IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE MEDICAL SOCIETY OF NEW JERSEY, Plaintiff, v. FRED M. JACOBS, M.D., J.D., and the NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, Defendants.	Civil Action Case No.: 93-3670 (WGB)

MEMORANDUM OF THE UNITED STATES
AS AMICUS CURIAE

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I. Introduction

Plaintiff the Medical Society of New Jersey ("Society") has brought this action on behalf of its members, alleging that certain questions on the New Jersey State Board of Medical Examiners' biennial license renewal application discriminate on the basis of disability in violation of title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. II 1990). The application, which all physicians seeking to renew their licenses to practice medicine in the State of New Jersey must complete, requires licensees to disclose certain physical or mental impairments -- including any psychiatric illness, drug or alcohol dependence or treatment, and physical, mental, or emotional conditions resulting in termination or a leave of absence -- experienced during the past twelve years.[1] New applicants for licenses to practice medicine in the State are subject to a similar inquiry.

As amicus curiae, the United States supports plaintiff New Jersey Medical Society's position that the licensure inquiries violate the ADA.[2] While the ultimate goal of the New Jersey State Board of Medical Examiners ("the Board") to ensure that

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[1] The 1991 biennial license renewal application was the first to contain the questions at issue here and sought information dating back ten years (to 1981). Applicants failing to answer all the questions on the 1991 application were sent a supplementary form requesting information dating back to 1981 along with their 1993-1995 renewal application. Future license renewal applications will cover only the preceding two years.

[2] We take no position on other issues raised by the parties.

only persons able to practice medicine competently and safely be licensed is a laudable one, the means selected to achieve that goal is not.

The licensure questions at issue in this case target for further investigation those individuals who have histories or diagnoses of disabilities. A core purpose of the ADA is the elimination of barriers caused by the use of stereotypic assumptions "that are not truly indicative of the individual ability of [persons with disabilities] to participate in, and contribute to, society." 42 U.S.C. §12101(a)(7).[3] By categorizing persons with disabilities as potentially unfit and imposing additional burdens of investigation upon them, the Board is engaging in precisely the kind of impermissible stereotyping that the ADA proscribes.

The Board's licensure application does not focus on actual, current impairments of physicians' abilities or functions; on the contrary, the questions at issue are extremely broad in scope and are not narrowly tailored to determine current fitness to practice medicine.[4] While the Board is free, consistent with the

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[3] See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 30, 33, 40, 41 (1990) [hereinafter cited as Education and Labor Report]; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. III at 25 (1990) [hereinafter cited as Judiciary Report]; S. Rep. No. 116, 101st Cong., 1st Sess. at 7, 9, and 15 (1989) [hereinafter cited as Senate Report].

[4] There are five inquiries at issue:

Question 5: "Are you presently or have you previously suffered from or been in treatment for any psychiatric illness?"

ADA, to ask specific, targeted questions designed to determine whether a physician has a current impairment of his or her ability to practice medicine, the inquiry as currently undertaken by the Board seeks information about a candidate's status as a person with a disability instead of focusing on any behavioral manifestations of disabilities that might impair the ability to practice medicine. Thus, the Board's use of the challenged inquiries in its licensure program violates the ADA.

II. Argument: The Board's Use of the Challenged Inquiries in its Relicensing Program Discriminates on the Basis of Disability

Title II contains a sweeping prohibition of practices by public entities that discriminate against persons with

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Question 6: "Have you been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or any employer for reasons that related to any physical or psychiatric illness or condition? (Parental leave of absence need not be disclosed)"

Question 12: "Are you now or have you been dependent on alcohol or drugs?"

Question 13: "Are you now or have you been in treatment for alcohol or drug abuse?"

Question 14: "Have you ever been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or employer for reasons that related to any drug or alcohol use or abuse."

The supplemental application form, which was sent to licensees who did not answer all the questions propounded on the 1991 biennial application form, asks four questions very similar to those quoted above.

disabilities. Section 202 of the Act, 42 U.S.C. § 12132, provides,

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[5]

A "public entity" is defined in title II to include "any department, agency ... or other instrumentality of a State ... or local government." 42 U.S.C. § 12131(1)(B). The Board falls within this definition as it is the State governmental agency responsible for licensing physicians in the State of New Jersey. Defendant's Answer ¶¶ 1 and 11.

Title II and the Department's title II regulation[6] prohibit a public entity from discriminating against a "qualified individual with a disability."[7] The term "qualified individual

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[5] Prior to the passage of the ADA in 1990, similar protections had been provided by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, but only in programs or activities receiving federal financial assistance (including assisted programs of State and local governments). In language that is substantively similar to that of section 504, title II expanded this prohibition to all programs, services, and activities of State and local governments, not just to those aided by federal funds. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 357 (1989), reprinted in 1990 U.S.C.C.A.N. 303.

[6] 28 C.F.R. §§ 35.130(b)(3)(i), (b)(6).

[7] Where, as here, Congress expressly delegates authority to an agency to issue legislative regulations, 42 U.S.C. § 12134, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). See also Petersen v. University of Wis. Bd. of Regents, No. 93-C-46-C, 2 Americans With Disabilities

with a disability" is defined in title II of the ADA and section 35.104 of the Department's title II regulation to mean,

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices ... meets the essential eligibility requirements for the receipt of services or the participation in the programs or activities provided by a public entity.

42 U.S.C. § 12131(2); 28 C.F.R. § 35.104 (emphasis added). Similarly, as noted in the analysis accompanying section 35.130(b)(6), a person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification. 28 C.F.R. pt. 35, app. A at 435-36 (July 2, 1991)(emphasis added).[8]

Act Cases (BNA) 735, 738, 1993 U.S. Dist. LEXIS 5427 (W.D. Wis. Apr. 20, 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA).

Agencies are also afforded substantial deference in interpreting their own regulations. The Supreme Court has announced, as recently as May 3, 1993, that "provided that an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given `controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See Lyng v. Payne, 476 U.S. 926, 939 (1986); United States v. Larionoff, 431 U.S. 864, 872-873 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

[8] The commentary to the regulation also indicates that determining what constitutes "essential eligibility requirements" has been shaped by cases decided under section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. These cases have demanded a careful analysis behind the qualifications used to determine the actual criteria that a position requires. School Bd. v. Arline, 480 U.S. 273, 287-288 (1986); Panzadides v. Virginia Bd. of Educ., 946 F.2d 345, 349-50 (4th Cir. 1991)(noting that "defendants cannot merely mechanically invoke

Where public safety may be affected, a determination of whether a candidate meets the "essential eligibility requirements" may include consideration of whether the individual with a disability poses a direct threat to the health and safety of others.[9] An essential eligibility requirement for the

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any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications"); Doe v. Syracuse Sch. Dist., 508 F. Supp. 333, 337 (1981)(requiring analysis behind "perceived limitations"). Cases in this Circuit have held likewise. See, e.g., Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (finding State's characterization of essential nature of program to license bus drivers overbroad, and requiring a "factual basis reasonably demonstrating" that accommodating the individual would modify the essential nature of the program).

[9] As noted in the Department's title II analysis accompanying section 35.104,

> Where questions of safety are involved, the principles established in §36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 C.F.R. Part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.
>
> A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.... Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's

practice of medicine comprises the ability to safely and competently practice medicine; any person with a disability who can safely and competently practice medicine will be considered a "qualified person with a disability."[10]

> policies, practices, or procedures will not eliminate that risk.

28 C.F.R. pt. 35, app. A at 436.

[10] See Defendants' August 19, 1993, Memorandum in Opposition to Plaintiff's Application for Entry of a Temporary Restraining Order at 11 ("an 'essential eligibility requirement' for licensure is an ability to practice without risk of injuring patients"); Defendants' June 5, 1992, Memorandum in Response to the Amicus Brief of the National Mental Health Association at 2 ("[u]ltimately, the State Board must not only determine whether one has necessary educational qualifications, but also must determine whether a physician can practice in a manner that does not compromise the health, safety and welfare of patients"); Defendants' March 6, 1992, Memorandum in Response to Plaintiff's Brief Concerning Application of the ADA at 6 ("[a]bility to practice in a manner that does not compromise public safety is thus an 'essential eligibility requirement'").

As pointed out in Defendants' June 5, 1992, Memorandum in Response to the Amicus Brief of the National Mental Health Association, New Jersey law empowers the Board to suspend or revoke a practitioner's license if a licensee cannot "discharg[e] the functions of a licensee in a manner consistent with the public's health, safety and welfare," N.J. Stat. Ann. § 45:1-21(i)(1990)(emphasis added), or if a licensee "has demonstrated any physical, mental, or emotional condition or drug or alcohol use which impairs his ability to practice with reasonable skill and safety." N.J. Stat. Ann. § 45:9-16 (1990) (emphasis added).

As demonstrated below, however, the Board's inquiries are improper, in part because they focus on a licensee's condition and not behavior. The appropriateness of focusing on behavior, however, is also made clear by the Board's own statutory mandate.

The Board's inquiries discriminate against doctors with disabilities in the relicensure process because the Board utilizes the challenged inquiries to identify individuals for further investigation on the basis of disability. Yet the Board acknowledges that many of these individuals will ultimately be found to be qualified to practice medicine.[11] As we demonstrate below, this investigative process places greater burdens on doctors with disabilities than those placed on others. Moreover, these additional burdens are unnecessary in determining whether applicants meet the essential eligibility requirements for relicensure.

A. The Board's Relicensing Program Unnecessarily Imposes Burdens on Qualified Individuals with Disabilities[12]

Several provisions of the Department of Justice's title II regulation prohibit policies that unnecessarily impose greater requirements or burdens on individuals with disabilities than those imposed on others. As a State licensing entity, the Board must comply with section 35.130(b)(6), which states,

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[11] See, e.g., Defendants' August 19, 1993, Letter Brief in Opposition to Plaintiff's Application for Entry of an Order Imposing Temporary Restraints, at 5. It is the overbroad nature of the inquiries that lead to such a result. Some people with histories of disabilities but who no longer have disabilities affecting their ability to practice medicine will satisfy the requirements for licensure, as will those whose current disabilities do not impair their abilities to practice medicine safely.

[12] The arguments presented below are based on materials currently in the record. However, ultimately an evidentiary hearing may be necessary to fully explore the relevant factual issues in this case.

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability * * *.

28 C.F.R. § 35.130(b)(6). Section 35.130(b)(3)(i) provides,

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration ... that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. § 35.130(b)(3)(i).

Also applicable is the provision in the title II regulation prohibiting discriminatory eligibility criteria which states,

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130(b)(8).[13]

This court is not here faced with a situation where an individual has been denied relicensure based on disability. However, title II and its implementing regulations proscribe more than total exclusion on the basis of disability. Section 35.130(b)(6) prohibits administering a licensing program "in a manner that subjects qualified persons with disabilities to discrimination." Similarly, section 35.130(b)(3)(i) prohibits use of "methods of administration" that have a discriminatory

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[13] See also 28 C.F.R. § 35.130(b)(1)(ii) and (iii) (prohibiting title II entities from providing qualified individuals with disabilities with a benefit or service that is not equal to that afforded others and not as effective in providing an equal opportunity to gain the same benefit afforded to others).

effect. Finally, as pointed out in the interpretative guidance accompanying the regulation, section 35.130(b)(8) not only outlaws overt denials of equal treatment of individuals with disabilities, it prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities greater than those placed on others. 28 C.F.R. pt. 35, app. A at 441. It also prohibits unnecessary inquiries into disability. See Part B. below.

The Board's inquiries and reporting requirements concerning diagnosis and treatment for substance dependency or mental illness impose requirements on persons with histories of disabilities that are greater than those imposed on other applicants. In order to be eligible to receive a renewal certificate to practice medicine in the State of New Jersey, the Board requires applicants to answer all questions on the application, including those regarding prior psychiatric illness, substance dependency, and the medical basis for leave or termination.[14] Based on the answers, further investigation may be undertaken. The questionnaire is thus used as a screening device to identify persons who will be subject to further inquiry and investigation.

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[14] Indeed, the application warns licensees that "[f]ailure to answer any question, whether in whole or in part, may result in denial of this renewal application," and licensees are required to certify that they have answered the questions completely. The form does, however, contain a proviso stating that licensees may decide to refrain from answering based on the fifth amendment protection against self-incrimination.

During the ensuing investigative process, certain members of the plaintiff Medical Society are singled out because of their disabilities and are forced to reveal information of a highly personal and potentially embarrassing nature. Once applicants affirm that they have experienced a psychiatric illness, substance dependency, or have taken leave or have been terminated for reasons of disability or substance dependency, they must provide additional detailed information beyond what is required by the application form.

Mental health treatment is often bound up with intensely personal issues such as family relationships and bereavement. The Board's relicensure inquiry is invasive not only because it requires persons who answer the questions in the affirmative to provide information about these issues, but requires them to disclose details about what is arguably the most private part of human existence -- a person's inner mental and emotional state. Of potentially even more harm is the Board's attempt to obtain information about the person's fitness from others; the Board's officers apparently may engage in a full-fledged exploration of a licensee's condition with the person's colleagues and supervisors, asking questions regarding a person's habits, affect, lifestyle, etc. It is not difficult to imagine the attendant potential damage to an individual's reputation.

In addition, the Board's inquiries into an individual's history of disabilities can have a more insidious discriminatory effect. Concern over the Board's inquiries about diagnosis and

treatment for mental illness or substance dependency may deter physicians or licensee applicants from seeking counseling for mental or emotional problems or treatment for substance disorders. See Stephen T. Maher & Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Ind. L. Rev. 821, 830-33 (1990)(detailed discussion of how such inquiries have deterrent effect). Even when treatment is sought, its effectiveness may be compromised, because knowledge of the Board's potential investigation of issues surrounding treatment is likely to undermine the trust and frank disclosure on which successful counseling depends. See Maher & Blum, supra, at 824, 833-46.[15] Thus, rather than improving the quality of physicians in the State, the Board's inquiries may have the perverse effect

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[15] The chilling effect of the Board's practices runs completely counter to the goal ostensibly served by the inquiries -- ensuring that applicants will be fit practitioners. See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 582 (1985). Medical practice is a highly stressful enterprise, and many persons can benefit from mental health counseling as physicians. As Professor Maher and Dr. Blum state in their article regarding the use of analogous questions in the licensure process for attorneys:

> [I]f there is any wisdom in the choice to inquire at the cost of discouraging treatment, it is penny-wise and pound-foolish because it discourages applicants from taking advantage of opportunities to develop their mental and emotional fitness before they are admitted to the bar. This is a mistake because law practice is stressful, and students need to prepare for the stress of practice, just as they need to prepare for its other demands. Through counseling, students can develop healthy coping strategies that will permit them to deal with the stress of practice. Without adequate preparation, they may resort to unhealthy coping strategies, such as drug or alcohol abuse.

Maher & Blum, supra, at 824.

of deterring those who could benefit from treatment from obtaining it, while penalizing those who enhance their ability to perform successfully as physicians by seeking counseling.

Furthermore, the Board's focus on past diagnoses and treatment of disabilities rather than conduct cannot be deemed justified, because persons without such histories may well have undiagnosed impairments that impact on an individual's ability as a physician. Indeed, someone who has a mental or physical disability but is either unaware of it or unwilling to seek treatment for it may pose more of a risk than someone who has recognized his or her condition and obtained treatment. Yet the Board singles out for further investigation only those persons with a history of diagnosis or treatment for certain disabilities.

A recent court of appeals decision confirms that requiring persons to undergo medical scrutiny solely on the basis of their status as a member of a protected class violates anti-discrimination laws. In EEOC v. Massachusetts, 987 F.2d 64 (lst Cir. 1993), the Court of Appeals for the First Circuit addressed whether a Massachusetts statute, requiring that employees 70 or older pass an annual medical examination as a condition of continued employment, violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1986). The court found the state law to be facially discriminatory because it "allows age to be the determinant as to when an employee's deterioration will be so significant that it requires special treatment" and thereby

"strikes at the heart of the ADEA [whose] entire point ... is to abandon previous stereotypes about the abilities and capacities of older workers." 987 F.2d at 71.

In this case, an applicant's or licensee's status as a person with a history of a disability is the sole criterion used by the Board to trigger a requirement for submitting an additional detailed description of facts about the disability beyond that required by the application form, and in many cases, further investigation. The Board's requirements are rooted in assumptions and stereotypes about the capabilities of persons with mental disabilities and are just as unlawfully discriminatory as the age-based medical examination requirement struck down by the First Circuit.

B. The Board Cannot Establish That its Inquiries Are Necessary for the Safe Practice of Medicine

The purpose of the Board's licensure process is to determine whether individuals are capable of practicing medicine safely and competently, i.e. whether such persons will satisfy the "essential eligibility requirements" for the practice of medicine. See discussion at pp. 4-7, supra. The ADA recognizes the legitimacy of this objective. However, title II does not permit inquiries into disabilities where it is not necessary to achieve that objective because such inquiries may have the effect of discriminating against "qualified individuals with disabilities." Unnecessary inquiries are also barred by 28

C.F.R. 35.130(b)(8),[16] which is identical in substance to a statutory provision in title III, 42 U.S.C. § 12182(b)(2)(A)(i), and the Department of Justice's title III regulation, 28 C.F.R. 36.301(a). The legislative history of the title III statutory provision makes clear that Congress intended to prohibit unnecessary inquiries into disability.

> It also would be a violation for [a public accommodation] to invade such people's privacy by trying to identify unnecessarily the existence of a disability, as, for example, if the credit application of a department store were to inquire whether an individual has epilepsy, has ever ... been hospitalized for mental illness, or has other disability.

Senate Report at 62. See also Education and Labor Report at 105; Judiciary Report at 58. The Department of Justice emphasized this Congressional intention in the accompanying analysis to its title III regulation, 28 C.F.R. pt. 36, app. B at 590. The Title II Technical Assistance Manual, published by the Attorney General pursuant to statutory mandate, reiterates that title II prohibits unnecessary inquiries into disability. 42 U.S.C. §§ 12206(c)(3) & (d) (Supp. II 1990); U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual (1992 & Supp. 1993)("Technical Assistance Manual"). Section 204 of the ADA provides that the title II regulation shall incorporate this concept.[17]

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[16] See discussion at 9, supra.

[17] 42 U.S.C. § 12134(b); Judiciary Report at 51; Education and Labor Report at 84; 28 C.F.R. pt. 35, app. A at 430.

Diagnosis or treatment for a mental disorder or substance dependency provides no basis for assuming that these disabilities will affect behavior. See generally 1 Jay Ziskin, Coping with Psychiatric and Psychological Testimony 1-63 (3d ed. 1981); Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974)(both articles citing extensive authority establishing the inability of mental health professionals to make reliable predictions of future behavior). The ADA implicitly recognizes this principle as it prohibits discrimination based on stereotypical and unfounded fears and misconceptions over the perceived consequences of disabilities.[18]

If a disability affects the ability to practice medicine, it must, at some point, also affect behavior associated with practicing medicine. Consequently, identifying unacceptable behavior (or other consequences of a disability) for the practice of medicine is the appropriate course under the ADA. As noted in the American Psychiatric Association guidelines,

> The salient concern is always the individual's current capacity to function and/or current impairment. Only information about current impairing disorder affecting

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[18] See, e.g., Department of Justice's Technical Assistance Manual at 12 ("A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However the public entity must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities")(emphasis added).

> the capacity to function as a physician, and which is relevant to present practice, should be disclosed....[19]

The Board may obtain sufficient information to assess fitness to practice surgery or medicine through questions that focus on behavior rather than status. Nothing in the ADA prohibits the Board from asking applicants or licensees about past conduct or behavior that may evidence an incapacity to practice medicine or surgery. Such conduct or behavior, whether it results from mental illness, substance dependency, or other factors (such as irresponsibility or bad moral character), is a much better indicator of suitability as a physician than an applicant's diagnosis or treatment history. Consistent with this principle, the Department's title II Technical Assistance Manual, which is cited and relied upon by the Board,[20] states that,

> [p]ublic entities may not discriminate against qualified individuals with disabilities who apply for licenses, but <u>may consider factors related to the disability</u> in determining whether the individual is "qualified."

Technical Assistance Manual, at II-3.7200 (emphasis added). One permissible "factor related to the disability" is any inappropriate behavior associated with that disability.

Thus, the Board may inquire generally about any leaves of absence or terminations from employment in the past but may not

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[19] "Recommended Guidelines Concerning Disclosure and Confidentiality," American Psychiatric Association, Work Group on Disclosure (December 12, 1992) at 1.

[20] Defendants' August 19, 1993, Memorandum in Opposition to Plaintiff's Application for Entry of a Temporary Restraining Order at 8, 12.

focus the inquiry only on those leaves of absence and terminations occasioned by physical or psychiatric illnesses or conditions. Similarly, the Board may inquire about personal behavior, including whether the applicant uses drugs or alcohol and the frequency of use.[21] The Board may ask applicants whether there is anything that would currently impair their ability to carry out the duties and responsibilities of a physician.[22] Such a question, along with other questions about conduct and behavior, are a permissible means of ascertaining an applicant's fitness.[23] In contrast, asking about an applicant's history of diagnosis and treatment for mental disorders or substance

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[21] Under the ADA, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12110(a).

[22] For instance, in Doe v. Syracuse School District, 508 F. Supp. 333 (N.D.N.Y. 1981), the court held that a question on a job application form asking whether the applicant had ever experienced a nervous breakdown or undergone psychiatric treatment was illegal under the Rehabilitation Act and its implementing regulations. The district court noted that, "if defendant sincerely wanted to employ persons that were capable of performing their jobs, all it had to ask was whether the applicant was capable of dealing with various emotionally demanding situations." Id. at 337.

[23] See, e.g., Education and Labor Report at 57 ("For people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat. This determination must be based on the behavior of the particular disabled person, not merely on generalizations about the disability"); see also Landefeld v. Marion General Hosp., Inc., 994 F.2d 1178 (6th Cir. 1993) (holding that hospital Board of Directors' decision to suspend internist's medical staff privileges did not violate § 504 where Board of Directors suspended physician for conduct -- stealing mail from hospital mailboxes -- rather than on the basis of his mental illness (bipolar disorder)).

dependency treats a person's status as an individual with a disability as if it were indicative of that individual's future behavior as a physician. By focusing upon the disability itself, instead of focusing on relevant factors that may be associated with the disability, the Board cannot accurately assess a licensee's fitness to practice medicine and may discriminate against a qualified individual with a disability.

Moreover, additional lawful avenues exist for the Board to inquire about subjects of legitimate concern that bear on fitness to practice medicine, such as suspension or revocation of hospital privileges, malpractice suits, or patient complaints. Such information will be available to the Board under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, which is designed to gather, on a national basis, information about malpractice payments, sanctions and review actions (including suspensions, censures, reprimands, and probation) taken by hospitals, group medical practices and other health care entities. The HCQIA accomplished the goal of identifying and helping to remove incompetent and unprofessional physicians from practice by focusing on behavioral evidence of impairment, rather than generalizations about persons with disabilities.[24]

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[24] Robert S. Adler, Stalking the Rogue Physician: An analysis of the Health Care Quality Improvement Act, 28 Am. Bus. L.J. 683 (1991).

The ADA's prohibition on discrimination based upon an individual's mental health and substance dependency history places neither the public nor the medical profession at risk. The Board is free, consistent with the ADA, to ask specific, targeted questions designed to determine whether a physician suffers a current impairment of his or her ability to practice medicine. Furthermore, recent federal and State legislation will furnish the Board with considerable information regarding potential physician impairment.

Finally, the Board maintains that requiring individuals to identify themselves as having had a mental or physical disability is the only practical way for it to determine who should be investigated further. Indeed, the Board characterizes the task of reformulating the relicensure application's questions to target more precisely the behaviors about which it seeks

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New Jersey recently enacted a similar statute, the Professional Medical Conduct Reform Act of 1989, requiring medical practitioners (other than treating practitioners) to inform the Board of any evidence that another practitioner "has demonstrated an impairment, gross incompetence or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare." N.J. Stat. Ann. § 45:9-19.5 (1990). Practitioners are granted immunity for making such good faith reports and are subject to disciplinary action and civil penalties for failure to do so. Id. The Reform Act also establishes a Medical Practitioner Review Panel intended to investigate allegations of impairment, incompetence, and other misconduct by health care providers and consumers and to gather information regarding malpractice claims, privilege suspensions, etc. N.J. Stat. Ann. §§ 45:9-19.8 to -19.11. This legislation will provide additional information to the Board and will further make the Board's improper inquiries unnecessary.

information as an "effort" that is "impractical and impossible."[25] While the Board may believe that using a screening device such as disability is a quick and easy method of separating out who warrants further investigation and who does not, the use of mental or physical disability as a "red flag" to conduct further investigation of a person for unfitness to practice medicine is precisely the sort of conclusory jump which the ADA was enacted to combat.

[25] Defendants' September 10, 1993, Letter Brief in Opposition to the Medical Society's Application for Preliminary Injunctive Relief, at 13.

III. Conclusion

For the foregoing reasons, the United States urges the Court to conclude that the Board's relicensure program violates title II of the ADA.

Dated: Washington, D.C.

September 30, 1993

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