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The Legal Interpretation of Disability Under the Americans with Disabilities Act of 1990 and Changes in this Standard Set Forth in the Americans with Disabilities Act Amendments Act of 2008

Walter R. Keenan

University of Connecticut - Storrs, wkeenan@earthlink.net

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The Legal Interpretation of Disability Under the Americans with Disabilities Act of 1990
and Changes in this Standard Set Forth in the Americans with Disabilities Act

Amendments Act of 2008

Walter Raymond Keenan, Ph.D.

University of Connecticut, 2014

This dissertation consists of three manuscripts pertaining to the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) as it affects the legal definition of disability under the Americans with Disabilities Act of 1990 (ADA), and eligibility for coverage for postsecondary education. The first manuscript is a review of the literature discussing the changes in the legal standards under the ADA following the enactment of the ADAAA. The literature review presents the interpretation of experts in the field and implications for coverage of students in postsecondary education, including the affect upon documentation needed to meet the legal coverage standard. The second manuscript is a research study addressing the new definition of disability set forth in the ADAAA utilizing legal research methodology. This study provides a comprehensive analysis of the changes in the legal definition of disability through assessment of legislative history, statutory language, regulatory language and case law. The third manuscript provides practical guidance to secondary education professionals that assist students with disabilities in transition from high school to college. This manuscript addresses how documentation of functional limitation has become more relevant to postsecondary education and how appropriate documentation can be developed for transition from high school to college.

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and Changes in this Standard Set Forth in the Americans with Disabilities Act
Amendments Act of 2008

Walter Raymond Keenan

B.S., Western Connecticut State University, 1977

J.D., Western New England University School of Law, 1982

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Walter Raymond Keenan

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APPROVAL PAGE

Doctor of Philosophy Dissertation

The Legal Interpretation of Disability Under the Americans with Disabilities Act of 1990
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Amendments Act of 2008

Presented by

Walter Raymond Keenan, B.S., J.D.

Major Advisor _____
Joseph W. Madaus

Associate Advisor _____
Stan F. Shaw

Associate Advisor _____
Casey D. Cobb

Associate Advisor _____
Allison R. Lombardi

Associate Advisor _____
Preston C. Green

University of Connecticut

2014

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Walter R. Keenan
Doctoral Dissertation Chapter I
University of Connecticut

Abstract

The main purpose of the Americans with Disabilities Amendments Act of 2008 (ADAAA) was to restore the original intention of Congress in enacting the Americans with Disabilities Act of 1990 (ADA), which had been abrogated by a series of restrictive rulings from the United States Supreme Court, United States Court of Appeals, and United States District Court. The purpose of this study is to research the legal standard for coverage under the ADA as amended through a comprehensive review of the relevant literature on this topic. The literature review will provide guidance to help direct further study through legal research and analysis concerning eligibility determinations under the ADA.

The Legal Interpretation of Disability Under the Americans with Disabilities Act of 1990
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Introduction

The Americans with Disabilities Amendments Act of 2008 (ADAAA) was passed by Congress in 2008 and became effective on January 1, 2009. The main purpose of this legislation was to restore the original intention of Congress in enacting the Americans with Disabilities Act of 1990 (ADA), which had been abrogated by a series of restrictive judicial rulings from the United States Supreme Court, and various lower federal courts at both the appellate and trial levels. Congress further determined the need to clarify the original intent for broad inclusion of individuals with disabilities, including postsecondary education students, as protected class members under the law.

The ADAAA mandates broad coverage to the maximum extent permitted by law in relation to the original ADA, and that the determination of whether a person is an individual with a disability should not demand extensive analysis (ADAAA Section 2(b), 2008). Determination of whether an impairment substantially limits a major life activity must now be made without consideration of the ameliorative effects of mitigating measures, and the terms substantially limits and major life activity must be construed broadly. Congress ordered new administrative regulations to be issued to further define disability in terms of substantial limitation of a major life activity.

The focus under the new law will be on prevention of discrimination, which includes the provision of reasonable accommodations. At this time, the scope of this new legal standard is not clear. This paper will provide an analysis of the literature on how the ADA requirement of establishing a substantial limitation of a major life activity has previously been interpreted, and how this requirement has been changed by the ADAAA. First, the ADA of 1990 will be described including key court cases from the Supreme Court and lower federal courts. Section 504 of the Rehabilitation Act of 1973 (Section 504), the predecessor legislation to the ADA of 1990, will also be addressed. Finally, the analysis will continue onto the ADAAA of 2008 that made substantial changes to the original ADA of 1990.

The Americans with Disabilities Act of 1990

In order to understand the changes in the law enacted by the ADAAA, it is necessary to understand the development and history behind the original ADA. The roots or beginnings of the ADA are directly linked to the civil rights legislation of the 1960's enacted by Congress after the Supreme Court established that the constitution required inclusion as opposed to separation in the context of race in *Brown v. Board of Education* (1954). Related legislation includes the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 (Karger & Rose, 2010). Congress then enacted the Rehabilitation Act in 1973 that broadly prohibited discrimination based on disability. This law prohibited discrimination on the basis of disability against individuals that were otherwise qualified to participate in federally funded programs. The Rehabilitation Act contained several sections with various applications. Section 501

applied to the federal government, Section 503 to federal contractors, and Section 504 applied to recipients of federal financial assistance (Rothstein, 2006, chap. 1).

Slack (2009) noted that the enactments of disability discrimination legislation through Section 504 may be viewed historically as a continuation of Civil Rights Acts legislation that ultimately led to the enactment of the ADA. Section 504 applied to postsecondary education before the ADA and continues to apply today. Accordingly, it is important to understand the foundations of prior law that the ADA was built upon with special attention to Section 504.

Section 504 of the Rehabilitation Act of 1973

It should be noted that the Rehabilitation Act of 1973 was not the result of intensive lobbying by disability rights advocates, but was actually a broad spending bill with specific sections that actually copied the antidiscrimination language from the Civil Rights Act of 1964 and applied it to people with disabilities (Shapiro, 1994). Section 504 of the Act provides that:

No otherwise qualified [individual with a disability] ...shall, solely by reason of his [disability], be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... (29 U.S.C. § 794).

Although Section 504 and the ADA are similar in purpose, one main distinction between the two laws is that Section 504 only applied to entities and programs that received federal funding, federal executive agencies, and the United States Postal Service (U.S. Department of Justice, 2005). Accordingly, because state and local governments receive federal financial assistance, the public sector has been subject to

antidiscrimination mandates since the enactment of Section 504 and therefore, has a tradition of supporting the prohibition of discrimination on the basis of disability prior to the enactment of the ADA (Percy, 2001). Thus, Section 504 can be viewed as a less developed version of disability civil rights law that required further expansion to adequately protect the rights of individuals with disabilities.

Relevant Litigation Pertaining to Section 504

Litigation under Section 504 has addressed such issues as whether an individual is otherwise qualified, whether discriminatory action actually occurred, whether reasonable accommodations were required, and whether undue burden was a defense to a claim under Section 504. Judicial interpretation of Section 504 is important for understanding that statute, but also for understanding the ADA because this judicial interpretation was incorporated into the language of the ADA (Rothstein, 2006).

An early example of judicial interpretation of Section 504 by the United States Supreme Court is *Southeastern Community College v. Davis* (1979). In the *Davis* case, the Supreme Court held that Section 504 does not require educational institutions to make substantial modifications to programs to allow individuals with disabilities to participate, and that the “otherwise qualified” language of the statute requires the individual to meet academic and physical requirements of the program. Accordingly, a student must be otherwise qualified to meet the requirements of an academic program. Accommodations in postsecondary curriculum are not considered to be reasonable if they alter fundamental or essential requirements. However *Alexander v. Choate* (1985) held that reasonable

accommodations may be required to provide meaningful access to a program for an individual with a disability who is otherwise qualified to participate in the program.

United States Supreme Court Decisions Interpreting the ADA

Disability is a social construct defined by law rather than an immutable characteristic, and therefore, the legal definition determines coverage (Hensel, 2009). The United States Supreme Court provided direction for legal analysis of whether a person is considered to be an individual with a disability within the scope of ADA coverage. In *Bragdon v. Abbott* (1998), the Supreme Court set forth a three-step analysis: 1) Does the actual individual condition constitute an impairment? 2) Does the impairment affect one or more major life activity? 3) Does the individual's impairment substantially limit the particular major life activity at issue?

Another critical consideration pertaining to substantial limitation arose a year after the *Bragdon* decision. This issue involved whether mitigating measures should be taken into account when determining if an impairment substantially limits a major life activity. Three cases from the United States Court of Appeals addressing this issue were granted review by the Supreme Court and decided simultaneously (*Sutton v. United Air Lines, Inc.*, 1999; *Albertson's Inc. v. Kirkingburg*, 1999; and *Murphy v. United Parcel Inc.*, 1999). The Supreme Court held that mitigating measures must be taken into account when determining the degree of limitation imposed by an individual's impairment, notwithstanding the prior interpretation by both the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) that mitigating measures should

not be taken into consideration when determining if an individual is substantially limited in a major life activity.

The lead case that set judicial precedent was *Sutton v. United Air Lines, Inc.* (1999), which held that “...the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.” However, this conclusion was seen by lawyers that drafted the ADA statute as being contrary to the legislative intent of Congress. Three congressional committee reports specifically stated that mitigating measures should not be taken into account when determining disability, however, the Supreme Court did not find this legislative history persuasive (Feldblum, 2000). The Supreme Court further ignored the EEOC regulations that substantial limitation must be made without consideration of mitigating measures such as medications or assistive devices (Heekin, 2011). Another view was that the *Sutton* ruling was due to a poorly worded statute that was seen as a benefit to plaintiffs that were never intended to be beneficiaries of the ADA (Selmi, 2008).

The Supreme Court did note in one of the companion cases that was decided simultaneously with *Sutton*, *Albertson’s, Inc. v. Kirkingburg* (1999), that the burden of establishing a substantial limitation of a major life activity is not onerous and that certain limitations will ordinarily qualify as disabilities under the ADA. The Supreme Court further ruled in *Albertson’s* under the *Sutton* precedent that the lower court had erred in finding that “a mere difference” in “an individual’s manner of performing a major life activity” was sufficient to establish a substantial limitation to the capacity to perform the

activity, and there must be a “significant restriction” of the performance of a majority activity to establish a substantial limitation (National Council on Disability, 2003). The third case, *Murphy*, was also decided under the rationale set forth in *Sutton* in ruling against the plaintiff.

The *Sutton* trilogy appeared to preclude ADA coverage when ameliorative mitigating measures were present. However, a fourth case presenting the same issue, *Bartlett v. New York State Board of Law Examiners* (1999), was summarily remanded to the trial court by the Supreme Court to determine whether the plaintiff was covered by the ADA in light of the *Sutton* ruling. Therefore, the question presented upon remand was whether the plaintiff was substantially limited in a major life activity after the consideration of mitigating measures. The trial court answered in the affirmative that the plaintiff was substantially limited in the major life activity of reading, notwithstanding steps she had taken to mitigate her impairment (Rothstein, 2004). Accordingly, the *Bartlett* decision confounded the *Sutton* ruling to a limited extent.

Three years following the *Sutton* trilogy rulings, the Supreme Court issued another restrictive decision in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams* (2002). The *Toyota* decision was very significant concerning the legal standard required to establish disability under the ADA. The court’s ruling resulted in an even more restrictive interpretation of the term “substantially limits” that transferred the “significant restriction” language set forth in the *Albertson’s* case to “prevents or severely restricts” the performance of a major life activity. The Court further stated that the ADA creates a demanding standard to establish disability under the law. Additionally, the *Toyota* ruling

also imposed a strict interpretation of the term major life activity as activities that are of central importance to most people's daily lives (National Council on Disability, 2003). Following the *Toyota* ruling, Representative Steny Hoyer, a sponsor of the original ADA, wrote an op-ed in the Washington Post, entitled "*Not Exactly What We Intended, Justice O'Connor,*" criticizing the court's interpretation of the law (Hoyer, 2002). He chided the Supreme Court and indicated that Congress would have the final say as to the statutory interpretation of the ADA. Representative Hoyer later was instrumental in the passage of the ADAAA in 2008.

One later commentary further noted that individuals with cognitive impairments were essentially precluded from protection under the ADA following the Supreme Court's narrow interpretation of the term substantial limitation in the *Toyota* ruling because individuals who were otherwise qualified would be viewed as "too-able" to meet this narrow legal standard (Catchpole & Miller, 2006). Selmi (2008) noted that the Supreme Court ignored guidance from the EEOC, and a more "logical" analysis of the statutory text, to arrive at this more demanding standard to qualify under the law by requiring an individual to establish substantial limitation of activities of central importance to most people's daily lives. The court also ignored the legislative intent of the ADA in arriving at this restrictive decision (Hoffman, 2012) as the ADA was based upon Section 504. In litigation under Section 504 the courts accepted the concept of "universalism" giving the term disability an expansive reading, and mostly considered anyone alleging discrimination based on disability as an individual with a disability under the act (Barry, 2010).

As noted, the original intent of the ADA was to mirror the language and intent of Section 504, which had not been subject to such strict scrutiny by the Supreme Court. However, as noted above, that was not the case with the ADA. An overly restrictive standard for determining who was an individual with a disability protected by the law had been set by the Supreme Court and that precedent was passed down to the lower federal courts. This judicial interpretation created a conundrum where an individual was not disabled enough to invoke the protections of the law and at the same time was too disabled to enjoy privileges available to nondisabled individuals (Silverstein, 2011; Katsiyannis & Yell, 2003). In essence, the Supreme Court had ruled that the more an individual was able to manage an impairment, the less likely that person would be protected from discrimination based on that condition (Barry, 2013).

Federal Appellate Court Decisions Relevant to Postsecondary Education

Due to these restrictive rulings by the Supreme Court, the nation's courts struggled with the threshold question of whether an impairment is substantially limiting to the degree that it is considered a disability under the ADA (Fram, 2008). Most of the litigation under the ADA had been in the realm of employment discrimination. However, the definition of disability under the ADA was noted to be generic and was applied by the courts in the context of students seeking access to educational programs (Zirkel, 2011).

Subsequent to the Supreme Court's decision in *Toyota*, the United States Court of Appeals addressed the application of the legal analysis of being an individual with a disability under the ADA in the context of postsecondary education. The Court of Appeals for the Ninth Circuit followed the standard set forth in *Toyota* in the case of

Wong v. Regents of the University of California (2005). Mr. Wong was a medical student who had been academically successful until his third year in medical school, although he had been identified with a learning disability as early as kindergarten. The trial court had relied on his past successful academic outcomes in finding that he was not disabled because he was able to read, learn and work as well as “the average person.” The Ninth Circuit applied the three-step legal analysis as set forth in *Bragdon* and found that Mr. Wong had a mental impairment and that the major life activities of reading, learning and working were alleged to be substantially limited. Therefore, the dispositive issue was the third step of the analysis, as to whether Mr. Wong’s impairment substantially limited his ability to perform the major life activities of reading, learning or working. Relying on the Supreme Court’s decision in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams* (2002), the court interpreted the ADA term “substantially limits” to mean prevents or severely restricts and ruled that Mr. Wong was not an individual with a disability.

In *Singh v. George Washington University School of Medicine and Health Sciences* (2007), the District of Columbia Circuit also applied the restrictive standard concerning substantial limitation set forth by the Supreme Court in *Toyota*, finding that an impairment must prevent or severely restrict an individual from doing activities that are of central importance to most people’s daily lives. This case, like *Wong*, involved a medical school student who had been academically successful prior to taking on the rigorous curriculum of medical school. In reaching its decision that Ms. Singh was not an individual with a disability under the ADA, the Court further quoted the *Toyota* decision noting that the statutory language of the ADA must “be interpreted to create a

demanding standard to qualify as disabled.” The Court entered judgment for the medical school and remanded the case to the trial court for further proceedings. The trial court once again ruled against Ms. Singh who again appealed the decision. Upon a second review, the Court of Appeals again ruled against the medical student, but this time agreed with the trial court that Ms. Singh had failed to establish an impairment that caused her alleged learning disability, and therefore, the issue of substantial limitation was not even considered (*Singh v. George Washington University School of Medicine and Health Sciences*, 2011).

It should be further noted that prior to the *Toyota* ruling, the Sixth Circuit also found no substantial limitation in another ADA case involving another medical student with a learning disability in *Gonzales v. National Board of Medical Examiners* (2000). As did the Ninth Circuit, the court applied the three-step analysis set out in *Bragdon*. The first two steps of the analysis indicated that Mr. Gonzales had a psychological impairment and the major life activities of learning (reading and writing) and working were implicated. Accordingly, once again the dispositive issue was whether Mr. Gonzales’ impairment substantially limited his ability to perform these major life activities as compared to most people in the general population. The court focused on Mr. Gonzales’ academic success prior to medical school. The court further noted that under *Sutton*:

[e]ven if self-accommodations enhanced Plaintiff’s performance to that of most people, he is not disabled under the ADA. Recently [1999], the Supreme Court ruled that in determining whether individuals are disabled under the ADA they should be examined in their corrected state [citing *Sutton*, *Murphy*, and *Kirkingburg*].

Based upon this analysis, the Sixth Circuit affirmed the trial court's holding that Mr. Gonzales was not substantially impaired in his ability to perform the major life activities of reading, writing, and working. However, a dissenting opinion in *Gonzales* noted that his "reasonably good performance in high school and his first two years of college does not foreclose a finding that he has a reading disability," and referenced the evidence of record demonstrating how Mr. Gonzales was able to be successful without formal accommodations despite having a severe reading disability. The dissent further argued that compensatory strategies developed by an individual with LD are very much different than corrective self-accommodations referred to by the Supreme Court and should not be considered when determining disability status. (*Gonzales v. National Board of Medical Examiners*, 2000).

Summary of Court Rulings on the ADA

Under the rule of precedent from the Supreme Court, the Federal Court of Appeals accepted and indeed embraced this strict judicial interpretation of disability under the ADA. Individuals were now faced with an onerous burden in order to establish disability under the law. An individual now had to show an inability or severe restriction in performing a major life activity, and a major life activity had to be an activity that was of central importance of most people's daily lives. Additionally, mitigating measures that individuals used to alleviate the effects of an impairment had to be considered when determining eligibility under the ADA. The end result was that litigation under the ADA was often decided on the threshold issue of disability and individuals entitled to protection were denied coverage by the courts (Blue, 2012). As posited by Hill and

Blanck (2009), the courts had essentially disregarded an inclusive civil rights model premised on the notion that barriers to access were not a necessary result of medical conditions, but rather from societal assumptions and decisions to exclude individuals with disabilities.

Americans with Disabilities Act Amendments Act of 2008

These decisions from the Supreme Court and lower courts drastically changed the meaning of the term disability as originally intended, and Congress felt that the law had been misconstrued and misapplied to individuals with disabilities (Feldblum, Barry, & Benfer, 2008). In response, the Americans with Disabilities Act Restoration Act was introduced in Congress on July 26, 2007 (ADARA, 2007). However, it was not until June 25, 2008 that the House of Representatives passed a revised form of the ADARA, H. R. 3195, the ADA Amendments Act of 2008 (ADAAA, 2008). On September 11, 2008, the Senate passed S. 3406, a modified version of the ADAAA of 2008. Instead of being referred to conference committee for reconciliation, S. 3406 was voted on by the House of Representatives in its entirety and was passed on September 17, 2008. The legislation was signed into law by President George W. Bush on September 25, 2008, and went into effect on January 1, 2009. The major provisions of the law provide for:

- relaxation of the standard to establish a substantial limitation of a major life activity;
- the elimination of use of mitigating measures;
- the expansion of definition of major life activities;

- instruction to the EEOC to revise the regulatory definition of substantial limitation;
- expansion of the definition of auxiliary aids and services (Heyward, 2009).

The focus of Congress in enacting the ADAAA was to be inclusive with statutory text and provide legislative history as a safety net, and blueprint for administrative agencies to follow later when creating regulations pursuant to the amended law (Barry, 2013).

Significant Changes in the ADA Effectuated by the ADAAA

As noted, prior Supreme Court holdings had narrowed the broad scope of protection under the ADA intended by Congress, and the application of these judicially imposed restrictive standards resulted in less than three percent of individuals asserting claims of discrimination against employers and educational facilities to successfully prevail on claims of discrimination (Slack, 2009). The ADAAA rejected this demanding standard in favor of broad coverage of individuals with disabilities (Long, 2008). However, although Congress recognized the need to relax this overly restrictive standard, the language of the bill failed to specifically alter the ADA language to reflect this change (Klein, 2010).

The purposes section of the ADAAA states congressional intent to reinstate a broad scope of protection under the ADA, and a rejection of the *Sutton* requirement of consideration of ameliorative effects of mitigating measures in determining substantial impairment of a major life activity (Long, 2008). The ADAAA further rejected the standards enunciated in *Toyota* that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a

demanding standard for qualifying as disabled” and that “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” The question of whether an individual’s impairment substantially limits a major life activity under the ADA should not demand extensive analysis (ADAAA Section 2, 2008). Furthermore, the holding in *Toyota* that the significant restriction of a major life activity must pertain to activities of central importance to daily life was also determined to be contrary to the intent of the original ADA (Feldblum, Barry, & Benfer, 2008).

The Revised Definition of Disability for Determining Eligibility Under the ADAAA

The issue of whether a person has a disability was intended to be a basic threshold issue. The legislative history of the ADAAA recognizes a much lower threshold for determining whether a person is an individual with a disability under the law than enunciated by the Supreme Court (Barry, 2010). The changes brought about by the ADAAA indicate that the focus should be on whether discrimination has occurred rather than meeting a strict definition of disability (Elliott, 2012). The ADAAA restored the original intent that the focus of judicial analysis of the statute should be whether an individual with a disability, which was intended to be a very broad category, is being granted equal access through reasonable accommodations (i.e., is not being discriminated against by the entity subject to the provisions of the ADA; American University Washington College of Law, 2009). Once this initial standard is established, it is incumbent on the entity to provide reasonable accommodations and modifications to ensure access to the individual with a disability. The definition of disability must now be

construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the amended statute (Race & Dornier, 2009). Yet even with this enunciation of a much more liberal standard, Hickox (2011) stated that Congress may have missed the mark in not setting forth more clearly how an individual can establish a substantial limitation of a major life activity under the ADA.

New EEOC Regulations Re: Definition of Disability

As part of the ADAAA, Congress explicitly rejected the then current EEOC regulation that defined substantially limited as “significantly restricted to the condition, manner or duration under which an individual can perform a particular major life activity as compared to ... the average person in the general population” (ADA Regulations, Title I, 29 C.F.R. §10.2(j), 2010).

The ADAAA further expressly delegated authority to the EEOC to issue regulations to define the term “substantially limits” as a direct response to the Supreme Court’s ruling in the *Sutton* case that questioned the authority of the EEOC to issue such a specific regulation under the original ADA (Miller, 2011). Final regulations were published by the EEOC on March 25, 2011, with an effective date of May 24, 2011 (ADAAA Final Regulations, Title I, *Federal Register*, 2011). Although the EEOC regulations specifically pertain to employment under Title I of the ADA, courts have applied provisions of Title I regulations interchangeably with Title II and Title III of the ADA that are applicable to postsecondary education (*McElwee v. County of Orange*, 2012).

The new EEOC regulations have made it easier for a person seeking protection under the ADA to establish that he or she is an individual with a disability within the meaning of the law. An individual no longer is required to establish that a substantially limiting impairment must severely restrict the performance of a major life activity (Smith & Cherry, 2012), or even significantly restrict the ability to perform a major life activity (Stone, 2011). The regulatory language, which parallels the statutory language, provides that the new standard should not demand an extensive analysis and ensures the provision of reasonable accommodations to individuals protected under the act (Barry, 2010). The regulations provide that the focus should be on how a major life activity is substantially limited and not on the outcomes an individual can achieve (Travis, 2011).

The comparison group for determining substantial limitation was changed from the “average person” to “most people in the general population” to allow for a more common sense approach in determining substantial limitation (Drohan, 2011). The comparison to “most people” usually will not require scientific, medical, or statistical analysis under the EEOC’s regulatory rules of construction (Silverstein, 2011). However, it may be helpful to consider the condition, manner, or duration it takes to perform a specific activity as compared to most people (Simon, 2011). For example, an individual with dyslexia struggles with the basic mechanics of reading but most people do not have such discrepancies (Simon, 2002). Accordingly, under a liberal reading of the new statutory language, the fact that most people do not suffer from dyslexia may be enough to differentiate such individuals from the general population.

The key element of the new EEOC regulations for determining disability is the section that addresses the term “substantially limits” in relation to establishing that a person is an individual with a disability within the scope of protection of the act. There are nine enumerated rules of construction when determining whether an impairment substantially limits a major life activity:

- 1) substantially limits must be construed broadly in favor of coverage and is not a demanding standard;
- 2) the comparison group is most people in the general population, but an impairment does not have to prevent, or significantly or severely restrict the performance of a major life activity;
- 3) determination of substantial limitation should not demand extensive analysis;
- 4) an individualized assessment is required;
- 5) comparison to most people in the general population does not require scientific, medical or statistical evidence, but may be used if appropriate; typically a person with a learning disability will be substantially limited in learning, reading and thinking as compared to the general population;
- 6) determination of substantial limitation must be made without regard to the ameliorative effects of mitigating measures, except for eyeglasses and contact lenses;
- 7) impairments that are episodic or in remission may be substantially limiting;
- 8) there only needs to be substantial limitation of one major life activity;
- 9) effects of an impairment that is expected to last fewer than six months may be substantially limiting (Allbright, 2011 and Equal Employment Opportunity Commission, 2011).

Impact of the ADAAA on Postsecondary Education and Eligibility Documentation

The ADAAA made changes to the three main titles of the ADA, pertaining to employment, public services, and public accommodations and services operated by

private entities. Therefore the ADAAA has a significant impact on postsecondary educational institutions. These amendments, effective as of January 2009, have greatly relaxed the standard for students with disabilities to qualify for coverage under the ADA. The legal standard for showing that one is substantially impaired in the performance of a major life activity is much easier to establish under the amended statute. The lower threshold standard of establishing disability under the ADAAA will shift the focus to more complex factual issues such as the provision of reasonable accommodations (Peikes & Burns, 2009). As early as 2009, the courts were already interpreting this threshold standard more liberally and requiring a lesser burden of documenting disability (Sampat & Grant, 2012).

Furthermore, reading, writing, thinking, speaking, concentration, all components of learning, and learning specifically are all now enumerated major life activities under the law (ADAAA Section 4(a), 2008), meaning that more students may be covered under the law and there will be a more specific focus on these enumerated major life activities (Heekin, 2011). The past jurisprudence under the ADA of being centered on whether an individual was disabled is likely over and now impairments ranging from depression to cancer in remission may be seen as disabilities *per se* under the ADAAA (Terry, 2011). Accordingly, educational institutions of higher learning must adopt new policies or revise existing policies concerning requests for accommodations under the ADA, and focus on an interactive process to provide reasonable accommodations for students with disabilities (Bowman, 2011).

Post-ADAAA Focus for Postsecondary Education Institutions

Prior to the ADAAA, the focus for postsecondary education was the actual determination of whether a student was substantially limited in a major life activity, and therefore eligible for protection and reasonable accommodations. Now the determination concerning disability status is a lesser threshold issue. Instead, the focus of the ADAAA is on discrimination which will most often arise in the context whether a student with a disability is being provided with reasonable accommodations in order to obtain equal access (Travis, 2011). This change is likely to impact perspectives of the field on the role of documentation. The main purpose of documentation before the ADAAA was to establish that the student was an individual with a disability. Now the main purpose is to establish the impact of an impairment on functional capacity and the ability of the student to perform academic related tasks (Shaw, Keenan, Madaus, & Banerjee, 2010).

Additionally, the ADA existing regulations were amended by the DOJ on September 15, 2010 (ADA Regulations, Title III Amendments, 2010). In particular the regulation at 28 C.F.R §36.309 addressing examinations and courses related to licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes were amended. This amendment provided that 1) documentation must be reasonable and limited to the need for accommodation, 2) considerable weight must be given to documentation of past accommodation in testing, and 3) the entity must respond in a timely manner to requests for accommodations (Sampat and Grant, 2012).

Postsecondary institutions have relied on case law under Section 309 in the past in

developing documentation policies and therefore, these changes in the regulations will become more important as case law develops (Simon, 2011).

Potential Focus of the Courts Under the ADAAA

Looking forward, courts may focus on the severity of endogenous limitations and the right to obtain reasonable accommodations under the ADAAA (Cox, 2010). Accordingly, postsecondary schools should focus on an individualized assessment of students to determine disability status and the need for appropriate academic accommodations based on current functional capacity (Shaw, 2009). Focus on quantitative psychometric test scores and evaluations, and debate over interpretation of test scores in terms of defining disability that have permeated disability documentation may no longer be an advisable practice. For example, in addition to overall standardized scoring on psychometric testing, substantial limitation may also be documented when test scores indicate a significant discrepancy between individual intellectual capacity and actual reading ability (Yingling, 2011). Students continue to bear the burden of presenting documentation of the need for requested academic accommodations. However, rejection of documentation presented from a student's medical or educational expert must be clearly explained and supported by the opinion of an appropriate expert in the relevant field (Heyward, 2009).

Because of this expanded definition of disability, courts will now decide more cases on the merits than on if a person is qualified for protections under the law, and postsecondary institutions will need to establish that actions, or even failure to take action, are not a result of discrimination (Slack, 2009). A broader and more liberal

interpretation of coverage called for under the ADAAA should have a substantial impact on the relevance of standardized testing results, especially for students that have done well academically, and therefore were previously found not to meet ADA qualification standards (Grossman, 2009). The legislative history of the ADAAA clearly indicates that a student that has done well academically in the past may still be substantially limited in the major life activities of learning, reading, writing, thinking or speaking (Shackelford, 2009), as noted in the pre-ADAAA decision in *Bartlett v. New York State Board of Law Examiners* (2001). In fact the legislative history of the ADAAA indicates Congressional endorsement of the *Bartlett* decision, and rejection of the restrictive interpretations set forth in *Wong v. Regents of the University of California* (2005) and *Gonzales v. National Board of Medical Examiners* (2000; Yingling, 2011). Congress has further indicated that a student may be gifted and talented, and at the same time require academic accommodations as an individual with a disability (Simon, 2011). Furthermore, the new EEOC regulations specifically provide, at 29 C.F.R. § 1630.2(j) (4)(iii), that an individual with a learning disability that has achieved a high level of academic success may be substantially limited in learning due to additional effort required as compared to most people (ADAAA Final Regulations, Title I, *Federal Register*, 2011).

Disability Determination Under the ADAAA

Postsecondary schools retain the right to make disability determinations after consideration of evidence provided by students. Something more than a mere diagnosis must be provided, however, requesting documentation beyond the minimum to establish a disability and support a request for reasonable accommodation may be determined to be

impermissible under the ADAAA (Heyward, 2011). The ADAAA does not change the duty to provide reasonable accommodations, yet medical verification of a disabling impairment may play an enhanced role in determining reasonable accommodations by showing the impact of an impairment (Jones, 2010). However, eligibility under the ADA is now a much more relaxed threshold requirement, and therefore, students are much more likely to establish disability status under the ADA, thereby switching the focus to more complex issues regarding the provision of reasonable accommodations (Bowman, 2011). The Association on Higher Education And Disability (AHEAD) has provided an updated conceptual framework pertaining to postsecondary education documentation policy for supporting requests for academic accommodations (AHEAD, 2012). In congruence with the ADAAA, this guidance focuses on determining effective reasonable accommodations as opposed to establishing that a student is considered to be an individual with a disability under the law.

Right to Make Determinations and Preservation of Academic Integrity

Postsecondary institutions may be concerned that the relaxed legal standard for qualification under the ADAAA will open the “floodgates” and that students with disabilities utilizing mitigating measures may be able to function with minimal impairment (Joiner, 2010). Congress has provided less guidance concerning the determination of reasonable accommodations than in making the initial determination that an individual has a disability that is within the scope of coverage under the ADA (Bissonette, 2009). However, postsecondary institutions have taken a broad view of disability and the provision of academic accommodations even beyond the scope of prior

ADA requirements (Lerner, 2004). Therefore, the impact of an expanded definition of substantial limitation under the ADAAA may be limited as to increasing the number of students actually receiving ADA accommodations (Hensel, 2009).

Colleges and universities retain the right to make accommodation decisions as before the enactment of the ADAAA, although it should be noted that the process of making such determinations has varied considerably across institutions of higher education (Lindstrom, 2007). Additionally, the language of the ADAAA reinforces the longstanding ADA provision that postsecondary institutions are not required to provide academic accommodations that would fundamentally alter essential academic requirements (ADAAA Section 6(a)(1)(f), 2009; American University Washington College of Law, 2009). Nevertheless, it is incumbent on the postsecondary institution to provide reasonable accommodations to all students with disabilities through a process that is fair and equitable and to determine the true requirements that meet appropriate academic standards (Race & Dornier, 2009). Accordingly, the determination that a specific academic accommodation fundamentally alters an essential academic requirement must be made through a valid deliberative process (*Wynne v. Tufts University School of Medicine*, 1992; *Guckenberger v. Boston University*, 1998). Courts are not likely to override academic policy unless there is substantial departure from academic norms that indicate a failure to exercise professional judgment (*Zukle v. Regents of the University of California*, 1999; *Regents of the University of Michigan v. Ewing*, 1985).

A postsecondary institution may also show that providing the requested accommodation imposes an undue hardship and therefore, is not required under the ADA. For example, in *Powell v. National Board of Medical Examiners* (2004), the court found that a medical school student's requested accommodation of waiving a passing grade on the United States Medical Licensing Examination was unreasonable and imposed an undue hardship on the medical school. These protections still insulate postsecondary institutions from having to provide requested academic accommodations that would otherwise be viewed as reasonable under the ADA, but for the fact that they would fundamentally alter an essential academic requirement or impose an undue hardship.

Summary

Review of the literature concerning the ADA indicates that the original intent of this federal legislation was to protect the civil rights of individuals with disabilities from discrimination. However, the Supreme Court issued rulings that severely limited the standing of a plaintiff to show substantial limitation of a major life activity. Specifically, the court ruled that mitigating measures must be considered, a major life activity must be one that is of central importance to most people's lives, and that substantial limitation is a strict standard requiring a showing that an impairment prevents or severely limits the ability to perform a major life activity. The result was that many individuals were found not to be substantially limited in a major life activity and were not protected by the ADA.

The ADAAA was enacted by Congress to rectify the improper standards imposed by the Supreme Court, and to restore the original intent of the ADA. Substantial limitation of a major life activity was restated as a threshold standard that did not demand

extensive analysis, not requiring severe or even significant restriction by an impairment. The EEOC was ordered by Congress to amend its regulations that defined substantial limitation as a significant restriction. The definition of major life activities was expanded and a non-exhaustive list of major life activities was enumerated.

The impact of the changes enacted through the ADAAA is still unfolding. It is now easier to establish substantial limitation of a major life activity. Accordingly, more postsecondary students will be eligible for protection from discrimination under the ADA. Students will have a lesser burden in presenting documentation to establish eligibility. Students that have demonstrated academic success in the past may still be eligible for postsecondary academic accommodations. Postsecondary institutions are not required to fundamentally alter essential academic requirements, or provide accommodations that create an undue burden or hardship. Accordingly, postsecondary institutions do not have to provide accommodations that alter essential academic requirements, and will be given deference by the courts in determining these academic requirements.

References

- Association of Higher Education And Disability, (2012). *Supporting accommodation Requests: guidance on documentation practices*. Retrieved from <http://www.ahead.org/resources/best-practices-resources/principles>.
- Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
- Alexander v. Choate*, 469 U.S. 287 (1985).
- Allbright, A. L. (2011). The EEOC’s regulations implementing the ADAAA: Expanding coverage under the “disability” definition. *Mental and Physical Disability Law Reporter*, 35, 2007-2012.
- American University Washington College of Law. (2009). Panel: What the ADA amendments and higher education acts mean for law schools. *American University Journal of Gender, Social Policy & the Law*, 18, 13 – 39.
- Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (1990), 42 U.S.C. § 12101 (2010).
- Americans with Disabilities Act of 1990 Regulations, Title I, 56 Fed. Reg. 35726, (July 26, 1991) (codified at 29 C.F.R. § 1630).
- Americans with Disabilities Act of 1990 Regulations, Title III Amendments, 75 Fed. Reg. 56255, (September 15, 2010).
- Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (2008).
- Americans with Disabilities Act Amendments Act of 2008 Final Regulations, Title I, 76 Federal Register 16978 (2011).
- Americans with Disabilities Act Restoration Act of 2007, S. 1881, 110th Cong. (2007).

- Barry, K. (2013) Exactly what congress intended? *Employee Rights and Employment Policy Journal*, 17, No. 1 (author's preliminary working draft). Retrieved from <http://ssrn.com/abstract=2240043>.
- Barry, K. (2010). Toward universalism: What the ADA amendments act of 2008 can and can't do for disability rights. *Berkeley Journal of Employment and Labor Law*, 31, 203 – 283.
- Bartlett v. New York State Board of Law Examiners*, 527 U.S. 1031 (1999).
- Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001).
- Bissonnette, R. S. (2009). Reasonably accommodating nonmitigating plaintiffs after the ADA amendments act of 2008. *Boston College Law Review*, 50, 859-896.
- Blue, E. P. (2012). Arguing disability under the ADA amendments act: Where do we stand? *The Federal Lawyer*, 59, 38-43.
- Bowman, L. (2011). Americans with disabilities act as amended: Principles and practice. *New Directions For Adult And Continuing Education*, 132, 85-95.
- Bragdon v. Abbott*, 524 U.S. 624 (1998).
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- Catchpole, N. & Miller, A. (2006). The disabled ADA: How a narrowing ADA threatens to exclude the cognitively disabled. *Brigham Young University Law Review*, 2006, 1333-1379.
- Cox, J. (2010). Crossroads and signposts: The ADA amendments act of 2008. *Indiana Law Journal*, 85, 187-224.

- Drohan, J. P. (2011). Practicing law institute's tenth annual school law institute: The Americans with disabilities act and section 504 update. *Touro Law Review*, 26, 1173-1193.
- Elliott, T. L. (2012). The path to the americans with disabilities act amendments act: U. S. supreme court cases, congressional intent, and substantial change. *Gonzaga Law Review*, 48, 395-420.
- Equal Employment Opportunity Commission. (2011). *Fact sheet on the EEOC's final regulations implementing the ADAAA*. Retrieved from www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.
- Feldblum, C. R. (2000). Definition of disability under federal anti-discrimination law: What happened? And what can be we do about it? *Berkeley Journal of Employment and Labor Law*, 21, 91-165.
- Feldblum, C. R., Barry, K. & Benfer, E. A. (2008). The ADA amendments act of 2008. *Texas Journal on Civil Liberties & Civil Rights*, 13, 187-240.
- Fram, D. K. (2008). The ADA amendments act: Dramatic changes in coverage. *Hofstra Labor & Employment Law Journal*, 26, 193-221.
- Gonzales v. National Board of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000).
- Grossman, P. D. (2009). Foreword with a challenge: Leading our campuses away from the perfect storm. *Journal of Postsecondary Education and Disability*, 22, 4-9.
- Guckenberger v. Boston University*, 8 F. Supp. 2d 82 (D. Mass. 1998).
- Heekin, J. P. (2011). ADHD and the new americans with disabilities act: Expanded legal

- recognition for cognitive disorders. *William & Mary Policy Review*, 2, 171-193.
- Hensel, W. F. (2009). Rights resurgence: The impact of the ADA amendments act on schools and universities. *Georgia State University Law Review*, 25, 641-697.
- Heyward, S. M. (2011). Legal challenges and opportunities. *New Directions for Higher Education*, 154, 55-64.
- Heyward, S. M. (2009). *The ADA amendments act of 2008 (ADAAA): How do we determine who are “qualified individuals with disabilities” now...* Paper presented at symposium on the ADAAA at Suffolk Law School, Boston, MA.
- Hickox, S. A. (2011). The underwhelming impact of the Americans with disabilities act amendments act. *University of Baltimore Law Review*, 40, 419-494.
- Hill, E. and Blanck, P. (2009). Future of disability rights advocacy and “the right to live in the world.” *Texas Journal on Civil Liberties & Civil Rights*, 15, 1-31.
- Hoffman, L. C. (2012). The U.S. supreme court’s “disability” in statutory construction: The debate over the interpretation of the definition of “disability” under the Americans with disabilities act (ADA) & the ADA amendments act of 2008. *The Scholar St. Mary’s Law Review on Minority Issues*, 14, 913-944.
- Hoyer, S. H. (2002). *Not exactly what we intended, justice o’connor*. Washington Post, Jan. 20, 2002. Retrieved from http://www.c-c-d.org/task_forces/rights/ada/Not%20Exactly%20What%20We%20Intended%20Justice%20O%27%20Connor.pdf.
- Joiner, A. M. (2010). The ADAAA: Opening the floodgates. *San Diego Law Review*, 47, 331-369.

- Jones, J. D. (2010). Enfeebling the ADA: The ADA amendments act of 2008. *Oklahoma Law Review*, 62, 667-699.
- Karger, H. & Rose, S. R. (2010). Revisiting the Americans with disabilities act after two decades. *Journal of Social Work in Disability & Rehabilitation*, 9:2-3, 73-86.
- Katsiyannis, A. & Yell, M. (2003). Americans with disabilities act and the supreme court: Implications for practice. *Preventing School Failure*, 47, 39-41.
- Klein, P. R. (2010). The ADA amendments act of 2008: The pendulum swings back. *Case Western Reserve Law Review*, 60, 467-490.
- Lerner, C. S. (2004). Accommodations for the learning disabled: A level playing field or affirmative action for elites? *Vanderbilt Law Review*, 57, 1043-1124.
- Lindstrom, J. H. (2007). Determining appropriate accommodations for postsecondary students with reading and written expression disorders. *Learning Disabilities Research & Practice*, 22(4), 229-236.
- Long, A. B. (2008). Introducing the new and improved Americans with disabilities act: Assessing the ADA amendments act of 2008. *Northwestern University Law Review Colloquy*, 103, 217-229.
- McElwee v. County of Orange*, 700 F. 3d 635 (2d Cir. 2012).
- Miller, C. J. (2011). EEOC reinforces broad interpretation of ADAAA disability qualification: But what does “substantially limits” mean? *Missouri Law Review*, 76, 43-80.
- Murphy v. United Parcel Inc.*, 527 U.S. 516 (1999).
- National Council on Disability (2003). *Policy brief series: Righting the ADA no. 13*

- the supreme court's ADA decisions regarding substantial limitation and major life activities*. Retrieved from <http://www.ncd.gov/publications/2003/April292003>.
- Peikes, L. & Burns M. D. (2009). Recent development in ADA law. *Connecticut Lawyer*, 19, 13-15, 38-39.
- Percy, S. L. (2001). Challenges and dilemmas in implementing the Americans with disabilities act: Lessons from the first decade. *Policy Studies Journal*, 29:4, 633-640.
- Powell v. National Board of Medical Examiners*, 364 F. 3d 79 (2d Cir. 2004).
- Race, P. A. & Dornier, S. M. (2009). ADA amendments act of 2008: The effect on employers and educators. *Willamette Law Review*, 46, 357 – 405.
- Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985).
- Rothstein, L. F. (2006). *Disability law: Cases, materials, problems* (4th ed.). Newark, NJ: LEXISNEXIS.
- Rothstein, L. F. (2004). Disability law and higher education: A road map for where we've been and where we may be heading. *Maryland Law Review*, 63, 122-161.
- Sampat, N. M. and Grant, E. V. (2012). The aspiring attorney with ADHD: Bar accommodations or a bar to practice? *Hastings Race & Poverty Law Journal*, 9, 291-351.
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2010).
- Selmi, M. (2008). Interpreting the Americans with disabilities act: Why the supreme court rewrote the statute, and why congress did not care. *The George Washington*

Law Review, 76, 522-575.

Shackelford, A. L. (2009). Documenting the needs of student veterans with disabilities: Intersection roadblocks, solutions, and legal realities. *Journal of Postsecondary Education and Disability*, 22, 36-42.

Shapiro, J. P. (1994). *No pity: People with disabilities forging a new civil rights Movement*. New York, NY: Times Books.

Shaw, S. F. (2009). Transition to postsecondary education. *Focus on Exceptional Children*, 42(2), 1-16.

Shaw, S. F., Keenan, W. R., Madaus, J. W. & Banerjee, M. (2010). Disability documentation, the americans with disabilities act amendments act, and the summary of performance: How are they linked? *Journal of Postsecondary Education and Disability*, 22, 142-150.

Silverstein, R. (2011). *Description and analysis of EEOC's final regulation implementing The ADA amendments act of 2008*. Retrieved from http://www.thesierragroup.com/assets/documents/adaaa_.

Simon, J. A. (2011). Legal issues in serving students with disabilities in postsecondary education. *New Directions For Student Services*, 134, 95-107.

Simon, J. A. (2002). Bartlett v. new york state board of law examiners: A high-stakes testing case study. *Perspectives*, 28, 1-5.

Singh v. George Washington University School of Medicine and Health Sciences, (2011) 667 F.3d 1 (D.C. Cir. 2011)

Singh v. George Washington University School of Medicine and Health Sciences, (2007).

- 508 F.3d 1097 (D.C. Cir. 2007).
- Slack, M. H. (2009). ADA amendments act of 2008: Implications for employers and education institutions. *Journal of Health & Biomedical Law*, 5, 283-307.
- Smith, L. D. & Cherry, M. H. (2012). The ADA amendments act of 2008: Practical implications for employers in 2012 and beyond. *Defense Counsel Journal*, 79, 32-48.
- Southeastern Community College v. Davis*, 442 U.S. 397 (1979).
- Stone, K. (2011). Substantial limitations: Reflections on the ADAAA. *New York University Journal of Legislation and Public Policy*, 14, 509-564.
- Sutton v. United Air Lines*, 527 U.S. 471 (1999).
- Terry, J. K. (2011). The ADA amendments act three years after passage: The EEOC's final regulations and the first court decisions emerge at last. *The Federal Lawyer*, 58, 49-56.
- Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
- Travis, M. C. (2011). A new direction: Amendments put americans with disabilities act back on path of tackling discrimination. *Tennessee Bar Journal*, 47, 12-17.
- United States Department of Justice (2005). *A guide to disability rights laws*. Retrieved on February 20, 2012 from <http://www.ada.gov/cguide.htm>.
- Wong v. Regents of the University of California*, 410 F.3d 1052 (9th Cir. 2005).
- Wynne v. Tufts University School of Medicine*, 976 F. 2d 791 (1st Cir. 1992).
- Yingling, M. P. (2011). Learning disabilities and the ADA: Licensing exam accommodations in the wake of the ADA amendments act of 2008. *Cleveland State Law Review*, 59, 291-313.

Zirkel, P. A. (2011). Does section 504 require a section 504 plan for each eligible

non-IDEA student? *Journal of Law & Education*, 40, 407-416.

Zukle v. Regents of the University of California, 166 F. 3d 1041 (9th Cir. 1999).

Analysis of the Legal Standard of Disability Under
the Americans with Disabilities Act Amendments Act of 2008

Walter R. Keenan
Doctoral Dissertation Chapter II
University of Connecticut

Abstract

The Americans with Disabilities Act of 1990 (ADA) was enacted as civil rights legislation to eliminate discrimination against individuals with disabilities. The intent of Congress was to provide broad coverage and that the threshold eligibility requirement of being substantially limited in a major life activity would not require extensive legal analysis. However, the legal precedent set by the Supreme Court resulted in lower federal courts denying many people coverage under the ADA. Specifically, students in postsecondary education with documented learning disabilities were denied coverage because they had exhibited high academic achievement. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was a direct response by Congress to overrule the Supreme Court, and restore the original intent of broad coverage of individuals with disabilities. The purpose of this study is to expand research on the current legal standard of disability under the ADA as amended by the ADAAA through legal research methods analyzing statutory and regulatory language, legislative history, and relevant case law.

Analysis of the Legal Standard of Disability Under the Americans with Disabilities Act Amendments Act of 2008

Introduction and Statement of the Problem

Congress provided protection against discrimination for individuals with disabilities through the Americans with Disabilities Act (ADA) in 1990 and intended for this to be a broad scope of protection (Long, 2008; 42 U.S.C. §12101(b)). However, a series of restrictive judicial rulings from the United States Supreme Court (Supreme Court) and various lower federal courts that followed the Supreme Court precedent abrogated this intent (Feldblum, Barry, and Benfer, 2008). These judicial rulings created restrictive legal standards concerning the definition of disability as a substantial limitation of a major life activity. The Supreme Court required that an impairment must prevent or severely restrict the performance of a major life activity that is of central importance to most people's daily lives. (*Toyota Motor Manufacturing Kentucky v. Williams*, 2002), and that the ameliorative effects of mitigating measures must be considered in determining whether there is a substantial limitation of a major life activity (*Sutton v. United Air Lines*, 1999; *Murphy v. United Parcel Inc.*, 1999; *Albertson's Inc. v. Kirkingburg*, 1999).

Contrary to the original intent of Congress, the Supreme Court issued the four referenced judicial rulings that set a very restrictive legal standard to establish the basic threshold of eligibility under the ADA. In response, Congress passed the American with Disabilities Amendments Act of 2008 (ADAAA) that became effective on January 1, 2009. The main purpose of this legislation was to restore the original intention of

Congress in enacting the ADA, and to negate the restrictive legal standards imposed by the Supreme Court.

Although the Supreme Court decisions focused on eligibility in the context of employment, the ADAAA has significant impact on the focus of eligibility determination for postsecondary education institutions and students with disabilities. In the case of postsecondary education, the law requires the provision of academic accommodations to qualified students with disabilities to enable them to access educational programs. In this context, the crux of antidiscrimination protection under the law is to provide these necessary accommodations to ensure a student is not being denied the benefit of equal participation in the postsecondary education program (Title II of the ADA, 42 U.S.C. § 12132 and Title III of the ADA, 42 U.S.C. § 12182(a)).

The lower federal courts issued subsequent rulings denying postsecondary students with disabilities the protection of the ADA noting that the students failed to establish disability under the restrictive standards set forth in the *Toyota* and *Sutton*. Under this restrictive standard, postsecondary students who were academically successful encountered difficulty in establishing a substantial limitation of a major life activity to qualify for legal protection under the ADA.

The current issue for postsecondary education students and institutions is determining the legal standard for eligibility under the ADA following the enactment of the ADAAA. Congress enacted the ADAAA to overrule the restrictive eligibility standard set forth by the Supreme Court. Was this goal accomplished and to what extent? Accordingly, legal analysis of the current standard is necessary to determine if the

ADAAA has remedied the past problem and what is the new legal standard that has replaced the prior interpretation of the Supreme Court.

Method

The method utilized in the study is analysis through legal research. Legal research is the process that lawyers, jurists, and legal scholars use to find authority to support and define a principle of law. Primary authorities are sources of law that are binding on courts, government and individuals. These sources include statutes, administrative regulations, court decisions and court orders (Cornell University Law School – Legal Information Institute, 2013a). A brief description of each source follows.

Federal Statutes

The ADA and ADAAA are federal statutes. The official federal statutes are codified first in the Statutes at Large and then in the United States Code (USC), and also are available with further annotations and relevant case law citations in the United States Code Annotated (USCA) and United States Code Service (USCS). Analysis of the meaning of the subject statutes is first done through a close reading of the statutory language to ascertain the intent of Congress in enacting these antidiscrimination laws, and further determine the substantive principles of law codified in the statutes.

Statutory construction. The process of determining the meaning of a particular statute is referred to as statutory construction. Statutory interpretation begins with a reading of the plain language of the subject statute, and application of the usual and ordinary meaning to determine original intent. There are basic or general rules of statutory construction. One section of statutes is read to be consistent with all other

sections of the statute. A limitation in an earlier version of the statute that is deleted prior to enactment presumes the limitation was not intended. Congress is presumed to act intentionally when language is included in one section of a statute but omitted in another. Conflict between case law and legislation is usually reconciled in favor of the legislation. Courts may look to the common usage of a word, prior case law, dictionaries, parallel meaning, and punctuation to determine the meaning of a statute (Cornell University Law School – Legal Information Institute, 2013b).

However, there are conflicting schools of thought concerning the application of statutory construction. There is the position of “purposivism” which is interpretation by discerning the underlying purpose of Congress in enacting a statute. Contrary to purposivism, the principle of “new textualism” advocates that the meaning of the plain text, and not the intent of Congress, determines the meaning of a statute (Walker, 2002). The plain meaning rule that disallows reliance on legislative history to determine the meaning of a statute was often more honored in the breach than the observance with courts finding the language to be ambiguous indicating the need to consider the legislative history (Kim, 2008). Regardless of the emphasis placed upon statutory construction, the analysis of the intent of Congress in the context of comprehensive legal research includes analysis of the legislative history of a statute.

Given that the subsequent legislation declaring the intent of an earlier statute is entitled to great weight in terms of statutory construction (*Red Lion Broadcasting Co. v. FCC*, 1969), this especially holds true with the statutory sources of law that are the focus of the present subject research, the ADA and the ADAAA. Legislative history to

determine the intent of a legislature is appropriately used to interpret statutory text where the meaning cannot be conclusively determined from the text alone (Funk, 1997).

Legislative history. Federal legislative history consists of all the related documents created by Congress that precede the enactment of a public law (McKinney & Sweet, 2008). Legislative history includes congressional committee reports and recorded commentary from the floor of the House of Representatives and Senate that often becomes valuable when disputes arise from ambiguous statutory language. As noted, some courts disapprove of using legislative history to clarify the meaning of a law, however the volume of federal legislation has resulted in an increasing reliance on legislative history in the federal court system (Duke University School of Law, 2012). Legislative history can be instructive in determining the intent of Congress when legislation is drafted and enacted. However, authority given to legislative history will vary depending on the specific court interpreting a statute. Statutory language that is plain and unambiguous will be attributed the plain meaning of the language, and legislative history will be given limited weight as a general rule of law utilized by courts in interpreting statutes (*Barnhart v. Sigmon Coal Co.*, 2002).

Usually, the reports of the congressional committees that review proposed legislation and recommend enactment are considered the most authoritative source for determining the intent of Congress in enacting a law. Other documents that comprise the legislative history include statements made on the floor of Congress in legislative debate, testimony at committee hearings, and earlier or alternative versions of the bill that is

passed (Duke University Law School, 2012). The reports of congressional committees include reports from the House of Representatives and the Senate.

Administrative Agency Regulations

The Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) also formally promulgated administrative regulations related to the ADA and the ADAAA pursuant to specific delegation of rulemaking authority in the statutes. Substantive agency rules or regulations, referred to as legislative rules, are promulgated by the respective administrative agencies pursuant to the federal Administrative Procedures Act (2011) at 5 U.S.C. §553, and have the force and effect of law (Funk, 2002). The terms rule and regulation are generally considered synonymous; see 2 U.S.C §658(10) defining rule and regulation as meaning the same.

Agency regulations are initially published in the *Federal Register* pursuant to the Federal Register Act (2011) at 44 U.S.C. §§ 1501-1511. Both proposed and final regulations are published as part of the promulgation process. A period for public comment is provided following the issuance of a proposed regulation. Pursuant to administrative regulation, all comments to proposed rules and agency responses are summarized in the preamble before a final regulation is published, and all proposed and final regulations must be submitted with specific preamble heading material (Federal Register Act Regulations, 1976). This supplementary information often provides the background and need for the regulation, and how a final rule differs from a proposed rule when changes have been made (McKinney, 2012). Administrative agency regulations are codified in the Code of Federal Regulations (CFR) after being published in the

Federal Register. In addition to the regulations, the Code of Federal Regulations contains references to the statutory authority supporting the regulation and references to related publications in the *Federal Register*.

Judicial Case Law

The history of jurisprudence in the United States is based upon the English common law system. Over time, the common law system has been supplanted by statutory law created by Congress and federal administrative agencies. Judicial decisions are an important primary source of law because it is the courts that interpret the disputed meaning of specific statutes and regulations. Decisions of higher authority appellate courts set legal precedence and may be binding on lower courts under the legal doctrine of *stare decisis*, or at least persuasive concerning rules of law. Accordingly, the federal courts must interpret statutes and regulations and are bound by authoritative rulings by higher courts. In the hierarchy of authority in the federal court system the Supreme Court is the highest authority and final arbiter involving disputes concerning the constitution and federal statutes. The Court of Appeals is the intermediate federal appellate court, while the District Court is the trial level of adjudication in the federal system.

In researching case law to determine a specific rule of law it is necessary to make certain the judicial decision that is being relied upon is still “good law.” This process will show if a prior ruling has been overruled and even more importantly, when the ruling has been followed by other courts. Accordingly, research of subsequent case law is necessary.

Findings

The findings derived from the research include: 1) Legal standard of disability under the ADA prior to the enactment of the ADAAA; 2) Legislative history showing Congressional intent in enacting the ADAAA; 3) Specific statutory language from the ADAAA; 4) Changes in administrative agency regulations required by the ADAAA; and 5) Judicial decisions interpreting the ADAAA and amended regulations.

Legal Standard of Disability Under the ADA of 1990

The Supreme Court issued four decisions interpreting the ADA definition of disability and defining the legal standard of substantial limitation of a major life activity. These decisions narrowed the original intent of Congress that the standard of establishing disability under the ADA be broad and inclusive (Keenan & Shaw, 2011). The first three decisions were *Sutton v. United Air Lines* (1999), and its companion cases *Murphy v. United Parcel Inc.* (1999); and *Albertson's Inc. v. Kirkingburg* (1999). *Sutton* is the main case of this trilogy that set forth the precedent narrowing the scope of coverage under the ADA by requiring consideration of mitigating measures in determining eligibility. The court's decision in the *Murphy* case applied the ruling in *Sutton* finding that medication corrected high blood pressure to the point it was no longer substantially limiting a major life activity. The *Albertson's* case further defined mitigating measures to include self-compensatory measures of adaptation through body systems. In this case one eye compensating for a visual deficit in the other eye.

The Supreme Court further restricted eligibility in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams* (2002). This decision further narrowed the scope of the ADA

in holding that to be substantially limited in a major life activity an individual has to be prevented or severely restricted from performing tasks that are of central importance to most people's daily lives. Substantially limits was defined as considerable or to a large degree, and major was defined as important with major life activities as activities of central importance to daily life. The court found these terms that establish disability, and therefore eligibility, require strict interpretation to meet the legal standard of the law.

Impact on postsecondary education. The precedent set forth by Supreme Court was followed by the lower federal courts. Challenges pertaining to postsecondary education students seeking academic accommodations were denied coverage as not meeting the legal standard of disability. A case involving a medical student with a learning disability focused on academic success prior to medical. The court relied on the ruling in *Sutton* concerning mitigating measures in finding he was not substantially limited in his ability to perform the major life activities of reading and writing, and therefore, not eligible under the ADA (*Gonzales v. National Board of Medical Examiners*, 2000).

The standard set forth in *Toyota* was followed in the case of *Wong v. Regents of the University of California* (2005) involving another medical student who had been academically successful until his third year in medical school. The determinative issue was whether his impairment substantially limited the ability to perform the major life activities of reading, learning or working. Relying on the decision in *Toyota* the court interpreted the term "substantially limits" to mean prevents or severely restricts and ruled against the medical student.

In *Singh v. George Washington University School of Medicine and Health Sciences* (2007), the court again applied the restrictive standard from *Toyota*, finding that an impairment must prevent or severely restrict an individual from doing activities that are of central importance to most people's daily lives. This case also involved a medical school student who had been academically successful prior to taking on the rigorous curriculum of medical school. The Court further quoted the *Toyota* decision noting that the statutory language of the ADA must "be interpreted to create a demanding standard to qualify as disabled."

Legislative History of the ADAAA Indicative of Congressional Intent

Congress passed the ADAAA in response to the restrictive standards set forth by the Supreme Court. The proposed legislation went through both houses of Congress before it was voted on and enacted as law. In the House of Representatives the ADAAA was H. R. 3195 and was considered by the Committee on Education & Labor and the Committee on the Judiciary. On June 23, 2008, the committees issued formal reports on the proposed legislation (House of Representatives Report 110-730 – Part 1 [Committee on Education and Labor] and Part 2 [Committee on the Judiciary], 2008). The ADAAA was later passed by Congress as the Senate form of the legislation, S. 3406, following reconciliation of the bills between the House and the Senate. The Statement of the Managers to Accompany S. 3406 was published in the Congressional Record on September 11, 2008. These reports provide written expression of the legislative intent and purpose of Congress in enacting the ADAAA. Table 1 provides a summary of the legislative history of the ADAAA provided by these reports from Congress.

[Insert Table 1]

Statutory Language of the ADAAA

Following the legislative process noted above, Congress passed the ADAAA. This remedial legislation was enacted as Public Law 110-325 and initially recorded in the federal Statutes at Large with specific language later codified in the United States Code. The ADAAA contains two sections that define the definition of disability and expand coverage under the ADA: Section 2. Findings And Purposes, and Section 4. Disability Defined And Rules Of Construction. Table 2 provides a summary of the major provisions of the ADAAA that affect the determination of disability and eligibility for coverage under the ADA.

[Insert Table 2]

Amended Equal Employment Opportunity Commission Regulations

As part of the ADAAA, Congress rejected the EEOC regulations that defined substantially limited as “significantly restricted” in the performance of a major life activity and directed the EEOC to promulgate new regulations consistent with the ADAAA definition of disability. The EEOC published the new regulations in the *Federal Register* on March 25, 2011. Table 3 provides a summary of the provisions of the EEOC regulations that pertain to the definition of disability and determination of substantial limitation of a major life activity. The regulations provide that an impairment is compared to most people in the general population but this determination does not usually require scientific, medical or statistical evidence. The determination should take

into account the condition, manner, or duration to perform a major life activity by the individual as compared to most people in the general population.

[Insert Table 3]

Judicial Case Law Following Enactment of the ADAAA

As noted previously, decisions of appellate courts set legal precedence and may be binding on trial courts. In the case of the ADAAA, there have not been any decisions from the Supreme Court to date, however, there have been decisions issued from the Court of Appeals. These appellate decisions are not numerous because it takes years for cases to progress from trial court litigation through appellate adjudication, and the ADAAA has only been in effect since January 1, 2009. There are also trial court decisions from the federal District Court that have interpreted the ADAAA. These decisions do not set legal precedence *per se* but are relevant to the development of case law concerning the ADAAA. Accordingly, this section includes trial court decisions on the ADAAA that pertain to postsecondary education.

Appellate case law interpreting the ADAAA legal standards. The following are cases that applied the amended standards from the ADAAA:

Brown v. City of Jacksonville (2013). The plaintiff was terminated by her employer on June 9, 2009 after the implementation of the ADAAA. The court noted that the trial court had applied the prior EEOC regulation as defining substantially limited as significantly restricts that had been expressly rejected by Congress in the ADAAA. The appellate court evaluated the plaintiff's disability under the "more generous post-amendment version of the ADA" and assumed she was a qualified individual with a

disability, although no formal finding was made on this issue (*Brown v. City of Jacksonville*, 711 F. 3d 883, 889).

Jenkins v. National Board of Medical Examiners (2009). The plaintiff was a third year medical student seeking an academic accommodation of additional time to take the United States Medical Licensing Examination as a student with a learning disability. The trial court held that he was not an individual with a disability under the ADA applying the restrictive standard set forth in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, (2002). The Court of Appeals found that the claim involved prospective relief and therefore, the new legal standards set forth in the ADAAA applied. The court specifically noted the broad protection under the ADAAA and the directive that courts interpret the ADA in a more inclusive manner concerning the threshold standard of coverage *Jenkins v. National Board of Medical Examiners* 2009 FED App. 0117N, *7-9 .

McElwee v. County of Orange (2012). The plaintiff was diagnosed with Pervasive Developmental Disorder, which is part of the Autism spectrum. He was dismissed from his volunteer position at a nursing home and alleged he was discriminated against because of his disability. Although the relevant events in this matter took place after January 1, 2009, the trial court did not apply the standards set forth in the ADAAA, and the case was dismissed. The Court of Appeals upheld the dismissal on other grounds and did not determine if the trial court had erred in the determining the plaintiff was not substantially limited in a major life activity. However, the court noted that the amended EEOC

regulations provide that Autism presents an impairment that is virtually substantially limiting in all cases; citing 29 C.F.R. §1630.2(j)(3)(iii).

The plaintiff's behavior at the nursing home was found to be inappropriate. Therefore, the court reasoned that the plaintiff was not a qualified individual without accommodation, and that his requested accommodations were not reasonable. His first accommodation request provided no assurance that it would enable him to meet essential requirements of the volunteer program. The second request was found by the court to be unreasonable as a matter of law because it merely required people at the nursing home to be more tolerant of his inappropriate behavior. Accordingly, the dismissal was upheld on appeal.

Rohr v. Salt River Project Agricultural Improvement and Power District (2009).

In this case an employee was impaired by type 2 insulin dependent diabetes. His condition was found to potentially impose a substantial limitation of the major life activity of eating due to the need to strictly monitor and manage his dietary intake. The court in *Rohr* did not apply the ADAAA but did discuss the new legal standards to provide for the elimination of discrimination against individuals with disabilities and provide broad coverage under the ADA. The court noted the broad construction of the ADA mandated by Congress and the negation of the Supreme Court's strict standards for coverage. Substantially limits does not mean, prevents, severely restricts, or significantly restricts, and impairments must be assessed in an unmitigated state *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F. 3d 850, 861-62 (citations omitted).

Allen v. Southcrest Hospital (2011). The plaintiff alleged discrimination for termination of her employment due to a disability. The court provided analysis of substantial limitation of the major life activities of caring for oneself and working. In terms of caring for oneself the court found: “Thus, taken as a whole, the evidence showed that Ms. Allen's migraines, when active and treated with medication, did not permit her to perform activities to care for herself in the evenings and compelled her to go to sleep instead” (*Allen v. Southcrest Hospital*, 455 Fed. App’x 827, 832). However, the court further found that the plaintiff had merely made a conclusory showing, not supported by evidence, and had not established that she was substantially limited as compared to an average person in the general population.

The court also found that she was not substantially limited in the major life activity of working. In doing so, the court acknowledged that the ADAAA was in effect during the relevant events pertaining to the litigation, but also noted that the EEOC regulations had not been amended until after such time, and therefore applied regulatory language that had been deleted in the revised regulations. (*Allen v. Southcrest Hospital*, 455 Fed. App’x 827, 834-35).

ADAAA trial court case law relevant to postsecondary education. The following cases provide judicial interpretation of the legal standards from the ADAAA that are relevant to postsecondary education:

Peters v. University of Cincinnati College of Medicine (2012). The plaintiff in this case was a medical student who was dismissed from the program due to deficient academic progress. Peters was diagnosed with Attention Deficit Disorder (ADD) and a

Non-verbal Learning Disorder (NVLD). During the third year of medical school she failed a pediatrics exam and was dismissed from the program. Peters alleged discrimination on the basis of disability for refusing to allow her to retake the failed exam and dismissal from medical school (*Peters v. University of Cincinnati College of Medicine*, 2012 U.S. Dist. LEXIS 126426, at *1-*7). The court found that Peters was disabled under the ADA as being substantially limited by her ADD in the major life activity of learning. The court applied the revised standards of disability under the ADAAA and the EEOC regulations, noting that the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis (*Id.*, 2012 U.S. Dist. LEXIS 126426, at *13-*18).

In reaching this conclusion the court noted that ADD affects learning so that someone with ADD cannot perform at a level that might otherwise be expected, and that it causes problems with focus, attention, organization and inhibitory control. Peters struggled more than the average person with organizing her thoughts and registering and retaining new information. The court further noted that the fact that Peters graduated from college with a dual major and was able to succeed in part of medical school did not negate this finding. Rather it indicated she was able to achieve some measure of success despite her disability and does not speak to her learning disability as compared to the average person. The court stated: the “Defendant’s rationale-that anyone who has had some modicum of academic success cannot be found to have a disability that affects learning-flies in the face of Congress’ directives and the relevant implementing regulations” (*Id.*, 2012 U.S. Dist. LEXIS 126426, at *18-*20).

The defendant further argued that allowing Peters to retake the failed exam would be a fundamental alteration of curriculum. However, the court found that the Dean of the College of Medicine had not introduced evidence to show he “...even considered the issue of whether granting her request for accommodation would alter-let alone fundamentally later-the program or its standards.” The evidence did not establish that the Dean’s decision should be given deference, and that the discretion to make academic judgments cannot be used to mask discrimination. Consequently, failure to provide reasonable accommodations may constitute disability discrimination (*Id.*, 2012 U.S. Dist. LEXIS 126426, at *21-*24).

Alexiadis v. New York College of Health Professionals (2012). In this case a student was diagnosed with HIV. After disclosing his condition he was dismissed by the college. He filed suit alleging discrimination on the basis of his disability. The court noted that the mandate of the ADA was to eliminate discrimination on the basis of disability, and that the ADAAA expanded the class of individuals entitled to protection citing the *Rohr* case. The court further noted that HIV may substantially limit the bodily function of the immune system, which was included in the ADAAA as a major life activity (*Alexiadis v. New York College of Health Professionals*, 891 F. Supp. 2d 418, 427-28). The court went on to state that the revised EEOC regulations at 29 C.F.R. §1630.2 specifically provide that a factfinder should easily conclude that HIV substantially limits the major life activity of the function of the immune system. *Alexiadis v. New York College of Health Professionals*, 891 F. Supp. 2d 418, 429-30.

Doe v. Samuel Merritt University (2013). The plaintiff was a student in podiatry medicine program and had failed Part 1 of the American Podiatric Medical Licensing Examinations (APMLE) three times. She requested unlimited attempts to retake the exam. The school had a rule that three sittings was the maximum allowed and the plaintiff was dismissed from the program. Doe was noted to be diagnosed with an anxiety disorder, and a panic disorder with agoraphobia, although the court referred to her impairment as ADD. The defendant did not dispute that Doe had an impairment and therefore, the dispositive question was whether her impairment presented a substantial limitation of a major life activity (*Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958-62, 966).

The court provided a thorough discussion of the new legal standards under the ADAAA. Guidance from the new statutory rules of construction were noted as well as the revised EEOC regulations. The court stated that the term substantially limits is not a demanding standard and must be construed in favor of expansive coverage. The term major, in major life activity, should not be interpreted strictly to create a demanding standard and not in reference to activities of central importance to daily life (*Id.* 921 F. Supp. 2d 958, 965-66; citing 29 C.F.R. §§16630.2(j)(1)(i), (iii) & 16630.2(i)(2)).

The court noted that *Bartlett v. N.Y. State Board of Law Examiners*, (1997) had held test-taking is a major life activity under the ADA. The defendant argued that test-taking is not a major life activity. However, the court found that Doe had raised serious questions as to whether test-taking is a major life activity relying on *Bartlett*, the directives of the ADAAA, and the importance of test-taking in society. The defendant

further argued that only this particular test and not test-taking in general was being challenged. However, the court found that although Doe required a different accommodation than was needed for other tests, her limitations affected the general ability to take tests (*Id.*, 921 F. Supp. 2d 958, 967).

The defendant further argued that granting this accommodation would create a fundamental alteration of the school's academic program by lowering standards. The court responded that the "three strikes" rule did not necessarily heighten academic standards, and found that the school had failed to explore the nature of the student's disability and alternatives for other accommodations. The court found that the evidence indicated there were "serious questions" whether the defendant's basis to deny the requested accommodation, and whether "unlimited" testing opportunities is a reasonable accommodation. The court then ordered the defendant to reinstate Doe on inactive student status so that she would be eligible to retake the podiatry exam while the litigation was pending (*Id.*, 921 F. Supp. 2d 958, 970-72).

Brodsky v. New England School of Law (2009). This case involved a law student seeking readmission after being dismissed for failing two courses. Brodsky was diagnosed with memory and organizational deficits by neuropsychological examination. Although the events in this case were before January 1, 2009, the court applied the standards in the ADAAA due to the potential of prospective injunctive relief was at issue, and further noted that her allegations met the pre-ADAAA standards. Brodsky asserted that her difficulty in law school was due to her impairment of poor executive functioning and memory abilities, and therefore had alleged a substantial impairment of the major life

activity of learning. However, the court noted that it would be difficult to prove the impact of her disability at trial because she had failed two courses yet had passed her other courses (*Brodsky v. New England School of Law*, 617 F. Supp. 1-8).

Rumbin v. Association of American Medical Colleges (2011). This case involved a denial of a request for testing accommodations on the Medical College Admission Test (MCAT). Rumbin was diagnosed with a visual deficit impairment. The underlying condition was first noted to be “glaucoma, ocular misalignment.” However, at trial his treating ophthalmologist clarified that the impairing condition was “convergence insufficiency” causing difficulty with seeing and reading (*Rumbin v. Association of American Medical Colleges*, 803 F. Supp. 2d 83, 85-86).

The court noted the defendant conceded that Rumbin had a visual impairment and that seeing, reading, and learning are major life activities under the ADAAA. Accordingly, the dispositive issue was whether his impairments substantially limited him in any of these major life activities. The court noted that an impairment must be substantially limiting and not just affect a major life activity citing pre-ADAAA cases including *Sutton*. The focus of analysis was then on the issue of comparison group of “most people” with reference to a pre-ADAAA Department of Justice regulation, as opposed to the EEOC regulation that implemented the ADAAA (*Id.*, 803 F. Supp. 2d 83, 93).

The court further cited the *Wong* case that had been rejected by Congress in legislative history of the ADAAA, that Rumbin must show he is substantially limited in a major life activity for purposes of daily living as compared to most people. However, the

ADAAA had clarified that a major life activity does not have to be of central importance to the daily lives of most people. The court found that Rumbin was not substantially limited in his ability to see, learn, and read as compared to the general population, and therefore was not an individual with a disability. In reaching this conclusion, the court relied upon interpretation from the *Albertson's* and *Gonzales* cases that had been rejected by Congress without explaining why this was still good law following enactment of the ADAAA. The court also rejected the clinical opinion of Rumbin's treating physician and evaluation of a behavioral optometrist, and accepted the opinion of the defendant's consultant who did not examine him. The decision also referred to the *Bartlett* case involving a reading disability that found a substantial limitation in reading based on clinical judgment of evaluating psychologists, but found it to be inapposite because Rumbin's ophthalmologist had not conducted similar testing. Rumbin's claim was further rejected by the court because he had a prior history of "education and test-taking without accommodations." *Id.*, 803 F. Supp. 2d 83, 93-95.

Healy v. National Board of Osteopathic Medical Examiners (2012). This case involved a request for accommodations on the COMPLEX-USA Level 1 examination administered by the National Board of Osteopathic Medical Examiners (NBOME). Healy was first diagnosed with a reading disorder and anxiety disorder in college in 2002. He was granted academic accommodations of extended time and a separate quiet room for taking tests upon the recommendation of the evaluating psychologist. After college he sat for the Medical College Admission Test (MCAT) and was granted the same accommodations in 2005, and again upon reevaluation by the same psychologist in 2006.

Healy was treated by a psychiatrist for anxiety prior to attending medical school and was further diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). At medical school his accommodations of extended time and a quiet testing room were continued. However, upon requesting the same accommodations for the NBOME examination Healy was denied after his documentation was reviewed by two NBOME consulting psychologists (*Id.*, 870 F. Supp 2d 607, 611-16).

The *Rumbin* case was cited in support of the court's conclusion that Healy's reading impairment did not substantially limit the major life activities of reading, learning, thinking, and concentrating as "compared to the general population." The court further noted the ADA provides that professional licensing or certification examinations must be provided "in a place and manner accessible to persons with disabilities or offer alternative arrangements for such individuals" (42 U.S.C. §12189. *Healy v. National Board of Osteopathic Medical Examiners*, 870 F. Supp 2d 607).

The court referenced provisions of the ADAAA and the revised EEOC regulations in its analysis of the applicable law, as well as the prior Supreme Court interpretation and EEOC regulations that were superseded by the ADAAA. The court found that Healy had a reading disorder, but did not exhibit anxiety or ADHD that would be considered impairments under the ADA. The major life activities of learning, reading, thinking, and concentrating were noted to be affected by his impairment. Accordingly, the court framed the dispositive issue as: "Whether a person is substantially limited in a major life activity [as] measured by comparison to most people in the general population" without reference to any statutory or regulatory authority. However, the court did cite the

pre-ADAAA *Price* and *Gonzales* cases that were rejected by Congress in the legislative history of the ADAAA (*Id.*, 870 F. Supp 2d 607, 616-20).

The court determined that Healy had a relative weakness from his reading disability but was still in the low average range as assessed by his psychologist, and that by definition “average” is not substantially limited. The court further concluded that a “clinical disability” based upon an “internal referrant” is not a “disability under the ADA” which must be based on an “external referrant...that is, the general population.” The court continued that an absence of limitation was demonstrated by high academic achievement in middle school and high school without accommodations, although he may have self-accommodated at that time. The court further stated that self-accommodation mechanisms may permit an individual with a disability to achieve academic success as did the plaintiff in the *Bartlett* case. However, the court found that Healy did not present sufficient evidence of self-accommodation and the “scant” evidence presented did not pertain to his reading disorder, failing to note the accommodations that had been provided throughout college and medical school. Thus, Healy was found not to be an individual with a disability under the ADA (*Id.*, 870 F. Supp 2d 607, 620-22).

Rawdin v. The American Board of Pediatrics (2013). This case also involves medical professional licensing testing. In 1987, the plaintiff had surgery, chemotherapy and radiation therapy for treatment of a brain tumor. In 1995 the tumor returned requiring further surgery and treatment. Rawdin was evaluated by a neuropsychologist in 1996 and again in 2007 with findings of a cognitive impairment impacting his memory

retrieval system. The memory deficit improved with verbal cueing. In 2008 another neuropsychologist evaluated Rawdin. The results showed declarative memory impairment that affected the ability to recall and process discrete bits of unrelated information (*Rawdin v. The American Board of Pediatrics*, 2013 U.S. Dist. LEXIS 159458 at *1-*16). At the time of the case, he was a practicing pediatrician who had failed the American Board of Pediatrics certification examination five times. Testing accommodations of double time, individual testing room, 3.5 hours per day maximum testing, and periodic breaks were provided the fifth time.

Upon review, the court noted the ADAAA had rejected the past strict interpretation and demanding standard for qualifying as disabled under the ADA, and referenced the revised EEOC regulations. The court stated: “Thus ‘an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity’ ...nor should the ‘threshold issue of whether an impairment ‘substantially limits’ a major life activity...demand extensive analysis.’ [29 C.F.R.] §1630.2(j)(1)(ii),(iii).” The court further noted that an impairment must substantially limit the performance of a major life activity “as compared to most people in the general population.” However, this inquiry will not usually require scientific, medical or statistical evidence but such evidence may be used in cases that are appropriate (citing 29 C.F.R. §1630.2(j)(1)(ii),(v); *Rawdin v. The American Board of Pediatrics*, 2013 U.S. Dist. LEXIS 159458 at *31-*34).

The court easily found that Rawdin suffered from a memory impairment that impacted the major life activities of test-taking and working. Accordingly, the

dispositive issue for determining disability was whether his impairment substantially limited the ability of test-taking or working. The court emphasized that Rawdin must be compared to members of the general population, citing the pre-ADAAA cases of *Singh* and *Wong* that were rejected by Congress. Further emphasis was made that the ADAAA “did not eliminate the requirement that an individual’s substantial limitation be measured in comparison to the general population.” The court also cited the *Bartlett* case in support of this point although *Bartlett* was found to meet the pre-ADAAA standard, and was endorsed by Congress in the ADAAA legislative history. The court then concluded that Rawdin was not substantially limited because his test-taking skills were not lower than the average person in the general population, citing the pre-ADAAA *Gonzales* case that was rejected by Congress, and the *Rumbin* and *Healy* cases (*Id.*, 2013 U.S. Dist. LEXIS 159458 at *38-*41).

The court went on to find that the requested testing accommodations were not reasonable because they would fundamentally alter the test by devaluing board certification. This conclusion was based on a comparison to the analysis whether academic accommodations fundamentally alter curriculum. However, the ADAAA refers to “academic requirements in postsecondary education” but does not include testing accommodations specifically (ADAAA Section 6(a)(1), (2008)). Accordingly, the legal analysis concerning deference given to postsecondary education is not necessarily applicable to a testing entity. Additionally, the court found that the requested modification of the test format would fundamentally alter the measure of the knowledge being tested, citing 28 C.F.R. §36.309(b)(3). However, the cited regulation pertains to

“auxiliary aids” without mention of test format modification (*Rawdin v. The American Board of Pediatrics*, 2013 U.S. Dist. LEXIS 159458 at *45-*54). It should also be noted that another court facing a similar request for physician board certification stated that waiver of an oral section of the exam may be a reasonable accommodation depending upon the extent of a disability and the value of the section of the exam at issue (*Shaywitz v. American Board of Psychiatry and Neurology*, 675 F. Supp. 2d 376, 390-91 (S.D. N.Y. 2009), summary judgment entered for defendant on other grounds, 848 F. Supp. 2d 460 (S.D. N.Y. 2012)).

Rawdin requested an oral component modification noting that other certification boards and the ABP previously had used oral components. The court rejected this argument giving total deference to the ABP, and further found that modification of the test format would be cost prohibitive, and therefore an undue burden (*Rawdin v. The American Board of Pediatrics*, 2013 U.S. Dist. LEXIS 159458 at *54-*57).

Discussion

The first purpose of this study was to establish the legal standard of disability under the ADA prior to the enactment of the ADAAA. Disability is defined as when a physical or mental impairment substantially limits one or more major life activity of an individual (42 U.S.C. §12102(1)(A)). The research indicates this definition was strictly interpreted by the Supreme Court and lower federal courts to create a demanding legal standard to establish disability under the ADA. Specifically, the findings indicate that the term “substantially limits” was interpreted to mean “prevents or severely restricts” the performance of a major life activity. The term “major life activity” was interpreted to

mean an activity that is of “central importance to most people’s daily lives.”

Additionally, the court held that the “ameliorative effects of mitigating measures” must be considered in determining whether an impairment substantially limits a major life activity.

After having determined this prior standard, the purpose of this research was to ascertain the new legal standard following enactment of the ADAAA. The research findings indicate that the ADA was extensively rewritten by Congress to override the strict interpretation by the courts. This intent is evidenced in the legislative history and language of the statute itself. Specifically, Congress overruled the Supreme Court cases in the language of the ADAAA, and repudiated several lower federal court decisions concerning postsecondary education in the legislative history. Additionally, the EEOC was instructed to revise its administrative regulations that had defined “substantially limited” as “significantly restricted” because that standard was also seen as being too demanding.

The terms “prevents or severely restricts” and “significantly restricts” were negated as being inconsistent with the broad remedial purposes of the ADA. Consideration of the ameliorative effects of mitigating measures was explicitly rejected. The term “major life activity” was defined for the first time in the statute to emphasize the broad span of covered activities as opposed to be limited to only activities that are of central importance to most people’s daily lives. The mechanism utilized was to provide a non-exhaustive list of major life activities, and to further include a non-exhaustive list of major bodily functions that are considered to be major life activities.

Rules of construction were included to direct courts in interpreting the meaning of the law in future litigation. The new standard of disability was intended to be construed to provide greater coverage than previously. However, the ADAAA failed to specifically define the term “substantially limits” because there was disagreement concerning this issue. The House of Representatives bill had specifically defined this term as “materially restricts.” The Senate would not agree to this language. In the end the Senate prevailed and instead the term “substantially limits” would be determined through rules of construction that must be applied on a case-by-case basis. This compromise may turn out to be problematic as courts address this issue.

As a matter of law, the rules of construction dictate that substantially limits has to be construed in favor of broad coverage to the maximum extent under the ADA, and consistently with the findings and purposes of the ADAAA. The statute further directs that the determination of whether an impairment substantially limits a major life activity be made without regard to the ameliorative effects of mitigating measures. It is fairly easy to apply the rule that an impairment must be assessed in an unmitigated state (except for routine eyeglasses and contact lens). However, what does broad coverage to the maximum extent under the ADA and interpretation consistent with the findings and purposes of the ADAAA actually mean? The new standard is obviously imprecise and subject to varied interpretations.

The revised EEOC regulations offer some assistance. They indicate that disability determination is a threshold standard that does not demand extensive analysis and is met by a functional limitation that is less than the standard applied prior to the ADAAA.

However, a specific definition is still lacking. The revised regulations also add another consideration that has the potential to create even more ambiguity concerning the definition of disability. Under the regulations, the determination of a substantial limitation of a major life activity is made in comparison to “most people in the general population.” This language is open to multiple interpretations. The regulations state that usually scientific, medical or statistical evidence will not be necessary but may be used where appropriate. Also, in determining substantial limitation in comparison to most people the condition, manner, and duration it takes to perform an activity must be taken into consideration, which includes difficulty, effort or time to perform the subject activity. Again, these are terms that are open to varied interpretations.

Most of the early case law interpreting the ADAAA has been positive in terms of expanding coverage (NCD, 2013). However, some courts have focused on the issue of comparison to most people in the general population as a limiting factor that is relied upon in finding that someone is not an individual with a disability. For example, in *Allen v. Southcrest Hospital* (2011), the court referred to multiple limitations from the plaintiff’s impairment but then summarily concluded she was not substantially limited in caring for herself “as compared to the average person in the general population.”

Although most of the case law to date has favored expanding coverage, three cases concerning postsecondary education and testing applied a strict interpretation of this regulation resulting in a denial of coverage under the ADA. In *Rumbin v. Association of American Medical Colleges* (2011), *Healy v. National Board of Osteopathic Medical Examiners* (2012), and *Rawdin v. The American Board of*

Pediatrics (2013) the courts each found that the plaintiffs were not substantially limited in a major life activity when compared to most people in the general population. These decisions essentially ignored the mandate of the ADAAA and EEOC regulations that the threshold determination of disability must be interpreted in favor of broad coverage and is not a demanding standard that requires extensive analysis. The courts further applied a strict interpretation to the comparison to most people requirement of the EEOC regulations that is not even contained in the ADAAA.

This interpretation countermands the intent of Congress as set forth in the statute and legislative history. It is also based on a restrictive interpretation of the regulations that is contrary to the intent of the EEOC by relying heavily on scientific, medical and statistical information, and failing to take into account the condition, manner, and duration it takes to perform the subject major life activities as compared to most people. This regulatory comparison group standard that was not addressed in the text of the ADAAA has created a loophole for courts to circumvent the mandate of broad coverage set forth in the statute. Although this position is contrary to Congressional intent and text of the EEOC regulations that students who have performed well academically cannot be substantially limited in the activities of learning, reading, writing, thinking, concentrating, or speaking, these decisions further relied on past academic achievement to support findings of no disability.

The determination of substantial limitation of a major life activity as compared to most people is a threshold standard that is required to be construed in favor of eligibility as opposed to being strictly construed against eligibility as in the above-referenced

decisions. Judicial interpretation of the comparison group of most people that is in accordance with the ADAAA is found in the pre-ADAAA decision in *Bartlett v. New York State Board of Law Examiners* (2001).

Bartlett involved a law school graduate with dyslexia who had been denied accommodations for the New York Bar Exam. The court found that a learning disability cannot be determined by psychometric testing alone and that clinical judgment is an essential part of the diagnosis of a learning disability. The court concluded there was a substantial limitation in reading because most people do not read with the level of difficulty experienced by the plaintiff. Accordingly, she was substantially limited in comparison to most people, notwithstanding that she had compensated through self-accommodations. Accommodations that mitigate the impact of the impairment merely assist in function but do not affect the impairment itself. Successful outcomes alone do not negate the underlying disability. There must be consideration of the condition, manner, or duration in which activities are performed in comparison to most people (*Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 at *68, *92, *113, *117-19, *120-21, * 130-34). The application of the ADAAA standards in *Peters v. University of Cincinnati College of Medicine* (2012) is similar where the court found that a medical student was substantially limited in learning because she struggled more than most people in processing information although she was able to achieve academic success. In *Doe v. Samuel Merritt University* (2013), the court's reliance on both the statute and regulation further provided emphasis and authority for a liberal interpretation of these terms.

The impact for postsecondary education is how the comparison group issue will be applied by institutions of higher education. It may be strictly applied as in the *Rumbin*, *Healy*, and *Rawdin* cases or it may be more liberally applied as in the *Bartlett*, *Doe*, and *Peters* decisions. Further guidance will be provided as more courts address this issue. Other trial courts may find one interpretation more persuasive than the other, or even provide a different interpretation. Appellate court decisions that set precedent will provide more guidance. In the event there are opposing interpretations issued by the Court of Appeals, the Supreme Court may have to address this issue in the future.

Limitations

This study is based on legal research and provides analysis of multiple primary sources of law. The legal precedent prior to the enactment of the ADAAA is well documented by the Supreme Court, lower federal courts, and the EEOC regulations over a period of more than eighteen years. The statutory language of the ADAAA is finite and codified in the United States Code. The legislative history is set forth in extensive published reports from the House of Representatives and Managers of the Senate bill that actually became legislation. The amended EEOC regulations are codified in the Code of Federal Regulations and extensive commentary was provided in the *Federal Register* upon publication. Accordingly, these sources of law pertaining to the ADAAA are developed and not subject to change, unless amended in the future.

Judicial case law interpreting the ADAAA is under development. Under the legal system the courts are charged with interpretation of the law, which may include review of statutes, regulations, legislative history, and prior case law. The litigation process takes a

great deal of time to develop case law through the appellate stage, and especially to the Supreme Court. The ADAAA has been in effect a little more than five years.

Accordingly, there is limited appellate case law interpreting the amended legal standards set forth in the ADAAA. Case law at the trial level relevant to postsecondary education has been developed to an extent. This process is fluid as courts build upon the interpretation and rulings of other courts pertaining to specific legal issues presented in litigation. The limited amount of decisions available to date and early development of case law is a significant limitation on this study. Accordingly, case law needs to be closely monitored and reviewed on an ongoing basis as the decisional law develops.

Conclusions

Despite these limitations, the research at this point indicates that Congress has acted directly and in a strong manner to correct the past misinterpretations of the ADA. The statutory language of the ADAAA is explicit and provides specific guidance in statutory construction to courts that must apply the new legal standards from the legislation. Congress has further provided evidence of its intent in enacting the ADAAA through comprehensive legislative reports. The result, as indicated by initial case law, is that the definition of disability has been broadened to be more inclusive. More people will become eligible for coverage under the ADA and the focus of inquiry will change to whether there has been discrimination on the basis of disability. In the realm of postsecondary education prior academic success should not be an impediment to eligibility, and therefore, more students should receive academic accommodations and modifications to attain access to education programs.

However, case law at the trial level has gone both ways on this issue in postsecondary education. Some courts have issued liberal interpretations of the ADAAA in finding coverage under the ADA that was not available previously. However, some courts have interpreted the ADAAA more strictly and specifically have denied coverage under the ADAAA standards based on strict interpretation of the requirement that an individual be substantially limited in the performance of a major life activity in comparison to most people. They have also cited past academic achievement as negating substantial limitation in the ability to learn. Accordingly, the definition of the new legal standard of disability under the ADA will be the subject of more litigation and eventually appellate decisional law. The legal definition of disability will become more definitive as this process continues.

Further research is necessary concerning the issues of determining substantial limitation in comparison to most people in the general population and the interpretation of past academic success as indicating an impairment does not substantially limit the ability to learn, think, read, communicate, concentrate, or test-taking. Additionally, further research is needed due to the shift in the legal analysis from determining the threshold standard of eligibility to determining the scope of reasonable accommodations, and when an accommodation becomes unreasonable as a fundamental alteration of postsecondary curriculum or imposes an undue hardship on the postsecondary institution.

References

Administrative Procedures Act, 5 U.S.C. §§ 511-599 (2011).

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

Allen v. Southcrest Hospital, 455 Fed. App'x 827 (10th Cir. 2011).

Alexiadis v. New York College of Health Professionals, 891 F. Supp. 2d 418 (E.D.N.Y. 2012).

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 42 U.S.C. § 12101 (2010).

Americans with Disabilities Act Amendments Act of 2008. Pub. L. No. 110-325, 122 Stat. 3553 (2008).

Barnhart v. Sigmon Coal Co., 534 U.S. 249 (2002).

Bartlett v. New York State Board of Law Examiners, 2001 U.S. Dist. LEXIS 11926 (S.D. N.Y. August 15, 2001).

Bartlett v. New York State Board of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997).

Brodsky v. New England School of Law, 617 F. Supp. 2d 1 (D. Mass. 2009).

Brown v. City of Jacksonville, 711 F. 3d 883 (8th Cir. 2013).

Cornell Law School – Legal Information Institute, (2012a). *Legal research: An overview*. Retrieved on February 10, 2013 from http://www.law.cornell.edu/wex/legal_research.

Cornell Law School – Legal Information Institute, (2012b). *Statutory construction*. Retrieved on February 10, 2013 from http://www.law.cornell.edu/wex/statutory_construction.

Doe v. Samuel Merritt University, 921 F. Supp. 2d 958 (N.D. Cal. 2013).

Duke University School of Law, (2012). *Federal legislative history*. Retrieved on February 9, 2013 from <http://law.duke.edu/sites/default/files/lib/fedleghist.pdf>.

Equal Employment Opportunity Commission Regulations, 76 Fed. Reg. 17,000 (March 25, 2011), 29 C.F.R. §1630.2.

Federal Register Act, 44 U.S.C. §1501.

Federal Register Act Regulations, 41 Fed. Reg. 56624 (1976), 1 C.F.R. § 18.2.

Feldblum, C. R., Barry, K. & Benfer, E. A. (2008). The ADA amendments act of 2008. *Texas Journal on Civil Liberties & Civil Rights*, 13, 187-240.

Funk, W. (1997). Review essay faith in texts: Justice Scalia's interpretation of statutes and the constitution: Apostasy for the rest of us? *Administrative Law Review*, 49, 825-853.

Gonzales v. National Board of Medical Examiners, 225 F.3d 620 (6th Cir. 2000).

Healy v. National Board of Osteopathic Medical Examiners, 870 F. Supp. 2d (S.D. Ind. 2012).

House of Representatives Report 110-730 – Part 1 (Committee on Education and Labor) (2008).

House of Representatives Report 110-730 – Part 2 (Committee on the Judiciary) (2008).

Jenkins v. National Board of Medical Examiners, 2009 FED App. 0117N (6th Cir. 2009).

Keenan, W. R. and Shaw, S. F. (2011). The legal context for serving students with learning disabilities in postsecondary education. *Learning Disabilities: A Multidisciplinary Journal*, 17(2), 55-61.

Kim, Y. (2008). Statutory interpretation: General principles and recent trends.

Congressional Research Service Report For Congress-Order Code 97-589.

Long, A. B. (2008). Introducing the new and improved Americans with disabilities act:

Assessing the ADA amendments act of 2008. *Northwestern University Law*

Review Colloquy, 103, 217-229.

McElwee v. County of Orange, 700 F. 3d 635 (2d Cir. 2011).

McKinney, R. J. (2012). *A research guide to the federal register and the code of federal*

regulations. Retrieved on February 10, 2013 from [http://www.llsdc.org/fr-cfr-](http://www.llsdc.org/fr-cfr-research-guide)

[research-guide](http://www.llsdc.org/fr-cfr-research-guide).

McKinney, R. J. and Sweet, E. (2008). *Federal legislative history research: A practitioners'*

guide to compiling documents and sifting for legislative intent. Retrieved on February

10, 2013 from <http://www.llsdc.org/fed-leg-hist>.

Murphy v. United Parcel Inc., 527 U.S. 516 (1999).

National Council on Disability (2013). *A promising start: Preliminary analysis of court*

decisions under the ADA amendments act. Retrieved on

January 3, 2013 from <http://www.ncd.gov/publications/2013/0723213>.

Peters v. University of Cincinnati College of Medicine, 2012 U.S. Dist. LEXIS 126426

(S.D. Ohio 2012).

Price v. National Board of Medical Examiners, 966 F. Supp. 419 (S.D. W.Va. 1997).

Rawdin v. The American Board of Pediatrics, 2013 U.S. Dist. LEXIS 159458 (E.D. Pa.

2013).

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Rohr v. Salt River Project Agricultural Improvement and Power District, 555 F. 3d 850
(9th Cir. 2009).

Rumbin v. Association of American Medical Colleges, 803 F. Supp. 2d 83 (D. Conn. 2011).

Singh v. George Washington University School of Medicine and Health Sciences,
508 F.3d 1097 (D.C. Cir. 2007).

Statement of the Managers to Accompany S. 3406, 154 Cong. Rec. S8344-47 (daily ed.
Sept. 11, 2008).

Sutton v. United Air Lines, 527 U.S. 471 (1999).

Toyota Motor Manufacturing Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

Walker, J. M. (2002). Judicial tendencies in statutory construction: Differing views on
the role of the judge. *New York University Annual Survey of American Law*,
58, 203-239.

Wong v. Regents of the University of California, 410 F.3d 1052 (9th Cir. 2005).

Table 1

Summary of the Legislative History of the ADAAA

Broadening the Definition of Disability

- 1) The ADA requires a broad construction of the definition of disability and deletes sections of the ADA that were interpreted by the courts to limit coverage.
- 2) Courts have narrowed the interpretation of disability resulting in a large number of people with substantially limiting impairments not to be considered people with disabilities.
- 3) The ADAAA will lower the standard of establishing disability for the purpose of coverage under the ADA and reinstates the intent of Congress that the definition of disability is to be interpreted broadly and inclusively.
- 4) The definition of disability is amended by clarifying the terms “substantially limits” and “major life activities”, and creating rules of construction that add several standards to be applied when considering the definition of disability.
- 5) The establishment of coverage should not be overly complex or difficult and will be a lesser standard than interpreted by the courts.

Definition of the Term Substantially Limits

- 1) Rejects that Supreme Court has defined “substantially limits” as “prevents or severely restricts” which has resulted in the exclusion of many individuals that were intended to be covered.
- 2) The limitation of an impairment is a lesser standard that need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity.
- 3) Proposed legislation rejects Supreme Court decision that “substantially” and “major” need to be interpreted strictly to create a demanding standard to qualify as disabled, and instead should be construed broadly.
- 4) The standard for determining substantial limitation is not “materially restricts” because the lack of clarity in the terms material, moderate, and severe will only encourage courts to engage in an inappropriate level of scrutiny when determining disability.

- 5) Substantially limits is not meant to be a demanding standard and is properly construed pursuant to the findings and purposes of the proposed legislation to ensure the provision of reasonable accommodations or modifications to individuals with impairments.
- 6) Using the correct standard that is lower than the demanding standard created by the Supreme Court will make disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications.

Application to Specific Learning Disabilities

- 1) Some courts have found that students who attain a high level of academic achievement are not considered individuals with disabilities, and may have difficulty demonstrating substantial limitations in learning or reading relative to “most people.”
- 2) In considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity it is critical to reject the assumption that an individual who performs well academically can not be substantially limited in learning, reading, writing, thinking, or speaking.
- 3) The comparison of individuals with specific learning disabilities requires a careful analysis of the method and manner the impairment limits a majority life activity. For the majority of the population the basic mechanics of reading and writing are effortless, unconscious and automatic processes. The process of reading for an individual with a neurologically based reading impairment is cumbersome, painful, deliberate and slow throughout life. Individuals with specific learning disabilities will be better protected under the ADAAA.

Major Life Activities

- 1) The ADAAA provides significant new guidance and clarification on the subject of major life activities.
- 2) An impairment need only substantially limit one major life activity to be considered a disability under the ADA.
- 3) A non-exhaustive illustrative list of major life activities is added to the ADA in the proposed legislation, and also adds the operation of major bodily functions as part of major life activities.

Ameliorative Effects of Mitigating Measures

- 1) Consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity is prohibited, overruling the Supreme Court on this issue.
- 2) Mitigating measures include medication, assistive technology, accommodations and modifications.
- 3) An individual should not be penalized for managing adaptive strategies or received informal or undocumented accommodations that have lessened the deleterious impact of a disability.
- 4) Upon elimination of the consideration of ameliorative effects of mitigating measures, individuals who were improperly excluded from coverage will be found substantially limited and entitled to protection from disability based discrimination.

The ADAAA as Comprehensive Antidiscrimination Legislation

- 1) The critical inquiry is whether a qualified person has been discriminated against on the basis of disability, and not focused on the preliminary question of whether someone is an individual with a disability.
- 2) The changes enacted by the ADAAA will make the threshold definition of disability, under which individuals qualify for protection from discrimination, more generous, and will result in coverage for some individuals who were previously excluded from protection.
- 3) The determination of disability is a necessary threshold issue but an appropriately generous standard on that issue will allow courts to focus primarily on whether discrimination has occurred or accommodations improperly refused.

[H.R. Rep. No. 110-730, pt. 1, at 7-16 (2008); H.R. Rep. No. 110-730, pt. 2, at 5 (2008); 154 Cong. Rec. S8344-47 (daily ed. Sept. 11, 2008)]

Table 2

Summary of the Major Provisions of the ADAAA

Section 2 – Findings

- 1) The ADA was intended to provide broad coverage to eliminate discrimination against individuals with disabilities.
- 2) Supreme Court narrowed definition of disability and eliminated protection for individuals.
- 3) Term “substantially limits” was interpreted restrictively and set too high a standard for eligibility by the Supreme Court and the Equal Employment Opportunity Commission
- 4) Relying on the Supreme Court lower courts incorrectly found that individuals with a range of impairments are not people with disabilities.

Section 2 - Purposes

- 1) To reinstate the broad scope of protection under the ADA.
- 2) Rejection of the Supreme Court cases that created a demanding legal standard to qualify for coverage under the ADA.
- 3) To reverse the restrictive standard from the Supreme Court as applied by the lower courts and provide that the question of whether an individual’s impairment is a disability should not demand extensive analysis.
- 4) Need to revise administrative regulations pertaining to the term “substantially limits” to be consistent with the changes in the ADAAA.

Section 4 – Disability Defined

- 1) Major life activities are defined to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- 2) Major life activities include the operation of major bodily functions. These include functions of the immune system, normal cell growth, digestive, bowel,

bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Section 4 – Rules of Construction Regarding the Definition of Disability

- 1) Definition of disability shall be construed in favor of broad coverage to maximum extent under the ADAAA.
- 2) Term “substantially limits” shall be interpreted consistently with findings and purposes of the ADAAA.
- 3) An impairment that substantially limits only one major life activity is considered a disability.
- 4) An impairment that is episodic or in remission if it would be substantially limiting if active.
- 5) The determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures.

[ADAAA of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3353-3356]

Table 3

Summary of the EEOC Regulations Implementing the ADAAA

Rules of Construction to Determine Substantial Limitation of a Major Life Activity

- 1) Substantially limits shall be construed broadly in favor of expansive coverage to the maximum extent under the ADA, and is not a demanding standard.
- 2) The comparison group is most people in the general population, but an impairment does not have to prevent, or significantly or severely restrict the performance of a major life activity to be considered substantially limiting.
- 3) The threshold issue whether an impairment substantially limits a major life activity should not demand extensive analysis.
- 4) An individualized assessment is required for determination of limitations and the term substantially limits requires a degree of functional limitation that is lower than the standard applied prior to the ADAAA.
- 5) Comparison of an individual's performance of a major life activity to most people in the general population does not require scientific, medical or statistical evidence, but may be used if appropriate.
- 6) Determination of substantial limitation must be made without regard to the ameliorative effects of mitigating measures, except for ordinary eyeglasses and contact lenses.
- 7) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- 8) There only needs to be substantial limitation of one major life activity to be considered a substantially limiting impairment.
- 9) The effects of an impairment lasting or expected to last less than six months can be substantially limiting.

Condition, Manner, or Duration Required to Perform a Major Life Activity

- 1) In determining substantial limitation of a major life activity, consideration of the condition under which the major life activity is performed; manner in which the major life activity is performed; and/or the duration of time it takes to perform a

major life activity, or for which the major life can be performed, as compared to most people in the general population.

- 2) Consideration of the condition, manner or duration may include difficulty, effort, or time required to perform a major life activity; the length of time a major life activity can be performed; and/or how an impairment affects the operation of a major bodily function. Also, the negative side effects of mitigating measures, such as medication, may be considered in determining the substantial limitation of a major life activity.
- 3) The focus is on the limiting effect of an impairment and not the outcome achieved. Someone with a learning disability may achieve a high level of academic success but may be substantially limited in learning due to additional time or effort needed to read, write, or learn compared to most people.

[EEOC Regulations, 76 Fed. Reg. 17,000-17,001 (March 25, 2011), 29 C.F.R. §1630.2(j)(1),(4)]

The Impact of the ADAAA on Documentation of Disability for Students
with Learning Disabilities and ADHD Transitioning from High School to College

Walter R. Keenan
Doctoral Dissertation Chapter III
University of Connecticut

Abstract

The Americans with Disabilities Act Amendments Act of 2008 expanded the legal definition of disability to establish broader coverage for individuals with disabilities, including college students, than the definition in the Americans with Disabilities Act of 1990. The new definition of disability shifted the main purpose of documentation from proving eligibility for services as a person with a disability to determining appropriate academic accommodations. This change in the law enhances the importance of documentation from a student's secondary education experience that may provide relevant information concerning functional limitations and the need for academic accommodations. This article provides practical guidance to high school professional staff in preparing disability documentation for students' transition to college.

The Impact of the ADAAA on Documentation of Disability for Students
with Learning Disabilities and ADHD Transitioning from High School to College

According to the National Longitudinal Transition Study-2, postsecondary education is a primary goal for 80% of high school students with disabilities (Newman, Wagner, Cameto, & Knokey, 2009). In order to receive disability-based services in college, students must self-identify with the campus Office of Disability Services (ODS) and provide documentation to establish eligibility. College ODS personnel are allowed to require documentation of disability that established a substantial limitation in performing a learning related activity such as reading (Madaus & Shaw, 2007; U.S. Department of Education, Office for Civil Rights, 2011a). This documentation of disability is also a necessary component of establishing eligibility for accommodations in college. However, a key issue for students in transition is providing the correct type and amount of documentation. Colleges may set their own documentation requirements but they must be reasonable and comply with the Americans with Disabilities Act of 1990 (ADA). However some colleges have strict documentation standards that require extensive and recent evaluations to establish a learning disability or ADHD (U.S. Department of Education, Office for Civil Rights, 2011b).

Traditionally, there has been a disconnect between high schools and colleges in regard to the requirements regarding the documentation of disability. This “documentation divide” came about because of the differences in eligibility under the legal requirements of the Individuals with Disabilities Education Act (IDEA) and the ADA, which applies to postsecondary institutions (deBettencourt, 2002). For example,

many colleges routinely required students with learning disabilities to submit comprehensive psychoeducational evaluations to establish eligibility for services (Madaus, Banerjee, & Hamblet, 2010). Often, a specific discrepancy between ability and academic achievement measured through standardized testing was required. Requiring this level of documentation was in accordance with the strict legal interpretation of the ADA by the Supreme Court. However, that strict standard was overruled by Congress through the enactment of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Accordingly, with the changes in practice and the law there is a need to revisit the role of documentation from high school to support requests for accommodations in college.

The New Legal Definition of Disability Under the ADAAA

Prior to the enactment of the ADAAA, the legal interpretation of disability was strict and resulted in many people with significant impairments not being eligible for protection under the ADA. In a series of rulings, the Supreme Court held that the impact of an individual's impairment must be assessed with consideration of the ameliorative effects of mitigating measures, including medication, auxiliary aids, and informal self-accommodations (*Sutton v. United Airlines*, 1999). The Court also held that an impairment must prevent or severely limit the performance of an activity of central importance to most people's daily lives (*Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 2002). Although these rulings were based on employment cases, their impact rippled into the field of education, and courts ruled that students with learning disabilities in postsecondary education were not eligible for protection under the ADA (*Singh v.*

George Washington University School of Medicine and Health Services, 2007; Wong v. Regents of the University of California, 2005).

The ADAAA became effective on January 1, 2009, with the main purpose to reinstate the broad scope of protection for individuals with disabilities that was originally intended under the ADA. The ADAAA sets forth the need to provide an extensive revision to the law and for the first time provides a specific definition of disability (see Box 1, “Summary of the Major Provisions of the ADAAA”). The changes include for the first time a non-exhaustive list of major life activities that were absent. This list sets forth learning, reading, concentrating, thinking, and communicating as specific major life activities of particular relevance to secondary and postsecondary education. The law also includes the operation of major bodily functions, such as neurological and brain functions, as major life activities.

[Insert Box 1]

Even more important is how the ADAAA addresses the term “substantially limits.” Instead of providing a specific definition such as “moderately restricts” or “significantly restricts”, this term must be defined on a case-by-case basis (see Box 2, “Interpreting the Definition of Disability”). Under the ADAAA, the terms “substantially limits” and “major life activity” must be interpreted to expand coverage of individuals under the ADA to prevent discrimination on the basis of disability. Coverage is expanded because it is easier to qualify for protection under the ADAAA. The determination of disability was intended to be a threshold point that should be easily established. The ADAAA restores the original intent that the focus of inquiry should be

whether an individual with a disability is being granted equal access to postsecondary education. Once disability is established, it is incumbent on the postsecondary institution to consider reasonable accommodations and modifications to ensure equal access (Shaw, Keenan, Madaus, & Banerjee, 2010). For example, a reasonable accommodation for a student that has difficulty taking notes in class may be to receive copies of the lecture notes in advance.

The effects of mitigating measures that lessen the impact of an impairment cannot be considered when determining substantial limitation in performing a major life activity. For example, the ability of a student with ADHD to concentrate and stay on task may increase while taking medication. However, the medication has not changed the impairment but has mitigated or lessened the impact of the impairment. Accordingly, when determining if ADHD substantially limits the major life activity of concentrating the assessment should be done without taking medication that lessens the impact of the impairment (ADAAA §4(a)). Likewise, the use of auxiliary aids or accommodations that aid in reading cannot be considered when determining an impairment's impact on reading to an individual with dyslexia.

[Insert Box 2]

Impact of the ADAAA

The ADAAA has moved the focus of documentation from establishing the presence of disability to assessing the impact of an impairment to determine appropriate academic accommodations in college (Shaw, Keenan, Madaus, & Banerjee, 2010). Under this broad standard, colleges will be hard pressed to find that high school students

who received services and accommodations under the IDEA are not considered to be individuals with disabilities under the ADA (Shaw, 2009). Students with learning disabilities and ADHD will more readily come under the protection of the ADA and strict documentation requirements developed prior to the ADAAA may no longer be appropriate (Keenan & Shaw, 2011). The law has always required that colleges provide reasonable accommodations to ensure equal access to postsecondary education programs. However, now the main focus of documentation must shift from determining eligibility for services to the functional limitation of an impairment to determine the need for specific accommodations. Accordingly, the main purpose of documentation should now focus on how learning is impacted, rather than on extensively proving there is a specific disability.

Association on Higher Education And Disability Documentation Guidance

In response to the ADAAA and the changing definition of disability in general, the Association of Higher Education And Disability (AHEAD), a professional association that advocates full participation in postsecondary education for individuals with disabilities, published guidance on documentation for supporting accommodations requests in college that are in conformity with the ADAAA (AHEAD, 2012; see www.ahead.org). The following acceptable forms of documentation for postsecondary education accommodations are noted:

- Primary documentation from the student's self-report of functional limitation from impairment;

- Secondary documentation from observation and interaction during interviews and conversations or in evaluating previous implemented accommodations;
- Tertiary documentation from external or third parties including the IEP, summary of performance (SOP), teacher observations, in addition to assessments from school psychologists, health care providers, and teachers.

The AHEAD guidance recommends consideration of the past use of accommodations that have been effective through individual review to determine the impact of the impairment on the student noting that a clear understanding establishes the reasonableness of the accommodation for the individual. Documentation of these factors in high school records will assist in determining appropriate academic accommodations in college. However, this guidance is only advisory and colleges are not bound by the AHEAD interpretation of the ADAAA. High school students entering college will continue to see disparities in college documentation requirements. Accordingly, transition planning must anticipate that some colleges will retain more restrictive pre-ADAAA documentation guidelines. Therefore, relevant testing and other assessment results should be included in transition documentation and especially any assessments done while the student was in high school.

Focus on Documentation from High School

The main purpose of providing information from high school is to document that a student is an individual with a disability and received specific services and accommodations. Accordingly, high schools should provide documentation for transition to college that explains how a disability limits the ability to learn and how high school

accommodations have helped to compensate the impact of the student's impairment (Hamblet, 2014). The ADAAA makes documentation of functional impairment more important than documentation that proves the existence of a disability. In this regard, qualitative information from student high school records will become more relevant in documenting eligibility and the need for accommodations in college. Postsecondary education accommodations are based on the unique profile of the student, the functional impact of an impairment, and how specific limitations affect learning in the postsecondary academic setting (Lindstrom, 2007). The information from high school provides recent documentation of the impact of an impairment on the ability to learn that is very relevant to providing accommodations, and therefore, equal access to college programs.

Due to these changes in the law the role of high school special educators in providing transition documentation for college has become more relevant to college disability determination. The IEP team and/or Section 504 team are instrumental in creating documentation that will later assist the student in the transition from high school to college. Input from high school educators and students with disabilities is now more important under the focus on functionality and provision of effective accommodations because all play a key role in the documentation process (see Box 3, "Secondary Education Involvement In Transition Documentation"). Special education teachers and school psychologists provide substantial input in the planning process and follow-up documentation, and have the most direct contact with special education students. Regular education teachers and school counselors have significant interaction with special

education students, and even more interaction with students on Section 504 Plans that do not usually receive special education services. In these roles, special and regular educators are enabled to create documentation of disability through ongoing interaction with students that is relevant to attaining coverage under the ADA in college. These educators are important in gathering and assessing relevant information that is later recorded in the student's IEP, SOP or Section 504 Plan as objective documentation.

The National Transition Assessment Summit (2005) that created the model SOP template was made up of representatives from secondary and postsecondary organizations such as the Council for Exceptional Children, LDA and AHEAD. Information from the model SOP such as transition goals, a history of functional limitations and use and effectiveness of accommodations can help colleges make accommodation determinations at the postsecondary level based on the broad ADAAA specifications (Shaw, Keenan, Madaus & Banerjee, 2010). Research by de Vries and Schmitt (2013) found that most postsecondary disability personnel rated the sections of the Model Summary of Performance (Dukes, Shaw & Madaus, 2007) to be very useful to extremely useful for making college accommodations decisions.

Past practices by many colleges have been to require scientific, medical, and statistical data to establish eligibility under the ADA that was not available from high school records or was not current enough to meet college documentation requirements to determine eligibility under the ADA. The changes implemented under the ADAAA state that this type of documentation will usually not be necessary (ADAAA Regulations, Title I, 2013). The first purpose of transition documentation is to determine the presence of a

disability to establish eligibility. Documentation from high school is relevant to this issue. The second purpose is to determine functional impact that will guide the determination of reasonable accommodations in college. Transition documentation that provides information on functional limitation and prior successful accommodations is even more relevant in determining these compensatory accommodations that will provide equal access to postsecondary education in college.

[Insert Box 3]

Individual Student Documentation Transition to College

Documentation of disability is specific and unique for each student that transitions from high school to college. Kellems & Morningstar (2010) recommend the development of a notebook of important paperwork for postsecondary settings to provide important information to the student in transition. Such materials may be invaluable to a student with a disability upon entering college as a freshman. It is recommended that the student participate in this process to be involved in planning for postsecondary education and further develop self-determination and self-advocacy skills. Depending on the circumstances of the individual student, the notebook may contain the following documentation:

- A complete copy of the most recent IEP or Section 504 plan noting accommodations that were provided, the basis for using those accommodations and transition goal planning;
- A copy of the student's SOP including academic achievement, functional performance, and recommendations to assist in meeting postsecondary goals;

- History of receiving and utilization of accommodations in other settings, i.e., high school competency examinations, SAT, ACT, middle school and elementary school;
- A statement developed by the student and professional staff that reflects upon the effectiveness of accommodations that have been used in high school;
- Most recent psychoeducational reports, neuropsychological reports, and other assessment data and reports should be included as relevant in describing functional deficits and the impact on the student's ability to learn (Kellems & Morningstar, 2010).

Final Thoughts

Changes in the definition of disability under the ADAAA has expanded coverage for students with learning disabilities and ADHD in college, lessened the documentation standards, and placed more of an emphasis on documentation from high school.

Documentation of disability is more qualitative and focuses on functional limitation.

However, it is important to remember that the impairment must be assessed without consideration of mitigating measures that lessen functional impact (e.g., the use of assistive technology, medicine). The *AHEAD Guidance* document notes that the primary documentation in college should be more focused on student self-report of the functional impact of a diagnosed impairment, and then secondary documentation of the impact of a disability is obtained through observation and interaction with students. However, it must be remembered that not all colleges follow the AHEAD recommendations, nor are they required to do so.

High school professionals are uniquely qualified to provide this documentation as participant observers within secondary education. The documentation is provided through the IEP or Section 504 Plan, and in some cases, the SOP. Prepared statements that include written descriptions of the impairment, functional limitations, prescribed accommodations, and the efficacy of utilized accommodations will be increasingly important. However, because the use of accommodations in high school does not automatically translate to receipt of accommodations in college, the most recent test scores and evaluation results possible should also be included to support the diagnosis of a specific disability, and functional limitation due to an impairment.

Other strategies may be employed to develop transition documentation. Compilation of documentation in a notebook format provides objective evidence and support in obtaining academic accommodations in college. This form of documentation may be in an actual physical notebook with each section tabbed and labeled for easy access. However, it may also be a virtual notebook in electronic format that may be encrypted and sent to the college disability services provider via email prior to a face-to-face meeting. Student self-determination and self-advocacy may be further developed through exercises that practice requesting accommodations in college while in high school. Part of such an exercise could include researching college disability documentation guidelines to prepare documentation that is relevant to particular colleges.

References

- Americans with Disabilities Act of 1990. Pub. L. No. 101-336, 42 U.S.C. § 12101 (2012).
- Americans with Disabilities Act Amendments Act of 2008. Pub. L. No. 110-325, 122 Stat. 3553 (2008).
- Americans with Disabilities Act Amendment Act of 2008 Regulations, Title I. 29 C.F.R. §1630.2(j)(1)(v) (2013).
- Association of Higher Education and Disability, (2012). *Supporting accommodation requests: guidance on documentation practices*. Retrieved from <http://www.ahead.org/resources/best-practices-resources/principles>.
- deBettencourt, L. (2002). Understanding the differences between IDEA and Section 504. *Teaching Exceptional Children*, 34(3), 16-23.
- Hamblet, E. C. (2014). Nine strategies to improve college transition planning for students with disabilities. *Teaching Exceptional Children*, 46(3), 53-59.
- Individuals With Disabilities Education Act, Pub. L. 94-142, 20 U.S.C. §1400 (2012).
- Keenan, W. R. & Shaw, S. F. (2011). The legal context for serving students with learning disabilities in postsecondary education. *Learning Disabilities: A Multidisciplinary Journal*, 17(2), 55-61.
- Kellems, R. O. & Morningstar, M. E. (2010). Tips for transition. *Teaching Exceptional Children*, 43(2), 60-68.
- Lindstrom, J. (2007). Determining appropriate accommodations for postsecondary students with reading and written expression disabilities. *Learning Disabilities*

- Research & Practice*, 22(4), 229-236.
- Madaus, J. W., Banerjee, M., & Hamblet, E. (2010). Learning disability documentation decision making at the postsecondary level. *Career Development for Exceptional Individuals*, 33, 68-79.
- Madaus, J. W., Gerber, P. J., & Price, L. A. (2008). Adults with learning disabilities in the workforce: Lessons for secondary transition programs. *Learning Disabilities Research & Practice*, 23(3), 148-153.
- Madaus, J. W. & Shaw, S. F. (2007). Transition assessment. *Assessment for Effective Intervention*, 32(3), 130-132.
- Madaus, J. W. & Shaw, S. F. (2004). Section 504: The difference in the regulations Regarding secondary and postsecondary education. *Intervention in School and Clinic*, 40, 81-87.
- Newman, L., Wagner, M., Cameto, R., & Knokey, A. M. (2009). *The post-high school outcomes youth with disabilities up to 4 years after high school. A report from the national Longitudinal Transition Study-2 (NLTS2)*. Menlo Park, CA: SRI International.
- Section 504 of the Rehabilitation Act of 1973, Pub. L. 93 – 112 as amended, 29 U.S.C. §794.
- Shaw, S. F. (2009). Transition to postsecondary education. *Focus on Exceptional Children*, 42(2), 1-16.
- Shaw, S. F., Keenan, W. R., Madaus, J. W., & Banerjee, M. (2010). Disability documentation, the Americans with Disabilities Act Amendments Act, and the summary of performance: How are they linked? *Journal of Postsecondary*

Education and Disability, 22(3), 142-150.

Singh v. George Washington University School of Medicine and Health Sciences,
508 F.3d 1097 (D.C. Cir. 2007).

Sutton v. United Air Lines, 527 U.S. 471 (1999).

Toyota Motor Manufacturing Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

U.S. Department of Education, Office for Civil Rights. (2011a). *Students with disabilities preparing for postsecondary education: Know your rights and responsibilities*.

Retrieved from

<http://www2.ed.gov/print/about/offices/list/ocr/transition.html>.

U.S. Department of Education, Office for Civil Rights. (2011b). *Transition of students with disabilities to postsecondary education: A guide for high school educators*.

Retrieved from

<http://www2.ed.gov/print/about/offices/list/ocr/transitionguide.html>.

Wong v. Regents of the University of California, 410 F.3d 1052 (9th Cir. 2005).

Box 1**Major Provisions of the ADAAA****Section 2 – Findings**

- The ADA was intended to provide broad coverage to eliminate discrimination against individuals with disabilities.
- Supreme Court narrowed definition of disability and eliminated protection for individuals.
- Term “substantially limits” was interpreted restrictively and set too high a standard for eligibility by the Supreme Court and the Equal Employment Opportunity Commission.
- Relying on the Supreme Court lower courts incorrectly found that individuals with a range of impairments are not people with disabilities.

Section 2 - Purposes

- To reinstate the broad scope of protection under the ADA.
- Rejection of the Supreme Court cases that created a demanding legal standard to qualify for coverage under the ADA.
- To reverse the restrictive standard from the Supreme Court as applied by the lower courts and provide that the question of whether an individual’s impairment is a disability should not demand extensive analysis.
- Need to revise administrative regulations pertaining to the term “substantially limits” to be consistent with the changes in the ADAAA.

Section 4 – Disability Defined

- Major life activities are defined to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- Major life activities include the operation of major bodily functions. These include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Box 2

Interpreting the Definition of Disability

- Definition of disability shall be interpreted in favor of broad coverage to maximum extent under the ADAAA.
- Term “substantially limits” shall be interpreted consistently with findings and purposes of the ADAAA.
- The determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures.
- An impairment that substantially limits only one major life activity is considered a disability.
- An impairment that is episodic or in remission if it would be substantially limiting if active.

Box 3

Secondary Education Involvement in Transition Documentation

- **Student** – Involvement is key to help understand nature of their disability, functional impact of impairment, and to enhance self-determination and self-advocacy in college. Should participate in development of IEP, 504 Plan and SOP.
- **Special Education Teacher** – Most familiar with IEP, academic accommodations, student use of accommodations to achieve academic progress, and consults with regular education teachers to assess effectiveness.
- **Regular Education Teacher** – Familiar with special education students and IEP accommodations through LRE inclusive classroom, and also with regular education students who have accommodations from Section 504 plan; may implement academic accommodations and assess effectiveness.
- **School Counselor** – Assists students with search for college that is best fit and assists with preparing disability documentation; also may be Section 504 coordinator who helped design and implement Section 504 plan accommodations.
- **School Psychologist** – Plays key role as performing psychoeducational assessments and interpretation to determine impact of impairment and provision of accommodations; also will often provide ongoing counseling services that provide further feedback on student needs for accommodations.