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ADA AMENDMENTS ACT OF 2008: Implications for Employers and Education Institutions

Meghan Hayes Slack*

DISABILITY DISCRIMINATION

Throughout history, people with disabilities have suffered innumerable indignities and faced challenges in virtually every aspect of their lives.¹ In the early 1900s, people with disabilities were often confined to their homes, care facilities and mental institutions, thereby isolated from the general public.² Federal disability initiatives, which began to appear after World War I, allowed individuals with disabilities to make substantial gains socially, politically and medically.³ Despite this progress, the

* J.D. Candidate, Suffolk University Law School, 2010; M.P.A. Candidate, Suffolk University, 2010; B.A., Emerson College, 2001. Ms. Slack may be contacted at mhayessuffolk@aim.com.

¹ See Polly Welch & Chris Palames, *A Brief History of Disability Rights Legislation in the United States*, in STRATEGIES FOR TEACHING UNIVERSAL DESIGN 5, 5-12 (Polly Welch ed., Mig Communications 1995), available at <http://www.udeducation.org/resources/readings/welch.asp> (describing society's attempts to isolate disabled from public). During the mid-1900s, ideas about disabilities, race and evolution were interwoven. See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 33, 36 (Paul Longmore and Lauri Umansky eds., NYU Press 2001). Individuals with certain disabilities, such as Down syndrome, were considered to have regressed back to earlier stages in the evolutionary process. *Id.* Others with pronounced disabilities were considered primitive and impossible to educate. *Id.*

² See Communities of Power!: Organizing Michigan's Disability Community, Disability History Timeline, <http://www.copower.org/leader/DisabilityRightsHistory.htm> (last visited Nov. 1, 2009).

³ See The 2004 Progress Report: The President's New Freedom Initiative for People with Disabilities (2004), <http://georgewbush-whitehouse.archives.gov/infocus/newfreedom/newfreedom-report-2004.pdf> (last visited Nov. 1, 2009) (reflecting progress made in President Bush's 2001 plan to integrate people with disabilities into society); STEPHEN L. PERCY, DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION 44 (University of Alabama Press 1989) (noting Civilian Vocational Rehabilitation Act of 1920 was first broad federal assistance program for disabled).

barriers confronting people with disabilities extend beyond the physical limitations caused by medical conditions.⁴ People with disabilities struggle to find quality employment and education opportunities and are therefore the poorest minority in America.⁵ Advocates continue to push for legislation that will do more to prevent discrimination against people with disabilities.⁶

On September 25, 2008, President Bush signed into law the ADA Amendments Act (ADAAA), which was designed to address inconsistencies between case law and the original intentions of Congress when it passed the Americans with Disabilities Act of 1990 (ADA).⁷ Congress intended the ADA as a broad piece of legislation that would address the challenges in employment and receipt of public services faced by tens of millions of people with physical and mental disabilities.⁸ Perhaps most importantly, it provided legal recourse to people who suffered discrimination because of their conditions.⁹ However, through a series of cases, the Supreme Court greatly narrowed the scope of the protections afforded by the ADA, and following the Supreme Court's lead, lower courts began to deny protections federal legislators, disabled people and disability advocates believed the ADA guaranteed.¹⁰ The new law amending the ADA

⁴ See RUTH COLKER & ADAM M. MILANI, *EVERYDAY LAW FOR INDIVIDUALS WITH DISABILITIES 1* (Paradigm Publication 2006) (indicating flaws in judicial system causing barriers to remedies).

⁵ American Civil Liberties Union, *Disability Rights*, ACLU Position/Briefing Paper, Jan. 1, 1999, available at <http://www.aclu.org/disability/gen/10648pub19990101.html>.

⁶ American Civil Liberties Union: Disabilities Rights, <http://www.aclu.org/disability/index.html> (last visited Nov. 1, 2009) (stating "people with disabilities are still . . . treated as second class citizens").

⁷ Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, *NEW JERSEY LAWYER*, Feb. 2009, at 37. The ADAAA took effect on January 1, 2009. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

⁸ Americans with Disabilities Act, 42 U.S.C. § 12101 (2006). Congress based some of its language in the ADA on the Rehabilitation Act of 1973, which had been interpreted to provide benefits to a wide range of people with disabilities. See *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 4-5 (2008) (statement of Chai R. Feldblum, Professor, Federal Legislation Clinic, Georgetown University Law Center), available at http://help.senate.gov/Hearings/2008_07_15/Feldblum.pdf [hereinafter *Feldblum Senate H.E.L.P. Committee Testimony 2008*] (explaining Congress used language to replicate judicial interpretations of Rehabilitation Act).

⁹ 42 U.S.C. § 12101. *But see*, Colker and Milani, *supra* note 4, at 36 (recommending negotiating with employers to avoid unfavorable judicial decisions).

¹⁰ See H. Rep. No. 110-730 Part I, at 8 (2008) (expressing House Members' intent to broaden coverage with ADAAA); *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 6-9 (outlining cases changing the interpretations of ADA language); Sharona Hoffman, *Corrective*

reinstates the original intent of Congress and consequently expands the requirements of both employers and schools to address the needs of people with disabilities.¹¹ While education institutions will be affected by the ADAAA, the labor and employment sectors will likely need more significant reform to comply with the new standards to which employers will be held.¹²

The purpose of this note is to look at the changes the ADAAA will make to the ADA and the case law that developed around it. The primary focus is the effect the law will have on employers and education facilities. The first section will address the history of legislation written to protect people with disabilities and its interpretations by the courts, including the strict interpretations of the ADA applied by the Supreme Court over the past decade. The next section will introduce the material changes to the ADA made by the amendments. Finally, this note will analyze and determine what adjustments employers and educators will need to make in order to conform to the anti-discrimination requirements of the ADAAA and will address fears and skepticism concerning unlikely effects of the ADAAA.

Justice and Title I of the ADA, 52 AM. U. L. REV. 1213, 1218 (2003) (noting judicial narrowing causes difficulties determining those covered by ADA).

¹¹ See § 3406, 122 Stat. at 3553-3559. "Congress finds that in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act ... provide broad coverage." § 3406, 122 Stat. at 3553; see also Jim Abrams, *Congress Passes Expansion of Disability Law*, ASSOCIATED PRESS, Sept. 17, 2008, <http://origin2.foxnews.com/wires/2008Sep17/0,4670, CongressDisabilities,00.html> (noting balance between individual rights and employer obligations needed to pass bill); Christina A. Samuels, *Changes to Disabilities Act Seen as Offering Students Protections*, EDUCATION WEEK, Sept. 19, 2008, <http://www.edweek.org/ew/articles/2008/09/24/05ada.h28.html> (analyzing how ADAAA will affect disabled students).

¹² See *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 1-10 (2008) (statement of Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation), available at http://help.senate.gov/Hearings/2008_07_15/Grossman.pdf [hereinafter *Grossman Senate H.E.L.P. Committee Testimony 2008*] (describing concerns of employers regarding changes to ADA); *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 1-10 (2008) (statement of Jo Anne Simon, Attorney, Law Office of Jo Anne Simon), available at http://help.senate.gov/Hearings/2008_07_15/Simon.pdf [hereinafter *Simon Senate H.E.L.P. Committee Testimony 2008*] (challenging arguments made by educators against ADAAA); *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 3-5 (2008) (statement of Samuel Bagenstos, Professor, Washington University Law School), available at http://help.senate.gov/Hearings/2008_07_15/Bagenstos.pdf [hereinafter *Bagenstos Senate H.E.L.P. Committee Testimony 2008*] (challenging concerns regarding broad interpretation clause of Act).

THE DETERIORATION OF DISABILITY DISCRIMINATION LAW

Legislators aimed to help only a small portion of the population with early disability legislation.¹³ The Smith-Sears Veterans' Rehabilitation Act of 1918 established programs to motivate and assist disabled World War I veterans to overcome their injuries and to reenter the workforce through medical assistance and employment training.¹⁴ The Smith-Fess Vocational Rehabilitation Act of 1920 extended rehabilitation programs to civilians but only protected white men who had been injured at work.¹⁵ In 1943, Congress amended the Act to cover medical treatment for those men.¹⁶ Among other shortcomings, the Smith-Fess Act lacked provisions to compel employers to accommodate or hire disabled individuals.¹⁷

The Rehabilitation Act of 1973 (Rehabilitation Act) was written based on language in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.¹⁸ The Rehabilitation Act made discrimination against persons

¹³ See C.G.K. Atkins, *A Cripple at a Rich Man's Gate: A Comparison of Disability, Employment and Anti-Discrimination Law in the United States and Canada*, 21 NO. 2 CAN. J.L. & SOC'Y 87, 91 (2006) (outlining the evolution of disability legislation in the United States). Prior to World War II, federal disability legislation was aimed at providing rehabilitation services to individuals whose impairments could be cured. *Id.*

¹⁴ Vocational Rehabilitation Act, Pub. L. No. 65-178, 40 Stat. 617 (1918), amended by Vocational Rehabilitation Amendments of 1967, Pub. L. No. 90-99, § 1, 81 Stat. 250. Rehabilitation programs were developed to help individuals with disabilities reenter the workforce and become productive members of society. Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065, 1077 (2004). See also Atkins, *supra* note 13, at 91-92 (discussing the "whole man theory" of rehabilitation programs). There were not any efforts to provide protection from disability-based discrimination in any area of society. See *id.*

¹⁵ See Atkins, *supra* note 13, at 91 (discussing the discrimination within early disability legislation). In 1943, Congress created the Office of Vocational Rehabilitation and provided for programs to serve individuals who had not been employed prior to the appearance of their disabilities. *Id.* (indicating increased coverage for federal disability legislation). Services also became available to those with psychological impairments. *Id.* (noting first federal disability legislation for individuals with mental disorders). The text of the Act was facially neutral, however, Atkins asserts that benefits were dispersed along race and gender lines. Smith-Fess Vocational Rehabilitation Act of 1920, Pub. L. No. 66-236, 41 Stat. 735, repealed by Rehabilitation Act of 1973, Pub. L. No. 95-602, 92 Stat. 2955; Atkins, *supra* note 13, at 91.

¹⁶ See Tara Jones, Article, *The Threat-to-Self Defense and Americans with Disabilities Act*, 27 S. ILL. U. L.J. 539, 542 (2003) (indicating these amendments were aimed to cure individuals and help them work).

¹⁷ See Buhai, *supra* note 14, at 1076-77 (discussing goals of legislation to protect workforces over individuals).

¹⁸ 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, 98 (2000). The Civil

with disabilities by entities receiving federal funds illegal.¹⁹ In 1975, Congress made free public education available to all children with disabilities by passing the Education for All Handicapped Children Act.²⁰ In 1990, Congress passed its broadest piece of disability discrimination legislation up to that point, the ADA, which outlawed discrimination against people with disabilities by all covered entities, including labor organizations and employers with fifteen or more employees.²¹

Congressional records and the language used in the ADA indicate Congress intended the ADA be a sweeping piece of legislation, providing substantial protections to individuals with disabilities.²² Congress used language from the Rehabilitation Act, which the Supreme Court interpreted broadly, verbatim in the ADA, such as the definition of “handicapped” under the Rehabilitation Act, which became the definition

Rights Act of 1964 contained provisions that prohibited discrimination based on an individual’s race, and the Education Amendments of 1972 prohibited discrimination based on gender in educational programs. *Id.* Title VI of the Civil Rights Act and Title IX of the Education Amendments, as well as the Rehabilitation Act, were restricted to programs and activities funded by the federal government. *Id.*

¹⁹ See Welch & Palames, *supra* note 1, at 5-12 (examining the history of disability legislation in the United States).

²⁰ 20 U.S.C. §§ 1400, 1412 (2006). The Education for All Handicapped Children Act was the gateway for mainstream schooling, allowing children with disabilities to be taught in the same classes as children without disabilities. See U.S. OFFICE OF SPECIAL EDUCATION PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2000), <http://www.ed.gov/policy/speced/leg/idea/history.pdf> (last visited Nov. 1, 2009).

²¹ Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.). The ADA was intended to prevent discrimination in the areas of employment, receipt of public services, including education, and use of public transportation and public accommodations. Americans with Disabilities Act, 42 U.S.C. § 12101 (2006). The ADA requires covered entities to make reasonable accommodations and modifications for individuals with disabilities. 42 U.S.C. § 12112(b)(5). Examples of reasonable accommodations and modifications include adjusting physical space to allow for easier access by handicapped individuals or adjustments to job structure, including responsibilities, schedules and resources available to disabled employees. See 42 U.S.C. § 12111(9). Covered entities may be relieved of obligations to accommodate a disabled individual if the required or requested alternation would fundamentally change the nature of the service provided. 42 U.S.C. § 12128(b)(2)(A)(iii).

²² 42 U.S.C. § 12101(b)(4). The ADA stated part of the Act’s purpose was “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b)(4). See also Feldblum Senate H.E.L.P. Committee Testimony 2008, *supra* note 8 at 7-8 (stating committee reports discussing proposed ADA language noted broad interpretation of “regarded as” by courts).

of “disability” under the ADA.²³ The Rehabilitation Act defined “handicapped individual” as (i) having “a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) . . . a record of such an impairment, or (iii) [being] regarded as having such an impairment.”²⁴ Congress apparently hoped that by using the same language, the same broad court interpretations would follow in interpreting the ADA.²⁵ Senate Committee reports regarding the ADA expressly stated mitigating measures taken by persons with disabilities should not be considered in determining whether or not a person was protected by the Act.²⁶ Committee records and statements of those involved in passing the ADA also indicate Congress intended the “regarded as” prong to be interpreted based on the severity of covered entities treatment of disabled persons, not the severity of their disabilities.²⁷

In several cases decided in 1999, the Supreme Court dealt a hard blow to Congress's intended interpretations of the ADA by reading the statutory language narrowly in ways that substantially reduced the number of people protected under the

²³ See Feldblum, *supra* note 18, at 107 (analyzing case law following passing of Rehabilitation Act).

²⁴ An Act to Amend the Rehabilitation Act of 1973, Pub. L. No. 95-602, 92 Stat. 2955 (1978). Courts provided coverage for a wide variety of disabilities under the Rehabilitation Act, including mental disorders, learning disabilities, contagious infections, episodic disorders, and disabilities that could be controlled through medication and other efforts. See *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 281 (1987) (holding individual with tuberculosis “handicapped individual” under Rehabilitation Act); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (contending epilepsy substantially limited plaintiff's ability to work); *Bentivegna v. U.S. Dep't. of Labor*, 694 F.2d 619, 623 (9th Cir. 1982) (determining requirement of controlled blood sugar levels discriminated against diabetics); *Flowers v. Webb*, 575 F. Supp. 1450, 1452, 1456 (E.D.N.Y. 1983) (asserting individual with developmental disorder disabled); *Schmidt v. Bell*, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (noting Post Traumatic Stress Disorder is a disability as defined under Rehabilitation Act).

²⁵ See Feldblum, *supra* note 18, at 91 (noting ADA drafters' beliefs Rehabilitation Act language used in ADA would carry same broad interpretation). The ADAAA also amended the Rehabilitation Act with minor language edits for the purpose of obtaining conformance with the ADA amendments. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

²⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

A person is considered an individual with a disability for purposes of the first prong of the definition 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 [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.

S. REP. NO. 101-116, at 121 (1989).

²⁷ S. REP. NO. 101-116, at 24 (1989).

Act.²⁸ In *Sutton v. United Airlines*, petitioners Karen Sutton and Kimberly Hinton, twins with uncorrected vision of 20/200 and corrected vision of 20/20, were not hired as pilots because United Airlines required an uncorrected vision of 20/100 or better.²⁹ In *Albertson's, Inc. v. Kirkingburg*, respondent Hallie Kirkingburg, a warehouse truck driver, had an uncorrectable condition that left him with 20/200 vision in one eye.³⁰ The Department of Transportation (DOT) required drivers to have 20/40 vision in each eye, and Kirkingburg's employer, Albertson's, Inc. (Albertson's), fired him because he did not have a valid DOT certificate authenticating his visual acuity.³¹ Although, Kirkingburg subsequently received a DOT waiver, Albertson's refused to rehire him because of his disability.³² The Court noted that Kirkingburg subconsciously adjusted to compensate for his visual impairment.³³

Based on the language of the Act, the Court held mitigating measures must be considered when determining if a person's impairment substantially limited one or more major life activities.³⁴ The Court determined that Sutton and Hinton's corrective lenses and Kirkingburg's subconscious mechanisms were mitigating measures and that when these individuals employed those measures they were no longer substantially limited in the major life activity of seeing.³⁵ These decisions resulted in permissible discrimination by employers of people with treatable but serious disabilities such as epilepsy or diabetes.³⁶

²⁸ See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

²⁹ *Sutton*, 527 U.S. at 475-76.

³⁰ *Kirkingburg*, 527 U.S. at 558-60.

³¹ *Id.*

³² *Id.* at 560.

³³ *Id.* at 565.

³⁴ See *Sutton*, 527 U.S. at 472. These decisions were contrary to EEOC's "Interpretive Guidance" publication that stated the "determination of whether an individual is substantially limited in a major life activity must be made...without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998). The Court determined it did not need to consider this guidance in making its decision. See *Sutton*, 527 U.S. at 480; *Kirkingburg*, 527 U.S. at 569 n.15.

³⁵ See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 472, 475 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999). The Court only considered Kirkingburg's case under the first prong of the disability definition and not under the "regarded as" prong. *Kirkingburg*, 527 U.S. at 563.

³⁶ See *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 23, 14-15 (2007) (statement of Chai R. Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center), available at http://help.senate.gov/Hearings/2007_11_15_b/Feldblum.pdf [hereinafter *Feldblum Senate H.E.L.P. Testimony 2007*].

Additionally, the Court determined the “regarded as” prong under the definition of disability should be determined based on the seriousness of a person’s disability, not the severity of covered entities’ treatment of people with disabilities.³⁷ In *Sutton*, the Court noted that this required a finding that the applicant or employee could not perform a broad class of jobs because of his or her disability.³⁸ Similarly, in *Murphy v. United Parcel Service, Inc.*, the Court determined that petitioner Vaughn Murphy did not qualify as disabled under the “regarded as” prong because his impairment, high blood pressure, only prevented him from working as a truck driver.³⁹ The Court’s interpretation required a person seeking protection based on the “regarded as” prong definition to show, first, that an employer thought the individual had a serious disability and, second, that the employer’s belief was the reason for discriminating against the employee.⁴⁰ Plaintiffs found the “regarded as” standard under this definition an extremely difficult standard to meet.⁴¹

³⁷ *Id.* at 15-18. According to a Senate report:

[An] important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

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

³⁸ *Sutton*, 527 U.S. at 491 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). The regulation states:

(3) With respect to the major life activity of working --

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (1998).

³⁹ *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 524 (1999). The petitioner in *Murphy* was fired from his position as a mechanic after it was determined he was erroneously given a Department of Transportation (DOT) health certificate to drive commercial vehicles. *Id.* at 518-20. The ability to drive commercial vehicles was considered an essential function of his job, and his blood pressure tested too high to obtain a new certificate, though he would have been eligible for a temporary certificate. *Id.* at 519, 522. His employer claimed the petitioner was not fired because he was regarded as being substantially limited in the major life function of working, but because he was unable to get a DOT certificate. *Id.* at 522.

⁴⁰ *Murphy*, 527 U.S. at 521-22. Under the Rehabilitation Act, the “regarded as” prong was analyzed based on how individuals were treated. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 282-83 (1987). The Court determined that an employee with tuberculosis was no longer seen as substantially limiting a major life function, but still used the disease as a basis for discrimination. *Id.* at 276-77.

⁴¹ *See Murphy*, 527 U.S. at 524; *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999).

Finally, in 2002, the Court further narrowed coverage under the ADA when it provided a restricted definition of a major life activity.⁴² A major life activity was described by the Court as an important daily activity, such as bathing or taking care of one's home.⁴³ Under the Court's definition, a person would have to show they were virtually unable to do one of these daily activities without aid.⁴⁴ This has been a challenge particularly for individuals suffering from disabilities that present episodic challenges or illnesses that may be in remission.⁴⁵ People with seizure disorders and people in remission after cancer treatment, for example, are generally able to care for themselves, but employers may still discriminate against them fearing seizures at work or reoccurrence of cancer.⁴⁶

⁴² See *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In *Toyota*, the respondent, an assembly line employee, developed carpal tunnel syndrome. *Id.* at 187-89. Her doctor recommended restricting her physical tasks at work, and, therefore, Toyota assigned her to only two of four quality assurance tasks. *Id.* at 188-98. After two years, Toyota decided all quality assurance employees should rotate through all four tasks, including two which the employee was unable to perform without injury. *Id.* at 189. The court considered the issue before it to be "what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks," which the Court determined was unaddressed by the EEOC. *Toyota*, 534 U.S. at 196. The EEOC defined "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner, or duration under which an individual can perform a particular 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." 29 C.F.R. § 1630.2(j) (1998). It defined "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

⁴³ *Toyota*, 534 U.S. at 197, 201-02. The Court used Webster's Dictionary to develop its definition of "major life activity." *Id.* at 197. Webster's defined "major" as "greater in dignity, rank, importance, or interest." *Id.* The Court held that "major life activities" means those activities "of central importance to daily life." *Id.* Ability to perform manual labor was expressly excluded from this definition. *Toyota*, 534 U.S. at 198. The respondent was unable to sweep, dance or drive long distances; she sometimes needed help dressing; she had to reduce the time she spent playing with her children and gardening. *Id.* at 202. The Court determined none of these restrictions were so severe that they were of central importance to her daily life. *Id.*

⁴⁴ See *id.* at 197.

⁴⁵ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 4 (noting illnesses in remission and episodic impairments often prevented individuals from receiving protection under the ADA). The *Toyota* Court specifically noted substantial limitations must be permanent or long term for a person to be considered disabled under the ADA. *Toyota*, 534 U.S. at 198.

⁴⁶ See *Feldblum Senate H.E.L.P. Testimony 2007*, *supra* note 36, at 26-28 (describing cases of individuals with episodic impairment or in remission not considered disabled under ADA).

These precedents and the subsequent lower court decisions severely reduced the number of people who were covered by the ADA.⁴⁷ A survey of claims filed under the ADA indicated the new standards presented such a challenge that less than three percent of individuals asserting claims of discrimination against employers and educational facilities prevailed.⁴⁸ The ADAAA rewrote the language of the ADA to ensure the broad protections originally intended by Congress could finally be realized by disabled persons.⁴⁹

Meanwhile, as protections under the ADA diminished, Congress continuously worked to increase access to special education and related services.⁵⁰ In 1990, Congress renamed the Education of All Handicapped Children Act (now the Individuals with Disabilities Education Act or IDEA) and amended it to require that publicly funded schools develop and monitor the success of Individualized Education Programs (IEP) for each disabled student.⁵¹ These programs attempt to guarantee children with

⁴⁷ See *Wong v. Regents of University of California*, 410 F.3d 1052, 1065-66 (9th Cir. 2005) (holding learning disability not disability under ADA when it did not prevent some academic success); *McClure v. General Motors Corp.*, 2003 WL 21766539, at *1 (5th Cir. June 30, 2003) (finding electrician with muscular dystrophy not disabled); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 188 (D.N.H. 2002) (holding employee's cancer was not disability).

⁴⁸ *Feldblum Senate H.E.L.P. Testimony 2007*, *supra* note 46, at 22-29 (describing several types of challenges individuals face when filing claims under the ADA).

⁴⁹ See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. § 12101). The Act states:

Congress finds that—

in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage; in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers; while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.

Id. Congress uses broad construction clauses to prevent courts from interpreting statutes too narrowly. See *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993) (noting broad construction clauses clarify Congress's intent).

⁵⁰ See generally Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2004) (representing culmination of developments in federal special education legislation).

⁵¹ See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 1824, 104 Stat. 1103 (1990). The IDEA also underwent significant amendments in 1997 and 2004. See

disabilities the benefit of an appropriate education designed around each child's specific individual abilities.⁵² As of 2009, over 6.5 million individuals under the age of twenty-two received services under the IDEA.⁵³ However, older students, including many in professional programs, have not received the same protections from colleges and universities.⁵⁴

DELIVERING PROTECTIONS UNDER THE ADA

There have been many instances of people who were denied coverage under the ADA despite admitted discrimination by employers and schools.⁵⁵ For example, in *McClure v. General Motors Corp.*, Carey McClure, a certified electrician from Georgia with facioscapulohumeral muscular dystrophy, a muscle disorder that affects the face and

20 U.S.C. § 1414 (adding provisions to assure compliance with the No Child Left Behind Act); Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (shifting focus of IDEA to improving teaching and integrated classrooms). Under the amendments, for example, schools may not classify a child as disabled if his development problems are the result of lack of appropriate instruction or limited English proficiency. 20 U.S.C. § 1414(b)(5).

⁵² 20 U.S.C. § 1400(d)(1)(a). The primary goal of the IDEA is "to ensure that all children with disabilities have available to them a free public education that emphasizes special education and related services designed to meet their unique needs . . ." *Id.* While the provisions of IDEA require schools to remove most restrictions barring disabled students from a quality education and develop plans to address students' individual needs, schools are not required to provide students with the "best education money can buy." *Individuals with Disabilities Education Act—Requirements under IDEA*, 16B McQuillin Mun. Corp. § 46.02.52 (2009).

⁵³ See U.S. Department of Education, Building the Legacy: IDEA 2004, <http://idea.ed.gov> (last visited Nov. 1, 2009). On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 into law, which provided \$12 billion to fund IDEA mandates. See U.S. Department of Education, The American Recovery and Reinvestment Act of 2009: Education Jobs and Reform, <http://www.ed.gov/policy/gen/leg/recovery/factsheet/overview.html> (last visited Nov. 1, 2009).

⁵⁴ See Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L.J. 116, 116-17 (2005) (noting challenges of law students with learning disabilities in an unaccommodating education environment). However, even under the ADA, schools will not be required to provide reasonable accommodation that compromise academic standards. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3557 (codified as amended at 42 U.S.C. § 12201). When determining if program standards are fundamentally altered to the point reasonable accommodation is not required, courts often defer to the institutions' judgment. See *Zukle v. Regents of University of California*, 166 F.3d 1041, 1047-48 (9th Cir. 1999) (describing decisions in other circuits granting deference).

⁵⁵ See *Feldblum Senate H.E.L.P. Committee Testimony 2007*, *supra* note 46, at 22-29 (describing sixteen cases in which protection under ADA was denied because people were not disabled enough).

shoulder area, rectified his inability to reach above shoulder level by using stools.⁵⁶ After a pre-employment physical examination, General Motors (GM) revoked a job offer given to Mr. McClure because of his disability.⁵⁷ The Fifth Circuit Court of Appeals rejected his ADA claim, determining his ability to adapt to his disability meant he did not have a disability as described under ADA, and, thus, he had no recourse against GM.⁵⁸ In July of 2008, Mr. McClure represented himself and thousands of others with similar stories when he spoke before the Senate Committee on Health, Education, Labor and Pensions regarding proposed changes to the ADA.⁵⁹ In his testimony, Mr. McClure described his frustration with the judicial system, which allowed GM to argue he was not disabled under the meaning of the ADA despite admitting his employment offer was withdrawn because of his physical impairment.⁶⁰

Similarly, in *Pimental v. Dartmouth-Hitchcock Clinic*, a clinic in New Hampshire fired registered nurse Mary Ann Pimental while she received treatment for Stage III breast cancer.⁶¹ Just one year prior, the clinic promoted Ms. Pimental to the nurse

⁵⁶ See *McClure v. General Motors Corp.*, 2003 WL 21766539, at *3 (5th Cir. 2003); see also *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 1-2 (2008) (statement of Carey McClure, Citizen) [hereinafter *McClure Senate H.E.L.P. Committee Testimony 2008*]. Carey McClure was diagnosed with muscular dystrophy at 15 years old, yet worked as a successful electrician for 20 years. *Id.* Muscular dystrophy is a disease that causes muscle weakness. *Facioscapulohumeral Muscular Dystrophy*, About FSHD, <http://www.fshsociety.org/pages/about.html> (last visited Nov. 1, 2009). *Facioscapulohumeral* refers to the muscles in the face, shoulder girdle and upper arms, the areas of the body most profoundly affected by muscular dystrophy. *Id.*

⁵⁷ *McClure Senate H.E.L.P. Committee Testimony 2008*, *supra* note 56, at 2-3. McClure informed the doctor who conducted his physical examination, Dr. Kuipers, how he adjusted at work in order to compensate for his impairment, but Kuipers still recommended GM revoke the offer. *Id.* Kuipers recommendation came despite the fact he admitted that he was not familiar with the physical requirements of the position. See *McClure*, 2003 WL 21766539, at *2.

⁵⁸ *McClure Senate H.E.L.P. Committee Testimony 2008*, *supra* note 56, at 4. McClure indicated in his testimony to the Senate committee that his disability also caused problems in his personal life including difficulty dressing, eating and showering. *Id.* at 1. During trial, the defense counsel subjected McClure to intense and personal testimony about these matters and other aspects of his home life, including inquiries into how he had intercourse. *Id.* at 3. The court held that, because McClure was still able to perform these functions, they could not be considered substantially limited. *McClure*, 2003 WL 21766539, at *2.

⁵⁹ *McClure Senate H.E.L.P. Committee Testimony 2008*, *supra* note 56, at 1-4.

⁶⁰ *Id.* at 3-4.

⁶¹ *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 179-80 (D.N.H. 2002). Mary Ann Pimental was diagnosed with Stage III breast cancer and endured eight months of treatment including a mastectomy, radiation, chemotherapy and reconstructive surgery. *Id.* at 180. Dartmouth-Hitchcock Clinic (DHC) did provide Pimental with time off she was due under the Family Medical Leave Act, but cut her position under management reconstruction. *Id.*

management team.⁶² After her cancer went into remission, she was hired back in a lower level part-time position with fewer benefits.⁶³ When she filed a claim against her employer alleging discrimination due to her illness, the United States District Court for the District of New Hampshire held that despite the significant impact on her life, Ms. Pimental was not disabled because the substantial effects were not long-term.⁶⁴ The court noted an impairment is not a disability within the meaning of the ADA unless it substantially limits a major life activity, a demanding standard Ms. Pimental could not meet because of the short duration of her actual illness.⁶⁵

In *Wong v. Regents of University of California*, Andrew H.K. Wong, a medical student with a learning disability, received additional time on assignments and exams from elementary school through college.⁶⁶ He found it difficult to keep up with his clinical rotation requirements in medical school, but the school denied him accommodations due to his prior academic success.⁶⁷ The Ninth Circuit Court of

⁶² *Pimental*, 236 F. Supp. 2d at 180.

⁶³ *Pimental*, 236 F. Supp. 2d at 180. In the management position, Pimental could expect to work approximately 35 hours each week, while the position she took at DHC after her treatment only offered 20 hours per week, which made her ineligible for increased benefits. *Id.* Though Pimental expressed interest in other positions after her rehire, she was unable to acquire another position, and she claimed the reason was due to DHC's management's discrimination against her because of her illness. *Id.* at 180-81. Six months after she was rehired, Pimental left her position at DHC for a full-time position as a school nurse. *Id.* at 181.

⁶⁴ *Pimental*, 236 F. Supp. 2d at 188. DHC denied all of Pimental's allegations that her cancer had anything to do with decisions not to hire her for other positions. *Id.* at 181. Pimental asserted discrimination under each prong of the definition of discrimination under the ADA. *Id.* While the court found Pimental's cancer was an impairment, she could not be considered disabled for protection under the statute. *Id.* at 182. Pimental stated her cancer inhibited her ability to care for herself, sleep, concentrate, and conceive, but the court held this did not substantially limit a major life activity, as required under previous interpretations of the statute. *Pimental*, 236 F. Supp. 2d at 183. The court also found she had no record of a qualifying impairment and was not perceived to have such an impairment by DHC. *Id.* at 185.

⁶⁵ *Pimental*, 236 F. Supp. 2d at 188. The court decision stated "[t]he narrow issue before the court, however, is whether, during the time period at issue, her cancer rendered her 'disabled,' as that term is used in the ADA." *Id.* The court determined it did not. *Id.*

⁶⁶ *Wong v. Regents of University of California*, 410 F.3d 1052, 1056 (9th Cir. 2005). Prior to entering medical school, Andrew Wong graduated magna cum laude with a B.S. in biochemistry from San Francisco State University, despite working with a learning disability since early childhood. *Id.* at 1056-57. At Regents, the school's Disability Resource Center (DRC) determined Wong's learning disability made processing and communicating information a challenge for him. *Id.* at 1057.

⁶⁷ *Id.* at 1058. Through his first two years, Wong completed the program requirements without special accommodations. *Wong*, 410 F.3d at 1057. The DRC recommended giving Wong additional time to prepare for his third year clerkship rotations, but the school denied Wong's

Appeals determined because he had success without accommodations before, he should not be considered disabled or receive ADA protections.⁶⁸

Congress passed the ADAAA to address the concerns of legislators and disability advocates regarding judicial narrowing of the ADA.⁶⁹ Legislators incorporated new language into the Act to increase its protections and remove ambiguities found by courts interpreting the ADA.⁷⁰ The ADAAA expressly states “disability” shall be interpreted under the Act in a manner that will provide broad coverage.⁷¹ The only change to the definition of the term “disability” itself is a reference to the definition of “regarded as having such an impairment,” which appears later in the Act.⁷² The Act also amends the ADA by removing a finding in the original legislation that identified people with disabilities as a discrete and insular minority.⁷³ As a result, each of the above-mentioned individuals and others in similar circumstances are entitled to more accommodations by employers and schools, can seek recovery under the new law if they continue to be victims of discrimination by covered entities, or at least can have their cases heard on the merits without being thrown out due to an overly restrictive standard

request for an extension before his Pediatrics rotation, claiming it was an unreasonable accommodation. *Id.* Wong failed his initial clinical rotation, but passed the next three after he took time off for personal family reasons and used the time off to study. *Id.* Shortly after the denial, school officials determined Wong would be unable to meet the program requirements and dismissed him as a student. *Id.* at 1057-58.

⁶⁸ *Wong*, 410 F.3d at 1067. The court did find Wong suffered from an impairment that impacted a major life activity, his ability to educate himself, but did not find a substantial limitation in his pursuit of education. *Id.* at 1063. The court pointed to Wong’s success in the first two years of the program as evidence that he was not substantially limited when compared with other individuals. *Id.* at 1065. The court contrasted Wong’s case with a hypothetical example of a blind high achieving student, who the court noted would be considered disabled under the ADA because the major life activity of seeing would be substantially impaired. *Id.*

⁶⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 12101). The Act specifically addressed *Sutton* and *Toyota* and stated an intention for both decisions to be overturned. *Id.* Though the ADAAA did not take effect until January 1, 2009, the Ninth Circuit noted that the Act provides insight into Congress’s original intent and therefore may be important in deciding cases resulting from discriminatory actions occurring prior to 2009. *See Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850, 861 (2009).

⁷⁰ *See* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, NEW JERSEY LAWYER, Feb. 2009, at 37 (noting ADAAA addresses inconsistencies between Congress’s original intent and court interpretation of ADA).

⁷¹ § 3406, 122 Stat. at 3555. *See supra* note 55 (noting wide variety of disabled individuals previously denied protection under ADA).

⁷² § 3406, 122 Stat. at 3555.

⁷³ *Id.*

to establish protection under the ADAAA.⁷⁴

Congress expressly states the purpose of the ADAAA is to reverse the trend in judicial decisions that require extensive and restrictive analysis of both “substantially limiting” and “major life function” and that also allow consideration of mitigating measures taken by people with disabilities.⁷⁵ The Act provides a non-exclusive list of activities that should be major life activities for the purpose of determining if someone has a disability covered under the ADA.⁷⁶ The definition of major life activities also includes a list of major bodily functions.⁷⁷ Notably, under the ADAAA, episodic impairments and diseases in remission are considered disabilities if, when active, an associated impairment substantially limits a major life activity.⁷⁸

The Act also addresses how and when mitigating measures may be considered in determining whether or not an impairment substantially limits a major life activity.⁷⁹ Generally mitigating measures may not be considered in making a determination as to whether a person should be considered disabled.⁸⁰ A single exception is provided: use of ordinary eyeglasses or contact lenses should be considered when determining whether a person is disabled within the meaning of the statute.⁸¹

⁷⁴ See *supra* note 47 (detailing several court reasons for denying protection under ADA).

⁷⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101). The Act also expressly states the standard used to determine whether or not an impairment “substantially limits” a major life activity in Equal Employment Opportunity Commission regulations is too high a standard to meet. *Id.*

⁷⁶ *Id.* “Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* This non-exclusive list was selected over a materiality test, which had also been considered by Congress. See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 6-8. A materiality test would have required court analysis to determine on a case by case basis if a major life activity was materially restricted. *Id.* at 6-7.

⁷⁷ § 3406, 122 Stat. at 3553. “Major life activity also includes 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.” *Id.*

⁷⁸ § 3406, 122 Stat. at 3555-56.

⁷⁹ *Id.* Mitigating measures include medication, medical supplies, use of assistive technology, reasonable accommodations, and learned behavioral modifications. *Id.*

⁸⁰ *Id.*

⁸¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3555-56 (codified as amended at 42 U.S.C. § 12102). Eyeglasses and contact lenses under the ADAAA refer to corrective lenses that fully correct vision or a refractive error, not low-vision devices. *Id.*

Congress defined “regarded as having such an impairment” for the first time in the ADAAA.⁸² The Act states discrimination on the basis of a perceived disability is still prohibited regardless of whether or not the disability actually does limit a major life activity.⁸³ Minor transitory impairments are not covered under this section of the statute.⁸⁴

Throughout the Act, Congress expresses its intent to provide broad and comprehensive protections for people living with disabilities under both the ADA and the new amendments.⁸⁵ It mentions key Supreme Court opinions that were contrary to Congress’s original intent when the ADA was passed.⁸⁶ It also specifies how courts should now analyze cases with similar fact patterns to reach more favorable results for disabled plaintiffs.⁸⁷ As a whole, the amendments to the ADA will have some profound effects on how covered entities, particularly employers, address disability discrimination.⁸⁸

EFFECTS OF THE ADAAA

Congress specifically sought to correct unintended judicial interpretations of the ADA when it passed the ADAAA.⁸⁹ The new legislation was written to restore the ADA to its originally intended scope.⁹⁰ The results should be broader interpretations of the Act and greater protections for more individuals with disabilities.⁹¹ These changes do not come without concern to employers and school administrators.⁹²

⁸² § 3406, 122 Stat. at 3555.

⁸³ *Id.*

⁸⁴ *Id.* Transitory impairments are defined as those not expected to last longer than six months. *Id.*

⁸⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

⁸⁶ See *supra* note 69 (naming cases specifically overturned by ADAAA).

⁸⁷ See also *supra* note 75 and accompanying text (describing how ADAAA expands protection for disabled individuals by providing expanded definitions of key terms).

⁸⁸ See *Feldblum Senate H.E.L.P. Committee Testimony 2007*, *supra* note 46, at 22-29 (describing dozens of types of cases believed to be erroneously decided prior to ADAAA passing).

⁸⁹ See *supra* note 7 and accompanying text (noting ADAAA intended by Congress to overturn unfavorable court decisions regarding ADA interpretation).

⁹⁰ See *supra* notes 7 and 8 and accompanying text (describing Congress’s original intent when passing ADA).

⁹¹ See *supra* note 12 and accompanying text (identifying employer and school administrator concerns with ADAAA).

⁹² See *Grossman Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 1-10 (outlining concerns of employers regarding amendments); *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra*

Some critics of the ADAAA expressed concerns regarding overturning Supreme Court decisions that employers country-wide have relied on for over sixteen years.⁹³ These critics assert attorneys are currently able to rely on previous court decisions, following Supreme Court decisions overturned by the ADAAA, to develop informed opinions regarding likely outcomes of their clients' cases with minimal expense.⁹⁴ Advocates of the Amendments note that whenever new legislation affecting labor is adopted, attorneys must rely on legislative history, relevant court decisions and the language of the statute to interpret the new act until new cases are decided under the law.⁹⁵

Another concern was the constitutionality of the broad construction provisions.⁹⁶ The Supreme Court may strike down a statute for lack of clarity.⁹⁷ The Supreme Court, however, expressly stated its intent to interpret the ADA's predecessor, the Rehabilitation Act, broadly.⁹⁸ Similarly broad language is also used in other statutes and the Supreme Court expressed no concerns for their validity.⁹⁹ Given the narrow

note 12, at 9 (countering school administrator's concerns ADAAA would weaken higher education programs).

⁹³ See *Grossman Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 1-2, 4-6. Grossman argues it is an incredible burden, particularly on small businesses, to reinterpret the new act versus relying on substantial case law developed interpreting the ADA. *Id.* at 1-2.

⁹⁴ See *id.* at 7 (expressing concern small businesses may need lawyers, ADA consultants, and ergonomic engineers to accommodate employees).

⁹⁵ See *Feldblum Senate H.E.L.P. Committee Testimony 2007*, *supra* note 46, at 9-22 (outlining how Court decided landmark cases narrowing scope of ADA).

⁹⁶ See *Grossman Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 4 (stating broad construction provisions will complicate work of those attempting to follow ADAAA's new mandates). The ADAAA states "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102).

⁹⁷ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 3-5 (asserting broad construction clauses resolve ambiguity, not create it).

⁹⁸ See *supra* note 25 and accompanying text (describing how Congress adapted sections of Rehabilitation Act to use in ADA).

⁹⁹ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 3-5 (expressing expectation courts would not challenge validity of ADAAA despite broad construction clause). Congress has previously interpreted similar broad construction provisions in the Religious Land Use Act, the Institutionalized Persons Act, which is a statute that authorizes criminal appeals by the United States, and another statute that authorizes criminal forfeiture in narcotics cases. See *id.* (supporting claims broad interpretation clauses are not detrimental to statutes). The Supreme Court has noted its interpretation that the intention of Congress when using a broad construction clause is to prevent too narrow a reading of a statute. *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993) (stating broad construction clause removes uncertainty rather than causes it).

judicial interpretation of the ADA, such broad construction is necessary to ensure disability claims are heard on their merits and not dismissed prematurely.¹⁰⁰ The more clearly defined term “disability” should provide courts with sufficient guidance to interpret the new law.¹⁰¹

Some argue the ADAAA will have a negative effect on the economy, due to the financial burdens it will place on small businesses and the potential for abuse by people without disabilities.¹⁰² As under the ADA, employers’ responsibilities and liabilities rest on whether or not an employee is considered disabled under the Act.¹⁰³ Employers may fear litigation because there is no judicial precedent that applies to the term disability as it is used in the ADAAA.¹⁰⁴ These fears may stifle job growth if employers shy away from hiring new employees as a result.¹⁰⁵ Legislators carefully considered employer liability when drafting the ADAAA.¹⁰⁶ The legislative process included conversations between disability advocacy organizations and business organizations, and the legislation reflects compromises made as a result of those conversations.¹⁰⁷

¹⁰⁰ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 2-5 (asserting interpretations under ADA prevented many claims from being decided based on employment conditions). The text of the ADAAA states: “The purposes of this Act are . . . to carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection available under the ADA.” § 3406, 122 Stat. at 3554.

¹⁰¹ See *supra* notes 75-76 and accompanying text (describing changes to text clarifying who is covered under ADAAA). Specifically, the amendments add to the definition of disability by listing major bodily functions, which should be considered major life activities, and further defining “regarded as,” and “substantially limits.” § 3406, 122 Stat. at 3555-56. The amendments also expressly provide for coverage for those with episodic conditions and conditions in remission and direct how mitigating measures may, in limited circumstances, be considered. *Id.*

¹⁰² See *Grossman Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 8-9 (suggesting ADAAA will cause downward spiral hurting national economy and people intended to be protected).

¹⁰³ See *id.* at 1-2 (arguing definition of disability must be clear to minimize confusion and expense).

¹⁰⁴ See *id.* at 2-4, 10 (asserting overruling Supreme Court decisions interpreting meaning of disability will cause intolerable confusion to employers).

¹⁰⁵ See *id.* at 6-8 (expressing concerns employers less likely to win cases under new law).

¹⁰⁶ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 2, 10 (describing process used to develop ADAAA text including contribution from business organizations).

¹⁰⁷ See *id.* at 9-12 (noting important contributions of business organizations in developing ADAAA text). The business and advocacy organizations jointly passed on the results of their communications to Congress. *Id.* at 10-12.

Critics assert abuses by employees who are not disabled will overly burden employers by forcing them to make accommodations for minor and trivial impairments like an infected finger or hangnail.¹⁰⁸ These arguments ignore the substantial limitation requirement and basis for reasonable accommodations expressed in the ADAAA.¹⁰⁹ The definition of disability is confined to the terms outlined in the Act.¹¹⁰ Minor or nonexistent impairments will not pass the substantial limitation threshold in court.¹¹¹

If a person does meet the substantial limitation requirement, employers will still only need to make necessary reasonable accommodations, not accommodations that create an undue hardship on their businesses.¹¹² Also, the Act does not require

¹⁰⁸ See *Grossman Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 6 (arguing result more likely due to express consideration of corrective lenses as mitigating measures). Grossman worries employers will be more likely to settle bogus claims, further costing employers. *Id.* at 8-9. He uses abuses of the Family and Medical Leave Act as evidence of likely abuse of the ADAAA, but notes that most workers only use leave when it is needed. *Id.* at 8.

¹⁰⁹ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 8-9 (countering arguments ADAAA abuses will be high due to broadened scope). Although, under the amendments, more people will be protected under the ADA, individuals who only qualify under the “regarded as” prong are not eligible for reasonable accommodations. See ADA, 42 U.S.C. § 12111(9) (outlining the types of accommodations that may be necessary for those who qualify under other “disability” definition prongs). Those individuals only have recourse to address discrimination that they encounter at work, not to seek special benefits from their employers. See *id.* The ADAAA retains the section of the ADA that provides for an affirmative defense if a reasonable accommodation denied would not aid in an employee’s job performance or would create an undue burden on the employer, limiting the circumstances under which any employee may seek accommodation. 42 U.S.C. § 12113(a).

¹¹⁰ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 9-13 (asserting limitations of ADAAA preventing fraudulent claims from succeeding in court).

¹¹¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102). The amendments expressly state that protections under the act “shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” *Id.*

¹¹² See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 8-9 (noting accommodations necessary not more burdensome under ADAAA than under ADA). An accommodation creates an undue hardship if it would require the employer to incur great expense or would be difficult to implement. 42 U.S.C. § 12111(10)(A). Employers should consider the following factors to determine if an accommodation would create an undue hardship:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the

reasonable accommodations be made for individuals only covered under the “regarded as” prong, because their disabilities do not impose any substantial limitations.¹¹³ This should eliminate concerns employers have regarding providing unnecessary accommodations to individuals who should not be protected by the ADAAA.¹¹⁴ The Act simply seeks to correct previous narrow judicial interpretation of the ADA.¹¹⁵

School administrators in K-12 schools have expressed concerns the ADAAA will place unreasonable burdens on schools, requiring them to accommodate every minor ailment of their students.¹¹⁶ Like employers, schools will not be required to provide accommodations to students who are not protected by the ADAAA.¹¹⁷ However, the Amendments do require schools provide reasonable accommodations to students with disabilities even if the students could achieve academic success without them.¹¹⁸

business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B).

¹¹³ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 12 (summarizing improvements of ADAAA over ADA further protecting employers and educational facilities). Previously four circuit courts of appeal, in the 1st, 3d, 10th, and 11th Circuits, allowed employees reasonable accommodations under the “regarded as” prong. *Id.*

¹¹⁴ See *id.* (noting ADAAA prohibits discrimination against non-disabled based on perceived disabilities but does not require accommodations).

¹¹⁵ See *supra* text accompanying note 7 (stating reasons Congress passed ADAAA). House reports support this opinion: “[T]oo rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.” H.R. Rep. No. 110-730 pt. 1, at 8 (2008).

¹¹⁶ See *Simon Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 2-9 (tackling concerns expressed by school administrators regarding ADAAA). The ADAAA precludes recovery to those with minor or transitory impairments. § 3406, 122 Stat. at 3555.

¹¹⁷ See *Simon Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 2-9 (noting ADAAA language would not burden schools by forcing schools to make unnecessary accommodations). The same rule applies to employers and schools. See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 8 (indicating reasonable accommodation not available to all individuals protected under ADAAA). If an individual only qualifies as disabled under the “regarded as” prong, any accommodation requested would be considered unreasonable per se. *Id.*

¹¹⁸ See *Simon Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 2-9 (describing most likely change in schools adapting to ADAAA).

The focus of analysis for a student's entitlement to reasonable accommodations rests on whether or not an impairment substantially limits the conditions under or manner in which the student learns.¹¹⁹ Concerns regarding effects on schools are primarily unfounded, though, because most children already must receive accommodations for their disabilities under the IDEA.¹²⁰ Furthermore, the ADAAA only requires accommodations that are reasonably made and assistive to the student.¹²¹

Universities also challenged the ADAAA due to fears their programs will need to be degraded in order to accommodate students with disabilities.¹²² The ADAAA, however, does not change the part of the ADA that prohibits requiring modifications that fundamentally alter an education program.¹²³ Courts have given school administrators great deference in determining what would fundamentally alter their programs.¹²⁴ Nothing within the statute indicates courts should limit this deference.¹²⁵

¹¹⁹ See *id.* (reflecting on how schools should analyze requirements to provide assistance to disabled students).

¹²⁰ *Id.* Most change to schools caused by the ADAAA will be limited to higher education institutions, because students twenty-one and younger already receive the same protections under IDEA. 20 U.S.C. § 1412 (2006).

¹²¹ See *Simon Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 2-9 (indicating requirements on schools parallel those imposed on employers by ADAAA).

¹²² See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 9 (noting concerns ADAAA would adversely affect integrity of university and college academic programs).

¹²³ See *id.* at 9 (noting ADAAA maintains protections of institution academic programs within ADA text). The ADAAA specifically addresses post secondary education programs stating that reasonable accommodation is not required if such accommodation "would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3557 (codified as amended at 42 U.S.C. § 12201).

¹²⁴ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 9 (asserting courts attempt to protect programs from degradation).

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Zukle v. Regents of University of California, 166 F.3d 1041, 1047 (9th Cir. 1999) (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985)).

¹²⁵ See *Bagenstos Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 9 (attempting to calm fears college level programs will suffer due to accommodations for disabled students).

The ADAAA could have profound effects on the results in cases like those described previously.¹²⁶ Courts will decide more cases on their merits, because the Act expands the definition of disability and provides protection to more people.¹²⁷ Employers and educators will shoulder the burden of establishing their actions are not a result of discrimination, rather than forcing victims to prove their employers' or school administrators' state of mind.¹²⁸ As more cases are pursued and case law changes to protect more people, employers and schools should begin to change their tactics when dealing with disabled employees and students to prevent litigation.¹²⁹

The change expressly prohibiting consideration of most mitigating measures in determining whether an individual is protected by the ADA will allow more people to have the heart of their claims heard in court.¹³⁰ In *McClure*, Mr. McClure would likely

¹²⁶ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 9-13 (describing anticipated effects of ADAAA). Ironically, several of the landmark cases which narrowed the scope of the ADA may still be decided in favor of the employers under different sections of the ADAAA, which were also in existence under the ADA. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 495 (Stevens, J., dissenting) (noting "Congress certainly did not intend to require United Airlines to hire unsafe or unqualified pilots"). The petitioners in *Sutton's* claims may have been denied by a finding that accepting their lower visual acuity would be an unreasonable accommodation for a pilot position. See *supra* note 112 and accompanying text (expressing employer protections housed within text of ADAAA). In *Murphy*, the Court would likely now find that the employee was disabled under the statute. See *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 525 (Stevens, J., dissenting) (noting employee would likely be hospitalized if not medicated). However, the Court may have found through further examination of his medical records that he would be unable to keep a DOT license, preventing him from performing an essential function of the position. See *supra* note 21 (stating ADAAA does not require employers fundamentally change job functions to accommodate disabled employees). In *Toyota*, the Court may have found the schedule adjustment the respondent requested was not a reasonable accommodation depending on the reasons the employer changed it originally. See *id.* (listing some types of accommodations that may be required by employers).

¹²⁷ Compare Americans with Disabilities Act, Pub. L. No. 101-336, § 993, 104 Stat 327, 329-330 (1990) (prior to 2008 amendment) (providing barebones definition of disability under ADA) with ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3555-56 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (enlarging definition of disability and calling for broad interpretation under new Act).

¹²⁸ See *supra* text accompanying note 83 (explaining ADAAA expands protection under "regarded as" prong).

¹²⁹ See *Feldblum Senate H.E.L.P. Committee Testimony 2008*, *supra* note 8, at 12 (describing various types of employer responsibilities under ADAAA); *Simon Senate H.E.L.P. Committee Testimony 2008*, *supra* note 12, at 5-6 (noting changes require schools provide reasonable accommodations to all qualifying disabled students with need).

¹³⁰ See *supra* note 79 and accompanying text (noting change to ADA prohibiting consideration of mitigating measures in determining disability). With the exception of ordinary corrective lenses,

have been awarded judgment under the ADAAA, since the adjustments he made to live with his disability could not be considered.¹³¹ A court would have to decide a case like McClure's based on his treatment, not his ability to work around his disability.¹³²

Under the ADAAA, people in remission or suffering from episodic impairments may have their claims considered under the "regarded as" prong.¹³³ In *Pimental*, Ms. Pimental may now be considered disabled, despite the fact she was in remission, if she met the new statutory requirements for shorter term impairments.¹³⁴ Under the Act, if an impairment substantially limits a major life activity when active, it is still a disability even if it is episodic or in remission.¹³⁵ Pimental would have a chance to show her employer regarded her as living with a substantial limitation despite the fact she was in remission.¹³⁶

no mitigating measure may be considered to determine if an individual is substantially limited in a major life activity. § 3406, 122 Stat. at 3556. Mitigating measures may include medical treatments, technology devices, or learned adaptive techniques. *Id.* The ADAAA does not, however, address what employers' requirements are to accommodate an individual who does not use readily available mitigating measures. *Id.*

¹³¹ See *supra* notes 56-59 and accompanying text (providing facts surrounding case and reasoning of court); see also *supra* text accompanying note 80 (noting ADAAA prohibits most mitigating measures from consideration in determining whether disability exists).

¹³² See *supra* notes 56-59 and accompanying text (discussing McClure court's decision ability work around impairments meant disability not substantially limiting). Despite evidence that McClure's muscular dystrophy affected how he worked, ate and generally cared for himself, both the district and appellate courts determined that McClure failed to show his condition substantially limited him because he adapted by performing these tasks in different ways. *McClure v. General Motors Corp.*, 2003 WL 21766539, at *1, *3 (5th Cir. June 30, 2003). Additionally, McClure would likely be considered disabled under the "regarded as" prong, because GM specifically revoked his employment offer because of his disability. *Id.* at *3.

¹³³ See *supra* text accompanying note 78 (noting change provided by ADAAA allowing individuals in remission coverage under ADA) and notes 82, 83 and accompanying text (indicating ADAAA provides broader consideration under "regarded as" prong).

¹³⁴ See *supra* notes 61-65 and accompanying text (providing facts surrounding case and reasoning of court); see also *supra* text accompanying note 78 (indicating ADAAA protects individuals in remission from discrimination).

¹³⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3555-56 (codified as amended at 42 U.S.C. § 12102).

¹³⁶ See *supra* text accompanying notes 82 and 83 (describing new definition of regarded as under ADAAA). Over the course of several months, Pimental's employer refused to hire her for several full-time positions to which she applied. *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 180-81 (D. N.H. 2002). Pimental believed she was not selected because she was in remission. *Id.* Under the ADAAA, Pimental would have qualified as disabled despite being in remission, and, therefore, the court would have to consider whether or not she was not hired because of her disability. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122

All students are now entitled to accommodations if a disability or disease substantially limits their daily activities, regardless of whether they have been able to achieve academically without accommodations from their schools.¹³⁷ In *Wong*, Mr. Wong would at the very least have his case heard on its merits, because his achievements without accommodation would no longer be the deciding factor in whether or not he would be considered disabled under the statute.¹³⁸ His case would now rest on whether the accommodations he requested fundamentally altered the school's program.¹³⁹

CONCLUSION

If effectively implemented, the ADA AAA will likely have a far more profound impact in the employment setting than in the school setting. Schools are already bound by federal laws, including the IDEA, to provide the same protections granted by the ADA AAA to all students aged twenty-one and under. Employers, who previously benefited from the strict and narrow interpretations of the pre-amendments ADA, will have to amend their policies, procedures and practices to assure compliance with the new law and protect themselves from future litigation. Given the broadening language in the amendments, it is more likely that future plaintiff-employees will succeed in establishing *prima facie* cases of disability discrimination. Therefore, disabled employees are expected to be the primary beneficiaries of the ADA AAA and the expanded protections it provides. Employers may no longer avoid their obligations under the ADA by claiming a disabled individual is not protected by technicalities of the Act.

Stat. 3553, 3555-56 (codified as amended at 42 U.S.C. § 12102).

¹³⁷ See *supra* note 116 and accompanying text (noting change in determining which students should receive accommodations under ADA AAA). Prior to the ADA AAA, in some cases, higher education facilities were permitted to consider mitigating measures, including substantial additional studying time, when determining if a student was disabled within the meaning of the ADA. See *Wong v. Regents of University of California*, 410 F.3d 1052, 1056 (9th Cir. 2005) (refusing ADA protections to student who adapted his study habits to compensate for learning disability). Now, under the ADA AAA, these adaptive learning techniques will not be used to evaluate whether a student qualifies as disabled under the statute. See § 3406, 122 Stat. at 3555-56.

¹³⁸ See *supra* notes 66-67 and accompanying text (providing facts surrounding case and reasoning of court); see also *supra* notes 116 and 118 and accompanying text (noting schools must provide accommodations to qualified disabled students regardless of successes without accommodation).

¹³⁹ See *supra* note 121 and accompanying text (describing basis for consideration of whether accommodation is required in educational programs). Under the ADA AAA, Regents would not be required to provide Wong with a reasonable accommodation that fundamentally altered their medical program. See § 3406, 122 Stat. at 3557.

The ADAAA protects more of the tens of millions of people in the United States living with disabilities, and it protects them in more ways than the pre-amendments ADA. Under the ADAAA, individuals with disabilities will benefit from a prohibition of consideration of most mitigating measures. The Act expressly protects individuals with episodic impairments and individuals in remission. Broader definitions of what constitutes a “substantial limitation” of a “major life activity” and broader coverage under the “regarded as” prong of the definition of disability under the Act will also give people with disabilities more protections from discrimination because of their conditions. As a result, employers and higher education facilities must prepare to provide more accommodations to individuals with disabilities in order to fulfill the broader protections provided by the ADAAA.

