IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE	**:**	**CIVIL ACTION**
	:	
v.	**:**	
	:	
NATIONAL BOARD OF	**:**	
MEDICAL EXAMINERS	**:**	**NO. 99-4532**

MEMORANDUM AND ORDER

M. FAITH ANGELL November 1, 1999
UNITED STATES MAGISTRATE JUDGE

Plaintiff, John Doe, filed a complaint against the National Board of Medical Examiners under Subsections III and V of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*. Doe, a fourth year medical student, seeks declaratory and injunctive relief to prevent the National Board of Medical Examiners from annotating or "flagging" the scores he earns on the United States Medical Licensing Examination, when reporting these scores to medical residency programs to which Doe has or will apply.

This matter is before the Court on Plaintiff's motion for a preliminary injunction, to which the Defendant has responded; the matter was referred to me by Order of the Honorable Lowell A. Reed, Jr., dated October 14, 1999. The parties have consented to have the preliminary injunction motion decided by me, pursuant to the provisions of 28 U.S.C. §636(c) and Fed.R.Civ.P. 73. After considering the testimony and the documentary evidence submitted, and for the reasons which follow, Plaintiff's motion for a preliminary injunction is **GRANTED.**

BACKGROUND

The parties have stipulated to the following facts for the purposes of resolution of Plaintiff's motion for a preliminary injunction.

1. Plaintiff John Doe [hereinafter "Plaintiff" or "Doe"] is a medical student at the Medical College of Virginia. He resides in Richmond, Virginia.

2. Defendant National Board of Medical Examiners [hereinafter "NBME"] is a private entity with its principal place of business at 3750 Market Street, Philadelphia, Pennsylvania 19104.

3. Together with the Federation of State Medical Boards of the United States, Inc., NBME offers the United States Medical Licensing Examination [hereinafter "USMLE"].

4. Plaintiff was first diagnosed with multiple sclerosis in the summer of 1987.

5. According to Plaintiff's doctor, Doe's multiple sclerosis causes him to have muscular spacticity, fine motor problems, and the need to use the bathroom frequently.

6. According to Doe's doctor, Doe experiences urgency of the bowel and bladder and occasional incontinence.

7. Doe does not have any learning disabilities and his multiple sclerosis does not affect his cognitive abilities.

8. The type of symptoms, frequency and duration of symptoms that Doe experiences from his multiple sclerosis are varied and unpredictable.

9. Doe graduated from Harvard University in 1988 and the University of Pennsylvania Law School in 1991, he passed the Illinois Bar Examination in 1991 and the United States Patent and Trademark Bar Examination in 1992.

10. Doe practiced law at Kirkland & Ellis in Washington, D.C. and Hogan & Hartson in Washington, D.C. for five years prior to entering medical school.

11. Doe currently is a fourth year medical student at the Medical College of Virginia.

12. The USMLE is a standardized multiple-choice test administered in three parts, called "Steps".

13. Prior to May 1999, the USMLE was provided in a written format. Steps 1 and 2 of the exam consisted of four 3-hour booklets of multiple choice questions given over a two day period. Since May 1999, the USMLE had been given in a computerized format. Under the computerized format, Step 1 of the exam is comprised of seven 1-hour blocks of multiple choice questions provided over an 8-hour day, and Step 2 of the USMLE is comprised of eight 1-hour blocks of questions provided over a 9-hour day. Examinees can use the additional hour of time for completion of a tutorial and time before and between blocks of questions, including breaks or lunch, as the examinee chooses.

14. Individuals who are enrolled in, or graduates of, accredited medical schools in U.S. and Canada are eligible to take USMLE Step 1 and 2. To apply for Step 3 of the USMLE, the applicant must have passed both Steps 1 and 2, have obtained an M.D. or D.O. degree and must meet the Step 3 requirements set by the medical licensing authority to which the applicant is applying.

15. NBME will send an examinee's USMLE score transcript to any third party designated by the examinee, including residency programs, fellowship programs, and state licensing authorities.

16. In order to obtain a license to practice medicine in the United States, Doe must obtain a passing score on all three Steps of the USMLE.

17. In 1997, Doe applied to the NBME to take Step 1 USMLE for the June 9-10, 1998 administration of the Step 1 examination.

18. The USMLE is designed to assess an examinee's understanding of, and ability to apply, concepts and principles that are important in health and disease and that constitute the basis of safe and effective patient care.

19. Doe completed the NBME questionnaire requesting testing accommodations for the Step 1 June 1998 examination.

20. On that questionnaire, Doe informed the NBME that he had a physical disability.

21. For Step 1 of the USMLE, Doe requested that the NBME provide him with accommodations including: (i) double time (but at least 1.5 times the normal time) to take the exam; and (ii) a separate test room near the men's bathroom.

22. The NBME provided the following accommodations for Doe's Step 1 examination: (1) additional time of one and one half times the normal time to take the examination and (2) a special seating assignment close to the restroom.

23. Step 1 of the USMLE at the time Doe took it was administered in the pencil and paper format.

24. NBME issued Doe's Sept 1 scores in July 1998.

25. The USMLE is now administered in a computer-based testing format. Doe took Step 2 USMLE in the computer-based testing format, using a mouse.

26. On November 30, 1998, Doe applied for Step 2 USMLE and again requested testing accommodations from the NBME including time and a half additional time.

27. The NBME provided Doe the accommodation of double time for the Step 2 examination.

28. The USMLE in the computer-based test format is administered at Sylvan Prometric facilities throughout the United States.

29. Doe took Step 2 of the USMLE examination in August 1999.

30. Doe took Step 2 of the USMLE at a Sylvan Prometric facility in Arlington, Virginia.

31. The NBME will only report an examinee's score on the USMLE to medical residency programs upon the request of the examinee.

32. When an examinee is granted a testing accommodation of extra time for the USMLE, the examinee's transcript of scores will contain a comment stating: "Testing Accommodations" on the front of the transcript, and a description on the back of the transcript stating: "Following review and approval of a request from the examinee, testing accommodations were provided in the administration of the examination."

33. Doe's score report for Step 1 of the USMLE contains an annotation that Doe received testing accommodations for the examination.

34. In August 1998, Doe wrote to the NBME and requested that it modify its policy.

35. By letter of October 1, 1998, the NBME denied Doe's request.

DISCUSSION[1]

I. Standing.

As a threshold matter, NBME argues, in opposition to the motion for a preliminary injunction, that Plaintiff lacks standing to seek the injunctive relief requested because:(1) he is unable to allege any real injury; (2) Doe cannot establish the requisite causal link between the NBME's annotation policy and the mere possibility that he will be denied admission to a residency program and (3) Doe cannot establish that the alleged harm, failure to be accepted into a residency program, will be redressed by the grant of a preliminary injunction. *See* Defendant's memorandum of law in opposition to the motion for preliminary injunction [hereinafter "Defendant's Opposition Memo"] at pp. 5-8. NBME takes the position that the harm which Doe fears, namely rejection of his applications to residency programs because of the flagging of his USMLE scores, is neither concrete nor actual, and if the harm does occur, it will be at the hands of an independent third party, and not the Defendant. *Id.* at 6-7 ("The reporting of scores, which is all NBME does, causes no harm to Plaintiff.")

A party invoking federal jurisdiction bears the burden of establishing standing under Article III of the United States Constitution. Proof of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992). Article III constitutional standing contains three elements: (1) the plaintiff must establish an injury in fact – an invasion of a legally

[1] All additional findings of fact will be set forth within the text of this discussion, as appropriate, and will be annotated to the record.

protected interest which is concrete and particularized and actual or imminent (not conjectural or hypothetical); (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of an independent action by a third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Trump Hotels & Casino Resorts v. Mirage Resorts*, 140 F.3d 478, 484-85 (3d Cir. 1998)(*citing Lujan*).

Under this well established test, I have little trouble concluding that Doe has standing to seek preliminary injunctive relief against the NBME. As discussed more fully below, I believe that Doe has pled a significant immediate injury resulting from the NBME's refusal to report his USMLE scores without annotation to the fact that he requested, and was granted, an accommodation. Contrary to Defendant's argument that Doe's alleged injury is completely speculative and will, if at all, be perpetrated by third parties (namely residency programs), I find that Doe has pled infringement of his right to be free from discrimination under the Americans with Disabilities Act [hereinafter "ADA"] as a result of the NBME's policy of flagging all USMLE scores for which the examinee was granted an accommodation in which additional time is given. The injury asserted, the Defendant's refusal to report these scores without annotation, is actual and occurs at a much earlier point in time than when the residency programs begin screening applicants. It is the NBME's policy of flagging scores for which time-related accommodations are granted which, in and of itself, is challenged as discriminating against examinees with disabilities. Moreover, if Doe prevails on his claims, the injury asserted, the

improper flagging of USMLE scores for time-related accommodations, will be redressed. As Plaintiff has pled all three of the required elements under Article III, I conclude that he has standing to bring this action against the NBME.

II. Privilege.

Defendant argues that Plaintiff's preliminary injunction motion should be denied because "the truthful communication of information such as the NBME annotation of scores is a communication protected by privilege." According to Defendant:

> "The privilege defense applies equally to NBME's communication of plaintiff's annotated score transcripts to residency programs and licensing authorities. NBME and the various residency programs and licensing authorities share a common interest in ensuring that NBME provides standardized tests for all examinees, and in knowing whether or not particular examinees' scores were achieved under non-standard conditions. Plaintiff does not allege, nor is there any evidence, that NBME's annotation policy was promulgated, or enforced against the plaintiff, in bad faith or with any malice on NBME's part. Accordingly, [. . .], the Court should find that the report of annotated scores to residency programs and licensing authorities that share the same interest as NBME in the validity of the standardized testing process is a privileged communication. On that basis, plaintiff's ADA claims should be dismissed." *See* Defendant's Opposition Memo at pp. 24-27.

I have been unable to find any cases in this Circuit which recognize, as a defense to ADA claims, an absolute privilege for communications between a testing organization and the third parties to whom test results are reported. Nor do the cases cited by Defendant convince me that such a privilege should be created in this case.

Defendant relies heavily on the case of *Rothman v. Emory University*, 123 F.3d 446 (7th Cir. 1997). Defendant is correct in noting that the Seventh Circuit dismissed an ADA claim by a law student with epilepsy against his law school for, *inter alia*, reporting his epileptic condition to the Illinois Board of Law Examiners. The *Rothman* Court concluded that summary judgment

in favor of the law school was warranted as plaintiff failed to prove that he suffered an adverse consequence as a result of the alleged act of discrimination. With regard to Emory University's asserted defense of absolute privilege for communications between the Bar Examiners and those persons providing information regarding a bar applicant, the Court found "exceptional force" in the proposed privilege, however, it specifically declined to base its judgment of this ground. *See Rothman*, 123 F.3d at 452 n.4 (7th Cir. 1997). The Seventh Circuit, in *dicta*, opines that an absolute privilege for persons providing information to the Bar Examiners would "without question" improve its ability to evaluate a candidate's fitness to practice law.[2]

The cases cited by Defendant are not controlling, nor are do I find their analyses persuasive or applicable to the issues before me. I decline to create an absolute privilege for NBME under the facts of this case.[3]

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[2] NBME also cites to two additional cases: *Langston v. ACT*, 890 F.2d 380 (11th Cir. 1980) and *Johnson v. Educational Testing Service*, 754 F.2d 20 (1st Cir.), *cert. denied*, 472 U.S. 1029 (1985). In relevant part, these cases dealt with slander/libel and defamation (respectively) and whether the Court would recognize a qualified privilege defense. There is, under Pennsylvania law, a conditional privilege defense to defamation for "communications made on proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause." *See Elia v. Erie Insurance Exchange*, 430 Pa.Super. 384, 391 (1993). There is no claim of defamation in the instant action, and therefore, I find reliance on the cited privilege unavailing.

[3] As a final threshold matter, NBME argues that Plaintiff's request for preliminary injunctive relief is barred by laches. Citing to the facts that: (1) Doe did not file suit until over one year after he received his Step 1 scores; (2) Doe did not seek a preliminary injunction until October 1999, even though he brought this action in September 1999; and (3) Doe is, himself, an attorney, Defendant argues that "[t]his is not a plaintiff who pursued his claim with all deliberative speed, and, this factor alone, warrants denial of the extraordinary equitable relief he seeks." *See* Defendant's Surreply at pp. 4-5.

I disagree. Based upon Doe's testimony at the preliminary hearing, which I find credible, he diligently attempted to secure representation. *See* Doe's Testimony, N.T. 10/21/99 at pp.60-66. This search was complicated by the fact that: (1) Doe has limited financial resources and serious time constraints as a full-time medical student, (2) the issue in this litigation is a matter of first impression, and (3) Title III of the ADA does not allow monetary damages which results in

III. The Preliminary Injunction Motion.

A. The Preliminary Injunction Standard.

The Third Circuit has stated:

> "'Four factors,' as we have recently had occasion to observe, govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by the denial of the relief; (3) whether granting the preliminary relief will result in even greater harm; and (4) whether granting the preliminary relief will be in the public interest. [citations omitted]. A district court should endeavor to 'balance[ ] these four . . . factors to determine if an injunction should issue.'" *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999).

Plaintiff argues that "[t]he NBME's current policy and practice, when reporting scores to medical residency programs and others, is to annotate, or 'flag,' the scores of individuals with disabilities who take the test with accommodations for their disabilities. This practice will unnecessarily identify Doe as an individual with a disability, unfairly call into question the validity of his scores, and irreparably expose him to discrimination on the basis of the disability." *See* Plaintiff's Memorandum in Support of Application for Preliminary Injunction [hereinafter "Plaintiff's preliminary injunction memo"] at p. 2.

In response, Defendant argues that Doe "has failed to satisfy the requirements entitling him to injunctive relief, particularly since binding Third Circuit precedent (which plaintiff fails to address in his memorandum of law) hold that Title III of the ADA does not apply to matters such as the NBME's score reporting policy, he has acknowledged that he has not been harmed, and cannot prove any harm, and the balance of harms and public interest favor NBME." *See*

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little financial incentive for an attorney to bring a case under Title III. Defendant has not alleged any specific prejudice from the delay, nor do I see the level of prejudice which would justify barring Doe's action on the grounds of laches.

Defendant's Opposition Memo at pp.2-3.

I turn now to the applicable law, the Americans With Disabilities Act of 1990, 42 U.S.C. §12101 *et seq*. (1994).

B. Violation of the Americans With Disabilities Act.

Doe contends that NBME's current policy with regard to reporting USMLE scores with annotations for time-related accommodations violates Title III of the ADA. Specifically, Plaintiff argues that the NBME flagging policy violates 42 U.S.C. §12182(b)(2)(A)(I); section 309 of the Act; and section 503.

Title III states the following "general rule":

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §12182(a).

Discrimination includes:

> "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered [. . .]" 42 U.S.C. §12182(a)(2)(A)(I).

Section 309 of the ADA covers "examinations and courses" and provides:

> "Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. §12189.

Section 503 prohibits retaliation and coercion, making is unlawful to "coerce, intimidate,

threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." 42 U.S.C. §12203(b).

C. Analysis.

In light of the ADA standards, I will address each of the elements in the four-factor determination of whether a preliminary injunction against NBME should issue.

1. Likelihood of Success on the Merits under the ADA.

The Defendant does not dispute, nor is there a question, that Plaintiff, who has multiple sclerosis, is a "disabled person" within the meaning of the ADA *See* 42 U.S.C.§12102(2)(which defines the term "disability") and 28 C.F.R. §36.104.[4] The focus of the dispute is whether Doe can prove that the challenged NBME policy falls within the scope of Title III and whether the challenged NBME policy improperly discriminates against Doe.

Citing *Ford v. Schering-Plough Corp.,* 145 F.3d 601 (3d Cir. 1998), *cert. denied,* 119 S.Ct. 850 (1999), as binding precedent, NBME asserts that Doe cannot establish a claim of discrimination related to the physical accessibility of "places of accommodation." According to the Defendant, "[. . .] NBME's policy of reporting the existence of a testing accommodation when scores are transmitted to third parties is an issue relating to the content of the goods and

[4] 28 C.F.R. §36.104(1) states: "*Disability* means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." §36.104(1)(iii) specifically includes multiple sclerosis within the definition of "a physical or mental impairment."

services offered by NBME and not an issue relating to the physical access of a 'place of public accommodation'." "As a result, based upon *Ford*, each and every one of plaintiff's Title III claims, which raise no issues relating to physical accessibility of the locations where the USMLE is administered, have failed to state a claim upon which relief can be granted. Since this failure means plaintiff is unlikely to succeed on the merits in this action, the motion for a preliminary injunction should be denied." *See* Defendant's Opposition Memo at pp. 10-14.

I believe the Defendant reads the *Ford* decision too broadly and the scope of Title III too narrowly. The language of *Ford* does restrict the term "public accommodation" as set forth in Title III to a physical place. *Ford*, 145 F.3d at pp. 612-13. [5] There is, however, mention of a "nexus" between the physical place and the alleged discrimination. *See Ford*, 145 F.3d at 612-613 (3d Cir. 1998)("Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation.")

This nexus language was relied upon in a later Third Circuit case, *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1999), to support a Title III claim by an orthopedic surgeon who has an attention-deficit disorder. The physician alleged, *inter alia*, that the hospital discriminated against him on the basis of his disability by denying him the opportunity to participate in the medical staff privileges offered by the hospital. The *Menkowitz* Court reversed the district court's order dismissing the plaintiff's disability discrimination claim

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[5] The issue in *Ford* was whether a disparity between disability benefits for mental and physical disabilities violated the ADA. The Third Circuit held: "Ford fails to state a claim under Title III of the ADA since the provision of disability benefits by MetLife to Schering's employees does not qualify as a public accommodation." *Ford*, 145 F.3d at 614 (3d Cir. 1998).

under Title III, holding that the plaintiff stated a cause of action as an "individual" discriminated against in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." *Menkowitz*, 154 F.3d at 120 (3d Cir. 1999).

In recognizing the plaintiff's cause of action, the *Menkowitz* Court read the *Ford* decision as announcing the principle that Title III requires "at the very least some 'nexus' between the physical place of public accommodation and the services denied in a discriminatory manner." *Id.* at 121 (3d Cir. 1999). The Court went on to find, based upon the nature of medical staff privileges, "privileges that lie at the very core of the hospital's facilities", that there was sufficient nexus between the denial of staff privileges and the physical place of the hospital as a public accommodation. This conclusion was "reinforced", *inter alia*, by the "observation" that Plaintiff would effectively have no recourse under the ADA if the Court were to hold that he had no cause of action under Title III. *Id.* at 122 (3d Cir. 1999).

I believe that Doe has shown the required nexus between a physical place of accommodation and the NBME's annotation policy to state a cause of action under Title III. The service provided by the NBME is not merely access to taking the USMLE. The service includes, as a core element, the reporting of USMLE scores to medical schools, medical licensing authorities, and third parties at the request of the examinee and upon payment of "requisite fees." *See* Plaintiff's Exhibit 4 (USMLE Bulletin of Information on Computer-based Testing 1999) at pp. 19-20 (setting forth how scores are reported). *See also* the testimony of Dr. Golden[6], N.T.

[6] Dr. Gerald S. Golden, who is employed at NBME as Vice President for Examination Support Services and Medical School Liaison, was offered by Defendant as a joint fact/expert witness. Dr. Golden was accepted as an expert in neurology and test administration, including

10/21/99 at 145, 161 (explaining how scores are reported and stating that generating and providing a score report is an integral part of what the NBME does).[7] The purpose of taking the USMLE is to get a score report. *See* Dr. Golden's testimony, N.T. 10/21/99 at 162, 169 ("We give them test scores.") Based upon the nature of the service provided by the NBME–the giving, scoring and reporting of USMLE scores– I "cannot imagine a greater nexus" between the challenged annotation policy and the testing facilities of the NBME. *See Menkowitz,* 154 F.3d at

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the identification of irregularities in testing. *See* N.T. 10/21/99 at pp.107, 113, 117.

[7] USMLE Scores are reported as follows:

> "After you take Step 1 or Step 2, your scores will be reported directly to you from the entity that registered you, either the ECFMG ["Educational Commission for Foreign Medical Graduates"] or the NBME.
>
> The scores on Steps 1 and 2 are also reported by NBME to AOA- and LCME-accredited medical schools for their students and graduates. Scores are reported to those medical schools for the purpose of internal use by that medical school."
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> "USMLE score reports [citations to page number omitted] and USMLE transcripts [citations to page number omitted] show your scores and an indication of whether you passed or failed. The same information is sent to medical licensing authorities for their use in granting the initial license to practice medicine."
>
> "Except as otherwise stated above, USMLE scores will not be reported to you or to third parties without your written request and payment of requisite fees. When you request a report, it will be provided in the forms of a USMLE transcript. USMLE transcripts include a complete score history of all Step examinations for which you sat as of the date the transcript was processed. Transcripts also include a notation of any examinations for which no scores were reported [citations to page numbers omitted]; an indication of whether you have previously taken NBME parts I, II, III, or FLEX; an annotation if you were provided with any test accommodations [citations to page numbers omitted]; annotations documenting any determinations of irregular behavior [citations to page numbers omitted]; and a notation of any actions taken against you by medical licensing authorities or other credentialing entities that have been reported to the FSMB Board of Action Databank." *See* Plaintiff's Exhibit 4 (USMLE Bulletin of Information on Computer-based Testing 1999) at pp. 18-20.

122 (3d Cir. 1999).

As the Third Circuit has recently stated, it is well established that the ADA is intended to be "a broad remedial statute with broad ramifications." *Menkowitz*, 154 F.3d at 118 (3d Cir. 1999). Were I to accept Defendant's argument, the scope of Title III would require "only that disabled examinees be provided with full and equal accessibility to testing facilities in order to participate in the administration of the USMLE." *See* Defendant's Opposition Memorandum at p.16. This would leave Doe without any recourse to challenge a reporting policy which treats him, as a physically disabled person who requires extra time to complete the USMLE, differently than all other examinees for whom time-related accommodations are not granted. The Defendant's reading of Title III would also ignore the statute's prohibition against provision of an unequal benefit "from a good, service, facility, privilege, advantage, or accommodation" to persons who are disabled, which I believe is applicable to the facts of this case. *See* 42 U.S.C. §12182(b)(1)(A)(ii). Consistent with the broadly drafted language and intent of the ADA, and in light of the *Menkowitz* analysis, I decline to limit the language of Title III to exclude Doe from its protections. *See Menkowitz*, 154 F.3d at 122 (3d Cir. 1999)("We cannot see how Congress intended such a result given the ADA's remarkable breadth of language and purpose [. . .].")

Permitting Doe to maintain a cause of action under Title III is supported by the NBME's own admission, in an October 1, 1998 letter to Doe. *See* Plaintiff's Exhibit 7. Ms. Janet Carson, General Counsel for NBME, stated: "While the National Board of Medical Examiners (NBME)

acknowledges that it is an entity subject to the provisions of Title III of the ADA, it strongly disagrees with your assertion that the annotation of score reports and transcripts violates that or any other law." *Id.* at p. 2.[8]

In addition to arguing that its annotation policy is not subject to Title III, Defendant contends that Doe has not shown a likelihood of success as he has not established any discrimination by the NBME.

I disagree. The testimony from Defendant's own witnesses establishes that all time-related accommodations granted to USMLE examinees are annotated. The grant of a time-related accommodation is at the discretion of the NBME and is not given unless the Office of Test Accommodations of the NBME, after having the request for accommodations reviewed by an expert, determines that the requested accommodation is appropriate. Examinees who request accommodations are not given accommodations to which the NBME believes they are not entitled. All individuals who are granted time-related accommodations are disabled. The

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[8] The parties spend considerable time arguing which, if any, of the subparts to the general rule set forth in 421 U.S.C. §12182(a) apply to the facts of this case. While I believe that a reasonable argument can be made that Doe's claims fall within the provisions of §12182(b)(2)(A)(I) which prohibits the imposition of "eligibility criteria that screen out or tend to screen out an individual with a disability [. . .]" and/or that Doe's claims are covered by 42 U.S.C. §12189 which specifically speaks to examinations related to applications, licensing, certification, or credentialing for secondary or post-secondary education purposes, I do not believe it necessary to decide these issues, in light of my conclusion that Doe's claims are covered by the general rule of Title III. *See* 28 C.F.R. §36.213 which distinguishes between the general rules applicable to all entities subject to Title III and the subparts which provide guidance of the application of the statute to specific situations.

Doe also argues that he is entitled to bring a claim for interference with his exercise or enjoyment of rights granted by the ADA under section 503. Because I conclude that Doe has a cause of action under §12182 generally, I decline to reach the question of whether he can bring an action against NBME under section 503.

annotation of these individuals' scores is intended to signify that the NBME cannot certify the meaning of these scores as comparable to scores obtained under standard administration conditions. An annotated score shows that a person is disabled. *See* Dr. Golden's Testimony, N.T. 10/21/99 at pp. 171, 176-180, 184; Dr. Case's Testimony[9], 10/28/99 at p.36. *See also* Defendant's Exhibit 22 (William A. Mehrens, *Flagging Test Scores: Policy, Practice and Research* (1997)) at p. 36 (flagging a test score indicates that the individual has a disability and "apparently violates regulations written following passage of the [Rehabilitation and ADA] Acts.")

The undisputed fact that the NBME will not certify the scores of disabled persons, who are entitled to, and are granted, time-related accommodations in taking the USMLE is discrimination under Title III of the ADA. The NBME does comply with Title III of the ADA by granting time-related accommodations to persons with disabilities to permit them to take the USMLE, however, its annotation policy absolutely bars these individuals, based upon their disabilities, the opportunity to receive USMLE scores which are certified or verified as meaningful. *See* the Testimony of Dr. Golden, N.T. 10/21/99 at p.184; the Testimony of Dr. Case, N.T. 10/28/99 at pp. 33-34. The annotation shows that the person receiving time-related accommodations is disabled and that "one needs to look carefully, one cannot– to use the words I

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[9] Susan M. Case, who is employed by NBME as a Senior Evaluation Officer and Director of Step Two of the USMLE, who was offered by Defendant, and accepted, as a testing expert, including psychometrics. *See* N.T. 10/28/99 at pp. 6-9.

Psychometrics is "a sub-discipline within quantitative psychology, that looks at testing and – the usefulness of tests, generally and other predictive variables. [. . .] Psychometrics, generally, includes the techniques that are used to build tests and then evaluate those tests, once built." Testimony of Dr. Geisinger, N.T. 10/22/99 at p. 17.

say [sic] before, guarantee that the score is the same as a score taken under other conditions." *See* Testimony of Dr. Golden, N.T.10/21/99 at p.158.[10]

The NBME's annotation policy runs afoul of 42 U.S.C. §12182(b)(1)(A)(ii), which prohibits discrimination, on the basis of a disability, that denies an individual "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." *See* Testimony of Dr. Mehrens[11], N.T. 10/28/99 at p. 81 (there is a consensus among psychometric authorities that flagging violates the regulations issued after the Rehabilitation Act and the ADA); Defendant's Exhibit 19 (a January 1993 newsletter of Division 5:Evaluation, Measurement, and Statistics of the American Psychological Association, entitled "The Score") at p. 12 (noting the legal problems with flagging scores under the letter and spirit of the ADA).

Defendant argues that its annotation policy is consistent with accepted psychometric

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[10] Dr. Mehrens took it a step further in his "very broad but relevant policy and technical questions":

> "4. If an individual receives an **invalid score due to an accommodation**, that**invalidity** is not recognized, and an admission decision is based on that score, how much is the individual harmed?
>
> Answer: There would be different answers depending on whether (1) the score was **higher than the 'true' score**, an individual was admitted, and did not succeed, or (2) the score was **lower than the 'true' score**, an individual was not admitted, and he/she could have succeeded. Although research has suggested that accomodated scores overpredict, and therefore scenario 1 has a higher probability than scenario 2, research has certainly not informed us regarding the exact probability of either type of error, let alone the cost of the error. [emphasis added]" *See* Defendant's Exhibit 22 (William A. Mehrens, *Flagging Test Scores: Policy, Practice and Research* (1997)) at p. 37-38.

[11] William A. Mehrens is employed by Michigan State University. He was offered by Defendant, and accepted, as a testing expert, including psychometrics. *See* N.T. 10/28/99 at pp.39, 42.

standards and with its obligation to be truthful to test users of the USMLE scores. According to Defendant's experts, NBME's annotation policy is appropriate to alert test users of the fact that the USMLE was taken under non-standardized conditions and, therefore, that "we [the NBME] have less confidence in these scores." *See* Testimony of William Mehrens, N.T. 10/28/99 at pp. 69, 88 ("One ought to have some notion of the quality of the data one is using. If the quality of the data is not exactly the same across conditions, one ought to be aware of that.")

Limitations to the prohibition against discrimination under 42 U.S.C. §12182 include: necessity, safety, fundamental alteration, readily achievable and undue burden. *See* 28 C.F.R. Part 36, Appendix B, §36.204. Of these, it would appear, based upon the evidence before me, that Defendant's position can be read as asserting a "necessity" and/or "fundamental alteration" defense.

Looking at the evidence which was presented at the preliminary injunction hearing, I note that there are some basic points of agreement between most, if not all, of the experts who testified.

With regard to the applicable psychometric standards, all of the psychometric experts agree that the *Standards for Educational and Psychological Testing* [hereinafter "Testing Standards"][12] are sound principles of accepted psychometric practice. *See* Dr. Geisinger's Testimony[13], N.T. 10/22/99 at pp. 26-27; Dr. Case's Testimony, N.T. 10/28/99 at p. 27; and Dr. Mehrens' Testimony at N.T. 10/28/99 at pp. 43-44. All further agree that the Testing Standards

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[12] These standards at set forth as Defendant's Exhibit 14 and Plaintiff's Exhibit 11.

[13] Kurt Francis Geisinger is employed at Le Moyne College in Syracuse, New York. He was offered by Plaintiff, and accepted, as an expert in psychometrics. *See* N.T. 10/22/99 at pp.6, 16.

are silent on the issue of whether individual scores should be flagged in admission and/or licensing situations. *See* Dr. Mehrens' Testimony, N.T. 10/28/99 at pp. 86-91; Dr. Case's Testimony, N.T. 10/28/99 at p. 30; and Dr. Geisinger's Testimony, N.T. 10/22/99 at p. 68.[14]

All of the experts agree that the USMLE is primarily a licensing exam, although it is used for other purposes, such as screening of applicants to residency and internship programs. As a licensing exam, the USMLE is mainly a "power" or content driven test, with some "speededness" or time concerns. *See* Dr. Case's Testimony, N.T. 10/28/99 at pp. 10, 22-24; Dr. Golden's Testimony, N.T. 10/21/99 at p. 159, 165-66; and Dr. Geisinger's Testimony, N.T. 10/22/99 at pp. 25 (Dr. Geisinger gave the following explanation: "A test that's a power test at the extreme, would be a test that every individual has adequate time to take every question. At the other extreme of speededness, a truly speeded test, it would be one that every – every test taker gets every question right to the extent that they reach it, such as a clerical test.")

With regard to flagging, both Plaintiff's and Defendant's experts agree that if it can be shown that scores obtained under standard conditions are "comparable" to scores obtained with a time-related accommodation, then the flagging of the latter scores is unnecessary. *See* Dr. Geisinger's Testimony, N.T. 10/22/99 at p. 40 (comparability is "the critical determinant" of whether a score should be flagged or not); and Dr. Mehrens' Testimony, N.T. 10/28/99 at pp. 83. The experts further agree that the best study to date on the question of comparability of scores

[14] As discussed below, Dr. Mehrens infers from the Testing Standards that individual test scores should be flagged. *See* Dr. Mehrens' Testimony, N.T. 10/28/99 at p. 86.

taken under standard conditions and scores for which time-related accommodations were granted, is that of Warren W. Willingham, entitled Testing of Handicapped People (Allyn and Bacon, 1998).[15] *See* Dr. Geisinger's Testimony, N.T. 10/22/99 at p. 87; Dr. Case's Testimony, N.T. 10/28/99 at p. 14; Dr. Mehrens' Testimony, N.T. 10/28/99 at pp. 48, 108. There is no dispute that there is a need for additional research in the area of comparability of scores when the test-taking conditions are not standard, especially when the accommodation involves additional time. *See* Dr. Mehrens' Testimony, N.T. 10/28/99 at pp.72-73, 108; Dr. Geisinger's Testimony, N.T. 10/22/99 at p.48.

Having reviewed all of the evidence before me, I find that Defendant has not established, at this stage of the litigation, that the flagging of Doe's scores is necessary and/or that not flagging Doe's scores will fundamentally alter its services. What is clear from the Willingham study, Dr. Mehrens' paper, and the Testing Standards, is that: (1) the research on comparability of standardized scores and scores where time-related accommodations are given is too sparse to support any definitive conclusions[16]; (2) the available data on handicapped examinees necessary to allow such research is severely limited; and (3) there is no simple psychometric solution to the question of interpreting scores for persons with disabilities, given competing legal, psychometric, ethical and practical concerns.

The scholarly treatises are replete with caveats about the degree of certainty to which their

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[15] The Willingham study is submitted as Plaintiff's Exhibit 12.

[16] Drs. Geisinger and Mehrens both agree that Willingham's study shows standardized scores are comparable with scores of physically handicapped persons who are given time-related accommodations on six of the eight factors which Willingham identifies. However, they reach diametrically opposed conclusions as to whether the scores are, therefore, comparable, and should be annotated.

conclusions have been drawn, caveats about the proper course of action with regard to flagging individual scores and references to the dilemma surrounding the decision to flag scores of disabled persons. For example, Willingham's study notes that there is "a paucity of relevant, dependable data [and] [. . .] the major implication of this lack of data is that any conclusions must necessarily be tentative."[17] Dr. Mehrens' *Flagging Test Scores: Policy, Practice and Research* states: "Regarding the quality of research, I believe that given the constraints of sample sizes, many different types and degrees of disabilities, and many different accommodations, the bulk of the research has been of good quality. **It is true that the profession can still not make definitive statements about the equivalence or validity of scores obtained under all different circumstances; but there is legitimate reason to question whether that can ever be done.** [emphasis added]"[18] The Testing Standards, themselves, while silent on the issue of whether individual scores should be annotated in the context of licensing and admissions settings, provide the following observations:

> "Despite the history of attempts to modify tests for handicapped people, significant problems remain. First, there have been few empirical investigations of the effects of special accommodations on the resulting scores or on their reliability and validity. Strictly speaking, unless it has been demonstrated that the psychometric properties of a test, or type of test, are not altered significantly by some modification, the claims made for the test by its author or publisher cannot be generalized to the modified version. The major reason for the lack of research is the relatively small number of handicapped test takers. For example, there are usually not enough students with handicapping conditions entering one school in any given year to conduct the type of validation study that is usually conducted for college admission exams. [. . .]
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> Of all of the aspects of testing people who have handicapping conditions, reporting test scores has created the most heated debate. Many test developers have argued that

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[17] See Plaintiff's Exhibit 12, Testing of Handicapped Persons at p.46.

[18] *See* Defendant's Exhibit 22 at p. 40.

> reporting scores from nonstandard test administrations without special identification (often called `flagging' of test scores) violates professional principles, misleads test users, and perhaps even harms handicapped test takers whose scores do not accurately reflect their abilities. Handicapped people, on the other hand, have generally said that to identify their scores as resulting from nonstandard administrations and in so doing to identify them as handicapped is to deny them the opportunity to compete on the same grounds as nonhandicapped test takers, that is, to treat them inequitably. Until test scores can be demonstrated to be comparable in some widely accepted sense, there is little hope of happily resolving from all perspectives the issue of reporting scores with or without special identification. Professional and ethical considerations should be weighed to arrive at a solution, either as an interim measure or as continuing policy."[19]

Fortunately, the larger issue of whether, in fact, standardized scores and scores obtained by disabled individuals for whom time-related accommodations were granted are comparable in psychometric terms (which the psychometric field itself has not been able to determine) need not be answered by me. For the purposes of showing a likelihood of success on the merits, I believe that Doe has shown that the annotation of his scores does violate Title III of the ADA and that NBME has not established that the annotation of Doe's scores is required under prevailing psychometric standards and/or required to protect the integrity of NBME's testing and reporting service.[20]

While not determinative of "the likelihood of success" element, I make the following

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[19] *See* Plaintiff's Exhibit 11 at p. 78.

[20] Much of NBME's evidence and argument focused on the claim that any accommodation involving additional time is problematic because the NBME takes "the time allotment very seriously", as evidenced by instances where the opportunity for a retest was given to individuals taking the USMLE under standard conditions who were shorted "a couple of minutes." *See* Dr. Case's testimony, N.T. 10/28/99 at p. 16. However, both Dr. Case and Dr. Golden acknowledged that with the change to a computer-based testing format for the USMLE, a decision was made to grant only one additional time accommodation, up to double time, even if the full amount of time is not needed, because to continue to allow any other variation of time, such as time and one-half, would be administratively impractical. *See* Dr. Case's Testimony, N.T. 10/28/99 at pp. 24-25; Dr. Golden's Testimony, N.T. 10/21/99 at pp. 133,150-151.

"observation". There is no dispute that Doe is entitled to the accommodations which he sought, and which were ultimately granted by the NBME. Defendant has conceded that there is no evidence that, in fact, Doe improperly used the extra time which he was given to accommodate his disability. *See* Testimony of Dr. Golden, N.T. 10/21/99 at p.175, 179 (stating that he would not grant an accommodation to someone to which that individual was not entitled and agreeing that the NBME has no reason to believe that Doe was cheating or attempting to subvert the USMLE in anyway). However, there is a repeated presumption by Defendant's witnesses that giving extra time to physically disabled examinees who do not suffer from cognitive impairments gives them an unfair advantage over other applicants. *See* Testimony of Dr. Golden, who made the ultimate accommodation decision in Doe's case, N.T. 10/21/99 at pp. 141 ("I think the opportunity to continue thinking is there, and spending more time doing that then every other candidate with any examinee who takes a test with extended time, one doesn't – I find it hard with whatever small knowledge I may have of the function of the human brain to say, I'm thinking about the question, now, I'm going to turn off my thinking process. I'm going to turn on the thinking process again and so I've used three hours thinking and an hour and a half adjusting my position."); 193-96 (acknowledging that Doe's response times to questions were "studied" and that his response times to questions showed a high degree of variability without any pattern, which indicates that "he might have been taking mini or micro breaks, he may have been thinking about the material and the question that he found difficult" and stating that the latter "is an extremely viable hypothesis."); and 178-79 (opining that he was "frankly quite puzzled" as to why Doe did not choose, as an accommodation, assistance with filling out his answer sheets, "in my opinion if he would have accepted assistance with answer sheets he still could have done his

postural readjustments to relieve the spasticity and would have been able to work in regular time constraints. [. . .] I don't think that he needed extended time if he had accepted the option of assistance with his answer sheets. I think the whole exam would have been infinitely more comfortable for him.") *See also* Dr. Mehrens' Testimony, N.T. 10/28/99 at p.126 (where he testifies that the idea that individual who has a disability and gets extra time does better than somebody without a disability who doesn't get extra time is "certainly a plausible hypothesis on a timed test.") and 112 (opining that an annotation should be given for "an irregularity due to not following the standardization of the administration" whether for extra time or for "a person who at the end of the time to test would literally refuse to quit and work for two or three more minutes"). This suspicion with which the NBME witnesses view physically disabled persons is troublesome.

2. Irreparable Harm.

Doe testified that he has not disclosed his disability to anyone in his medical school, with the exception of two individuals -- one person in the administration office who administers examinations and the physician in charge of his surgical rotation at medical school. Doe further testified that it is his desire to keep his disability private because it's embarrassing. With regard to the residency programs and internships to which he has or will apply in the immediate future, Doe does not intend to disclose his disability during the application process. *See* Doe's Testimony at pp. 54, 65, 98.

Doe has submitted approximately 20 applications to residency and internship programs. These programs do an initial screening and only grant interviews to those individuals who make

it past the initial screening. The decision to grant an interview is on a rolling basis, meaning that as the interview slots are filled, the chances of being granted an interview with a particular program diminishes. Doe has not yet provided his Step 1 USMLE score to the programs to which he has applied. One of the programs to which Doe has applied has requested that he complete his application by supplying his Step 1 score. *See* Doe's testimony, N.T. 10/21/99 at pp. 47-50. Even though the Step 2 USMLE scores have not yet been finalized, the NBME will send out Step 1 USMLE scores as soon as the examinee requests release of the score to a third party. *See* Dr. Golden's Testimony, N.T. 10/21/99 at pp. 191-92.

Doe has shown that he will suffer immediate irreparable harm if his request for a preliminary injunction is not granted. The time is quickly approaching when Doe will have to release his Step 1 USMLE scores in order to complete his residency and internship applications within the deadlines established by the programs. If NBME is not enjoined from doing so, it will release his annotated scores which will unnecessarily identify Doe as a disabled person. Being identified as a disabled person, against his wishes, is, in and of itself, an irreparable harm. *See* 28 C.F.R. Part 36, Appendix B, §36.301 ("Section 36.301 also prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability; for example, it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, mental illness, or any other disability, or to inquire unnecessarily whether an individual has HIV disease.")

In addition to the above injury, Doe has established that once identified as a disabled person to the residency and internship programs, his application may be viewed differently than it would be without the annotated score. Doe's past experience with differences in the way his

annotated and non-annotated scores were received in admission contexts, as supported by Dr. Geisinger's opinion, that a flagged score places the applicant at a disadvantage in the admissions process because it identifies the individual as disabled, is more convincing and outweighs the testimony of Dr. Mehrens, who opined that flagging of scores in the admissions process has little impact on the process. *Compare* Doe's Testimony, N.T. 10/21/99 at pp. 41-45 and Dr. Geisinger's Testimony, N.T. 10/22/99 at pp. 69-70 *with* Dr. Mehrens' Testimony, N.T. 10/28/99 at pp. 72-73.[21]

3. Harm to NBME.

As discussed above, I find that NBME has not established that the integrity of its testing service will be harmed if I grant Doe's request for preliminary relief. It is important to note the limited nature of the relief which is being granted. NBME will be enjoined from reporting Doe's Step 1 and Step 2 USMLE scores with annotations, and will be directed to produce these scores without annotation. The injunction affects the reporting of one individual's score for a limited period of time. I find the immediate harm to Doe clearly outweighs any harm to the Defendant in granting the injunctive relief requested.

4. Public Policy Concerns.

The Title III of the ADA is intended to ensure that individuals with disabilities are given "full and equal enjoyment" of services provided by places of public accommodation, without

[21] Interestingly, Dr. Golden testified that the decision on which accommodations to flag is made on the basis of internal discussions at the NBME between psychometricians, test development people and the Office of Test Accommodations. "Many of them [test development people] are in fact residency program directors." *See* Dr. Golden's Testimony, N.T. 10/21/99 at pp. 164-65, 170.

discrimination on the basis of their disabilities. Doe is simply seeking full and equal enjoyment of the services offered by NBME, namely the reporting of his USMLE scores without flagging to identify the fact that he is disabled and to call into question the validity of his scores. As the Willingham study recognizes: "To many handicapped people, it is inherently objectionable to be told that one must go through the testing process because it is important and then to hear that the score must be flagged because the test sponsor is not sure what it means." This is precisely the type of discrimination that is prohibited by Title III of the ADA.

CONCLUSION

Consistent with the above discussion, I conclude that Doe is entitled to the preliminary injunctive relief sought as he has shown: (1) a reasonable probability of success on the merits of his Title III claim; (2) that the denial of injunctive relief will subject Doe to irreparable injury; (3) that the grant of the injunctive relief sought will not result in greater harm to the NBME; and (4) granting the preliminary injunction is in the interest of public policy.

An appropriate order follows.

O R D E R

AND NOW, this 1st day of November, 1999, having held a preliminary injunction hearing in the above captioned matter, and based upon the evidence of record before me, I find that Doe has met each of the four criteria for issuance of a preliminary injunction (as discussed in the

accompanying memorandum). Therefore, it is hereby **ORDERED** that Plaintiff's Application for a Preliminary Injunction is **GRANTED.**

It is further **ORDERED** that Defendant NBME is **ENJOINED** from annotating or "flagging" in any way the Plaintiff's scores which he has, or will, attain on Steps 1 and 2 of the USMLE. The NBME is to report Doe's Step 1 and Step 2 USMLE scores as though Plaintiff took the first two steps of the USMLE without accommodation for his disability. The terms of this Order shall continue in force unless, and until, modified by the Court.

BY THE COURT:

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE