

2005

Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT

Nancy Leong

Repository Citation

Leong, Nancy, "Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT" (2005). *Faculty Publications*. 217.

<https://scholarship.law.wm.edu/facpubs/217>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

COMMENT

BEYOND *BREIMHORST*: APPROPRIATE ACCOMMODATION OF STUDENTS WITH LEARNING DISABILITIES ON THE SAT

Nancy Leong*

INTRODUCTION.....	2136
I. SOME STUDENTS WITH LEARNING DISABILITIES QUALIFY FOR PROTECTION UNDER FEDERAL LAW AND DESERVE ACCOMMODATION ON THE SAT	2138
A. <i>Definition of Learning Disability</i>	2138
B. <i>Learning Disabilities Under Federal Law</i>	2139
C. <i>Accommodation on the SAT</i>	2140
II. THE FLAGGING DEBATE	2142
A. <i>Scores Achieved with and Without Extended Time Are Not Comparable</i> ..	2142
B. <i>Flagging Was a Poor Solution to the Problem of Comparability</i>	2143
C. <i>Not Flagging Scores Achieved with Extended Time Is Equally Problematic</i>	2146
1. <i>Harm to test validity</i>	2146
2. <i>Undesirable incentives to seek diagnosis</i>	2147
3. <i>Socioeconomic inequity</i>	2148
4. <i>Backlash against students with legitimate learning disabilities</i>	2149
III. TESTING SERVICES SHOULD MODIFY THEIR PRACTICES TO BETTER SERVE LEGAL AND FAIRNESS INTERESTS	2150
A. <i>Testing Services Should Tighten Eligibility Requirements for Accommodation</i>	2150

* J.D. expected, Stanford Law School, 2006. The author gratefully acknowledges the guidance of Professors Stephen Rosenbaum and Mark Kelman and the analytic insights of Justin Pidot and Hans Allhoff. As always, Dan Bernstein's constant support and encouragement were invaluable.

B. Testing Services Should Modify the SAT to Eliminate Speededness	2152
CONCLUSION	2155

INTRODUCTION

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.¹

What could account for this seemingly perverse behavior? The answer is simple: students diagnosed with learning disabilities receive extra time to take the SAT.

This phenomenon is troubling in many respects. The SAT is commonly justified as a means of leveling the playing field in the college admissions process, and the idea of a diagnosis as a means to gain precious time raises a host of issues ranging from fairness to score predictivity. Moreover, recent developments have compounded the problem: following the controversial settlement of *Breimhorst v. Educational Testing Service*,² colleges will no longer know when a student receives extra time.

Prior to *Breimhorst*, students with disabilities could receive extended time accommodation on standardized tests, but their scores were accompanied by an asterisk, or “flag,” and the designation “nonstandard administration.”³ The flag indicated that a score had been achieved with extended time and therefore might not be comparable to a standard score.

This situation changed after Mark Breimhorst sued Educational Testing Service (ETS) when his scores were flagged after he received extra time on the Graduate Management Admission Test (GMAT). As part of the settlement, ETS agreed to stop flagging all of its tests. This did not result in immediate changes for the SAT, which is owned by the College Board and merely administered by ETS. However, after convening a panel of testing experts to study the flagging issue, the College Board decided to follow suit.⁴ As of October 2003, SAT scores achieved with and without extended time are indistinguishable to admissions committees. This decision has significant

1. Jane Gross, *Paying for a Disability Diagnosis to Gain Time on College Boards*, N.Y. TIMES, Sept. 26, 2002, at A1.

2. *Breimhorst v. Educ. Testing Serv.*, No. C-99-3387 (N.D. Cal. Jan. 24, 2001).

3. Miriam Kurtzig Freedman, *Disabling the SAT*, EDUC. NEXT, Fall 2003, at 37.

4. Press Release, College Bd., The College Board and Disabilities Rights Advocates Announce Agreement to Drop Flagging from Standardized Tests, <http://www.collegeboard.com/press/article/0,1443,11360,00.html> (July 17, 2002) [hereinafter College Board Press Release].

consequences for students with learning disabilities, who comprise an overwhelming majority of the students granted extended time and whose numbers have increased by twenty-six percent in the past five years alone.⁵

The *Breimhorst* result ultimately creates an untenable situation. Although flagging was undeniably stigmatizing to students with disabilities and should not be reinstated, simply removing the flags without modifying the format of the SAT impairs the validity of the test and creates undesirable incentives for fraud. This Comment argues that the best way for the College Board to circumvent these unappealing alternatives is to eliminate speed as a factor on the SAT.

This debate over accommodation for students with learning disabilities has made salient a larger problem: the SAT is not intended to test speed, yet for many students, the time limit affects their scores. However, the learning disability context provides a useful forum for discussing these issues, while the *Breimhorst* settlement creates an immediate incentive to address them.

The Comment is divided into three Parts. Part I provides background, demonstrating that some, though not all, students with learning disabilities qualify for protection under the Americans with Disabilities Act (ADA). Given the College Board's concession that the SAT is not intended to measure speed, such students consequently qualify for extended time on the SAT.

Part II addresses the tension between providing accommodation and preserving the validity of the SAT. Because some students without learning disabilities would also benefit from extended time, granting such accommodation inflates the scores of students with learning disabilities. Flagging was an undesirable way of signaling potential score incomparability because the stigmatization resulting from flagging conflicted with the spirit of the law and made disabled students vulnerable to discrimination. However, the *Breimhorst* solution of simply removing the flags compromises the validity of the test and encourages students to seek inappropriate accommodation.

Part III proposes two alternatives to mitigate the current situation. The more conservative approach attacks the problem of improper accommodation by restricting eligibility for accommodation to those students whose thoroughly documented learning disabilities merit accommodation under the ADA. However, this approach ultimately provides only a partial solution: even if every student who receives accommodation has a legitimate learning disability, the issue of test validity still remains. The best way for testing services to address this problem is to modify the test to reflect its stated purpose of measuring problem-solving ability rather than speed. Recent research suggesting that speed is not a factor for most students on the new SAT indicates progress toward this goal, yet ETS still retains time limits for nondisabled test

5. BRENT BRIDGEMAN ET AL., COLLEGE BOARD, RESEARCH REPORT NO. 2003-2, EFFECT OF FEWER QUESTIONS PER SECTION ON SAT I SCORES 1 (2003).

takers. As long as these time limits prove to be an issue for some students, the SAT will remain an inequitable assessment.

I. SOME STUDENTS WITH LEARNING DISABILITIES QUALIFY FOR PROTECTION UNDER FEDERAL LAW AND DESERVE ACCOMMODATION ON THE SAT

The exact medical definition of the term “learning disability” prompts considerable debate, and a student with a medically diagnosed learning disability is not automatically a student with a legally recognized disability. This Part first examines learning disabilities as medical phenomena, then applies relevant federal law to determine under what circumstances a student with a learning disability qualifies for federal legal protection. Given that some learning disabilities do qualify for legal protection, students with such disabilities should be granted accommodation on the SAT.

A. *Definition of Learning Disability*

The Individuals with Disabilities Education Act (IDEA)⁶ defines a learning disability as “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”⁷ The “heterogeneity” of this remarkably broad definition, which in effect includes seven different cognitive disorders, “renders diagnostic precision impossible.”⁸ However, more specific standards for actually diagnosing learning disabilities have proved elusive. The President’s Commission on Excellence in Special Education recently found that “[m]any of the current methods of identifying children with disabilities lack validity. As a result, thousands of children are misidentified every year, while many others are not identified early enough or at all.”⁹ Compounding the problem of varying diagnosis methods, cognitive shortcomings such as those mentioned in the IDEA are largely on a continuum, and it is often difficult to distinguish between normal impairment and impairment that constitutes a learning disability.

Until very recently, the most commonly used indicator was that of a significant disparity between ability and achievement, defined as a discrepancy of at least 1.5 standard deviations. However, after recent amendments, the

6. 20 U.S.C. §§ 1400-1482 (2000).

7. *Id.* § 1401(30)(A) (Supp. IV 2004).

8. G. Reid Lyon et al., *Rethinking Learning Disabilities*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 264 (Chester E. Finn, Jr. et al. eds., 2001).

9. PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES* 3, <http://www.ed.gov/inits/commissionsboards/whspecialeducation/reports/pcesefinalreport.pdf> (2002).

Individuals with Disabilities Education Act now states that, in diagnosing a learning disability, “a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability”¹⁰ This modification suggests that local agencies are still *permitted* to use the discrepancy model, but cannot be *forced* to do so, and moreover allows them to rely exclusively on “scientific, research-based intervention.”¹¹ Essentially, the IDEA now gives individual schools even more discretion in diagnosing learning disabilities, which will only lead to greater inconsistency in the standards used.

This Comment does not advocate a particular medical definition of learning disability; rather, it only aims to demonstrate the considerable variability in methods of diagnosis. The more important issue from a legal standpoint is whether, and to what extent, a medically diagnosed learning disability can also qualify as a disability deserving protection under current federal statutory law.

B. Learning Disabilities Under Federal Law

Title III of the ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities.”¹² For plaintiffs with learning disabilities, the obstacle to ADA protection generally has been the showing of substantial limitation. Articulating the major life activity in question as “learning” has proved prohibitive in many cases because the substantial limitation must restrict an individual’s major life activity as to the “conditions, manner, or duration under which [the activity] can be performed in comparison to most people.”¹³ Even if a student is diagnosed with dyslexia or ADHD, as long as his academic achievement is approximately average, his learning cannot be considered substantially limited compared to most people for purposes of establishing a legal disability.¹⁴ Consequently, the

10. 20 U.S.C. § 1414(b)(6)(A) (Supp. IV 2004).

11. *Id.* § 1414(b)(6)(B). “[S]cientific, research-based intervention” involves providing a student with treatment and services for a suspected learning disability and evaluating whether his or her performance improves; improvement is seen as evidence of a learning disability. Frequently, such intervention refers to nothing more scientific than parents and teachers filling out a questionnaire based on their observations of the student’s behavior, then obtaining a prescription for medication from a physician and administering the medication to the child. Craig S. Lerner, *Accommodations for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1068-69 (2004).

12. 42 U.S.C. § 12102(2)(A) (2000).

13. 28 C.F.R. pt. 36 app. B § 36.104 (2004) (DOJ regulations construing ADA); *see also* S. REP. NO. 101-116, at 23 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

14. *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419 (S.D. W.Va. 1997) (holding that the learning of three medical students was not limited in relation to the general population because each plaintiff had graduated from high school and college without

legal definition of disability under the ADA is not coextensive with the medical definition of learning disability, at least with respect to the major life activity of learning. However, courts have sometimes been more receptive to the idea that a plaintiff whose overall learning is not limited is nonetheless limited in more specific major life activities such as reading and writing.¹⁵

Although not all students who are medically diagnosed with learning disabilities qualify for ADA protection, recent court decisions and applicable law support the idea that a subset of all students with learning disabilities—those who are substantially limited with respect to certain activities—also qualify for protection under the ADA. The remainder of the Comment will focus on this ADA-protected group of students.

C. *Accommodation on the SAT*

The ADA explicitly requires accommodation on standardized tests for students with disabilities, stating that “examinations or courses [shall be offered] in a place and manner accessible to persons with disabilities or [the test administrator shall] offer alternative accessible arrangements”¹⁶ The Department of Justice regulations construing the ADA mandate a test-specific approach in clarifying the meaning of “alternative accessible arrangements.” Tests must “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).”¹⁷ Additionally, testing services do not have to provide aids that would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden.”¹⁸

Thus, no matter how severe an individual’s disability, it does not follow that she should be accommodated on every test throughout her life. If a particular aspect of a test’s format negatively impacts a disabled student’s score for reasons unrelated to the skills being assessed, the regulations explain that this negative impact should be minimized through accommodation. If, however, the disadvantage stems from something the test is intended to measure, a right to accommodation does not follow.

On the SAT, students with learning disabilities often struggle to complete the test in the allotted time because they tend to work at slower speeds than

accommodation, ultimately with grades sufficient to matriculate at a medical school); Lerner, *supra* note 11, at 1088.

15. See, e.g., *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 222 F.3d 620, 625 (6th Cir. 2000); *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *aff’d*, 156 F.3d 321 (2d Cir. 1998).

16. 42 U.S.C. § 12189 (2000).

17. 28 C.F.R. § 36.309(b)(1)(i) (2004).

18. *Id.* § 36.309(b)(3).

their peers. Consequently, they request extended time to compensate. However, the fact that the time limit disadvantages students with learning disabilities is not in itself an argument that they should receive the accommodation of extended time. The key question is whether speed is a skill that the SAT “purports to measure” or is merely incidental to the format of the test.

The SAT is supposed to allow colleges to make predictions about students’ first-year college grades. In support of this purpose, ETS has stated that the SAT is “intended to measure skills related to academic ability rather than the rate at which examinees can work,” and that “the speed at which test takers answer the questions should play a minor role, at most, in determining test scores.”¹⁹ Thus, according to the test makers themselves, speed is incidental rather than a “skill . . . that the examination purports to measure,” and the provision of extra time to students with learning disabilities would not “fundamentally alter” the measurement of the skills the SAT attempts to assess.²⁰

Moreover, an unspedded SAT is appropriate because academic success in college does not necessarily require the ability to work quickly. The extent to which professors use speeded exams to assess students varies widely among schools and among subject areas at the same school.²¹ It is true that certain disciplines, particularly the sciences and engineering, do typically use in-class exams (in which speed might or might not be a factor) to determine grades. However, classes in many fields rely heavily or exclusively on untimed assessments, such as papers, for evaluation. Consequently, a student’s inability to work quickly might reasonably dissuade her from undertaking certain majors once she has been admitted to a particular college, but certainly does not preclude her from success in all or even most courses of study. Research has not conclusively determined whether, despite this reality of college curricula, a speeded SAT is a more accurate predictor of first-year grades. However, there is no immediately obvious reason that the SAT needs to be speeded.

Although available research has not completely settled the issue, relevant law and ETS’s assertions weigh in favor of providing extended time on the SAT to students with learning disabilities. However, granting this accommodation raises the more problematic issue of whether extended time

19. Brent Bridgeman et al., *Testing and Time Limits*, R & D CONNECTIONS, Nov. 2004, at 1; see also THE COLLEGE BOARD TECHNICAL HANDBOOK FOR THE SCHOLASTIC APTITUDE TEST AND ACHIEVEMENT TESTS (T.F. Donlon ed., 1984).

20. The text sentence here borrows the phrasing of 28 C.F.R. § 36.309(b)(1)(i), (c)(3). The SAT differs from many other exams, particularly professional school entrance exams such as the LSAT and MCAT, in that speed is not a measured skill. Thus, conclusions about accommodation on the SAT do not necessarily translate to other standardized assessments with different purposes.

21. The issue of whether colleges should be allowed to require students to take timed assessments is a complicated one beyond the scope of this Comment. For a discussion of speeded tests in higher education, see generally MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* (1997).

provides an advantage relative to students who take the test under standard conditions.

II. THE FLAGGING DEBATE

Testing services must balance two competing considerations: providing accommodation to students with disabilities and preserving the validity of the test as an accurate measure of academic ability. This Part introduces evidence that scores achieved under standard and extended time on the SAT are not completely comparable and then discusses problems with the approaches that testing services have used to address the comparability issue.

A. Scores Achieved with and Without Extended Time Are Not Comparable

Even if the SAT is not intended to measure speed, providing learning disabled students with extra time is not a straightforward proposition so long as the exam is in fact speeded. If some nondisabled students would also find this accommodation even minimally useful, the question of score comparability arises. Does the accommodation merely place learning disabled students on a level playing field, or does it actually give them a slight advantage relative to nondisabled students who receive no accommodation?

Available research strongly suggests that most students face at least minimal time pressure on the current version of the SAT. On past standard administrations, researchers simulated extended time accommodation by administering experimental sections (sections that contain problems typical of those throughout the SAT but that do not count toward the student's score) with fewer questions than standard sections.²² By extrapolating their results, researchers found that extra time would translate to a 5-to-10-point improvement on the verbal section and a 20-point increase on the math section.²³ Although small, this difference might be outcome-determinative for some students whose scores are marginal at a particular school.²⁴

Compounding this evidence that extended time creates at least some score inequity is the fact that the College Board must also make arbitrary decisions about how much extra time learning disabled students will be allowed. The Student Eligibility Form, required for students requesting extended time on the SAT, asks whether students receive extra time on school exams in increments of 50% or 100%, and SAT accommodation is generally granted in the same

22. See BRIDGEMAN ET AL., *supra* note 5, at 1.

23. *Id.* at 10.

24. The full impact of extended time also may be greater than the study indicates. Students with learning disabilities who are granted extended time are notified in advance and may adjust their test-taking strategy accordingly; the students in this study were not notified.

increments.²⁵ In contrast to these discrete categories, learning disabilities fall on a continuum. In a perfect world, learning disabled students would receive exactly as much time as necessary to compensate for their specific disabilities without receiving any additional advantage. In reality, however, this perfectly tailored accommodation is impossible to implement, and consequently a slight mismatch between the disability and the accommodation is virtually inevitable.

Finally, other recent research suggests that the SAT scores of students who receive extended time accommodation for their learning disabilities tend to overpredict their first-year college grades. The study in question found that, for such students, SAT scores predicted first-year GPAs that were 0.12 grade points higher on a 4.0 scale than those that students actually achieved.²⁶ The researchers themselves acknowledged that the conclusions that may be drawn from the study are limited because the sample size was small, the groups of learning disabled and nondisabled students were drawn from different populations, and no attempt was made to adjust GPAs for important factors such as class selection. However, if anything, the results indicate that SAT scores achieved with extended time tend to overestimate future academic performance.

Thus, available evidence seems to indicate that, on average, granting extended time increases scores and leads to the SAT slightly overpredicting college grades. This lack of equivalence raises the issue of comparability between accommodated and nonaccommodated scores.

B. *Flagging Was a Poor Solution to the Problem of Comparability*

Until the *Breimhorst* settlement, the College Board addressed the issue of comparability by flagging scores achieved with extended time. Although flagging did not explicitly reveal that a student had a disability, the vast majority of flagged scores were achieved by students with disabilities who had been granted extended time, in most cases to compensate for learning disabilities.²⁷

Current federal law conflicts on the practice of flagging scores. Implementing regulations to Section 504 of the Rehabilitation Act promulgated

25. COLLEGE BD., INSTRUCTIONS FOR COMPLETING THE 2004-2005 *STUDENT ELIGIBILITY FORM* FOR ACCOMMODATIONS ON COLLEGE BOARD TESTS BASED ON DISABILITY 5, http://www.collegeboard.com/prod_downloads/ssd/ssd_eligibility_04_05.pdf (2004) [hereinafter SAT ACCOMMODATION ELIGIBILITY FORM INSTRUCTIONS].

26. CARA CAHALAN ET AL., COLLEGE BOARD, RESEARCH REPORT NO. 2002-5, PREDICTIVE VALIDITY OF SAT I: REASONING TEST FOR TEST-TAKERS WITH LEARNING DISABILITIES AND EXTENDED TIME ACCOMMODATIONS 9-10 (2002).

27. Michael Slipsky has explored this subject in relation to the LSAT and MCAT, and many of the analytical principles carry over to the SAT. Michael Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811, 821-24 (2004).

by the Department of Health, Education and Welfare state that postsecondary educational institutions may not make a "preadmission inquiry as to whether an applicant for admission is a handicapped person."²⁸ Under the plain language of this regulation, flagging violates federal law. Because flagged scores essentially identify students who have disabilities, testing services are in effect facilitating an indirect preadmission inquiry about the applicant's disability.²⁹ However, more than twenty-five years ago, the Office of Civil Rights promulgated regulations that protect both colleges³⁰ and testing services³¹ from lawsuits arising from the use of flagged SAT scores. Despite the fact that these "interim policies" were intended only to shield schools and testing services against litigation until a better solution could be designed, the regulations remain on the books today. The bottom line is that current law offers no clear solution to the question of whether flagging is legal, and final legislative resolution is long overdue.

An unambiguous law would obviously settle the debate, but given that contradictions exist, the more important question is whether flagging actually harms students whose scores are flagged. A study performed in the 1980s found some statistical disparities between actual and expected rates of admission for students with disabilities who submitted flagged scores, but did not conclusively trace this discrepancy to the flags.³² On an individual level, proof of denial of admission based on flagging would be virtually impossible to obtain even if it did occur. College admissions decisions are typically cloaked in secrecy and involve weighing a number of objective and subjective variables. In cases in which the student's application has any deficiencies in addition to the flagged score, courts have not been amenable to imputing discriminatory motives to admissions committees,³³ despite the fact that even the most outstanding *successful* application is bound to have some weaknesses.

28. 34 C.F.R. § 104.42(b)(4) (2004).

29. Although the DOJ regulations construing the ADA (which regulates testing services as public accommodations) do not specifically address the issue of preadmission inquiries, regulations construing Section 504 have generally been viewed as incorporated under Titles II and III of the ADA. See Diana C. Pullin & Kevin J. Heaney, *The Use of "Flagged" Test Scores in College and University Admissions: Issues and Implications Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797, 821 (1997).

30. R. SILVERSTEIN ET AL., DEP'T OF HEALTH, EDUC. AND WELFARE, HANDBOOK FOR THE IMPLEMENTATION OF SECTION 504 OF THE REHABILITATION ACT OF 1975, at 275 (1979).

31. AM. ASS'N OF COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS & AM. COUNCIL ON EDUC., RECRUITMENT, ADMISSIONS, & HANDICAPPED STUDENTS: A GUIDE FOR COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, at 22 (1978); see also Pullin & Heaney, *supra* note 29, at 821.

32. WARREN W. WILLINGHAM ET AL., TESTING HANDICAPPED PEOPLE 109-32 (1988); see also Pullin & Heaney, *supra* note 29, at 817.

33. See, e.g., *Mallett v. Marquette Univ.*, 65 F.3d 170 (7th Cir. 1995).

However, if such injuries are likely to occur despite the difficulty of proving them to a legal certainty, policy considerations alone militate against flagging tests. To assess the possibility of such discrimination, researchers in a study conducted in 2002 mailed questionnaires to college admissions offices and received responses from 175 schools.³⁴ When they saw a flagged score, 72.9% of respondents stated that they assumed the flag indicated a disability, while 23.2% assumed a learning disability (incorrectly, in the latter case, although a majority of flagged scores do indicate learning disabilities).³⁵ These responses show that admissions officers are aware—and, in many cases, overaware—of the implications of a flagged score. Additionally, 2.3% of admissions officials actually indicated a belief that the flag may decrease an applicant's chances for admission.³⁶ Although this group is a small minority, it nonetheless provides concrete evidence that submitting flagged scores may disadvantage some applicants at some schools. Moreover, because half the questionnaires were not returned, the results may be more reflective of schools that care about students with disabilities enough to respond to a questionnaire and are thus more likely to have unbiased admissions practices.

Admissions officers, like all humans, are inevitably bound to hold certain biases, whether consciously or unconsciously. It is this reality that the law prohibiting preadmission inquiry about disability is designed to protect against. As such, it is difficult to deny that flagging conflicts with the spirit of a law designed to prevent stigmatization. Flagging undeniably raises questions about a student's score, and there is no established venue for that student to explain why, specifically, his score was flagged. Moreover, every student would prefer an unflagged score to one with a flag, indicating that the flagged score is inherently less desirable.³⁷ In a legal context, subjective evaluation can only receive so much deference, but a unanimous preference for an unflagged score provides at least some evidence that the flagged score may be objectively less valuable.

Thus, although under current law it is unclear whether flagging was legal, the policy reasons underlying the law raise serious concerns about flagging.

34. See ELLEN B. MANDINACH ET AL., COLLEGE BOARD, RESEARCH REPORT NO. 2002-2, THE IMPACT OF FLAGGING ON THE ADMISSIONS PROCESS: POLICIES, PRACTICES, AND IMPLICATIONS 11 (2002). In presenting the results of the survey, the researchers summarized the overall sentiments of the various groups studied and also included anonymous quotations from specific participants. *Id.*

35. *Id.* at 37.

36. *Id.* at 38.

37. Mark Breimhorst, Presentation to Disability Rights Law class at Stanford Law School (Nov. 18, 2004) (recording on file with author).

C. *Not Flagging Scores Achieved with Extended Time Is Equally Problematic*

Despite the many problems inherent in flagging scores, not flagging scores results in at least as many problems. The most troubling issues include harm to the validity of the SAT, undesirable incentives to seek extended time, exacerbation of the already considerable socioeconomic inequity of the SAT, and backlash against students with legitimate disabilities.

1. *Harm to test validity*

Following the *Breimhorst* settlement, the College Board convened a “Blue Ribbon Panel,” made up of experts on testing, disabilities, and college admissions, to study flagging.³⁸ At the panel’s recommendation, the College Board decided to stop flagging SAT scores as of October 1, 2003.³⁹

The panel did not provide sufficient justification for dropping the flags without modifying the SAT to preserve its validity. The two psychometricians on the panel both acknowledged that flagged and unflagged scores had not been proven comparable, citing the evidence discussed in Part II.A.⁴⁰ In light of this lack of proof, the panel’s recommendation to stop flagging misinterprets the *Standards for Educational and Psychological Testing*.⁴¹ While not “properly viewed as a ‘bible’ for the field of measurement,” these standards do “carry considerable ‘weight.’”⁴² Standard 10.11 states:

When there is credible evidence of score comparability across regular and modified administrations, no flag should be attached to a score. When such evidence is lacking, specific information about the nature of the modification should be provided, if permitted by law, to assist test users properly to interpret and act on test scores.⁴³

This standard stipulates that the burden for providing evidence of comparability lies with the testing services. To act in accordance with this standard, the panel should have reached one of two conclusions given that extended time scores are not proven comparable: either extended time scores should be flagged (although this solution is problematic for the reasons discussed in Part II.B), or the SAT should be modified so that all scores are, in fact, comparable.

38. See NOEL GREGG ET AL., *THE FLAGGING TEST SCORES OF INDIVIDUALS WITH DISABILITIES WHO ARE GRANTED THE ACCOMMODATION OF EXTENDED TIME: A REPORT OF THE MAJORITY OPINION OF THE BLUE RIBBON PANEL ON FLAGGING 2* (2002).

39. College Board Press Release, *supra* note 4.

40. ROBERT L. BRENNAN & DONALD A. SALEH, *FLAGGING SCORES FOR EXTENDED TIME ON COLLEGE BOARD STANDARDIZED TESTS: A MINORITY REPORT 2* (2002).

41. AM. EDUC. RESEARCH ASS’N ET AL., *STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* (1999) [hereinafter *TESTING STANDARDS*].

42. BRENNAN & SALEH, *supra* note 40, at 2.

43. *TESTING STANDARDS*, *supra* note 41, at 108, quoted in GREGG ET AL., *supra* note 38, at 6-7.

The problems caused by the impaired validity of the SAT are best examined from the standpoint of a test user such as a college admissions committee. The primary concern is that nonflagged scores taken with extended time may be less predictive of students' college performance. Admissions officers are concerned about undermining the SAT as an admissions tool: they fear that "[e]liminating the flags will make test scores harder to interpret," "scores will become inflated and therefore less predictive," and that the change will "contaminate the testing process."⁴⁴ Such concerns are justified by available research indicating that the scores of students with learning disabilities who received extended time overpredicted their subsequent academic achievement.⁴⁵ Without further research, the ongoing absence of flags poses troubling and unanswered questions about unmarked scores attained with extra time.

2. *Undesirable incentives to seek diagnosis*

In addition to these validity issues, discontinuing the practice of flagging also creates undesirable incentives. The potential for improper or fraudulent diagnosis leading to accommodation is inevitably greater with a purely cognitive phenomenon such as a learning disability than it is with a physical disability. Prior to the removal of the flags, however, the practice of flagging provided at least some disincentive for a student considering taking the SAT with extended time. Regardless of how admissions committees actually evaluate nonstandard scores, the perception that a flagged score might raise questions could conceivably deter a student who was simply interested in gaining some sort of advantage.

Without flags, however, there is a considerable incentive for students and their parents to seek extended time accommodation, and there are no obvious disincentives. A guidance counselor contemplating the removal of flags predicted that the decision to stop flagging "will open the floodgates to families that think they can beat the system by buying a diagnosis, and getting their kid extra time."⁴⁶ With admissions committees deprived of information about the student, it is unlikely that other stakeholders will have the power or desire to prevent abuse. One commentator observes that "school districts certainly don't have any incentive to limit the number of students who take the SAT with extended time, since higher scores look good to parents, taxpayers, and real estate agents."⁴⁷ One could argue that students themselves might be deterred by negative peer reaction to a questionable extended time accommodation, but in

44. MANDINACH ET AL., *supra* note 34, at 20.

45. CAHALAN ET AL., *supra* note 26, at 9.

46. Tamar Lewin, *Abuse Feared as SAT Test Changes Disability Policy*, N.Y. TIMES, July 15, 2002, at A8.

47. Freedman, *supra* note 3, at 43.

the hypercompetitive world of admissions to elite colleges, the opposite is just as likely to be true. When students see that one of their peers was able to “work the system” to obtain a benefit that they perceive as valuable, they may even feel compelled to seek a similar advantage rather than risk falling even slightly behind.

3. Socioeconomic inequity

Wealthy students have always had innumerable advantages in the college admissions process, ranging from good schools to private tutors to pricey test preparation courses. As a result, social status manifests itself with painful obviousness on the SAT: test scores correlate more highly with family income than any other variable.⁴⁸ The quality of education available to wealthier students undoubtedly explains much of this correlation, but as students increasingly utilize SAT preparation courses, the inability to afford such a course becomes more and more of a disadvantage.⁴⁹

The socioeconomic bias that already pervades the world of test taking has an even greater impact within the sphere of extended time accommodation. Perhaps due to their greater likelihood of having concerned parents and well-trained teachers, wealthy students with learning disabilities are already much more likely to be recognized and diagnosed than their less-privileged peers.⁵⁰ Moreover, securing a trained psychologist to administer a battery of tests and write the comprehensive report necessary to secure extended time can cost upwards of two thousand dollars, which presents a considerable economic barrier for less-affluent students seeking appropriate accommodation.⁵¹

Inappropriate accommodation for the wealthy is an even greater concern. Even before the flags were removed, a study performed in southern California found that in wealthy communities nearly 10% of students taking the SAT received extra time, while not a single student in inner-city regions received

48. Students whose families earn \$10,000 to \$20,000 annually average a score of 897, while students whose families earn \$100,000 annually average 1115. COLLEGE BD., COLLEGE-BOUND SENIORS 2004: A PROFILE OF SAT PROGRAM TEST TAKERS 7, http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2004/2004_CBSNR_tatal_group.pdf (2004); *see generally* Nat'l Ctr. for Fair & Open Testing, FairTest Home, at <http://www.fairtest.org> (last visited Apr. 10, 2005).

49. For example, private tutoring through Kaplan costs \$3399 for 32 hours of tutoring—over \$100 per hour. *See, e.g.*, Kaplan, Inc., Programs, Services, & Events, http://www.kaptest.com/course_options.jhtml?coi=SAT%20I&zip=94306&needeng=false&prodid=null&requestid=131748 (last visited May. 27, 2005) (providing pricing information for test centers in the 94306 zip code).

50. *See* Lerner, *supra* note 11, at 1108.

51. Gross, *supra* note 1. Moreover, neither ETS nor the College Board offers financial assistance for students who cannot afford the cost of getting an evaluation. *See, e.g.*, Educ. Testing Serv., Disabilities and Testing—Frequently Asked Questions, at <http://www.ets.org/disability/faq.html> (last visited Apr. 10, 2005).

any accommodation.⁵² A College Board analysis of accommodation data also revealed that 142 schools, representing less than 1% of the nation's high schools, account for 24% of all accommodation nationwide.⁵³ At one school, 46% of all students taking the SAT received accommodation.⁵⁴ Although it is impossible to know for sure whether some of these students improperly received accommodation, it strains credulity to suggest that even 10% of students, let alone 46%, are learning disabled to such an extent that one of their major life activities is substantially limited relative to most people.

After *Breimhorst*, without any significant disincentives to deter students from obtaining extra time via fraudulent diagnoses, "so-called diagnosis shopping will undoubtedly become even more common among the well-heeled, who can afford the private psychologists and pricey lawyers."⁵⁵ One admissions officer cynically predicted that people in affluent communities will be "beating the bushes finding the charlatans who are already doing a thriving business providing questionable evaluations."⁵⁶ Ironically, it seems likely that *Breimhorst* will have the unintended consequence of further tilting the playing field in favor of the wealthy.

4. Backlash against students with legitimate learning disabilities

The most problematic aspect of discontinuing flagging is the backlash that students with legitimate learning disabilities will inevitably experience in the form of increased skepticism about their impairments. As one admissions officer commented, "it is the disability community who is getting screwed by the manipulation."⁵⁷ If many students are obtaining questionable or outright fraudulent diagnoses, other stakeholders in the educational process will increasingly come to perceive not only these students but also legitimately disabled students as attempting to seek an illicit advantage. Such a perception can only result in increased skepticism, disbelief, and hostility when a legitimately disabled student seeks to disclose information about his disability.

52. See Lerner, *supra* note 11, at 1108-09; Kenneth R. Weiss, *The New Test-Taking Skill: Working the System*, L.A. TIMES, Jan. 9, 2000, at A1.

53. Tamar Lewin, *Disability Requests Reflect Changes in SAT Procedure*, N.Y. TIMES, Nov. 8, 2003, at A10.

54. *Id.*

55. Freedman, *supra* note 3, at 43.

56. MANDINACH ET AL., *supra* note 34, at 14.

57. *Id.* at 20.

III. TESTING SERVICES SHOULD MODIFY THEIR PRACTICES TO BETTER SERVE LEGAL AND FAIRNESS INTERESTS

Moving forward, the current untenable situation created by the *Breimhorst* settlement may be ameliorated in two ways. Part III.A proposes that, given the current format of the SAT, the College Board can curtail fraud and improper accommodation by improving its procedures to ensure that only ADA-eligible students receive accommodation. However, this approach ultimately provides only a partial solution—even if only the students who deserve accommodation receive it, the problem of test validity still remains. As Part III.B discusses, this problem can only be addressed by completely overhauling the format of the test so as to reflect its stated purpose of measuring problem solving rather than speed equally for all students.

A. *Testing Services Should Tighten Eligibility Requirements for Accommodation*

In ensuring that only students who deserve extra time receive it, two separate concerns arise. First, students attempting to obtain extended time for a fraudulent disability obviously should be barred from doing so. Second, students who do have learning disabilities but are not legally eligible for accommodation under the ADA also should not receive extended time.

These concerns are best addressed by closely tailoring accommodation decisions to the requirements of the ADA. To receive accommodation, a student must show that she is “substantially limit[ed] [in] one or more of the major life activities.”⁵⁸ ETS has taken nominal steps toward recognizing this distinction, explicitly stating on its website that while it “grants reasonable accommodations for persons with disabilities as defined by the Americans with Disabilities Act[,] . . . [n]ot every physical or mental impairment meets this definition.”⁵⁹ However, the College Board, which actually grants accommodation on the SAT, does not yet explicitly use the ADA definition as a benchmark.

Following *Breimhorst*, the College Board has attempted to prevent undeserving students from receiving accommodation by adopting much more restrictive guidelines for documenting learning disabilities. Any student whose official education plan has been on file at his school for less than four months or who does not have disability documentation on file at his school must provide full documentation,⁶⁰ and the College Board is now much less deferential to such documentation than it has been in the past.⁶¹ Although more

58. 42 U.S.C. § 12102(2)(A) (2000); see *supra* text accompanying notes 12-15.

59. Educ. Testing Serv., *supra* note 51.

60. SAT ACCOMMODATION ELIGIBILITY FORM INSTRUCTIONS, *supra* note 25, at 4.

61. See Lewin, *supra* note 46.

time is needed to observe trends in accommodation requests, in the short term, these stricter requirements appear to have had the desired deterrent effect: from July 1 to September 30, 2003, despite the impending removal of the flags for the October 2003 SAT, the board received ten percent fewer requests than in the previous year.⁶²

However, for students whose official education plans have been on file for more than four months, the documentation requirements are much more lenient. The *Instructions for Completing the 2004-2005 Student Eligibility Form* state, "If a student receives extended time on school-based tests, and the responsible school official verifies this on the *Student Eligibility Form*, the College Board generally approves the same amount of extended time as the student receives on school-based tests."⁶³ In other words, as long as a student receives extended time at school, the College Board accepts the school's verification that the learning disability merits accommodation—despite evidence that individual school districts use widely varying and frequently inaccurate means of assessing learning disabilities and the fact that the revised IDEA will only worsen existing uncertainties.⁶⁴ By largely deferring to determinations by individual school districts (both well-intentioned and questionably motivated), the College Board leaves open the possibility of accommodation not sanctioned by the ADA.

Testing services should also prevent overuse of extended time accommodation by requiring more specific information about students' learning disabilities and granting accommodation on individual sections of the test rather than on the test as a whole. As explained previously, learning disabilities include a broad spectrum of conditions, and even the presence of one condition legitimately deserving accommodation does not necessarily mean that a student deserves accommodation on all sections of all tests. As of July 1, 2004, ETS has begun providing accommodation on a section-by-section basis depending on the nature of the reported disability.⁶⁵ The College Board does not yet explicitly follow similar procedures. However, the *Student Eligibility Form* does request separate information on whether a student receives extended time on tests requiring reading, writing, mathematical calculations, listening, and speaking, and so it would be relatively easy to incorporate these data into a section-by-section analysis.⁶⁶

The reality is that stricter documentation requirements are an imperfect solution to the problems of fraud and overaccommodation. Students with sufficient resources and determination to procure extended time will probably

62. *Id.*

63. SAT ACCOMMODATION ELIGIBILITY FORM INSTRUCTIONS, *supra* note 25, at 6.

64. *See supra* text accompanying notes 6-11.

65. *See* Educ. Testing Serv., Disabilities and Testing—General Information, at <http://www.ets.org/disability/index.html> (last visited Apr. 10, 2005).

66. SAT ACCOMMODATION ELIGIBILITY FORM INSTRUCTIONS, *supra* note 25, at 5.

be able to do so regardless of the legitimacy of their accommodation requests. Ironically, stricter requirements may actually end up having the greatest impact on legitimately disabled students who are less well-off, since more affluent students are more likely to have savvy parents and teachers who ensure that their learning disabilities are well documented throughout their educational careers.

B. Testing Services Should Modify the SAT to Eliminate Speededness

Tightening documentation requirements and restricting accommodation to students whose learning disabilities actually qualify for ADA protection can prevent much of the abuse of the current system. However, such measures fail to address the more serious problem of score incomparability that creates incentives to obtain extended time in the first place. As long as some students receive more time than others, and some of the students who did not receive extended time would have benefited from it, students who are given as much time as they need will have an advantage, however slight, relative to students who encounter some time pressure. In addition to providing incentives to work the system, this lack of equivalence impairs college admissions officers' faith in the test and their ability to compare students. Moreover, it disadvantages any student who would benefit from more time.

From a fairness perspective, the best solution to this problem is to remove the speed element for everyone, either by making the standard time limit the same as that of the longest accommodation or by offering every student the option of extended time. If we accept the testing services' claim that the SAT is not supposed to measure speed, extending the time limits would not sacrifice any important feature of the test and would have numerous benefits in addition to treating all students equally. From an admissions perspective, the test would better achieve the goal of providing a totally standardized assessment that allows colleges to compare students from very different high schools, and colleges could have confidence that all students took the test under equivalent conditions. This modification would also remove incentives for students to obtain fraudulent diagnoses and, as a result, would moot the eligibility concerns discussed in Part III.A. It would even help remedy the disparate economic impact of the test: if there are economically disadvantaged students with learning disabilities who cannot afford evaluation to receive accommodation, increasing the allotted time would place them on equal footing with wealthier students.⁶⁷ Finally, eliminating the need to review thousands of requests for accommodation annually would have the collateral benefit of reducing administrative and financial burdens on the testing services.

67. See Mark Kelman, *The Moral Foundations of Special Education Law*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 77, 80 (Chester E. Finn et al. eds., 2001).

ETS has recently acknowledged the theoretical advantages of an essentially unsped test. As some of its leading researchers explain, concerns have been raised “over the possibility that nondisabled students may attempt to obtain extended-time accommodations But if evidence suggests that extra time does not improve test taker performance, students would have little or no motivation to manipulate the system to receive extra test-taking time that they’re not entitled to.”⁶⁸

Given this institutional understanding of the psychology of seeking accommodation, one wonders why ETS does not simply offer extended time to any student who requests it, regardless of his or her disability status. Revisions to the content of the SAT in March 2005 removed arcane question types (analogies), incorporated more advanced math concepts, and added a scored writing section consisting of grammar questions and a writing sample.⁶⁹ This much-heralded update would have provided a convenient opportunity to modify the timing construct as well. Rather than pursue this seemingly sensible alternative, however, ETS has instead chosen to continue offering the SAT with a time limit while permitting students with disabilities to seek extensions.

Despite leaving the time limit in place, ETS has paid lip service to the idea of an unsped exam by publicizing field trials of the New SAT which suggest that the math and verbal sections are now almost completely unsped. Researchers administered sections of the New SAT with both 25- and 40-minute time limits, and found that the extra time had virtually no effect on verbal scores and that math scores increased by only about ten points (on a 200-800 scale).⁷⁰ At first glance, these data would seem to negate the concern about score incomparability: if providing extended time doesn’t raise scores, then not providing it doesn’t create inequity. However, the fact that, on average, students’ scores did not improve with extended time does not necessarily indicate that extended time made no difference to anyone; it is entirely possible that the extra time hurt some students and helped others. As long as there is a group of students for which extended time would be beneficial, that group is disadvantaged relative to students who do receive extended time.

More importantly, field trials also suggest that the new writing section—which will be scored on a scale of 200-800 and so will count as much as the other two sections—is in fact still speeded.⁷¹ Extended time allowed students to improve scores by an average of over thirty points, and more than one-third of

68. Bridgeman et al., *supra* note 19, at 1.

69. See generally College Bd., About the SAT Reasoning Test, at <http://www.collegeboard.com/student/testing/sat/about/SATI.html> (last visited Apr. 10, 2005) (describing the new test).

70. BRENT BRIDGEMAN, EDUC. TESTING SERV., SPEEDEDNESS AS A THREAT TO CONSTRUCT VALIDITY 6, http://www.ets.org/research/dload/NCME_2004-Bridgeman.pdf (2004).

71. *Id.*

students did not complete the last several questions on the test in twenty-five minutes. Although ETS noted this effect and stated that “plans are underway to make the final version of this test less speeded,”⁷² extra time might always continue to be useful to students on a minimally structured essay task by allowing them to plan their answers more thoroughly, incorporate more sophisticated analysis, revise syntax, and proofread carefully. Thus, even accepting ETS’s rather questionable contention that the math and verbal sections are now unspeeded, all the comparability concerns addressed in Part II.A of this Comment still apply with at least as much force to the new writing section.

There are no immediately obvious explanations for ETS’s reluctance to make extended time a universal option on the SAT. ETS typically cites a desire to minimize expenses associated with test administrations, such as hourly fees for proctors.⁷³ However, this concern seems somewhat flimsy considering that under the current system many students are already taking extended time administrations, so additional proctors would not necessarily be required. Moreover, the savings that would result from not having to review requests for accommodation would at least partially offset any additional costs. Particularly given that ETS is a “nonprofit” with 2004 revenues of \$825 million,⁷⁴ it is difficult to imagine that wages for proctors actually prohibit making extra time a universal option.

Strictly from the perspective of fairness, the best solution is for ETS to offer extended time to everyone. The separate question of whether the SAT would be as effective at predicting college grades under these conditions remains, as yet, unaddressed. Preliminary research on the New SAT suggests that making the test less speeded does not impair its correlations with some external criteria: when researchers correlated students’ math and verbal scores with self-reported high school grades in math and English, no significant differences in correlation were found between students who took the test under standard and extended time conditions.⁷⁵ These data are hardly conclusive with respect to college grades, but it is encouraging that speed does not increase correlation at least with respect to one external variable. More relevant data on the relationship between scores on the New SAT and college grades obviously will not be available for some time. However, the important point is that even the current SAT is only moderately accurate at predicting students’ first-year college grades.⁷⁶ Thus, even if, hypothetically, a slight loss of predictive ability

72. *Id.*

73. Bridgeman et al., *supra* note 19, at 1.

74. Press Release, Educ. Testing Serv., Thompson Prometric Signs \$1 Billion+ Contract Renewal with ETS, at <http://www.ets.org/news/04100401.html> (Oct. 5, 2004).

75. BRIDGEMAN, *supra* note 70, at 8.

76. Estimates vary; one ETS study found that the SAT had a correlation of .35 with the SAT. BRENT BRIDGEMAN ET AL., COLLEGE BOARD, RESEARCH REPORT NO. 2000-1,

does result from extending the time limit on the SAT, such psychometric concerns must be balanced against the host of serious fairness issues that arise from offering the test in its current speeded format.

Although fairness considerations militate in favor of making extended time universally available on the SAT, and the test's administrators have even recognized the validity of this approach, recent modifications to the SAT fall short of achieving this goal. As long as the timing construct continues to disadvantage a significant number of students, the SAT will remain a flawed and inequitable assessment.

CONCLUSION

This Comment has examined the complicated relationship between learning disabilities and standardized testing. While the settlement of *Breimhorst* resolved some legal and equitable problems surrounding the accommodation of learning disabilities on the SAT, it also created more general concerns regarding the fairness and validity of the test. Fundamentally, the *Breimhorst* controversy and its aftermath emphasize the paramount importance of examining critically the tools our society uses for allocating valuable privileges such as college admission. When assessments such as the SAT appear to cause needless disadvantage to any group of students—not just the disabled—fairness necessitates a particularly careful evaluation of the testing construct. Educational stakeholders will inevitably prompt ETS and the College Board to continue to evaluate the SAT. In reflecting upon the design of their assessment, the testing services would be wise to give priority to ensuring that all students, with and without disabilities, compete on a level playing field during this important step in the college admissions process.