Testimony of Jo Anne Simon, Esq.
Before the United States Senate Committee on
Health, Education, Labor and Pensions

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Mr. Chairman and Members of the Committee, I am pleased to submit this testimony for the record. My name is Jo Anne Simon. For the past 12 years I have maintained a law practice concentrating on disability rights in education, high stakes standardized testing and employment discrimination matters. I have been an adjunct Assistant Professor at Fordham University School of Law for the past 10 years and previously served as Staff Attorney for Hofstra University School of Law's Disabilities Law Clinic for four years. I have served as counsel on a number of disability rights cases, including Bartlett v. NYS Board of Law Examiners.[1]

I have been asked specifically to address the impact of the ADA Amendments Act, as passed by the House, on schools and universities.

Like Professor Bagenstos, I both study and litigate disability rights cases. I strongly support this bill. The ADAAA will do no more than protect those Congress originally intended to protect. It would overturn the mitigating measures holding of Sutton v United Airlines which has been applied in such a way as to deprive large numbers of individuals with disabilities of the law's protections. These are people that Congress meant to protect when it enacted the ADA. The ADAAA will also overturn the restrictive interpretation of "substantially limits" as applied in Toyota and decisively reject that Court's requirement that meeting the threshold for the law's protections is a strict and demanding standard. No other civil rights law so stringently and stingily scrutinizes those whom it seeks to protect.

The threshold issue of who is covered by the ADA has formed the bulk of the case law as covered entities have sought to reject coverage based on narrow interpretations by the Supreme Court. While the Court has held that the determination of whether a person is protected

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[1] Bartlett v. New York State Board of Law Examiners, 970 F. Supp. 1094 S.D.N.Y. 1997) (Bartlett I); *aff'd* 2 F. Supp. 2d 388 (S.D.N.Y. 1997) (Bartlett II); *aff'd in part, rev'd & remanded in part,* 156 F. 3d 321 (2d Cir. 1998)(Bartlett III); *vacated and remanded*, 119 S.Ct. 2388 (1999)(Bartlett IV); *aff'd in part & remanded*, 226 F. 3d 69 (2d Cir. 2000)(Bartlett V); 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001) (Bartlett VI). *See also*, Root v. Georgia Board of Veterinary Medicine, 114 F.Supp.2d 1324 (N.D. Ga. 2000) *rev'd on other grounds*, No. 00-14751 (11th Cir. 2001).

by the ADA is to be made on a case by case basis,[2] the Court's "demanding standard"[3] is harshly inconsistent with the original intent of the Congress which enacted the ADA, and has given rise to cookie-cutter like formulations which sacrifice substance to form.

Impact of the ADAAA on K-12 Education

Under the ADAAA, similar to the current language of the ADA and that of Section 504, an impairment must "substantially limit" a major life activity. An impairment meets this test if it "materially restricts" a major life activity. Major life activities include such things as learning, reading, thinking, and concentrating, as well the operation of various bodily functions.

The ADAAA directs courts not to take into account mitigating measures when determining if impairments substantially limit a major life activity. This will help children with impairments, such as diabetes and epilepsy, who manage their impairments with medication. Similarly, it will help children with learning disabilities who manage to succeed academically by working round-the-clock to complete assignments as a means of overcoming the effects of their impairment on learning. In addition, a key purposes provision of the ADAAA overturns the "demanding standard" for interpreting "substantially limits" that had been articulated by the Supreme Court in the *Toyota* case.

The ADAAA will ensure that students with disabilities receive appropriate protection under the ADA and Section 504. While few federal court decisions have held that elementary or secondary school children do not have disabilities under these laws,[4] you heard from Sue

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[2] Sutton v. United Airlines, 527 U.S. at 482 (1999). (". . . whether a person has a disability under the ADA is an individualized inquiry").

[3] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

[4] Children have lost only a small number of these cases on the ground that they did not have disabilities under the ADA or Section 504. See, e.g., Costello v. Mitchell Public School District 79, 266 F.3d 916 (8th Cir. 2001) (epilepsy, ADD, unspecified learning disabilities, depression and suicidal thoughts); Kropp v. Maine School Administrative Union #44, 2007 WL 551516 (D. Me. Feb. 16, 2007) ("severe persistent" asthma requiring high-dose inhaled corticosteroids, allergies requiring shots, and gastroesophageal reflux); Garcia v. Northside Independent School District, 2007 WL 26803 (W.D. Tex. Jan. 3, 2007) (severe asthma that caused child to collapse and die during running exercises at school); Smith ex rel C.R.S. v. Tangipahoa Parish School Bd., 2006 WL 3395938 (E.D. La. Nov. 22, 2006) (asthma and allergies requiring daily medication and use of EpiPen); Marshall v. Sisters of Holy Family of Nazareth, 399 F. Supp. 2d 597 (E.D. Pa.

Gamm's testimony that school districts and state educational agencies routinely refuse to extend these laws' protections to children who have managed to achieve high or even passing grades despite serious impairments. Ms. Gamm provided the example of a hearing officer's decision that a 10th grader who worked exceptionally hard to earn As and Bs was not substantially limited in learning even though she had difficulty organizing ideas and breaking down complex written material, took a long time to break down material, had difficulty completing assignments on time and problems with executive functioning, and occasionally failed tests.[5]

This is precisely the problem that the ADAAA is intended to address. Students like that 10th grader should not be denied the protections of the ADA simply because they have worked hard to overcome the effects of a disability.

Moreover, the notion that a student cannot have a reading or learning disability if he or she manages to attain high or passing grades is fundamentally wrong. It reflects an outmoded and inaccurate understanding of individuals with disabilities as individuals who are completely incapable of performing well.

As the Department of Justice explains in its ADA regulatory guidance, a person has a disability if he or she is substantially limited in the condition, manner or duration under which he or she performs a major life activity as compared to the condition, manner or duration under which most people perform the activity. This is the correct way to apply the definition of disability -- a student who has an impairment that substantially limits the *conditions* under which she learns, or the *manner* in which she learns, has a disability even if she manages to obtain average grades. The ADA's goal is not equal test scores, but equal *opportunity*.

Ms. Gamm testified that schools are accommodating many students with disabilities informally, but should not be subjected to the planning and evaluation requirements of Section 504. Congress did not intend that students with disabilities who need accommodations should be left without legal rights and be dependent solely on the good will of schools to provide the help they need in order to learn. In any event, Section 504 imposes minimal planning and evaluation

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2005) (ADHD); Block v. Rockford Public School Dist., 2002 WL 31856719 (N.D. Ill. Dec. 20, 2002) (asthma and allergies requiring use of inhaler).

[5] Indeed, the Department of Education's Office of Civil Rights has issued guidance making clear that mitigating measures must be considered in education claims brought under the ADA and Section 504. *Sutton Investigative Guidance: Consideration of "Mitigating Measures" in OCR Disability Cases* (Sept. 29, 2000).

requirements that should effectively be met by any school that is adequately meeting the needs of a child with a disability.[6]

School districts that have been complying with the ADA and Section 504 have nothing to fear from the ADAAA. Indeed, they should welcome the clarity that the amendments bring.

Most students, of course, receive their accommodations (related and supplemental services) under the Individuals with Disabilities Education Act (IDEA) and will continue to be so served.[7] Some students, however, receive their accommodations solely under Section 504 and the ADA. These same students will continue to receive such accommodations. For those children who have been inappropriately denied the protections of the law, the new bill will help clarify the coverage they should have been receiving.

Concerns that the ADAAA will compel schools to provide services to students who don't really need them are misplaced. Whether a student has a disability and what, if any, services he needs are two distinct issues. Take the hypothetical child with Attention Deficit Hyperactivity Disorder whose medication fully corrects the symptoms of his disorder. That is actually unlikely to be the case since medication does not improve deficits in working memory, processing speed, lexical access or executive functioning.[8] However, even if medication *had* a completely corrective effect, that child would still be protected from discrimination based on his disability. Protection from discrimination, however, only requires the provision of services where there is a demonstrated *need* for those services. The ADA does not require needless service provision. The greater danger, of course, is that a child entitled to protection and perhaps in need of services, will not get them, and will not have the opportunity to learn what he could and should be learning.

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[6] 34 C.F.R. §§ 104.33, 104.35.

[7] Twelve percent of public school students receive services under the IDEA, compared with approximately 1.2% under Section 504 only. *See* Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPLES BULLETIN, March 2008, at 24, 30.

[8] Swanson, H. L. & Jerman, O. (2006). Math disabilities: A selective meta-analysis of the Literature. *Review of Educational Research, 76,* 249-274.

Impact of the ADAAA on Postsecondary Education

While the number of students with disabilities on American campuses is growing, today only about 6 to 8 % of college students identify themselves as having a disability.[9] Unlike K-12 schools, postsecondary institutions bear no responsibility for identifying such students and we rely on students' self-identification in order to ensure that they receive necessary services. It is extremely unlikely that more college students will request help for a disability due to a change in the ***legal*** definition of disability under the ADA. Most students are not aware of the nuances of the law. Rather, they ask for help because they were identified with a disability prior to arriving at the postsecondary institution, or because they are diagnosed with a disability later in life. It is their experience and diagnosis of a disability that triggers the request for help – not a wording change in the law.

Indeed, the vast majority of postsecondary institutions are doing an admirable job of providing welcoming and compliant environments for students with disabilities. While the ADAAA would require changes by those institutions that are applying an unduly restrictive definition of disability in reliance on Supreme Court cases, those changes are appropriate. Moreover, such institutions are the exception, not the norm.

The ADAAA will prevent the inappropriate loss of protection for students who use various measures to compensate for the limitations caused by their disabilities. It provides that compensatory mechanisms that an individual has used to circumvent some of his or her limitations (for example, listening to books on CD to compensate for limitations caused by dyslexia) cannot be used as evidence that the students do not experience limitations in the first place. Some higher education and standardized testing entities have determined whether a student is "substantially limited" in learning by comparing an individual's scores with those of the statistical average standardized achievement test scores (in other words, below 16th percentile, or virtual failure) or by comparing an individual's real-life outcomes with those of the average person (for example, determining that a student is not disabled simply because he has a graduate degree and the average person doesn't). As a result, students with serious disabilities

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9 According to the Association on Higher Education And Disability (AHEAD), the average disability services office has a mean of 7 staff members, each of whom serves an average of 100 students (100-1 ratio). Harbour, Wendy S.. *2008 Biennial AHEAD Survey of Disability Services and Resource Professionals in Higher Education*, 2008. AHEAD: Huntersville, NC. Other student services programs are generally staffed at higher ratios. For example, many university housing programs are staffed at a ratio of 10-1.

who have managed to achieve higher than average test scores or outcomes **by taking steps to mitigate the effects of their disabilities** subsequently lose protection under the ADA simply for having taken those steps. The fact that an individual has managed to compensate for his or her impairment, through whatever means, should not be used to punish the individual. The touchstone for accommodations in the testing arena should be that set forth in Department of Justice regulations: whether an accommodation is needed in order to ensure that the examination results "accurately reflect the individual's aptitude or achievement level."[10]

Moreover, as is true now, under the ADAAA, postsecondary students with disabilities will still need to demonstrate that they are qualified and meet the essential eligibility criteria for an educational program or course of study.[11] A student who cannot meet essential eligibility criteria will not prevail on a claim brought under the ADA. Such a claim should be analyzed based on the merits and not on an inappropriately narrow definition of disability.

Considering whether an individual has a disability is distinct from determining what accommodations might be reasonable in a given circumstance. Under current law, colleges and universities are not required to make modifications or offer accommodations that fundamentally alter programs or services or compromise academic standards.[12] The ADAAA does not change this. Colleges and universities will have the same ability to maintain academic standards that they do under current law.

Concerns that the numbers of students bringing legal actions will increase are unjustified. Similar concerns were raised in 1977 before Section 504 regulations were promulgated, and again in 1990 when the ADA was enacted. Nevertheless, after over thirty years of protections, roughly six to eight percent of the postsecondary population reports a disability and costs are minimal in comparison to overall institutional budgets. There is no evidence to support a concern about academic standards; rather it seems clear that students with disabilities who graduate from our colleges and universities are fine examples of the power of American education. The law does not require institutions to fundamentally alter the nature of their services or programs. Moreover, considerable deference has historically been given to educational institutions'

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10 28 C.F.R. § 36.309.

11 42 U.S.C § 12131(2).

12 42 U.S.C § 12182(b)(2).

academic judgments. This deference helps institutions balance the competing equities while maintaining program standards. Although discrimination may not masquerade as deference to academic judgment, the courts have struck a balance well understood by all.[13]

Standardized Testing

The standardized testing industry has aggressively and rigidly applied Sutton's and Toyota's narrow rulings. Testing entities have applied Sutton and Toyota as if they had replaced all known diagnostic criteria; their approaches have elevated form over substance and ignored scientific practice.[14] Some courts have substituted the covered entity's judgment that an applicant does not have a disability for the individual's physician's judgment rather than get to the merits of the applicant's request.

A Word About Public Perception

Unfortunately, incorrect public perceptions have driven the courts' analyses of many ADA claims, and have often replaced objective judgment, to the detriment of individuals with disabilities. This has particularly been true of standardized testing at all levels of education, and markedly at the college admissions level.

A popular myth is that students without disabilities seek accommodations on the SAT and other tests in order to achieve a competitive edge on the test. Underlying this perception is a belief that with extra time, everyone would perform significantly better,[15] and that students from families of means will therefore unfairly seek this type of advantage.

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13 Guckenberger v. Boston University, 8 F. Supp. 2d 82 (D. Mass. 1998), Wynne v. Tufts University School of Medicine, 976 F.2d 791 (1st Cir. 1992), Ewing v. Michigan, 474 U.S. 214 (1985).

14 *See* Bartlett VI at 8. See also, Barkley, Russell A. PhD; Biederman, Joseph MD, Toward a Broader Definition of the Age-of-Onset Criterion for Attention-Deficit Hyperactivity Disorder. Journal of the American Academy of Child & Adolescent Psychiatry, September 1997, pp 1204-1210.

15 *But see* Bartlett VI at 42 ("this assumption is belied by research showing that extra time does not have a significant impact on the performance of individuals who do not have learning disabilities.")

This perception has been shown to be wrong. A class action suit filed in 2002 alleged that ETS's practice of "flagging" the scores of students who had taken the exam with disability accommodations violated the law. As part of the settlement, the College Board agreed to create a Blue Ribbon Panel of experts to review whether scores for SATs taken under standard administration could be **validly compared** with those taken by students with disabilities under non-standard conditions. If they could be validly compared, then there was no need to "flag" the exams in order to maintain the integrity of the exams,

The panel unanimously agreed that the practice of flagging was not needed. Based on a thorough review of all the scientific evidence, the Blue Ribbon Panel concluded that when students with learning disabilities took exams under standard conditions, the scores they received were ***not*** valid reflections of their actual knowledge. Conversely, when such students received appropriate accommodations, their scores were comparable to those of students without learning disabilities who had not received accommodations.[16] Thus, there was no advantage being given to students with disabilities by virtue of the accommodations.[17]

Based on the report from the Blue Ribbon Panel, the College Board ceased flagging in 2004.

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16 Gregg, N, Mather, N, Shaywitz, S. Sireci, S. (2002) *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,* at 6.

17 In fact, while overprediction is often cited as a concern in connection with extended time accommodations, the SAT (the only test for which such data is available) overpredicts slightly more for African-American students than students with disabilities. To the extent this represents a problem, it is with the test or the data, not students with disabilities. Id. at 7, 8.

Subsequent studies have confirmed the conclusions of the Blue Ribbon panel.[18] Repeatedly, studies have shown that students without disabilities do not perform significantly better with extended time; students perform significantly better with extended time only when they need the accommodations because of a learning disability.

Accommodations do not improve results; they facilitate the demonstration of knowledge by students who are disadvantaged by the test's mechanics. Aren't we are supposed to be testing what students have learned? Why are we suspicious when they can show it? In the Bartlett case, after 21 days of trial, two trips to the Second Circuit and one to the U.S. Supreme Court, on remand, the district court found that:

> The Board [of Law Examiners'] preoccupation with test scores and its distrust of clinical judgments, however, seems to be driven, at least in part, by misperceptions and stereotypes about learning disabilities. . . . [t]he Board appears to view applicants who claim to be learning disabled with suspicion. *Bartlett I,* 970 F.Supp. at 1136. Of particular concern . . . were alleged comments [that]. . . "anyone who has the money can pay for a report [concerning a learning disability]." *Id.* This same attitude was evidenced at the remand trial when defendants and their experts implied on numerous occasions that plaintiff might be "faking" her reading problems or contriving her errors. . .

Bartlett VI, at 42.

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18 *See, e.g.*, Cohen, A., Gregg, N., and Deng, M. (2005) *The Role of Extended Time and Item Content on High Stakes Mathematics Test*, Learning Disabilities Research & Practice, 20, 225-233 (finding that extended time does not improve scores unless the test-taker has a disability and sufficient mastery of content). A review of such studies by Ofiesh, et al., found that the results of all studies uniformly indicated that under time constraints, students with learning disabilities scored significantly lower than their peers. When provided with extra time, students with learning disabilities had no significant score differences from those of their peers who received no extra time. Journal of Psychoeducational Assessment, Vol. 23, No. 1, 35-53 (2005); Journal of Postsecondary Education and Disability,Vol. 14, No.1 (2000). *See also*, Mandinach, Bridgeman, Cahalan-Laitusis, and Trapani (2005) *The Impact of Extended Time on SAT Performance*. Research Report 2005-8, New York: The College Board. http://professionals.collegeboard.com/data-reports-research/cb/impact-extended-time-sat; and Lindstrom and Gregg (2007) Journal of Learning Disabilities (in review)(large scale meta-analysis found that extended time does not change the construct validity of these tests.).

In closing, I highlight the Supreme Court's decision in PGA Tour, Inc. v. Martin.[19] In PGA Tour, the Court held that the use of a cart by a professional golfer with a physical disability did not fundamentally alter the game of golf even though the PGA Tour's ordinary requirement was that golfers had to walk the course. The Supreme Court stated:

> The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires.[20]

That is all the ADAAA will do – provide access to the competition that is the stuff of American life: school, work and play. The ADAAA will prevent covered entities from putting individuals with disabilities in a position where everything they have done to better their circumstances will be used against them in a court of law. I strongly urge the Committee's support of this bill.

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[19] PGA Tour, Inc. v. Casey Martin, 532 U.S. 661 (2001).

[20] Id. at 690 (2001).