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**Head Starts and Extra Time:
Academic Accommodation on Post-secondary Exams
and Assignments for Students with Cognitive and
Mental Disabilities
IHELG Monograph
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Head Starts and Extra Time: Academic Accommodation on Post-secondary Exams and Assignments for Students with Cognitive and Mental Disabilities

*Bruce Parady**

Universities and colleges routinely grant extra time on exams and assignments to accommodate students with cognitive and mental disabilities. Such accommodation is inappropriate and inconsistent with the law. Exams and assignments are, in part, competitions. Like a head start in a race, extra time means that the competition is no longer valid. Races test speed, and no accommodation can be made for disabilities that affect speed, which is the bona fide criterion of the race. Exams and assignments assess a range of cognitive and mental skills, and no accommodation can be made for disabilities that affect those skills, which are bona fide criteria of the assessment. A head start imposes undue hardship on other runners, and extra time imposes undue hardship on other students in the class. The purpose of accommodation is to facilitate participation, not to compensate for lack of ability that is relevant to the test. Students with mental disabilities are able to sit exams without extra time, which means that they are already able to participate. The real purpose of claims for extra time is to increase their prospects for success at the expense of other students, which is not legitimate. Universities and colleges should not provide extra time as an accommodation for disabilities that relate to cognitive and mental skills.

Les universités et les cégeps accordent régulièrement du temps supplémentaire pour les examens et les travaux afin d'accueillir les élèves ayant des déficiences cognitives et des incapacités mentales. Cette mesure d'adaptation est inappropriée et incompatible avec la loi. Les examens et les travaux sont, en partie, des compétitions. Comme une longueur d'avance dans une course, le temps supplémentaire signifie que la compétition n'existe plus. Les courses servent à mesurer la vitesse, laquelle se trouve être le critère neutre de la course, et on ne devrait pas consentir d'avantages pour compenser les limitations liées à la performance. Les examens et les travaux évaluent un éventail de compétences cognitives et mentales, et aucune mesure d'adaptation ne peut être apportée pour des handicaps affectant ces compétences, qui sont des critères neutres d'évaluation. Une longueur d'avance impose une contrainte excessive sur les autres coureurs et le temps supplémentaire impose une contrainte excessive sur les autres élèves de la classe. Le but de la mesure d'adaptation est de faciliter la participation, non pas de compenser le manque de capacité pertinente à l'épreuve. Les étudiants en situation

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de handicap sont en mesure de passer des examens sans temps supplémentaire, ce qui signifie qu'ils sont déjà en mesure de participer. Le but réel des demandes de temps supplémentaire est d'augmenter leurs chances de succès au détriment des autres étudiants, ce qui n'est pas légitime. Les universités et les cégeps ne devraient pas donner du temps supplémentaire comme mesure d'adaptation pour les handicaps se rapportant à des compétences cognitives et mentales.

You're the fastest runner but you're not allowed to win.

— Howard Jones, “No One Is To Blame”

1. INTRODUCTION

Canadian universities and colleges are legally required to accommodate student disabilities, except in the case of bona fide requirements that render accommodation of the disability a matter of undue hardship. How these requirements play out in the post-secondary context is not always clear. One common accommodation is particularly fraught with difficulty:¹ extra time on exams and assignments for students with cognitive and mental health difficulties. In this article, I argue that such accommodation is inappropriate because it defeats bona fide purposes of the assessment. The practice imposes an undue hardship on other students in the class² and is contrary to the law.

When Canadian universities and colleges provide such accommodations, they make at least four substantive errors and carry out a process that is procedurally flawed. First, they assume that the practice is self-evidently legitimate and consistent with the law.³ Second, they acknowledge that the

¹ See Suzanne E. Rowe, “Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time” (2009) 15 *Journal of the Legal Writing Institute* 165.

² Whether extra time on exams and assignments actually results in higher grades would be difficult to establish. Some students may benefit and others may not. This question is irrelevant to whether extra time is a legitimate accommodation. If the accommodated student improves her grades because of the extra time, the accommodation is unfair to the other students in the class. If she does not, the accommodation is unnecessary and serves no useful purpose. Either way, extra time is not appropriate.

³ “Academic accommodations help students with a disability Some examples of accommodations are: Extended time on exams. ... Eligibility for academic accommodations: The types of conditions supported by Access and Diversity include, but are not limited to: Mental health conditions such as depression, anxiety disorders or bi-polar disorder; Neurological disabilities such as attention deficit/hyperactivity disorder, learning disabilities, head injuries and Asperger’s syndrome.” University of British Columbia, Student Services, “Academic Accommodations,” available at: University of British Columbia <<http://students.ubc.ca/success/student-supports/academic-accommodations>>. This assumption is also found throughout the academic literature. See, e.g., Mike Condra, Mira Dineen, Sarah Gauthier, Helen Gills, Anita Jack-Davies, and Eleanor Condra, “Academic Accommodations for Postsecondary Students with Mental

purpose of accommodation is to enable participation rather than to enhance success, but fail to give effect to that distinction.⁴ Third, they fail to recognize that exams and assignments are competitions and, therefore, that granting extra time to some students adversely affects the interests of others. Fourth, they proceed on the mistaken premise that the substance of the assessment can be divorced from its form. Procedurally, the university's Disability Services Office⁵ may act both as advocate for the disabled and as adjudicator of claims, granting requests for accommodation by assessing only the circumstances and interests of the applicant.⁶

Cognitive and mental difficulties are experienced by a significant portion of the post-secondary student population in Canada. In 2013, the American College Health Association conducted a survey of 34,039 students attending 32 Canadian post-secondary institutions.⁷ It found that in the preceding 12-month period, 10 per cent had been diagnosed with depression, twelve per cent with anxiety, and

Health Disabilities in Ontario, Canada: A Review of the Literature and Reflections on Emerging Issues" (2015) 28 *Journal of Postsecondary Education and Disability* 277 at 280 [Academic Accommodations].

⁴ For example, the webpage of Accessibility Services at Queen's University states, "Academic accommodations for reasons of a disability are never intended to give an advantage or to guarantee academic success. Rather, they are intended to provide an equal opportunity for students who need to do certain tasks in a different fashion. Students with disabilities, like all students, are expected to meet the essential requirements of the curriculum, regardless of their need for accommodation." Queen's University, Student Wellness Services, "Academic Accommodations," available at: Queen's University <<http://queensu.ca/studentwellness/accessibility-services/instructors>>. Nonetheless, Queen's policy is to provide extra time on exams for students with mental disabilities.

⁵ Also known as the "Accessibility Services Office," "Office for Students with Disabilities," or variations thereof.

⁶ "The process a post-secondary institution takes to assess an accommodation (the "procedural" part of the duty to accommodate) is just as important as the accommodation provided (the "substantive" part of the duty to accommodate). Both the student and the institution have responsibilities in the accommodation process. For example, students must make their needs known to the best of their ability and participate in solutions. The post-secondary institution is required to accept accommodation requests in good faith, unless there are legitimate reasons for acting otherwise, ask only for the information they need to provide the accommodation, take an active role in finding solutions where problems arise, respond in a timely way and protect confidentiality." M. Condra and E.M. Condra, *Recommendations for Documentation Standards and Guidelines for Academic Accommodations for Post-Secondary Students in Ontario with Mental Health Disabilities* (Queen's University and St. Lawrence College Partnership Project, 2015), available at: St. Lawrence College <<https://www.stlawrencecollege.ca/~media/Files/Documents/About/Mental%20Health%20Research/COMPLETE%20DOCUMENT%20AUG%2024th.pdf>> at 3 [the Condra report]. Also see Academic Accommodations above, note 3 at 279.

⁷ American College Health Association, National College Health Assessment II, *Canadian Reference Group Executive Summary* (Spring 2013), available at: Canadian Association of College and University Student Services <<http://www.cacuss.ca/>

two per cent with obsessive compulsive disorder.⁸ Almost four per cent reported a learning disability,⁹ and five per cent attention deficit and hyperactivity disorder.¹⁰ The number of students with mental health disabilities registered with Disability Services Offices at Ontario colleges and universities increased by 67 per cent between 2006 and 2011.¹¹

It is beyond the scope of this article to inquire into the medical causes or diagnoses of these and other cognitive and mental conditions, or to address issues or controversies relating to their potential causes or remedies. For the purpose of this article, it does not matter whether or to what extent such conditions are physiological or psychological, genetic or environmental, temporary or permanent, or consistent or variable from person to person or moment to moment. It matters only that these conditions are claimed to constitute a disability that requires accommodation in the form of extra time on exams and assignments. This analysis focuses exclusively on the granting of extra time on assessments. It does not address any other accommodation issues in the post-secondary context, including teaching in classrooms or online, teaching materials or technologies, or the physical accessibility of buildings and facilities.

2. THE LEGAL TEST FOR ACCOMMODATION

The issue of accommodation for disabilities in higher education is a matter of provincial jurisdiction.¹² Although this means that a different statute exists in each province, human rights legislation tends to be similar across Canada. Furthermore, two Supreme Court of Canada decisions¹³ under the British Columbia *Human Rights Code*¹⁴ have defined the test to be applied to the issue of

[_Library/documents/NCHA-II_WEB_SPRING_2013_CANADIAN_REFERENC
CE_GROUP_EXECUTIVE_SUMMARY.pdf](#)> .

⁸ *Ibid.* at 15.

⁹ Learning disabilities are “disorders that affect the ability to understand or use spoken or written language, do mathematical calculations, coordinate movements, or direct attention.” National Institute of Neurological Disorders and Stroke, “NINDS Learning Disabilities Information Page,” available at: National Institute of Neurological Disorders and Stroke <<http://www.ninds.nih.gov/disorders/learningdisabilities/learningdisabilities.htm>>.

¹⁰ Above, note 7 at 3.

¹¹ Academic Accommodations above, note 3 at 277.

¹² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No 5, s. 91.

¹³ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, 1999 CarswellBC 1907, 1999 CarswellBC 1908, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*) [1999] 3 S.C.R. 3 (S.C.C.) [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CarswellBC 2730, 1999 CarswellBC 2731, [1999] 3 S.C.R. 868 (S.C.C.) [*Grismer*].

¹⁴ R.S.B.C. 1996, c. 210.

accommodating disabilities under such legislation across the country. I will refer to the legislative provisions in force in Ontario, but the reasoning applies more broadly.¹⁵

To “discriminate” means to distinguish or tell apart. Discrimination is not illegal. Rather, it is an essential tool for functioning in the world. People discriminate constantly. They choose to be friends with some people and not others. Employers hire better qualified candidates rather than those less qualified. Diners choose shepherd’s pie instead of stir fry at their favourite restaurant. In popular parlance, the word “discrimination” has come to be associated with treating people in a way that is illegal, but in accordance with the normal rules of statutory interpretation, any instance of discrimination that is not specifically prohibited in legislation is allowed.

Section 1 of the Ontario *Human Rights Code*¹⁶ states that every person has a right to equal treatment with respect to services, goods, and facilities, without discrimination on the grounds enumerated therein. One of those grounds is disability. “Disability” is defined in s. 10 to include conditions of mental impairment, developmental disability, learning disability, mental disorders, and dysfunction in one or more of the processes involved in understanding or using symbols or spoken language. Educational programs offered by universities and colleges are “services” within the meaning of s. 1.¹⁷ Therefore, universities and colleges cannot apply policies that actively exclude or disadvantage students with cognitive and mental disabilities. For example, a university could not adopt a policy excluding students with mental illness from registering for courses. Such a policy would be an instance of “direct discrimination.”¹⁸

As the Supreme Court of Canada has observed, cases of direct discrimination are rare.¹⁹ The *Code* also prohibits constructive or “adverse effect” discrimination²⁰ in s. 11:

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

¹⁵ Including the United States under Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. §701, and the Americans with Disabilities Act of 1990 (ADA), codified at 42 U.S.C. §12101. See Laura Rothstein, “The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education” (2015) 41 *J.C. & U.L.* 531.

¹⁶ R.S.O. 1990, c. H.19.

¹⁷ *Tang v. McMaster University*, 2014 HRTO 92, [2014] O.H.R.T.D. No. 96 (Ont. Human Rights Trib.) at para. 61.

¹⁸ *Grismer* above, note 13 at paras. 15-16.

¹⁹ *Ibid.* at para. 17.

²⁰ *Ibid.* at para. 15.

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; ...
- (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Under s. 11, discrimination will not amount to a violation of a right if the requirement that results in the discrimination is reasonable and bona fide. Bona fide questions most commonly arise in employment cases, where the issue is whether an employer's occupational requirements are genuinely necessary for the performance of the job. I will argue below that the issue of bona fide requirements plays out differently in the context of academic accommodations.

Under s. 11(2), a requirement will not be bona fide unless, in the case of disability, the needs created by the disability cannot be accommodated "without undue hardship." Undue hardship is a function of cost, inconvenience, and a compromise of other important considerations such as the health and safety of the claimant or others in the workplace. I will make the case below that in claims for extra time on post-secondary assessments, undue hardship arises not because of the cost or inconvenience to the institution of providing the extra time, but rather the skewing of the competition to the detriment of the other students in the class.

Section 17 of the Ontario *Code* also provides for a defence specific to alleged cases of discrimination based on disability. Section 17(1) reads as follows:

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

Grant and Mosoff²¹ explain that the original intent of this section was to protect employers when they dismissed workers for failing to perform essential duties of their jobs, but not when they fired them for failing to fulfill requirements that were not essential.²² Section 17(2) adds the requirement of accommodation without undue hardship similar to s. 11(2). Section 17(2) was not originally in the *Code* "although such a duty was read in by the courts."²³

- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those

²¹ Isabel Grant and Judith Mosoff, "Disability and Performance Standards under the Ontario Human Rights Code" (2002) 1 *J. L. & Equality* 205.

²² *Ibid.* at 220.

²³ *Ibid.*

needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

In *Meiorin*,²⁴ a case under the British Columbia *Human Rights Code*, the Supreme Court of Canada applied a common approach to all claims of discrimination under that statute, whether direct or constructive.²⁵

Once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a [bona fide occupational requirement] or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.²⁶

The BC *Code* does not make the distinction the Ontario *Code* makes between direct and constructive discrimination, and it could have been argued that *Meiorin* was limited in its application to BC cases. However, the Ontario Court of Appeal subsequently held that the *Meiorin* test applies to cases under the Ontario statute.²⁷ Whatever distinction there may have been between direct and constructive discrimination under the Ontario *Code* no longer exists. The *Meiorin* test is now applied in discrimination cases across the country under various provincial human rights statutes.²⁸

Post-secondary institutions regularly grant extra time for exams and assignments as accommodation for cognitive or mental disability. Despite the widespread acceptance of this practice, or perhaps because of it, there is as yet no reported court or tribunal decision in Canada that directly addresses a claim for

²⁴ Above, note 13.

²⁵ “*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them.” *Grismer* above, note 13 at para. 19.

²⁶ *Grismer* *ibid.* at para. 20.

²⁷ *Entrop v. Imperial Oil Ltd.*, 2000 CarswellOnt 2525, 189 D.L.R. (4th) 14 (Ont. C.A.).

²⁸ For example, see *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225, 2015 CarswellAlta 1190, 19 Alta. L.R. (6th) 219 (Alta. C.A.); leave to appeal allowed 2016 CarswellAlta 478, 2016 CarswellAlta 479 (S.C.C.); *Tracey v. 502798 NB Inc.*, 2008 NBQB 390, 2008 CarswellNB 663, 93 Admin. L.R. (4th) 212 (N.B. Q.B.); and *J. (M.) v. Companion*, 2002 NFCA 38, 2002 CarswellNfld 188, 214 Nfld. & P.E.I.R. 183 (Nfld. C.A.).

the denial of such an accommodation.²⁹ In its present form, the *Meiorin* test provides little guidance. Both bona fide requirements and undue hardship are relevant, but claims for accommodation in academic assessment have unique features that do not fall cleanly inside the template of the *Meiorin* test. One of the most important distinctions between academic assessment and other common accommodation scenarios is that exams and assignments are, to a significant degree, competitions among the students in each class.

3. EXAMS AND ASSIGNMENTS ARE COMPETITIONS

Students' course grades depend in large measure upon how their performance compares to that of others in the class. Professors differ in their methods and purposes of assessment, and there are no ironclad rules about how an exam is to be graded. However, inevitably exams and assignments are compared to each other to determine appropriate grades and students' relative standing in the class. Exams are not graded in isolation from one another, but as

²⁹ The leading case in Canada on accommodating a disability in a test situation is the Supreme Court of Canada's judgment in *Grismer* above, note 13. Terry Grismer suffered from homonymous hemianopia as the result of a stroke and had almost no left-side peripheral vision in either eye. The British Columbia Motor Vehicle Branch cancelled Grismer's driver's licence because his vision no longer met the minimum 120 degree field of vision, as established by the British Columbia Superintendent of Motor Vehicles. Exceptions were permitted to the standard in some cases but never for people with homonymous hemianopia, who always have less than 120 degrees. Grismer applied for a licence four times in seven years, passing the standard visual test and the driving test, but was refused on each occasion. The Court held that Grismer had been discriminated against and that accommodation was required to allow him to demonstrate the requisite level of competence in spite of his disability. "The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety." *Ibid.* at para. 44. If the purpose of post-secondary exams and assignments was merely to demonstrate a minimum level of competence, then the reasoning in *Grismer* might apply to cognitive and mental disabilities and accommodation in the form of extra time could make sense. However, post-secondary assessments and driver licences are qualitatively different. An unlimited number of driver licences are available and the granting of a licence depends merely on a minimum level of competence and safety. University exams are competitive; the number of A grades is limited; and the purpose is not to show a minimum level of competence but to achieve as high a relative level of achievement as possible. The closest academic equivalent to *Grismer* is the pass-fail exam, which is a less acute form of competition between students. Unlike As and Bs, the number of passes and fails is not limited. A passing grade is less dependent upon the comparative performance of one's peers than is the awarding of an A or a C grade. In a pass-fail exam, alternative ways to demonstrate competence do not disadvantage other students as acutely since the maximum reward available is a pass and the number of passes available does not diminish. But unless the assessment in question is pass-fail, the reasoning in *Grismer* does not apply to academic accommodations for cognitive and mental disabilities. In a similar vein, see *University of British Columbia v. Kelly*, 2015 BCSC 1731, 2015 CarswellBC 2739 (B.C. S.C.).

a group. Professors do not award better grades to poorer exams. Therefore, grades reflect relative performance.

The competitive nature of assessment is especially acute where professors are subject to a mandatory grade curve. Such policies can vary widely, but for example, consider the grade distribution policy at the law school where I teach. The policy requires that, in lecture courses,³⁰ B is the median grade, no more than 20 per cent of students are awarded grades of A or A-, and no more than 20 per cent of students are awarded grades of C+ or lower. Under this policy, a student's grade depends to a significant extent upon how his exam ranks in the class. If Professor Smith teaches a class of 50 students in Bankruptcy Law, then even before the course begins Smith knows that the median exam will receive a B, irrespective of its quality in any objective or absolute sense. Even if Smith's class consists of a group of unusually talented students and she is of the opinion that the median exam in the class is outstanding, that exam will still earn a B. She may be of the opinion that the median exam is outstanding because of extensive experience with the exams of other students in other classes in other years, or because she is comparing it to an abstract, theoretical standard that she has in her head. These considerations are not irrelevant, but they are secondary to her assessment of where the exam ranks in the class. In this group of talented students, only the 10 best exams are eligible for an A or A- grade. Therefore, an A grade depends not merely on the professor's assessment of an exam as an isolated product, but on its standing in the class. An outstanding exam that is not quite as good as 10 other outstanding exams will be awarded a B+.

This particular policy is relatively flexible, and class rank is not the sole determinant of grade. If all students perform poorly, the professor is not compelled to award any A grades at all. However, even in programs in which no mandatory policy exists, professors tend to "bell curve" the marks, adjusting them upwards or downwards to achieve a more standard distribution. Thus, students who perform poorly in absolute terms but excel relative to their classmates are apt to end up with a high grade, whether there is a mandatory distribution or not.

The form of assessment least dependent upon comparative accomplishment is the pass-fail exam. It is also the least precise and arguably the least effective.³¹ Unlike a mandatory curve where the number of As and Fs are limited, in a pass-fail scenario the entire class may pass or fail (unless, of course, there is a grading policy that says otherwise). A passing grade, therefore, is less dependent upon the comparative performance of one's peers than in a graded exam.

³⁰ Lecture courses are courses other than seminars and "small groups," which have a limited enrolment. Lecture courses typically, although not universally, have a higher enrolment, often between 50 and 90.

³¹ Pass-fail exams provide the least incentive to excel. Mastery of the subject produces the same reward — a pass — as a rudimentary grasp.

4. IN ANY COMPETITION, PARTICIPANTS HAVE AN INTEREST IN WHETHER OTHERS ARE COMPETING ON EQUAL TERMS OR RECEIVING AN ADVANTAGE

A race is a competition. Because it is a competition, each runner has an interest in the conditions imposed upon the others. All runners competing in the 100-metre dash must run 100 metres. If one competitor was granted a 20-metre head start, the other runners would justifiably object.

In a college or university course, students are in pursuit of high grades. For them, the objective of the course is not merely the education it offers but the credentials it provides. Grades are signals to students about their level of academic performance relative to their peers. Via their academic transcripts, students communicate that accomplishment to third parties, including prospective employers and graduate and professional schools.³² The competition for grades is real and the outcome can carry significant consequences. Like athletic medals, high grades are scarce. Earning them depends upon the outcome of the competition. Students have a direct and personal interest in the conditions and criteria imposed upon the other members of their class. They have a stake in the fairness of the competition.

5. BONA FIDES: NO ACCOMMODATION CAN BE MADE FOR DISABILITY THAT RELATES TO THE SKILLS AND ABILITIES THAT THE COMPETITION IS ABOUT

The bona fides of any competition are the skills and abilities that the competition tests. The *raison d'être* of a race is speed: Whose legs can carry them across the finish line fastest? “The sports equivalent of a bona fide occupational requirement is the rules of the game. To meet such a requirement is to play the game as others play it.”³³ Races discriminate: they distinguish between people based on their speed. *Discrimination is the purpose of the race.* Because races discriminate against all people based on speed, they also discriminate against people with disabilities that affect speed, but not in a way that offends the *Human Rights Code*. The discrimination is not illegal or inappropriate. No accommodation need be made.

³² As graduate degrees become more popular and arguably more necessary, the competition among undergraduate students for graduate school spots increases. In 2007, 165,789 graduate students were enrolled in Canadian universities, an average annual increase of five per cent since 2000. The rate of this growth is faster than at the undergraduate level. Statistics Canada, “Education Indicators in Canada: Fact Sheets,” available at: Statistics Canada <<http://www.statcan.gc.ca/pub/81-599-x/81-599-x2009003-eng.htm>>. Increased pressure to enter graduate studies means increased competition for spots and a corresponding need for better grades.

³³ *McLeod v. Youth Bowling Council of Ontario*, 1990 CarswellOnt 2720, 75 O.R. (2d) 451 (Ont. Div. Ct.) at 457 [O.R.]; affirmed 1994 CarswellOnt 4144 (Ont. C.A.) [*Youth Bowling*].

If someone with a limp claimed the right to an accommodation in a race and was accommodated with a 20 metre head start, the consequences would be perverse. A 20 metre head start in the 100 metre dash means that she was not really in the race at all. Her finish was not a genuine result. Perhaps she crossed the line first. Perhaps her lead eroded and two runners passed her 10 metres from the tape. Perhaps she was overtaken by all but two others. It does not matter; any finish is meaningless. She did not place in the 100 metre race because she did not run it. She was not the fastest in the field, the third fastest, or the third slowest. Her result is not comparable to the other runners. She ran, but she did not run the race. The record of her finish is a fiction.

In a competition, the legal objective of accommodation is not to make slower runners more competitive but to enable all to compete under the same conditions relevant to the skill that the contest is about.³⁴ It is to enable participation. Consider, for example, a runner who is deaf. The race is a contest of speed, not hearing. Therefore, hearing is not a bona fide criterion for the race. An appropriate accommodation is one which enables runners to test their speed against one another. The deaf runner can see a green light flash as effectively as the other runners can hear the start gun, so a flashing light to start the race in addition to the gun is an appropriate accommodation.³⁵ Of course, she must start the race the same distance from the finish as everybody else. Accommodations

³⁴ In *Youth Bowling*, the Ontario Divisional Court upheld a board of inquiry order under the Ontario *Human Rights Code* that permitted an 11-year-old girl with cerebral palsy to participate in a bowling tournament using a ramp to deliver her bowling ball. The court found that use of the device did not impact others and provided no advantage: “The evidence is clear that Tammy’s device gives her no competitive advantage over others. Her ball speed is low. She cannot significantly vary the velocity of the ball — an important competitive element; nor can she impart spin to it, which according to the council’s expert, is one key to success. ... [A]rtificial aids are governed by Rule 5 [of the Bowling Rules] which forbids moving parts in such a device to impart force to the ball. Tammy’s device appears to comply with these rules. Should she adopt a more sophisticated device, the rule contemplates that permission may be withdrawn.” *Ibid.* at 462. One could take issue with the decision on the grounds that “important competitive elements” are the skills that the competition is about. That the device does not provide a competitive advantage may minimize the harm, but if velocity and spin are key attributes of the sport, then arguably she is not actually taking part in the competition. However, there is an important distinction between *Youth Bowling*, on the one hand, and head starts in races and extra time on exams, on the other. The claimant’s participation in *Youth Bowling* depended on the accommodation. Slow runners and mentally disabled students seek their accommodation not to participate but to succeed by getting “a leg up.”

³⁵ *Badgett v. Alabama High Sch. Athletic Ass’n*, 2007 U.S. Dist. LEXIS 36014 (N.D. Ala., May 3, 2007) at 18. Also see *McFadden v. Grasmick*, 485 F.Supp.2d 642 (D. Ma., 2007). The runner who is deaf can be accommodated without undue hardship. That might not be the case for other kinds of disabilities, even those not related to speed. If a runner with limited sight wanted to compete, providing an extra lane for a guide runner is a feasible solution. On the other hand, if the runner required bright lights be installed in the ground between lanes, that accommodation would arguably create undue hardship on the organizers of the race because of their expense and possible logistical difficulties.

that enable disabled athletes to participate in the competition are consistent with the *Code*, but accommodations that require modification to the rules of play or create advantages over other competitors are not.³⁶ As the Ontario Divisional Court stated in *Youth Bowling*,

the Code imposes upon those who offer services in the sports field the obligation of making accommodations to the needs of handicapped persons who wish to participate, up to the point of undue hardship. That point is reached, in my opinion, when the proposed accommodation would impact significantly upon the way in which other participants would be required to play or would give the accommodated person an actual advantage over others in such participation.³⁷

Disabled runners should be accommodated to the point of undue hardship so that they can run in the race,³⁸ but no accommodation should be provided to compensate for lack of speed, which would be to impose an undue hardship on the rest of the field because of the advantage that it provides.

Races are run to answer *whether* not *why*: can you run faster than the next guy? Why you can do so is irrelevant. If you lost the race, it may have been because of your training regime, your genetic makeup, your mental preparation, your poise under pressure, or a combination of all of these. The reason does not matter. These inquiries are irrelevant to the purpose of the race. The same is true for exams and assignments.

6. EXAMS AND ASSIGNMENTS ASSESS COGNITIVE SKILLS AND MENTAL ABILITIES AS DETERMINED BY THE PEDAGOGICAL PURPOSES AND APPROACHES OF THE PROFESSOR

When a professor awards an A to the best exam and a B to the one in the middle of the pack, she discriminates between exams. By extension, she

³⁶ In *Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass., 2005), a wheelchair racquetball player claimed for the right to be allowed to compete in the able-bodied players' league, and requested an accommodation of the rules to allow him two bounces of the ball before shots instead of the standard rule of one. Two bounces was the rule in wheelchair racquetball. The Massachusetts Supreme Court held that changing the number of bounces would fundamentally change the nature of the game. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); Maureen Weston, "The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities" (2005) 50 *Saint Louis U.L.J.* 137 at 159-62.

³⁷ *Youth Bowling* above, note 33 at 458.

³⁸ In *McCreath v. Victoria International Running Society*, 2013 BCHRT 53, 2013 CarswellBC 1242 (B.C. Human Rights Trib.), the BC Human Rights Tribunal found that a blind runner had the right to start five minutes ahead of the main start of an open-entry 10 kilometre race. The purpose and effect of the accommodation was to allow the runner to participate safely in the run, not to provide him with a five-minute advantage over his competitors. McCreath was a "middle of the pack" runner, the accommodation did not interfere with the competition, and presumably McCreath's time in the race was his actual running time, not his time less the five-minute head start.

discriminates between students on the basis of their cognitive skills and mental abilities. That discrimination is not prohibited. Indeed, as in a race, *discrimination is one of the purposes of the exam* — to identify and distinguish different levels of academic achievement. Like races, which discriminate against people with disabilities that affect how fast they can run, exams discriminate against people with disabilities that affect how well they can think, learn, analyze, communicate, plan, prepare, focus, and perform under pressure. That discrimination is not illegal or inappropriate. No accommodation need be made.

For any particular exam or assignment, bona fide criteria depend on the pedagogy and purposes of the individual course and professor. But whatever the specific objectives, divorcing substantive content from the form of the assessment is not possible. The purpose of exams and assignments is not merely to test knowledge, comprehension, and analytical ability but to do so under conditions that require poise, organization, forward planning, and grace under pressure. Depending on the discipline, bona fide criteria may include knowledge, analytical ability, critical thinking, logic, pattern recognition, spatial reasoning, memory, creativity, organization, speed, focus, concentration, resilience, preparation, and intestinal fortitude. The assessment may test the ability to read and comprehend written language or abstract or mathematical information; to write concisely, efficiently and clearly; to reason and calculate with insight and accuracy; and to concentrate and apply mental skills and faculties to the task at hand. The limited time within which the exam must be written is part of the test. Stress, anxiety, the pressure of performing well in a limited period of time, the difficulties in overcoming procrastination and distraction, and the job of completing assignments by their due dates and being prepared for exams by the exam date are important features of university and college education and assessment.

Nonetheless, a recent report on documentation standards for academic accommodations for mental health disabilities³⁹ recommended that “functional limitations” serve as the basis for academic accommodations.⁴⁰ The functional limitations cited as grounds for providing accommodation included difficulty with the following cognitive and social-emotional skills and abilities: attention and concentration; short- and long-term memory; information processing; the ability to manage distractions; executive functioning such as planning, organizing, problem solving, sequencing and time management; judgment; communication; the ability to control emotions during evaluation situations; and the ability to manage the demands of academic life.⁴¹

What is left to assess? These skills and challenges are not collateral to post-secondary education but are central to it. Can the student remember the formula? Concentrate and find a solution to the problem? Focus on the exam and not be distracted by its importance to the final grade? Maintain sustained

³⁹ The Condra report above, note 6.

⁴⁰ *Ibid.* at Recommendation 1, p. 6 and Appendix C.

⁴¹ *Ibid.*, Appendix C.

attention for the duration of the exam? Read, understand, and analyze material, and communicate her findings? There is no pure core of knowledge unrelated to these other skills and attributes. If students are unable to use and express that knowledge, then they have not been able to use the skills and perform the tasks that the exam seeks to call upon. A student who can exhibit proficiency only when sources of stress are eliminated is like an athlete who can perform at his best only in practice rather than in the big game. Accommodating the student makes no more sense than accommodating the athlete.

The purpose of accommodation is to facilitate participation, not to compensate for lack of ability that is relevant to the test.⁴² Students with mental disabilities are able to participate without accommodation. If they have the same amount of time as everybody else, they are participating. Therefore, extra time does not facilitate participation. The real purpose of claims for extra time is to increase their prospects for success, which is not legitimate.

7. THE ALTERNATIVE: MORE TIME FOR ALL STUDENTS

For the sake of argument, in the event that I am wrong in my claim that substantive knowledge cannot be separated from the form of the assessment, I will address the alternative. Let us say that it is, in fact, possible and meaningful to test knowledge under circumstances that do not test “functional” capabilities. Let us assume that assessing such capabilities is not a legitimate or bona fide purpose of exams or assignments, and that instead, the limited time available on an exam is an artificial circumstance that gets in the way of students’ demonstration of their actual academic abilities. If that is the case, then it must be so not just for students with cognitive and mental disabilities, but for all students.

The pedagogical purposes of the assessment apply to all students in the class, disabled or otherwise. If time limitations are bona fide, then the limited time set for the exam must be the same for all. If time limitations are not bona fide, then all students should write the exam with enough time to communicate knowledge at their leisure. Students with cognitive and mental disabilities are not the only ones who run out of time on exams, feel pressure, or struggle to perform. It is incoherent to conclude that, on one hand, students with a cognitive or mental disability should not be subject to time limits because such pressures are collateral to the purpose of the assessment, but on the other hand, to find that it is reasonable to impose time limits on other students. The competition demands that it be one way or the other for everybody. No student should be penalized for failure to organize, prepare, focus, or perform under pressure if those skills are not being tested in the same way across the board.

⁴² For example, Condra et al. correctly state, “Students are entitled to receive accommodation if their disability results in a functional impairment that impacts their ability to *participate* in academics.” Academic Accommodations above, note 3 at 279 (emphasis added).

Assessments without time pressure or due dates would require a radically different system of post-secondary assessment. Imposing such a system would violate the academic freedom of professors to determine the methods and purposes of assessment that meet their pedagogical goals, and would enfeeble the academic enterprise. Requiring such changes would also conflict with the principle that accommodation should not interfere with “the rules of the game” or alter the way that others participate.

8. THE ADJUDICATION OF CLAIMS FOR EXTRA TIME

Because students have competing interests, claims for academic accommodation require neutral adjudication from unbiased decision-makers. Condra et al. describe the standard practice at Ontario universities and colleges for handling accommodation claims for mental health disabilities:

The established accommodation practice at all Ontario postsecondary institutions is that the [Office for Students with Disabilities] processes requests for academic accommodations from students with documented disabilities. Colleges and universities have established protocols and documentation requirements that guide the process. Some postsecondary institutions have separate procedures for accommodating students with temporary disabilities. Students requesting academic accommodations for [a mental health disability] must first register with the OSD and provide documentation from a qualified mental health professional (such as a physician, psychiatrist, or psychologist). The documentation must include a diagnostic statement and a description of the functional impairment(s) resulting from the disorder that interfere with academic functioning. By itself, the documented diagnosis of an MHD does not necessarily establish the need for accommodation or identify the most appropriate accommodation in an academic environment. Accommodation planning involves an appraisal of the extent of the functional impairment associated with the diagnosed disorder and how it impacts academic functioning.⁴³

No neutral assessment is conducted between two competing interests.⁴⁴ Indeed, no acknowledgement is made that there are any legitimate interests at stake other than the interest of the disabled student in acquiring accommodation.⁴⁵ Claims are processed but they are not adjudicated.⁴⁶ The

⁴³ *Ibid.* (notes omitted).

⁴⁴ I once attended a seminar presented by an officer from our university’s Accessibility Services Office. I had the opportunity to ask whether she considered herself to be an advocate for disabled students or an adjudicator of disability claims. She considered the question for a moment and then answered, “Both.”

⁴⁵ For example, see Queen’s University, Student Wellness Services, “Academic Accommodations” above, note 4; University of Toronto, “Accessibility Services,” available at: University of Toronto <<http://www.studentlife.utoronto.ca/as>>.

⁴⁶ Recent guidelines proposed by the Ontario Human Rights Commission exacerbate the

professor of the course is excluded from the decision-making process⁴⁷ even though she possesses information relevant to whether the requested accommodation is justified: whether the claimed disability relates directly to one of the skills or attributes that the assessment is testing; the conditions under which the class is writing the exam; the pedagogical reasons for those conditions; and whether accommodation of the disability would be fair to the rest of the students, all of whom are in pursuit of a limited number of A grades. At my university, the fact and content of the application are treated as confidential, and no information is provided — even when the professor asks. Where the accommodation applies to a final exam, the Disability Services Office does not notify the professor that an application for accommodation has been made or granted. For example, when the Disability Services Office has determined that a student should receive three hours instead of two to write an exam, the central Exam Office reserves a separate room, assigns an invigilator, and sends the completed exam to the professor for marking, without any indication of the changed conditions under which the exam was written.⁴⁸

All students have a legal right to a fair competition based upon academic criteria. If a professor granted extra time on the exam to Caucasian students, the others would obviously have a complaint under the *Code*. If she gave extra time to five students who did renovations on her house, the rest of the class could well seek administrative law remedies. The professor has an unwritten obligation to provide an unbiased, neutral assessment of student achievement, such that grades in the course reflect actual and relative accomplishments. Setting and marking exams may not constitute a formal adjudicative function requiring procedural

lack of essential adjudicative features in the process of granting extra time. The guidelines suggest that students who apply for accommodation for mental health conditions need not even disclose the nature of the condition to the person making the decision about whether an accommodation is appropriate: Ontario Human Rights Commission, *New Documentation Guidelines for Accommodating Students with Mental Health Disabilities* (January 2016), available at: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/news_centre/newdocumentationguidelinesaccommodatingstudentsmentalhealthdisabilities> .

⁴⁷ The literature suggests that many professors are dubious about the legitimacy of accommodating students with mental health disabilities. See Y. Hinde and J. Mather, “Inclusive Education at the Postsecondary Level: Attitudes of Students and Professors” (2007) 17 *Exceptionality Education Canada* 107; Jessica L. Sniatecki, Holly B. Perry and Linda H. Snell, “Faculty Attitudes and Knowledge Regarding College Students with Disabilities” (2015) 28 *Journal of Postsecondary Education and Disability* 259; A. Shaddock, “Academics’ Responses to the Challenging Behaviour of Students with Mental Illness” (2004) 23 *Journal of the Australia and New Zealand Student Services Association* 56. My anecdotal experience is that many professors do not agree with providing extra time for cognitive and mental disabilities but feel powerless to influence the way such claims are treated.

⁴⁸ Occasionally I can tell which exams have been accommodated. The answers may be written on different colour booklets or delivered separately from the rest of the pile. Sometimes the answers in those exams are significantly longer than any of the others.

trappings found in other administrative decision-making contexts, but students have a legitimate expectation that grades will be determined by academic criteria applied consistently to all. When the Disability Services Office uses a flawed process to order accommodation that conflicts with that requirement, the professor may be obligated to refuse.

9. CONCLUSION

When is it appropriate to change the conditions under which some students write exams and assignments, and for what kinds of disability? Accommodations may be appropriate in a variety of circumstances. A blind student will require the exam to be in Braille. A student who cannot use her hands will be unable to write or type her exam and will need different means by which to communicate her answer. These are appropriate accommodations for disabilities not related to the bona fides of the exam and create no undue hardships for either the institution or the other students in the class.

Not so with cognitive and mental disabilities. According to one advocate for students with mental disabilities, herself a former university student diagnosed with dyslexia, depression, anxiety, and Asperger's syndrome, students with mental disabilities "might have the smarts to achieve [grades in the] 90s but will only receive 60s. [Accommodations are] about levelling the playing field."⁴⁹ This claim is false. Extra time does not level the field but tilts it. Given enough time, many students in the class could put together an exam deserving a mark of 90 — if they had actually written it within the normal time for the exam. Because they took extra time, it is not an exam worth a mark of 90. Claiming the right to extra time and then insisting that what you produce is an A paper is really no different from claiming that you can run 100 metres in 10 seconds as long as you only have to run 80 metres. In neither case is it true that the accomplishment is superior to that of others who had a more demanding task to perform.

Accommodation is not for the purpose of improving one's odds in relation to one's competitors, or to compensate for deficiencies in the attributes that the assessment is assessing. The purpose of accommodation is to enable participation, not to enhance success. Because the student with mental difficulties is able to participate in the exam, the fact that she earned only a mark of 60 does not justify a claim for extra time. She can write the exam without accommodation. She simply expects not to do well.

An extra hour on the exam for someone with a cognitive disability is as perverse as a 20 metre head start in the 100 metre dash for someone with a limp. The resulting grade is not real. Perhaps she receives the highest mark in the class. Perhaps she gets the lowest mark but for two others. It does not matter: any result is not accurate. Her standing in the class, whether it is first or third last, is a fiction. She did not write the same exam as the rest of the class because she did

⁴⁹ Alicia Raimundo, quoted in Cathy Gulli, "Making accommodations," *Maclean's* (22 February 2016) 58 at 60.

not write it under the same conditions. Those conditions are bona fide features of the exam, and the advantage that the extra time provides amounts to an undue hardship on the other members of the class. They are participating in a high-stakes competition for grades and have a legitimate expectation that the same assessment criteria will be applied to all. Universities and colleges should not provide extra time as an accommodation for disabilities that relate to cognitive and mental skills.