

**SETTLEMENT AGREEMENT**  
**AND FULL AND FINAL RELEASE OF CLAIMS**

This Settlement Agreement and Full and Final Release of Claims (“Agreement”) is made and entered into by The International Dyslexia Association (on behalf of itself and its members), Californians For Disability Rights (on behalf of itself and its members), and Mark Breimhorst, for themselves, their heirs, executors, administrators, successors, assigns and attorneys (hereinafter collectively referred to as “Plaintiffs”) and The College Entrance Examination Board (hereinafter the “College Board”).

WHEREAS, Plaintiffs filed a Complaint and Amended Complaint against Educational Testing Service (hereinafter “ETS”) in the United States District Court for the Northern District of California, Case No. C-99-3387 (WHO) (“Breimhorst, et al. v. ETS”), alleging that ETS’s practice of reporting on score reports when an individual with a disability takes a standardized test with the accommodation of extended time (hereafter “flagging”) violated: (1) The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (“ADA”); (2) the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Rehabilitation Act”); (3) The Unruh Civil Rights Act, California Civ. Code §§ 51 *et seq.* (“Unruh Civil Rights Act”), and (4) California Business and Professional Code § 17200; Breimhorst, et al. v. ETS did not challenge the denial or adequacy of any accommodation, or the adequacy of the procedures for providing accommodations; and

WHEREAS, ETS filed an Answer expressly denying the allegations contained in Plaintiffs’ Complaint, and further denying having violated any statute or having otherwise committed any legal wrong to the injury of Plaintiffs; and

WHEREAS, Plaintiffs and ETS entered into a Settlement Agreement and Full and Final Release of Claims in December, 2000, which, *inter alia*, provided for certain changes in ETS-administered standardized admissions tests that were not owned or controlled by the College Board and provided for a panel to be convened to consider and report on issues relating to the flagging of scores on College Board standardized tests (the “December 2000 Settlement Agreement”); and

WHEREAS, the panel provided for by the December 2000 Settlement Agreement received submissions from Plaintiffs and the College Board (to which the ETS delegated responsibility to appear before the panel, pursuant to Section 18 of the December 2000 Settlement Agreement) and issued a report on April 18, 2002 (the “panel report”), and the Plaintiffs and the College Board thereafter conferred and reached agreement on the terms set forth herein.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the sufficiency and adequacy of which mutual consideration is hereby acknowledged, the parties resolve all disputes between them regarding the College Board’s flagging practice as follows:

1. Non-admission of Liability: Neither this settlement nor this Settlement Agreement shall constitute or be construed as any admission or adjudication of liability of the College Board or

ETS on the merits of the above-referenced lawsuit, all liability and wrongdoing having been expressly denied by the College Board and ETS.

2. Release of Claims: Other than those claims expressly reserved herein, Plaintiffs, both individually and collectively, hereby fully and finally release and discharge the College Board and all its affiliates, parents, subsidiaries, agents, distributors, and test administrators (including, but not limited to, ETS), and their respective employees, officers and attorneys (collectively "Released Parties") from any and all claims, charges, demands, rights, damages, costs, losses, suits, actions, causes of action, attorneys' fees and expenses of any nature whatsoever, in law or in equity, known or unknown, asserted or unasserted, suspected or unsuspected, or concealed or hidden, which Plaintiffs presently have or have had against Released Parties accruing prior to the date of the execution of this Agreement which arise in any way from or by reason of the College Board's practice of flagging, including, without limitation, any and all claims by or on behalf of Plaintiffs that Released Parties have ever committed any statutory violation, breach of contract, tortious act, or other wrongdoing with respect to Plaintiffs insofar as such claims arise in any way from the College Board's practice of flagging and have or could have been asserted in the above-referenced lawsuit; any and all claims of other liability or damage of any nature whatsoever which have arisen or might have arisen in any way from the College Board's practice of flagging (including any alleged acts, omissions, events, circumstances, or conditions related in any way to the College Board's flagging practice) and which relate to Released Parties; any and all claims of any nature whatsoever asserted by Plaintiffs in any complaint, suit or charge against Released Parties arising in any way out of the College Board's practice of flagging occurring up to and including the date of execution of this Settlement Agreement; any and all claims of disability discrimination regarding Released Parties arising in any way out of the College Board's practice of flagging and asserted pursuant to any federal, state, or other government statute, regulation or ordinance, including, but not limited to: (1) the ADA; (2) the Rehabilitation Act; (3) the Unruh Civil Rights Act; (4) Section 17200 of the California Business and Professional Code; (5) all other federal or state law causes of action, whether statutory or common law, under which a challenge to the College Board's flagging practice might be made, including, but not limited to, those for disability discrimination, fraud, defamation, tort, invasion of privacy, intentional or negligent infliction of emotional distress, breach of any duty, and breach of any express or implied covenant of good faith and fair dealing, the validity, existence or occurrence of which is expressly denied by the College Board.

Expressly excepted from this Release are: (1) any future reintroduction or modification, other than termination, of the flagging practice on any College Board-administered standardized admissions test; (2) claims concerning flagging of exam scores due to changes in construct; and (3) disputes arising in connection with the interpretation or implementation of this Agreement, but even then only pursuant to terms set forth in Section 6, herein.

3. College Board Standardized Admissions Tests: With respect to all ETS-administered standardized admissions tests that are owned or controlled by The College Board, the College Board has made the following changes to its practice concerning score reports:

- a. Beginning as of October 1, 2003, score reports for administrations of the College Board's standardized admissions tests taken with the accommodation of extended

time, including score reports issued on or after October 1 concerning such tests taken prior thereto, will not contain a flag.

- b. Prior to October 1, 2003, score reports for administrations of the College Board's standardized admissions tests taken with the accommodation of extended time will contain a flag.

4. Disclosure of Change in Practice: As soon as practicable after execution of this Agreement, and on a schedule to be agreed between Plaintiffs and the College Board, a statement describing the change in practice in the form annexed as Exhibit A will be released. Any public comments thereafter by Plaintiffs and their representatives or by the College Board and its representatives concerning the change in practice will be consistent with the statement.

5. Confidentiality. The parties agree that the negotiations leading up to and relating to this Agreement are confidential, and neither Plaintiffs nor the College Board shall, without prior written approval of the other parties, disclose the content of these negotiations to anyone. The parties also agree not to provide copies of the Agreement, or otherwise make the Agreement available, to anyone. Nothing in this paragraph shall prohibit disclosure of information relating to the Agreement (i) to the attorneys or accountants of Plaintiffs, the College Board and ETS, (ii) as may be required by law, or by judicial process or order or in response to an inquiry by a governmental agency, or (iii) by or within the College Board in the ordinary course of its business to those persons with a need to know, as determined by the College Board. Nothing herein will preclude any party from disclosing the April 18, 2002 report after the release of the statement provided for in Section 4. This paragraph constitutes a material provision of this Agreement, and any party shall be entitled to obtain injunctive relief to enforce any person's or entity's obligations under this paragraph.

6. Dispute Resolution: Any disputes arising in connection with the interpretation or implementation of this settlement agreement will be determined by arbitration in San Francisco. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules.

7. End of Litigation: Litigation of this matter is complete, and the underlying disputes between the parties are resolved.

8. Full Accord and Satisfaction: The agreement, by the College Board, as set forth herein, and the payment of a sum total of \$85,500 to Disabilities Rights Advocates upon full and final execution hereof, is in full accord, satisfaction, and final compromise and settlement of any of Plaintiffs' disputed claims against the College Board or ETS, as well as of any claims against the College Board or ETS for attorneys' fees and costs, including claims under Section 10 of the December, 2000 Settlement Agreement. Plaintiffs and their attorneys, Sid Wolinsky and Alison Aubrejuan individually and on behalf of the Disability Rights Advocates, represent and warrant that Plaintiffs are the only persons and that agents of Disability Rights Advocates are the only attorneys entitled to assert said claims on behalf of any of the Plaintiffs.

9. Choice of Law: This Settlement Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed by and under the laws of the State of California and applicable federal laws.

10. Waiver of Civil Code: Each party represents and warrants to the others that he or it has read and is familiar with California Civil Code Section 1542, which provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”

Each party, with the advice of counsel, hereby waives and releases any rights or benefits that he or it might otherwise have under Civil Code § 1542 or any other similar statute or law of California or any other state or federal jurisdiction, to the full extent that such rights and benefits may be waived.

11. Severability: The provisions of this Settlement Agreement are severable, and if any part of this Settlement Agreement is found to be unenforceable, all other portions and paragraphs shall remain fully valid and enforceable. This Settlement Agreement shall survive the termination of any arrangements contained herein.

12. THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ OR BEEN ADVISED OF THE WITHIN AND FOREGOING “SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF CLAIMS,” AND KNOW AND UNDERSTAND THE CONTENTS THEREOF AND THAT THEY EXECUTE THE SAME OF THEIR OWN FREE AND INFORMED ACT AND DEED. Plaintiffs had the opportunity to be advised by and consult with their attorneys prior to signing this Agreement. Plaintiffs state that they understand the Agreement and its final and binding effect, including that upon unknown claims.

For The International Dyslexia Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

For Californians For Disability Rights

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Mark Breimhorst

Date: \_\_\_\_\_

SO AGREED AND APPROVED:

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Sid Wolinsky, Esq.  
Alison Aubrejuan, Esq,  
DISABILITY RIGHTS ADVOCATES  
449 15th Street, Suite 303  
Oakland, California 94612  
(510) 451-8644

For the College Entrance Examination Board

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

SO AGREED AND APPROVED:

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Theodore O. Rogers, Jr., Esq.  
SULLIVAN & CROMWELL  
125 Broad Street  
New York, New York 10004  
(212) 558-4000

For Californians For Disability Rights

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Mark Breimhorst

Date: \_\_\_\_\_

SO AGREED AND APPROVED:

  
\_\_\_\_\_  
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For The International Dyslexia Association

By: J. Thomas K. M.

Title: EXECUTIVE DIRECTOR

Date: 7.26.02

For Californians For Disability Rights

By: Chris Elms  
Title: President  
Date: 8-13-02

Mark Breimhorst

Date: \_\_\_\_\_

SO AGREED AND APPROVED:

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Sid Wolinsky, Esq.  
Alison Aubrejuan, Esq,  
DISABILITY RIGHTS ADVOCATES  
449 15th Street, Suite 303  
Oakland, California 94612  
(510) 451-8644

For Californians For Disability Rights

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Mark Breimhorst *Mark Breimhorst*

Date: *August 5, 2002*

SO AGREED AND APPROVED:

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Sid Wolinsky, Esq.  
Alison Aubrejuan, Esq.  
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