

12-1-2021

The Historical Diagnosis Criterion Should Not Apply: Reasonable Accommodations in Standardized Testing for Individuals with a Later Diagnosis of ADHD

Denise Elliot

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Disability Law Commons](#), [Education Law Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Denise Elliot, *The Historical Diagnosis Criterion Should Not Apply: Reasonable Accommodations in Standardized Testing for Individuals with a Later Diagnosis of ADHD*, 30 J. L. & Pol'y 121 (2021).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol30/iss1/3>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**THE HISTORICAL DIAGNOSIS CRITERION SHOULD
NOT APPLY: REASONABLE ACCOMMODATIONS IN
STANDARDIZED TESTING FOR INDIVIDUALS WITH A
LATER DIAGNOSIS OF ADHD**

*Denise Elliot**

“The Americans with Disabilities Act (ADA) ensures that individuals with disabilities have the opportunity to fairly compete for and pursue such opportunities by requiring testing entities to offer exams in a manner accessible to persons with disabilities.”¹

“If you are someone without ADHD, imagine you are asked to write your name in cursive with your non-dominant hand. At the same time, you are asked to make circles with your right foot, move your left foot side to side, and tap the top of your head with your dominate [sic] hand. Not very easy? That’s how much effort it takes someone with ADHD to do what those without ADHD deem simple and easy.”²

* J.D. Candidate, Brooklyn Law School, 2023. M. Ed., Secondary Special Education & Transition Services, George Washington University, 2019. B.A., Colgate University, 2016. I would like to thank my parents, Gordon and Patricia, my aunt Debbie, and my brothers, Mitch and Joe, for their support and encouragement. A big thanks to the staff and editorial board of the *Journal of Law and Policy* for their meticulous editing and a special thanks to the PAIMI team at Disability Rights New York for encouraging me to pursue disability rights law.

¹ U.S. DEP’T OF JUST. C. R. DIV., ADA REQUIREMENTS TESTING ACCOMMODATIONS 1, (2014), https://www.ada.gov/regs2014/testing_accommodations.pdf (last visited Sept. 18, 2021).

² Anni Rodgers & Wayne Kalyn, *10 Things I Wish the World Knew About ADHD*, ADDITUDE, <https://www.additudemag.com/living-with-adhd-facts/> (last updated Mar. 2, 2021).

“ADHD and exams are two things that shouldn’t exist together. However, they do exist together, and quite likely they always will.”³

There is a growing number of adults being diagnosed with ADHD who were not diagnosed in childhood, misdiagnosed, or primarily exhibited symptoms in adulthood. Notably, most of the later diagnoses of ADHD in adults are individuals pursuing some level of higher education. Some of the reasons posited for this increase in ADHD diagnoses in higher education may be attributed to increased workloads, decreased structural and community supports, misdiagnosis in childhood, masking, and racial and socioeconomic factors that overlook subpopulations like children of color, female-presenting, and gender-nonbinary children with ADHD. Unfortunately, testing agencies that administer college entrance exams, graduate school entrance exams, and professional licensing exams do not make any exceptions to their strict accommodations policies for individuals who receive a later diagnosis of ADHD. Instead, testing agencies continue to require an extensive history of supportive information, including a history of diagnosis criterion (referring to a childhood diagnosis) for individuals with ADHD to prove requests for an accommodation. This Note argues that the history of diagnosis criterion puts individuals with a later diagnosis of ADHD at a disadvantage because they cannot demonstrate that history when they have only recently been diagnosed. This Note calls on the U.S. Department of Justice to issue guidance to testing agencies regarding the subset of individuals with disabilities who have received a later diagnosis of ADHD, specifically advising testing agencies to make an exception to the history of diagnosis requirement for individuals who receive a later diagnosis of ADHD.

³ Tanya J. Peterson, *ADHD and Exams: Test Taking Strategies for ADHD Students*, HEALTHYPLACE, <https://www.healthyplace.com/self-help/adhd/adhd-and-exams-test-taking-strategies-for-adhd-students> (last updated June 19, 2019).

INTRODUCTION

Attention-Deficit/Hyperactivity Disorder, commonly referred to as ADHD, is a neurodevelopmental disorder associated with inattention, hyperactivity, and impulsivity.⁴ Children with ADHD may exhibit some or all of these behaviors, which will often determine which of the three subcategories of ADHD a child is diagnosed with.⁵ Diagnosticians who determine that a child has ADHD must also rule out other potential diagnoses which share similar characteristics to ADHD.⁶ ADHD is “one of the most common neurodevelopmental disorders of childhood” and “often lasts into adulthood.”⁷

According to the Centers for Disease Control and Prevention (“CDC”), one in four adults in the United States—approximately 61 million Americans—live with “some type of disability.”⁸ This makes people with disabilities⁹ one of the largest minority groups

⁴ *Attention-Deficit/Hyperactivity Disorder*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd/index.shtml> (last updated Sept. 2019).

⁵ See *Attention-Deficit/Hyperactivity Disorder (ADHD)*, CDC, <https://www.cdc.gov/ncbddd/adhd/facts.html> (last updated Jan. 26, 2021). See also JAMES MCGOUGH, ADHD 32–33 (2014) (listing three different types of ADHD: Predominantly Inattentive, Predominantly Hyperactive-Impulsive, and Combined).

⁶ See *Attention-Deficit/Hyperactivity Disorder (ADHD)*, *supra* note 5; see also MCGOUGH, *supra* note 5, at 1 (explaining that ADHD can manifest similar symptoms to “anxiety, depression, sleep problems, and certain types of learning disabilities . . .”).

⁷ *Attention-Deficit/Hyperactivity Disorder (ADHD)*, *supra* note 5; see also MCGOUGH, *supra* note 5, at 8.

⁸ *Disability and Health Promotion: Disability Impacts All of US*, CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf (last updated Sept. 16, 2020).

⁹ This Note uses person-first language, but this choice within this piece of writing by no means seeks to determine the label that individual people choose to define themselves. See Tara Haelle, *Identity-First vs. Person-First Language is an Important Distinction*, ASS’N HEALTH CARE JOURNALISTS (July 31, 2019), <https://healthjournalism.org/blog/2019/07/identity-first-vs-person-first-language-is-an-important-distinction/> (discussing the use of person-first language in comparison to identity-first language in health care journalism). See generally NAT’L CTR. ON DISABILITY & JOURNALISM, *Disability Language Style*

in the United States, if not the world.¹⁰ While it seems like a misnomer to label people with disabilities as a minority group if disability is so prevalent, minority status refers to a group's place in a societal hierarchy resulting in "different and unequal treatment" and is not based on numerical value alone.¹¹ In fact, "disability is a universal human condition" because "every person will experience disabilities, temporarily or permanently, at least once in their lifetime."¹² Since disability is experienced broadly, the disability community is incredibly diverse and multi-faceted.¹³ This means that research and solutions for people with disabilities often do not seek, or fail to include, the full spectrum of disabled people.¹⁴ In education research, specifically, researchers who fail to consider intersectionality when looking at disability risk producing "findings [which] can reproduce educational inequalities."¹⁵

In higher education,¹⁶ the number of students with disabilities are likely undercounted. Of all school-aged students, 6.1 million, or 9.4% of students "age[d] 2 to 17[,] are estimated to have ever

Guide, ARIZ. ST. UNIV., <https://ncdj.org/wp-content/uploads/2021/08/NCDJ-STYLE-GUIDE-EDIT-2021-SILVERMAN.pdf> (last updated Summer 2021) (discussing the preference for person-first language while maintaining that individuals should be able to self-identify).

¹⁰ See DEP'T OF ECON. AND SOC. AFF., *Factsheet on Persons with Disabilities*, U.N. (citing to *Disability and Health*, WORLD HEALTH ORG. (Dec. 1, 2020), <https://www.who.int/en/news-room/fact-sheets/detail/disability-and-health>), <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (last visited Oct. 30, 2020); see *Disability and Health Promotion: Disability Impacts All of Us*, *supra* note 8.

¹¹ See RUTH DUNN, MINORITY STUDIES, at 4 (2021) (ebook). See generally Ellen C. Wertlieb, *Minority Group Status of the Disabled*, 48 HUM. REL. 1047, 1047 (1985) (discussing the applicability of the definition of "minority group" status to people with disabilities).

¹² Alfredo J. Artiles, *Fourteenth Annual Brown Lecture in Education Research: Reenvisioning Equity Research: Disability Identification Disparities as a Case in Point*, 48 EDUC. RESEARCHER 325, 326 (2019).

¹³ See Linda R. Shaw et al., *Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender*, 55 REHAB. COUNSELING BULL. 82, 83–84 (2012).

¹⁴ See *id.*

¹⁵ Artiles, *supra* note 12, at 325.

¹⁶ In this article, higher education refers to schooling past high school.

been diagnosed with [ADHD]”¹⁷ The percentage of students in college with ADHD is projected to be between 2% and 8%.¹⁸ For people with disabilities in higher education, Title III of the Americans with Disabilities Act (“ADA”) applies to standardized tests¹⁹ and requires “reasonable modification[s]” be made to “services and locations” so they are “accessible to people with disabilities.”²⁰ Reasonable testing accommodations are meant to help “level the playing field” between students with and without disabilities so that students with disabilities have the same level of access as their peers.²¹ The ADA applies when test-takers can show that “at least one major life activity . . . is substantially limited because of a disability.”²² In relation to standardized test-taking, “major life activities . . . are learning, reading, concentrating, thinking, and communicating.”²³ For people with ADHD, concentrating for the duration of a standardized test is

¹⁷ Anni Rodgers & Wayne Kalyn, *ADHD Statistics: New ADD Facts and Research*, ADDITUDE, <https://www.additudemag.com/statistics-of-adhd/> (last updated June 25, 2021).

¹⁸ George J. DuPaul et al., *College Students with ADHD: Current Status and Future Directions*, 13 J. ATTENTION DISORDERS 234, 234 (2009); see also Children and Adults with Attention-Deficit/Hyperactivity Disorder, *ADHD and Long-Term Outcomes*, CHADD, <https://chadd.org/about-adhd/long-term-outcomes/> (last visited Nov. 1, 2020) (observing that according to the 2014 National Center for Education Statistics there could be “between 412,856 and 1,651,425 students with ADHD enrolled in college in 2012”). It is important to note that these statistics are a range because reports of ADHD in higher education need to be self-reported and many students with an ADHD diagnosis during K-12 may not choose to disclose this diagnosis in college or attend college.

¹⁹ 42 U.S.C. § 12189 (2018).

²⁰ Haley Moss, *Extra Time is a Virtue: How Standardized Testing Accommodations After College Throw Students with Disabilities Under the Bus*, 13 ALB. GOV’T L. REV. 201, 207 (2019).

²¹ *Id.* at 208 (citing MARTHA L. THURLOW ET AL., TESTING STUDENTS WITH DISABILITIES: PRACTICAL STRATEGIES FOR COMPLYING WITH DISTRICT AND STATE REQUIREMENTS 30 (2d ed. 2003)).

²² *Id.* at 211 (citation omitted).

²³ *Id.*

incredibly difficult and can be ameliorated by extra time or testing breaks.²⁴

This Note focuses on the subsection of the disability community that attends or seeks to attend some level of postsecondary school and identifies as having ADHD. Many school-aged individuals with disabilities may be eligible for testing accommodations, but not all seek these testing accommodations.²⁵ For students with a diagnosis of ADHD, extended time is one of the most common test-taking accommodations.²⁶ Other common accommodations for ADHD include, but are not limited to, a quiet or isolated room and additional test breaks.²⁷

Testing agencies have the discretion to determine the required documentation to receive an accommodation. To receive a testing accommodation for ADHD, a student may be asked to provide

²⁴ Emin Gharibian, *Learning Disabilities & Academic Accommodations: Everything You Wanted to Know About Getting Academic Accommodations on Standardized Tests*, VERDUGO PSYCH. ASSOCS., <https://verdugopsych.com/learning-disabilities-and-academic-accommodations-standardized-tests/> (last visited Nov. 8, 2020).

²⁵ See National Center for Education Statistics, *Students with Disabilities*, https://nces.ed.gov/programs/coe/pdf/coe_cgg.pdf (last visited Oct. 30, 2020) (finding that in the 2018-19 school year, 7.1 million students, or 14% of students aged three to twenty-one attending public schools received services under the Individuals with Disabilities Education Act). This statistic does not represent students with disabilities who receive services under Section 504 of the Rehabilitation Act, private school, homeschool, or students who receive informal accommodations. See National Center for Education Statistics, *Students with Disabilities*, [https://nces.ed.gov/fastfacts/display.asp?id=60#:~:text=The%20percentage%20of%20undergraduates%20having,%2Dolds%20\(18%20percent\).&text=The%20percentage%20of%20postbaccalaureate%20students,for%20undergraduates%20\(19%20percent\)](https://nces.ed.gov/fastfacts/display.asp?id=60#:~:text=The%20percentage%20of%20undergraduates%20having,%2Dolds%20(18%20percent).&text=The%20percentage%20of%20postbaccalaureate%20students,for%20undergraduates%20(19%20percent)) (last visited Oct. 30, 2020) (finding that in the 2015-16 school year, 19.4% of students enrolled in undergraduate schools reported having a disability and 11.9% of postbaccalaureate students reported having a disability). In postsecondary education, students must self-disclose if they have a disability, which likely means that students with disabilities are underrepresented.

²⁶ See Alison Esposito Pritchard et al., *Academic Testing Accommodations for ADHD: Do They Help?*, 21 LEARNING DISABILITIES: A MULTIDISCIPLINARY J. 67, 68 (2016); DuPaul et al., *supra* note 18, at 245.

²⁷ Nicole Ofiesh et al., *Voices of University Students with ADHD About Test-taking: Behaviors, Needs, and Strategies*, 28 J. OF POSTSECONDARY EDUC. & DISABILITY 109, 109 (2015).

documentation including: “[r]ecommendations of qualified professionals; [p]roof of past testing accommodations; [o]bservations by educators; [r]esults of psycho-educational or other professional evaluations; [a]n applicant’s history of diagnosis; and [a]n applicant’s statement of his or her history regarding testing accommodations.”²⁸ The history of diagnosis criterion refers to the request that a test-taker show a diagnostic history of a disability in their application for an accommodation.²⁹ This criterion is often requested in testing accommodations for ADHD because standardized testing agencies are trying to “prevent abuse of the accommodation system.”³⁰

Due to the potential for later diagnoses and adult forms of ADHD, accommodations for standardized tests should not require documentation of a history of diagnosis for test-takers who are recently diagnosed with ADHD. While ADHD is seen as “over-diagnosed,”³¹ the reality for some populations (like females and minority groups) is that ADHD is underdiagnosed or diagnosed later in adolescence or early adulthood.³² Individuals who are not diagnosed with ADHD before the age of 12, or whose symptoms of ADHD do not manifest before the age of 12, do not meet the criteria for ADHD under the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) used by the American Psychiatric Association.³³ A growing number of experts recognize that there is

²⁸ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 5.

²⁹ See Moss, *supra* note 20, at 215 (explaining how the history of diagnosis requirement is needed to acquire accommodations, therefore, to acquire accommodations at the post-secondary level, a history of diagnosis from as early as elementary school is needed).

³⁰ *Id.* at 213.

³¹ *Id.*

³² See Neha M. Sampat & Esme V. Grant, *The Aspiring Attorney with ADHD: Bar Accommodations or a Bar to Practice?*, 9 HASTINGS RACE & POVERTY L.J. 291, 292–93 (2012) (discussing populations that are less likely to receive an ADHD diagnosis in childhood); John D. Ranseen, *Reviewing ADHD Accommodations Requests for the Bar Exam: What Has and Has Not Changed over 20 Years*, 85 BAR EXAMINER 10, 14 (2016).

³³ See AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 314 (5th ed. 2013) [hereinafter DSM-5].

an adult form of ADHD.³⁴ For this subpopulation of individuals with ADHD, the history of diagnosis requirement is impossible to produce because the student only recently received a diagnosis of ADHD.³⁵ The case-by-case nature of each accommodation evaluation allows requests to be rejected for not showing enough support, including a lack of a history of diagnosis, subject to the opinion of the evaluator³⁶ who may not be aware of this subpopulation of students with ADHD.

Individuals with disabilities who receive a later diagnosis of ADHD should not have to provide a history of their diagnosis of ADHD for testing accommodations on standardized tests. Students who are diagnosed later or who are misdiagnosed during their childhood should not have to prove something for which no acceptable evidence is available due to the timing of their diagnosis. Testing agencies should make an exception to the history of diagnosis criterion for individuals who receive a later diagnosis for ADHD, and the Department of Justice should provide guidelines to improve the process testing agencies use to decide on accommodation requests by test-takers with ADHD.

Part I of this Note explains why some test-takers with ADHD are diagnosed later in adolescence and early adulthood and the way broader societal discrimination influences individual ADHD diagnoses. Part II analyzes how previous exceptions to testing accommodation requirements came to exist, focusing on the issue

³⁴ See Jessica C. Agnew-Blais et al., *Evaluation of the Persistence, Remission, and Emergence of Attention-Deficit/Hyperactivity Disorder in Young Adulthood*, 73 JAMA PSYCHIATRY 713, 714 (2016); Arthur Caye et al., *Attention-Deficit/Hyperactivity Disorder Trajectories from Childhood to Young Adulthood: Evidence from a Birth Cohort Supporting a Late-Onset Syndrome*, 73 JAMA PSYCHIATRY 705, 709–11 (2016).

³⁵ See Moss, *supra* note 20, at 214.

³⁶ Testing agencies hire evaluators to assess the merits of accommodation claims from individuals with disabilities who apply to receive testing accommodations. See, e.g., *Documentation Guidelines: ADHD*, COLL. BD., <https://accommodations.collegeboard.org/request-accommodations/provide-documentation/by-disability/adhd> (last visited Nov. 4, 2020) (the College Board administers the PSAT, APs and SAT); *Policy for Requesting Accommodations for the ACT Test*, ACT, <https://www.act.org/content/act/en/products-and-services/the-act/registration/accommodations/policy-for-accommodations-documentation.html> (last visited Nov. 4, 2020).

of the unfair penalization of students for prior academic success and the flagging of test scores. Part III of this Note describes the current state of standardized testing accommodations for test-takers with disabilities generally and test-takers with ADHD specifically. Finally, Part IV proposes a narrow exception to the history of diagnosis criterion (“HDC”) for test-takers who are diagnosed with ADHD later in adolescence or early adulthood and therefore cannot prove a history of their ADHD diagnosis.

I. DIAGNOSING ATTENTION-DEFICIT/HYPERACTIVITY DISORDER

While ADHD is often characterized as a childhood disability,³⁷ there is growing scholarship regarding later in life diagnosis of ADHD and even adult ADHD.³⁸ There are several reasons why ADHD may be diagnosed after childhood, including misdiagnosis and masking.³⁹ ADHD diagnosis is further complicated when looked at through the lenses of gender, race, socioeconomic status, and culture.

A. ADHD Diagnostic Criteria in the DSM-5

The Diagnostic and Statistical Manual of Mental Disorders (DSM-5)—the standard authority by which “health care professionals in the United States and much of the world” diagnose disorders such as ADHD⁴⁰—requires a diagnosis of ADHD to be

³⁷ See DSM-5, *supra* note 33 (requiring that for a diagnosis of ADHD in adults, listed symptoms must begin during childhood before the age of 12).

³⁸ See Agnew-Blais et al., *supra* note 34, at 714 (“To date, adult attention-deficit/hyperactivity disorder (ADHD) has been conceptualized as a continuation of childhood ADHD. However, recent findings have suggested that, for some individuals, ADHD may not arise until adolescence or adulthood . . .”); see also Caye et al., *supra* note 34, at 709–11 (distinguishing between childhood ADHD, young adulthood ADHD, and adulthood ADHD).

³⁹ See discussion *infra* Part I, Section B.

⁴⁰ American Psychiatric Association, *DSM-5: Frequently Asked Questions*, PSYCHIATRY, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> (last visited Nov. 6, 2020); Cf. Lisa Fritscher, *Advantages and Disadvantages of the Diagnostic Statistical Manual*, VERYWELLMIND (last updated June 19, 2020), <https://www.verywellmind.com/dsm-friend-or-foe-2671930> (discussing how the DSM is beneficial in that in

based on evidence of ADHD before the age of 12.⁴¹ As psychologists continue to study ADHD, there is a growing understanding that the DSM-5's cutoff age for the onset of ADHD may be inaccurate. For example, adult ADHD, which does not present during childhood, gained traction with psychologists in 2014, a year after the latest DSM-5 was published.⁴² The American Psychiatric Association has called the DSM a "living document,"⁴³ and has specifically cautioned against using it as a legal standard because of its inherent ambiguity and flexibility.⁴⁴ Accordingly, while the DSM-5 is an important tool for diagnosing ADHD in childhood, it does not accurately reflect the full spectrum of how ADHD presents in different individuals and at different ages.

B. Reasons for a Later Diagnosis of ADHD

A mischaracterization or misdiagnosis of ADHD symptoms is one of the two predominant reasons why a person receives their ADHD diagnosis after childhood.⁴⁵ ADHD is commonly comorbid, which means it is present along with other diagnoses.⁴⁶ The "core ADHD symptoms can be nonspecific symptoms of many other psychological disorders."⁴⁷ Some of the most common

creates standardization and simplifies the process of diagnosis for "mental disorders" but is faulty in that it oversimplifies and incorrectly diagnoses the "unique human element" and involves stigmatization, including the choice of wording in "disorder").

⁴¹ See DSM-5, *supra* note 33.

⁴² See Ranseen, *supra* note 32, at 12.

⁴³ See Mark Moran, *Portal Now Open for Making DSM a 'Living Document'*, PSYCHIATRIC NEWS (Dec. 30, 2016), <https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2017.1a6>; Michael B. First, *Psychiatry's List of Disorders Needs Real-Time Updates*, STAT NEWS (Dec. 12, 2016), <https://www.statnews.com/2016/12/12/psychiatry-dsm-update/>.

⁴⁴ Ashley Yull, *The Impact of Race and Socioeconomic Status on Access to Accommodations in Post-Secondary Education*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 353, 385 (2015).

⁴⁵ See Jeanette Wasserstein, *Diagnostic Issues for Adolescents and Adults with ADHD*, 61 J. CLINICAL PSYCH. 535, 541 (2005).

⁴⁶ *Id.*

⁴⁷ *Id.* at 541; see also Sumathi Reddy, *Can Adults Get a Different Kind of ADHD?*, WALL ST. J. (May 23, 2016), <https://on.wsj.com/2pb2rD5> (explaining

comorbidities include, but are not limited to, anxiety, depression, and substance use disorders, which are not only related to ADHD but also linked to a wide variety of disabilities.⁴⁸ This can lead to ADHD being misdiagnosed because diagnosticians assume that these “nonspecific” ADHD symptoms are symptoms of another diagnosis.⁴⁹ When ADHD is present with these other diagnoses, it is easy for diagnosticians to overlook diagnosing a child with ADHD.

Masking is another reason why individuals receive a late diagnosis of ADHD.⁵⁰ Masking refers to the ways that people hide their symptoms of ADHD through “adaptive or compensatory skills.”⁵¹ Common masking strategies include benign behaviors like creating organizational systems that include to-do lists and alarms⁵² and potentially riskier behaviors like self-medication.⁵³ Masking behaviors may differ depending on whether an individual has ADHD that presents as hyperactive-impulsive, inattentive, or a

that one reason individuals are not identified as having ADHD earlier is because they “actually have other disorders that can have similar symptoms to ADHD . . .”).

⁴⁸ See Wasserstein, *supra* note 45, at 541 (listing that comorbidities include “substance abuse [and] antisocial behavior” in addition to depression and anxiety).

⁴⁹ See *id.* (stating that since many symptoms of ADHD can also be symptoms of other psychological disorders, part of the process of diagnosing ADHD includes ruling out other psychological disorders).

⁵⁰ Reddy, *supra* note 47.

⁵¹ *Impact of ADHD*, ADHD INST. (Mar. 2021), <https://adhd-institute.com/burden-of-adhd/impact-of-adhd/>.

⁵² See Kate Kysow et al., *The Use of Compensatory Strategies in Adults with ADHD Symptoms*, 9 ADHD ATTENTION DEFICIT & HYPERACTIVITY DISORDERS 73, 77 (2017) (listing categories for coping with ADHD such as “adaptation,” “paying attention,” “organization,” “external support,” and “avoidance,” and including examples of each such as moving from project to project, making to-do lists, setting alarms, relying on others, or avoiding long lines in stores, among other things).

⁵³ See Carlos Canela et al., *Skills and Compensation Strategies in Adult ADHD – A Qualitative Study*, 12 PLOS ONE 1, 9, 12 (Sept. 27, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5617155/> (explaining that some individuals with ADHD reported self-medication including nicotine use or common stimulants like caffeine along with more risky substance use).

combination of the two.⁵⁴ Hyperactive-impulsive ADHD typically presents as a person who is “fidgety, always on the go, interrupt[s] others, feel[s] restless, talk[s] a lot, make[s] snap decisions, [has] mood swings, and [is] impatient.”⁵⁵ Hyperactive-impulsive ADHD is what is traditionally—and stereotypically—thought of as the disorder. Inattentive type ADHD often presents internally where a person may struggle “to focus, pay attention to details, stay organized, listen, and remember things.”⁵⁶ People who “mask” their ADHD tend to show fewer stereotypical signs of ADHD and find alternative solutions to some of the problems encountered by people with ADHD. For inattentive type ADHD and females with ADHD, masking may be as simple as being quiet at school, which often causes a child to be overlooked in ADHD diagnoses.⁵⁷ As a consequence of masking, students may not be detected during childhood and only reach out for help once they reach secondary education because their alternative solutions no longer work effectively.⁵⁸

⁵⁴ See *What is ADHD?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/adhd/facts.html> (last updated Jan. 26, 2021) (describing the three types of ADHD as “predominantly inattentive presentation,” which includes being easily distracted or forgetful, “predominantly hyperactive-impulsive presentation,” which includes fidgeting, restlessness, and potentially inappropriate behavior, and “combined presentation”).

⁵⁵ Keath Low, *How ADHD Symptoms Commonly Present in Women*, VERYWELLMIND, <https://www.verywellmind.com/add-symptoms-in-women-20394> (last updated Sept. 1, 2021).

⁵⁶ *Id.*

⁵⁷ See Wasserstein, *supra* note 45, at 537–38.

⁵⁸ *Id.*; see also Reddy, *supra* note 47 (“Dr. Jaksa estimates that a bit more than half of his adult patients with ADHD were not diagnosed as children. Many of his patients, he says, excelled in school while at home. But once they get to college and are on their own, they aren’t able to keep up because they lack the organizational skills needed to succeed.”).

C. Societal Factors Complicating ADHD Diagnosis

Further complicating the diagnosis of individuals with ADHD are the intersections of race, class, and gender.⁵⁹ In the education sphere, there is disagreement over whether data of K-12 students shows an overrepresentation⁶⁰ or underrepresentation⁶¹ of students with disabilities according to race.⁶² Much of the educational research finding overrepresentation thus far has focused on

⁵⁹ See generally Dara Shifrer et al., *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language*, 44 J. LEARNING DISABILITIES 246 (2011) (discussing the disproportionate identification of various socio-demographic groups with learning disabilities, though not ADHD specifically).

⁶⁰ See Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)Segregated Education*, 107 TCHRS. COLL. REC. 453, 454 (2005) (finding that “Black students are overrepresented in nine of thirteen disability categories”); see also Russell J. Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 EXCEPTIONAL CHILD. 411, 411 (2006) (finding that African American students are overrepresented in five disability categories, not including ADHD).

⁶¹ See Paul L. Morgan et al., *Racial and Ethnic Disparities in ADHD Diagnosis from Kindergarten to Eighth Grade*, 132 PEDIATRICS 85, 90 (2013) (finding that “racial/ethnic minority children are much less likely than otherwise identical white children to receive an ADHD diagnosis.”); see also Paul L. Morgan et al., *Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools*, 46 EDUC. RESEARCHER 305, 306 (2017) [hereinafter *Replicated Evidence*] (reaffirming that recent research supports that “race and ethnic minority children may instead be under-identified as having disabilities”). See also Philip Asherson et al., *Under Diagnosis of Adult ADHD: Cultural Influences and Societal Burden*, 16 J. ATTENTION DISORDERS 20S, 20S (2012) (“There is a clear bias toward under diagnosis [of ADHD] in minorities.”).

⁶² See *Replicated Evidence*, supra note 61, at 307 (finding that under identification is further complicated because the U.S. Department of Education “expressly states that underidentification based on race or ethnicity is discriminatory and a civil rights violation.”); see also Benjamin Zablotsky & Josephine M. Alford, *Racial and Ethnic Differences in the Prevalence of Attention-Deficit/Hyperactivity Disorder and Learning Disabilities Among U.S. Children Aged 3-17 Years*, NCHS DATA BRIEF NO. 358 1, 2 (2020), <https://www.cdc.gov/nchs/data/databriefs/db358-h.pdf> (finding that the prevalence of ADHD identification differs based on race).

learning disabilities,⁶³ and, therefore, may not be applicable to ADHD specifically.⁶⁴ This disagreement about over- or under-identification is further complicated by socioeconomic factors like intergenerational poverty,⁶⁵ school district funding,⁶⁶ and the state in which a student resides.⁶⁷ While scholars are confident that race has some bearing on diagnoses, more studies need to be specifically dedicated to racial disparities in ADHD diagnoses in children to understand how diagnosticians can and should recognize and identify ADHD in students of color.

Additionally, some scholars explain that disability diagnostic criteria “are based on male norms, such that the ‘good’ behavior of girls leads to their under-identification.”⁶⁸ Females are more likely to have inattentive type ADHD, which often causes them to be

⁶³ See Zawn Villines, *ADHD: Is it a Learning Disability?*, MED. NEWS TODAY (June 13, 2021), <https://www.medicalnewstoday.com/articles/is-adhd-a-learning-disability> (explaining that even though ADHD can affect learning, it is not a learning disability, though ADHD is often comorbid with learning disabilities).

⁶⁴ See generally Dara Shifrer et al., *supra* note 59 (discussing the overrepresentation of students with learning disability by minority status, gender, and socioeconomic status).

⁶⁵ Artiles, *supra* note 12, at 329.

⁶⁶ See *Replicated Evidence*, *supra* note 61, at 318 (noting that “greater exposure to poverty as well as living in lower-resourced inner cities” may explain the overrepresentation of “minority children[]” in special education).

⁶⁷ Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/> (explaining that “[s]pecial education identification practices vary widely across and within states and districts . . .”).

⁶⁸ Shifrer et al., *supra* note 59, at 246; see also Patricia O. Quinn & Manisha Madhoo, *A Review of Attention-Deficit/Hyperactivity Disorder in Women and Girls: Uncovering This Hidden Diagnosis*, 16 THE PRIMARY CARE COMPANION FOR CNS DISORDERS PCC.13r01596 (Oct. 13, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4195638/?report=reader> (discussing the reasons that females are overlooked in ADHD diagnosis); Joseph Biederman et al., *Influence of Gender on Attention Deficit Hyperactivity Disorder in Children Referred to a Psychiatric Clinic*, 159 AM. J. PSYCHIATRY 36, 36–39 (2002) (finding that females with ADHD have “different clinical presentations” than males).

overlooked in early childhood diagnosis.⁶⁹ This means that, because of the focus on male-stereotypical ADHD in diagnostic criteria, many females and gender non-binary children may be overlooked.⁷⁰ Not surprisingly this leads to more females and gender non-binary individuals seeking a diagnosis of ADHD later in adolescence or early adulthood, which partially explains why individuals diagnosed with late-onset ADHD are “more likely to be female.”⁷¹ While it is more likely for males to be diagnosed with ADHD during childhood, rates of adults with ADHD are more equally divided by gender.⁷²

II. ACCOMMODATION GUIDELINES FOR STANDARDIZED TESTING AGENCIES

Standardized testing agencies continue to evolve in how they evaluate accommodations requests. Before the ADA was passed in 1990, testing agencies were not required to provide reasonable accommodations to test-takers with disabilities.⁷³ In 2010, twenty years after the passage of the ADA, the Department of Justice (“DOJ”) “published revised final regulations implementing the ADA regarding testing agencies” which helped to “clarify and refine issues that [had] arisen” and “contain[ed] new and updated

⁶⁹ See Wasserstein, *supra* note 45, at 537–38; see also Biederman et al., *supra* note 68, at 38–39

⁷⁰ See Quinn & Madhoo, *supra* note 68 (explaining that females tend to be compared to “male classmates” as opposed to other females, resulting in fewer ADHD diagnoses for females); see also Biederman et al., *supra* note 68, at 36, 39 (finding that when females were compared to stereotypical male ADHD behaviors, females were underdiagnosed with ADHD).

⁷¹ Agnew-Blais et al., *supra* note 34, at 718.

⁷² Meadow Schroeder, *Fourteen Signs Your Daughter May Have ADHD*, THE CONVERSATION (Nov. 16, 2017), <https://theconversation.com/fourteen-signs-your-daughter-may-have-adhd-86377> (citing to Nancy L. Nussbaum, *ADHD and Female Specific Concerns: A Review of the Literature and Clinical Implications*, 16 J. ATTENTION DISORDERS 87, 88 (Oct. 5, 2011)).

⁷³ See 42 U.S.C. § 12189 (2008); Dustin Shullick, *The Americans with Disabilities Act (ADA) and Testing Accommodations*, THE PROFESSIONAL TESTING BLOG (July 11, 2017), <http://www.proftesting.com/blog/2017/07/11/americans-disabilities-act-ada-testing-accommodations/>.

requirements.”⁷⁴ In 2014, the DOJ published further guidelines concerning “technical assistance on testing accommodations . . . [to] address[] the obligations of testing entities”⁷⁵ The combined guidance from the DOJ has helped to define what practices are not acceptable means of assessing accommodations for people with disabilities on standardized tests ranging from college entrance exams like the SAT and ACT to professional licensing exams like the Multistate Bar Exam (MBE) or the United States Medical Licensing Examination (USMLE).⁷⁶ The DOJ has deemed two practices unacceptable: the history of flagging the test scores of test-takers with disabilities and denying requests for accommodations because of prior academic success.⁷⁷

A. *The History of Flagging Test Scores*

Prior to the early 2000s, standardized testing agencies regularly flagged the test scores of test takers with accommodations.⁷⁸ According to the DOJ, “[f]lagging’ is the policy of annotating test scores or otherwise reporting scores in a manner that indicates the exam was taken with a testing accommodation.”⁷⁹ Essentially, flagging adds an asterisk next to the student’s score and tells an admissions office that the student took the test with an accommodation. In a series of court cases against different testing agencies, plaintiffs argued that the practice of flagging discriminated against test-takers with disabilities.⁸⁰ For example, “[i]n the overwhelming majority of admissions offices, postsecondary program admission officers inherently believed that a flag was indicative of a disability”⁸¹ In this way, flagging allowed postsecondary schools to “particularly identify students

⁷⁴ See Shullick, *supra* note 73.

⁷⁵ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1.

⁷⁶ See *id.* at 2.

⁷⁷ See *id.* at 3, 8.

⁷⁸ See Moss, *supra* note 20, at 217.

⁷⁹ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1.

⁸⁰ See Moss, *supra* note 20, at 217 (discussing the use of flagging and how the practice is discriminatory against students with disabilities).

⁸¹ *Id.*

with disabilities during the admissions process, which is prohibited under federal regulations.”⁸²

In 2000, *Breimhorst v. Educational Testing Service*⁸³ served as the death knell for flagging.⁸⁴ In *Breimhorst*, a plaintiff without hands took the Graduate Management Admission Test (GMAT) with accommodations allowing the use of a computer and extra time.⁸⁵ The plaintiff alleged that the Educational Testing Service (ETS) score report, which flagged his score with the note “[s]cores obtained under special conditions,” discriminated against test-takers with disabilities.⁸⁶ Following this case, the ETS, which administers graduate school admissions exams like the Graduate Record Exam (GRE) and GMAT, agreed to stop flagging test scores on their exams.⁸⁷

In 2002, the College Board followed suit and announced that it would stop flagging test scores on the Preliminary SAT (PSAT), Advanced Placement (AP) exams, and the SAT beginning in 2003.⁸⁸ The American College Test (ACT) announced its decision to stop flagging test scores shortly thereafter, but also announced heightened standards for receiving accommodations in an effort to curb abuse.⁸⁹ The Law School Admission Council (LSAC)

⁸² *Id.* at 220 (citing to 34 C.F.R. § 104.42(b)(4)).

⁸³ *Breimhorst v. Educ. Testing Serv.*, No. C-99-CV-3387, 2000 WL 34510621, at *1 (N.D. Cal. Mar. 27, 2000).

⁸⁴ *See id.*; *see also* Moss, *supra* note 20, at 218 (“Flagging began coming to its abrupt end in 2000 with the landmark case *Breimhorst v. Educational Testing Service.*”).

⁸⁵ *See Breimhorst*, 2000 WL 34510621, at *1–2.

⁸⁶ *Id.*

⁸⁷ *See* Kenneth R. Weiss, *Firm Agrees to Stop Flagging Disabled Students’ Test Scores*, L.A. TIMES (Feb. 8, 2001), <https://www.latimes.com/archives/la-xpm-2001-feb-08-mn-22757-story.html#:~:text=The%20Educational%20Testing%20Service%20announced,by%20colleges%20and%20graduate%20schools;Moss, supra note 20, at 218>.

⁸⁸ *See* Tamar Lewin, *Abuse Feared as SAT Test Changes Disability Policy*, N.Y. TIMES (July 15, 2002), <https://www.nytimes.com/2002/07/28/us/act-ends-flags-on-test-scores-of-the-disabled.html?searchResultPosition=1>; Moss, *supra* note 20, at 218.

⁸⁹ *See* Tamar Lewin, *ACT Ends Flags on Test Scores of the Disabled*, N.Y. TIMES (July 28, 2002), <https://www.nytimes.com/2002/07/28/us/act-ends-flags-on-test-scores-of-the-disabled.html?searchResultPosition=1>; *see also* Moss,

originally decided to retain the practice of flagging test scores in 2003,⁹⁰ but changed course in 2014, agreeing to stop flagging Law School Admission Test (“LSAT”) scores in a settlement agreement with the California Department of Fair Employment and Housing.⁹¹ In this settlement, unlike the ACT, the “LSAC also agreed to streamline the accommodation process . . . [which] would almost automatically grant accommodations to any disabled test-taker who had previously received an accommodation on another standardized test relating to postsecondary school admissions”⁹² Following *Binno v. ABA*,⁹³ the LSAC is in the process of removing the logic games section from the LSAT, which requires diagramming to solve complex analytical reasoning questions. In *Binno*, the plaintiff, a blind man, sued the American Bar Association (“ABA”), arguing that “his disability made the visual and spatial reasoning of the LSAT logic games virtually impossible.”⁹⁴ While the Sixth Circuit dismissed the plaintiff’s claims for naming the ABA instead of LSAC,⁹⁵ the LSAC did announce in October 2019 that it will remove the logic games section from the LSAT over a period of four years, or by October 2023.⁹⁶ Finally, in 2015, the Medical College Admissions Test (“MCAT”) announced that it would end flagging by 2016.⁹⁷

supra note 20, at 219 (“[The] ACT decided independently of the SAT lawsuit to stop the flagging practices, but it also increased the standards necessary to receive accommodations . . .”).

⁹⁰ See Moss, *supra* note 20, at 220–21.

⁹¹ See Press Release, *Law School Admission Council Agrees to Systematic Reforms and \$7.73 Million Payment to Settle Justice Department’s Nationwide Disability Discrimination Lawsuit*, DEP’T OF JUST. (May 20, 2014), <https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice>; Moss, *supra* note 20, at 217, 221.

⁹² Moss, *supra* note 20, at 223–24.

⁹³ See *Binno v. ABA*, 826 F.3d 338 (6th Cir. 2016); Staci Zaretsky, *Major Changes Coming to the LSAT with Removal of Logic Games Section*, ABOVE THE LAW (Oct. 8, 2019, 1:43 PM), <https://abovethelaw.com/2019/10/major-changes-coming-to-the-lsat-with-removal-of-logic-games-section/>.

⁹⁴ Moss, *supra* note 20, at 227.

⁹⁵ See *Binno*, 826 F.3d at 348.

⁹⁶ See Moss, *supra* note 20, at 227; see also Zaretsky, *supra* note 93.

⁹⁷ See Moss, *supra* note 20, at 226.

The DOJ issued guidelines in 2014 to “clarify and refine issues that have arisen” since the creation of the ADA regarding testing accommodations.⁹⁸ It explained that the practice of flagging discriminates against test-takers with disabilities because “[f]lagging announces to anyone receiving the exam scores that the test-taker has a disability and suggests that the scores are not valid or deserved” and actually works to “discourage[] test-takers with disabilities from exercising their right to testing accommodations under the ADA for fear of discrimination.”⁹⁹ Though most standardized testing agencies had already agreed to end the practice of flagging by 2014, the DOJ also explicitly condemned the practice of flagging as incompatible with the purpose of the ADA.¹⁰⁰ The DOJ advised that “[t]esting entities should report accommodated scores in the same way they report scores generally” so as not to discriminate against test-takers with disabilities.¹⁰¹ Even when testing entities have decided to use a practice that is discriminatory against students with disabilities, the DOJ has the ability to advise testing entities on the correct interpretation of the ADA, ultimately improving the process of requesting accommodations for people with disabilities.

B. Prior Academic Success

The 2014 DOJ guidelines also addressed the issue of testing entities penalizing students with disabilities for prior academic success.¹⁰² Specifically, the DOJ stressed that “[a] history of academic success does not mean that a person does not have a disability that requires testing accommodations.”¹⁰³ Similarly, the Department of Education made it clear that just because a student with ADHD “is not receiving special education or related services, and is achieving good grades in academically rigorous classes . . . [does not mean that the] student is not substantially

⁹⁸ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.* at 3–4.

¹⁰³ *Id.*

limited in a major life activity and therefore is not a person with a disability.”¹⁰⁴ The Congressional Record accompanying The Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) clarified that, “[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.”¹⁰⁵ The Congressional Record of the ADAAA notes a similar, but distinct point, “that an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received accommodations (including informal or undocumented ones) that have the effect of lessening the deleterious impacts of their disability.”¹⁰⁶ If students with disabilities cannot be penalized for past academic success, then students who have masked their ADHD should not be penalized through the history of diagnosis criterion (“HDC”) because their misdiagnosis hinges on their past academic success.

The guidance issued from the DOJ put testing agencies on notice that practices like flagging and penalizing students for prior academic success are incompatible with the purpose of providing accommodations to students with disabilities under the ADA.¹⁰⁷ While testing entities may be increasingly more attuned to accommodations request practices that discriminate against test-takers with disabilities, the DOJ can and should step in and provide preemptive and corrective guidelines to amend the process by which testing agencies determine accommodations requests by test-takers with disabilities.

¹⁰⁴ Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> (last updated Jan. 10, 2020).

¹⁰⁵ 154 CONG. REC. 18515, 18518 (2008) (Explanation of the Bill and Manager’s View Overview); *id.*

¹⁰⁶ 154 CONG. REC. at 18519.

¹⁰⁷ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 8.

III. CURRENT STANDARDIZED TESTING AGENCY
ACCOMMODATIONS FOR ADHD

The standardized testing agencies that are required by the ADA to provide reasonable accommodations to people with disabilities include “[e]xams administered by any private, state, or local government entity related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes”¹⁰⁸ When determining whether to grant or deny a test-taker’s request for accommodations under the ADA, standardized testing agencies must determine whether an individual with a disability is “‘substantially limited’ in a major life activity.”¹⁰⁹ While considering whether an individual’s impairment rises to the level of a disability, testing agencies may request documentation so long as the requested documentation is “narrowly tailored to the information needed to determine the nature of the candidate’s disability and his or her need for the requested testing accommodation.”¹¹⁰ Standardized testing agencies often ask for documentation listing prior diagnostic history (history of diagnosis) and proof of prior testing accommodations (either formal or informal).¹¹¹

A. College Level Standardized Tests

Most college entrance standardized testing companies use the HDC as one of many factors to determine whether individuals need accommodations for standardized tests.¹¹² Testing agencies will often base their accommodation decisions on prior accommodations that an individual has received¹¹³ by asking for

¹⁰⁸ *Id.* at 2 (regulating exams set by private, state, or local governments, generally); *see also* 28 C.F.R. § 36.309 (2012) (regulating exams administered by private entities, exclusively).

¹⁰⁹ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 3; *see also* 42 U.S.C. § 12102(1)(a) (defining a person with a disability as suffering from “a physical or mental impairment that substantially limits one or more major life activities.”).

¹¹⁰ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 5.

¹¹¹ *Id.*

¹¹² *See* COLL. BD., *supra* note 36; ACT, *supra* note 36.

¹¹³ *See* COLL. BD., *supra* note 36; ACT, *supra* note 36.

proof of whether a test-taker received prior accommodations under the Individuals with Disabilities Education Act (“IDEA”)¹¹⁴ or Section 504 of the Rehabilitation Act.¹¹⁵ Students who have not received accommodations under IDEA or Section 504 must prove that they have received informal accommodations on tests,¹¹⁶ or in the case of the ACT, “a detailed explanation” of why a student has not had accommodations in the past but needs them on the ACT.¹¹⁷ For example, students who were homeschooled or attended private education would need to provide proof they received informal accommodations.¹¹⁸

Informal accommodations, though more difficult to prove, can help a student with a recent diagnosis of ADHD who has been misdiagnosed previously by showing that they have a history of accommodations.¹¹⁹ For example, a student who recently received a diagnosis for ADHD, but who may have received accommodations for anxiety in the past, can still prove a history of accommodations.¹²⁰ For some students who have received informal accommodations in the past, they may not have needed to have a

¹¹⁴ See 34 C.F.R. § 300 (2021); COLL. BD., *supra* note 36; ACT, *supra* note 36.

¹¹⁵ See 34 C.F.R. § 104 (2021); COLL. BD., *supra* note 36; ACT, *supra* note 36.

¹¹⁶ See COLL. BD., *supra* note 36 (explaining that the College Board allows students to include evidence of informal accommodations through “[t]eacher observations”).

¹¹⁷ ACT, *supra* note 36. See Abigail Sullivan Moore, *Accommodations Angst*, N.Y. TIMES (Nov. 4, 2010), <https://www.nytimes.com/2010/11/07/education/edlife/07strategy-t.html?auth=login-email&login=email> (explaining that the ACT is “considered the tougher of the two” to acquire accommodations, even using “the same documentation”).

¹¹⁸ See Moss, *supra* note 20, at 209–10.

¹¹⁹ See U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 6–7 (advising testing agencies that “[a]n absence of previous formal testing accommodations does not preclude a candidate from receiving testing accommodations”).

¹²⁰ See *id.* at 7 (describing an example of informal testing accommodations that could apply to “[a] student with a diagnosis of ADHD and an anxiety disorder . . .”).

formal diagnosis of ADHD until applying for college entrance tests like the SAT and ACT.¹²¹

Unfortunately for students with a late diagnosis of ADHD, testing agencies are suspicious of late diagnoses and the skepticism was present even before the recent Operation Varsity Blues cheating scandal, in which wealthy parents paid for disability diagnoses that enabled their children to receive extra time on standardized tests.¹²² The 2019 Operation Varsity Blues scandal created an increased incentive for college-entrance standardized testing agencies to discourage people who “shop” for a diagnosis to increase their standardized testing scores.¹²³ The scandal publicized the phenomena of individuals “shopping” for ADHD diagnoses and parents who game the accommodations system for their children without disabilities.¹²⁴ Testing agencies’ heightened suspicion of late diagnoses harms the prospects of students with ADHD who are diagnosed later due to no fault of their own. In large part, the history of prior accommodation requirements by testing agencies attempts to sort out false ADHD diagnoses, but the issue is that it does so at the cost of some legitimate test-takers with recent diagnoses of ADHD.¹²⁵

¹²¹ See Whitney Hollins, *Does My Child Need to be Evaluated to Qualify for SAT Test Accommodations?*, UNDERSTOOD, <https://www.understood.org/en/school-learning/partnering-with-childs-school/tests-standards/does-my-child-need-to-be-evaluated-to-qualify-for-sat-test-accommodations> (last visited Nov. 4, 2020) (explaining that to receive an accommodation on the SATs, a student needs a formal evaluation).

¹²² See Moore, *supra* note 117; see also Mitch Prinstein, *The Truth About Getting Extra Time on the SAT*, PSYCHOLOGYTODAY (June 26, 2019), <https://www.psychologytoday.com/us/articles/201906/the-truth-about-getting-extra-time-the-sat> (explaining how students with disabilities “may now have an additional obstacle to contend with: Widespread suspicion, in the aftermath of the blockbuster college admissions scandal code-named Operation Varsity Blues, of the very accommodations [students with disabilities] need to thrive”).

¹²³ See Prinstein, *supra* note 122 (explaining how “there may be a small number of clinicians willing to sign off on documentation for families with flimsy claims but substantial ability to pay . . .”).

¹²⁴ See *id.*

¹²⁵ See Sampat & Grant, *supra* note 32, at 292–93 (2012) (listing the legitimate reasons why an individual may not receive a diagnosis for ADHD in childhood).

B. Graduate School Level Standardized Tests

Graduate school admission exams, like the GRE, LSAT, and MCAT, also require that test-takers provide a history of prior accommodations and strongly recommend proof of diagnostic history.¹²⁶ Test-takers who have just recently received a diagnosis of ADHD may face similar difficulty showing a history of prior accommodations for graduate school exams because their late diagnosis inhibited them receiving accommodations in college.¹²⁷ In other words, the prior accommodations requirement is diagnostic history by another name.

Test-takers often sit for graduate school admissions exams either during or after college, so it seems sensible for graduate school admission testing agencies to base their accommodations on prior accommodations received in college. Unfortunately, this practice does not take into consideration that higher education accommodations differ from disability services in K-12 education¹²⁸ because accommodations in higher education are covered by different laws, namely Section 504 of the Rehabilitation Act¹²⁹ and the ADA.¹³⁰ In higher education, students

¹²⁶ See OFF. OF DISABILITY POL'Y, EDUC. TESTING SERV., GUIDELINES FOR DOCUMENTATION OF ATTENTION-DEFICIT/HYPERACTIVITY DISORDER (ADHD) IN ADOLESCENTS AND ADULTS, 3–6 (3d ed. 2016), https://www.ets.org/s/disabilities/pdf/documenting_adhd.pdf; *LSAC Policy on Accommodations for Test Takers with Disabilities*, L. SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/lsac-policy-accommodations-test-takers-disabilities> (last visited Nov. 4, 2020); *Submitting Your Initial Application*, ASS'N OF AM. MED. COLLS., <https://students-residents.aamc.org/applying-medical-school/article/applying-accommodations/> (last visited Nov. 4, 2020).

¹²⁷ See Moss, *supra* note 20, at 213–14.

¹²⁸ K-12 is covered by IDEA and Section 504 of the Rehabilitation Act which require that children with disabilities receive testing accommodations as part of their Individual Education Plan or 504 Plan until they graduate high school or age out of high school. See *generally* 20 U.S.C. §§ 1412(a)(16), 1401(3); 29 U.S.C. § 794; 34 C.F.R. § 104.35 (2021).

¹²⁹ See *Disabilities in Higher Education*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/disabilities-in-higher-education/> (last visited Nov. 4, 2020) [hereinafter *What Laws Protect Students*] (noting that accommodations processes differ depending on level of education).

¹³⁰ See 42 U.S.C. § 12189 (2008); see also Association on Higher Education and Disability, *Supporting Accommodation Requests: Guidance on*

with disabilities must choose to disclose their disability to their school in order to seek accommodations, but schools may only ask for “reasonable medical documentation” and students “are *not* required to produce [their] entire medical or mental health history.”¹³¹ In K-12 schools, on the other hand, students do not self-identify that they have a disability. Instead, when a student is diagnosed with a disability in K-12, the school staff is required to ensure the success of the student with a disability.¹³²

Many people seeking accommodations during college or before graduate school admissions exams are learning how to cope without their official or unofficial accommodations and support systems.¹³³ This is especially true of individuals from lower income communities who suffer acutely from a lack of support systems in secondary education.¹³⁴ When students attend college, they do not have a team of professionals who “determine [what] accommodations the student needs in order to be successful[;]” instead, the student must decide on their own to request accommodations and determine what those accommodations should be.¹³⁵ Colleges are required to offer resources that guide students through the process of requesting accommodations, but students need to request graduate school admissions exam accommodations on their own.¹³⁶ At this particular stage in a

Documentation Practices, AHEAD, https://www.ahead.org/professional-resources/accommodations/documentation#_edn9 (last visited Nov. 4, 2020).

¹³¹ *What Laws Protect Students*, *supra* note 129.

¹³² Learning Disabilities Ass’n of Am., *Modifications vs. Accommodations: High School vs. College*, LDAAMERICA (June 3, 2016), https://ldaamerica.org/lda_today/modifications-vs-accommodations-high-school-vs-college/.

¹³³ See Wasserstein, *supra* note 45, at 540–41 (“[A] highly organized home life can mitigate the expression of many ADHD symptoms . . . [and] mask the expression of many symptoms . . . ADHD problems become ever more manifest as environmental demands become more complex and, concurrently, external supports are increasingly removed.”).

¹³⁴ See Joseph W. Madaus, *Promoting Access to Postsecondary Education for Low-Income Students With Disabilities*, 37 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 50, 53 (May 2014), (“[S]tudents with disabilities from lower income families are less likely to attend college than their peers from higher income families.”).

¹³⁵ Learning Disabilities Ass’n of Am., *supra* note 132.

¹³⁶ *Id.*

student's academic pursuit, students are left largely on their own to navigate the accommodations process, which can leave students overwhelmed and at risk of making miscalculations in their applications for accommodations.¹³⁷ Prior accommodations in K-12 are a poor measure of whether a student needs an accommodation because students who were not identified in K-12 as having a disability still find that they need accommodations once they attend higher education.

C. Professional Licensing Exams

Professional licensing exams like the Multistate Professional Responsibility Examination ("MPRE"), the Multistate Bar Exam ("MBE"), and the United States Medical Licensing Examination ("USMLE") look critically at prior accommodations, the diagnosis of a test-taker, and the credentials of the evaluator who diagnosed the test-taker.¹³⁸ This critical examination is primarily focused on verifying that a test-taker with ADHD is diagnosed according to the strict standards of the DSM-5.¹³⁹ This means that test-takers with ADHD must prove a history of diagnosis, or else they will need to show that their symptoms tie back to the age of twelve.¹⁴⁰ This requirement is easier to satisfy if a test-taker has received accommodations on the LSAT or MCATs, because they can use their prior documentation as proof. However, students who did not receive accommodations on the LSAT, for example, will have a

¹³⁷ *Id.*

¹³⁸ See *ADHD Medical Documentation Guidelines*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpre/ada-accommodations/documentation-guidelines/adhd-guidelines/> (last visited Nov. 6, 2020); N.Y. STATE BD. OF L. EXAM'RS, *Test Accommodations Handbook* 1, 14 (revised Oct. 2018), <https://www.nybarexam.org/Docs/NTAHandBook.pdf> (This is a citation to the New York State Board of Law Examiners but is generally representative of the level of scrutiny an ADHD diagnosis will receive for accommodations on the MBE); *Test Accommodations: Guidelines*, UNITED STATES MED. LICENSING EXAMINATION, <https://www.usmle.org/test-accommodations/guidelines.html#guidelines-general> (last visited Nov. 6, 2020).

¹³⁹ See NAT'L CONF. OF BAR EXAM'RS, *supra* note 138; N.Y. STATE BD. OF L. EXAM'RS, *supra* note 138; UNITED STATES MED. LICENSING EXAMINATION, *supra* note 138.

¹⁴⁰ See DSM-5, *supra* note 33.

*HISTORIAL DIAGNOSIS CRITERION SHOULD NOT APPLY*¹⁴⁷

more difficult time receiving accommodations for their State Bar Exam or the MBE.¹⁴¹ This is an especially difficult task for individuals who were diagnosed later with ADHD as they now need to find evidence of their diagnosis before they were aware that they had ADHD.¹⁴² Professional licensing exams that rely on the DSM-5 consistently deny test-takers with adult ADHD accommodations in contrast with ongoing clinical findings.¹⁴³

Individuals who receive a diagnosis of ADHD during secondary education are likely high performers in school and on tests, but that does not mean they do not struggle.¹⁴⁴ Students at this stage “should not automatically be excluded from consideration for accommodations simply because they are unable to demonstrate a history of ADHD evaluation and school-based academic support prior to adult diagnosis.”¹⁴⁵ By requiring a history of prior accommodations or diagnoses, professional licensing agencies essentially penalize students for prior academic performance, “masking,” or factors like gender, race, and poverty that are not under the test-taker’s control.¹⁴⁶

IV. ADOPTING A NARROW EXCEPTION TO THE HISTORY OF DIAGNOSIS CRITERION

When approving or denying requests for accommodations, testing agencies must balance an individual with a disability’s need for an accommodation against the concern that the accommodations process is an avenue for non-disabled test-takers

¹⁴¹ See Moss, *supra* note 20, at 228; see also Ranseen, *supra* note 32, at 14.

¹⁴² See Ranseen, *supra* note 32, at 14; see also Sampat & Grant, *supra* note 32, at 292.

¹⁴³ See Ranseen, *supra* note 32, at 10, 12 (discussing the use of the DSM-5 as the standard for receiving accommodations on professional licensing exams in contrast with ongoing findings from clinicians who are finding that ADHD does not always present in the way the DSM-5 requires).

¹⁴⁴ See U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1, at 3–4 (“A history of academic success does not mean that a person does not have a disability that requires testing accommodations.”).

¹⁴⁵ Ranseen, *supra* note 32, at 14.

¹⁴⁶ See discussion *supra* Part I for a discussion of these factors in limiting the diagnosis of students with ADHD.

to receive a leg up by obtaining a false diagnosis.¹⁴⁷ Even diagnosticians have trouble determining disability accuracy, and testing agencies are no less fallible, since they “defer to recommendations from qualified professionals.”¹⁴⁸ Testing agencies that deny an individual with ADHD an accommodation due to an inaccurate diagnosis prevent that person from competing on a level playing field. This not only flouts general attitudes on equity and fairness, but also hinders certain students’ ability to succeed on standardized tests that determine admission prospects for higher education and potential scholarship aid. A pattern as widespread as the inaccuracy of ADHD diagnosis harms untold numbers of students with ADHD who have been denied accommodations.

A. *Limitations of the History of Diagnosis Criterion*

Courts—and testing agencies generally—have an important interest in preventing students without disabilities from gaming the system. However, protecting a test-taker’s history of diagnosis from judicial dissection would not inhibit testing agencies’ ability to review the validity of a test-taker’s diagnosis.

Consider the case of *Love v. Law School Admission Council, Inc.*, where the United States District Court for the Eastern District of Pennsylvania examined the validity of the plaintiff’s ADHD diagnosis.¹⁴⁹ In *Love*, the court reviewed the plaintiff’s history of ADHD from elementary school through graduate school.¹⁵⁰ Although the plaintiff was diagnosed with ADHD “in accordance with the DSM diagnostic categories and criteria,”¹⁵¹ the court continued to dig into the diagnosis and held that it lacked documentation despite the plaintiff presenting evidence of

¹⁴⁷ See generally Dana Goldstein & Jugal K. Patel, *Need Extra Time on Tests? It Helps to Have Cash*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/extra-time-504-sat-act.html>.

¹⁴⁸ *Id.*

¹⁴⁹ See *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206 (E.D. Pa. 2007).

¹⁵⁰ See *id.* at 212–18.

¹⁵¹ Yull, *supra* note 44, at 365.

disability that went back to elementary school.¹⁵² “[T]he court erred on the side of caution” when considering whether Love’s ADHD rose to the level of accommodation and determined that it did not.¹⁵³ This Note does not contend that the court was wrong in its determination that the plaintiff in *Love* should not receive accommodations based, in part, on the history of an ADHD diagnosis and DSM standards. What is problematic about the court’s analysis is that the factors it viewed as important are disproportionately more difficult to prove for test-takers who are diagnosed with ADHD in later adolescence and early adulthood.¹⁵⁴

The history of diagnosis criterion (“HDC”) demands proof that the individual exhibited ADHD during childhood, specifically before the age of twelve under the DSM-5¹⁵⁵ (increased from age seven under DMS-IV).¹⁵⁶ Proving a diagnostic history for ADHD can be hard for people who are overlooked,¹⁵⁷ misdiagnosed, or who “mask.”¹⁵⁸ The HDC is unprovable for individuals who have only recently received a diagnosis of ADHD:

The childhood documentation requirement and courts’ eagerness for a full accommodation and lifespan disability history opens the doors to other

¹⁵² See *Love*, 513 F. Supp. 2d at 225 (referencing the DSM-IV, the court found that the plaintiff did not prove the correct childhood symptoms for ADHD).

¹⁵³ See Moss, *supra* note 20, at 213. (“While in *Love* it could be argued that Jonathan Love did indeed have inattention and issues relating to ADHD, the court erred on the side of caution given his educational history and to prevent abuse of the accommodation system.”).

¹⁵⁴ See discussion *supra* Part I; see also Ranseen, *supra* note 32, at 14 (explaining that factors like wealth, age, and whether a child grew up in the U.S. affects the ability of an individual to “demonstrate a history of ADHD evaluation and school-based academic support prior to adult diagnosis.”).

¹⁵⁵ See DSM-5, *supra* note 33.

¹⁵⁶ See AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

¹⁵⁷ See Moss, *supra* note 20, at 214 (discussing how the lack of an early diagnosis prevents students from receiving early intervention “coping mechanisms” and “medication” in addition to making it harder “down the road when it comes to postsecondary and graduate school admission examinations.”); Sampat & Grant, *supra* note 32, at 292–93.

¹⁵⁸ See Wasserstein, *supra* note 45, at 537–39.

questions about access to healthcare providers, diagnoses, and how this approach drastically discriminates against people with disabilities who are also members of minority groups and lower socioeconomic status than their peers who are granted accommodations and also are not minorities and have higher socioeconomic status.¹⁵⁹

This unfairly penalizes females and gender nonbinary test-takers,¹⁶⁰ lower income test-takers,¹⁶¹ and Black, Indigenous, People of Color (BIPOC), and others who may not be able to show a history of having ADHD.¹⁶²

B. Creating a Narrow Exception to the History of Diagnosis Criterion

The HDC should not apply to individuals who are diagnosed with ADHD in late adolescence or early adulthood. The DOJ's 2014 guidelines interpreting the ADA require that "a testing entity['] . . ." requests for supporting documentation should be narrowly tailored to the information needed to determine the nature of the candidate's disability and his or her need for the requested testing accommodation."¹⁶³ The DOJ lists "[a]n applicant's history of diagnosis" as one of the "[e]xamples of types of documentation" that testing entities may request, but listing the HDC as an example does not indicate that a testing entity must require this criterion.¹⁶⁴

¹⁵⁹ Moss, *supra* note 20, at 214.

¹⁶⁰ See Sampat & Grant, *supra* note 32, at 347–48.

¹⁶¹ See *id.* at 343–46.

¹⁶² See Moss, *supra* note 20, at 214 ("Students that are racial and ethnic minorities are far less likely to receive diagnoses during their early school years, despite presenting symptoms of disability"); see also Sampat & Grant, *supra* note 32, at 337 (explaining that racial and ethnic minority groups "are less likely to be identified in childhood as having symptoms of ADHD.").

¹⁶³ U.S. DEP'T OF JUST. C. R. DIV., *supra* note 1.

¹⁶⁴ *Id.* at 5 ("Depending on the particular testing accommodation request and the nature of the disability, however, a testing entity may only need one or two of the above documents to determine the nature of the candidate's disability and his or her need for the requested testing accommodation. If so, a testing entity should generally limit its request for documentation to those one or two

HISTORIAL DIAGNOSIS CRITERION SHOULD NOT APPLY 151

Instead, testing agencies should rely on “the level of impairment that an individual experiences,” which is more accurate than the HDC for determining a test-taker’s need for an accommodation and does not rely on changing ADHD criteria.¹⁶⁵ In other words, the DOJ only offers the HDC as an option for determining whether an individual with a disability should receive an accommodation, but it does not recommend that the HDC be required for accommodations if a test-taker has recently received a disability diagnosis, as in the case of a later diagnosis of ADHD.

A narrow exception should be made under the DOJ’s ADA guidelines for reasonable accommodations to remove the use of “history of a diagnosis” criterion for testing accommodations in cases where an individual received a late diagnosis of ADHD. It is not reasonable to expect someone with a recent diagnosis to produce a history of that new diagnosis. The HDC, as used by standardized testing agencies, relies on the DSM-5 diagnostic criteria that requires that a person exhibit ADHD symptoms before the age of twelve.¹⁶⁶ This requirement is challenged by many ADHD experts who caution that there are many reasons why someone with ADHD may not be able to meet the HDC but still have a valid diagnosis.¹⁶⁷ The DSM, which the American Psychiatric Association expressed should be a “living document,”¹⁶⁸ is not meant to be a static “bible,”¹⁶⁹ but that is

items and should generally evaluate the testing accommodation request based on those limited documents without requiring further documentation.”).

¹⁶⁵ See Yull, *supra* note 44, at 386–87.

¹⁶⁶ DSM-5, *supra* note 33.

¹⁶⁷ See Ranseen, *supra* note 32, at 12; Sampat & Grant, *supra* note 32, at 306.

¹⁶⁸ See Moran, *supra* note 43; see also First, *supra* note 43 (noting that the DSM should “reflect changes in psychiatry” and should be updated regularly).

¹⁶⁹ See Jon Hamilton, *Experts Agree: ‘Psychiatry’s Bible’ Is No Bible*, NPR (May 17, 2013), <https://www.npr.org/sections/health-shots/2013/05/17/184849282/experts-agree-psychiatrys-bible-is-no-bible#:~:text=iStockphoto.com-,The%20new%20version%20of%20the%20psychiatric%20%22bible%22%20is%20more,of%20a%20dictionary%2C%20psychiatrists%20say.&text=Wh en%20the%20American%20Psychiatric%20Association,it%20as%20%22psychi atry’s%20bible.%22> (explaining that the DSM is often referred to as “psychiatry’s bible” but the DSM’s authors and other experts “cringe” at this description).

exactly how standardized testing agencies treat it. In fact, the DSM is meant to serve as a guide for clinicians and not as exact diagnostic criteria.¹⁷⁰ “[T]he drafters of the DSM specifically acknowledged [the inherent ambiguity of the DSM] when they cautioned against use of the DSM as a legal standard.”¹⁷¹

The DOJ should issue updated guidelines that include this narrow exception to exempt test-takers with a recent diagnosis of ADHD from the HDC. As diagnostic knowledge improves, testing agencies must be aware that opportunities to be tested and accommodations are not equally applied, leaving students with undiagnosed disabilities or later diagnoses particularly vulnerable.

C. Gaming the System

Courts, testing agencies, and the public are concerned that ADHD is over-diagnosed in students and used to game the college admissions process.¹⁷² Gaming the system concerns are valid, as we have seen most notably in the 2019 Operation Varsity Blues cheating scandal, but they do not outweigh the need to grant accommodations to those who are entitled to them.¹⁷³

In the Operation Varsity Blues scandal, William Singer, a college admissions counsellor, accepted funds in return for helping students get into college.¹⁷⁴ Singer’s strategies included falsifying students’ academic and extracurricular records, bribing “college coaches and athletic officials,” and paying “proctors at testing sites to improve [student] scores on the SAT or ACT by secretly

¹⁷⁰ See Sampat & Grant, *supra* note 32, at 297 (citing to the DSM-IV).

¹⁷¹ Yull, *supra* note 44, at 385.

¹⁷² See Moss, *supra* note 20, at 213 (citing Mark J. Scitutto & Miriam Eisenberg, *Evaluating the Evidence for and Against the Overdiagnosis of ADHD*, 11 J. ATTENTION DISORDERS 106 (2000)).

¹⁷³ See Jennifer Medina et al., *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html>; see also Daniel Golden & Doris Burke, *The Unseen Student Victims of the ‘Varsity Blues’ College-Admissions Scandal*, NEW YORKER (Oct. 8, 2019), <https://www.newyorker.com/books/page-turner/the-unseen-student-victims-of-the-varsity-blues-college-admissions-scandal>.

¹⁷⁴ See Medina et al., *supra* note 173; see also Golden & Burke, *supra* note 173.

correcting wrong answers.”¹⁷⁵ While Operation Varsity Blues focused mainly on gaming the process by which “elite universities recruit student athletes,”¹⁷⁶ there is concern that parents similarly gamed the system through the accommodations process,¹⁷⁷ which included “the abuse of extended-time accommodations on standardized tests.”¹⁷⁸ Since the most common accommodation for ADHD is extended time,¹⁷⁹ ADHD diagnoses may be highly scrutinized in the aftermath of Operation Varsity Blues.¹⁸⁰

The “revelation” that the Operation Varsity Blues scandal exposed—the ability for wealthy parents to buy their child a diagnosis that grants extended testing time—is shocking and should be prevented.¹⁸¹ However, the true number of parents (and students) who game the system in this way are likely small:

While it cannot be known how many students who are granted extra time on the SAT or ACT do not actually need it, the accommodation rate of 5 percent on these tests is still significantly lower than the estimated 15 percent of students nationwide who legitimately qualify for special services within their public schools.¹⁸²

The parents who “‘shop’ for clinicians”¹⁸³ who will diagnose their child with ADHD and the proctors who are willing to take bribes to “manipulate answers” are to blame and not the families who use the accommodations process properly.¹⁸⁴ Moreover, as

¹⁷⁵ See Golden & Burke, *supra* note 173.

¹⁷⁶ See Medina et al., *supra* note 173.

¹⁷⁷ See Prinstein, *supra* note 122.

¹⁷⁸ Natalie Escobar, *The Time Crunch on Standardized Tests Is Unnecessary*, ATLANTIC (Mar. 25, 2019), <https://www.theatlantic.com/education/archive/2019/03/standardized-test-extended-time/585580/>.

¹⁷⁹ See Pritchard et al., *supra* note 26, at 68.

¹⁸⁰ See generally Escobar, *supra* note 178 (discussing the effect of the scandal on students with disabilities who receive extended time).

¹⁸¹ See *id.*

¹⁸² Prinstein, *supra* note 122.

¹⁸³ Importantly, there are only a “small number of clinicians willing to sign off on documentation for families with flimsy claims but substantial ability to pay.” *Id.*

¹⁸⁴ *Id.*

Part I of this Note portrays, ADHD is more likely underdiagnosed than over-diagnosed.¹⁸⁵

The gaming the system argument assumes that test-takers with disabilities, and ADHD specifically, are “shopping” for a diagnosis to give them an advantage on tests.¹⁸⁶ This incredibly harmful and pervasive argument not only overshadows the prevalence of ADHD,¹⁸⁷ but it also disproportionately harms test-takers who receive a later diagnosis of ADHD and are doubly scrutinized.¹⁸⁸ Individuals who are diagnosed later with ADHD have struggled and coped with the disorder for years but have only recently received the diagnosis that grants them the right to ask for accommodations. A person with a disability who is academically successful prior to their diagnosis is just as worthy of an accommodation as an individual who receives an earlier diagnosis.¹⁸⁹ The age criteria for ADHD in the DSM-5 is increasingly being questioned by diagnosticians as “arbitrary”¹⁹⁰ and the DOJ should issue guidance to recognize this ongoing debate. Guidance from the DOJ would put pressure on standardized testing companies to comply with changing ADHD criteria before the next updated DSM is released.

Students with disabilities should not bear the burden of cheating scandals. In fact, the practice by which families game the system shines a light on standardized testing inequalities that prioritize speed and technique over knowledge and intelligence.¹⁹¹ “As a logical matter, it is unlikely that the ranked test scores on an exam where a large number of applicants did not even finish are more valid than the ranked test scores on an exam where every

¹⁸⁵ See Moss, *supra* note 20, at 213 (“Critics and popular media argue that ADHD is a disorder that [sic] is over-diagnosed, while the science says otherwise.”).

¹⁸⁶ See Prinstein, *supra* note 122.

¹⁸⁷ See *id.*

¹⁸⁸ See Sampat & Grant, *supra* note 32, at 292–93.

¹⁸⁹ Ranseen, *supra* note 32, at 14.

¹⁹⁰ See Reddy, *supra* note 47.

¹⁹¹ See generally Ruth Colker, *Test Validity: Faster is Not Necessarily Better*, 49 SETON HALL L. REV. 679 (2019) (discussing how the accommodation of extended time should be a reality for everyone).

applicant is given an opportunity to finish.”¹⁹² Standardized tests instead value speed over taking the time to think and accurately answer questions.¹⁹³ If standardized testing agencies are unable to create an equitable accommodations process due to the deceptive tactics of diagnosticians who hand out false ADHD diagnoses and parents who “shop” for a diagnosis, they should consider removing time limitations altogether. “Under the ADA, organizations such as the College Board aren’t permitted to use tests that have a ‘disparate impact on the basis of disability’—in this case, timed tests that students with disabilities have trouble completing—unless they can prove that those conditions are necessary for a test’s measurement.”¹⁹⁴ If the time limitations imposed by testing agencies are not deemed central to the skill being assessed and standardized testing agencies are worried about the validity of their own accommodations process, then they should remove time constraints for all test-takers.¹⁹⁵

CONCLUSION

The ADA requires that students with disabilities have equal access to opportunities and the ability to compete fairly for those opportunities.¹⁹⁶ In the high-stakes environment of standardized testing, it is important to ensure that testing entities uphold the ADA mandate not to discriminate against people with disabilities. In the case of ADHD, which is unfairly categorized as over-diagnosed,¹⁹⁷ standardized testing agencies’ history of diagnosis criterion unfairly punishes students with ADHD who are diagnosed after the age of twelve. The DSM-5’s arbitrary age limit creates a divide where, starting at thirteen, a person cannot receive accommodations for a diagnosis of ADHD unless they can tie

¹⁹² *Id.* at 686–87.

¹⁹³ *See id.* at 690.

¹⁹⁴ Escobar, *supra* note 178 (quoting Colker, *supra* note 191, at 686).

¹⁹⁵ *See* Colker, *supra* note 191, at 686.

¹⁹⁶ U.S. DEP’T OF JUST. C. R. DIV., *supra* note 1.

¹⁹⁷ Based in large part to the abundance of white males or wealthy students with this diagnosis, which overshadows the issues of underdiagnosis discussed *supra* Part I. Popular opinion and stereotypes are not science, merely echo chambers.

symptoms back to age twelve. The older you are, the less likely it is that you can produce the required documentation, let alone memory of informal accommodations. The very definition of ADHD in the DSM-5 provides that upper-class white males will be diagnosed, but females, gender non-binary individuals, and BIPOC may not. Standardized testing agencies' reliance on rigid diagnostic criteria of a variable diagnosis erases the subset of test-takers with ADHD who are diagnosed with ADHD later because they are misdiagnosed, overlooked, or simply did not need accommodations until their academics became more demanding. The HDC considered in ADHD accommodations can be impossible to produce for some of these test-takers and is not necessary for evaluating the validity of a request for an accommodation. Common sense should require that testing agencies drop this criterion for individuals with ADHD who, by the timing of their diagnosis, cannot comply through no fault of their own. The DOJ's ADA guidelines should be updated to reflect that, while the HDC is one criterion that can be used to evaluate accommodations, it should not be applied to individuals who have only recently been diagnosed with ADHD.