Amendment concerns. Further, even where appropriate, such deference may not be used to mask discriminatory conduct. *See* Wong v. Regents of Univ. of Calif., 192 F.3d 807, 817 (9th Cir. 1999).[21]

Although not addressed specifically in this NPRM, deference has been raised in the context of state licensing agency decisions as to disability determinations. That too, should be limited in scope to those areas central to the entity's purpose in administering such an examination.

In Bartlett v. NYS Bd. of Law Examiners, 156 F3d 321, 327 (2d Cir. 1998), the Board asserted that its determination that an applicant with dyslexia did not have a disability was entitled to deference because it was a state agency. The Second Circuit noted that there was "no generally accepted rule according a degree of deference to the factual determinations of state and local administrative agencies," and held that "[w]hen deference is due, however, it is not because of the fact finder's status as a state agency, but because of the fact finder's inherent expertise on "technical matters foreign to the experience of most courts." *citing* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 648 (2d Cir.1979). The Second Circuit refused to find deference to such an agency when its decisions were supported by opinions of outside experts, ruling

> Moreover, even where an agency has expertise, courts should not allow agency factual determinations to go unchallenged, see Carey, 612 F.2d at 648, and deference is particularly "inappropriate once that agency is the defendant in a discrimination suit." Id. at 649.

[20] *See, e.g., Rawdin v. American Bd. of Pediatrics*, --- F. Supp. 2d ---, 2013 WL 5948074 (E.D. Pa. Nov. 6, 2013), *appeal docketed*, No. 13-4544 (3rd Cir. Nov. 26, 2013)(erroneously applying academic deference standard to testing (professional board certification) company covered by 42 U.S.C. § 12189).

[21] The degree of deference with which a court is to treat an educational institution's decisions involving its academic standards and curriculum is traditionally limited to according "great respect for [a] faculty's professional judgment" when reviewing "the substance of a genuinely academic decision." Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985). Courts typically defer to the judgment of academic institutions because courts generally are "ill-equipped," as compared with experienced educators, to determine whether a student meets a university's "reasonable standards for academic and professional achievement." Wong at 817. Such deference is not absolute and courts must ensure that educational institutions are not "disguis[ing] truly discriminatory requirements" as academic decisions Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 25-26 (1st Cir.1991) (en banc) (Wynne I)). Thus an institution's duty is to make itself aware of the nature of the student's disability and to explore alternatives for accommodating the student while exercising professional judgment as to whether such modifications might fundamentally alter the course of study. Courts should "defer to the institution's academic decisions only after we determine that the school "has fulfilled this obligation." Wong at 818, *citing* Zukle v. Regents of the University of California, 166 F.3d at 1048 (9th Cir. 1999).

> Applying these principles to the instant case, the district court properly refused to defer to the Board. The Board has no expertise in assessing learning disabilities. Rather, the Board's expertise is in defining the minimum qualifications necessary to practice law in New York. Accordingly, both reason and the law militate against giving deference to the Board's findings regarding disability, especially where, as here, the Board is defending against charges of illegal discrimination."

Id. It would truly be at cross purposes with the ADAAA and congressional intent for covered entities to have blanket deference accorded to their decisions regarding disability accommodations.

VII. Condition, Manner, or Duration Analysis – §§ 35.108(d)(3)(i) and § 36.105(d)(3)(i)

We support and entirely agree with our colleagues in the CCD and DREDF with regard to these sections. We reiterate these points below and add a reference to ADHD:

A. The Department Should Change the Subheading

The subheading should be titled "Condition, Manner, *or* Duration"—paralleling the subheading in the EEOC's regulations, rather than "Condition, Manner, *and* Duration," which accurately reflects the content of both the Department's proposed regulation and the EEOC's final regulation, which state that *any* of these factors may be used to demonstrate a substantial limitation in how a person performs a major life activity compared to most people. *See* 29 C.F.R. § 1630.2(j)(4)(i); 79 Fed. Reg. 4839, 4859, 4861 (proposed regulations for 28 C.F.R. § 35.108(d)(3)(i) and § 36.105(d)(3)(i)). Thus it is clear that an individual need not demonstrate a substantial limitation in each or all of these ways (the condition, manner, *and* duration of how he or she performs a major life activity) in order to establish coverage.

B. Condition, Manner or Duration Analysis Not Necessary in All Cases

The Department should add the language below that was included in the EEOC's parallel regulations concerning the definition of "substantially limits" and the "application of condition, manner or duration," but deleted from the Department's proposed regulations.

> *(iv) Given the rules of construction set forth in paragraphs (d)(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 (d)(2)(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.*

This language serves an important purpose and makes clear that the "condition, manner or duration" analysis—which may not be necessary to establish coverage in many cases, and particularly with respect to impairments that are described as "virtually always" being

disabilities. In such cases, as described by the EEOC, establishing coverage should be "particularly simple and straightforward."

We commend the Department for recognizing and identifying many self-mitigating measures that reflect much about the condition, manner, or duration in which individuals with specific learning disorders and ADHD perform major life activities and aid covered entities in understanding their obligations to such individuals. In addition, the Department's discussion helps avoid the over-reliance of national testing companies in particular on psychometric test data to determine whether and how they might provide testing accommodations. Such testing can fall woefully short of demonstrating the condition, manner or duration in which such individual perform major life activities, for example, it is not possible on three minute long subtests to assess an individual's difficulties with sustaining attention. Thus, there are many circumstances, particularly in the context of higher education and standardized testing, where condition, manner, and/or duration analysis effectively illustrates how one's impairment substantially limits one or more major life activities.[22]

C. Comparison to Most People Rather than to Subpopulations

We strongly urge the Department to remove the following language in the "supplementary information" section, 79 Fed. Reg. 4839, 4848:

> *The Department also notes that although in general the comparison to "most people" means a comparison to most people in the general population, there are a few circumstances where it is only appropriate to make this comparison in reference to a particular population. For example, it would be inappropriate to evaluate whether a young child with a learning disability that affected her or his ability to read was substantially limited in reading compared to most people in the general population, because clinical assessments of such an impairment (e.g., dyslexia), are always performed in the context of similarly-aged children or a given academic year (e.g., sixth grade), and not in comparison to the population at large.*

First, we are concerned about a principle that "when it is only appropriate" to compare a person's limitations to those of a particular population rather than to those of the general population, the former comparison must be done to determine whether the person's impairment is a disability. Such a principle has the potential to create unintended consequences.[23]

This principle also seems to be premised on the very notion that Congress rejected with respect to coverage of learning disabilities: that a learning disability should be measured by an

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[22] In this case, I find that given the inability of tests like the Woodcock to measure automaticity and orthographic problems, the clinical observations of plaintiff's manner of reading are the most probative evidence of her reading disability." Bartlett v N.Y,S. Bd. of Law Examiners, 2001 WL 930792 (S.D.N.Y.) at 29.

[23] Leaving covered entities to divine in what circumstances it would be "only appropriate" to compare a person to a particular population, and to what type of population invites *ad hoc* arguments against ADA protection for certain individuals, and further encourages a wide variety of similar arguments that individuals should be compared to similarly situated individuals rather than to "most people": for example, that an individual is not substantially limited compared to other individuals residing in group homes.

individual's test scores rather than the condition, manner or duration under which he or she learns. As is clear from the EEOC's regulations and from statements elsewhere in the Department's proposed regulation, the fact that a learning disability may be diagnosed by taking into account a person's age, measured intelligence and age-appropriate education does not mean that the person's limitations cannot be compared with those of the general population. The EEOC states:

> The comparison to most people in the general population continues to mean 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 limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.

29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v). As noted above, in reaching the diagnosis of impairment for such individuals, a comparison to most people is subsumed in the diagnostic process.

Similarly, the Department's "supplementary information" section states:

> Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that "[a]n impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." The Department cautions that this rule of construction addresses how to determine whether the individual's impairment substantially limits a major life activity and not how the impairment is diagnosed. For example, when a person is diagnosed with the impairment of a learning disability, one accepted method of arriving at that diagnosis is the administration of specific tests to determine whether there is a significant discrepancy between the individual's intelligence or aptitude and the individual's academic achievement.

79 Fed. Reg. 4839, 4845. This also invites the improper two-tier analysis discussed above.

VIII. Examples of Mitigating Measures in the Department's Section by Section Analysis – §§ 35.108(d)(4) and 36.105(d)(4) (79 Fed. Reg. 4848).

We commend the Department for its thorough discussion of self-mitigating measures, serving to clarify the type types of strategies employed by many students with disabilities to manage their disability related need. To this discussion we recommending adding "strategic course selection" (e.g., taking "paper courses" not "exam" courses). Highlighting and margin note taking which are self-mitigation measures also commonly used.

IX. Specific Recommendations

A. Final regulations §§ 35.108(b)(2) and 36.105(b)(2). These final regulation sections and the preamble should be revised to state "specific learning disabilities (including but not limited to dyslexia, dysgraphia, dyscalculia, dyspraxia and non-verbal learning disabilities) and Attention Deficit Hyperactivity Disorder" in the non-exhaustive list of physical or mental impairments.

B. Final regulations §§ 35.108(c)(1) and 36.105(c)(1). These final regulation sections and the preamble should include "writing," "test-taking," and "executive functioning" in the non-exhaustive list of major life activities.

C. Final regulations §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii). These final regulation sections and the preamble should be revised to take into consideration the serious concerns raised in our comments and the comments of our colleague organizations with regard to comparisons to "most people."

D. Final regulations §§ 35.108(d)(3)(i) and § 36.105(d)(3)(i). The heading, final regulation sections, and preamble should be revised to read "Condition, Manner, *or* Duration" rather than "Condition, Manner, *and* Duration." Additionally, the Department should add the language that was included in the EEOC's parallel regulations concerning the definition of "substantially limits" and the "application of condition, manner, or duration."

E. Final regulations §§ 35.108(d)(4) and 36.105(d)(4). These final regulation sections and the preamble should include the self-mitigating measures of "strategic course selection, highlighting and margin noting."

F. Final regulations §§ 35.108(d)(2) and 36.105(d)(2). These final regulation sections and the preamble should be revised to include as predictable assessments "specific learning disabilities substantially limit reading, learning, thinking, and communicating" and "Attention Deficit Hyperactivity Disorder substantially limits brain and executive functioning" as impairments that will virtually always be found to substantially limit a major life activity.

G. We strongly urge the Department to delete the following language in the "Supplementary Information" section, 70 Fed. Reg. 4839, 4848: "*The Department also notes that*

although in general the comparison to "most people" means a comparison to most people in the general population, there are a few circumstances where it is only appropriate to make this comparison in reference to a particular population. For example, it would be inappropriate to evaluate whether a young child with a learning disability that affected her or his ability to read was substantially limited in reading compared to most people in the general population, because clinical assessments of such an impairment (e.g., dyslexia), are always performed in the context of similarly-aged children or a given academic year (e.g., sixth grade), and not in comparison to the population at large."

H. We recommend the Department include a specific instruction as to the limitations and scope of academic deference consistent with the comments above.

Very truly yours,

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