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RIGHTS RESURGENCE: THE IMPACT OF THE ADA AMENDMENTS ACT ON SCHOOLS AND UNIVERSITIES

Wendy F. Hensel*

Few people would have predicted that 2008 would be the year disability rights made a comeback in the United States. For years, courts had taken an increasingly restrictive approach to defining disability under the Americans with Disabilities Act,¹ denying class membership to many who typically would be considered “disabled” within the common understanding of that term.² Although attempts to amend the ADA had been made, none had yet gained sufficient political traction in the legislature.³ Many predicted more of the legal status quo, with few opportunities for plaintiffs to survive summary judgment.⁴

In this case, however, the conventional wisdom proved wrong. On September 25, 2008, President George W. Bush signed the unanimously enacted Americans with Disabilities Amendments Act (ADAAA)⁵ into law, “reinstating a broad scope of protection” to

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1. 42 U.S.C. § 12102(2) (2006).

2. See, e.g., *Littleton v. Wal-Mart Stores, Inc.*, No. 05-12770, 2007 WL 1379986, at *2 (11th Cir. May 11, 2007) (mental retardation); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (diabetes); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 184 (D.N.H. 2002) (cancer); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (epilepsy).

3. See, e.g., ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4 (2007); Americans with Disabilities Act Restoration Act of 2006, H.R. 6258, 109th Cong. § 3 (2006). For a general discussion of the political climate in which these bills were introduced, see, for example, Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 996–97 (2008); Samuel R. Bagenstos, *The New Congress and the ADA*, Disability Law Blog, http://disabilitylaw.blogspot.com/2006_11_01_archive.html (Nov. 29, 2006, 09:29 EST).

4. See, e.g., Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 229 (2008) (noting “the skepticism of some (myself included) that Congress would enact any meaningful changes to the ADA in the near term”). See also John W. Parry, *1999 Employment Decisions Under the ADA Title I-Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348, 348 (2000) (study finding that employers win 95.7% of ADA Title I cases at the federal appellate level).

5. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

people with disabilities.⁶ As a result of this largely unanticipated development, there is a renewed sense of hope and optimism among people with disabilities and their advocates that has long been absent.⁷

With change, however, comes uncertainty and concerns with legal compliance. The Amendments, which became effective on January 1, 2009,⁸ unquestionably will impact the field of education both with respect to employment and the eligibility and accommodation of K-12 and university students with disabilities. Although it is difficult in the early days of legislation to predict the nuances that ultimately will materialize in the law, this Article provides an early look at the emerging legal issues for schools and universities occasioned by passage of the ADA. Part I provides a brief general overview of judicial interpretation of the disability definition prior to the enactment of the Amendments. Part II evaluates the revised law, exploring the specific provisions of the statute that have changed and the public impetus behind these changes. Finally, Part III explores the Amendments' likely impact on schools and universities, highlighting issues that will require further discussion in the future.

I. THE ORIGINAL ADA: JUDICIAL BACKLASH

When Congress passed the original Americans with Disabilities Act in 1990, disability advocates hailed the legislation as a substantial step towards ending discrimination against the millions of Americans who will experience physical or mental impairments

6. *See id.* § 2(b)(1).

7. *See, e.g.,* CHADD, President Signs ADA Amendments Act Into Law, http://www.chadd.org/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/HTMLDisplay.cfm&CONTENTID=7522 (last visited Mar. 8, 2009) (calling the ADA's passage "a huge victory" and "historic"); and Posting of Advocacy to NAD Advocacy Blog, <http://blogs.nad.org/advocacy/2008/09/25/nad-celebrates-as-%E2%80%9Cada-amendments-act%E2%80%9D-becomes-law/> (Sept. 25, 2008).

8. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 8, 122 Stat. 3553.

during their lifetime.⁹ Few anticipated that significant judicial resistance to the legislation would quickly curtail its effectiveness.

Because disability is a social construct defined by law rather than an immutable characteristic,¹⁰ the legal definition of disability determines coverage under the statute. Changes in the definition or the interpretation of its foundational components can significantly expand or contract the class protected by law. The ADA defines disability as a physical or mental impairment that substantially limits a major life activity.¹¹ Plaintiffs who can establish that they have an actual disability, a record of disability, or are regarded as having a disability all fall within the law's anti-discrimination mandate.¹² The following discussion briefly considers the judicial and regulatory treatment of these terms that set the stage for the Amendments. Although much of this discussion relates to the treatment of disability in an employment context, it is equally applicable to school and university obligations under Titles II and III because all sections of the ADA rely on the same statutory definition of disability.¹³

A. *Questionable Regulatory Authority*

Congress gave authority to three federal agencies to promulgate regulations under the ADA: the Equal Employment Opportunity Commission (EEOC) (Title I); the Department of Justice (DOJ)

9. See, e.g., Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 271 (2000) (“When President Bush signed the Americans with Disabilities Act in the Rose Garden among hundreds of people with disabilities, the mood was one of tremendous hope and triumph.”).

10. See, e.g., Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 637, 641–42 (2008) (explaining the social model of disability).

11. 42 U.S.C. § 12102(2)(A) (2006).

12. 42 U.S.C. § 12102(2)(A)–(C) (2006); 29 C.F.R. § 1630.2(g)(1)–(3) (2008). Individuals challenging the legality of medical inquiries and examinations under the ADA do not need to establish that they are disabled within the meaning of the law. 42 U.S.C. § 12112(d) (2006).

13. 42 U.S.C. § 12102(2) (2006). It is worth noting, however, that some scholars have challenged the extent to which Title I cases and theory are applicable to Titles II and III. See, e.g., Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1810 (2005) (finding that “Title II and III cases have had more pro-plaintiff results than Title I” cases and concluding “the Title I explanation and suggestions [by scholars] are to varying degrees incomplete or inaccurate when applied to the ADA’s non-employment Titles”).

(Titles II & III); and the Department of Transportation (DOT) (transportation services under Titles II & III).¹⁴ Each of these agencies has issued regulations interpreting the definition of disability.¹⁵ Pursuant to the Administrative Procedure Act, these regulations would ordinarily be entitled to deference by courts, provided that the agencies followed the appropriate procedures in adopting them and the agency's interpretation constituted a reasonable exercise of the delegated authority.¹⁶ The Supreme Court, however, called the EEOC's authority to promulgate such regulations into question in *Sutton v. United Airlines, Inc.*,¹⁷ because the definition of disability is located in the General Provisions section of the ADA rather than in any of the subsequent Titles.¹⁸ Because Congress gave no agency the authority to promulgate regulations relating to the General Provisions, the Court voiced skepticism that the regulations were entitled to any deference by the courts.¹⁹

Despite its misgivings, the Supreme Court never definitely determined what weight to give to the regulations because the parties in *Sutton* did not dispute their legitimacy.²⁰ In subsequent decisions, however, the Court defined "substantial limitation" and "major life activity" in ways that seemingly conflicted with EEOC regulations, establishing more exacting standards for plaintiffs.²¹ Although the impact of the Court's skepticism has been limited to some extent by

14. 42 U.S.C. § 12116 (2006) (Title I – EEOC); 42 U.S.C. § 12134(a) (2006) (Title II – DOJ); 42 U.S.C. § 12149(a) (2006) (Title II – DOT); 42 U.S.C. § 12186(a)(1), (b) (2006) (Title III – DOT and DOJ, respectively).

15. See, e.g., 29 C.F.R. § 1630.2(g) (2008) (Title I – EEOC); 28 C.F.R. § 35.104 (2008) (Title II – DOJ); 28 C.F.R. § 36.104 (2008) (Title III – DOJ); 49 C.F.R. § 37.3 (2008) (Title II and III – DOT).

16. See 5 U.S.C. § 553 (2006) (describing formal rule making process under the Administrative Procedure Act). See also Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 189–91 (2004) (explaining the deference attached to regulations).

17. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999).

18. See 42 U.S.C. § 12102(2) (2006) (defining disability); *Sutton*, 527 U.S. at 478.

19. *Sutton*, 527 U.S. at 479. Notably, this position seemingly conflicts with that taken in *Bragdon v. Abbot*, 524 U.S. 624, 646 (1998), where the Court stated that Title III regulations issued by DOJ, implicitly including those relating to the disability definition, were entitled to deference. *Id.*

20. *Sutton*, 527 U.S. at 480.

21. See, e.g., *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002). See also *infra* Part I.C. (discussing interpretation of the substantial limitation requirement).

lower courts' continued deference to the regulations,²² the *Sutton* decision clearly created the potential for a restrictive definition of disability and broad judicial discretion unchecked by regulatory guidance.

*B. "Major Life Activity"*²³

The text of the ADA provides no insight into the meaning of major life activity. Accordingly, the parameters of this term have been flushed out exclusively by regulatory and judicial interpretation.

The EEOC regulations on major life activity, consistent with those promulgated under the Rehabilitation Act,²⁴ define major life activity by way of example, listing "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" as activities that are "major."²⁵ This list was not intended to be exhaustive,²⁶ and the Commission later added "[m]ental and emotional processes such as thinking, concentrating, and interacting with others" as "other examples of major life activities" in its Compliance Manual.²⁷ Covered activities share the trait of being "basic activities that the average person in the general population can perform with little or no difficulty."²⁸

22. See, e.g., *Guzman-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 9 (1st Cir. 2003) ("We have regularly consulted EEOC definition of the terms . . . but no agency has been granted authority to issue binding regulations."); *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 762 n.7 (3d Cir. 2004) (stating, post-*Sutton*, that "we are guided by the Regulations issued by the Equal Employment Opportunity Commission ('EEOC') to implement Title I of the Act") (quoting *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 143 n.4 (3d Cir. 1998)).

23. Although the definition of disability also requires plaintiffs to show an "impairment," few cases have focused on this requirement. See, e.g., Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1475 (1999) ("In the vast majority of ADA cases, the impairment issue rarely surfaces as a point of contention.")

24. 34 C.F.R. § 104.3(j)(2)(ii) (2006). See also 29 C.F.R. § 1630.2(i) app. (2002) (noting that ADA regulations "adopt . . . the definition of the term 'major life activities' found in the regulations implementing section 504 of the Rehabilitation Act").

25. 29 C.F.R. § 1630.2(i) (2008).

26. See *Bragdon v. Abbot*, 524 U.S. 624, 639 (1998) ("As the use of the term 'such as' confirms, the list is illustrative, not exhaustive.")

27. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL § 902.3(b) (definition of the term "disability").

28. 29 C.F.R. pt. 1630, app. § 1630.2(i) (2002).

The Supreme Court clarified in *Bragdon v. Abbott* that “[t]he plain meaning of the word ‘major’ denotes comparative importance” and “suggest[s] that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.”²⁹ In reaching this conclusion, the majority rejected the dissent’s position that “major” was more appropriately defined “as ‘greater in quantity, number or extent’” because the activities listed by the EEOC all “are repetitively performed and essential in the day-to-day existence of a normally functioning individual.”³⁰

The dissent’s position gained traction in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,³¹ however, when the Court seemingly adopted a combination of the two definitions articulated in *Bragdon*. In *Toyota*, the majority concluded that major life activities encompass “those activities that are of central importance to daily life.”³² The Court also clarified that heightened requirements attach when alleging a substantial limitation in performing manual tasks, an activity identified in the regulations.³³ The Court reasoned that if each restricted task identified by the plaintiff fails to independently qualify as major, then “together they must do so” in order to satisfy the statutory definition.³⁴ The Court concluded that the definitional terms “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” or there would be significantly more Americans in the protected class than the 43,000,000 individuals with disabilities identified by Congress in the General Provisions of the ADA.³⁵

Courts have taken heed of the Supreme Court’s admonition and looked critically at those activities that fall outside of the EEOC regulations. At various times, courts have rejected driving, sleeping, eliminating waste, concentrating, interacting with others, and

29. *Bragdon*, 524 U.S. at 638 (quoting *Abbot v. Bragdon*, 107 F.3d 934, 939, 940 (1st Cir. 1997)).

30. *Id.* at 660.

31. *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184 (2002).

32. *Id.* at 197.

33. *Id.* at 199–200.

34. *Id.* at 197.

35. *Id.*

thinking as major life activities,³⁶ despite the EEOC's opinions to the contrary on many such activities.³⁷ Courts have relied on a variety of rationales in rejecting these activities, including that they are insufficiently significant to society at large, too narrow, too infrequent, or voluntary and therefore not covered.³⁸ Although *Sutton* counsels that the inquiry into an activity's significance should be determined objectively from society's perspective rather than from an individual's point of view,³⁹ there is some evidence suggesting that courts are more likely to identify an activity as major when alleged by plaintiffs with physical, rather than mental, impairments.⁴⁰

36. See, e.g., *Kellog v. Energy Safety Servs., Inc.*, 544 F.3d 1121, 1125–26 (10th Cir. 2008) (holding that “driving is not itself a major life activity”); *Haynes v. Williams*, 392 F.3d 478, 485 (D.C. Cir. 2004) (Williams, J., concurring) (questioning whether sleep is a major life activity); *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 385 (3d Cir. 2004) (discussing district court’s finding that eliminating waste was not a major life activity); *Humbles v. Principi*, No. 04-1218, 2005 WL 1581257, at *3 (10th Cir. July 7, 2005) (finding that “interactions with others and concentration have not been deemed major life activities by this circuit”); *Boerst v. Gen. Mills Operations, Inc.*, No. 00-3281, 2002 WL 59637, at *3 (6th Cir. Jan. 15, 2002) (thinking). For a general discussion of earlier cases interpreting the major life activity requirement, see Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of “Major Life Activity” in the Americans with Disabilities Act*, 33 TEX. TECH L. REV. 321, 325 (2002).

37. See, e.g., 29 C.F.R. pt. 1630, app. § 1630.2(i) (2002); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 27, at 902.3(b); The U.S. Equal Employment Opportunity Commission, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities [hereinafter Enforcement Guidance], <http://www.eeoc.gov/policy/docs/psych.html> (last visited Mar. 11, 2009). Because these sources of guidance were not promulgated pursuant to the Administrative Procedure Act, they are not entitled to deference by courts. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Many courts, however, have continued to find such sources to be persuasive. See, e.g., *Watson v. City of Miami Beach*, 177 F.3d 932, 936 (11th Cir. 1999) (finding the Enforcement Guidance “helpful”); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (citing the Enforcement Guidance with approval).

38. See, e.g., *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 642–43 (2d Cir. 1998) (emphasizing the gate-keeping function of the “major life activity” requirement in rejecting standing, sitting, lifting objects, working and sleeping as major life activities, reasoning that otherwise plaintiffs could minimize their burden of establishing a substantial limitation merely by “defin[ing] the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case”); *Brown v. BKW Drywall Supply, Inc.*, 305 F. Supp. 2d 814, 826–27 (S.D. Ohio E. Div. 2004) (holding intermittent, episodic conditions are generally not considered disabilities under the ADA unless they occur with sufficient frequency); *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106–07 (S.D. Iowa 1995) (rejecting reproduction as a major life activity pre-Bragdon because although all people walk, see, hear, speak and breathe unless prevented by illness, “[s]ome people choose not to have children”).

39. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

40. See Wendy F. Hensel, *Interacting With Others: A Major Life Activity Under the ADA?*, 2002 WIS. L. REV. 1139, 1142 (2002) (concluding that courts are more likely to find interacting with others a major life activity in the context of physical impairments).

C. Substantial Limitation

Of all the elements of the disability definition, the substantial limitation requirement has been the subject of the most controversy. Congress offered no explanation of “substantially limited” in the text of the ADA. EEOC regulations define the term to mean an inability “to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.”⁴¹ In evaluating the degree of limitation present, consideration is given to the following factors: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”⁴²

The Supreme Court initially adopted a relatively broad definition of substantial limitation in *Bragdon v. Abbot*. The Court explained that plaintiffs do not need to establish that they are absolutely precluded from performing a major life activity to show a substantial limitation, reasoning that “[t]he Act addresses substantial limitations on major life activities, not utter inabilities.”⁴³ Instead, the Court concluded that when “significant limitations” are present, “the definition is met even if the difficulties are not insurmountable.”⁴⁴

Nevertheless, the Court’s interpretation has progressively become more restrictive since *Bragdon*. Its scrutiny reached a high water mark in *Toyota*, where the Court cited Webster’s Dictionary rather than EEOC regulations in concluding that restrictions must be “‘considerable’ or ‘to a large degree’” in order to satisfy the statutory

41. 29 C.F.R. § 1630.2(j)(1) (2002).

42. 29 C.F.R. § 1630.2(j)(2) (2002).

43. *Bragdon v. Abbot*, 524 U.S. 624, 641 (1998).

44. *Id.*

definition.⁴⁵ The Court made clear that plaintiffs will not secure class coverage based on impairments “that interfere in only a minor way” with an identified activity, and instead must demonstrate a “severe restriction[.]”⁴⁶ The Court offered no explanation for its departure from the “significant restriction” language found in EEOC regulations, which some have argued is a more lenient threshold.⁴⁷

Although the “severe restriction” standard has created challenges for plaintiffs, it is the Court’s interpretation of substantial limitation in *Sutton v. U.S. Airways, Inc.* that has most impacted class membership. In *Sutton*, the Court considered the role that medication and other corrective devices play in evaluating whether an impairment is sufficiently limiting to be a protected disability.⁴⁸ The EEOC’s Interpretive Guidance had directed courts to consider plaintiffs’ limitations without regard to any alleviating measures employed by them.⁴⁹ This position was consistent with all other agencies interpreting the disability definition, as well as the legislative history of the ADA.⁵⁰ Every Circuit Court of Appeal to consider the issue prior to the Tenth Circuit in the underlying case had adopted the EEOC’s position.⁵¹ Nevertheless, the Supreme Court concluded that the plain language of the statute requires courts to consider all mitigating measures taken by plaintiffs, including medication, assistive technology, and internal coping mechanisms, in determining whether the substantial limitation requirement is satisfied.⁵²

45. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

46. *Id.* See also *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (holding that “a mere difference” in the way the activity is performed will not establish a substantial limitation); *Benko v. Portage Area Sch. Dist.*, 241 F.3d Appx. 842, 846 (3d Cir. 1997) (finding plaintiff not disabled because he did not demonstrate a “severe restriction” arising out of degenerative disk disease).

47. See Eichhorn, *supra* note 16, at 202–03 (discussing court decisions interpreting the “severe restriction” standard to be a higher threshold for plaintiffs).

48. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999).

49. 29 CFR pt. 1630, app. § 1630.2(j) (1998).

50. *Sutton*, 527 U.S. at 496, 499–501 (Stephens, J., dissenting).

51. *Id.* at 495–96.

52. *Id.* at 487.

Although many have questioned the wisdom of other Supreme Court decisions interpreting the disability definition, it is *Sutton*'s restriction on mitigating measures that has received the most condemnation from scholars and disability advocates alike. It has been extremely difficult for individuals with impairments that are even moderately controlled through ameliorative measures to establish coverage under the ADA. Individuals with impairments that society commonly considers to be disabilities—mental retardation, multiple sclerosis, diabetes, epilepsy and cancer, to name a few—have been judged not disabled within the meaning of the law.⁵³ In a turn unexpected by Congress, those impaired individuals who are most capable of being active, productive members of society have simultaneously become those least likely to receive legal protection under the ADA.

D. “Regarded As” Being Disabled

In light of the exacting showing necessary to establish an actual disability under the ADA, some advocates believed that that the regarded as prong would more readily facilitate class membership. This prong was originally conceived as a “catch-all” that would cover individuals who were not limited in a major life activity, but who nevertheless were treated as if they were by a defendant.⁵⁴ This approach arose out of the Supreme Court's decision under the Rehabilitation Act in *School Board of Nassau County v. Arline*, which recognized that defendants' “accumulated myths and fears about disability and disease” can be more limiting than any actual impairment experienced by plaintiffs.⁵⁵ Scholars had interpreted *Arline* to mean that a disability is established whenever an individual

53. See cases cited *supra* note 2.

54. See Anderson, *supra* note 3, at 1004 (noting that the regarded as prong “had been understood by many, including some among its drafters, to be a catch-all category for those who are not limited enough to be actually disabled, but who can show that the employer treated them as though they were so limited”); Alex B. Long, (*Whatever Happened To*) the ADA's “Record Of” Prong(?), 81 WASH. L. REV. 669, 680–81 (2006) (same).

55. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

is “discriminated against because of any impairment[.]”⁵⁶ A report by the Senate Committee on Labor and Human Resources evaluating the original ADA is consistent with this interpretation, stating that “[a] person who is excluded from any activity covered under this Act or . . . otherwise discriminated against because of a covered entity’s negative attitudes toward disability is being treated as having a disability which affects a major life activity.”⁵⁷

The Supreme Court in *Sutton*, however, took a significantly more restrictive view. Relying on a literalist reading of the statute, the Court concluded that a regarded as claim may be asserted only when the plaintiff establishes that the defendant believed him or her to have an impairment which substantially limits a major life activity. If a defendant acts on the basis of an impairment that is perceived to be less restrictive, no regarded as claim will arise.⁵⁸ Given the subjective nature of this inquiry, it can be difficult to make the requisite showing in the absence of direct evidence, particularly in those cases which allege work as the major life activity in question.⁵⁹ In order to establish a disability on this basis, EEOC regulations require plaintiffs to demonstrate that they are restricted in a class or broad range of jobs,⁶⁰ and *Sutton* requires this same showing in regarded as cases. Because few plaintiffs can demonstrate that a defendant believed them to be precluded not only from their current job, but also a wide variety of other positions,⁶¹ most scholars agree that the

56. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 92 (2000) (discussing early court cases).

57. S. REP. NO. 101-116, at 24 (1989).

58. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 473 (1999).

59. See Wendy F. Hensel & Gregory Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Physical Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 69 (2005) (study finding that work as a major life activity “is rarely a winning strategy for any plaintiff”).

60. 29 C.F.R. § 1630.2(j)(3)(i) (2008).

61. See, e.g., *Sutton*, 527 U.S. at 473 (1999) (affirming grant of summary judgment where plaintiffs failed to demonstrate that United viewed them as incapable of performing a broad range of jobs). See also Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 598 (1997) (noting that “courts are interpreting the single job exception so broadly that any rejection, no matter how broad the implications, can be reduced to a ‘single job’—namely, the job at issue”).

regarded as prong has largely failed to provide the broad coverage originally intended by Congress.⁶²

II. THE ADA AMENDMENTS ACT: THE PRODUCT OF BIPARTISANSHIP

A. Legislative History

As a result of restrictive judicial interpretation of the definition of disability, most scholars and disability advocates agree that the ADA has not lived up to its promise of preventing discrimination and integrating people with disabilities into the mainstream of society.⁶³ Not surprisingly, there have been many calls to amend the ADA, which increased in frequency following the Court's decision in *Toyota* in 2002.⁶⁴ The first serious legislative response took place in June 2007, when the ADA Restoration Act ("ADARA") was introduced in the House and Senate.⁶⁵ The bill, which had been carefully crafted by the disability rights community, initially proposed changing the definition of disability to require only a physical or mental impairment.⁶⁶

62. See Feldblum, *supra* note 56, at 141 (stating that "the assumption that the third prong of the disability definition would protect individuals with a range of impairments who are not covered under the first and second prongs never materialized in ADA cases").

63. See, e.g., Eichhorn, *supra* note 23, at 1408 ("Although the ADA has been hailed as the chief accomplishment of a civil rights movement on behalf of people with disabilities, the way in which "disability" is defined in the statute has undercut its effectiveness as a guarantor of civil rights."); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000) (stating that recent Supreme Court decisions "drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination"); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 36 (2000) ("If the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA's employment title has been nothing less than a betrayal of the ADA's promise.").

64. See, e.g., Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 193–94 (2008) (describing the *Toyota* case as "a turning point for many individuals in the disability community, as well as their Congressional allies").

65. ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4. Notably, a form of the bill had been introduced in late 2006, but it became evident that efforts to secure its passage were not "ultimately feasible." Feldblum et al., *supra* note 64, at 197 (describing H.R. 6258 (2006)).

66. ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4.

As support for ADARA grew over time, the business community voiced its opposition to the bill.⁶⁷ Similar concerns were echoed by the Justice Department on behalf of the Bush Administration.⁶⁸ Ultimately, however, the business community was persuaded by a few members of Congress to meet with disability rights advocates to determine whether a consensus bill could be developed.⁶⁹ Following a marathon of meetings and negotiation sessions,⁷⁰ the ultimate result was the first version of the ADAAA, which passed the House by a vote of 402-17 on June 25, 2008.⁷¹

When the Senate took up consideration of the bill, opponents voiced objections to many of its provisions. The concern that gained traction, however, related to the provision stating that an impairment “substantially limits” a major life activity when it “materially restricts” that activity. Many believed that the “materially restricts” language was ambiguous and no more instructive to courts than existing precedent,⁷² and the Senate’s version deleted this language from the bill. The Senate unanimously passed the revised ADAAA on September 11, 2008,⁷³ and the House passed the Senate’s version shortly thereafter.⁷⁴

67. See Feldblum et al., *supra* note 64, at 229 (describing early support and opposition for the ADARA).

68. *Id.* at 229.

69. See *id.* (describing the efforts of “Majority Leader Steny Hoyer and Congressman Jim Sensenbrenner”).

70. *Id.* at 229–30 (describing the negotiations as “thirteen weeks of meetings . . . endless drafting and redrafting of legislative language . . . and numerous meetings and calls for internal vetting within the separate communities”).

71. 154 CONG. REC. H6081 (daily ed. June 25, 2008).

72. See, e.g., Long, *supra* note 4, at 219 (noting that the “materially restricts” language “did little to clarify the meaning of substantial limitation”); Andrew M. Grossman, *The Senate’s ADA Amendments Act: Only Half Bad*, HERITAGE FOUNDATION WEB MEMO, 1 (Aug. 18, 2008) available at http://www.heritage.org/Research/Legalissues/upload/wm_2028.pdf (describing the “materially restricts” language as “Replacing a Cipher for a Cipher”); Council on Law in Higher Education, *The ADA Amendments Act: Overview and Analysis*, <http://www.clhe.org/clhe/wp-content/uploads/2009/01/eiada2008.pdf> (last visited Mar. 12, 2009) (“Unless more clarity is provided in the legislation, there will be significant confusion as to what constitutes ‘significantly limits.’”).

73. 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008).

74. 154 CONG. REC. H8298 (daily ed. Sept. 17, 2008).

B. General Statutory Provisions

The ADAAA represents an interesting mix of sweeping change and adherence to the status quo. The legislation repudiates the Supreme Court's endorsement of a restrictive definition of disability, declaring that this position has "narrowed the broad scope of protection" that Congress intended to afford through the ADA.⁷⁵ Congress specifically rejects the language of *Sutton* and *Toyota*,⁷⁶ and eliminates the declaration in the original ADA that "43 Million Americans have disabilities"—language the Court had repeatedly used to justify the need for a "demanding standard" of disability.⁷⁷ The statute's antidiscrimination focus is reinforced by the bill's direction to courts to give "primary . . . attention . . . [to] whether entities covered under the ADA have complied with their obligations."⁷⁸ Although the requirement of class membership remains in the legislation, the ADAAA clarifies that this inquiry "should not demand extensive analysis."⁷⁹ In language sure to be repeatedly cited by courts, Congress makes clear that "[t]he definition of disability . . . shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of this Act."⁸⁰

Reflecting the input of the business community, the ADAAA retains the ADA's original definition of disability and continues to require plaintiffs to show an impairment which substantially limits a major life activity to establish class membership via the first prong.⁸¹ Although the impairment requirement stands unaltered, the ADAAA represents a significant departure from the original legislation because its broad new definitions of "major life activity" and

75. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553, 3553.

76. *Id.* § 2(b)(2)–(4).

77. *Id.* § 3(1). For an example of the Court's use of this language, see, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002); and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999). To this end, the legislation also removes the original finding that people with disabilities are "a discrete and insular minority." ADA Amendments Act of 2008 § 3(2).

78. ADA Amendments Act of 2008 § 2(b)(5).

79. *Id.*

80. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3553 (2008).

81. *Id.*

“substantial limitation” have the potential to meaningfully expand the legal protection of people with disabilities.

The ADAAA for the first time provides a statutory list of major life activities that are covered under the law. This list includes all of the activities identified in the formal EEOC regulations⁸² and adds “eating, sleeping . . . standing, lifting, bending . . . reading, concentrating, thinking, and communicating” as non-exhaustive examples of covered activities.⁸³ Reflecting the broad intent of Congress, the statute also recognizes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions,” as a major life activity.⁸⁴ As is apparent, this expansive list is likely to encompass virtually every physiological disorder experienced by plaintiffs, lowering the hurdle erected by this requirement. The ADAAA also makes clear that the EEOC, Attorney General, and Secretary of Transportation have the authority to promulgate regulations on the disability definition, ending judicial debate on this issue.⁸⁵

In a major shift, the ADAAA reverses *Sutton* and directs courts to undertake the substantial limitation inquiry “without regard to the ameliorative effects of mitigating measures[.]”⁸⁶ Although “ordinary eyeglasses or contact lenses” are exempted from coverage,⁸⁷ there is some protection even for plaintiffs in this category. The statute provides that any qualification standard which requires a certain level of uncorrected vision must be job-related and consistent with business necessity in order to be lawful.⁸⁸ This significant change

82. 29 C.F.R. § 1630.2(i) (2008) (listing caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working as major life activities).

83. ADA Amendments Act of 2008 § 4(a) (amending 42 U.S.C. § 12102(2)(A)).

84. *Id.* (amending 42 U.S.C. § 12102(2)(B)).

85. *Id.* § 6(a)(2) (amending 42 U.S.C. § 12205a).

86. *Id.* § 4(a) (amending 42 U.S.C. § 12102(4)(E)(i)).

87. *Id.* § 4(a) (amending 42 U.S.C. § 12102(4)(E)(ii)).

88. *Id.* § 5(a) (amending 42 U.S.C. § 12113(c)).

overrules years of case law and may have a profound impact on class membership under the ADA.

The revised statute also overturns significant judicial precedent limiting the statute's coverage of individuals with episodic impairments, such as epilepsy and asthma. As described earlier, EEOC regulations direct courts to consider the duration of an individual's impairment in evaluating whether it is substantially limiting.⁸⁹ As a result, courts have often denied class membership to individuals with impairments that are debilitating when active, but which often have long periods of latency or remission.⁹⁰ This reasoning has proven to be particularly problematic for individuals with psychiatric disorders, who, even with otherwise debilitating impairments, can experience periods of relative calm and well-being through counseling and medication.⁹¹ The ADAAA reverses this trend, declaring that impairments that are "episodic or in remission" are covered disabilities even in their latent stages if they "would substantially limit a major life activity when active."⁹²

Perhaps the most radical change in the statute, however, is the revised interpretation of the regarded as prong of the disability determination. The ADAAA provides that an individual who has

89. 29 C.F.R. § 1630.2(j)(1) (2002).

90. See, e.g., *Cassimy v. Bd. of Educ. Rockford County Sch.*, 461 F.3d 932, 937 (7th Cir. 2006) (holding elementary school principal was not disabled because "isolated bouts of depression" were not permanent or long-term); *Vande Zande v. Wis. Dep't of Admins.*, 44 F.3d 538, 544 (2d Cir. 1995) ("Intermittent, episodic impairments are not disabilities."); *Alderdice v. Am. Health Holdings, Inc.*, 118 F. Supp. 2d 856, 863–64 (S.D. Oh. 2000) (finding plaintiff with cancer not disabled because cancer was in remission at the time of termination). See also Douglas E. Blair, *Employees Suffering From Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1396 (1999) (stating that "because . . . mental illnesses often undergo periods of remission...individuals may have trouble overcoming precedent holding that intermittent and episodic conditions are not impairments for purposes of Title I"). *But see Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 2000) (holding that although plaintiff's bipolar disorder did not cause "problems every day[,] it could be a protected disability because "[c]hronic, episodic conditions can easily limit how well a person performs an activity as compared to the rest of the population: repeated flare-ups of poor health can have a cumulative weight that wears down a person's resolve and continually breaks apart longer-term projects.").

91. See, e.g., *Glowacki v. Buffalo Gen. Hosp.*, 2 F. Supp. 2d 346, 351–52 (W.D.N.Y. 1998) (finding plaintiff with Bipolar Affective Disorder not disabled because her condition, at most, "sporadically lessened her ability to think, concentrate and work effectively").

92. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553, 3553 (amending 42 U.S.C. § 12102(4)(D)).

experienced discrimination “because of an actual or perceived physical impairment[,] whether or not the impairment limits or is perceived to limit a major life activity,” is regarded as having a disability.⁹³ As a result, once a plaintiff demonstrates that he or she has an impairment, the only question remaining is whether the defendant acted on that basis. Once this threshold is crossed, a plaintiff automatically establishes a protected disability, and the focus in litigation will shift to the appropriateness of the defendant’s conduct.

The potential breadth of this change, however, is limited in some meaningful respects. First, Congress excluded individuals with impairments that are “transitory and minor,” defined as having “an actual or expected duration of 6 months or less,” from class membership under the regarded as prong.⁹⁴ In addition, Congress made clear that individuals requesting reasonable accommodation must establish an actual disability to seek this form of relief under the ADA.⁹⁵ This change settles a long-standing split among circuits as to whether plaintiffs proceeding under the regarded as prong are entitled to reasonable accommodation.⁹⁶ Accordingly, the revised regarded as prong will facilitate class membership only for those who seek relief from an adverse action unrelated to accommodation requests.

93. *Id.* § 4(a) (amending 42 U.S.C. § 12102(3)(A)).

94. *Id.* § 4(a) (amending 42 U.S.C. § 12102(3)(B)). Notably, the United States Office of Management and Budget objected to the conjunctive nature of this defense, arguing it would be more appropriate to exclude impairments that are transitory *or* minor. See Executive Office of the President, *Statement of Administrative Policy: HR3195 – ADA Amendments Act of 2008* (June 24, 2008) (“The bill does exclude impairments that are *both* transitory *and* minor; however, those that are one or the other would be covered. As a result, the bill could extend ADA protection to a short bout with the flu or a mild seasonal allergy. The Administration believes that the bill should exclude from coverage impairments that are *either* transitory *or* minor.”), available at <http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr3195-r.pdf>. Congress’ refusal to alter this language strongly suggests that temporary impairments that are otherwise significant are covered under the regarded as prong.

95. *Id.* § 6(a) (amending 42 U.S.C. § 12201(h)).

96. See Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why “No” Should Not Be the Answer*, 36 SETON HALL L. REV. 895, 919–56 (2006) (surveying cases).

III. RIGHTS RESURGENCE: THE ADA's IMPACT ON SCHOOLS AND UNIVERSITIES

All claims under the ADA and Rehabilitation Act⁹⁷ arising after January 1, 2009, will be impacted in some way by the passage of the ADA's Amendments Act. Although it will be many years before the full significance of the legislation is clear, there can be little doubt that the landscape for schools and universities is changing rapidly. This section identifies and discusses the issues that are likely to arise as a result of the Amendments. Notably, because schools and universities employ more than 8 million people in the United States, this section begins with an exploration of the Act's impact on these institutions in their role as employers.⁹⁸ The remainder of the discussion focuses on the legislation's likely effect on eligibility and accommodation decisions relating to students with disabilities in both higher education and elementary and secondary schools.

A. Employment in Schools and Universities

The ADA's potential impact on the employment of people with disabilities has dominated popular and scholarly attention throughout the legislative process.⁹⁹ This focus is not surprising given the nearly universal view that the original legislation failed to protect people with disabilities in the workplace as intended.¹⁰⁰ It is notable that the two Supreme Court ADA cases decided in plaintiffs' favor did not

97. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 7, 122 Stat. 3553, 3553 (amending Rehabilitation Act to conform to ADA's Amendments Act).

98. See Careeronestop, "Industries with the Largest Employment," <http://www.acinet.org/acinet/indview3.asp?id=8,&nodeid=47>. This number includes 6.2 million teachers alone. See Press Release, U.S. Census Bureau, Special Edition: Teacher Appreciation Week (May 2-8), http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/001737.html (Apr. 22, 2004).

99. See, e.g., Feldblum et al., *supra* note 64, at 234-35. See also Letter from ACT et al. to Edward Kennedy, Thomas Harkin, Arlen Specter & Ted Stevens, United States Senate Leaders [hereinafter "Letter from ACT"] (July 14, 2008), available at <http://www.aamc.org/advocacy/library/educ/corres/2008/071408s.pdf> (noting that "the discussions that have occurred to date" about pending disability legislation "have focused on its likely impact on employers and employees").

100. See sources cited *supra* note 63.

relate to employment; instead, they alleged discrimination by public accommodations.¹⁰¹ For many courts, disability has remained synonymous with incapacity and excludes the individual who is generally able to function in the workplace.¹⁰²

Congress clearly intends to shift the balance of power in ADA litigation through the amendments, particularly with respect to the disability inquiry. Schools and universities are major employers in United States¹⁰³ and are well advised to consider all policies and practices relating to the identification and accommodation of employees with impairments. Because the employment law implications of the ADAAA are of interest to employers generally and are likely to receive detailed attention elsewhere, however, this section will only briefly highlight notable areas of change.

1. Expanding Numbers of Covered Employees

Several titles of the ADA regulate the employment of individuals with disabilities in schools and universities. Title I governs employment relationships in private institutions which employ at least 15 individuals,¹⁰⁴ and the Rehabilitation Act also applies if they receive support from the federal government.¹⁰⁵ Although Title II technically governs these same relationships in public institutions, the employment claims of state employees are evaluated pursuant to the standards established in Title I.¹⁰⁶

101. See *PGA Tour, Inc. v. Martin*, 523 U.S. 661 (2001); *Bragdon v. Abbot*, 524 U.S. 624 (1998).

102. See, e.g., Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 *YALE L. & POL'Y REV.* 1, 33–34 (1999) (discussing ways in which the “law is profoundly suspicious of any plaintiff who professes to be limited by a physical or mental impairment”).

103. In 2006, elementary and secondary schools collectively were identified as the “industry” with the largest employment, while colleges and universities were identified as the sixth largest. See Careeronestop, “Industries with the Largest Employment,”

<http://www.acinet.org/acinet/indview3.asp?id=8,&nodeid=47>. This number includes 6.2 million teachers alone. See Press Release, U.S. Census Bureau, Special Edition: Teacher Appreciation Week (May 2-8), http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/001737.html (Apr. 22, 2004).

104. 42 U.S.C. § 12111(5)(A) (2006).

105. 29 U.S.C. § 793(a) (2006).

106. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.140(b)(1) (2008).

There is no question that the Amendments will significantly expand the protected class under all of these provisions. The ADAAA's direction to give a broad interpretation to the disability inquiry, coupled with its repudiation of *Sutton* and *Toyota*, will make it significantly easier for employees to establish an actual disability in court. *Sutton*'s direction to consider mitigating measures markedly diminished plaintiffs' ability to establish a protected disability, and its rejection is likely to have an equally profound impact.¹⁰⁷ At a minimum, employees with impairments that the public has traditionally viewed as disabilities—epilepsy, diabetes, missing limbs, cancer and the like—are likely to establish class membership relatively easily in the future.

There undoubtedly will also be a jump in class coverage under the regarded as prong. Under the new statute, whenever an employer makes a decision based on an employee's real or perceived impairment, regardless of its perceived severity, the employer automatically bestows a covered disability on the employee.¹⁰⁸ As a result, litigation in this area in the future is likely to focus on causation and the legitimacy of the adverse employment action in dispute. This has the potential to be a complicated inquiry and has caused confusion among courts and scholars in the past.¹⁰⁹ There may be many cases, however, that do not dispute this relationship. In *Sutton*, for example, all parties agreed that the plaintiffs were not hired as airline pilots because of their severe myopia.¹¹⁰ In this type of case, the ADAAA may significantly expand the law's reach.

Nevertheless, the Amendments do not eradicate the continued need for inquiry into the plaintiff's medical condition, and questions

107. See, e.g., Hensel & Jones, *supra* note 59, at 67 (study finding "a highly significant difference" between plaintiffs' ability to establish a disability before and after *Sutton*).

108. See discussion *supra* at II.B. See also Long, *supra* note 4, at 224 (explaining that "the new amendments place the focus on the employer's motivation . . . [i]f a plaintiff has a physical or mental impairment and can show that the impairment motivated the defendant's adverse action, the plaintiff can claim coverage under the 'regarded as' prong, regardless of how limiting the impairment actually is").

109. See, e.g., Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006) (discussing court treatment of causation under the ADA).

110. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 476 (1999).

remain about courts' future treatment of each element of the disability inquiry. It is possible, for example, that employers and courts will direct more attention to the determination of whether a plaintiff has an impairment recognized by law. Although this element has received relatively little attention in the past, it now has heightened significance, particularly in the revised regarded as inquiry. There are some conditions, like obesity, which have been viewed with some skepticism by courts and would seem well-suited to this new approach.¹¹¹

It is unlikely, however, that this element will become a burdensome component of the disability inquiry. EEOC regulations broadly define impairment,¹¹² and this agency is unlikely to narrow its definition in the future given Congress' mandate for broad coverage. In addition, the determination of whether a condition qualifies as an impairment will depend, for the most part, on expert medical testimony on the nature of the condition. Because a battle of experts does not lend itself to resolution on summary judgment, it is unlikely to gain traction as a wide-spread defense strategy.¹¹³

The new statutory list of major life activities will undoubtedly reduce litigation on this component of the disability definition. Courts will no longer debate the legitimacy of the identified activities or the deference owed to the implementing regulations. Litigation in this area is likely to continue, however, because the statutory list, like its predecessor regulation, makes clear that it is not exhaustive.

111. See, e.g., Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 678–88 (1999) (discussing court treatment of obesity as an impairment). See also *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (holding that plaintiff's paranoid, oppositional and threatening behavior did not establish a mental impairment); *Mundo v. Sanus Health Plan of N.Y.*, 966 F. Supp. 171, 173 (E.D.N.Y. 1997) (rejecting inability to tolerate stressful situations as an impairment under ADA); and 1 CORP. COUNSEL'S GUIDE TO AM. WITH DISABILITIES ACT § 2:2 (2005) (discussing impairments rejected by courts).

112. 29 C.F.R. § 1630.2(h) (2008).

113. Notably, one circuit has found that a plaintiff's testimony on this issue standing alone "may suffice to establish a genuine issue of material fact" for purposes of summary judgment. See *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1058 (9th Cir. 2005). See also *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097, 1106 (9th Cir. 2004) (finding that plaintiff's diagnosis with a learning disability was "[a]t a minimum . . . sufficient to create a genuine issue of material fact as to whether he suffers from an impairment").

Congress' decision to provide a list of activities rather than a description of the commonalities between them leaves the door open for restrictive judicial interpretation. In the absence of further guidance, *Bragdon's* holding that "significance" is the touchstone of major life activities continues to guide this inquiry.¹¹⁴ The divergent conclusions reached by courts when applying this standard to such common activities as driving¹¹⁵ and interacting with others¹¹⁶ reflects the limitation of this definition. Notably, the ADAAA's lowered threshold of disability is likely to encourage plaintiffs with weaker claims to coverage to come forward. These plaintiffs may feel pressured to identify narrow, questionable activities in order to more readily satisfy the substantial limitation requirement.

It is the legislation's alteration of the substantial limitation inquiry, however, that will have the most immediate impact on employer schools and universities. The new law makes clear that impairments need not be "severe" or even "significant" in order to be legally cognizable.¹¹⁷ Because Congress rejected defining disability as "impairment,"¹¹⁸ it is also clear that plaintiffs must demonstrate at least some meaningful limitation arising out of their disorders. Where courts will draw the line between these extremes, however, is entirely unclear. Although the statute exempts "transitory and minor" impairments from coverage under the regarded as prong, this limitation does not extend to the actual disability inquiry,¹¹⁹ presumably because the substantial limitation requirement remains in place.

114. *Bragdon v. Abbot*, 524 U.S. 624, 638 (1998).

115. See *Edmonds*, *supra* note 36, at 360–63 (detailing court treatment of transportation and driving as major life activities).

116. Compare *Soileau v. Guilford of Me.*, 105 F.3d 12 (1st Cir. 1997), and *Davis v. Univ. of N.C.*, 263 F.3d 95 (4th Cir. 2001), and *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (rejecting interacting with others), with *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (recognizing interacting with others). See also *Hensel*, *supra* note 40 (discussing court treatment of interacting with others).

117. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553, 3553.

118. ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 4.

119. ADA Amendments Act of 2008 § 4(a) (amending 42 U.S.C. § 12102(3)(B)).

The “materially restricts” language offered in the original House bill may provide some insight into Congressional intent despite its ultimate rejection. One scholar involved in the drafting has described the term as “intended, on a severity spectrum, to refer to something that is less than ‘severely restricts,’ and less than ‘significantly restricts,’ but more serious than a moderate impairment which is in the middle of the spectrum.”¹²⁰ Distinguishing which impairments fall within these parameters is likely to prove a challenge that is not resolved by simple citation to Congress’ direction to interpret substantial limitation broadly. In the absence of further direction from the EEOC, employers will need to proceed with extreme caution in evaluating the severity of an employee’s impairment.

This calculation may prove particularly difficult in the context of episodic impairments. The new law makes clear that “if” impairments in this category “would substantially limit a major life activity when active,” they will be covered even when latent or in remission.¹²¹ This provision seems relatively straightforward in cases involving employees with a documented history of meaningful episodic illness, like cancer or serious mental illness. It also readily covers disorders that have periodic flare ups despite being well controlled generally by medication, like diabetes and epilepsy.¹²² It is possible, however, that this provision will extend beyond these categories in ways unforeseen by the drafters.

These provisions not only permit employers to speculate about an employee’s condition, but often will require it. The purpose of the statute is to exempt plaintiffs from the need to show a substantially limiting impairment in the present. Problematically, however, the statute does not require plaintiffs to show that they experienced a substantially limiting impairment in the past. Instead, a literal reading of the statutory language suggests that plaintiffs will be able to

120. See Feldblum et al., *supra* note 64, at 236.

121. ADA Amendments Act of 2008 § 4(a) (amending 42 U.S.C. § 12102(4)(D)).

122. Notably, the statute’s direction to consider impairments in the unmitigated state would likely resolve most difficulties for these individuals in any event. See *id.* § 4(a) (amending 42 U.S.C. § 12102(4)(E)(i)).

establish a disability where there is only the possibility of developing a substantial limitation in the future. If an expert hypothesizes that what is now a mild impairment will “substantially limit a major life activity when active,” the statutory language, on its face, appears to be satisfied. If this reading is correct, it has the potential to require employers to accommodate individuals who have only hypothetically demonstrated the possibility of meaningful limitation at some point in the future.

Take, for example, an employee who has experienced minor depressive episodes in the past, common to many people. If the employee secures a psychiatrist’s note indicating that that he or she will experience an active episode of debilitating depression if certain accommodations are not granted, the literal language of the statute would seem to cover the employee’s hypothetical condition. Likewise, an individual diagnosed with a progressive auto-immune disorder may be covered from the moment the diagnosis is made, regardless of the impairment’s present functional limitation. To some extent, this immediate status would seem warranted because of the discrimination often experienced by employees in this category. This protection, however, is already available in the context of adverse employment actions through the revised prong. Because the accommodation mandate imposes affirmative obligations on employers, the implications of recognizing speculative disabilities under the actual disability prong would seem more problematic.

The significance of this possibility remains to be seen. The more attenuated the disability inquiry from present actual functioning, however, the more difficult it will be for employers and courts to determine whether an individual is actually disabled and entitled to the law’s protection. Hypothetical inquiries by nature carry with them the potential for fraud and error, and this approach would seem to conflict with the individualized inquiry that previously has been the hallmark of the ADA.¹²³

123. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (explaining that “the ADA was enacted to eliminate discrimination against ‘individuals’ with disabilities To comply with this command, an individualized inquiry must be made.”). Cf. Long, *supra* note 4, at 221 (“By directing

2. *Heightened Need for Documentation*

For many years, employers and courts have largely focused on the severity of an employee's medical limitations when faced with a request for accommodation or accusation of an unfair employment action. Because more employees will easily establish a protected disability under the new law, the focus in litigation will undoubtedly turn to the legitimacy of the employment decision. Adequate documentation will become increasingly important at every level of decision-making.

In this regard, it is critical to recall that a covered disability, standing alone, is insufficient to establish class membership under the law. In order to receive the ADA's protection, plaintiffs must also demonstrate that they are qualified for the position in question, or capable of performing the essential functions of the job with or without accommodation.¹²⁴ Because it is often difficult for courts to determine the essential functions of a position, and an employer's judgment is entitled to consideration on this issue,¹²⁵ it will be critical for schools and universities to develop clear, detailed lists for each position in advance of litigation and update them on regular basis. This will provide clear guidelines both to employees and to courts of the expectations and purposes attached to each position in the school.

It will also be important for employers to be particularly vigilant in documenting each instance of poor performance on the job. Documentation protects employees with disabilities by giving them notice of their employer's expectations and helping to ensure equitable treatment. It protects employers, moreover, by ensuring that any subsequent adverse action can be supported and justified. The more clearly the record reflects a history of documented deficiencies, the more difficult it will be for a plaintiff to show that the

courts to consider whether an impairment *would* substantially limit a major life activity if it were active, the ADA Amendments Act allows courts to engage in this once-prohibited type of hypothetical inquiry, at least in this one instance.”)

124. 42 U.S.C. § 12112(a) (2006) (prohibiting discrimination against “qualified individual[s] on the basis of a disability”); 42 U.S.C. § 12111(8) (defining “qualified”).

125. *See* 29 C.F.R. § 1630.2(n)(3)(i)–(ii) (2008).

employment action was taken “because of” his disability. Where such evidence is absent, an inference of discriminatory intent is more readily drawn.¹²⁶

Documentation can be critical, moreover, to establishing good-faith participation in the interactive process, which may preclude an award of damages in subsequent litigation.¹²⁷ This documentation begins once an employee raises a request for accommodation formally or informally.¹²⁸ Front line managers and supervisors must be trained to treat all requests for accommodation seriously and immediately report them to HR professionals. Because mitigating measures are no longer relevant to the disability inquiry, individuals who appear to have insignificant limitations or no limitation at all may nevertheless be entitled to accommodation under the ADA if such functioning results from the use of medication or corrective devices. The revised law requires employers to not only consider the employee’s current functioning, but the restrictions that are likely to be in place in the absence of such coping mechanisms.

Securing reliable information to judge the validity of requests for accommodation may initially prove challenging. The ADA permits employers to ask questions about the existence of a disability where such questions are job-related and consistent with business necessity.¹²⁹ Although employers are allowed to seek medical information to legitimate the need for accommodation, they are limited to documentation which is “sufficient to substantiate . . . [the] disability” and need for accommodation.¹³⁰ Employers may not

126. See, e.g., Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 197–98 (2005) (describing prima facie case and burden shifting under the ADA).

127. See 42 U.S.C. § 1981a (3) (2006) (“damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.”).

128. See 29 C.F.R. § 1630.2(o)(3) (discussing interactive process).

129. 42 U.S.C. § 12112(b)(6).

130. EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited Mar. 8, 2009). The Guidance

request information about prescription medication or other corrective devices unless the employee is in a position which affects public safety.¹³¹ An employer is also restricted from seeking an independent examination by his own expert unless the documentation provided by the employee is insufficient in some meaningful respect.¹³²

Although these rules have not changed under the new law, the reversal of *Sutton* makes information provided by physicians increasingly important in the disability determination. In order to secure accurate, helpful information about the limitations imposed by employees' impairments, it may be advisable to create a standard form which specifically requests an explanation of the employee's medical limitations and need for accommodation without regard to current medication or other mitigating measures taken by the employee. Ironically, securing such information will be easier for schools and universities in one respect—there is less of a need to carefully balance their desire for knowledge against the fear that such knowledge will set the stage for a regarded as claim. Although the regarded as prong provides for relatively easy class membership in the context of adverse employment actions, it cannot be used to prosecute an action for failure to accommodate.

3. *Increased Litigation*

There is no question that administrators should anticipate a rise in disability litigation in the wake of the ADAAA. In the past, employers have been overwhelmingly successful in defeating disability claims on motions to dismiss and motions for summary judgment. In 2007, for example, employers won 95.5% of all ADA

provides that “[d]ocumentation is sufficient if it: (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.” *Id.* See also EEOC, Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), available at <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>, (last visited Mar. 8, 2009).

131. *Id.*

132. *Id.*

cases, with the majority on the grounds the plaintiff could not establish a protected disability under the ADA.¹³³ The legislation's broadening of the key disability terms and direction to courts to give broad construction to this inquiry will undoubtedly reverse this trend. Attorneys who previously have been unwilling to take on ADA cases because of the virtual certainty of losing may be encouraged to do so in the wake of the ADAAA.¹³⁴ This may be particularly true in the case of plaintiffs with mental impairments, who have filed the second largest number of EEOC claims but who are poorly represented in federal court.¹³⁵

It is worth noting, however, that the change in the law does not guarantee plaintiffs victory in court. The ability of civil rights legislation to change the landscape for people with disabilities depends to a large extent on the willingness of the public to embrace the law's vision of equality. If legislation moves too far from public acceptance, it is unlikely to prove effective in its execution. Judges, who are members of the public, can easily find ways to defeat the Act's purpose within the parameters of judicial discretion. Many have attributed the failure of the original ADA to disability advocates' inability to convince the public of its legitimacy.¹³⁶ The public never signed on to or understood an imagery of disability that encompasses fully functioning individuals.¹³⁷ Uncomfortable with a broad conception of disability, the majority of courts took a very technical and literalist approach to the legislation which limited its reach and potential impact.¹³⁸

133. See Amy L. Allbright, *Employment Decisions Under the ADA Title I – Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 336 (2008).

134. See, e.g., Allison Torres Burtka, *ADA Amendments Take Effect, Broadening Protections*, 45 TRIAL 14, 14 (2009) (speculating that the new law “will make it easier for people with disabilities to find a lawyer to take their cases”).

135. See Hensel & Jones, *supra* note 59, at 73.

136. See, e.g., Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 11 (2000) (describing public backlash against disability rights advocacy).

137. *Id.* at 13.

138. See, e.g., Anderson, *supra* note 109, at 324–25. Professor Anderson has argued that “while the ADA attempts to change the treatment of individuals with disabilities under the law, the judiciary continues to approach the legal questions posed by the Act with a deeply ingrained attachment to

It is possible that this same type of judicial backlash may occur in the wake of the ADAAA, particularly in the employment arena. Although reaction to the legislation overwhelmingly has been positive in light of the cooperation between the business community and disability advocates, this has not universally been the case.¹³⁹ If there once again is a disconnect between society's vision of disability and the sweeping definition in the new legislation, courts will simply find new avenues for limiting the statute's reach. The concepts of "reasonable accommodation" and "undue hardship" have received relatively little attention to date and are sufficiently vague to provide continuing flexibility to courts intent on restricting the ADA's reach.¹⁴⁰

Fortunately, however, the time would seem particularly ripe for a positive and expansive view of impairment. Historically, advances in the understanding and legal treatment of disability have been closely connected to the return of disabled veterans from foreign wars.¹⁴¹ As a result of the war with Iraq and Afghanistan, the next decade will see many such veterans seeking accommodation and acceptance in society.¹⁴² Against this background, the ADAAA has a meaningful chance to significantly alter the playing field for people with disabilities in the workplace.

principles of formal equality that resists any attempts at modification. Despite rejection by Congress and the Supreme Court of judicially crafted limitations on the right to accommodation in the name of formal equality, the judiciary's underlying values remain the same and simply manifest themselves in other ways." *Id.* See also Long, *supra* note 4, at 229 (noting that "[t]he new amendments do virtually nothing to assist courts and potential litigants" with the "host of reasonable accommodation issues [still] unresolved").

139. See, e.g., Grossman, *supra* note 72, at 2; Posting of Richard Tuschman to Florida Employment and Immigration Law Blog, <http://www.femploymentlawblog.com/tags/adaaa/> (Sept. 2, 2008) (describing the ADAAA as "good news for lawyers, bad news for employers").

140. See, e.g., Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 230 (1999) (explaining that the interplay between reasonable accommodation and undue hardship is "complicated" and raises many unanswered questions).

141. See Ann Hubbard, *A Military Coalition for Disability Rights*, 75 MISS. L.J. 975, 995 (2006) ("[D]isability policy has advanced in the wake of . . . wars, prompted by political, social and economic imperatives for the rehabilitation, support, care, education, and reintegration of veterans.").

142. See, e.g., Linda Blimes, *The Battle of the Wounded*, L.A. TIMES, Jan. 5, 2007, at A23 (noting that "more than 200,000 veterans from Iraq and Afghanistan have been treated at VA facilities," some of whom have "crippling disabilities").

B. Eligibility and Academic Accommodations in Higher Education

The ADA requires both public and private universities to provide reasonable accommodations to all eligible students with disabilities who attend or desire to attend their institutions.¹⁴³ In addition, Title III requires testing agencies and professional licensing boards to administer tests in “a place and manner accessible to persons with disabilities.”¹⁴⁴ Students at all levels of education have had greater success in establishing coverage under these provisions than have employees under Title I.¹⁴⁵ Notably, the majority of these cases are lost for reasons other than the plaintiff’s inability to establish a protected disability.¹⁴⁶ The ADA’s newly expanded definition of substantial limitation and overruling of *Sutton* will increase these favorable odds for students, particularly in the context of learning disabilities. Nevertheless, because institutions of higher education have generally taken a broader view of disability and accommodation for students than the law has required,¹⁴⁷ the ultimate impact of this expansion may be limited.

1. The Historical Treatment of Learning Disabilities under the ADA and Rehabilitation Act

Regulations promulgated by the EEOC and DOJ identify learning as a major life activity,¹⁴⁸ and it is no surprise that over 40% of students with disabilities in higher education claim a substantial

143. 42 U.S.C. § 12132 (2006); 42 U.S.C. § 12182(a) (2006). *See also* 29 U.S.C. § 794(a) (applying antidiscrimination mandate to entities receiving federal funds).

144. 42 U.S.C. § 12189 (2006).

145. *See, e.g.,* Waterstone, *supra* note 13, at 1829 (study finding that “success at trial is noticeably less pro-defendant for Titles II and III than Title I”).

146. *Id.* at 1837 (finding 6% of plaintiffs lose at the appellate level on this basis).

147. *See* Craig S. Lerner, “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1078 (2004) (stating that “universities and other institutions of higher learning, when approached by the learning disabled in pursuit of accommodations, often decline to make the threshold challenge that the students are not, as a matter of law, ‘disabled,’ and therefore not legally entitled to accommodations of any sort”).

148. *See* 29 C.F.R. § 1630.2(i) (2008); 28 C.F.R. § 36.104 (2008).

limitation in this activity.¹⁴⁹ All evidence suggests that this number will continue to grow as an increasing number of matriculating students will have received accommodations throughout secondary school.¹⁵⁰ The critical mass of students in this category, however, has not guaranteed their acceptance either on campus or in court. Judicial skepticism that a student can be both substantially limited in learning and academically successful at the same time has made it quite difficult for these students to qualify for legal protection under the ADA.

Once again, the substantial limitation requirement has operated as the primary impediment to class membership in this area. The Supreme Court's decisions in *Sutton* and *Albertson's, Inc. v. Kirkingburg*¹⁵¹ have made it difficult for these students, like most plaintiffs, to establish the degree of limitation necessary to establish a protected disability. Many individuals with learning disabilities, particularly those with Attention-Deficit Hyperactivity Disorder (ADHD), achieve at least moderate control over some aspects of their impairments through the use of medication.¹⁵² The Court made clear in *Kirkingburg*, moreover, that courts must consider all conscious and subconscious self-help measures undertaken by a plaintiff, including the body's internal coping mechanisms, in making the disability

149. See Michael J. Ward, *The Picture of College Freshmen in Greater Focus: An Analysis of Selected Characteristics by Types of Disabilities*, HEATH RESOURCE CENTER, Aug. 2007, available at <http://www.heath.gwu.edu/index.php/News-Stories-from-Previous-Site/The-Picture-of-College-Freshmen-in-Greater-Focus-An-Analysis-of-Selected-Characteristics-by-Types-o.html> (discussing a 2004 study finding that "more freshmen with learning disabilities enter college (35,772) than in the past and they make up a larger percentage of the students with disabilities population (41.8%)"). See also Lerner, *supra* note 147, at 1073 (quoting a study finding that 2.5% of the college population as a whole self-identifies as learning disabled).

150. See, e.g., Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1150 (2007) (discussing the rise in eligibility under the IDEA for learning disabilities); Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 233–34 (2007) (discussing the rising number of students with learning disabilities in higher education).

151. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

152. See Lerner, *supra* note 147, at 1090 (noting that "persons suffering from certain learning disabilities, in particular those falling under the general heading of ADD/ADHD, are now widely medicated").

determination.¹⁵³ As a result, the success of any intentional or unintentional learning strategy employed by these students has simultaneously served to undermine their access to legal protection under the ADA.

Students with learning disabilities are also impeded by the DOJ's direction that courts consider the degree of limitation posed by an impairment in relation to "most people."¹⁵⁴ The problem for most students in higher education, particularly those in graduate or professional school, is that they have attained a level of educational achievement which surpasses the majority of Americans. Some large cities have nearly 50% of their students drop out of high school with no diploma,¹⁵⁵ and nationally less than one-third of all adults attain college degrees.¹⁵⁶ There is abundant evidence that the average person cannot read at a high school level, let alone at a collegiate one.¹⁵⁷ Against this background, a college or professional student's claim that he or she is significantly restricted in learning vis-à-vis a typical adult appears weak at best.

In part, this difficulty has arisen because of the differences between the medical and legal definitions of learning disability. Historically, medical professionals have diagnosed learning disabilities when psychological testing reflects a substantial discrepancy between a student's intellectual capabilities and his

153. *Kirkingburg*, 527 U.S. at 565–66.

154. See 28 C.F.R. pt. 36, app. B (2008) (finding a person substantially limited "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people"). See also *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097, 1109 (9th Cir. 2004) (finding that medical student's ability to achieve academically in early years of program demonstrated that he "is not less able to 'learn' than most people").

155. Ruth Curran Neild, Scott Stoner-Eby & Frank Furstenberg, *Connecting Entrance and Departure: The Transition To Ninth Grade and High School Dropout*, 40 EDUC. & URB. SOC'Y 543, 543 (July 2008).

156. Press Release, U.S. Census Bureau News, One-Third of Young Women Have Bachelor's Degrees (Jan. 28, 2008), available at <http://www.census.gov/Press-Release/www/releases/archives/education/011196.html>.

157. See, e.g., B.D. Weiss et al., *Communicating with Patients Who Cannot Read*, 337 NEW ENG. J. MED. 272 (1997) (discussing 1992 finding that an estimated "40 million to 44 million people, or about one quarter of the adult population in the United States, cannot understand written materials that require only very basic proficiency in reading. These people would generally be unable to read and understand instructions on medication bottles or household cleaning solutions, notes from a child's teacher, or directions on a map.").

actual academic performance.¹⁵⁸ This standard does not reference external norms in the population like the DOJ regulations, but instead focuses on the internal subjective abilities of a particular individual. Under the DOJ's definition, any evidence of even mediocre performance will be sufficient to negate a claim of disability. Under the latter definition, evidence of even superior performance will not be sufficient to negate a claim of disability where the individual is capable of even greater academic achievement.

Some plaintiffs have identified the components of learning as major life activities, such as reading, writing, thinking, concentrating, and studying, in order to overcome this difficulty.¹⁵⁹ This approach, however, has not been widely successful. Although some courts have found writing and reading to be major life activities, most have rejected thinking, concentrating and studying as insufficiently narrow to qualify independently as "major".¹⁶⁰ More problematically, students experience the same difficulties establishing comparative limitations in the components of academic performance that they experience in the broader category of learning.¹⁶¹ Because, on the whole, their skills exceed those of the average person in the general population, they are unable to establish a substantial limitation in even these more narrow activities.

Two cases that are often cited for their treatment of students with learning disabilities under the ADA demonstrate the divergent approaches taken by courts when resolving claims made by

158. See, e.g., Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J. LAW & EDUC. 217, 229–30 (2003) (describing discrepancy model); Lerner, *supra* note 147, at 1088–89.

159. See, e.g., Szmaj v. AT&T, 291 F.3d 955, 956 (7th Cir. 2002) (reading all day long); Thornton v. McClatchy Newspapers, Inc., 292 F.3d 1045, 1046 (9th Cir. 2002) (continuous keyboarding and handwriting); Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 80 (2d Cir. 2000) (learning, reading, writing, studying, test-taking and working); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 627–30 (6th Cir. 2000) (reading and writing); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (3d Cir. 1999) (thinking); Pack v. Kmart Corp., 166 F.3d 1300, 1304–05 (10th Cir. 1999) (concentrating).

160. See, e.g., Taylor, 184 F.3d at 307; Pack, 166 F.3d at 1305.

161. See, e.g., Wong v. Regents of Univ. of Cal., 379 F.3d 1097, 1110 (9th Cir. 2004) (finding academically talented medical student not substantially limited in reading because "the relationship between reading and academic success is sufficiently close to make that argument a difficult one to maintain"); Gonzales, 225 F.3d at 627–30 (6th Cir. 2000).

academically talented students. In *Price v. National Board of Medical Examiners*,¹⁶² three students with learning disabilities sued the NBME seeking extra time on the medical bar exam as well as a separate testing room. All three claimed to have ADHD, and two claimed to also have reading disorders and disorders of written expression, characterized by the court as “specific learning disabilities.”¹⁶³ None had received academic accommodations in high school or college.¹⁶⁴ Although each plaintiff submitted documentation from medical professionals supporting their diagnoses, the court nevertheless concluded that none could establish that their impairments substantially limited the major life activity of learning.¹⁶⁵ Referring to DOJ regulations, the court reasoned that it was required to compare the plaintiffs’ functioning to that of “most people.”¹⁶⁶ Because “each of the students has a history of significant scholastic achievement . . . corroborated by standardized test scores measuring cognitive ability and performance,” the court found no evidence that they could not learn “at least as well as the average person.”¹⁶⁷ This holding has subsequently been cited to suggest that a plaintiff’s status as a graduate student is virtually sufficient, standing alone, to negate class membership on the basis of learning disabilities.¹⁶⁸

The Second Circuit in *Bartlett v. New York State Board of Law Examiners*,¹⁶⁹ on the other hand, favored a careful, individualized assessment of the plaintiff’s limitations regardless of her general

162. *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419 (S.D.W.V. 1997).

163. *Id.* at 422–23.

164. *Id.* at 423–24.

165. *Id.*

166. *Id.* at 426 (internal citations omitted)

167. *Id.* at 427–28.

168. *See, e.g., Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097, 1102 (9th Cir. 2004) (describing district court’s finding that medical student’s “prior academic success, which won him admission to medical school and which continued through the first two years of medical school, was . . . fatally inconsistent with his claim to be disabled”); *Steere v. George Wash. Univ. Sch. of Med. & Health Scis.*, 439 F. Supp.2d 17, 21–23 (D.D.C. 2006) (concluding that medical student did not have a disability, in part, because he “enjoyed a great deal of academic success throughout his life . . . and performed extremely well in many subjects”). *See also* Lerner, *supra* note 147, at 1089.

169. *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 156 F.3d 321 (2d Cir. 2000).

success in academic settings. In that case, the plaintiff, a Ph.D. who had also completed her law degree, claimed that she was disabled on the basis of dyslexia, a reading disorder. She repeatedly applied to take the New York state bar exam, requesting that she be given unlimited or extended time, permission to tape record her essays, and permission to circle her test answers in the booklet rather than on the testing sheet.¹⁷⁰ Each time the Board denied her request, finding that she did not have a legal disability and thus was not entitled to accommodation under the ADA.¹⁷¹ The Second Circuit disagreed, holding that the self-help and adapted learning strategies that she employed to achieve academic success should be excluded from the evaluation of whether she was substantially limited in a major life activity.¹⁷²

As a consequence of the Supreme Court's decision in *Sutton*, the case was remanded to the district court for reconsideration. That court concluded that the plaintiff was not substantially limited in the major life activities of reading or learning because her "history of self-accommodation 'ha[d] allowed her to achieve . . . roughly average reading skills (on some measures) when compared to the general population.'"¹⁷³ The Second Circuit, however, once again disagreed, reasoning that even if the plaintiff had "average skills on 'some' measures," she nevertheless could qualify as disabled if "her skills are below average on other measures to an extent that her ability to read is substantially limited."¹⁷⁴ The court justified this conclusion post-*Sutton* on the basis that "[s]low reading speed is

170. *Id.* at 324.

171. *Id.*

172. *Id.* at 329.

173. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at *1 (S.D.N.Y. 2001). The court also found that the plaintiff was substantially limited in the major life activity of work because she compared unfavorably with persons of "comparable training, skills and abilities." *Id.* (citing *Bartlett v. N.Y. State Bd. of Law Exam'rs (Bartlett I)*, 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997) (internal citations omitted)). The Second Circuit, however, overruled this finding. *Bartlett*, 226 F.3d at 82 (2d. Cir. 2000). Although the court agreed that the practice of law qualified as a "class of jobs," it remanded the decision for further consideration of whether plaintiff's reading impairment, rather than other factors, was a substantial factor in her inability to pass the bar. *Id.* at 83–84.

174. *Bartlett*, 226 F.3d at 81.

clearly a condition or manner that can present a substantial limitation—unlike, perhaps, wearing contact lenses.”¹⁷⁵ Accordingly, *Bartlett* stands for the proposition that past evidence of academic achievement is not sufficient, standing alone, to negate the claim that a student is substantially limited in learning. Instead, courts are required to take a careful look at the method and manner in which the plaintiff achieves her academic success.¹⁷⁶

2. *Legislative History of Learning Disabilities under the ADAAA*

The legislative history of the ADAAA repeatedly references Congress’ desire to reject the position articulated in *Price* and its progeny and affirm the Second Circuit’s approach in *Bartlett*.¹⁷⁷ The Congressional record and the Report of the House Committee on Education and Labor, for example, both conclude that “it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.”¹⁷⁸ Although the report does not reject courts’ comparison of individuals with learning disabilities to “most people,” it cautions that this inquiry “requires a careful analysis of the method and manner” in which the major life activity is performed, referencing dyslexics’ need to read slowly word-for-word.¹⁷⁹ The Report of the House Judiciary Committee seconds this approach, directing courts to evaluate future claims of learning disabilities by evaluating whether a plaintiff’s acts of self-accommodation “restricted [him] as to the condition, manner or duration under which [he] performed” the respective academic activities.¹⁸⁰

175. *Id.* (finding it significant that plaintiff “read . . . slowly, haltingly, and laboriously.”) (citing *Bartlett I*, 970 F. Supp. at 1099).

176. *Id.* at 86.

177. *See, e.g.*, 154 CONG. REC. H8290–91 (daily ed. Sept. 17, 2008); H.R. REP. NO. 110-730, pt. 1, at 10 (2008) (rejecting *Price*, *Gonzales* and *Wong*); H.R. REP. NO. 110-730, pt. 1, at 10 (2008).

178. *See* 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) and H.R. REP. NO. 110-730, pt. 1, at 10 (2008).

179. H.R. REP. NO. 110-730, pt. 1, at 10–11 (2008).

180. H.R. REP. NO. 110-730, pt. 2, at 21 (2008).

Several legislators also made pointed references to the ADAAA's impact on individuals with learning disabilities during the legislative debate. Representative Fortney Stark, for example, held the following exchange with Representative George Miller:

Mr. STARK.

I am pleased that this bill, S.3406, will sustain the rights and remedies available to individuals with disabilities, including individuals with learning disabilities just as in the measure passed by the House, H.R. 3195.

Would the Chairman agree that the measure before us rejects the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning reading, writing, thinking, or speaking?

Mr. GEORGE MILLER of California.

Yes, I would. As chairman of the Education and Labor Committee, I agree that both H.R. 3195 and S. 3406 reject the holding that academic success is inconsistent with the finding that an individual is substantially limited in such major life activities. As such, we reject the findings in *Price v. National Board of Medical Examiners*, *Gonzalez v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*.

Mr. STARK.

I thank the Chairman. Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration.

This legislation will reestablish coverage for these individuals by ensuring that the definition of this ability is broadly construed and the determination does not consider the use of mitigating measures.

Given this, would the chairman agree that these amendments support the finding in *Bartlett v. New York State Board of Law Examiners* in which the court held that in determining whether the plaintiff was substantially limited with respect to reading, Bartlett's ability to "self-accommodate" should not be taken into consideration when determining whether she was protected by the ADA?

Mr. GEORGE MILLER of California.

Yes, I would. As we stated in the committee report on H.R. 3195, the committee supports the finding in *Bartlett*. Our report explains that "an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability."¹⁸¹

Representative Joe Courtney also applauded the bill's extension to this community, arguing that "[t]oo many individuals with documented learning disabilities . . . are denied access to easily administered and often low-cost accommodations that would make the critical difference in allowing them to demonstrate their knowledge. These amendments . . . ensure that each individual with a learning disability has every opportunity . . . [to] move forward in his/her chosen educational and career paths."¹⁸²

Not everyone, however, applauded this aspect of the Amendments. During the hearings on the legislation, eight organizations involved in standardized testing and higher education, including the ACT, National Board of Medical Examiners, and National Conference of Bar Examiners, expressed concern that the legislation could adversely affect entities with obligations under Titles II and III of the

181. 154 CONG. REC. H8290-91 (daily ed. Sept. 17, 2008).

182. *Id.* at H8296.

ADA.¹⁸³ They argued that the number of students seeking accommodation for standardized testing would increase as a result of the legislation, a problematic result because “[t]he provision of such accommodations—especially extra testing time—can affect the comparability of the resulting scores[.]”¹⁸⁴ They noted that “the vast majority of accommodation requests have been based upon LD and/or ADHD diagnoses[.]” both of which are difficult to confirm and difficult to assess in terms of reasonable accommodation.¹⁸⁵ They pointed to a significant “risk of misdiagnosis” in these categories from “flaws in the[ir] diagnostic models” and the incentives to exaggerate in order to secure preferential treatment.¹⁸⁶ As a result, they predicted that passage of the ADAAA in its current form not only would threaten the public with potentially unqualified professionals, but also would increase costs for schools and universities because of new requests for support services and subsequent litigation.¹⁸⁷

The organizations also characterized the inclusion of thinking and concentrating as major life activities as “extremely problematic in an instructional or testing context” because it would unfairly result in accommodations for students not substantially limited in their overall ability to learn.¹⁸⁸ The entities argued that they should be permitted to include “learned behavioral or adaptive neurological modifications” in evaluating disability because behavioral changes needed to do well academically, such as studying longer and working particularly hard, are simply “a normal part of life for everyone” and relevant to an assessment of limitation.¹⁸⁹

183. Letter from ACT, *supra* note 99, at 2. The letter was also signed by the Law School Admission Council, Association of American Medical Colleges, Federation of State Medical Boards of the United States, Inc., Graduate Management Admission Council, and National Council of Examiners for Engineering and Surveying. *Id.* at 5.

184. *Id.* at 3.

185. *Id.* at Attachment B.II.

186. *Id.*

187. *Id.* at Attachment B.IV.

188. Letter from ACT, *supra* note 99, at Attachment C.I.

189. *Id.* at Attachment C.II.

Congress, however, was not persuaded by these arguments and did not alter the disability definition in the ADAAA. It did, however, attempt to alleviate the concerns of higher education by adding a provision in the legislation reaffirming that public accommodations are not required to provide modifications that would fundamentally alter the nature of the goods or services of the institution, including, explicitly, “academic requirements in postsecondary education.”¹⁹⁰ The Report of the House Committee on Education and Labor likewise confirms that colleges and universities do not need “to eliminate academic requirements essential to the instruction being pursued by a student,” but counsels that they may need “to make modifications in order to enable students with disabilities to meet those academic requirements,”¹⁹¹ like “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”¹⁹² The Report also states that Congress intends to permit institutions of higher education and licensing boards to continue to require “appropriate and reasonable” documentation in order to determine eligibility under the Act.¹⁹³

One Senator also added his voice to the concern that the ADAAA not be read to override the discretion of professional licensing boards. Senator John Barrasso, a physician, reasoned that “[i]t is vital that standardized testing organizations not be required to fundamentally alter key performance measurements when providing reasonable accommodations to students with disabilities.”¹⁹⁴ He contended that the decision “whether an accommodation is reasonable should be left to the licensing board,” at least in the context of physicians.¹⁹⁵ Because of the potential public health implications, he advocated that

190. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 6, 122 Stat. 3553 (2008) (amending 42 U.S.C. § 12201(f)).

191. H.R. REP. NO. 110-730, pt. 1, at 11 (2008).

192. *Id.*

193. *Id.*

194. 154 CONG. REC. S8355 (daily ed. Sept. 11, 2008).

195. *Id.*

“[w]hen a testing organization or a licensing board has made a decision in good faith about an appropriate accommodation, the decision should be given great deference.”¹⁹⁶

3. *Future Impact on Higher Education*

The ADA's repeal of *Sutton* and statutory recognition of thinking, concentrating, reading, and communicating as major life activities will undoubtedly increase the number of students with learning disabilities who qualify for legal protection. The ultimate impact of this expansion, however, is unclear at this point. Many colleges and universities in the past have taken a broader approach to disability than the law requires when responding to requests for accommodation by students. Some disability coordinators in colleges and universities have focused on whether the accommodations would “enable the individual student to realize his or her full academic potential” rather than whether they are legally required or likely to impact “the integrity of a school’s academic program.”¹⁹⁷ In these institutions, there may be little appreciable change as a result of the revised legislation.

Even if the ranks of students with disabilities remain relatively constant, however, there is little doubt that disputes will continue to arise over some students’ coverage under the ADA. Although the ADA will provide guidance in many cases, significant ambiguity remains in the wake of the amendments. Colleges and universities will continue to struggle with the meaning of “substantial limitation” and the actionable line between minimal and severe effects.¹⁹⁸ The

196. *Id.*

197. Tracey I. Levy, *Legal Obligations and Workplace Implications for Institutions of Higher Education Accommodating Learning Disabled Students*, 30 J.L. & EDUC. 85, 86 (2001) (explaining that disability coordinators are typically clinicians “with little or no training in the actual legal requirements of the federal anti-discrimination laws”). See also Lerner, *supra* note 147, at 1117–22.

198. See Council on Law in Higher Education, *The ADA Amendments Act: Overview and Analysis*, available at <http://www.clhe.org/clhe/wp-content/uploads/2009/01/eiada2008.pdf> (September, 2008) (“Unless more clarity is provided in the legislation, there will be significant confusion as to what constitutes ‘significantly limits.’ This would be one of the core issues colleges and universities would have to wrestle with when complying with the changes to the ADA.”).

requirement that students with disabilities be compared to the “most people” stands unaltered, and it is unclear how courts will apply this language going forward. Although Congress’ direction to interpret disability broadly is helpful to some extent, those courts unfamiliar with the legislative history of the ADAAA or unwilling to consider its direction are left with significant discretion.

With respect to those students covered by the ADAAA, litigation in this area will increasingly focus on the appropriate scope of legally required accommodations. In the past, courts have given significant deference to institutions’ academic judgment.¹⁹⁹ In *Wynne v. Tufts University School of Medicine*, for example, the First Circuit held that if an institution fully considers the availability, feasibility, and cost of all modifications and makes “a rationally justifiable conclusion that [an accommodation] would result either in lowering academic standards or requiring substantial program alteration,” the duty of reasonable accommodation is satisfied as a matter of law.²⁰⁰ There is no question that the legislative changes will result in renewed attention to this standard and the ADA’s accommodation imperative.

The first appellate case to consider the treatment of learning disabilities under the ADAAA confirms this conclusion. In *Jenkins v. National Board of Medical Examiners*,²⁰¹ the plaintiff, a third-year medical student, was diagnosed with a reading disorder early in life and had received accommodations throughout his academic career.²⁰² He petitioned the NBME for accommodations on his medical board examinations and, following the NBME’s refusal to award them, filed for an injunction in district court. The district court heard extensive evidence from plaintiff’s medical expert and concluded that it was “clear from the record” that the plaintiff “does not read at the same rate as many, if not most people,” and that the condition “has unquestionably made it more difficult for [him] to keep up with a

199. Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349, 368 (2008).

200. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (en banc).

201. *Jenkins v. Nat’l Bd. of Med. Exam’rs (Jenkins II)*, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009).

202. *Id.* at *1.

rigorous medical school curriculum and to succeed on written tests where he is under time constraints.”²⁰³ Judging by the “average person’s life” rather than a “medical student’s life,” however, the court, relying on *Toyota*, concluded that the plaintiff could not establish a substantial limitation because he was still able to perform reading tasks “central to daily life,” such as reading a newspaper or menu.²⁰⁴

The ADAAA went into effect before the Sixth Circuit heard the case on appeal. In an unpublished opinion, the court concluded that the revised statute applied because the plaintiff sought the “right to receive an accommodation on a test that will occur in the future” rather than damages for prior acts of discrimination.²⁰⁵ The court remanded the case for reconsideration in light of the ADAAA, noting that “the categorical threshold scope of the ADA’s coverage has been broadened.”²⁰⁶ Although the court declined to provide further clarification of the new legislation, it counseled that the “breadth” of the revised definition of disability “heightens the importance of the district courts’ responsibility to fashion appropriate accommodations.”²⁰⁷ It cautioned the lower court that even if it found the plaintiff to be disabled, it still must

determine specifically what NBME must do to comply with the requirement that a professional licensing board offer its examination “in a place and manner accessible to persons with disabilities.” This nuanced determination is not governed by previous, voluntarily provided accommodations that Jenkins has received, nor necessarily by what accommodations were required under the narrower previous definition of disability.²⁰⁸

203. *Jenkins v. Nat’l Bd. of Med. Exam’rs (Jenkins I)*, No. 3:07-CV-698-H, 2008 WL 410237, at *1 (W.D. Ky. Feb. 12, 2008).

204. *Id.* at *2–3.

205. *Jenkins II*, 2009 WL 331638, at *1.

206. *Id.* at *4.

207. *Id.*

208. *Id.* (citing 42 U.S.C. § 12189).

The court provided no insight into the more difficult question—how courts under the new legislation should balance an individual student’s need for accommodation against the need to maintain the integrity of higher education and licensing exams. This complicated issue is likely to pose a continuing challenge for administrators and courts in the foreseeable future.

C. Eligibility and Academic Accommodations in Elementary and Secondary Schools

The ADAAA will undoubtedly expand eligibility for students with disabilities in elementary and secondary school seeking accommodations pursuant to § 504 of the Rehabilitation Act. This may prove to be problematic for schools, particularly in the context of children with learning disabilities. The newly liberal § 504 eligibility standards are in tension with the restrictive threshold interpretation that some courts and administrative hearing officers have given to learning disabilities under the Individuals with Disabilities Education Act (IDEA).²⁰⁹ This conflict has the potential to result in confusion for administrators and the inconsistent treatment of similarly situated children.

1. § 504 and Child Find Obligations in K-12

There is no question that the broader definition of disability adopted in the ADAAA will expand eligibility under § 504 to at least some extent. Administrative hearing officers and courts have cited *Sutton* in several cases finding that the major life activities of these students were insufficiently limited to establish coverage under the Rehabilitation Act. One case, for example, involved a student with severe asthma who ultimately died from an asthma attack at school.²¹⁰ The court reasoned that the student was not substantially limited in a major life activity because, with the use of his inhaler, his

209. 20 U.S.C. §§ 1400–91 (2006).

210. *Garcia v. Northside Indep. Sch. Dist.*, No. SA-05-CA-0218 FB(NN), 2007 WL 26803, at *1 (W.D. Tex. Jan. 3, 2007).

“breathing was regulated to such a degree that he succeeded in school, played with friends like a normal child, and participated in a wide range of physical activities.”²¹¹ Similar logic has been used to deny eligibility to students with severe allergies, ADHD, diabetes and other impairments.²¹² These students and others with disorders that are relatively well controlled on medication will have a significantly better chance of securing § 504 coverage as a result of the new legislation.

The future treatment of students with learning disabilities is more uncertain. Not surprisingly, the logic articulated by courts in a higher education context has extended as well to K-12 students seeking protection for learning disabilities. Students performing at or above grade level generally have not been able to show a substantial limitation in learning under § 504 even when they take significantly longer to complete assignments, use medication, or employ significant self-help strategies to achieve academic success.²¹³ This has occurred both as a result of *Sutton’s* direction to consider

211. *Id.* at *4.

212. *See, e.g.*, Kropp v. Me. Sch. Admin. Union #44, Civil No. 06-81-P-S., 2007 WL 551516, at *17 (D. Me. Feb. 16, 2007) (“For a typical asthmatic treated with corticosteroids . . . , it can be very difficult to demonstrate a substantial limitation in the ability to breathe.”); Block v. Rockford Pub. Sch. Dist., No. 01 C 50133, 2002 WL 31856719, at *2 (N.D. Ill. Dec. 20, 2002) (finding student not disabled on the basis of asthma and allergies where disorder was controlled through inhaler); Smith v. Tangipahoa Parish Sch. Bd., No. 05-6648, 2006 WL 3395938, at *8 (E.D. La. Nov. 22, 2006) (finding student with severe allergies who took daily medications and carried an EpiPen at all times not substantially limited in breathing because there was only the “potential” for a severe reaction in some circumstances); Hopkinton Pub. Sch., 105 LRP 34753, at *12, (Mass. SEA July 19, 2005) (reversing school’s finding that student with ADHD was no longer substantially limited in the major life activity of learning based on her academic success where success was achieved only through accommodations previously offered by school); Gloucester County Pub. Sch., 49 IDELR 21, at *1 (OCR Jan. 28, 2007) (rejecting school’s finding that student with severe nut allergy that could result in death was not eligible under § 504); Marshall v. Sisters of Holy Family of Nazareth, 399 F. Supp. 2d 597, 605 (E.D. Pa. 2005) (finding no disability where student with moderate behavioral problems performed well academically).

213. *See, e.g.*, Jefferson County Pub. Sch., 37 IDELR 127 (OCR Apr. 15, 2002) (denying eligibility where student tested in the average range); Narragansett Sch. Comm., 105 LRP 20240 (RI SEA Sept. 16, 2004) (finding student with learning disabilities not substantially limited compared to average students). *See also Proper Scope of Coverage for the Americans with Disabilities Act: Testimony Before the Comm. on Health, Education, Labor, & Pensions*, at *3, 110th Cong. (2008) (testimony of Sue Gamm) [hereinafter *Gamm Testimony*], available at <http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=061408sgsenate.pdf> (noting a “long time practice by school districts across the country” denying § 504 eligibility to students with learning disabilities who are “performing adequately in the classroom and school generally”).

mitigating measures and because of the requirement that students demonstrate a substantial limitation in learning in comparison to the average child. In *Needham Public Schools*, for example, a high school student diagnosed with “mild dyscalculia and weaknesses in executive functioning and processing speed” sought extended time for in-class tests.²¹⁴ The school conceded that she needed the additional time to complete her tests, and her parents argued that she “compensates for her documented learning disability by spending an inordinate amount of time on homework and extra credit assignments to make up for poor test grades.”²¹⁵ Despite this evidence, the hearing officer concluded that she did not have a disability because “Section 504 calls for comparing Student’s functioning to the average person her age, not her own potential given accommodations.”²¹⁶ The officer reasoned that

even if Student struggles with completing some tests or assignments in a timely manner [or] . . . her problems with executive functioning prevent her from achieving to her maximum potential on timed tests, or . . . cause[] her to occasionally fail tests, her overall skill level and performance is as good as or better than that of the average student her age.²¹⁷

The hearing officer refused to consider whether plaintiff’s self-accommodating measures should be taken into consideration because there was “insufficient evidence of whether and how the amount of time Student spends on school work is excessive.”²¹⁸

Many of the cases denying eligibility to academically-talented plaintiffs because of the success of mitigating measures employed are in tension with the position adopted by the Office Civil Rights (OCR), the agency within the Department of Education charged with

214. *Needham Pub. Sch.*, 106 LRP 32299, at *1 (MA SEA May 30, 2006).

215. *Id.*

216. *Id.* at *10.

217. *Id.* at *9.

218. *Id.*

enforcing § 504 in elementary and secondary schools.²¹⁹ In 2000, OCR issued an Investigative Guidance for enforcement offices on the impact of *Sutton*.²²⁰ The Guidance makes clear that a distinction should be made between a school's obligation to provide a free appropriate public education under § 504 and an employer's obligation to provide reasonable accommodation under the ADA. It explains that "[a] mitigating measure is a device or practice that a student *uses on his or her own* to reduce or eliminate the effects of the student's impairment . . . *without any action or assistance by the school*."²²¹ If a learning modification is provided by or under the control of the educational institution, the Guidance precludes its consideration in evaluating eligibility. As a result, schools are required to ignore "the impact of reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services . . . when evaluating whether a student's impairment substantially limits a major life activity."²²²

The ADAAA's potential to expand coverage under § 504 beyond even this relaxed approach raised concerns among schools and administrators during the legislative process. On July 14, 2008, the Senate Committee on Health Education, Labor, and Pensions heard testimony from Sue Gamm,²²³ an educational consultant, on the bill's potential impact on elementary and secondary schools. She argued that *Sutton's* rejection, combined with the expansion of coverage to students with learning disabilities performing at or above grade level, "could have a profound impact on the legal obligations of elementary schools."²²⁴ She contended that the legislation would significantly increase the cost of child-find activities because it requires more evaluations, assessments and accommodations, all of which carry the

219. See 34 C.F.R. § 104.31 et seq.

220. OFFICE OF CIVIL RIGHTS, SUTTON INVESTIGATIVE GUIDANCE: CONSIDERATION OF "MITIGATING MEASURES" IN OCR DISABILITY CASES, 1 (Sept. 29, 2000), http://www.diabetes.org/uedocuments/Sutton_Investigative_Guidance.pdf.

221. *Id.* at 3 (emphasis added).

222. *Id.* at 4.

223. Gamm testified "Representing the Interests of Elementary and Secondary Education Public Consulting Group." *Gamm Testimony*, *supra* note 213.

224. *Id.* at *1.

potential for increased litigation against school districts.²²⁵ She noted particular concern with the “very large numbers of nonproficient readers” in most schools, many of whom experience difficulty because of poor classroom instruction rather than learning disabilities.²²⁶ She argued that a relaxed standard of disability “could very well open a flood gate of Section 504 eligibility” by extending legal protection to all of these students.²²⁷ Because schools already make informal arrangements to assist students with health problems, and only a limited number of cases have been brought under § 504, she concluded that the current law was adequate to protect the needs of K-12 students.²²⁸

Congress, however, was not persuaded by these concerns. The ADAAA makes clear that schools evaluating eligibility under § 504 are no longer permitted to refer to any mitigating measures employed by the student, regardless of whether such measures come in the form of medication, assistive technology, or self-help measures. The student who has severe asthma will likely be covered despite his use of an inhaler, and the student capable of high levels of academic achievement now at least has the opportunity to secure legal protection on the basis of a learning disability. Schools necessarily will need to change their eligibility evaluation procedures to the extent they are inconsistent with these new standards.

The ultimate impact of this change, however, is again uncertain. One expert has concluded that the number of students receiving accommodations pursuant to § 504 is likely to expand significantly, perhaps even doubling as a result of the ADAAA.²²⁹ Coverage may increase not only because of the adoption of a broader understanding of substantial limitation, but also because the formal inclusion of

225. *Id.* at *1–2.

226. *Id.* at *4.

227. *Id.* at *6.

228. *Id.* at *1.

229. [Specialedconnection.com](http://www.specialedconnection.com), House passes ADA Amendments Act to Mixed Reviews – Sept. 17 2008, <http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetStory?docid=4956397&printer=1> (last visited Mar. 12, 2009) (comments of Bruce Hunter, Associate Executive Director of the American Association of School Administrators).

thinking and communicating as major life activities may facilitate eligibility for students who cannot show limitation in the more expansive category of learning.²³⁰ Although there are relatively few reported cases on eligibility under § 504,²³¹ it may be misleading to rely on these numbers because parents only rarely file formal challenges to school districts' decisions, and most that are filed are resolved prior to formal resolution.²³² At a minimum, those school districts with a past practice of routinely denying coverage to any student with learning disabilities performing near grade level should see a meaningful increase in coverage under the ADAAA.²³³

Some commentators, however, believe that the new law will have little impact overall for elementary and secondary schools. Many schools have provided 504 plans to students more readily than the law has required.²³⁴ Few 504 teams include attorneys schooled in disability law, and the focus in eligibility determinations is often on

230. Specialedconnection.com, Efforts to Broaden Scope of "Disability" Could Create Larger Pool of 504 Students – June 24, 2008 <http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetStory?docid=4802297&printer=1> (last visited Mar. 12, 2009) (comments of Attorney Gary Ruesch).

231. See, e.g., *Gamm Testimony*, supra note 213, at * 1 (noting "the dearth of litigation or OCR activity in the area of Section 504/ADA eligibility for elementary and secondary education students").

232. Although there is little evidence available on this point in the context of § 504 disputes, a recent study found "more than 80 percent of requests for due process—a legal remedy outlined in the federal Individuals with Disabilities Education Act—never get to the point at which a hearing is held." Christine A. Samuels, *States Found Moving to Head Off Due Process Hearings*, 27 EDUC. WEEK 12 (June 13, 2008). See also Posting of Charles Fox to Special Education Law Blog, http://specialedlaw.blogs.com/home/parent_advocacy/ (Aug. 3, 2008, 12: 37 EST) ("The simple reality is that parents file due process in incredibly small numbers relative to the violations of the law that occur systematically and frequently.").

233. See *Gamm Testimony*, supra note 213, at *3. See also Specialedconnection.com, Experts Weigh In on Key Provisions of ADA Amendments Act – Oct. 3, 2008, <http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetStory?docid=4994360&printer=1> (last visited Mar. 12, 2009). Jeff Simering, legislative counsel for Council of Great City Schools, argued that "[i]t's disingenuous for people to continue to propound the concept that these changes in the ADA are going to have almost no effect on elementary and secondary schools." *Id.*

234. See, e.g., Specialedconnection.com, Disability Advocates Defend ADA Bill, Call Section 504 Fears Unwarranted – June 20, 2008, <http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetStory?docid=4797471&printer=1> (last visited Mar. 12, 2009). Ron Hager, Senior Staff Attorney for National Disability Rights Network, commented that the law "really shouldn't have that big of an impact on schools. I never saw the school districts following that line of Sutton cases, in determining who was a person with a disability." *Id.* See also Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only Students,"* 92 NASSP BULLETIN 19, 21 (Mar. 2008) (citing study speculating that "districts may be overidentifying students under Section 504 from families at either extreme of socioeconomic status").

the instructional needs of the student without regard to the law's requirements, a parallel phenomenon to that experienced in higher education.²³⁵ To some extent, moreover, there have been incentives for school administrators to err on the side of over-inclusiveness under § 504 because affixing a disability label to higher functioning students can “help the principal make adequate yearly progress under NCLB, assuage parents who seek extra testing time . . . [and] add[] leverage to get teachers to differentiate instruction and otherwise provide individually responsive adjustments to students.”²³⁶ Notably, even if eligibility requests increase, the relatively small number of students receiving services under § 504 in comparison to the IDEA population suggests that schools will see, at most, a modest impact from these changes.²³⁷

If there is a meaningful increase in the number of requests for accommodation, it is most likely to occur at the high school level. A 504 plan for these students brings the potential for “shortened homework assignments, additional and personalized assistance, exemptions from otherwise required classes, and accommodations on exams,” including the SAT and ACT.²³⁸ Although there is always stigma attached to a label of disability, the 504 plan is often perceived to carry less prejudice than would participation in special education classes.²³⁹ As a result, some commentators and scholars have speculated that 504 plans are “the vehicle of choice” for high-income parents seeking advantageous treatment for children on standardized tests, particularly since the SAT voluntarily agreed to

235. See, e.g., Holler & Zirkel, *supra* note 234, at 34. The authors' study found that 504 teams did not follow “judicial interpretations of the Section 504 eligibility definition” and tended to over identify 504 students. They attribute this finding in part to the “professional orientations” of the 504 team, which suggest that “the ‘right’ educational frame of reference” is to “look[] at the child’s potential and analyz[e] the child’s functioning without mitigating measures[.]” *Id.* at 36.

236. *Id.* at 36–37.

237. See *id.* at 30 (study suggesting that “504-only students” represent approximately 1.2% of the public school population).

238. Lerner, *supra* note 147, at 1075.

239. See, e.g., Perry A. Zirkel, *Suspensions and Expulsions Under 504: A Comparative Overview*, 226 WEST’S ED. L. RPT. 9, 11 n.18 (2008) (noting that schools at times will provide § 504 coverage to a student eligible under the IDEA because of “parental perceptions of stigma” attached to special education).

cease its practice of flagging the test scores achieved under non-standard conditions in 2003.²⁴⁰

Not all scholars and commentators, however, would agree with this prediction. Many would reject both the conclusion that there is widespread abuse of accommodation requests and the belief that extra time for students with learning disabilities provides an unfair advantage on standardized tests.²⁴¹ As a result, the ADAAA's impact on accommodation requests at the high school level should prove to be a fruitful area for future study.

2. *Tension Between ADAAA & IDEA's Treatment of Learning Disabilities*

One little discussed aspect of the ADAAA's broadened definition of disability is the tension it creates between the identification of learning disabilities under the IDEA and § 504. These two statutes cover some, but not all, of the same students in public education. Students who are eligible under the IDEA will virtually always be covered under § 504 because they have an impairment which substantially limits the major life activity of learning.²⁴² The contrary,

240. Holler & Zirkel, *supra* note 234, at 21–22 (citing Los Angeles Times article reporting abuses by “upper-income game players” who received extra time on the SAT through 504 plans); Letter from ACT, *supra* note 99, at 3 (predicting that “[t]he number of individuals requesting accommodations” for standardized testing “would increase” following passage of the ADAAA).

241. See, e.g., Hensel, *supra* note 150, at 1191–93; Mark Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 126 (2009) (“It has . . . become clear that one common criticism of the LD concept, the charge that rich parents buy LD diagnoses for their children in order to secure accommodations that confer a competitive advantage in school, is an urban legend.”); Testimony of Jo Anne Simon, Esquire, *H.R. 3195 and Determining the Proper Scope of Coverage for the Americans with Disabilities Act Before the Comm. on Health, Education, Labor, & Pensions*, 110th Cong. (July 15, 2008) available at http://help.senate.gov/Hearings/2008_07_15/2008_07_15.html (rejecting the “popular myth . . . that students without disabilities seek accommodations on the SAT and other tests in order to achieve a competitive edge on the test,” arguing that several scientific “studies have shown that students without disabilities do not perform significantly better with extended time; students perform significantly better with extended time only when they need the accommodations because of a learning disability.”). Cf. Holler & Zirkel, *supra* note 234, at 33 (study finding “no significant difference in the percentage of 504-only students with respect to school wealth”).

242. See, e.g., Letter to Veir, 20 IDELR 864, at *3 (OCR Dec. 1, 1993) (stating that the Office of Civil Rights “cannot conceive of any situation” where a child would be eligible under the IDEA but not under § 504); OCR Sutton Investigative Guidance, *supra* note 220, at 3 (when a school finds a student eligible under the IDEA, this creates “a strong, although rebuttable, presumption that the condition, with

however, is not true. Although some students receiving § 504 services will be covered under the IDEA, this generally will be the exception rather than the rule.²⁴³

Despite these differences, one might expect significant overlap between the statutes with respect to the identification and accommodation of students with learning disabilities. One study found that more than 25% of students receiving 504 plans qualify on the basis that they are substantially limited in the major life activity of learning.²⁴⁴ Likewise, approximately 45% of children receiving services under the IDEA qualify on the basis of specific learning disabilities.²⁴⁵ In practice, administrators applying either statute will use the same definition when evaluating eligibility for these students because OCR historically has relied upon the definition of specific learning disabilities (SLD) that appears in the IDEA when assessing eligibility under § 504.²⁴⁶

The IDEA defines SLD to mean “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations[.]”²⁴⁷ Following the reauthorization of the IDEA in 2004, DOE regulations require the following showing in order to establish a learning disability: (1) “the child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the enumerated areas;” (2) “[t]he child does not make sufficient progress to meet age or State-approved grade-level standards . . . when using a process based on the child’s

any mitigating measures used, is an impairment that substantially limits a major life activity such as learning or reading”).

243. Holler & Zirkel, *supra* note 234, at 20.

244. *Id.* at 35.

245. Weber, *supra* note 241, at 123 (noting that children with learning disabilities comprise “about 45%” of all students eligible under the IDEA).

246. 34 C.F.R. pt. 104, app. A(3) (2007) (stating that OCR will interpret “specific learning disabilities” “as it is used in Section 602 of the Education of Handicapped Act, as amended”). *See also Gamm Testimony*, *supra* note 213, at *2 (noting that “[t]he OCR, U.S. Department of Education, has historically relied upon the definition of a specific learning disability (SLD) provided in IDEA”).

247. 20 U.S.C. § 1401(30) (2006). *See also* 34 C.F.R. 300.8(c)(10) (2008).

response to scientific, research-based intervention” or “exhibits a pattern of strengths and weaknesses in performance, achievement, or both . . . that is . . . relevant to the identification of a specific learning disability,” and (3) other non-disability related reasons for these difficulties are adequately eliminated.²⁴⁸

Despite the statutes’ reliance on the same definition, eligibility for students with learning disabilities may vary significantly between the statutes in the wake of the ADAAA. The Amendments make clear that in evaluating whether an impairment substantially limits a child’s ability to learn under the Rehabilitation Act, eligibility teams may not consider the effects of mitigating measures taken by the student, such as adaptive learning strategies, classroom modifications, and other supports and services. The same is not always true in IDEA eligibility cases. Some courts and administrative hearing officers routinely consider the success of mitigating measures when evaluating whether a child’s impairment “adversely affects” his academic performance. If the child performs adequately with supports and services in the classroom that do not technically meet the definition of “special education,”²⁴⁹ the child cannot establish the required “adverse effect” on educational performance.²⁵⁰ Because there is little agreement concerning which services qualify as “special education,”²⁵¹ this approach often results in the denial of eligibility and fails to recognize that the child’s impairment must have affected

248. 34 C.F.R. 300.309(a).

249. The IDEA defines “special education” as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability[.]” 20 U.S.C. § 1401(25). The regulations explain that “specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to meet the unique needs of a child with a disability.” 34 C.F.R. § 300.39.

250. See, e.g., *R.B. v. Napa Valley Unified Sch. Dist.*, 43 IDELR 188, 192 (N.D. Cal. 2005) (finding no adverse effect on educational performance in part where plaintiff’s performance improved following the implementation of a behavioral support plan under section 504); *George West Indep. Sch. Dist.*, 35 IDELR 287, 288 (finding no adverse effect on educational performance where student was capable of performing well academically in the classroom as the result of an amplification system provided pursuant to § 504); *Fenton Area Pub. Sch.*, 44 IDELR 223, 224 (Mich. SEA 1995) (finding student ineligible where significant outside tutoring resulted in good academic performance, acknowledging that “[i]t is because Student X has been able to achieve in school, possibly in part because of this remediation, that she is not eligible for special education”) (emphasis added).

251. See Hensel, *supra* note 150, at 1174-77.

educational performance in some negative respect in order to trigger the need for the supports and services in the first instance.²⁵²

Equally problematic are those jurisdictions that categorically exclude students who are performing adequately in the classroom from eligibility under the IDEA. Although the statute and regulations do not contain qualifying language about the degree of impact a child must show for eligibility, many courts and hearing officers have required children to demonstrate a “significant” or “substantial” negative impact on educational performance in order to establish coverage under the IDEA.²⁵³ For these decision makers, any evidence of passing grades, success on statewide assessments, or performance at or above grade level can be sufficient to defeat a claim whether or not the student shows that it is significantly more difficult to achieve that success because of slow reading time, concentration difficulties, or similar limitations.²⁵⁴

Notably, some scholars have criticized this approach as inconsistent with the letter and spirit of the IDEA, just as in the ADA context.²⁵⁵ Many jurisdictions agree and award eligibility when the child’s impairment makes performance more difficult in any material aspect, or where performance would be enhanced or improved with the addition of supports and services.²⁵⁶ In those jurisdictions that

252. *See id.* at 1172-73. Interestingly, in many of these cases, the child has received services because he has been found eligible under the Rehabilitation Act. *Id.* The denial of eligibility because of the success of mitigating measures conflicts with an opinion letter issued by the Office of Special Education Programs (OSEP). OSEP directs eligibility teams to consider the supports and services provided to the child who is passing from grade to grade because “the child’s current educational achievement [may] reflect[] the service augmentation [and] not what the child’s achievement would be without such help.” *In re Pawlisch*, 24 IDELR 949, 961 (OSEP 1996).

253. *See Weber*, *supra* note 241, at 103-09 (detailing case law).

254. *See, e.g., id.*; Robert A. Garda, Jr., *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J. LAW & EDUC. 291, 311-15 (2006); Hensel, *supra* note 15050, at 1177 (“[C]ourts and hearing officers regularly conclude that any child capable of academic success cannot establish the requisite need for services under the statute” even when the child must work “significantly harder than a typical student in order to achieve comparable success.”).

255. *See, e.g., Hensel*, *supra* note 150 at 1161-62; *Weber*, *supra* note 241, at 121.

256. *See, e.g., Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp. 2d 906, 918-19 (M.D. Tenn. 2000) (overruling ALJ’s determination that child’s “reasonable progress in school” negated her ability to show her impairment adversely affected her educational performance where she was repeatedly expelled from school while in a regular learning environment); *Dighton Rehoboth Regional Sch. Dist.*, 45 IDELR 146 (concluding student could establish an adverse effect on educational

adhere to the contrary approach, however, the potential for treating similarly situated students differently under the two statutes remains. Students who are capable of meaningful academic performance may be automatically excluded from protection under IDEA while potentially eligible for accommodations under the Rehabilitation Act despite the statutes' reliance on the same definition of learning disabilities.

This disconnect is likely to grow as schools increasingly shift to a Response to Intervention model (RTI) of identifying learning disabilities under the IDEA.²⁵⁷ As discussed earlier, the discrepancy model has historically been the preferred method of identifying learning disabilities.²⁵⁸ This approach will diagnose learning disabilities when a high achieving student demonstrates a discrepancy between his intellectual ability and his academic performance, even if his overall performance is impressive.²⁵⁹ In contrast, the RTI method diagnoses learning disabilities by presenting students performing poorly in the classroom with a series of teaching interventions to redress academic deficiencies. If the student fails to respond to several such interventions, a learning disability is identified as the likely source, and eligibility under the IDEA follows.²⁶⁰ As is immediately apparent, this approach will never identify the student performing adequately in the classroom as eligible under the IDEA.²⁶¹

During her testimony to the Senate Committee on Health, Education, Labor and Pensions, Sue Gamm used the conflict between expanded 504 eligibility standards and the RTI method of identifying learning disabilities to argue against the bill's passage:

performance despite receiving good grades where student was unable to attend school and received tutoring at home).

257. See Hensel, *supra* note 150, at 1161 (explaining the Response to Intervention methodology).

258. See sources cited *supra* note 158.

259. See Hensel, *supra* note 150, at 1160.

260. See, e.g., Weber, *supra* note 241, at 127–29 (describing RTI model of identifying learning disabilities).

261. See, e.g., Nancy Mather & Nadeen Kaufman, *Introduction to the Special Issue, Part Two: It's About the "What," the "How Well," and the "Why,"* 43 *PSYCHOL. IN THE SCH.* 829, 831 (2006) (noting that the RTI method does not recognize that "[i]ntelligent people can have SLD").

With a new definition for substantial limitation in favor of a broad scope of protection, a valid question remains regarding the extent to which students with poor academic performance who have a reading impairment (which is likely to be most of them unless school officials find the student lacked appropriate instruction) will be eligible for legal protection and mandated accommodations under Section 504. Furthermore, with H.R. 3195's mandate to consider the substantial limitation requirement without regard to mitigating measures, such as early intervention services or medication, school districts *could be required to superimpose Section 504 evaluation, planning and procedural safeguards requirements upon the Response to Intervention model*. Such a scheme is the antitheses to that envisioned by the 2004 IDEA Reauthorization and *Rethinking Learning Disabilities*:

Given that the underlying causes of most early reading difficulties are similar for children regardless of whether they are currently served in special or compensatory education programs, we argue that the most valid and efficient way to deliver this early intervention in reading is through regular education. This approach allows limited funds to be targeted at intervention rather than expensive eligibility determination practices.²⁶²

It may be that treating learning disabilities differently under the two statutes is justified given that eligibility under the IDEA allocates funding to elementary and secondary schools and provides significant due process protections to students. It strains common sense, however, to say that a student is substantially limited in learning for purposes of § 504 but cannot establish a learning disability in the same academic setting for purposes of the IDEA. It would seem that students, educators, and administrators all would benefit from a more

262. *Gamm Testimony*, *supra* note 213, at *6 (emphasis added). *Cf. Weber*, *supra* note 238, at 133–43 (discussing difficulty of using RTI to identify learning disabilities).

consistent, seamless treatment of learning disabilities rather than a shifting array of eligibility standards for similarly situated students. It remains to be seen how elementary and secondary schools will respond to this new challenge.

CONCLUSION

The ADAAA offers hope to the millions of people in the United States who have experienced physical or mental disabilities during their lifetime. The ADAAA rejects courts' narrow approach to eligibility under the statute and restores Congress' original intent to provide broad legal protection from disability discrimination in society. There is no question that the changes occasioned by the new legislation will pose challenges to schools and universities in the future. In many respects, however, these challenges will be tied to the fundamental mission of these institutions—providing education to enable all students, impaired or otherwise, to reach their human potential.

