
2008

Combating the Unfair Competitive Edge: Random Drug Testing Should Be Implemented in Standardized Testing to Deter Illicit and Unfair Use of Prescription Stimulants

Shawn Romer

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>



Part of the [Education Law Commons](#), [Food and Drug Law Commons](#), and the [Health Law and Policy Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Note, Combating the Unfair Competitive Edge: Random Drug Testing Should Be Implemented in Standardized Testing to Deter Illicit and Unfair Use of Prescription Stimulants, 21 J.L. & Health 151 (2007-2008)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

COMBATING THE UNFAIR COMPETITIVE EDGE: RANDOM
DRUG TESTING SHOULD BE IMPLEMENTED IN
STANDARDIZED TESTING TO DETER ILLICIT AND UNFAIR
USE OF PRESCRIPTION STIMULANTS

SHAWN ROMER*

I.	INTRODUCTION	151
II.	OVERVIEW OF PRESCRIPTION STIMULANTS	153
	A. <i>Abuse</i>	154
	B. <i>Academic Enhancing Effect</i>	155
	C. <i>Harmful Effects</i>	156
	D. <i>Current Safeguards Against Non-Prescribed Use</i>	157
III.	THE IMPORTANCE OF STANDARDIZED TESTING TO ADMISSIONS.....	158
IV.	ANTI-DOPING EFFORTS IN SPORTS LAW	159
	A. <i>Therapeutic Use Exemptions</i>	159
	B. <i>USADA Anti-Doping Law: a Shifting of Burdens</i>	161
	C. <i>Appeals and Review Board</i>	163
	D. <i>Arbitration</i>	163
	E. <i>The National Collegiate Athletic Association's Example</i>	164
V.	THE SOLUTION.....	168
VI.	POSSIBLE CONCERNS	170
	A. <i>Is it an illegal Search?</i>	170
	B. <i>Reporting Therapeutic Use Exemptions – Does it Violate the ADA?</i>	172
VII.	CONCLUSION.....	177

I. INTRODUCTION

John Doe was a student contemplating attending law school.¹ Law school admissions, similar to admissions in most types of graduate and professional schools,

*JD expected 2008. The author would like to thank Professor Deborah Klein for her insight and input in advising the writing process. The author would also like to thank his family and friends for putting up with his many absences during the writing of this note.

¹Interview with Anonymous 2d Year Law Student, in Cleveland, Ohio (Sept. 21, 2006) [hereinafter Interview with John Doe.] The student, whose name was changed to John Doe to protect anonymity, admitted to taking Adderall before taking the Law School Admissions Test (LSAT). *Id.*

are heavily dependent upon a student's standardized test scores.² John, having less than spectacular grades in college, knew that he would have to do very well on the Law School Admissions Test (hereinafter "LSAT") in order to be accepted into any law school.³

John was an average test taker, and he had been scoring consistently in the mid 150's on his practice LSAT tests.⁴ He had heard from a friend that taking Adderall, a drug commonly prescribed for patients suffering from Attention Deficit Hyperactivity Disorder (hereinafter "ADHD"), could tremendously enhance one's performance on standardized tests. John obtained some Adderall tablets from one of his friends who had a prescription for the medication. John took two of the tablets before the examination.⁵

The drugs did not seem to take effect until the second (of six) thirty five minute sections.⁶ At that point, John indicated that the drugs started stimulating him – increasing his heart rate and body temperature. In addition, he began to "think harder" and had little difficulty keeping his mind from wandering away from the LSAT problems.⁷ John had barely finished the first section before his time expired; however, he finished the second section and subsequent sections around five to ten minutes before his time expired.⁸ John scored a 162 on the actual examination.⁹ He attributes his approximate seven point increase to his illicit use of Adderall.¹⁰

John is not the only student who has taken these types of prescription stimulants in an effort to enhance his academic performance.¹¹ According to one study, 35.5% of undergraduate students have used these drugs in college, and one of the most

²Princeton Review, *Dispelling the Myths about the LSAT and Law School Admissions*, <http://www.Princetonreview.com/law/testprep/testprep.asp?TPRPAGE=265&TYPE=LSAT> (last visited Dec. 2, 2006). The Princeton Review is one of the foremost and largest college and graduate school admissions counseling services. *Id.*

³Interview with John Doe, *supra* note 1. The LSAT is the "test required for admission to all ABA-approved law schools." Law School Admissions Council, *About the LSAT*, <http://www.lsac.org/LSAC.asp?url=lsac/about-the-lsat.asp> (last visited Oct. 22, 2006).

⁴Interview with John Doe, *supra* note 1. The LSAT is graded on a scale of 120-180. Law School Admission Council, *About the LSAT*, <http://www.lsac.org/LSAC.asp?url=lsac/about-the-lsat.asp> (last visited Oct. 22, 2006).

⁵Interview with John Doe, *supra* note 1. John Doe does not recall the dosage or specific type of Adderall that he consumed. *Id.*

⁶*Id.*

⁷*Id.* The description of this experience is consistent with experiences of other students. See Adrienne Jeffries, *Some Teens Abuse ADD/ADHD Drugs*, THE VIRGINIAN-PILOT, March 29, 2004 at E1. It is commonly believed by students that Adderall and other prescription stimulants increase academic performance on tests. *Id.*

⁸*Id.*

⁹*Id.*

¹⁰Interview with John Doe, *supra* note 1.

¹¹See K. Graff Low & A.E. Gendaszek, *Illicit Use of Psychostimulants Among College Students: a Preliminary Study*, 7, No. 3 PSYCH. HEALTH, AND MED. 283, 283 (2002).

common stated reasons was to enhance academic performance.¹² In light of the importance of standardized tests to admissions,¹³ it should not be surprising that these students are also using prescription stimulants in an effort to enhance their performance on tests as well.

The perception that these drugs enhance one's academic performance is common, especially among students.¹⁴ The same is true for drugs that some athletes illicitly take in order to enhance their physical performance. Though many of these drugs taken to enhance one's performance in athletics and academics do have a proven enhancing effect, many have not been proven to have any enhancing effect. Regardless of whether performance enhancing drugs actually improve an athlete's performance, an athlete may not ingest a drug listed on the competition's banned list.¹⁵

This note will first give an overview of prescription stimulants and will then explore the prevalent number of students who illicitly take prescription stimulants to enhance their academic performance. A description of how illicit use can be harmful to a student follows, and thereafter the note describes the scant current safeguards that currently exist against the use of illicit prescription stimulants. An explanation of the importance of standardized test scores to admissions follows, along with a description of how this importance has motivated students to seek an unfair competitive edge through illicit drug usage, which happens in many sporting competitions. The note will then explore the safeguards in place preventing illicit drug usage in sports and will argue that a similar random drug testing program should be implemented for students taking standardized tests.

Finally, the note will explore possible objections to implementing a random drug testing program in standardized testing. Some contend that these tests may constitute an illegal search and seizure of a person in violation of the Fourth or Fourteenth amendments. In addition, some could contend that the proposed system of flagging scores of students taking prescription stimulants violates the Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101-12213 (LexisNexis 2007) (hereinafter "ADA"). These objections will be rebutted by an examination of legal precedent that demonstrates that random drug testing will not violate the Constitution or ADA.

¹²*Id.*

¹³*The 5 Most Important Factors in College Admissions*, http://www.kaptest.com/Kaplan/Article/College/College_Home/Apply_to_College/Prepare/CO_admiss_five2.html?jsessionid=FQ1LFKPNX05GBLA3AQJHBOFMDUCBG2HB (last visited Dec. 2, 2006). This assertion is according to Kaplan, one of the foremost private for-profit organizations that focuses on helping students who seek admittance to colleges and graduate schools. *Id.*

¹⁴Low and Gendaszek, *supra* note 11, at 287.

¹⁵See Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of the Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 178-79 (2006).

II. OVERVIEW OF PRESCRIPTION STIMULANTS

ADHD is a disease that causes inattention, hyperactivity, and impulsivity in children and adults.¹⁶ Sufferers feel as if they always need to be moving, and they have difficulty concentrating on any particular subject or task.¹⁷ Prescription stimulants are the most common forms of drug treatment.¹⁸ These drugs “improve their [the patients’] ability to focus, work, and learn.”¹⁹

Previously, a prescription stimulant was administered in an immediate-release form.²⁰ Immediate-release stimulants begin affecting a patient within thirty minutes, generally peaking between one to three hours after ingestion.²¹ This rapidly-absorbing version of the drug had the most potential for abuse.²² Fortunately, a new extended-release version of the drug was developed that had less potential for abuse among those seeking a “high.”²³ These extended-release stimulants “are absorbed so gradually that they don’t cause a euphoric sensation and are therefore much less susceptible to misuse.”²⁴ However, these stimulants are still susceptible to abuse among those who, without a prescription, wish to use them to enhance their academic performance.

Many may think of ADHD as a disease that affects only children. On the contrary, an estimated 1.5 million adults, 10% of them over the age of fifty, are now prescribed stimulants to treat ADHD.²⁵ Treatment in adults, however, has not been found to be as effective as it has been for children.²⁶ According to one study, only 54% of adults treated with prescription stimulants responded to the therapy.²⁷ Approximately only half of adult users encounter any effect from ingestion of the prescription stimulant.²⁸

¹⁶Nat’l Inst. of Mental Health, U.S. Dep’t of Health & Human Servs., Publ’n No. 94-3572, Attention Deficit Hyperactivity Disorder, at 2 (1996).

¹⁷*Id.*

¹⁸*Id.* at 22.

¹⁹*Id.*

²⁰*ADHD Update: New Data on the Risks of Medication*, HARV. MENTAL HEALTH LETTER 3, 3 (2006)[hereinafter *ADHD Update*].

²¹P.J. Santosh & E.Taylor, *Stimulant Drugs*, 9 EUR. CHILD. & ADOLESCENT PSYCHIATRY 127 (2000).

²²*ADHD Update*, *supra* note 20, at 3.

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 4.

²⁶Santosh & Taylor, *supra* note 21, at 133.

²⁷*Id.*

²⁸*Id.*

A. Abuse

Although prescription stimulants are often very successful in treating ADHD, “the increase in prescription rates has raised some public health concerns because of the potential abuse of these medications.”²⁹ Studies have suggested that varying numbers of college students abuse prescription stimulants.³⁰ According to one study, the non-medical use of Ritalin in 2003 was 5.7% for college students and 2.5% for those not attending college.³¹ However, another study found that as many as 35.5% of undergraduate students have illicitly used prescription stimulants.³² One study found that improving concentration was among the most prevalent reasons for their non medical use.³³ Another study found that “[m]otivations were primarily academic.”³⁴ This abuse was disproportionately high among white male students who are members of a fraternity, attend competitive colleges, and have lower grade point averages.³⁵

Additionally, increased proliferation of prescription stimulants has likely aided in their abuse. Between 2000 and 2004, prescriptions for these medications increased from 1.6 million per month to 2.6 million per month.³⁶ Many factors may contribute to this increase such as heightened awareness of ADHD and its potential for treatment and the erosion of the stigma surrounding psychological disorders.³⁷ Another likely factor is the discovery that these drugs may enhance one’s academic performance.

B. Academic Enhancing Effect

These stimulants have proven to enhance the academic performance of the user, regardless of whether he has been diagnosed with ADHD.³⁸ According to Dr. Eric Heiligstein, a psychiatrist who studies substance abuse at the University of Wisconsin, ADHD drugs can give the user almost “super human ability to focus for

²⁹Sean McCabe et al., *Non-medical Use of Prescription Stimulants for Treating Symptoms of ADHD*, SOC’Y FOR THE STUDY OF ADDICTION, Aug. 2005, at 96, 97.

³⁰ See *Id.*

³¹ *Id.*

³²Low & Gendaszek, *supra* note 11, at 284.

³³McCabe et al., *supra* note 29, at 102.

³⁴Low & Gendaszek, *supra* note 11, at 283.

³⁵McCabe et al., *supra* note 29, at 96.

³⁶Nicholas Zamiska, *Pressed to Do Well on Admissions Tests, Students Take Drugs --- Stimulants Prescribed for Attention Disorders Find New Unapproved Use*, WALL ST. J., Nov. 8, 2004, at A1.

³⁷The general understanding of what ADHD is, how it is caused, and possible treatment continues to increase as more studies are conducted. See generally Attention Deficit Hyperactivity Disorder, The National Institute of Mental Health <http://www.nimh.nih.gov/health/publications/adhd/minhadhdpub.pdf> (2006). As a result, more children who have the disorder are properly diagnosed with it. *Id.*

³⁸Andrew Conte, *More Students Abusing Hyperactivity Drugs*, PITTSBURGH TRIB. REV., Oct. 25, 2004, available at http://www.pittsburghlive.com/x/pittsburghtrib/print_265518.html.

long periods of time.”³⁹ Dr. Heiligstein went on to describe Adderall as an “academic steroid.”⁴⁰ Studies conducted by the National Institute of Health in the 1970s have confirmed this statement by showing that stimulants increase concentration in healthy individuals.⁴¹ Anita Barkin, the director of the Student Health Services at Carnegie Mellon University, said “Adderall and Ritalin are getting to be the drugs of choice for students who believe they will enhance their performance on tests or help them study more effectively.”⁴²

Amphetamines, such as Adderall and Ritalin, mimic the dopamine neurotransmitter in the brain.⁴³ According to a study of healthy non-ADHD adults, published in the *American Journal of Psychiatry*, increased dopamine levels correspond with enhanced interest in the activity at hand.⁴⁴ This enhanced interest is likely the reason why stimulants are generally known to enhance academic performance.⁴⁵ Prescription stimulants have also been proven to enhance the academic performance of those diagnosed with ADHD.⁴⁶ One study showed that students diagnosed with ADHD, who were given prescription stimulants, attempted more math problems on a standardized test and had a higher accuracy percentage.⁴⁷

It is documented that students are abusing prescription stimulants to enhance their academic performance in college.⁴⁸ It is probable that they, like John Doe, are using these stimulants to enhance their performance in other academic areas such as when taking standardized tests. Not only does abuse in this way give those who break the rules an unfair competitive edge, it can also be very harmful to these abusers as well.

³⁹*Id.*

⁴⁰*Id.*

⁴¹Zamiska, *supra* note 36.

⁴²Conte, *supra* note 38.

⁴³Nora Volkow, et al., *Evidence that Methylphenidate Enhances the Saliency of a Mathematical Task by Increasing Dopamine in the Human Brain*, 161 AM J. PSYCHIATRY. 1173-80 (2004).

⁴⁴*Id.* at 1173.

⁴⁵*Id.* at 1179.

⁴⁶*See* Regina S. James et al., *Double-Blind Placebo-Controlled Study of Single-Dose Amphetamine Formulations in ADHD*, 40 (11) J. OF THE AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 1268 (2001).

⁴⁷*Id.* Thirty five students were given Adderall, immediate release dextroamphetamine, and a placebo over an 8 week period. *Id.* The students mentioned in the above text were those taking dextroamphetamine, which is a main active ingredient in Adderall. *Id.* The test was administered four hours after the drug was given. *Id.* Notably, the children taking Adderall did not differ in scores from those taking the placebo. *Id.* However, the study administrators attributed this to timing – Adderall reaches maximum efficacy two hours after administration. *Id.* What is important is that a major active ingredient in Adderall has been proven to have an academic enhancing effect on children with ADHD. *See Id.*

⁴⁸*See Id.*

C. Harmful Effects

Prescription stimulant abuse can have harmful effects on the abuser. According to Dr. Nora Volkow, Director of the National Institute on Drug Abuse, prescription stimulants have a high potential for abuse.⁴⁹ Especially when taken in high concentrations, these drugs, like cocaine, increase the dopamine level in the user's brain.⁵⁰ This increase creates a euphoric sensation in the user, and the user becomes accustomed to the high dopamine levels.⁵¹ The desire to re-create this feeling is what causes addiction.⁵² According to Dr. Volkow, the "misperception of safety [in using prescription stimulants] may contribute, for example, to the casual attitude of many college students towards abusing stimulants to improve function and academic performance."⁵³

Overuse of prescription stimulants because of addiction can lead to elevated blood pressure, increased heart and breathing rates, sleep deprivation, and paranoia.⁵⁴ The effects obviously damage an abuser's heart and psyche.⁵⁵ In 2005, Canada removed Adderall XR⁵⁶ from the market because of twenty recent deaths and twelve strokes attributed to ingestion of the drug.⁵⁷ Thus, not only does illicit use of prescription stimulants give the abuser an unfair competitive edge over those legitimately taking standardized tests, it also poses a serious health risk to the abuser.

D. Current Safeguards against Non-Prescribed Use

Currently, drugs like Adderall and Ritalin are available only with a prescription.⁵⁸ Under the Controlled Substances Act, these drugs are classified as Schedule II controlled substances.⁵⁹ As such, non-prescribed possession of these drugs violates federal law.⁶⁰ Illicit possession of Schedule II drugs can result in up to one year in

⁴⁹*Prescription Drug Abuse: Statement Before the Subcomm. on Crim. Justice, Drug Policy, & Human Resources*, 109th Cong., 2 (2006) (statement by Dr. Nora D. Volkow, M.D., Director of the National Institute on Drug Abuse at the National Institutes of Health).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*ADHD Update*, *supra* note 20.

⁵⁶This is the extended release version of the medication. *Id.*

⁵⁷*ADHD Update*, *supra* note 20.

⁵⁸Adderall Overview, http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/add1008.shtml (last visited Feb. 3, 2007); Ritalin Overview, http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/rit1383.shtml (last visited Feb. 3, 2007)

⁵⁹21 U.S.C.S. § 812 (LexisNexis 2006).

⁶⁰21 U.S.C.S. § 844 (LexisNexis 2006). The relevant part of the statute reads as follows: "Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a

prison and a minimum fine of \$1,000 for the first offense.⁶¹ The penalty substantially increases for subsequent offenses.⁶² Thus, anyone who illicitly procures these drugs and takes them to enhance academic performance on standardized tests, violates a federal law that imposes stiff penalties.

However, standardized tests, such as the LSAT, do not specifically prohibit non-prescribed use of these drugs.⁶³ Accordingly, no mechanism of enforcement exists aimed at preventing students from obtaining the unfair competitive edge resulting from illicit use of prescription stimulants.⁶⁴ Abusers can easily obtain these drugs,⁶⁵ and it is doubtful that law enforcement is successful in apprehending and punishing these people for their contravention of federal law. Not only should the organizations responsible for administering these standardized tests address the problem by specifically banning illicit use of prescription stimulants, they must also implement an effective mechanism of enforcement. This mechanism comes in the form of random drug testing similar to that instituted by the organizers of many competitive sporting events.

III. THE IMPORTANCE OF STANDARDIZED TESTING TO ADMISSIONS

Standardized tests are becoming increasingly important in college and graduate admissions decisions.⁶⁶ High schools and colleges are very diverse, and it is often difficult to compare the grade point averages of their students because of the corresponding diversity in the schools' grading standards.⁶⁷ Standardized test scores are a uniform criterion that can be used to directly compare students. Accordingly, "standardized tests have become the one factor that admissions departments can use [to] easily – and cheaply – distinguish between candidates."⁶⁸

The LSAT, specifically, is a highly weighed criterion in law school admissions. According to the University of California at Berkeley's Boalt School of Law, "[t]he LSAT score is a very important admission factor."⁶⁹ In fact, it is often considered the most important admissions criterion for law schools.⁷⁰ Because admissions are

valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III."

⁶¹*Id.*

⁶²*Id.*

⁶³ See LSDAS, LSDAS Candidate Requirements, <http://www.lsat.org/applying/lstdas-candidate-requirements.asp> (last visited Jan. 9, 2008).

⁶⁴ *Id.*

⁶⁵ U.S. DEP'T OF JUSTICE, DRUGS OF ABUSE 35 (2005), <http://www.usdoj.gov/dea/pubs/abuse/doa-p.pdf>.

⁶⁶ See The 5 Most Important Factors in College Admissions, *supra* note 13.

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹ University California, Berkeley Boalt School of Law, Admissions Frequently Asked Questions, <http://www.law.berkeley.edu/admissions/jddegree/faq.html#Q6> (last visited Dec. 4, 2006).

⁷⁰ Princeton Review, *supra* note 2.

so heavily dependent upon these scores, it is not surprising that students are greatly concerned with their performance on these tests.

Because these tests are often the one standardized criterion that schools can use to compare students, it is important that their standardized nature be preserved. Anyone taking prescription stimulants are put at an unfair competitive edge vis-à-vis those who take the tests in a legal manner. In this way, the standardized nature of the test is not preserved, and thus one of the major purposes of the test is defeated.⁷¹

Whatever the actual proportion is, many students illicitly use prescription stimulants to enhance their academic performance in school.⁷² Because standardized test scores are weighted so heavily in admissions considerations, it is probable that there are more students like John Doe abusing prescription stimulants to enhance test scores. A deterring system, similar to that found in sports law, should be implemented to help prevent this unfairness.

IV. ANTI-DOPING EFFORTS IN SPORTS LAW⁷³

A. *United States Anti-Doping Agency's Method*

Generally, anti-doping efforts in sports are the products of contract law.⁷⁴ When athletes enter into a competition, they often sign contracts in which they agree not to use certain substances, although legal, that will unfairly enhance their performance.⁷⁵ If athletes are found guilty of a doping violation,⁷⁶ they are generally disqualified from the current competition and sometimes suspended or banned from subsequent competitions.⁷⁷

Though some sports organizations have their own rules and procedures for drug testing, many follow the United States Anti-Doping Agency's example (hereinafter "USADA.") The USADA, founded in 2000, is responsible for managing the testing of U.S. athletes who participate in the Olympics, the Pan-Am Games, and the Paralympics.⁷⁸ It was formed as a reaction to the increase in athletes who use performance enhancing drugs and as an attempt at credible regulation of this

⁷¹This assertion has been noted by the courts, specifically regarding the LSAT: "The LSAC has a legitimate interest in preserving, to the extent possible, the standardized format of the LSAT, and it has an obligation to all candidates who take the LSAT and to the law schools which rely on the formats to preserve the standardized format." *Badgley v. LSAC*, Civil Action No. 4:99CV-0103-M 2000 U.S. Dist. LEXIS 16925, at *2 (N.D. Tex. Aug. 24, 2000).

⁷²Low & Gendaszek, *supra* note 11, at 283-84.

⁷³"Doping" is the process of taking illicit drugs to enhance one's performance.

⁷⁴Connolly, *supra* note 15, at 174-75.

⁷⁵*Id.*

⁷⁶The term "doping violation" is used when an athlete tests positive for a banned substance.

⁷⁷*Id.* at 178.

⁷⁸USADA Mission, <http://www.usantidoping.org/who/mission.html> (last visited Sept. 23, 2006).

phenomenon.⁷⁹ In a contract between the United States Olympic Committee and the USADA, the USADA has agreed to not only conduct all drug tests of U.S. Olympic athletes, but also to manage the data collection and oversee adjudication of any testing disputes.⁸⁰ The USADA may relay any information it procures incident to testing to the relevant governing bodies of the sport in question.⁸¹

Testing for banned substances occurs both in and out of competition.⁸² Out-of-competition testing occurs year round, and an athlete is selected at random.⁸³ The USADA attempts to collect samples at times more highly susceptible to doping.⁸⁴ In contrast to out-of-competition testing, athletes tested in-competition are generally not selected at random. Rather, they are selected according to the athlete's position in that specific competition.⁸⁵

Samples are collected either by USADA representatives or other USADA-authorized individuals,⁸⁶ who are often officials from other anti-doping organizations, such as the World Anti-Doping Agency (hereinafter "WADA"). The WADA is an international independent organization that coordinates and monitors anti-doping policies in international competition.⁸⁷ Results are generally reported to the USADA within ten working days of the laboratory's receipt of the testing sample.⁸⁸ Retesting occurs only at USADA direction.⁸⁹

If the USADA receives a negative lab report, the USADA promptly notifies the athlete.⁹⁰ Penalties for a confirmed positive test are expansive.⁹¹ They have ranged

⁷⁹USADA History, <http://www.usantidoping.org/who/history.html> (last visited Sept. 23, 2006).

⁸⁰U.S. Anti-Doping Agency, *Protocol for Olympic Movement Testing 2* (2004) http://www.usantidoping.org/files/active/policies_procedures/2004%20USADA%20Protocol%5B3%5D.pdf [hereinafter *Protocol for Olympic Movement Testing*].

⁸¹*Id.*

⁸²Doping Control Process, <http://www.usantidoping.org/what/process/selection.html> (last visited Sept. 23, 2006).

⁸³Doping Control Process, Notification, <http://www.usantidoping.org/what/process/notification.html> (last visited Jan. 6, 2008).

⁸⁴Doping Control Process, *supra* note 82.

⁸⁵*Id.* For instance, any competitor who finishes the competition in third place may be pre-selected for testing.

⁸⁶*Protocol for Olympic Movement Testing*, *supra* note 80, at 4.

⁸⁷*See Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*See Protocol for Olympic Movement Testing*, *supra* note 80, at 5.

⁹¹*See Sanctions*, <http://www.usada.org/what/management/sanctions.aspx> (last visited Dec. 2, 2006).

from a mere public warning,⁹² to temporary suspensions from participating in that sport, to permanent expulsion.⁹³

B. Therapeutic Use Exemptions

Athletes may qualify for a “therapeutic use exemption” for a drug normally prohibited but legally prescribed to them.⁹⁴ An athlete must apply for this exemption at least twenty-one days in advance of the competition, and there is no guarantee that the exemption will be granted.⁹⁵

The USADA specifically addresses therapeutic use exemptions for drugs used to treat ADHD.⁹⁶ In addition to completing a form describing the nature of the use and the disorder, the athlete must also submit the following information: medical reports concerning the diagnosis; a family history related to the diagnosis; psychological evaluations; a description of how the medication is supposed to help treat the disorder; and “[e]vidence that allowed medications have been considered or tried and that the outcome of use of the allowed medications is such that the prohibited medication must be used.”⁹⁷

V. USADA ANTI-DOPING LAW: A SHIFTING OF BURDENS

When the athlete undergoes testing that is analyzed in a USADA-approved lab, the process is presumed accurate.⁹⁸ Generally, these labs are approved by the WADA.⁹⁹ In testing, these labs must follow the WADA’s International Standard for Laboratory Analysis.¹⁰⁰

If an athlete tests positive for a banned substance, a *prima facie* case of guilt is established.¹⁰¹ Whether the banned substance *did* or is *likely to have* an effect on the athlete’s performance is immaterial in this analysis.¹⁰² The athlete’s mental state is likewise immaterial, regardless of whether he intentionally ingested the banned

⁹²*Id.* Generally these include very minor infractions, such as testing positive for pseudoephedrine, a common ingredient in over-the-counter nasal decongestants. *Id.*

⁹³*Id.*

⁹⁴U.S. Anti-Doping Agency, USADA, Forms, <http://www.usantidoping.org/dro/resource/forms.aspx> (last visited September 23, 2006).

⁹⁵ *Id.*

⁹⁶See USADA, *TUE Requirements for ADD and ADHD Medications (2005)*, <http://www.usantidoping.org/files/active/athletes/standard%20tue.pdf>.

⁹⁷*Id.*

⁹⁸See Connolly, *supra* note 15, at 177.

⁹⁹World Anti-Doping Agency, Mission, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Feb. 5, 2007).

¹⁰⁰See *Protocol for Olympic Movement Testing*, *supra* note 80, at 2.

¹⁰¹See *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 589 (7th Cir. 2001).

¹⁰²Oliver Niggli & Julien Sieveking, *Selected Case Law Rendered Under the World Anti-Doping Code*, JUSLETTER (Independent Swiss Legal Newsletter, Geneva, Switzerland), Feb. 2006, at 7, available at <http://www.wada-ama.org/rtecontent/document/jusletter-eng.pdf>.

substance.¹⁰³ In this sense, establishing the initial presumption of guilt can be likened to strict liability – if there is a positive test, then there is a presumption of guilt.¹⁰⁴ The actor's mental state and the actual effect of the drug are irrelevant.¹⁰⁵

An athlete, however, may rebut this presumption.¹⁰⁶ Since it is immaterial whether the drug actually affected the athlete's performance or whether the athlete intended to ingest it, the athlete's best defense to this established presumption is to show that the testing procedure was flawed.¹⁰⁷ Tests conducted by credible agencies are generally presumed accurate.¹⁰⁸ The athlete may proffer affirmative evidence that a specific part of the testing procedure was deficient, causing an incorrect test result.¹⁰⁹

The standard of proof that must be met in order to rebut this *prima facie* case of guilt is the "comfortable satisfaction standard."¹¹⁰ In the arbitration hearing of *De Bruin v. Fina*, CAS 98/211, Award of 7 June 1999, CAS Digest II,¹¹¹ the arbitration panel described this standard as "high: less than the criminal standard,¹¹² but more than the ordinary civil standard."¹¹³

In addition to banning certain types of substances, regulating agencies also prohibit athletes from having an extra-normal amount of *naturally* occurring substances in their bodies (such as testosterone).¹¹⁴ Under the USADA's framework, if an athlete tests positive for a prohibited amount of testosterone, the athlete will be promptly notified, as he would with any positive test.¹¹⁵ The laboratory will then conduct a second test in which the athlete is permitted to bring a "representative."¹¹⁶ The athlete will be provided the results of the first test that showed that the athlete

¹⁰³Connolly, *supra* note 15, at 179.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 177.

¹⁰⁷*Id.*

¹⁰⁸*Id.* These include the USADA.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*See generally* Connolly, *supra* note 15 (because doping violations are contract disputes, they generally are settled by arbiters and mediators rather than proceeding to court).

¹¹²The criminal standard is "beyond a reasonable doubt," which is a higher standard than required in civil cases. 1 LAIRD KIRKPATRICK & CHRISTOPHER MUELLER, FEDERAL EVIDENCE § 77 (2d ed., Lawyers Cooperative Publishing, 1994).

¹¹³*De Bruin v. Fina*, CAS 98/211, Award of 7 June 1999, CAS Digest II at 266. The civil standard is "upon a preponderance of the evidence," which indicates that the evidence is more likely than not to be true. LAIRD & MUELLER., *supra* note 112, at § 65. The standard described in *De Bruin* seems to fall somewhere between this standard and the criminal standard.

¹¹⁴*See* Slaney, 244 F.3d at 589.

¹¹⁵*Protocol for Olympic Movement Testing*, *supra* note 80, at 5

¹¹⁶*Id.* This witness, presumably, would be legal counsel, or someone else knowledgeable of the testing procedure or governing law, though it is not required.

tested positive for elevated levels of testosterone.¹¹⁷ Further action is not taken unless the second test confirms the first or the athlete waives the second test.¹¹⁸

In one such case, an athlete tested well over the acceptable rate for testosterone.¹¹⁹ The court held that this testing was enough to establish the *prima facie* case of guilt, and “the burden [then] shifted to the athlete, who must prove by clear and convincing evidence¹²⁰ that the elevated T/E [testosterone] ratio was due to pathological or physiological conditions.”¹²¹ This is the same system of burden-shifting used to establish and rebut liability for banned substances.

A. Appeals and Review Board

Some athletes may wish to appeal the USADA’s finding; in anticipation of such appeals, the USADA devised the USADA Anti-Doping Review Board (hereinafter “Review Board.”)¹²² The Review Board examines all samples that the lab indicated tested positive for a banned substance, or for an elevated level of a naturally occurring substance.¹²³ A positive test is reviewed by at least three members of the Review Board, which is comprised of at least one medical expert, one technical expert, and one legal expert.¹²⁴ All of these members must be employed independently from the USADA.¹²⁵

If a doping violation is found, the violator is promptly notified within ten days that he tested positive for an illicit substance.¹²⁶ Appeal of a positive test must be submitted in writing to the Review Board.¹²⁷ This is not a deliberative hearing in any sense. An athlete submits his appeal and then is not afforded any opportunity to further argue the merits of his claim.¹²⁸ The Review Board considers the writing and makes a recommendation to the USADA as to whether there is sufficient evidence to begin an adjudication process.¹²⁹ Upon issuance of the USADA’s decision to the athlete, the athlete will have ten days to determine whether he wishes to proceed in

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Slaney*, 244 F.3d at 584.

¹²⁰ The “clear and convincing” standard is “a greater burden than preponderance of the evidence . . . but less than evidence beyond a reasonable doubt” BLACK’S LAW DICTIONARY 250 (2d pocket ed. 2001). This standard seems to be close if not identical to the “comfortable satisfaction” standard described in *De Bruin*.

¹²¹*See Slaney*, 244 F.3d at 593.

¹²²*Protocol for Olympic Movement Testing*, *supra* note 80, at 7.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.* at 8.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

the adjudication process.¹³⁰ If he does not give notice that he wishes to continue with the adjudication process, then he will be sanctioned.¹³¹ If an athlete claims that he did give notice, but the Review Board claims that they received no notice, then the athlete must show by a preponderance of the evidence that notice was given.¹³²

B. Arbitration

If the adjudication process continues, then the claim is submitted to the American Arbitration Association.¹³³ The USADA has the right to request that other parties, such as the WADA, be represented at the hearing.¹³⁴ The athlete has the sole right to request that the hearing be open to the public.¹³⁵

The final decision by the arbitration panel may be further appealed to the Court of Arbitration for Sport (hereinafter "CAS").¹³⁶ The arbitration occurs in the CAS's New York office,¹³⁷ and the court reviews the matter *de novo*.¹³⁸ The CAS shall have the authority to increase, decrease, or void the sanctions the USADA imposed on the athlete.¹³⁹ The CAS decision shall be final and binding.¹⁴⁰

C. The National Collegiate Athletic Association's Example

The National Collegiate Athletic Association (hereinafter "NCAA") is an organization that colleges and universities join to regulate inter-collegiate athletic competitions.¹⁴¹ Over 1,250 institutions belong to this organization, including all

¹³⁰*Id.* (the athlete may be entitled to one five day extension to make this decision).

¹³¹*Id.*

¹³²*Id.* at 9.

¹³³*Id.* at 10

¹³⁴*Id.* at 10.

¹³⁵*Id.*

¹³⁶*Id.* The Court for the Arbitration of Sport was founded in 1984 by a special committee of the International Olympic Committee. It is an international organization with offices in Lausanne, Switzerland, Sydney, Australia, and New York City, U.S. Most Olympic and non-Olympic organizations recognize the authority of the court. Tribunal for the Arbitration of Sport, History, <http://www.tas-cas.org/en/histoire/frmhist.htm> (last visited Feb.7, 2007).

¹³⁷*Protocol for Olympic Movement Testing*, *supra* note 80, at 10.

¹³⁸*A de novo* appellate review is defined as "A court's non-deferential review of an administrative decision, usually through a review of the administrative record plus any additional evidence the parties present." BLACK'S LAW DICTIONARY 382 (2d pocket ed. 2001).

¹³⁹*Protocol for Olympic Movement Testing*, *supra* note 80, at 10.

¹⁴⁰*Id.* at 10.

¹⁴¹The National Collegiate Athletic Association, About the NCAA, http://www2.ncaa.org/portal/about_ncaa/ (last visited Feb. 3, 2007).

major colleges and universities.¹⁴² Its mission is to “govern competition in a fair, safe, equitable, and sportsmanlike manner.”¹⁴³

In 1986 and 1990, the NCAA adopted Proposal Numbers 20, 52, 53, and 54, in which each member affirmed its dedication to fair competition.¹⁴⁴ In that effort, the NCAA implemented drug testing of member institutions’ athletes.¹⁴⁵ This was done to ensure that no athlete obtained any kind of unfair competitive edge over others, to prevent encouraging innocent athletes from having to use banned substances in order to keep up with those already using illicit drugs, and to safeguard the health and safety of its participants.¹⁴⁶

According to the NCAA’s constitution, students must sign consent forms for any drug testing conducted year-round, though testing sometimes occurs only during in-season.¹⁴⁷ NCAA bylaw 31.2.3.4 gives a list of banned substances, among which are Adderall, Ritalin, and other prescription stimulants.¹⁴⁸ If the athlete tests positive for one of these substances, then he is banned from competition for a particular amount of time. If the positive test occurred before the season of the athlete’s competition, the athlete is banned from competition for that entire season.¹⁴⁹ The minimum ban is one season.¹⁵⁰ If the athlete tests positive after already having started the season, then he is ineligible for the remainder of that season and also for a portion of the next season, sufficient to bring the total banned time to one full season.¹⁵¹ In most cases, the athlete is ineligible for the calendar year following a positive test.¹⁵² After a probationary period, the athlete must test negative on a subsequent test and be approved by the Committee on Student-Athlete Reinstatement.¹⁵³ If he tests negative and is approved, then he may be reinstated. A failure to show for a scheduled drug

¹⁴²*Id.*

¹⁴³The National Collegiate Athletic Association, Our Mission, http://www2.ncaa.org/portal/about_ncaa/overview/mission.html (last visited February 3, 2007).

¹⁴⁴NCAA, *Drug Testing Program 1* (2006-07), <http://www.ncaa.org/library/sports/-sciences/drug-testing-program/2007-08/2007-08-drug-testing-program.pdf>.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷NCAA Const. Art. 3.2.4.7.1 10 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf. This depends on the sport in question. *See Id.*

¹⁴⁸NCAA Operation Bylaws 31.2.3.4 422-23 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁴⁹NCAA, *Drug Testing Program*, *supra* note 144, at 3.

¹⁵⁰*Id.*

¹⁵¹NCAA Operation Bylaws 18.4.1.5.1 382 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁵²*Id.*

¹⁵³*Id.*

test or proven tampering with a test is considered a positive test for purposes of determining eligibility.¹⁵⁴

Actual testing occurs both in-season and out of season.¹⁵⁵ Testing can occur at random times or immediately subsequent to a competition.¹⁵⁶ Testing following a competition is contingent upon an athlete's place in the competition.¹⁵⁷ For instance, the first place finisher, whoever it may be, is pre-selected for testing.¹⁵⁸ The athlete is given time to talk to reporters, collect his award, and to handle incidentals, but then he must immediately proceed to the on-site testing facility.¹⁵⁹ The facility itself and the actual administration¹⁶⁰ of the test is conducted by the National Center for Drug Free Sport.¹⁶¹

When an athlete is tested, he may bring a witness to verify that all testing procedures comply with NCAA protocol.¹⁶² An athlete is required to urinate into a container, and an official at the testing agency of the same gender observes in order to ensure that no tampering has occurred.¹⁶³ In order to induce urination, an athlete may be given fluids that do not contain banned substances.¹⁶⁴ The observer then packages the specimen and ships it to a National Drug Free Sport testing center.¹⁶⁵

Consequences for testing positive are greater if the banned substance is classified as a "street drug."¹⁶⁶ These include heroin, marijuana, and tetrahydrocannabinol (THC).¹⁶⁷ If an athlete tests positive for a second time for one of these drugs, he

¹⁵⁴*Id.*

¹⁵⁵Video: NCAA Drug Education and Testing Video (NCAA 2007), <http://ncaa.org> [hereinafter NCAA Video] (follow "Legislation and Governance" hyperlink; then follow "Drug Testing" hyperlink; then follow "NCAA Drug Education and Testing Video" hyperlink).

¹⁵⁶*Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰NCAA, Overview of the NCAA Year-Round Drug-Testing Program, http://www1.ncaa.org/membership/ed_outreach/health_safety/drug?testing/year?round?overview.html (last visited Jan. 7, 2008).

¹⁶¹The National Center for Drug Free Sport, History, <http://www.drugfreesport.com/who-we-are.html> (last visited Feb. 4, 2007). The National Center for Drug Free Sport is an organization founded specifically to address the drug testing needs of sports organizations, like the NCAA. *Id.* In addition to actually conducting and administering drug tests, Drug Free Sport also helps organizations develop drug testing programs. *Id.*

¹⁶²NCAA Video, *supra* note 155.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶NCAA Operation Bylaws 18.4.1.5.1 382 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁶⁷ NCAA, *Drug Testing Program*, *supra* note 144, at 3.

becomes ineligible not only for the remainder of his current season, but also for the next calendar year.¹⁶⁸

According to the NCAA Constitution Article 18.4.1.5.1.2, the athlete's institution may appeal the duration of ineligibility.¹⁶⁹ The Committee on Competitive Safeguards and Medical Aspects of Sports may reduce the penalty up to 50%, or in some cases, grant complete relief.¹⁷⁰ If the athlete has tested positive for a banned substance in a test conducted by any other organization who has adopted the World Anti-Doping Agency's Code,¹⁷¹ such as the USADA, then the athlete is ineligible for the period the other organization has banned him.¹⁷²

Methylphenidate (Ritalin) is on the NCAA's list of banned substances.¹⁷³ However, the athlete may qualify for a medical exception, which is similar to the USADA's therapeutic use exemption.¹⁷⁴ The NCAA's Executive Committee makes this decision according to the athlete's documented medical history and current need.¹⁷⁵ The committee recommends that the athlete first pursue alternative treatments that do not involve banned substances.¹⁷⁶ However, if there is no appropriate alternative treatment, the athlete may continue to use the substance.¹⁷⁷

Any anabolic or peptide hormone use must first be approved by the NCAA.¹⁷⁸ Pre-approval is likely required because those hormones have a high likelihood of eliciting a performance-enhancing effect and are, therefore, the most abused. If the athlete seeks NCAA approval of his medical use of anabolic agents or peptide hormones, then his institution's director of athletics must submit a request to the National Center for Drug Free Sport.¹⁷⁹

¹⁶⁸NCAA Operation Bylaws 18.4.1.5.1 383 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹The World Anti-Doping Agency is an "international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms." World Anti-Doping Agency, Mission and Priorities, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Feb. 11, 2007).

¹⁷² NCAA Operation Bylaws 18.4.1.5.1 382 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁷³NCAA Drug-Testing Programs Site Coordinator Manual 30 (2006-07), http://www.ncaa.org/library/sports_sciences/drug-testing_manual.pdf.

¹⁷⁴NCAA Operation Bylaws 31.2.3.5 423 (2006-07), http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

¹⁷⁵NCAA, *Drug Testing Program*, *supra* note 144.

¹⁷⁶NCAA, 2007-08 Drug-Testing, Exceptions Procedures, http://www.ncaa.org/membership/ed_outreach/health_safety/drug_testing/exceptions.html (last visited Jan. 9, 2007).

¹⁷⁷*Id.*

¹⁷⁸*Id.*

¹⁷⁹*Id.*

For any medical use exception, the institution must keep documentation that supports and explains the athlete's medical condition and why the substances are necessary to treat it.¹⁸⁰ Unless the substance in question is an anabolic agent or peptide substance, these records may be kept confidential in the member institution's files, and they need not be sent to the NCAA.¹⁸¹ If the athlete tests positive for a banned substance and had not pre-notified the NCAA, the athlete's director of athletics may request a medical exception.¹⁸² This request is sent to Drug Free Sport, and the athlete remains eligible until a final decision is made.¹⁸³ Drug Free Sport, along with the NCAA's chair of the drug-testing and drug education subcommittee, review the request and relevant medical documentation to determine whether to grant an exception.¹⁸⁴ Drug Free Sport then informs the athlete's director of athletics whether an exception will be granted.¹⁸⁵

Currently, no system similar to that imposed by the NCAA or the USADA exists that discourages students from taking prescription stimulants before standardized tests. If a student knows that he may be subjected to drug testing, he will be far less likely to illicitly ingest the drug. Because these drugs have a proven academic enhancing effect, and because the nature of admissions has become more and more competitive and contingent upon standardized test scores, more and more students will seek the performance enhancing effect of these drugs. If this trend continues, students who generally take the test without the use of performance drugs may be induced to take these drugs in order to keep up with the competition. Something needs to be done to prevent this snowball effect from occurring. The obvious answer is to implement random drug testing similar to those the NCAA and USADA use.

VI. THE SOLUTION

Random drug testing, similar to that instituted by the USADA and the NCAA, should be implemented. The organization administering the standardized test should require all students to register for possible drug testing when these students register for the written test.

Drug testing should occur at random, and tests should be administered immediately after the student takes the standardized test. Because of the expense involved with administering drug testing,¹⁸⁶ it is likely that only a small percentage

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*See* Congressional Budget Office, H.R. 2565, A bill to reauthorize the Office of National Drug Control Policy Act and to establish minimum drug-testing standards for major professional sports leagues 5 (2005), <http://www.cbo.gov/ftpdoes/65xx/doc6535/hr2565.pdf> (testing adhering to USADA standards costs approximately six hundred dollars per test). Though it is unconfirmed exactly how much a similarly effective test for prescription stimulants would cost, this expense would certainly not be negligible.

of students could actually be tested. However, fear of drug testing should discourage many students from illicitly taking these stimulants before a standardized test.¹⁸⁷

Every student should be presumed innocent, and a student who is medically prescribed these stimulants should qualify for a therapeutic use exemption. Only upon testing positive for a banned substance should the student be deemed presumptively guilty. The student, however, should be given an opportunity to rebut this presumption of guilt by showing that the testing was in some way inaccurate.

It should be immaterial whether the drug had an actual effect on the student's performance or whether ingestion was intentional. In this sense, the standard should be similar to the USADA's system of strict liability.¹⁸⁸ If a student tests positive for illicit prescription stimulants and is unable to rebut this presumption, then the student is deemed guilty. This will eliminate litigation expense that could be expended by students who may argue that their ingestion was unintentional. It would be immaterial whether the student intended on ingesting the drug – if he tests positive, and he cannot prove that testing was inaccurate, then he is guilty. Since mental state is not an issue, it could not be litigated. This strict liability system should aid in keeping expenses related to the program as low as possible.

If guilt is established, then the student should be subjected to consequences. These consequences should be harsh in order to strongly deter students from ingesting these substances. Because the system imposes strict liability, a student who recklessly or negligently ingests the substance is just as liable as a person who purposely ingests it. Harsh consequences will compel students to exercise a high standard of care in preventing themselves from inadvertently ingesting these substances and deter purposeful violators.

Consequences will be left within the purview of the admissions committee considering the positive-testing student's application. The scores of these students should be flagged as having been procured while illicitly under the influence of prescription stimulants. If this student takes the test again, regardless of whether he is tested and tests positive for illicit prescription stimulants, the fact that he once violated the rules should be reported to any institution to which he applies.

In this system, the decision whether to suspend or completely preclude a violator's admission would rest with the schools, and no compulsion would take place. If a school wishes to follow the NCAA's example and admit a past violator or require a probationary period between time of violation and admittance, then the choice lies with that school's admissions committee. If an institution wishes to grant a past violator leniency, then this decision is theirs as well.

In addition, students who take standardized tests under the legal influence¹⁸⁹ of prescription stimulants should have their scores flagged. The flag would indicate that the student was under something similar to a therapeutic use exemption for the drug. Prescription stimulants have been proven to enhance the academic performance

¹⁸⁷See Interview with John Doe, *supra* note 1. John Doe indicated that he would not have taken Adderall before the LSAT had he known there was a possibility that he may have to submit to a drug test.

¹⁸⁸See Connolly, *supra* note 15, at 179.

¹⁸⁹Under the legal influence refers to students who have a valid medical prescription for the drugs.

of students legitimately diagnosed with ADHD.¹⁹⁰ A student who takes the test under a therapeutic use exemption for prescription stimulants should have his scores flagged because it will be difficult or even impossible to tell whether the enhancing effect will compensate for the ADHD condition, or enhance his performance beyond a level of equality. The institution should be notified that the prescription stimulants were legitimately taken and reported to the standardized test administrators. In this way, the institutions themselves may decide how to treat these scores.

It is hoped that implementation of this system, similar to that found in sports law, will deter students from illicitly taking prescription stimulants to enhance their performance on standardized tests. Performance on these tests should be considered as just as important as performance in an athletic competition. Accordingly, an effort to level the academic playing field, as occurs on the sports field, should be made.

VII. POSSIBLE CONCERNS

A. *Is it an illegal Search?*

One possible criticism of conducting random drug tests for students taking standardized tests is that such tests might constitute an illegal search and seizure.¹⁹¹ Random drug tests, even those whose results are ultimately submitted to state universities, do not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.¹⁹²

First, the Fourth Amendment protects against only state action. In order for this type of drug testing to violate the Fourth Amendment, the organizations that administer standardized tests must be seen as state actors, or the process of state universities viewing the results of these tests must involve state action to the point of warranting Fourth Amendment protections.¹⁹³

The NCAA, a comparable institution in a comparable situation, has not been considered a state actor for purposes of determining whether constitutional limitations on its actions apply.¹⁹⁴ In *NCAA v. Jerry Tarkanian*, 488 U.S. 179 (1988), the Supreme Court addressed the issue of whether the NCAA's action in sanctioning a college basketball coach for violating NCAA rules involved state action subject to Fourteenth Amendment protections.¹⁹⁵ An NCAA committee investigation found that Tarkanian violated a number of NCAA rules. The NCAA

¹⁹⁰Conte, *supra* note 38.

¹⁹¹The Fourth Amendment reads as follows: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV. The Fourth Amendment prohibits federal officials from conducting illegal searches and seizures, while the Fourteenth Amendment, per *Mapp v. Ohio*, 367 U.S. 643 (1961), also incorporated this restriction upon state actors.

¹⁹²*See generally* *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 191-92.

sanctioned Tarkanian's employer, the University of Nevada – Las Vegas (UNLV), a state university. Additional sanctions would have been imposed if the university had not removed Tarkanian during the probationary period imposed on the university. Tarkanian argued that since UNLV was a state entity, the NCAA's compelling the university to suspend him constituted state action subject to Fourteenth Amendment due process limitations.¹⁹⁶

The Court recognized that no matter how arbitrary or unfair the conduct is, if it is of a private nature, constitutional restrictions do not apply.¹⁹⁷ Conduct that is comprised of even partial state action may be subjected to Constitutional restrictions. To determine whether indirect state action warrants Fourteenth Amendment protection, the Court examined factors such as whether the “[s]tate creates the legal framework governing the conduct,” whether the state “delegates its authority to the private actor,” and whether the private organization “knowingly accepts the benefits derived from unconstitutional behavior.”¹⁹⁸ Essentially, the question is “whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.”¹⁹⁹ In *Tarkanian*, the NCAA was the entity that created the legal framework for the action and compelled the state entity to act. Accordingly, the Court held that the NCAA was not a state actor, and thus no constitutional restrictions on state action applied.

Though *Tarkanian* involved the Due Process Clause – the issue presented with standardized tests is the same – are the standardized test administrators acting under color of state law to a point that warrants constitutional protection to governmental abuse? Under the *Tarkanian* analysis, it should be clear that testing of this type does not involve state action to a point that warrants constitutional protection. The organizations administering standardized tests²⁰⁰ do not receive any kind of governmental funding or direction in implementation of the organization's governing framework. They do not operate under any government-delegated authority, and neither the state nor federal government derive any benefit from unconstitutional behavior in the administration of standardized tests.

In the unlikely event that these random drug tests are found to be unreasonable, no constitutional protection preventing them applies. The possibility of random drug testing would be a part of the contractual relationship between the student and the standardized test administrator.

Though the direct drug testing itself may not involve state action, some may contend that state action is involved when scores are submitted to state universities for decision. It is unlikely that such indirect state action will be sufficient to implicate constitutional restrictions. Tarkanian disputed the fact that the NCAA was an organization founded in part by state entities (state universities).²⁰¹ The NCAA

¹⁹⁶See generally *Tarkanian*, 488 U.S. 179.

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 192.

¹⁹⁹*Id.*

²⁰⁰The organizations include LSDAS, the College Board, and ACT.

²⁰¹NCAA, History of the NCAA, <http://www.ncaa.org/about/history.html> (Last visited Feb. 5, 2007). President Theodore Roosevelt, in 1905, mandated that the Presidents of Universities meet to discuss reforms to the violent nature of the game of football. *Id.* Thirteen

rules that were followed in this situation were partially a product of state input.²⁰² The University of Nevada-Las Vegas, a state entity, along with many other state institutions were responsible for promulgating these rules.²⁰³ Tarkanian argued that the NCAA was sufficiently involved with state entities to subject its regulations to Constitutional protections against state action.²⁰⁴

The *Tarkanian* Court, however, found that only a small number of state entities contributed to these rules, especially in comparison to the number of private universities involved.²⁰⁵ Thus, the Court held that state involvement was not sufficient to consider the NCAA's action a "state action."²⁰⁶ In this way, the Court found that a state entity's mere involvement in an action does not make that action a "state action."²⁰⁷ Rather, there must be a sufficient amount of state involvement in order to subject that action to Fourteenth Amendment restrictions.²⁰⁸

This situation is similar to state institutions receiving the drug test results of standardized test-takers. A state entity is involved in this action – a state school is receiving the result of the drug test. However, the entity actually conducting the drug test, the standardized test administrator, is a private institution. Thus, it is likely that a reviewing court will hold that a review of drug test results by state universities is not sufficient to be considered a state action.

The state entity's involvement in receiving the drug test results, like that of the state entity involvement in the promulgation of NCAA rules, is minimal. *Tarkanian* considered the relative weight of state involvement in an activity to determine whether it should be, considered a state action. A court considering the situation presented in this note will likely apply the same standard as used in *Tarkanian* and reach the same result. Since it is likely that the review of drug test results by state universities will not be considered a state action, the fourth or fourteenth amendment protections will not apply.

universities met in December of 1905 to discuss these reforms and to establish a uniform set of rules. During the next meeting, on December 28, sixty-two institutions were represented, including many state universities. *Id.* These institutions formally established the Intercollegiate Athletic Association of the United States, which would later become known as the National Collegiate Athletic Association (NCAA) in 1910. *Id.* Representatives of institutions would meet at NCAA meetings to establish bylaws that govern the sports in which their institutions participate. *Id.* In this way, the NCAA is an entity partially founded and comprised by state actors.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Tarkanian*, 488 U.S. at 197.

²⁰⁵ *Id.* at 196.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 193-94

²⁰⁸ *Id.*

B. Reporting Therapeutic Use Exemptions – Does it Violate the ADA?

Another major criticism of implementing random drug testing for standardized tests is that it might violate the ADA.²⁰⁹ Title III, Section 309 of the ADA, which applies to places of public accommodation, states “[a]ny 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.”²¹⁰

Under the proposed system outlined in this note, those students legitimately prescribed ADHD medications would generally qualify for a therapeutic use exemption, and the fact that they took these drugs before taking the standardized test would be reported along with their scores. Students with therapeutic use exemptions for prescription stimulants would be accommodated, and thus the direct requirement of the ADA should be satisfied.²¹¹ A problem arises because flagging only occurs when disabled students are granted accommodations. Thus, the flagging vicariously indicates that the student is disabled in some way, though the actual disability is concealed.²¹² Some may contend that this practice could implicate ADA restrictions.

Currently, the Law School Admissions Council reports, along with the scores, whether the student took the test under accommodated conditions.²¹³ The most common report is that a student is granted more time to complete each section of the examination.²¹⁴ The LSAT and MCAT have been able to continue this practice, despite ADA concerns.²¹⁵ Likewise, the proposed system described in this note should be able to report therapeutic use exemptions without violating the ADA.

It has been proven that prescription stimulants enhance the academic performance of not only those students who illicitly take them, but also of those students diagnosed with ADHD.²¹⁶ It is difficult, if not impossible to tell whether

²⁰⁹See Americans with Disabilities Act, 42 U.S.C.S. §§ 12101-12213 (LexisNexis 2007); see also Dep’t of Justice, ADA homepage, <http://www.usdoj.gov/crt/ada/adahom1.htm> (Last visited Feb. 5, 2007). The ADA is federal legislation enacted to prevent federal and state governments from discriminating in employment on the basis of a person’s disability. *Id.*

²¹⁰42 U.S.C.S. § 12189 (LexisNexis 2005).

²¹¹See *id.* (“Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional or trade purpose shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”).

²¹²See LSAC, Accommodated Testing, <http://www.lsac.org/LSAC.asp?url=lsac/accommodated-testing.asp> (Last visited Feb. 5, 2007).

²¹³*Id.*

²¹⁴*Id.*

²¹⁵See Michael Slipsky, *Recent Development: Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of Academic Standards of the Legal and Medical Communities*, 82 N.C.L. REV. 811, 813 (2004).

²¹⁶See James, *supra* note 46, at 1268.

this academic enhancing effect merely puts ADHD students on the performance level of other healthy students or whether it in fact gives them an unfair competitive edge.²¹⁷ This difficulty is similar to the one occurring when students are given accommodated testing conditions, such as more time to complete a test.²¹⁸ It is difficult to tell whether these conditions merely level the playing field by compensating for the students disability or whether these conditions in fact do more.

Currently, the LSAT and MCAT are the only major standardized tests to report the fact that a test was taken under accommodated circumstances.²¹⁹ The Educational Testing Service, which administers the Scholastic Aptitude Test (SAT)²²⁰ and the Graduate Admissions Test (GRE),²²¹ agreed to stop indicating that tests were taken under accommodated circumstances (this practice is generally referred to as “flagging.”).²²² The American College Testing Program (hereinafter “ACT”)²²³ also discontinued flagging scores.²²⁴ The LSAT and MCAT, on the other hand, continue to flag scores, allowing admissions committees to decide just how much they want to weigh accommodated testing versus the student’s disability.²²⁵ This practice should be emulated for students with therapeutic use exemptions for prescription stimulants taken before standardized tests and should not be found to violate the ADA.

A claim that seeks injunctive relief in a federal court to prevent flagging would have to show that the defendant’s conduct is likely to result in the plaintiff experiencing a future injury.²²⁶ In the case of *John Doe v. National Board of Medical Examiners*, 99 F.3d 146 (3rd Cir. 1999), the plaintiff was a doctor with multiple sclerosis who had taken his state licensing medical exam under accommodated conditions.²²⁷ The Board of Medical Examiners, which administers the test, reported to medical internship and residency programs that the test was taken under accommodated circumstances, along with the actual score.²²⁸ Doe

²¹⁷ See *supra* Section II.B.

²¹⁸ See *supra* Section VIIB.

²¹⁹ See Slipski, *supra* note 215, at 813.

²²⁰The College Board, Meet the SAT, <http://www.collegeboard.com/parents/tests/meet-tests/21295.html> (last visited Feb. 5, 2007).

²²¹GRE, Homepage, <http://www.ets.org/portal/site/ets/menuitem.fab2360b1645a1de9b3a0779f1751509/?vgnnextoid=b195e3b5f64f4010VgnVCM10000022f95190RCRD> (last visited Feb. 5, 2007).

²²²See Slipski, *supra* note 215, at 813.

²²³ACT, What is the ACT, <http://www.actstudent.org/faq/answers/what.html> (last visited Feb. 5, 2007).

²²⁴See Slipski, *supra* note 215, at 812-813.

²²⁵ See *Id.*

²²⁶See *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3rd Cir. 1990).

²²⁷*John Doe v. Nat’l Bd. of Med. Exam’rs*, 99 F.3d 146, 150 (3rd Cir. 1999). The plaintiff was given extra time to complete the exam and a seat next to the bathroom. See *Id.*

²²⁸ *Id.*

claimed that this practice violated the ADA.²²⁹ The Third Circuit held that “Section 309 [of the ADA] does not explicitly bar the practice of flagging the test scores of examinees who have received testing accommodations.”²³⁰ It next addressed the question of whether flagging was implicitly banned by any ADA section.²³¹

The court noted that the Department of Justice’s regulations interpreting section 309 likewise did not specifically ban flagging.²³² The Department’s interpretation of section 309 required that:

The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure.)²³³

Nowhere does this text mention that accommodations must remain confidential. Rather, it requires only that they be made.

Doe also argued that the indirect indication that he is a disabled person violated the ADA’s general prohibition on discrimination because it aided third parties²³⁴ in discriminating against him.²³⁵ Again, the court noted that no provision of Title III of the ADA²³⁶ specifically required that implicated institutions keep evidence of disability confidential.²³⁷ In addition, the possibility of facilitating discrimination is not sufficient to establish an ADA claim.²³⁸ Rather, Doe would have had to prove that the testing service itself discriminated, which did not happen in his case.²³⁹

In the alternative, even if it could be proven that flagging scores produced by students under therapeutic use exemptions was in some way discriminatory, it is likely that ADHD does not qualify for ADA protection.²⁴⁰ In *Knapp v. City of*

²²⁹ *Id.*

²³⁰ *Id.* at 155.

²³¹ *Id.*

²³² *Id.* at 156.

²³³ *Id.* (citing 28 C.F.R. § 36.309(b)(1)(i)).

²³⁴ In this case, the third parties were the medical residency and internship programs to whom Doe sent his test scores.

²³⁵ *Nat’l Bd. of Med. Exam’rs*, 199 F.3d at 158.

²³⁶ This is the title under which section 309 is located. It generally refers to places of public accommodation, as opposed to governmental entities, which are referred to in the first two titles.

²³⁷ Title I, on the other hand, does require this confidentiality. However, it is not implicated here – only title III is implicated in this situation.

²³⁸ *Id.*

²³⁹ *See Nat’l Bd. of Med. Exam’rs*, 199 F.3d at 158.

²⁴⁰ *See generally Knapp v. City of Columbus*, 192 F. App’x. 323 (6th Cir. 2006).

Columbus, 92 F. App'x 323 (6th Cir 2006), the Sixth Circuit held that ADHD was not a disability protected by the ADA.²⁴¹ The case involved three plaintiffs who alleged that their medically diagnosed condition of ADHD qualified them for ADA protection.²⁴² The three plaintiffs, who were firemen, requested accommodations in taking the Columbus Civil Service Commission examination and the Fire Captain's Promotion examination.²⁴³ In requesting accommodation, one plaintiff submitted doctor statements indicating that he had "significant ADHD symptoms" which had an "adverse impact upon day-to-day functioning."²⁴⁴ The second plaintiff submitted a doctor's letter into evidence that indicated that the plaintiff "experiences significant distractibility, restlessness, and impulsivity that result in impairments."²⁴⁵ The third plaintiff admitted to only moderate ADHD.²⁴⁶

The court noted that the ADA defined disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," "a record of such impairment," or "being regarded as having such an impairment."²⁴⁷ In determining whether ADHD has limited an individual's learning capacity to the point that it "substantially limits one or more of the major life activities"²⁴⁸ of the individual, the court asks "whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."²⁴⁹ The court further noted that "[t]he requirements of the ADA are so demanding, that even if these critically important tasks are occasionally disrupted, a jury could still find the absence of a disability under the ADA."²⁵⁰

Though qualifying a condition as an ADA-protected disability is difficult, the court noted that this determination is conducted on an individual basis.²⁵¹ In the specific cases presented to the *Knapp* court, it did not find that ADHD had affected the individuals' lives to the point that it substantially limited one or more of the individuals' life activities.²⁵²

Thus, the court seemingly set a high bar for determining that ADHD qualifies as an ADA-protected disability requiring accommodation. A student must show that his ADHD substantially impairs one of his life activities – a difficult assertion to

²⁴¹*Knapp*, 92 F. App'x at 323 (6th Cir 2006).

²⁴²*Id.* at 325

²⁴³*Id.*

²⁴⁴*Id.*

²⁴⁵*Id.* at 326.

²⁴⁶*Id.* at 327.

²⁴⁷*Id.* at 328 (citing 42 U.S.C.S. § 12102(2)).

²⁴⁸42 U.S.C.S. § 12102(2).

²⁴⁹*Knapp*, 192 F. App'x. at 328 (citing *Toyota Motor Mfg., KY., Inc. v. Williams*, 534 U.S. 184, 200-01 (2002)).

²⁵⁰*Knapp*, 192 F. App'x at 329.

²⁵¹*Id.*

²⁵²*Id.* at 328-29.

make. Likely, many students who have made it to the level of applying for undergraduate or graduate school will not be able to show that their condition has substantially impaired one of their life activities. Although this analysis is conducted on a case-by-case basis, it seems likely that most claims that ADHD is protected by the ADA would fail.

Similarly, a claim would likely fail if it asserted that flagging scores of students under a therapeutic use exemption for prescription stimulants violates the ADA. Even if in a particular situation the court decides to treat a student's ADHD as an ADA-protected disability, Title III of the ADA requires only that the student be accommodated when taking a standardized test.²⁵³ It does not prohibit disclosure of accommodation, nor does it necessarily follow that disclosure leads to discrimination. Therefore, because it is unknown just how accommodations in the form of prescription stimulants exactly affect test scores of ADHD students, the best policy is to let the admissions committee decide how these scores should be treated.

VIII. CONCLUSION

Standardized tests are becoming an increasingly important criterion in admissions decisions. Because of this trend, standardized tests have become more and more competitive. Students taking standardized tests often will do everything they can to achieve the best result possible, and some students will not stay within the legal bounds to achieve their goals.

Prescription stimulants such as Adderall and Ritalin have a proven enhancing effect on the academic performance of not only those diagnosed with ADHD, but also on presumably healthy individuals. Because of the increased proliferation of these drugs and because of increased awareness that these drugs can enhance one's academic performance, documented abuse has occurred. Students are using these drugs to enhance their academic performance on standardized tests, and this practice needs to be stopped.

The solution to this increasing problem is found in random drug testing of these individuals, similar to what occurs in most sporting events. When athletes enter into a competition, they often sign contracts in which they agree not to use certain substances, although legal, that will unfairly enhance their performance. Though therapeutic use exemptions do exist, they are difficult to acquire and always require reporting.

Thus, individuals taking standardized tests should be subjected to drug testing similar to those undergone by many athletes. Like the NCAA and USADA examples, students would be tested mostly at random, and certain safeguards ensuring accuracy of the test should be taken. If a student tests positive for a prescription stimulant and did not apply for the requisite therapeutic use exemption, then his score should be flagged as having been procured while under the influence of illicitly taken prescription stimulants. Schools should then be free to decide how they want to treat the scores in their admissions decisions.

Similar to the LSAT and MCAT's treatment of scores taken under accommodated conditions, scores procured by students legitimately taking prescription stimulants should be flagged. Because these drugs have a proven academic enhancing effect on students' performance, and because it is difficult if not

²⁵³ Americans with Disabilities Act, 42 U.S.C.S. §§ 12101-12213 (LexisNexis 2007).

impossible to tell whether this enhancing effect merely evens the abilities of an ADHD student with a healthy student or further enhances them, scores procured by students with therapeutic use exemptions for prescription stimulants should be flagged when submitted to schools. Some may contend that flagging violates the American with Disabilities Act, but the ADA only requires that qualified individuals be accommodated and does not prohibit disclosure of accommodation, and therefore no ADA violation would likely occur.

Some may also contend that random drug testing may constitute an unreasonable search and seizure and violate either the Fourth and/or Fourteenth Amendments. Because state action to the point triggering Fourth or Fourteenth Amendment involvement does not occur when the tests are conducted, a determination of whether the tests constitute a search or seizure, or whether they are unreasonable, is not necessary.

Drug tests ensuring that the playing field in standardized tests remains level are needed. Proper steps should be taken to implement this protection so that students willing to break the rules are not rewarded with higher standardized test scores and consequently better chances at admission.