House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

# PROHIBIT GROUP-NORMING TEST SCORE ADJUSTMENTS

**House Bill 4054 as introduced**
**First Analysis (6-6-96)**

**Sponsor: Rep. Penny Crissman**
**Committee: Judiciary and Civil Rights**

## *THE APPARENT PROBLEM:*

There is a practice known as "group-" or "race-norming," in which someone's raw test scores on employment aptitude tests or college admission tests are changed on the basis of the test-taker's race. According to a 1991 article in the New York Times, in 1981 the U.S. Department of Labor started encouraging state employment agencies to use test "norming" because African-American and Hispanic applicants had lower raw scores on employment tests than white applicants. This "norming" of employment aptitude tests generally was carried out through a revised version (the so-called "Validity Generalization," or "VG" version) of the U.S. Department of Labor's 50-year-old General Aptitude Test Battery (GATB), which is used to assess a broad range of cognitive, perceptual, and motor skills. The "norming" of VG-GATB test scores was carried out through what is called "within-group score conversion," which means that individuals taking the test were measured against only members of his or her own group (the GATB apparently listed three groups: Black, Hispanic, and "Other"). Thus, a black applicant who scored in the 85th percentile of black test takers was put on the same footing as a white applicant who scored in the 85th percentile among white test takers, regardless of actual differences in their raw test scores. Under "percentile conversion tables," depending on which group the applicant was in, a raw test score on the VG-GATB could result in dramatically different percentile rankings. For example, a raw test score of 300 could translate into a percentile ranking of 83 for a black applicant, 67 for an Hispanic applicant, and 45 for a white applicant.

In November 1986, the U.S. Department of Justice reportedly notified the U.S. Department of Labor (DOL) that "within-group norming" appeared to be illegal. The DOL agreed not to further encourage its use, and commissioned the National Research Council of the National Academy of Sciences (NAS) for a special review of the VG-GATB. The NAS apparently issued its report in 1989, and in July 1990 the DOL solicited comments from the public on a proposed directive containing revised policy on the use of Validity Generalization. The comment period subsequently was reopened and extended through September 24, 1990. In November 1991, the president signed the Civil Rights Act of 1991, which amended the Civil Rights Act of 1964 to prohibit the discriminatory use of test scores for employment or promotion (see BACKGROUND INFORMATION). In December 1991, the DOL ordered that "within-group" scoring be discontinued, and announced a two-year research effort "aimed at making the GATB as good a predictor and placement tool as possible."

In addition to the use of employment test "norming," evidence exists that colleges and universities engage in similar kinds of practices in their admissions procedures. Recently, in fact, the 5th U.S. Circuit Court of Appeals (in Hopwood v University of Texas Law School, No. 94-50664) struck down a minority admissions program at the University of Texas Law School that used different cut-off scores, based on the LSAT and grade point average, for admitting applicants based on racial or ethnic identity. Whereas "non-minorities" with a score of 192 or less were "presumptively denied" admission, the cut-off score for black or Hispanic applicants was 179. In 1992, reportedly, black or Hispanic applicants with scores of 189 or higher were "presumptively admitted." While this case occurred in Texas, not Michigan, many people believe that similar kinds of practices go on in Michigan colleges and universities.

Many people believe that race-norming in employment and university admissions should be prohibited, and legislation has been introduced to do just that.

## *THE CONTENT OF THE BILL:*

The bill would amend the Elliott-Larsen Civil Rights Act to prohibit employers, employment agencies, and educational institutions from adjusting test scores, using different cut-off scores, or otherwise altering the results of a test based upon the religion, race, color, national origin, or sex of the person taking the test. An employer or employment agency would not be allowed to make any changes to tests or scores that are used for

selecting or referring an applicant or candidate for employment or promotion. The bill would also bar educational institutions from changing tests or scores used to determine class rank or status, eligibility for admission, eligibility to participate in any program offered by the institution, or eligibility for a grant of financial assistance.

MCL 37.2202, 37.2203, and 37.2402

## *BACKGROUND INFORMATION:*

Section 106 of the Civil Rights Law of 1991 (Public Law 102-166) amended Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 20003-2) to read as follows:

If shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

## *FISCAL IMPLICATIONS:*

The House Fiscal Agency says that the bill would have no fiscal impact on the state and that it wouldn't impact state hiring practices. (7-5-95)

## *ARGUMENTS:*

### *For:*

It is clearly wrong to award test scores on the basis of race rather than on merit. What is the point of taking -- or requiring -- an employment or college admissions test if the score is not a result of the test taker's knowledge and ability? While discrimination against minorities and women is wrong, it is equally wrong to falsify test scores in the name of anti-discrimination or affirmative action.

What is more, adjusting test scores upwards based on race or gender is insulting to those minority members who have the skills and education to compete and succeed on their own merit, while at the same time reinforcing negative stereotypes of minorities as being less capable than non-minorities. It also is no service to lower admission standards for otherwise unqualified applicants, who at some point in their lives will have to compete in arenas that will not give them any concessions. Proponents of the bill argue, further, that admission to universities of candidates otherwise unqualified by merit dilutes the university's academic product because lower admissions standards open the door to students incapable of doing the work required of other, qualified students. And although, when asked, Michigan colleges and universities have denied using race-norming in admissions, many people do not believe these denials. As an April 1996 Detroit News editorial notes, "State schools claim they only use race as a 'plus factor,' much like alumni status or athletic prowess. . . . But there still is a widespread and justified suspicion that race counts heavily -- perhaps too heavily -- in personnel decisions. The University of Michigan some years ago, for example, officially adopted a goal for minority hiring that sounded suspiciously like a quota."

Although federal law now explicitly prohibits employers from adjusting test scores, using different cut-off scores, or otherwise altering the results of tests used for employment or promotion, based upon the religion, race, color, national origin, or sex of the person taking the test, a recent case in Livingston County suggests that there still are problems. In February 1996, a Livingston County Circuit Court jury awarded $850,000 to a white state trooper who sued the Department of State Police on the grounds that he had not received deserved promotions due to reverse discrimination. According to the Lansing State Journal, under a state police "augmentation" process, minority troopers in a lower band of candidates -- those who score between 83 and 91 on promotional exams -- are allowed to compete with those in the highest band, 92 or above. The white trooper said he had scored in the second band before 1993 but was never allowed to compete with the first band; then, when he scored between 97 and 99 from 1993 to 1995, he was not promoted. The Equal Employment Opportunity Office at State Police headquarters in East Lansing reportedly said that the department's hiring and promotion practices were based on federal guidelines, and the department argued in the case that the white trooper was not the most qualified employee for the promotions he sought and that the department's promotions policy was needed to keep the state police force diverse.

Finally, race-norming of test scores serves to increase racial hostility and tension, as well as, potentially, increasing litigation. Rather than decreasing racial discrimination, practices such as race-norming cause resentment in those who believe that they are being harmed by reverse discrimination. If the goals of affirmative action, ultimately, are a color-blind society and harmonious integration of the races, this practice advances neither goal and actually works against both of them.

### *Response:*

With regard to the admission of "unqualified" (or, perhaps, "underqualified") minority students to universities, when asked, universities have denied

adjusting test scores for admissions. Opponents of the bill also point out that test scores are only one factor in the admissions decision and that different admissions criteria are used for a number of students, including student athletes, socially or economically disadvantaged students, the children of alumni, and so forth. According to testimony before the House Judiciary Committee by a constitutional law professor, moreover, the U.S. Supreme Court has held that colleges and universities have First Amendment interests not only in deciding who to admit but also in striving for diversity in admissions, as long as no one is admitted or denied admission solely on the basis of race, religion, national origin, or gender. Universities also have argued that racial and cultural diversity, instead of "diluting" the quality of academic work, are necessary for quality work. For example, in a July 1995 Ann Arbor News article the president of the University of Michigan argued that the university cannot achieve excellence in teaching and scholarship unless it reflects "the varied intellectual perspectives and experiences . . . of every aspect of our community." With regard to the racial hostility that proponents of the bill claim that affirmative action has promoted, opponents of the bill have instead suggested that racial hostility has always existed and that such hostility has increased as greater numbers of racial minorities have gained access to universities and the workplace. Finally, while the achievement of a color-blind society and the harmonious integration of the races may well be the ultimate goals of affirmative action programs, the fact remains that throughout the history of this country -- and despite the abolishment of slavery in the last century and decades of civil rights activism in this century -- that ideal society still is just that, an ideal, not a reality. Until these ideals are achieved, some opponents to the bill argue, attempts to weaken or reverse affirmative action do not promote fairness but instead serve to perpetuate the racism that has yet to be eliminated from society.

***Reply:***

The bill deals with the race-norming of test scores, and would not ban the consideration of race or other non-academic factors in admissions. As the U.S. Supreme Court has held, from the landmark 1978 Bakke decision to the 1989 Croson decision, affirmative action is constitutional under the U.S. Constitution provided that it survives a standard known as "strict scrutiny." However, no case has held that universities have a constitutional right to race-norm test scores, and this practice should be clearly prohibited in Michigan law. In general, the focus should be on ensuring that proper training and help is available and accessible to those who need it, regardless of race, so that competence and ability -- not artificial inflation of test scores -- become the relevant criteria for hiring and admissions decisions.

***Against:***

In the first place, the federal Civil Rights Act of 1991 already prohibits employers from adjusting test scores and using different cut-off scores in employment and promotion. Since federal law supersedes any state regulation or action, the bill's provisions regarding employment are redundant and unnecessary. With regard to university admissions, the bill could be seen as infringing on universities' autonomy and academic freedom, since the U.S. Supreme Court has ruled that academic freedom includes the freedom of universities to select their student bodies. What is more, clear evidence that universities engage in the practice of race-norming on their admissions tests is lacking, anecdotal evidence to the contrary notwithstanding. Finally, the bill addresses only certain kinds of university admission "preferences" without addressing other "preferences" that provide special consideration for lesser-qualified applicants, such as athletic ability or musical talent, or the special consideration given to university applicants who are related to wealthy financial contributors, alumni, or other influential private or public people. If the intent is to do away with unfair preferences, shouldn't these kinds of preferences, that aren't subject to public scrutiny, be prohibited as well?

***Response:***

The federal Civil Rights Act of 1991 doesn't apply to university admissions, so the bill is not unnecessary. And since the federal law against race-norming doesn't apply to employers with fewer than 15 employees, the bill isn't even redundant. The Elliott-Larsen Civil Rights Act, which the bill would amend, applies to all employers, so its provisions would capture the smaller employers not captured under federal law. In addition, it should be pointed out that at one point in time at least 38 state employment services reportedly used employment test norming, all without legislative action or any other kind of public scrutiny. Michigan, too, reportedly used race-norming for three years, beginning in 1985, in the Michigan Employment Security Commission (MESC) Job Service. The bill would ensure that Michigan employers and universities would never again use this unfair method of evaluating prospective employees and students. Finally, the other kinds of "preferences" not addressed by the bill do not raise constitutional issues, as do race and gender, and some of these "preferences" are the result of individual merit and not just accidents of birth.

## *POSITIONS:*

The following have presented testimony to the House Judiciary and Civil Rights Committee in support of the concept of the bill:

* The Michigan Farm Bureau

The following have presented testimony to the House Judiciary and Civil Rights Committee in opposition to the concept of the bill:

* The Michigan Chapter of the National Organization for Women

* The Michigan Education Association

* The Grand Rapids Urban League

* The United Auto Workers, Local 730



■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.