No. 09-7032

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carolyn Singh,

Plaintiff-Appellant,

v.

The George Washington University School of Medicine and Health Sciences, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, GRADUATE MANAGEMENT ADMISSION COUNCIL, AMERICAN UNIVERSITY, THE CATHOLIC UNIVERSITY OF AMERICA, HOWARD UNIVERSITY, AND UNIVERSITY OF THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE JUDGMENT BELOW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*. Except for the following entities, which are appearing as *amici* by way of this brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief of Appellee The George Washington University (April 8, 2011):

American Council on Education
Association of American Medical Colleges
Graduate Management Admission Council
American University
The Catholic University of America
Howard University
University of the District of Columbia

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Appellee The George Washington University (April 8, 2011).

C. Related Cases. This case was previously before the Court in Docket No. 06-7133, which was consolidated with Docket No. 06-7134. The Court's prior ruling is reported at 508 F.3d 1097 (D.C. Cir. 2007).

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and D.C. Cir. R. 26.1, *amici curiae* the American Council on Education ("ACE"), the Association of American Medical Colleges ("AAMC"), the Graduate Management Admission Council ("GMAC"), and the participating individual universities make the following disclosures:

1. ACE is a non-profit association. ACE is not a publicly held corporation or other publicly held entity. It does not have any parent corporation, it has not issued any stock, and there is no publicly-held corporation that owns 10% or more of ACE.

2. AAMC is a non-profit association. AAMC is not a publicly held corporation or other publicly held entity. It does not have any parent corporation, it has not issued any stock, and there is no publicly-held corporation that owns 10% or more of AAMC.

3. GMAC is non-profit corporation. GMAC is not a publicly held corporation or other publicly held entity. It does not have any parent corporation, it has not issued any stock, and there is no publicly-held corporation that owns 10% or more of GMAC.

4. American University, The Catholic University of America, Howard University and the University of the District of Columbia (collectively, the "Universities") are non-profit corporations. The Universities do not have parent

corporations, they have not issued any stock, and there is no publicly held corporation that owns 10% or more of any of the Universities.

5. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

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CASE OVERVIEW

Carolyn Singh was dismissed from medical school in March 2003 after she failed to meet the academic requirements of George Washington University for a third time. She claims that the dismissal violated the ADA because she was diagnosed with a learning disability in February 2003, shortly before her dismissal, and was entitled to accommodations. *See* 597 F. Supp.2d 89, 90 (D.D.C. 2009).

As noted in a prior appeal, Ms. Singh had an "illustrious" academic record in high school and in college. 508 F.3d 1097, 1099 (D.C. Cir. 2007) (*Singh I*). She achieved that academic success without receiving accommodations for any type of disability.

THE *AMICI CURIAE* AND THEIR INTEREST

ACE is a non-profit association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has promoted the highest standards in all aspects of higher education. In addition to serving as a national spokesperson for higher education, ACE sponsors the GED high school-equivalency testing program.

AAMC is a non-profit association whose members include all 134 accredited medical schools in the United States, 17 accredited Canadian medical schools, nearly 400 major teaching hospitals and health systems, and nearly 90

academic and professionals societies. Founded in 1876, AAMC's primary mission is to improve the nation's health by enhancing the effectiveness of academic medicine. AAMC provides a range of services for students and medical schools, including development and administration of the Medical College Admission Test ("MCAT"). Each year more than 16,000 students graduate with an M.D. degree from AAMC member schools.

GMAC is a non-profit corporation formed in the 1970's to support business schools. It has 200 university business school members and provides programs and services that are used by more than 1,800 graduate business programs around the world. Among other things, GMAC develops and administers the Graduate Management Admission Test ("GMAT").

Collectively, the member schools of **ACE**, **AAMC** and **GMAC** provide educational services to millions of students every year, including hundreds of thousands of disabled students. The *amici* and their member schools are committed to ensuring broad and effective access to higher education for all qualified individuals. They have a significant interest in how federal disability laws are applied to post-secondary students. The *amici* have a further interest because the Court's holding could affect application of the ADA in the context of standardized tests, which are governed by a separate provision in Title III.

American University, **The Catholic University of America, Howard University,** and the **University of the District of Columbia** are higher education institutions located in Washington, D.C. Collectively, they provide educational services to more than 23,000 students. Each school is committed to ensuring access to its programs for qualified disabled students. Hundreds of disabled students receive academic accommodations every year at each of these schools. The schools therefore have a direct and substantial interest in how federal disability laws are applied to post-secondary students, particularly by the local federal courts.

The *amici* file this brief pursuant to a motion for leave to file. No party's counsel authored any part of this brief, and no money has been contributed for the preparation of this brief by any party, party's counsel, or other person.

THE COURT'S REQUEST FOR *AMICUS* BRIEFING

In Orders dated December 22, 2010, and January 5, 2011, the Court appointed counsel as *amicus curiae* in favor of the appellant to present argument on the following issue:

> Whether, in the context of a Title III, non-employment Americans with Disabilities Act case, the appellant's learning impairment substantially limited her ability to learn; and more specifically, whether, in such a case, academic achievement precluded a disability finding.

Given the Court's interest in this issue, the discussion that follows focuses on the relevance of a history of academic achievement in deciding whether an individual with a diagnosed learning impairment is substantially limited in the major life activity of learning.

SUMMARY OF ARGUMENT

To prevail on her ADA claim Singh was required to show that she has an impairment that "substantially limits" one or more major life activities. 42 U.S.C § 12102(1)(A). She did not meet that burden.

In determining whether someone is substantially limited, the appropriate comparator is the average person in the general population, not people with the same background and level of education. Using a "peer group" comparator is contrary to agency guidance and to the holdings of virtually all courts that have addressed the question, including this Court. The ADA Amendments Act did not change the applicable comparator group, and it does not apply in this case in any event.

Students who need accommodations should make a timely request and provide reasonable supporting documentation that confirms the existence of an impairment and addresses the resulting functional limitations. In the case of cognitive impairments, such as learning disabilities or attention deficit disorders, the relevant documentation includes diagnostic reports from qualified

professionals, records relating to the student's academic history, records relating to when the student was first diagnosed, records of any prior accommodations in academic or work settings, or on standardized tests.

When an individual claims to be substantially limited in the major life activity of learning, objective evidence regarding academic achievement will always be relevant to the analysis. Indeed, objective evidence relating to actual academic performance is very important because of the absence of a professional consensus regarding the proper diagnostic criteria for learning disabilities. In a given case, the evidence of academic performance might well be sufficiently compelling to lead the fact finder to conclude that no substantial limitation has been shown. This is such a case.

BACKGROUND

I. APPLICATION OF THE ADA IN THE CONTEXT OF HIGHER EDUCATION

Public colleges and universities are governed by Title II of the ADA, which covers programs and services of public entities. *See* 42 U.S.C. §§ 12131-12134. Private schools are governed by Title III. Title III applies to "public accommodations," which Congress has defined to include "nursery, elementary, secondary, undergraduate, or postgraduate private school[s], or other place[s] of education." 42 U.S.C. §§ 12181(7)(J), 12182. Title III also has a provision which applies to private entities that "offer[] examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional or trade purposes…." 42 U.S.C. § 12189. This provision requires covered entities to offer their examinations or courses "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." *Id.*

Congress amended the ADA in 2008, with an effective date of January 1, 2009. ADA Amendments Act ("ADAA"), § 8, Pub. L. No. 110-325, 122 Stat. 3553, 3559. It did so in response to decisions by the Supreme Court that were viewed as interpreting the ADA too narrowly in the employment context, which is governed by Title I.

Concerns were raised prior to the ADAA's enactment regarding the spillover effect that employment-driven changes to the ADA might have on parties regulated by Titles II and III, such as colleges, universities, and entities that administer standardized examinations. The concerns arose because the ADA requires covered entities to provide accommodations to individuals who meet the statutory definition of "disabled."

Because of the ADA's accommodation requirement, colleges, universities and standardized testing organizations deal with ADA issues on a daily basis. In contrast, some employers will never have to deal with an ADA issue, and most employers will do so only episodically. Colleges, universities, and testing organizations routinely have separate departments dedicated to evaluating requests for disability-related accommodations and arranging for reasonable accommodations. They endeavor to provide such accommodations in a conscientious manner that does not fundamentally alter their programs and is fair to all constituents. *See, e.g., Powell v. NBME,* 364 F.3d 79, 88-89 (2d Cir. 2004).

Congress responded to the concerns raised by the higher education community by confirming that nothing in the ADAA is intended to require fundamental modifications in "academic requirements in postsecondary education." *See* 42 U.S.C. § 12201(f). This provision was included "to provide assurances that the bill does not alter current law with regard to the obligations of

academic institutions under the ADA…." Cong. Rec. S8840, S8843 (9/16/2008); *see also* Cong. Rec. S8342, S8354 (9/11/2008) ("we tried to minimize the impact this bill would have in the educational arena").

II. ACCOMMODATION REQUESTS BASED UPON LEARNING DISABILITIES OR OTHER MENTAL IMPAIRMENTS PRESENT UNIQUE CHALLENGES

Many students request academic accommodations under the ADA. Relatively speaking, accommodation requests involving physical impairments are not difficult to evaluate. But accommodation requests in the academic context are based primarily upon mental impairments, such as attention deficit/hyperactivity disorders (ADHD) and learning disabilities (LDs).[1] The same is true for accommodations requested on standardized tests used for admissions or licensure purposes. In most cases, it is far more difficult to confirm the existence of mental impairments and to evaluate the resulting functional limitations than it is when dealing with physical impairments. It is also more difficult to determine what accommodations are necessary and reasonable.

The number of individuals requesting accommodations based upon a diagnosis of a learning disability or ADHD has increased dramatically over the past 20 years. The accommodations requested have included exemptions from

[1] "[I]n 2000, more than 40% of college freshmen with disabilities had a diagnosis of either LD or attention-deficit/hyperactivity disorder." R. Sparks & B. Lovett, "College Students with Learning Disabilities Diagnoses: Who Are They and How Do They Perform?", *J. Learning Disabilities*, Vol. 42, No. 6, 494 (2009).

course requirements, note takers, tutors, extended testing time, readers, scribes, access to a professor's notes, calculators, additional rest periods, separate testing rooms, use of a laptop computer to prepare essays, "comfort" animals, changes to the grading process, and modification of the exam format (for example, changing multiple choice questions to essays). These requests are based upon diagnoses that are often poorly documented and as to which considerable room for professional disagreement is possible.

There are no universally agreed-upon standards for diagnosing LDs. The "discrepancy" model[2] for diagnosing LDs is widely used but it is unreliable and of questionable validity, as noted in a Senate report.[3] An "'astute diagnostician can qualify between 50% and 80% of a random sample of the population as having a learning disability'" by employing discrepancy-based diagnostic models. J. Brackett & A. McPherson, "Learning Disabilities Diagnosis in Postsecondary Students: A Comparison of Discrepancy-Based Models," in *Adults with Learning*

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[2] The discrepancy model looks at whether there is a discrepancy between general intellectual ability, or IQ, and academic achievement, as measured by various psycho-educational assessments. Ms. Singh's LD diagnosis appears to have been based, at least in part, on the discrepancy model. *See* SA145-SA146 (noting that Ms. Singh obtained a "Verbal IQ score…within the superior range" and performance scores that ranged from "low average" to "high average," with reading skills "in the average range").

[3] U.S. Senate Rep. 185, 108th Cong., 1st Sess. (Nov. 3, 2003) ("There is no evidence that the IQ-achievement discrepancy formula can be applied in a consistent and educationally meaningful (i.e., reliable and valid) manner").

Disabilities: Theoretical and Practical Perspectives, at 70 (1996).[4] This means that a significant number of LD diagnoses are likely to be unfounded.[5] A significant number of ADHD diagnoses are also likely to be unfounded.[6]

A recent study looked at the records of 378 college students who had received services from their schools' office of disability services based upon an LD diagnosis by a qualified professional. The study applied three different LD diagnostic models to this universe of students: the IQ-achievement discrepancy model; the DSM-IV model,[7] which includes academic impairment as a requirement for the LD diagnosis; and a third model that also requires evidence of academic

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[4] *See also* S. Dombrowski *et al*., "After the Demise of the Discrepancy: Proposed Learning Disabilities Diagnostic Criteria," 35 *Professional Psychology: Research & Practice*, 364, 366 (2004)("[T]he discrepancy model represents an assessment heuristic that appears to lack validity and reliability. Research indicates that it cannot distinguish those who have LD from those who do not in actual diagnostic practice….").

[5] *See, e.g.*, W. Mehrens *et al.*, "Accommodations for Candidates with Disabilities," 63 *The Bar Examiner*, No. 4, 33, 36 (1994)(noting one study which found that "approximately 60 percent of the pupils identified as learning disabled were misclassified").

[6] *See, e.g.*, J. Joy *et al.*, "Assessment of ADHD Documentation from Candidates Requesting [ADA] Accommodations for the National Board of Osteopathic Medical Examiners COMLEX Exam," *J. of Attention Disorders*, 14(2), 104, 106-7 (2010) (reviewing ADHD-based applications for accommodations on a medical licensing exam and finding that "only 14% (7 out of 50) … provided sufficient clinical information to meet the criteria for ADHD").

[7] The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") provides diagnostic criteria for learning disabilities and ADHD, among other mental impairments.

impairment, referred to as the "Dombrowski" model. The researchers found that "each set of objective diagnostic criteria leads to very different groups of students being diagnosed as LD," and that ***55% of the study participants "did not meet the criteria to be classified as LD by any of the three diagnostic models."***[8] In other words, "a lack of IQ-achievement discrepancies as well as an absence of evidence for academic impairment and for longstanding educational impairment did not deter professional diagnosticians from classifying large numbers of students as LD."[9] Consistent with that finding, "[d]iagnosticians are now routinely identifying learning disabilities in postsecondary students who never encountered meaningful impairment during high school or, in many cases, … college,"[10] even though "LD is a developmental disorder that emerges during childhood."[11]

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[8] R. Sparks & B. Lovett, "Objective Criteria for Classification of Postsecondary Students as Learning Disabled," 42 *J. Learning Disabilities* 230, 236-37 (2009)(emphasis added).

[9] *Id*. at 236. Of the students who were found to meet the criteria for at least one of the diagnostic models, "the largest numbers of participants were classified as LD by the IQ-achievement discrepancy model," a total of 160 students [out of 378], while much "smaller numbers of students were identified as LD by classification models that linked LD to academic impairment," a total of 26 for the DSM-IV model and 24 for the Dombrowski model. *Id.*

[10] M. Gordon, L. Lewandowski & S. Keiser, "The LD Label for Relatively Well-Functioning Students," *J. Learning Disabilities*, Vol. 32, No. 6, 485, 488 (1999).

[11] "College Students with Learning Disability Diagnoses," *supra* n.3, at 506.

A 2009 analysis of more than 350 articles involving college students with LD diagnoses highlights many of the issues noted above:

> [O]ur first finding was a non-finding: We failed to find consensus on the criteria used to determine the composition of that group. The sheer number of criteria found across studies is dizzying, and the range of criteria is depressing…. If different researchers could not agree on which college students met criteria for LD, how can we assume clinicians to be reliable judges?
>
> Our second finding was, again, a non-finding: We failed to find evidence of significant academic impairment among college students with LD. Their average IQ and achievement scores were generally in the standard score range of 95 to 105 (with the exception of written language skills, which were a bit weaker)…..
>
> There are four implications that can be drawn from these two findings. First, whether a postsecondary student is classified as LD is greatly dependent on the clinicians who assess the student and the administrators who review documentation, rather than being dependent on whether the student meets specific objective criteria. The evidence from the studies reviewed here demonstrates the perils of failure to develop a valid definition and empirically based diagnostic criteria for LD….
>
> Second, the substantial overlap between the achievement test score distributions for the students with and without LD classifications suggests that, at the postsecondary level, the LD label may bestow advantages (e.g., accommodations, tutoring, course waivers, and substitutions) to students without serious academic problems while denying these advantages to students with levels of academic achievement that are similar to (or even weaker than) those of the students with LD classifications….
>
> Third, results from this study suggest that LD may be a label used at the postsecondary level for students who simply lack college-level academic skills….
>
> Finally, the diversity of identification criteria found across studies suggests that disability service providers and other administrators at

> many colleges and universities are unaware of research-based and other best practice standards for [LD] identification and documentation….[12]

The risk of inaccurate diagnoses resulting from flaws in the diagnostic models is compounded by the fact that some individuals "exaggerate" their symptoms to obtain the desired diagnosis. The undersigned *amici* are not saying that this concern applies with respect to Singh, but it is an issue in the broader context. "Recent studies conducted at American post-secondary institutions report that a high proportion of college students seeking evaluations for either attention-deficit/hyperactivity disorder or learning disorders fail symptom validity tests (SVTs), calling into question the validity of their performance on standardized [diagnostic] assessment measures."[13] "[P]articularly in academic settings, adults undergoing diagnostic evaluations … might exaggerate symptomatology on self-report measures and tests of neurocognitive functioning" because of the "considerable secondary gain potentials," including "academic accommodations (e.g., extended test time, private testing environments, alternative courses) and

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[12] "College Students with Learning Disability Diagnoses," *supra* n.3, at 507.

[13] A. Harrison & M. Edwards, "Symptom Exaggeration in Post-Secondary Students: Preliminary Base Rates in a Canadian Sample," 17 *Applied Neuropsychology* 135 (2010).

other forms of assistance available to impaired students [under the IDEA, Section 504 and the ADA]."[14]

This does not mean that every LD or ADHD diagnosis submitted by a college student is suspect. That is obviously not the case. Many students have cognitive impairments for which reasonable accommodations are appropriately provided every year, and colleges proactively encourage students to seek assistance when needed. But the fact remains that accommodation requests based upon cognitive impairments are more difficult to evaluate and often rely upon diagnoses as to which legitimate questions arise.

The diagnostic issues have important implications. In the context of standardized tests, accommodations could alter the standardized test administration procedures that produce reliable and comparable test scores. Research has shown, for example, that scores achieved on a standardized test with extra testing time

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[14] B. Sullivan, K. May & L. Galbally, "Symptom Exaggeration by College Adults in Attention-Deficit Hyperactivity Disorder and Learning Disorder Assessments," 14 *Applied Neuropsychology* 189 (2007) (examining students at a mid-size college over a four-year period, and concluding that "significant numbers of college students demonstrate poor effort in the context of ADHD and LD evaluations, and that such poor effort is an indication of symptom magnification motivated by secondary gain potentials"); s*ee also* A. Harrison *et al.*, "An Investigation of Methods to Detect Feigned Reading Disabilities," 25 *Archives of Clinical Neuropsychology* 89, 90 (2010)("Until recently, most clinicians assumed that students could not feign a specific LD, such as a reading disability, … and that the base rate for such malingering in psychoeducational assessments was very low; however, this has proven not to be the case.").

often do not have the same meaning as scores from a standard administration.[15] This raises fairness issues for individuals who test without accommodations, and for the many entities that rely upon test scores as reliable indicators of an individual's achievement, competency, or aptitude.[16] If the test is an admissions test, giving an examinee unwarranted accommodations could harm other individuals who are competing for a limited number of admission slots. It could also harm the schools themselves, because they rely upon test scores to provide an objective means of comparing candidates from high schools or undergraduate institutions located across the country if not around the world. In the context of licensure and certification tests, the inappropriate provision of extra testing time or other accommodations could affect the general public. S.E. Phillips, "High Stakes Testing Accommodations: Validity Versus Disabled Rights," *Applied Measurement in Education*, 7(2), 93-120 at 98 (1994).[17]

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[15] *See, e.g., Love v. LSAC,* 513 F. Supp.2d 206, 216 n.7 (E.D. Pa. 2007)("research indicates that if you give someone extra time on a timed test… their score will improve whether they have a learning disability or not").

[16] *See, e.g., Standards for Educational and Psychological Testing*, at 61, 105 (1999) ("accommodations raise concerns that scores from non-standard administrations may not have the same meaning as scores from standard administrations" and could give an individual "an undue advantage over those tested under regular conditions.").

[17] Additional fairness concerns have been expressed in light of the demographics of individuals who tend to make up a large percentage of the pool of individuals who request accommodations. *See* C. Lerner, "Accommodations for

In the university context, accommodations can affect the manner in which a school has chosen to pursue its academic mission. Colleges have a legitimate interest in not having their academic programs fundamentally altered, as Congress and the courts have recognized. And students have a legitimate interest in ensuring that supplemental academic services that are not available to all students are provided only when warranted. Accommodation requests also raise practical challenges. Many colleges and universities are already "overwhelmed by requests for support services" and often "find themselves unable to provide special programs and services to every student claiming to be learning disabled." *Learning Disabilities Diagnosis in Postsecondary Students*, *supra*, at 69. "One of the risks inherent in broad definitions of disability is that monies, energies, and services will be spread too thin…. In the zero-sum world of school budgets, already scarce services rendered to a high functioning student [who is diagnosed as LD because of] relative discrepancies will diminish remedial opportunities for those with absolute impairments." *The LD Label for Relatively Well-Functioning Students*, *supra*, at 489. And these additional costs would come when most

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the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?", 57 *Vand. L. Rev.* 1041 (2004).

colleges and universities are confronting significant budgetary pressures across the board.[18]

Applying the definition of "disabled" to academically successful individuals with late LD diagnoses and no history of accommodations will also lead to more students challenging adverse academic decisions on the basis of a claimed disability. This means more internal appeals, more complaints to the Department of Education's Office of Civil Rights, and more litigation.

[18] *See* "Budget Cuts Pummel Public Colleges and U.S. Standing," www.Reuters.com (4/11/2011)("America's…public colleges are bracing for a run of lean years as states stay tight-fisted, tuition hikes get tougher and worries take root that a malnourished higher education system will stunt the U.S. economy for years…. Policymakers at the schools that educate three-quarters of America's 18.2 million college students are eyeing more layoffs, eliminating degree programs and campuses, and giving slots to higher-paying students from outside home states.").

ARGUMENT

Appointed *amicus* counsel has filed a brief that makes the following arguments:

> The district correct erred by failing to apply the ADAA…. Under the ADAA, the average-person comparison is inappropriate because substantial limitation should be determined by reference to individuals of similar age and educational background, i.e., other medical students in this case. When Ms. Singh's claim is properly analyzed under the ADAA, and she is compared to other medical students, her prior academic achievement does not factor into the substantial limitation analysis, and her evidence established that her impairment substantially limits her ability to learn. Therefore, this Court should vacate the district court's judgment in GW's favor and remand with instructions to analyze Ms. Singh's claim under the ADAA.

Br. of Appointed Amicus Curiae in Support of Appellant at 60.

The Court should reject these arguments. The ADAA does not apply because the alleged discriminatory actions of GWU took place well before the ADAA's effective date. But even if the ADAA were applicable, it would not lead to a different outcome. The ADAA did not change the operative comparator group from the "average person" (or "most people") standard recognized by this Court in *Singh I* to a "peer group" comparator. The relevant legal issue continues to be whether the record supports a finding that Singh's diagnosed learning impairment has resulted in a substantial limitation in her ability to learn as compared to most people in the general population. Her prior academic achievements provide objective evidence of her ability to learn and thus are directly relevant to the

substantial limitation analysis (under the ADA as amended, or as it existed prior to the ADAA).

Significant academic achievement does not independently "preclude" a finding that someone has a substantial limitation in her ability to learn, in the absolute sense in which "preclude" is generally used, but objective evidence of significant academic achievement is highly probative and is properly considered along with other relevant information in deciding whether a diagnosed impairment results in substantial limitations in the major life activity of learning. This is particularly true when the impairment in question is a lifelong condition, such as a learning disability.

The fact that someone has done very well academically without ever being diagnosed with a learning disability and without receiving accommodations is clearly relevant, factually and legally, to a determination of whether the claimed impairment has substantially limited the person's ability to learn. In a given case, an individual's history of academic success might well lead a court to conclude that the individual is not substantially limited in her ability to learn – as the district court concluded here.[19]

[19] Conversely, the fact that someone was first diagnosed before college and has a history of disability-based accommodations would also be relevant in determining whether that person is disabled within the meaning of the ADA – but not dispositive. If the original diagnosis was professionally unsound (as is true of

The appointed *amicus* has argued that "the district court erred in finding that academic achievement precluded substantial limitation…." Amicus Br. in Support of Appellant at 23. However, the district court did not actually use the word "precluded" in its analysis. It simply stated that Singh's extensive record of academic success "compelled" the conclusion that she is not substantially limited in her ability to learn, a decision which the court reached after "considering all of the evidence plaintiff presented." 597 F. Supp. 2d at 95, 98. That finding was not clearly erroneous.[20]

I. THIS CASE IS GOVERNED BY THE ADA AS IT EXISTED PRIOR TO ENACTMENT OF THE ADA AMENDMENTS ACT

This Court has already held that the ADAA "applies only prospectively." *Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009).

The fact that Singh is seeking "only prospective relief in the form of an injunction declaring her a student in good standing" does not make *Lytes* inapplicable. *See* Amicus Br. in Supp. of Appellant at 46. The relevant question is

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many LD and ADHD diagnoses), a history of accommodations that were based upon that diagnosis would be entitled to little or no weight.

[20] This Court reviews fact findings under the "highly deferential" "clearly erroneous" standard. *Ford v. Mabus*, 629 F.3d 198, 201–02 (D.C. Cir. 2010). "The question of whether an individual is substantially limited in a major life activity is a question of fact." *Williams v. Phila. Housing Auth. Police Dept.*, 380 F.3d 751, 763 (3d Cir. 2004); *accord, Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007).

when the allegedly unlawful conduct occurred.[21] Courts have correctly rejected similar efforts to apply the ADAA retroactively to conduct that occurred prior to the statute's effective date based upon the prospective nature of the relief requested. *See, e.g., Strolberg v. U.S. Marshall Serv.*, 2010 U.S. Dist. LEXIS 29296, **10-13 (D. Idaho 2010) ("[W]hile plaintiffs seek reinstatement to their positions, the event and conduct for which they are claiming discrimination…took place long before the enactment of the ADAA"); *Pinegar v. Shinseki*, 2010 U.S. Dist LEXIS 22265, *3 n.2 (M.D. Pa. 2010) ("Even though plaintiff's claims for reinstatement and reasonable accommodations could be considered claims for prospective relief, it cannot be denied that she seeks to hold defendants liable for conduct that occurred before the ADAA took effect.")

Here, as in *Lytes*, applying the ADA as it existed when the allegedly discriminatory actions were taken is consistent with Congress' desire "to protect settled expectations." 572 F.3d at 940.

II. THE DISTRICT COURT CORRECTLY HELD THAT SINGH IS NOT "DISABLED" WITHIN THE MEANING OF THE ADA

"Merely having an impairment does not make one disabled for the purposes of the ADA." *Toyota*, 534 U.S. at 195. This has not changed under the ADAA:

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[21] "[T]he ADAAA applies only to acts of alleged discrimination that occur on or after January 1, 2009." EEOC, "Notice Concerning ADA Amendments Act of 2008," appended to "Section 902: Definition of the Term Disability" (www.eeoc.gov/policy/docs/902cm.html).

> By retaining the essential elements of the definition of disability including the key term 'substantially limits' we reaffirm that not every individual with a physical or mental impairment is covered by the…definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability…. That will not change after enactment of the ADA Amendments Act….

Statement of the Managers to Accompany S. 3406, Cong. Rec. S8342, S8345 (9/11/08).

A. The Appropriate Comparator Is The Average Person In The General Population

This Court held in *Singh I* that the substantial limitation analysis calls for a comparison of a plaintiff's ability to perform the applicable major life activity with the average person in the general population. 508 F.3d at 1100-04. That holding was supported by guidance from the DOJ and EEOC and was consistent with the holdings of "sister circuits." *Id*. at 1102.[22]

Contrary to what is argued by Singh and her *amicus*, nothing in the ADAA changed the applicable comparator group. Thus, the EEOC's regulations implementing the ADAA state that "[a]n impairment is a disability…if it

[22] *See, e.g., Wong v. Regents of Univ. of Calif.*, 410 F.3d 1052, 1065-66 (9th Cir. 2005)("The relevant question…was not whether...his learning impairment makes it possible for him to keep up with a rigorous medical school curriculum. It was whether his impairment substantially limited his ability to learn…as compared to most people."); *McCrary v. Aurora Pub. Schs.*, 57 Fed. Appx. 362, 371 (10th Cir. 2003); *Palotai v. Univ. of Maryland*, 38 Fed. Appx. 946, 955 (4th Cir. 2002); *Costello v. Mitchell Pub. Sch. Dist*., 266 F.3d 916, 923-24 (8th Cir. 2001); *Gonzales v. NBME*, 225 F.3d 620, 627 (6th Cir. 2000); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155-56 (1st Cir. 1998).

substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population," 29 C.F.R. § 1630.2(j)(1)(ii)(2011), and DOJ's Title III guidance continues to define "substantially limited" in terms of an individual's ability to perform a major life activity "in comparison to most people,." 28 C.F.R. Part 36, App. B, at 704-05 (July 2010).

Moreover, Congress reaffirmed in the ADAA that one of the ADA's purposes is to provide "'*clear*, strong, *consistent*, enforceable standards addressing discrimination'…." *See* 42 U.S.C. § 12101 note at (b)(1)(emphasis added)(quoting 42 U.S.C. § 12101(b)(2)). A "peer group" comparator is not a clear standard and would lead to inconsistent outcomes. For example, a student might not be "disabled" in high school when compared to his peers, but "disabled" when compared to his peers in medical school or law school. As the Court has previously noted, Congress intended the ADA to provide "consistent" standards, and a situational "peer group" comparator group that "would make disabled status vary with a plaintiff's current career choices" is not such a standard. 508 F.3d at 1103.

B. The Applicable Major Life Activity Is Learning, Not Test-Taking

The Court held in *Singh I* that "test-taking itself is not a major life activity." 508 F.3d at 1104; *accord, Baer v. NBME*, 392 F. Supp.2d 42, 47 (D. Mass. 2005)

("The specific task of taking timed tests.. is not the kind of 'major life activity' protected under the ADA."); *Tips v. Regents of Texas Tech Univ.*, 921 F. Supp. 1515, 1516 (N.D. Tex. 1996).

The appointed *amicus* does not argue that a different holding is warranted here. *See* Amicus Br. in Support of Appellant at 5. Nevertheless, in describing how Singh is affected by her impairment, the appointed *amicus* repeatedly references her inability to do well on "multiple-choice tests." *See, e.g., id.* at 5-11; 24 ("When compared to other medical students…Singh's impairment substantially limits her learning by significantly interfering with her ability to fairly complete a…crucial component of medical school: multiple-choice exams").

It is therefore appropriate to note, again, that learning is the applicable major life activity. Performance on tests over the course of a person's academic career may provide relevant information regarding a person's ability to learn, 508 F.3d at 1104-05, but an individual cannot establish that she is "substantially limited" in learning based solely on her professed difficulties in taking tests – much less a particular kind of test (multiple choice tests with time limits) in a particularly challenging academic environment (medical school). *See also Ristrom v. Asbestos Workers Local 34,* 370 F.3d 763, 769-70 (8th Cir. 2004) ("The inability to pass a few highly specialized courses does not indicate an inability to learn under the ADA."); *McGuinness v. Univ. of New Mexico Sch. of Med.*, 170 F.3d 974, 978

(10th Cir. 1998) ("[Plaintiff] must demonstrate that his anxiety impedes his performance in a wide variety of disciplines, not just chemistry and physics."); *Leisen v. City of Shelbyville*, 153 F.3d 805, 808 (7th Cir. 1998)(plaintiff's inability to secure "paramedic certification does not show that she was substantially limited in…learning, any more than the fact that a particular individual might not be able to pass a course in physics or philosophy would allow an inference that all learning activity was substantially limited."); *Marlon v. Western New England Coll.*, 2003 U.S. Dist. LEXIS 22095, *28 (D. Mass. 2003), *aff'd*, 124 Fed. Appx. 15 (1st Cir. 2005).

C. Singh's Academic Success Is Directly Relevant To Whether She Is Substantially Limited In Her Ability To Learn

Courts routinely look to how individuals have actually performed academically in determining whether the individuals are "substantially limited" in their ability to learn. *E.g., Wong*, 410 F.3d at 1065 ("Wong's claim to be 'disabled' was contradicted by his ability to achieve academic success, and to do so without special accommodations."); *Ristrom*, 370 F.3d at 769; *Palotai v. Univ. of Maryland*, 38 Fed. Appx. at 955 (noting that plaintiff had a "demonstrated record of academic achievement"); *Li v. Intel Corp*., 35 Fed. Appx. 677, 679 (9th Cir. 2002); *Costello*, 266 F.3d at 923-24 (affirming summary judgment where plaintiff had average grades and was working toward her G.E.D.); *Betts v. Rector & Visitors of the Univ. of Virginia*, 18 Fed. Appx. 114, 118 (4th Cir. 2001)("Betts

has a history of academic achievement, and his learning abilities are comparable to the general population."); *Bercovitch*, 133 F.3d at 155-56 ("the record shows that Jason…excelled academically for most of his years at the Baldwin School").[23]

It is entirely appropriate to look at objective measures of someone's ability to learn over time – *i.e.*, their academic record and related history – in evaluating the extent to which a claimed impairment has substantially limited the individual's ability to learn. This is particularly true given the absence of any consensus regarding the proper means for diagnosing learning disabilities and the risk that a diagnosis may be unfounded. Cognitive impairments cannot be confirmed in the same way as most physical impairments. Instead, you have to look primarily at how the impairment has affected the individual. And because learning disabilities are lifelong conditions, evidence of "past" academic achievement remains relevant when determining whether someone is "currently" substantially limited in her ability to learn – contrary to what the appointed *amicus* has argued. *See* Amicus

[23] *See also Kamrowski v. Morrison Mgmt. Specialist*, 2010 U.S. Dist. LEXIS 103290,*23-29 (S.D.N.Y. 2010); *Butler v. Bloomington Pub. Schools*, 2010 U.S. Dist. LEXIS 10517, *11-13 (D. Minn. 2010); *Brief v. Albert Einstein Coll. of Med.*, 2010 U.S. Dist. LEXIS 55302 (S.D.N.Y. 2010); *Marshall v. Sisters of the Holy Family*, 399 F. Supp.2d 597, 603-04 (E.D. Pa. 2005); *Brown v. Univ. of Cincinnati*, 2005 U.S. Dist. LEXIS 40798, at *31-32 (S.D. Ohio 2005); *Spychalsky v. Sullivan*, 2003 U.S. Dist. LEXIS 15704 (E.D.N.Y. 2003), *aff'd*, 2004 U.S. App. LEXIS 10246 (2d Cir. 2004); *Hopkins v. St. Joseph's Creative Beginning*, 2003 U.S. Dist. LEXIS 21033 (E.D. Pa. 2003); *Dorn v. Potter*, 191 F. Supp.2d 612, 623 (W.D. Pa. 2002); *Pacella v. Tufts Sch. of Dental Med.*, 66 F. Supp.2d 234, 239 (D. Mass. 1999); *Pazer v. New York State Bd. of Law Examiners*, 849 F. Supp. 284, 287 (S.D.N.Y. 1994).

Br. in Supp. of Appellant at 28-31, 34-38. Absent an injury to the brain or some other external cause, a person does not suddenly become learning disabled on a going-forward basis. *See id*. at 38 (suggesting that a learning disability might be a "new or latent impairment").

In enacting the ADAA, certain members of Congress stated that "it is critical to reject the assumption that an individual who performs well academically…cannot be substantially limited in activities such as learning [or] reading…." House Rep. 110-730, Part 1, Comm. on Ed. & Labor, at 10 (June 23, 2008). The undersigned *amici* agree that a record of academic achievement does not automatically rule out a finding that a given individual is substantially limited in the activity of learning. More information is needed to make that determination, including whether the individual achieved that academic success after receiving accommodations based upon a diagnosed impairment. Again, learning disabilities are lifelong conditions, and the resulting functional limitations should become manifest in some fashion before an individual gets to college or (as here) graduate school. This point is made in the ADAA legislative history:

> The Committee believes that the comparison of individuals with specific learning disabilities to ''most people'' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose ***extraordinary lifelong challenges***; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. ***Because specific learning disabilities are neurologically-***

> ***based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.***

Id. at 10-11 (emphasis added).

After "considering all of the evidence plaintiff offered" and the "defendant's evidence," the district court concluded that Singh had not met her burden of establishing a disability within the meaning of the ADA. 597 F. Supp.2d at 98. The court appropriately attached significant weight to "the academic success she has enjoyed throughout her life, including her strength from a very young age in areas that require reading and comprehension…." *Id.* at 95. Singh is bright, capable, and accomplished. Unlike the learning disabled individuals referenced in the ADAA legislative history, above, she mastered "the basic mechanics of reading" as a child (indeed, she did so at age three, Amicus Br. in Supp. of Appellant at 12), and she has not encountered "extraordinary lifelong challenges" in her ability to read or learn. Her history of academic achievement through high school and college, without receiving any accommodations, supports the conclusion that she is not substantially limited in the major life activity of learning.

D. GWU's Decision To Dismiss Singh Is Entitled To Deference

A university's decision to dismiss a student for not meeting its academic standards is entitled to a degree of deference, even in cases in which the student

claims to have a disability.[24] GWU has a legitimate interest in ensuring that its graduates meet the school's rigorous academic requirements. The purpose of a medical school is to educate and train individuals to become highly qualified physicians, and not everyone will succeed. GWU was not required to excuse Singh's academic failures based upon her recently diagnosed learning disability.

[24] *See, e.g., Powell,* 364 F.3d at 88; *Zukle v. Regents of the Univ. of Calif.*, 166 F.3d 1041, 1051 (9th Cir. 1999); *McGuinness v. Univ. of New Mexico School of Medicine,* 170 F.3d 974, 979-80 (10th Cir. 1998); *Kaltenberger v. Ohio College of Pediatric Medicine,* 162 F.3d 432, 436-37 (6th Cir. 1998)("Courts must also give deference to professional academic judgments when evaluating the reasonable accommodations requirement…"); *Doherty v. Southern College of Optometry,* 862 F.2d 570, 576-77 (6th Cir. 1988).

CONCLUSION

The Court should affirm the lower court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,693 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced, fourteen-point Times New Roman type prepared using Microsoft Word.

Dated: April 15, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of *Amici Curiae* in Support of Defendants-Appellees were served by way of the Court's ECF system and by first class mail, postage prepaid, this the 15th day of April, 2011 on the following:

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