

Final Regulatory Assessment, Final Rule - Amendment of ADA Title II and Title III Regulations to Implement ADA Amendments Act of 2008

**DEPARTMENT OF JUSTICE
Office of the Attorney General
28 CFR Parts 35 and 36**

CRT Docket No. 124; AG Order No. 3702-2016

RIN 1190-AA59

**Amendment of Americans with Disabilities Act Title II and Title III
Regulations**

to Implement ADA Amendments Act of 2008

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule

SUMMARY: The Department of Justice (Department) is issuing this final rule to amend its Americans with Disabilities Act (ADA) regulations in order to incorporate the statutory changes to the ADA set forth in the ADA Amendments Act of 2008 (ADA Amendments Act or the Act), which took effect on January 1, 2009. In response to earlier Supreme Court decisions that significantly narrowed the application of the definition of "disability" under the ADA, Congress enacted the ADA Amendments Act to restore the understanding that the definition of "disability" shall be broadly construed and applied without extensive analysis. Congress intended that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their statutory obligations not to discriminate based on disability. In this final rule, the Department is adding

new sections to its title II and title III ADA regulations to set forth the proper meaning and interpretation of the definition of “disability” and to make related changes required by the ADA Amendments Act in other sections of the regulations.

EFFECTIVE DATES: This rule will take effect October 11, 2016.

FOR FURTHER INFORMATION CONTACT: Rebecca Bond, Section Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY); this is not a toll-free number. Information may also be obtained from the Department’s toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

You may obtain copies of this final rule in an alternative format by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This final rule is also available on the ADA Home Page at *www.ada.gov*.

SUPPLEMENTARY INFORMATION:

The meaning and interpretation of the definitions of “disability” in the title II and title III regulations are identical, and the preamble will discuss the revisions to both regulations concurrently. Because the ADA Amendments Act’s revisions to the ADA have been codified into the U.S. Code, the final rule references the revised U.S. Code provisions except in those cases where the reference is to the Findings and Purposes of the ADA Amendments Act, in which case the citation is to section 2 of Public Law 110-325, September 25, 2008.¹

This final rule was submitted to the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs for review prior to publication in the Federal Register.

I. Executive Summary

Purpose

This rule is necessary in order to incorporate the ADA Amendments Act's changes to titles II (nondiscrimination in State and local government services) and III (nondiscrimination by public accommodations and commercial facilities) of the ADA into the Department's ADA regulations and to provide additional guidance on how to apply those changes.

Legal Authority

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8, 122 Stat. 3553, 3559 (2008). The Act authorizes the Attorney General to issue regulations under title II and title III of the ADA to implement sections 3 and 4 of the Act, including the rules of construction set forth in section 3. 42 U.S.C. 12205a.

Summary of Key Provisions of the Act and Rule

The ADA Amendments Act made important changes to the meaning and interpretation of the term “disability” in the ADA in order to effectuate Congress's intent to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability. *See* Public Law 110–325, sec. 2(a)(3) (7). The Department is making several major revisions to the meaning and interpretation of the term “disability” contained in the title II and title III ADA regulations in order to implement the ADA Amendments Act. These regulatory revisions are based on specific provisions in the ADA Amendments Act or on specific language in the legislative history. The revised language clarifies that the term “disability” shall be interpreted broadly and explains that the primary object of attention in cases

brought under the ADA should be whether covered entities have complied with their obligations not to discriminate based on disability and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. The revised regulations expand the definition of "major life activities" by providing a non-exhaustive list of major life activities that specifically includes the operation of major bodily functions. The revisions also add rules of construction to be applied when determining whether an impairment substantially limits a major life activity. These rules of construction state the following:

- that the term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;
- that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;
- that the primary issue in a case brought under the ADA should be whether an entity covered under the ADA has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;
- that in making the individualized assessment required by the ADA, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADA Amendments Act;
- that the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

—that the ameliorative effects of mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a “disability”;

—that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

—that an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

The final rule also states that an individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. It also provides that individuals covered only under the “regarded as” prong are not entitled to reasonable modifications.

The ADA Amendments Act’s revisions to the ADA apply to title I (employment), title II (State and local governments), and title III (public accommodations) of the ADA. Accordingly, consistent with Executive Order 13563’s instruction to agencies to coordinate rules across agencies and harmonize regulatory requirements, the Department has adopted, where appropriate, regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission’s (EEOC) title I regulations implementing the ADA Amendments Act. *See* 76 - FR - 16978 (Mar. 25, 2011). This will promote consistency in the application of the ADA and avoid confusion among entities subject to both titles I and II, as well as those subject to both titles I and III.

Changes Made from the Proposed Rule

The final rule retains nearly all of the proposed regulatory text, although some sections were reorganized and renumbered. The section-by-section analysis in appendix C to part 35 and appendix E to part 36 responds to comments and provides additional interpretive guidance on particular provisions. The revisions to the regulatory text, which include substantive changes in response to comments, include the following:

- Added Attention-Deficit/Hyperactivity Disorder (ADHD) as an example of a physical or mental impairment in §§ 35.108(b)(2) and 36.105(b)(2).
- Added “writing” as an example of a major life activity in §§ 35.108(c) and 36.105(c).
- Revised the discussion of the “regarded as prong” in §§ 35.108(f) and 36.105(f) to clarify that the burden is on a covered entity to establish that, objectively, an impairment is “transitory and minor” and therefore not covered by the ADA.
- Modified the rules of construction to make them more consistent with the statute and to provide more clarity, including §§ 35.108(a)(2) and 36.105(a)(2), 35.108(c)(2) and 36.105(c)(2), and 35.108(d)(1) and 36.105(d)(1).
- Revised or added several provisions to more closely conform to the EEOC regulation.

II. Summary of Regulatory Assessment

As noted above, Congress enacted the ADA Amendments Act in 2008 to ensure that persons with disabilities who were denied coverage previously under the ADA would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law benefits millions of Americans, and that the benefits to many of these individuals are non-quantifiable, but nonetheless significant. This rule incorporates into the Department’s titles II and III regulations the changes made by the ADA

Amendments Act. In accordance with OMB Circular A-4, the Department estimates the costs and benefits of this proposed rule using a pre-ADA Amendments Act baseline. Thus, the effects that are estimated in this analysis are due to statutory mandates that are not under the Department's discretion. The Department has determined that the costs of this rule do not reach \$100 million in any single year, and thus it is not an economically significant rule.

In the Initial Regulatory Assessment (Initial RA), the analysis focused on estimating costs for processing and providing reasonable modifications and testing accommodations² to individuals with learning disabilities and ADHD³ for extra time on exams as a direct result of the ADA Amendments Act.

Although the Department's analysis focused only on these specific costs, the Department recognized that the ADA Amendments Act extends coverage to people with the full range of disabilities, and the accommodation of those individuals might entail some economic costs. After review of the comments, and based on the Department's own research, the Department has determined, however, that the above-referenced exam costs represent the only category of measurable compliance costs that the ADA Amendments Act will impose and the Department was able to assess. While other ADA Amendments Act compliance costs might also ensue, the Department has not been able to specifically identify and measure these potential costs. The Department believes, however, that any other potential costs directly resulting from the ADA Amendments Act will likely be minimal and have little impact on the overall results of this analysis.

The data used to support the estimates in this Final Regulatory Assessment (Final RA) focus on (1) the increase in the number of postsecondary students or national examination test takers requesting and receiving accommodations—specifically, requests for extra time on exams—as a result of the changes made to the ADA by the ADA Amendments Act; and (2) the actual cost of

these additional accommodations, which involves costs of providing staff with the training on the changes made to the ADA by the ADA Amendments Act, administrative costs to process the additional accommodation requests made as a direct result of the ADA Amendments Act, and the costs of additional proctor time needed for these additional accommodation requests. For both postsecondary institutions and national testing entities, costs are broken down into three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA Amendments Act.

Based on the Department's calculations, total costs to society for implementing the revisions to the ADA Amendments Act range from \$31.4 million to \$47.1 million in the first year. The first year of costs will be higher than all subsequent years because the first year includes the one-time costs of training. Note that even the high end of this first-year cost range is well within the \$100 million mark that signifies an "economically significant" regulation. The breakdown of total costs by entity is provided in the table below.

Total Costs First Year (2016), Primary Analysis

Cost Category	Low Value	Med Value	High Value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	\$12.8	\$18.0	\$23.1
Postsecondary Institutions: ONE-TIME Cost for Additional Training at Institutions	\$9.9	\$9.9	\$9.9

National Exams: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	\$6.8	\$9.5	\$12.2
National Exams: ONE-TIME Cost for Additional Training at Institutions	\$1.9	\$1.9	\$1.9
TOTAL	\$31.4	\$39.3	\$47.1

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Taking these costs over the next 10 years and discounting to present value terms at a rate of 7 percent, the total costs of implementing this final rule are approximately \$214.2 million over 10 years, as shown in the table below.

Total Costs over 10 Years, Primary Analysis

Total Discounted Value (\$millions)	Annualized Estimate (\$millions)	Year Dollar	Discount Rate	Period Covered
\$214.2	\$28.6	2015	7%	2016–2025
\$243.6	\$26.3	2015	3%	2016–2025

III. Background

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8. As with other civil rights laws, individuals seeking protection in court under the anti-discrimination provisions of the ADA generally must allege and prove that they are members of the “protected class.” Under the ADA, this typically means they have to show that they meet the statutory definition of being an “individual with a disability.” *See* 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* H.R. Rep. No. 110–730, pt. 2, at 6 (2008) (House Committee on the

Judiciary). Congress did not intend, however, for the threshold question of disability to be used as a means of excluding individuals from coverage. *Id.* H.R. Rep. No. 110–730, pt. 2, at 5 (2008).

In the original ADA, Congress defined “disability” as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(1). Congress patterned this three-part definition of “disability”—the “actual,” “record of,” and “regarded as” prongs—after the definition of “handicap” found in the Rehabilitation Act of 1973. *See* H.R. Rep. No. 110–730, pt. 2, at 6 (2008). By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term “disability” as used in the ADA.

H.R. Rep. No. 101–485, pt. 3, at 27 (1990); *see also* S. Rep. No. 101–116, at 21 (1989) ; H.R. Rep. No. 101–485, pt. 2, at 50 (1990). Congress expected that the definition of “disability” and related terms, such as “substantially limits” and “major life activity,” would be interpreted under the ADA “consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act”—*i.e.*, expansively and in favor of broad coverage.

Public Law 110–325, sec. 2(a)(1)-(8) and (b)(1)-(6); *see also* 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“When Congress passed the ADA in 1990, it adopted the functional definition of disability from... Section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.”); H.R. Rep. No. 110–730, pt. 2, at 6, & n.6 (2008) (noting that courts had interpreted the Rehabilitation Act definition “broadly to include persons with a wide range of physical and mental

impairments”).

That expectation was not fulfilled. Public Law 110–325, sec. 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. *Id.* sec. 2(a)(4)–(7). For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In *Sutton*, the Court also adopted a restrictive reading of the meaning of being “regarded as” disabled under the ADA’s definition of “disability.” *Id.* at 489–94. Subsequently, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Court held that the terms “substantially” and “major” in the definition of “disability” “need to be interpreted strictly to create a demanding standard for qualifying as disabled” under the ADA, *id.* at 197, and that to be substantially limited in performing a major life activity under the ADA, “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.” *Id.* at 198.

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. *See* 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“After the Court’s decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual’s impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.”). Congress concluded that these rulings imposed a greater

degree of limitation and expressed a higher standard than it had originally intended, and unduly precluded many individuals from being covered under the ADA. *Id.* at S8840–41 (“Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard” and “[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.”).

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. *See* 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner); *see also* 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The ADA Amendments Act modified the ADA by adding a new “findings and purposes” section focusing exclusively on the restoration of Congress’s intent in the ADA to broadly interpret the term “disability” to ensure expansive coverage. These new ADA Amendments Act-specific findings and purposes are meant to restore a broad scope of protection under the ADA by providing clear and enforceable standards that support the mandate to eliminate discrimination against people with disabilities. The “purposes” provisions specifically address the Supreme Court decisions that narrowed the interpretation of the term “disability,” rejecting the *Toyota* strict interpretation of the terms “major” and “substantially;” the *Sutton* requirement that ameliorative mitigating measures must be considered when evaluating whether an impairment substantially limits a major life activity ;

and the narrowing of the third, “regarded as” prong of the definition of “disability” in *Sutton* and *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In addition, the ADA Amendments Act specifically rejects the EEOC’s interpretation of “substantially limited ” as meaning “significantly restricted,” noting that it is too demanding of a standard. *See* Public Law 110–325 sec. 2(b).

The findings and purposes section of the ADA Amendments Act “gives clear guidance to the courts and ... [is] intend[ed] to be applied appropriately and consistently.” 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers). The Department has amended its regulations to reflect the ADA Amendments Act, including its findings and purposes.

IV. Summary of the ADA Amendments Act of 2008

The ADA Amendments Act restores the broad application of the ADA by revising the ADA’s “Findings and Purposes” section, expanding the statutory language regarding the meaning and interpretation of the definition of “disability,” providing specific rules of construction for interpreting that definition, and expressly superseding the standards enunciated by the Supreme Court in *Sutton* and *Toyota* and their progeny.

First, the ADA Amendments Act deletes two findings that were in the ADA: (1) that “some 43,000,000 Americans have one or more physical or mental disabilities,” and (2) that “individuals with disabilities are a discrete and insular minority.” 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* Public Law 110–325, sec. 3. As explained in the 2008 Senate Statement of the Managers, “[t]he [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting

these findings removes this barrier to construing and applying the definition of disability more generously.” 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Second, the ADA as amended clarifies Congress’s intent that the definition of "disability" “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. 12102(4)(A).

Third, the ADA as amended provides an expanded definition of what may constitute a “major life activity,” within the meaning of the ADA. 42 U.S.C. 12102(2). The statute provides a non-exhaustive list of major life activities and specifically expands the category of major life activities to include the operation of major bodily functions. *Id.*

Fourth, although the amended statute retains the term “substantially limits” from the original ADA definition, Congress set forth rules of construction applicable to the meaning of substantially limited that make clear that the term must be interpreted far more broadly than in *Toyota*. 42 U.S.C. 12102(4); *see also* Public Law 110–325, sec. 2(b)(5). Congress was specifically concerned that lower courts had applied *Toyota* in a way that “created an inappropriately high level of limitation necessary to obtain coverage under the ADA.” Public Law 110–325, sec. 2(b)(5). Congress sought to convey that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” *Id.*

Fifth, the ADA as amended prohibits consideration of the ameliorative effects of mitigating measures such as medication, assistive technology, or

reasonable modifications when determining whether an impairment constitutes a disability. 42 U.S.C. 12102(4)(E)(i). Congress added this provision to address the Supreme Court's holdings that the ameliorative effects of mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. Public Law 110-325, sec. 2(b)(2). The ADA as amended also provides that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. 12102(4)(D).

Sixth, the ADA as amended makes clear that, despite confusion on the subject in some court decisions, the "regarded as" prong of the disability definition does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. 42 U.S.C. 12102(3). With this clarifying language, an individual can once again establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. The ADA Amendments Act also clarifies that entities covered by the ADA are not required to provide reasonable modifications to policies, practices, or procedures for individuals who fall solely under the regarded as prong. 42 U.S.C. 12201(h).

Finally, the ADA as amended gives the Attorney General explicit authority to issue regulations implementing the definition of "disability." 42 U.S.C. 12205a.

V. Background on this Rulemaking and Public Comments received.

The Department published its Notice of Proposed Rulemaking (NPRM) proposing to amend its title II and title III ADA regulations in the Federal Register on January 30, 2014. 79 FR 4839 (Jan. 30, 2014). The comment

period closed on March 31, 2014. The Department received a total of 53 comments on the NPRM from organizations representing persons with disabilities, organizations representing educational institutions and testing entities, individual academics, and other private individuals. The Section-by-Section analysis in the appendix to this rule addresses the comments related to specific regulatory language proposed in the NPRM.

Many commenters on the NPRM noted the value of the regulation to people with disabilities while a number of commenters on the Department's NPRM expressed concern that the Department's regulatory assessment unduly focused on individuals with learning disabilities who sought accommodations in testing or educational situations. These commenters asserted that the Department's discussion of the potential costs for testing entities or educational entities of complying with the ADA Amendments Act and this rule could be misunderstood to mean that the Department believed the changes in the definition of "disability" did not have an impact on individuals with other types of disabilities.

As discussed in the regulatory assessment, the Department believes that persons with all types of impairments, including, but not limited to, those enumerated in §§ 35.108(b) and 36.105(b), will benefit from the ability to establish coverage under the ADA as amended, and will therefore be able to challenge the denial of access to goods, services, programs, or benefits based on the existence of a disability. The Department's regulatory assessment is not a statement about the coverage of the ADA. Rather, it is a discussion of identifiable incremental costs that may arise as a result of compliance with the ADA Amendments Act and these implementing regulations. As explained in the regulatory assessment and under Section VII.A below, the Department believes that those costs are limited primarily to the context of providing reasonable modifications in higher education and testing accommodations by testing entities.

VI. Relationship of this Regulation to Revisions to the Equal Employment Opportunity

Commission's ADA Title I Regulation Implementing the ADA Amendments Act of 2008.

The EEOC is responsible for regulations implementing title I of the ADA addressing employment discrimination based on disability. On March 25, 2011, the EEOC published its final rule revising its title I regulation to implement the revisions to the ADA contained in the ADA Amendments Act. 76 FR 16978 (Mar. 25, 2011).⁴

Because the ADA's definition of "disability" applies to title I as well as titles II and III of the ADA, the Department has made every effort to ensure that its proposed revisions to the title II and III regulations are consistent with the provisions of the EEOC final rule. Consistency among the title I, title II, and title III rules will promote consistent application of the requirements of the ADA Amendments Act, regardless of the Federal agency responsible for enforcement or the ADA title that is enforced. Further, because most entities subject to either title II or title III are also subject to title I with respect to employment, they should already be familiar with the revisions to the definition of "disability" in the 4-year-old EEOC revised regulation. Differences in language between the title I rules and the Department's title II and title III rules are noted in the Section-by-Section analysis and are generally attributable to structural differences between the title I rule and the title II and III rules or to the fact that certain sections of the EEOC rule deal with employment-specific issues.

VII. Regulatory Process Matters

A. Executive Order 13563 and 12866—Regulatory Planning and Review

This final rule has been drafted in accordance with Executive Order 13563 of January 18, 2011, 76 FR 3821, Improving Regulation and Regulatory Review, and Executive Order 12866 of September 30, 1993, 58 FR 51735, Regulatory Planning and Review. Executive Order 13563 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department has determined that this rule is a “significant regulatory action” as defined by Executive Order 12866, section 3(f). The Department has determined, however, that this rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

Purpose and Need for Rule and Scope of Final Regulatory Assessment

This rule is necessary in order to incorporate into the Department’s ADA regulations implementing titles II (nondiscrimination in State and local government services) and III (nondiscrimination by public accommodations and commercial facilities) the ADA Amendments Act’s changes to the ADA and to provide additional guidance on how to apply those changes. The ADA

Amendments Act, which took effect on January 1, 2009, was enacted in response to earlier Supreme Court decisions that significantly narrowed the application of the definition of "disability" under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The ADA Amendments Act clarifies the proper interpretation of the term "disability" in the ADA and fulfills congressional intent to restore the broad scope of the ADA by making it easier for individuals to establish that they have a disability within the meaning of the statute. *See* Public Law 110–325, sec. 2(a)(3)-(7). The Act authorizes the Attorney General to issue regulations under title II and title III of the ADA to implement sections 3 and 4 of the Act, including the rules of construction presented in section 3. 42 U.S.C. 12205a. The Department is making several revisions to the title II and title III ADA regulations that are based on specific provisions in the ADA Amendments Act.

The Department notes that the Supreme Court cases limiting the application of the definition of "disability" had the most significant impact on individuals asserting coverage under title I of the ADA with respect to employment. The legislative history of the ADA Amendments Act is replete with examples of how individuals with a range of disabilities were unable to successfully challenge alleged discriminatory actions by employers because courts found that they did not qualify as individuals with disabilities under the Supreme Court's narrow standards. *See, e.g.*, S. 154 Cong. Rec. S8840-44 (daily ed. Sept. 16, 2008) (Statement of the Managers). With respect to titles II and III, while the statutory amendments required by the ADA Amendments Act affect persons with all types of disabilities and across all titles of the ADA, Congress anticipated that the ADA Amendments Act's expanded definition would especially impact persons with learning disabilities who assert ADA rights in education and testing situations. *See* H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008); *see also* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008). Congress was concerned about the number of individuals with learning disabilities who

were denied reasonable modifications or testing accommodations (*e.g.*, extra exam time) because covered entities claimed these individuals did not have disabilities covered by the ADA.

In the NPRM, the Department requested public comments on whether the changes made by the ADA Amendments Act to titles II and III and that are addressed in the proposed rule would have benefits or costs in areas other than additional time for postsecondary students and national examination test takers with ADHD or learning disabilities. Those comments and the Department's response are discussed below. The Department wishes to stress that, although its economic analysis is focused on estimating costs for processing requests and providing extra time on exams as a direct result of the ADA Amendments Act, the ADA, as amended, extends coverage to individuals with the full range of disabilities and affords such individuals the full range of nondiscrimination protections under the ADA.⁵ The Department is aware that the accommodation of those individuals might entail some economic costs; however, it appears that in light of the legislative history and the experience of the Department in resolving ADA claims from 1990 to the present, the above-referenced exam costs represent the only category of measurable compliance costs that the ADA Amendments Act will impose and the Department was able to assess. While other ADA Amendments Act compliance costs might also ensue, the Department has not been able to specifically identify and measure these potential costs. The Department believes, however, that any other potential costs directly resulting from restoration of coverage to individuals with disabilities who assert their rights under other ADA nondiscrimination provisions will likely be minimal and have little impact on the overall results of this analysis.

Public Comments on Regulatory Assessment and Department Responses

This section discusses public comments to the Initial RA that accompanied the NPRM, as well as changes made to the estimation of likely costs of this rule in response to those comments.

While more than 50 comments were received during the NPRM comment period, only a few of those directly addressed the assumptions, data, or methodology used in the Initial RA. The Department received comments from persons with disabilities, organizations representing educational institutions and testing entities, individual academics, and other private individuals. The preamble to this final rule provides the primary forum for substantive responses to these comments. _

General and Recurring Concerns Expressed in Comments

Many commenters expressed appreciation for the proposed regulation, with several noting that the regulation would offer qualitative and quantitative benefits. Some of the quantitative benefits noted by commenters were a reduction in litigation costs as well as access to educational opportunities for persons with disabilities that would enhance employment prospects, productivity, and future earnings and investments. Qualitative benefits referenced in the comments included enhanced personal self-worth and dignity, as well as the values of equity, fairness, and full participation. Other commenters expressed concern about costs associated with implementation of the regulation.

The Department reviewed a number of comments suggesting that it underestimated the costs that postsecondary schools or national testing entities will incur to comply with the ADA Amendments Act. Commenters stated that the ADA Amendments Act will lead to a significant increase in the number of students seeking accommodations from postsecondary schools, which will lead to substantially increased direct costs (*e.g.*, the costs of

providing additional exam time and other accommodations to students with disabilities) and indirect costs (*e.g.*, the costs of processing these requests, complaints to the Office for Civil Rights at the U.S. Department of Education, and lawsuits). Commenters further stated that the Department overlooked the costs that postsecondary schools will incur in providing accommodations other than additional exam time, such as tutors, note takers, auxiliary aids, e-books, etc. These commenters suggested that postsecondary schools will need to hire additional staff to manage the additional administrative burden that the ADA Amendments Act imposes.

Those comments and as well as other related comments, are specifically addressed below. But, as a threshold matter, the Department believes that the concerns predicated on the assumption of a significant rise in students seeking accommodations due to changes brought about by the ADA Amendments Act are overstated. One of the primary purposes of the ADA Amendments Act was to restore ADA coverage to a subset of individuals with disabilities who lost ADA protection as a result of a series of Supreme Court decisions dating back to 1999.

While the Department recognizes that there has been an increase in the number of students with disabilities requesting accommodations at postsecondary institutions, much of this increase is likely not attributable to the passage of the ADA Amendments Act. Commenters and existing data suggest that, for the most part, increases in the number of students with disabilities attending college and seeking accommodations are likely related to the following factors:

- There are more diagnoses of disabilities in children overall since 1997;⁶
- More students are attending college generally;⁷
- Other laws such as the Individuals with Disabilities Education Act (IDEA) and section 504 are causing students with disabilities to be

identified more widely and at a younger age;⁸

- The stigma of identifying as a person with a disability appears to have diminished since the passage of the ADA in 1990;
- Diagnoses of autism spectrum disorders among children have increased significantly since 1997, perhaps as a result of improved diagnostic tools and protocols;⁹ and
- Postsecondary schools have improved their ability to accommodate students with disabilities, thus encouraging more students to seek such accommodations, and empowering students with disabilities to enroll in college and remain enrolled there.¹⁰

Most of the students affected by the ADA Amendments Act are students whose impairments did not clearly meet the definition of "disability" under the ADA after the series of Supreme Court decisions beginning in 1999 reduced the scope of that coverage. For instance, under the narrowed scope of coverage, some individuals with learning disabilities or ADHD may have been denied accommodations or failed to request them in the belief that such requests would be denied. As a result, the most likely impact of the ADA Amendments Act is seen in the number of students with disabilities eligible to request and receive accommodations in testing situations. There are different types of accommodations requested in testing situations, but requests for additional exam time appear to be the type of accommodation most likely to have a significant, measurable cost impact. Other types of accommodations requested in testing situations are expected to incur few to no additional costs as a result of the ADA Amendments Act and this rule. For instance, requests for accommodations such as the use of assistive technology or the need for alternative text formats were the types of accommodations that would have been granted prior to the passage of the ADA Amendments Act because students with sensory disabilities needing these types of accommodations would have been covered by the ADA even under the narrower scope of

coverage arising from the application of the Supreme Court's decisions in *Toyota* and *Sutton*. As a result, those types of accommodations cannot be directly attributed to the ADA Amendments Act. In addition, other types of accommodations such as adjustments to the testing environment (*e.g.*, preferential seating or alternative locations) or the ability to have snacks or drinks would result in minimal or no costs. Therefore, the Department's examination of the costs of this rule is confined to those accommodations that individuals at postsecondary institutions or taking national examinations are most likely to request as a result of the ADA Amendments Act and that are most likely to incur measurable costs—extra time on tests and examinations.

One commenter, however, asserted that costs should be estimated for entities other than postsecondary institutions and testing entities, such as elementary and secondary schools, courthouses, etc. Certain concerns related to elementary and secondary schools are addressed below, but the Department found no direct evidence to indicate that institutions other than postsecondary institutions and testing entities will incur any significant economic impact as a result of accommodating individuals now covered under the ADA after passage of the ADA Amendments Act. Even after conducting further research, the Department was unable to identify any accommodations that would result in compliance costs that could be specifically attributable to the ADA Amendments Act other than those identified and measured in this analysis—*i.e.*, accommodations for extra time on exams. While the Department anticipates that other individuals with disabilities will benefit from the ADA Amendments Act, no specific subsets of individuals with disabilities or specific accommodations were identified. Accordingly, it appears that the economic impact of ADA Amendments Act compliance for entities other than postsecondary schools and testing entities will not significantly affect the overall economic impact of the rule, and thus

those costs are not analyzed here.

One commenter cited the 2013–2014 Institutional Disability Access Management Strategic Plan at Cornell University¹¹ as an example of the kind of careful planning done by postsecondary institutions to address the needs of students with disabilities as a basis for determining that the costs of implementing the ADA Amendments Act will be very high. This document focuses almost exclusively on initiatives taken in furtherance of ADA compliance generally, rather than compliance with the ADA Amendments Act specifically. Further, this document discloses that Cornell University annually updates its plans and policies toward individuals with disabilities. Nothing in this document indicates that Cornell University is absorbing high costs as a result of such ongoing updates, or that the ADA Amendments Act has presented Cornell University with an unusually high burden, over and above the ordinary obligations that the ADA itself imposes. It is true that this document reflects careful, comprehensive, and possibly costly planning on the behalf of students with disabilities, but the expense inherent in such planning is attributable to the overall requirements of the ADA itself, rather than the implementation of the ADA Amendments Act.

Comments Regarding the ADA and Related Laws

Many of the commenters' points regarding increased costs appear to apply to concerns about the costs of complying with the ADA generally and not to costs related to expanded coverage due to the ADA Amendments Act. It is true that in some cases the costs of accommodating some students with more severe mobility and sensory disabilities could be significant, but these students were clearly covered even under the restrictive standards set forth by *Sutton* and *Toyota*, and accordingly, such costs cannot be attributed to the implementation of the ADA Amendments Act. One commenter expressed a concern that there has been an increase in requests for “exotic or untrained

animals as service or emotional support animals” in student housing provided by postsecondary institutions. The Department notes that neither “exotic animals” nor “emotional support animals” qualify as service animals under the existing regulations implementing titles II and III of the ADA and thus, any costs related to allowing such animals are not due to the application of the requirements of this rule.¹² And, similar to the observation noted above, the vast majority of students who use service animals as defined under the ADA have disabilities that would have been covered prior to passage of the ADA Amendments Act, even under the Supreme Court’s more narrow application of the definition of “disability.” So, although such costs may be measurable, they cannot fairly be attributed to the implementation of the ADA Amendments Act.

Comments Regarding the Costs for the Adjustment of Existing Policies

The Department acknowledges that postsecondary schools and national testing entities will incur some costs to update their written policies and training procedures to ensure that the definition of “disability” is interpreted in accordance with the requirements of the ADA Amendments Act, but has found no evidence to indicate that such costs would be high. The Department also notes that even prior to passage of the ADA Amendments Act, many postsecondary schools had policies in place that were broader and more comprehensive than would have been required under the more restrictive coverage set forth in *Sutton* and *Toyota*. As a result, their policies and procedures may require few, if any, updates to conform to the ADA Amendments Act and the revised regulations. The Department has found no evidence to suggest that the changes required by the ADA Amendments Act have placed or will place a significant burden upon the ongoing processes of evaluating and updating policies that already exist at postsecondary schools or with national testing entities. Nevertheless, the Department has attempted in this Final RA to quantify the cost of training staff members and updating

policies as a result of the changes that the ADA Amendments Act final rule may require.

Some commenters argued that the Department's estimate of a one-time cost of \$500 per institution to change policies and procedures in compliance with the ADA Amendments Act was too low. Instead, one commenter proposed an estimated one-time cost of \$2,500 per institution, and another commenter suggested an estimated one-time cost of \$5,000 per institution for the first year's training costs. The underlying data and methodology to support these estimates were not provided by these commenters.

The Department has found no data to substantiate the claims that the cost of changing existing policies and training procedures to comply with the ADA Amendments Act will be \$2,500 or \$5,000 per institution. The commenters proposing those costs did not provide any detailed evidence or arguments in support of such costs, and the Department's research found no evidence to indicate that any institutions have incurred training or policy revision costs of that magnitude since the ADA Amendments Act became effective in 2009. The commenter suggesting a \$5,000 cost cites to one institution's disability access plan to suggest some of the types of costs that might be incurred. The referenced document, however, does not provide specific dollar figures and is not ADA Amendments Act specific. Therefore, the Department does not believe that the commenter's projected cost increases are correct because, as discussed above, the programmatic concerns identified in this document pertained to ADA compliance as a whole, but not with changes to the ADA created by the ADA Amendments Act specifically. The Department acknowledges that the absence of evidence of such costs, however, is not necessarily conclusive that some costs do not or will not exist. Nevertheless, the Department believes that, had postsecondary schools incurred \$2,500 to \$5,000 in such compliance costs since 2009 or if they expected to incur such costs going forward, some indicia of these costs would be readily apparent.

Because no relevant supporting information regarding the commenters' estimates was provided, the Department conducted additional independent research and interviewed representatives at two postsecondary institutions to determine whether any additional formal or informal training had been needed to understand the implications of the ADA Amendments Act (and make adjustments to existing policies and procedures to conform to the Act's requirements). One of those two institutions stated that no additional training had been needed. The second institution said that additional training had been provided during meetings with staff. Approximately two hours per staff member (*i.e.*, two hours per meeting) had been dedicated to this training. Approximately two part-time staff and six graduate students (working part time) received this training. In addition, the staff member providing the training had to attend a one-day conference to receive the information to pass along to the other staff. The Department conducted research to determine the costs of attending such a conference and receiving training on the changes to the law resulting from the ADA Amendments Act. Based on this independent research and feedback from representatives of two postsecondary institutions, the Department increased its estimate for one-time training costs from approximately \$500 to \$1,371 (*see* below for greater details on how the \$1,371 was derived).

Comments Regarding the Costs of Additional Staff Time for the Administration of the Rule

Some commenters argued that the rule will lead to a significant increase in postsecondary institution accessibility support staff time devoted to disability accommodation issues, perhaps even requiring postsecondary institutions to hire additional personnel. One commenter representing higher educational institutions estimated that each affected institution would be required to hire one new full-time staff member, at \$40,000 per year, to address increased student requests. This commenter cited a study that indicated that the mean

number of staff who assist students with disabilities is four per campus. The Department questions the commenter's estimate that each affected institution would have to increase their staff by one full-time staff person, or approximately 25 percent of the mean entire staff, to address the incremental changes created by the ADA Amendments Act. The general increase in accommodation requests is likely attributable to a number of other factors not related to the ADA Amendments Act, including higher enrollment of students with disabilities. While there will likely be an incremental increase in the number of testing accommodations requested and granted as a direct result of the ADA Amendments Act, this incremental increase is unlikely to be the driving factor for hiring additional staff.

Similarly, some commenters argued that the Department needed to incorporate estimates of the additional administrative time needed to review and administer additional requests for testing accommodations for both postsecondary and national testing entities. To address these concerns, the Department contacted several universities and testing entities, but received responses from only one school and one testing entity, and those responses were inconclusive. The postsecondary school said that there has been no noticeable increase in applications for accommodations since the passage of the ADA Amendments Act, but the testing entity stated that it has detected a large increase in requests for additional testing time since the passage of the ADA Amendments Act. In light of the uncertainty regarding any potential additional staff time needed to review additional requests for accommodations, the Department has made several assumptions based on research and discussions with subject matter experts and impacted entities so as to incorporate estimated costs for this item. This information is presented further below.

Comments Regarding the Costs of Additional Disputes

Some commenters argued that the ADA Amendments Act would lead to increased litigation and internal disputes against institutions, as the scope of potential litigants would expand due to the increase in individuals covered by the ADA as a result of the passage of the ADA Amendments Act. Other commenters disagreed, stating that the new regulation would reduce the volume of complaints and litigation and streamline outstanding complaints and litigation due to increased consistency and predictability in judicial interpretation and executive enforcement. The Department does not agree with the commenters who asserted that the impact of the ADA Amendments Act will lead to an increase in litigation and disputes. The ADA Amendments Act clarified several contentious or uncertain aspects of the ADA, and thus may have decreased the overall amount of ADA litigation by reducing ambiguities in the law. However, assessing the impact of covered entities' failures to comply (or alleged failures to comply) with the requirements of the ADA, as amended, and the legal challenges that may result from compliance failures, are not properly within the ambit of the Final RA, nor do we have any relevant information that would assist in an analysis of such issues even if it they were appropriate to include in the Final RA.

Comments Regarding the Computation of Costs for Additional Examinations and Testing

One commenter stated that the Department placed too much emphasis on the cost of proctor supervision when assessing the cost of extra exam time in postsecondary institutions. The commenter posited that many tests are administered electronically; accordingly, the costs of those tests are appropriately based on the cost of "seat time" and not the cost of proctor supervision. Unfortunately, no commenter provided a description of what the additional costs per student might be in such circumstances, nor did any commenter explain how such costs could be computed. The Department contacted several postsecondary institutions and testing entities for

approximations of seat time costs, but did not receive any relevant information.

Two commenters noted that for some long national examinations, additional testing time would necessitate the provision of an additional testing day that would increase costs substantially. This potential cost was not estimated in the Initial RA because research indicated that prior to the passage of the ADA Amendments Act, national examination institutions were already accommodating individuals who required additional time because of disabilities already explicitly covered by the ADA. As a result, testing entities were already providing an additional testing day, where necessary.

Therefore, any individuals who would now request additional time on national exams lasting six hours or more as a direct result of the ADA Amendments Act would be accommodated alongside those individuals who would have been covered prior to the ADA Amendments Act, and any potential costs would likely be minimal. Despite this conclusion, the Department has nonetheless conducted a sensitivity analysis to assess these potential costs with the assumption that testing entities were not already providing an additional testing day to accommodate certain individuals with disabilities. Because an additional testing day for these examinations was likely already provided prior to passage of the ADA Amendments Act, the Department continues to believe that the costs of accommodating any additional students who are now seeking additional exam time as a direct result of the ADA Amendments Act will be minimal. As a result, the sensitivity analysis the Department has conducted likely overestimates these potential costs. Further information on the potential range of these costs can be found below.

Comments Regarding the Estimate of ADHD Prevalence among Postsecondary Students

Several commenters questioned the Department's approach of reducing the portion of students with ADHD who would be impacted by the ADA Amendments Act. In the Initial RA, the Department had assumed based on some available research that 30 percent of those who self-identify as having ADHD as their primary disability would not need additional testing time because they would not meet the clinical definition of the disability. One commenter raised concern about presenting a specific percentage of students with ADHD who would not meet that clinical definition, because that number might inadvertently become a benchmark for postsecondary institutions and national testing entities to deny accommodations to a similar percentage of applicants requesting additional exam time because of their ADHD. The Department did not intend for this percentage to establish a benchmark. Covered entities should continue to evaluate requests for additional exam time by all individuals with disabilities on an individualized basis. In direct response to these concerns, the Department has decided not to reduce the number of individuals with ADHD who could now receive testing accommodations as a direct result of the ADA Amendments Act.

Comments Regarding the Economic Impact of the Rule on Industries

A commenter representing institutions of higher education stated that the rule would have a significant impact on higher education as an industry, such that the rule should be considered "economically significant." For the reasons indicated throughout the Final RA, however, the Department does not believe that this commenter's points were persuasive. Based on the Department's own research and evaluation, it is convinced that the cost of ADA Amendments Act compliance will be far less than \$100 million dollars in any given year.

The commenter stated that the Department erred in its analysis by focusing primarily on college students with learning disabilities or ADHD and did not

factor in potential costs related to students with other impairments including depression, schizophrenia, obsessive compulsive disorder, traumatic brain injuries, post-traumatic stress disorder, visual impairments not rising to the level of blindness, anxiety, autism, food allergies, or transitory impairments. Prior to passage of the ADA Amendments Act, higher educational institutions already were incurring costs to accommodate students with the above-referenced impairments that constituted disabilities. These costs are not attributable to this rulemaking and thus not analyzed as such. For the relatively small number of students with the above-referenced disabilities who might not have been covered prior to the passage of the ADA Amendments Act, the Department was unable to specifically identify or measure any potential costs that postsecondary institutions would incur in accommodating these students.

The commenter also stated that the Department's Initial RA should have considered the costs of academic accommodations other than extended testing time, such as "note takers, tutors, technology based auxiliary aids, electronic versions of text-books and class materials, and other accommodations and aids," as well as "significant costs resulting from accommodation requests outside the classroom context, such as those involving residence halls, food services or athletics." The Department notes that, as with reasonable modifications and testing accommodations required prior to the ADA Amendments Act, the accommodations or auxiliary aids or services described by the commenter were being provided before the passage of the ADA Amendments Act and will not entail new costs specifically attributable to the ADA Amendments Act.

Comments Regarding ADA/IDEA Concerns

Several commenters addressed the possibility that the expanded definition of "disability" could result in more cases arising under the ADA, rather than

under the IDEA, in elementary and secondary schools. An association focusing on children with learning disabilities noted that students who manage their disabilities well often find that school districts challenge their IDEA claims of disability, but that such claims may meet with more success under the ADA or section 504 of the Rehabilitation Act. One commenter, whose comments were endorsed by several other groups, noted that particular subsets of children may be eligible for benefits under the ADA but not under the IDEA. These include students with episodic conditions, mitigated conditions, and conditions such as diabetes and seizure impairments that may require maintenance support, such as diet or medications. A national association of kindergarten through twelfth-grade educators indicated that, increasingly, in its view, some parents are more likely to seek school-related modifications for their child under the ADA, rather than the IDEA. This commenter suggested, accordingly, that ADA litigation would increase once parents become aware of the application of a broader definition of "disability" due to the ADA Amendments Act.

The Department recognizes that the definition of "disability" under the IDEA is different than that under the ADA.¹³ While many students will be covered by both statutes, some students covered by the ADA will not be eligible for special education services under the IDEA; however, such students are covered by section 504 of the Rehabilitation Act and are entitled to a "free appropriate public education" (FAPE) under the Department of Education's section 504 regulation. The Department acknowledges commenters' views that some parents may assert rights for their elementary, middle, and high school students under the ADA due to the expanded definition of "disability." However, the Department believes that the overall number of additional requests for reasonable modifications by elementary and secondary students that can be attributed to the ADA Amendments Act will be small and that any resulting economic impact is likely to be extremely limited. Students with

ADHD and learning disabilities who already are covered by section 504 and, in many instances, the IDEA as well, are entitled to needed special education, related aids and services, modifications or auxiliary aids or services under those statutes. Further, prior to filing suit under the ADA, any student that is covered under both the ADA and the IDEA must exhaust administrative remedies under the IDEA if seeking a remedy that is available under that statute. Thus, while the ADA is critical to ensuring that students with disabilities have a full and equal opportunity to participate in and benefit from public education, when viewed in concert with the protections already afforded by section 504 and the IDEA, the economic impact of implementing the ADA Amendments Act in K–12 schools will be minimal. The Department also notes that none of these commenters provided any data demonstrating that elementary and secondary schools have incurred additional costs due to the passage of the ADA Amendments Act more than six years ago.

Comments Regarding Possible Fraudulent Claims of Disability

A number of commenters stated that the rule might encourage some people without learning disabilities to claim that they have learning disabilities, so that they can take advantage of extra exam time. The Department has not identified any study suggesting that the release of this rule—more than six years after the effective date of the ADA Amendments Act—likely will motivate a spike in false claims for students seeking extra time on examinations. While individuals with learning disabilities previously denied accommodations may be motivated to seek recognition of their disabilities under this rule, because it may offer an improved opportunity for consideration of their unmet needs, the Department does not believe that individuals who might feign disabilities in pursuit of extra time would modify their behavior as a result of this rule; to the contrary, the motivation and opportunity to feign such disabilities would have existed prior to the passage of the ADA Amendments Act. The Department acknowledges that there will

always be some individuals who seek to take advantage of rules that extend benefits to particular classes of individuals. However, the Department has determined that the costs of such fraudulent behavior cannot readily be computed. It appears that there is no generally accepted metric for determining how many claims of disability are fraudulent, or how the cost of such fraudulent activity should be computed. And, the Department found no evidence to indicate that the rate of fraudulent claims of disability has increased since the implementation of the ADA Amendments Act in 2009. It should be emphasized that individuals seeking accommodations for their disabilities in testing situations under the ADA will still undergo an individualized assessment to determine whether they have disabilities covered by the statute. Extended exam time is an accepted reasonable modification or testing accommodation under the ADA for persons whose disabilities inhibit their ability to complete timed tests. Because the Department is not able to identify or measure an increase in fraudulent claims associated with this rule, those potential costs are not reflected in the economic analysis.

Final Results of the Primary Analysis

This section presents the calculations used to estimate the total costs resulting from the revisions to the title II and title III regulations to incorporate the changes made by the ADA Amendments Act. Costs are first presented for postsecondary institutions and then for national testing entities. For a more detailed explanation of the Department's methodology and data used to calculate these costs, please refer to relevant sections in the Final RA. The Final RA is available on Department's website at www.ada.gov.

As explained above, total costs to postsecondary institutions will include three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA Amendments Act.

To calculate the annual costs to all postsecondary institutions for processing these additional accommodation requests and proctoring additional exam time as a direct result of the ADA Amendments Act, the potential number of students who could request and receive these accommodations needs to be calculated. Calculations for the three costs listed above plus the number of students who are eligible to receive and likely to request accommodations for extra exam time as a direct result of the ADA Amendments Act are presented below.

The annual one-time training cost for all postsecondary institutions is presented in Table 1 below. The methodology used to calculate this cost is explained further in Section 2.1 of the Final RA, and the sources for the data used are provided in Section 3.1.1 of the Final RA.

Table: Calculation of One-Time Training Costs for Postsecondary Institutions

Variable	Value
Number of Postsecondary Institutions	7,234
One-Time Cost of Training on the Impacts of ADA Amendments Act per Institution	\$1,371
One-Time Training Cost for Postsecondary Institutions	\$9,917,633

Note: Due to rounding, totals may not equate exactly to the product of the

inputs provided in the table.

The number of additional eligible students likely to request and receive extra time on exams at postsecondary institutions as a direct result of the ADA Amendments Act is calculated in Tables 2 and 3 below. The methodology used for this calculation is explained further in Section 2.2 of the Final RA, and the sources for the data used are provided in Section 3.1.2 of the Final RA.

Table: Calculation of Number of Students who are Eligible to Receive Accommodations for Extra Exam Time at Postsecondary Institutions (First Year)

Row #	Variable	Value	Source
1	Total Number of Postsecondary Students	20,486,000	See Table 9 of the Final RA
2	Percentage of Postsecondary Students with a Learning Disability or ADHD	2.96%	See Table 11 of the Final RA
3	Total Postsecondary Students with a Learning Disability or ADHD	606,386	Calculation (Multiply Row 1 and Row 2)
4	Percentage of Students with Learning Disabilities or ADHD Already Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act	51.1%	See Table 12 of the Final RA
5	Total Number of Students with Learning Disabilities or ADHD who were Requesting Accommodations for Extra Exam Time Prior to the ADA Amendments Act	309,863	Calculation (Multiply Row 3 and Row 4)
	Percentage of Students with		

6	Learning Disabilities or ADHD Not Receiving Accommodations for Extra Exam Time Prior to Passage ADA Amendments Act	48.9%	See Table 12 of the Final RA
7	Total Eligible Students who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	296,523	Calculation (Multiply Row 3 and Row 6)

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 3: Calculation of Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time at Postsecondary Institutions (First Year)

Row #	Variable	Low Value	Med Value	High Value	Source
1	Total Eligible Students who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	296,523	296,523	296,523	See Table 2 above
2	Percentage of Eligible Students Who Were Not Previously Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act Who are Now Likely to Request and Receive this Accommodation	50%	70%	90%	See Table 13 of the Final RA
	Number of Students who are Eligible to Receive and Likely to				Calculation

3	Request Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	148,261	207,566	266,870	(Multiply Row 1 and Row 2)
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Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 4 below presents the calculations of the annual cost to postsecondary institutions for processing new accommodation requests for extra exam time. These requests are in addition to the ones currently received and processed by postsecondary institutions that are not being made as a direct result of the ADA Amendments Act. Costs depend on the number of students who will now be eligible to request and receive an accommodation for extra time on an exam as a direct result of the ADA Amendments Act revisions. The methodology used to calculate this cost is explained further in Section 2.3 of the Final RA, and the sources for the data used are provided in Section 3.1.3 of the Final RA.

Table 4: Calculation of Annual Cost to Postsecondary Institutions for Processing Additional Accommodation Requests for Extra Exam Time (First Year)

Variable	Low Value	Med Value	High Value
Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	148,261	207,566	266,870
Number of Staff Hours to Process each Accommodation Request	2	2	2
Total Staff Hours to Process New Requests	296,523	415,132	533,741
Staff Hourly Wage Rate for			

Processing Accommodation Requests	\$24.91	\$24.91	\$24.91
Annual Cost to Postsecondary Institutions for Processing Additional Accommodation Requests for Extra Exam Time	\$7,387,118	\$10,341,966	\$13,296,813

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Tables 5 and 6 calculate the annual costs to postsecondary institutions for proctoring additional time on exams requested by eligible students as a direct result of the ADA Amendments Act. The methodology used to calculate this cost is explained further in Section 2.4 of the Final RA, and the sources for the data used are provided in Section 3.1.4 of the Final RA.

Table 5: Calculation of Annual Cost to Postsecondary Institutions for Proctoring Extra Time on Exams, Per Student (First Year)

Variable	Value
Average Length of an Exam at a Postsecondary Institution in Hours	1.5
Average Additional Time Requested, as a Percentage of Total Exam Time	75%
Average Amount of Extra Time per Exam in Hours	1.13
Average Number of Exams per Class	3
Average Number of Classes per Year	8
Average Number of Exams per Student	24
Average Annual Additional Exam Time per Student in Hours	27
Average Proctor to Student Ratio	0.11
Average Hourly Wage of Exam Proctor	\$12.90
Annual Cost for Proctoring Additional	\$36.67

Time on Exams per Student	
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Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 6: Total Annual Cost to Postsecondary Institutions for Proctoring Extra Time on Exams (First Year)

Variable	Low	Med	High
Annual Cost for Proctoring Additional Time on Exams per Student	\$36.67	\$36.67	\$36.67
Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	148,261	207,566	266,870
Annual Cost to Postsecondary Institutions for Proctoring Extra Time on Exams	\$5,437,419	\$7,612,387	\$9,787,355

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Just as with postsecondary institutions, the costs to national testing entities from the revisions to the ADA Amendments Act will include three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA Amendments Act.

The annual costs of processing additional accommodation requests and proctoring the extra exam time depends on the number of test takers who will

request accommodations for extra exam time as a direct result of the ADA Amendments Act. Calculations for the three costs listed above plus the number of test takers who are eligible to receive and likely to request accommodations of extra exam time as a direct result of the ADA Amendments Act are presented below.

The annual one-time training cost for all national testing entities is presented in Table 7 below. The methodology used to calculate this cost is explained further in Section 2.1 of the Final RA, and the sources for the data used are provided in Section 3.2.1 of the Final RA.

Table 7: Calculation of One-Time Training Costs for National Testing Entities

Variable	Value
Number of National Testing Entities	1,397
One-Time Cost of Training on the Impacts of ADA Amendments Act per Institution	\$1,371
One-Time Training Cost for National Testing Entities	\$1,915,252

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

The number of test takers who are now eligible to receive and likely to request extra time on national exams is calculated in Tables 8 and 9 below. The methodology used to calculate this number is explained further in Section 2.2 of the Final RA, and the sources for the data used are provided in Section 3.2.2 of the Final RA.

Table 8: Calculation of Number of Test Takers who are Eligible to Receive Accommodations for Extra Exam Time from National Testing Entities (First Year)

Row			
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ROW #	Variable	Value	Source
1	Total Number of Test Takers	10,450,539	See Table 23 of the Final RA
2	Percentage of Test Takers with a Learning Disability or ADHD*	2.96%	See Table 11 of the Final RA
3	Total Test Takers with a Learning Disability or ADHD	309,336	Calculation (Multiply Row 1 and Row 2)
4	Percentage of Test Takers with Learning Disabilities or ADHD Already Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act*	51.1%	See Table 12 of the Final RA
5	Total Number of Test Takers with Learning Disabilities or ADHD who were Requesting Accommodations for Extra Exam Time Prior to the ADA Amendments Act	158,071	Calculation (Multiply Row 3 and Row 4)
6	Percentage of Test Takers with Learning Disabilities or ADHD Not Receiving Accommodations for Extra Exam Time Prior to Passage ADA Amendments Act*	48.9%	See Table 12 of the Final RA
7	Total Eligible Test Takers who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	151,265	Calculation (Multiply Row 3 and Row 6)

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

*For these assumptions, the Final RA assumes the same values for national test takers as found for postsecondary students, since no specific data for national examinations was found and many national exams are designed for students or recent graduates.

Table 9: Calculation of Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time from National Testing Entities

Row #	Variable	Low	Med	High	Source
1	Total Eligible Test Takers who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	151,265	151,265	151,265	See Table 8 above
2	Percentage of Eligible Test Takers Who Were Not Previously Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act Who are Now Likely to Request and Receive this Accommodation	50%	70%	90%	See Table 13 of the Final RA
3	Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act	75,633	105,886	136,139	Calculation (Multiply Row 1 and Row 2)

Note: Due to rounding, totals may not equate exactly to the product of the

inputs provided in the table.

Table 10 illustrates the calculations of the annual cost to national testing entities for processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act. The methodology used to calculate this cost is explained further in Section 2.3 of the Final RA, and the sources for the data used are provided in Section 3.2.3 of the Final RA.

Table 10: Calculation of Annual Cost to National Testing Entities for Processing Additional Accommodation Requests for Extra Exam Time (First Year)

Variable	Low Value	Med Value	High Value
Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	75,633	105,886	136,139
Number of Staff Hours to Process each Accommodation Request	2	2	2
Total Staff Hours to Process Additional Accommodation Requests for Extra Exam Time	151,265	211,771	272,278
Staff Hourly Wage Rate for Processing Accommodation Requests	\$24.91	\$24.91	\$24.91
Annual Cost to National Testing Entities for Processing Additional Accommodation Requests for Extra Exam Time	\$3,768,396	\$5,275,755	\$6,783,113

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Finally, Tables 11 and 12 calculate the annual costs to national testing entities

for allowing test takers to receive additional time on exams. Again, the cost here may be calculated as the opportunity cost of the seat occupied by the test taker for the additional hours of testing. However, because the seat cost per test taker was not available for this Final RA analysis, the additional time spent by a test proctor to oversee the exam is used as a proxy for the cost. The methodology used to calculate this cost is explained further in Section 2.4 of the Final RA, and the sources for the data used are provided in Section 3.2.4 of the Final RA.

Table 11: Calculation of Annual Cost to National Testing Entities for Proctoring Extra Time on Exams, Per Test Taker (First Year)

Variable	Value
Average Length of a National Exam in Hours	4.11
Average Extra Time Requested, as a Percentage of Total Exam Time	75%
Average Amount of Extra Time per Exam in Hours	3.09
Average Number of Exams per Test Taker per Year	1
Average Annual Extra Exam Time per Test Taker in Hours	3.09
Average Proctor-to-Test-Taker Ratio	1
Average Hourly Wage of Exam Proctor	\$12.90
Cost to National Testing Entities for Proctoring Extra Time on Exams per Test Taker	\$39.81

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 12: Total Annual Cost to National Testing Entities for Proctoring Extra Time on Exams (First Year)

Variable	Low Value	Med Value	High
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			Value
Cost to National Testing Entities for Proctoring Extra Time on Exams per Test Taker	\$39.81	\$39.81	\$39.81
Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time each year	75,633	105,886	136,139
Annual Cost to National Testing Entities for Proctoring Extra Time on Exams	\$3,011,096	\$4,215,534	\$5,419,973

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Based on the calculations provided above, total costs to society for implementing the ADA Amendments Act revisions into the title II and title III regulations will range between \$31.4 million and \$47.1 million in the first year. The first year of costs will be higher than all subsequent years because the first year includes the one-time cost of training. Note that even the high end of this first-year cost range is well below the \$100 million mark that signifies an “economically significant” regulation. The breakdown of total costs by entity is provided in Table 13 below.

Table 13: Total Costs First Year (2016) in Primary Analysis, Non-Discounted (\$ millions)

Cost Category	Low Value	Med Value	High Value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	\$12.8	\$18.0	\$23.1
Postsecondary Institutions: ONE-TIME Cost for Additional Training at Institutions	\$9.9	\$9.9	\$9.9
National Exams: ANNUAL Total Costs of Processing Additional Requests and	\$6.8	\$9.5	\$12.2

Proctoring Extra Exam Time			
National Exams: ONE-TIME Cost for Additional Training at Institutions	\$1.9	\$1.9	\$1.9
TOTAL	\$31.4	\$39.3	\$47.1

Note: Due to rounding, totals may not equate exactly to the sum of the inputs provided in the table.

Taking these costs over the next 10 years and discounting to present value terms at a rate of 7 percent, the total cost of implementing the ADA Amendments Act revisions is approximately \$214.2 million over 10 years, as shown in Table 14 below.

Table 14: Total Costs over 10 Years, Primary Analysis

Total Discounted Value (\$millions)	Annualized Estimate (\$millions)	Year Dollar	Discount Rate	Period Covered
\$214.2	\$28.6	2015	7%	2016–2025
\$243.6	\$26.3	2015	3%	2016–2025

Potential Additional Costs to National Testing Entities

The ADA Amendments Act revisions will allow eligible individuals with disabilities to receive additional time on exams, both for course-work exams at postsecondary institutions and standardized national examinations. Some national examinations are long and can last up to eight hours per test. Thus, when test takers request additional time on these longer exams, such requests will inevitably push the exam into an additional day.

As commenters pointed out in response to the Initial RA, there are costs associated with providing exams on an additional day. While there is no data to predict which exams will extend to an additional day, especially given that

specific accommodations are determined individually, this Final RA assumes that exams that normally would take six hours or more to administer and be scheduled for one day may require an additional day of testing if the test taker seeks more time as an accommodation. To quantify the total costs of providing an additional day of testing for those individuals who would not previously have received this additional time, prior to the passage of the ADA Amendments Act, the following two costs are quantified:

Exam Revision Costs

While it appears that many national testing entities do not revise the content of exams that span an additional day, the exam format and materials can be affected by such an extension. For instance, computer-based exams are programmed to span a certain amount of time, allowing for timed break periods throughout. When more time is provided to take the exam, the exam must be reprogrammed to span the new amount of time, with planned breaks for the test taker. For paper-based exams, test booklets are often reprinted to allow one set of questions for one day of testing, and another set for the extra day of testing. This form of printing prevents test takers from going home and looking up the answers for the next set of questions.

Room Rental Cost

Exams are delivered in different settings depending on the type of national exam. Some exams are delivered at testing centers where different types of exams are administered at once in the same room. In this case, the cost of an extra day of testing could be captured by the seat cost per test taker. Other exams are delivered to test takers exclusively taking that exam, and those exams are often administered in rooms rented out at a university, hotel, or other building. This cost could be captured by the room rental cost. The Final RA takes a conservative approach, using the room rental cost to

approximate the cost of delivering an exam over an additional day, as this is the larger of the two costs.

Based on the calculations provided in Sections 4.2.1 and 4.2.2 of the Final RA, the total additional costs of providing an extra testing day to eligible test takers will likely range between \$2.7 and \$4.8 million per year. Table 15 adds this into the total costs in the first year to approximate the range of total costs to society from implementing the ADA Amendments Act revisions. For further information on the methodology, data, and assumptions used to analyze these potential additional costs for national testing entities, please refer to Section 4.2 of the Final RA.

Table 15: Total Costs First Year, Plus Potential Additional Costs for Additional Day of Testing, Non-Discounted (\$ millions)

Cost Category	Low Value	Med Value	High Value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	\$12.8	\$18.0	\$23.1
Postsecondary Institution: ONE-TIME Cost for Additional Training at Institutions	\$9.9	\$9.9	\$9.9
National Exams: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	\$6.8	\$9.5	\$12.2
National Exams: ONE-TIME Cost for Additional Training at Institutions	\$1.9	\$1.9	\$1.9
National Exams: ANNUAL Potential Additional Costs for Exams that Run over onto an Additional Day	\$2.7	\$3.8	\$4.8
TOTAL	\$34.1	\$43.1	\$52.0

Note: Due to rounding, totals may not equate exactly to the sum of the inputs provided in the table.

Benefits Discussion

The Department believes that the enactment of the ADA Amendments Act benefits millions of Americans, and the benefits to those individuals are non-quantifiable but nonetheless significant. The Department determined, however, that there was a group of individuals with disabilities who would be able to receive benefits in the form of increased access to accommodations in testing from postsecondary institutions and national testing entities, and that these benefits would be associated with specific costs to those institutions and entities, which are analyzed above.

With respect to specific benefits, in the first year, our analysis estimates that approximately 148,261 to 266,870 postsecondary students will take advantage of accommodations for extra exam time that they otherwise would not have received but for this rule. Over 10 years, approximately 1.6 million to 2.8 million students will benefit. An additional 802,196 to 1.4 million national exam test takers would benefit over that same 10 years (assuming that people take an exam one time only).

Some number of these individuals could be expected to earn a degree or license that they otherwise would not have as a result of the testing accommodations they are now eligible to receive as a direct result of the ADA Amendments Act. The Department was unable to find robust data to estimate the number of students who would receive a bachelor's degree or licenses after this rule goes into effect that would not otherwise have received one. However, extensive research has shown notably higher earnings for those with college degrees over those who do not have degrees. Estimates of this lifetime earnings vary, with some studies estimating an earning differential ranging from approximately \$300,000 to \$1 million.¹⁴ In addition, some number of students may be able to earn a degree in a higher paying field than they otherwise could, and yet other students would get the

same degree, but perhaps finish their studies faster or more successfully (*i.e.*, higher grades) than otherwise would be the case. All of these outcomes would be expected to lead to greater lifetime productivity and earnings.

In addition to these quantitative benefits, this rule will have significant non-quantifiable benefits to individuals with disabilities who, prior to the passage of the ADA Amendments Act and this rule, were denied the opportunity for equal access to an education or to become licensed in their chosen professions because of their inability to receive needed testing accommodations. As with all other improvements in access for individuals with disabilities, the ADA Amendments Act is expected to generate psychological benefits for covered individuals, including reduced stress and an increased sense of personal dignity and self-worth, as more individuals with disabilities are able to successfully complete tests and exams and more accurately demonstrate their academic skills and abilities. Some individuals will now be more likely to pursue a favored career path or educational pursuit, which will in turn lead to greater personal satisfaction.

Additional benefits to society arise from improved testing accessibility. For instance, if some persons with disabilities are able to increase their earnings, they may need less public support—either direct financial support or support from other programs or services. This, in turn, would lead to cross-sector benefits from resource savings arising from reduced social service agency outlays. Others, such as family members of individuals with disabilities, may also benefit from reduced financial and psychological pressure due to the greater independence and earnings of the family member whose disability is now covered by the ADA under the revised definition of "disability."

In addition to the discrete group of individuals with learning disabilities and ADHD who will benefit from the changes made to the definition of "disability", there is a class of individuals who will now fall within the

nondiscrimination protections of the ADA if they are refused access to or participation in the facilities, programs, services or activities of covered entities. The benefits to these individuals are significant, but unquantifiable. The Department believes (as did Congress when it enacted the ADA) that there is inherent value that results from greater accessibility for all Americans. Economists use the term “existence value” to refer to the benefit that individuals derive from the plain existence of a good, service, or resource—in this case, the increased accessibility to postsecondary degrees and specialized licenses that would arise from greater access to testing accommodations or the increased accessibility to covered entities’ facilities, programs, services, or activities as a result of the ADA Amendments Act. This value can also be described as the value that people both with and without disabilities derive from the guarantees of equal protection and nondiscrimination. In other words, people value living in a country that guarantees the rights of persons with disabilities, whether or not they themselves are directly or indirectly affected by disabilities. There can be a number of reasons why individuals might value accessibility even if they do not require it now and do not ever anticipate needing it in the future. These reasons include: bequest motives and concern for relatives or friends who require accessibility. People in society value equity, fairness, and human dignity, even if they cannot express these values in terms of money. These are the exact values that agencies are directed to consider in Executive Order 13563.

B. Regulatory Flexibility Act

In the NPRM, the Department stated that, based on its analysis, it “can certify that the rule will not have a significant economic impact on a substantial number of small entities.” The Department sought public comment on this proposed certification and its underlying analysis, including the costs to small entities, but received no public comments on these issues. The Attorney

General has again reviewed this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), and by approving it hereby certifies that it will not have a significant economic impact on a substantial number of small entities for the reasons discussed more fully below.

First, the ADA Amendments Act took effect on January 1, 2009; all covered entities have been required to comply with the Act since that date and thus, should be familiar with the requirements of the law. Second, the rule does not include reporting requirements and imposes no new recordkeeping requirements. Third, as shown above, the only title II and title III entities that would be significantly affected by the proposed changes to the ADA regulations are national testing entities and postsecondary institutions. The type of accommodations that most likely will be requested and required by those whose coverage has been clarified under titles II and III of ADA Amendments Act will be additional time in testing situations. While many of these national testing or postsecondary institutions are small businesses or small governmental entities, the costs associated with additional testing time are minimal; therefore, the Department believes the economic impact of this rule will be neither significant for these small entities nor disproportionate relative to the costs for larger entities.

The Department estimates that approximately 7,234 postsecondary institutions could be impacted based on data from the [U.S. Department of Education National Center for Education Statistics](#).¹⁵ The Department used data from the U.S. Census Bureau¹⁶ from 2012 for Junior Colleges (NAICS¹⁷ 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) to estimate the proportion of those entities that would meet the Small Business Administration's criteria for small business or small governmental entity.¹⁸ As shown in Table 18 and Table 19 below, small postsecondary institutions are estimated to account for approximately 35.3 percent of all postsecondary institutions. Therefore, the Department estimates that 2,556 small

postsecondary institutions would be impacted by this rule.

The overall costs of this rule for postsecondary institutions were calculated based on the number of entities and number of postsecondary students affected. The cost of processing additional accommodation requests for extra exam time and the cost of additional time spent proctoring exams depend on the number of students. This methodology assumes that per-student costs are roughly the same for institutions of differing sizes. Because larger entities have more students on average than smaller ones, the Department used the proportion of the industry sub-group's revenues for small and large entities as a proxy for the number of students. Thus, using receipts for Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) as a proxy for number of students, small postsecondary institutions are estimated to bear 4 percent of the processing and proctoring costs for providing additional exam time for that industry sub-group—or approximately \$726,534 of the \$17.95 million first-year costs.

Additionally, postsecondary institutions are expected to incur one-time costs for additional training of \$1,371 per entity (*see* Tables 6–8 in the Final RA). In total, small postsecondary institutions would incur \$4.2 million in costs in the first year, which would average approximately \$1,655 for each of the 2,556 small postsecondary institutions. The average annual revenue for each of these small postsecondary institutions is \$501,600. The cost is 0.33 percent of their revenue. Therefore, the costs will not be substantial for these small entities.

In comparison to the number of small postsecondary entities, there are approximately 4,678 postsecondary institutions (64.7 percent of the 7,234) that would be considered larger entities, and these larger entities would incur \$23.6 million in costs during the first year, which would average out to approximately \$5,053 per large postsecondary institution during the first

year. This \$5,053 per large postsecondary institution during the first year is approximately 3.1 times higher than the cost that would be incurred by small postsecondary institutions during that same time.

Table 16: Firm, Establishment, and Receipts Data for Junior Colleges (NAICS 6112) in 2012

	Firms	Establishments	Est. receipts (\$000,000)
All Junior Colleges	464	953	\$8,449
Small Junior Colleges (estimated)*	378	427	\$1,723
Small Junior Colleges as a Percentage of All Junior Colleges	81.5%	44.8%	20.4%

**SBA small business standard is \$20.5 million; small business totals here include those with receipts under \$25 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million; and from \$20 million to \$24.99 million, and from \$25 million to \$29.99 million.*

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. See SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2 – Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry, 2012*, available at <https://www.sba.gov/advocacy/firm-size-data> (last visited April 22, 2016).

Table 17: Firm, Establishment, and Receipts Data for Colleges, Universities, and Professional Schools (NAICS 6113) in 2012

	Firms	Establishments	Est. receipts (\$000,000)
All Colleges, Universities, and Professional Schools	2,282	4,329	\$222,854
Small Colleges, Universities, and Professional Schools (estimated)*	1,369	1,439	\$7,637
Small Colleges, Universities, and Professional Schools as a Percentage of All Colleges, Universities, and Professional Schools	60.0%	33.2%	3.4%

**SBA small business standard is \$27.5 million; small business totals here include those with receipts under \$30 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million; and from \$20 million to \$24.99 million, and from \$25 million to \$29.99 million.*

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. See SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2 – Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry, 2012*, available at <https://www.sba.gov/advocacy/firm-size-data> (last visited April 22, 2016).

Table 18: Firm, Establishment, and Receipts Data for both Junior Colleges (NAICS 6112) and Small Colleges, Universities, and Professional Schools (NAICS 6113), combined, in 2012

	Firms	Establishments	Est. receipts (\$000,000)
All Junior Colleges, and			

Colleges, Universities, and Professional Schools	2,746	5,282	\$231,303
Small Junior Colleges, and Colleges, Universities, and Professional Schools (estimated)*	1,747	1,866	\$9,360
Small Junior Colleges, and Colleges, Universities, and Professional Schools as a Percentage of All Junior Colleges, and Colleges, Universities, and Professional Schools	63.6%	35.3%	4.0%

**SBA small business standard for Junior Colleges is \$20.5 million; small business totals here include Junior Colleges with receipts under \$25 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million; and from \$20 million to \$24.99 million, and from \$25 million to \$29.99 million. The SBA small business standard for Colleges, Universities, and Professional Schools is \$27.5 million; small business totals here include Colleges, Universities, and Professional Schools with receipts under \$30 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: i.e. from \$10 million to \$14.99 million, and from \$15 million to \$19.99 million; and from \$20 million to \$24.99 million, and from \$25 million to \$29.99 million.*

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. See SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2 – Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry,*

2012, available at <https://www.sba.gov/advocacy/firm-size-data>(last visited April 22, 2016).

Table 19: Estimated Small Entity Establishments for Postsecondary Institutions in 2011–12

Total Postsecondary Establishments (All Firms/Entities) Academic year 2010–2011*	7,234
Percent Small Entities (2012)**	35.3%
Total Impacted Small Entity Establishments***	2,556
<p>* U.S. Department of Education, National Center for Education Statistics, (2015), <i>Digest of Education Statistics, 2013</i> (NCES 2015-011), available at https://nces.ed.gov/fastfacts/display.asp?id=84 (last visited Feb. 3, 2016).</p> <p>** Derived from Tables 16–18 above.</p> <p>*** Estimated using percentage of small establishments for NAICS sectors 6112 and 6113.</p>	

In addition to postsecondary institutions, some national testing entities would also be impacted. The Department used data on Educational Test Development and Evaluation Services (NAICS 6117102)¹⁹ to estimate the number of affected entities. Approximately 1,397 national testing entities would be impacted by this rule, irrespective of size. Small entity establishments are estimated to account for 923 (66.1 percent) of these.

Table 20: Firm and Receipts Data for National Testing Entities in 200 Educational Test Development and Evaluation Services (NAICS 6117102)

	Firms	Establishments	Est. rece (\$000,000)
Small, Medium, and Large Entities*	748	1,144	2,843
Small Entities**	734	756	704

Percentage Small Entities	98.1%	66.1%	24.8%
Total Entities	1,000	1,397	2,907
Estimated Total Small Entities***	981	923	720

***Includes only those entities which were categorized by annual revenue in available data.**

****Data is reported in size categories that do not exactly match industry's business classifications: i.e. from \$5 million to \$9.99 million, and from \$10 million to \$24.99 million. SBA small business standard is \$15.0 million for Educational Support Services; small business totals here include those receipts under \$25 million.**

*****Applying the estimated percentage of small entities to the total number of entities.**

Source: Calculated from data provided by the U.S. Census Bureau. See Census Bureau, 2007 Economic Census, Educational Services: Subject Size, Establishment and Firm Size: Receipts/Revenue Size of Establishments for the United States: 2007 (EC0761SSSZ4), available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.jspx?_af=ECN_2007_US_61SSSZ1&prodType=table (last visited Feb. 3, 2016).

Small entity establishments in the Educational Test Development and Evaluation Services industry group account for 24.8 percent of that industry's receipts. If receipts are used as a proxy for number of test takers in a manner similar to that described above for postsecondary institutions, then small national testing entities can be expected to bear 24.8 percent of the industry's \$9.49 million first-year costs of processing additional accommodation requests for extra exam time and additional time spent proctoring exams—or approximately \$2.35 million. Additionally, national testing entities are expected to incur a fixed cost for additional training of \$1,371 per entity. Thus, for the approximately 923 small national testing entities, total costs in the first year are estimated to average \$3,918 each.

Average revenue for these entities is \$780,264. The cost is 0.50 percent of their revenue. Therefore, the costs will not be substantial for these small entities.

In comparison to the number of small testing entities, approximately 474 national testing center establishments (33.9 percent of the 1,397) would be considered larger entities, and they would incur \$7.79 million in costs during the first year, which would average out to approximately \$16,440 per large national testing center establishment during the first year. This \$16,440 per large national testing center establishment is approximately 4.2 times as high as the cost that would be incurred by small national testing center establishments during that same time.

As explained above, the Department estimates that approximately 2,556 small postsecondary establishments and 923 small national testing establishments would be impacted by this rule, for a total of approximately 3,479 small business establishments. The estimates were based on average estimates for all entities, irrespective of size. The Department notes that the average first-year cost estimates presented above for small entities are higher than the first-year cost estimates presented in the NPRM because the Department's estimates for the initial training costs (which will be incurred during the first year) are now higher based on public comment and further research and analysis conducted by the Department. However, the overall costs of this rule for small entities over the 10-year period are lower because the Department's final overall cost estimates in the Final RA are lower as a result of refinements made to the analysis in response to public comment and based on further research conducted by the Department.

Based on the above analysis, the Attorney General can certify that the rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132: Federalism

Executive Order 13132 of August 4, 1999, Federalism, directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, and does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

D. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514-0301 (voice); (800) 514-0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this final rule.

E. Paperwork Reduction Act

This final rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995. 44 U.S.C. 3501 *et seq.*

F. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal

regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Parts 35 and 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Communications equipment, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 42 U.S.C. 12134, 12186, and 12205a, and Public Law 110–325, 122 Stat. 3553 (2008), parts 35 and 36 of title 28 of the Code of Federal Regulations are amended as follows:

PART 35 – NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

1. Revise the authority citation for part 35 to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a

2. Revise § 35.101 to read as follows:

§ 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C.12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination

on the basis of disability by public entities.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part should not demand extensive analysis.

* * * * *

3. Amend § 35.104 by revising the definition of "Disability" to read as follows:

§ 35.104 Definitions.

* * * * *

Disability. The definition of *disability* can be found at § 35.108.

* * * * *

4. Add § 35.108 to subpart A to read as follows:

§ 35.108 Definition of "disability."

(a)(1) *Disability* means, with respect to an individual,

(i) A physical or mental impairment that substantially limits one or more of

the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (f) of this section.

(2) *Rules of construction.*

(i) The definition of "disability" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of "disability" in paragraph (a)(1) of this section, the "actual disability" prong in paragraph (a)(1)(i) of this section, the "record of" prong in paragraph (a)(1)(ii) of this section, or the "regarded as" prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a public entity's failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of "disability," which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" or "record of" prong regardless of whether the individual is challenging a public entity's failure to provide reasonable modifications.

(b)

(1) *Physical or mental impairment* means—:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) *Physical or mental impairment* does not include homosexuality or bisexuality.

(c)

(1) *Major life activities* include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a *major bodily function*, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.*

(i) In determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a *major life activity* is not determined by reference to whether it is of *central* importance to daily life.

(d) *Substantially limits.* (1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not

need to limit other major life activities in order to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(vii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or

contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month “transitory” part of the “transitory and minor” exception in paragraph (f)(2) of this section does not apply to the “actual disability” or “record of” prongs of the definition of “disability.” The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.*

(i) The principles set forth in the rules of construction in this section are intended to provide for more generous coverage and application of the ADA’s prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the “actual disability” prong) or paragraph (a)(1)(ii) of this section (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily

functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner or duration.*

(i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as

compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of "disability," the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial

limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment.*

(1) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of "disability" if the individual has a history of an impairment that substantially limited one or more major life activities when

compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the “regarded” as prong of the definition of “disability” (paragraph (a)(1)(iii) of this section):

(1) Except as set forth in paragraph (f)(2) of this section, an individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the public entity asserts, or may or does ultimately establish, a defense to the action prohibited by the ADA.

(2) An individual is not “regarded as having such an impairment” if the public entity demonstrates that the impairment is, objectively, both “transitory” and “minor.” A public entity may not defeat “regarded as” coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the public entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both “transitory” and “minor.” For purposes of this section, “transitory” is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is “regarded as having such an

impairment” does not, by itself, establish liability. Liability is established under title II of the ADA only when an individual proves that a public entity discriminated on the basis of disability within the meaning of title II of the ADA, 42 U.S.C. 12131–12134.

(g) *Exclusions.* The term “disability” does not include—

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

* * * * *

Subpart B—General Requirements

5. Amend § 35.130 by revising paragraph (b)(7) and adding paragraph (i) to read as follows:

§ 35.130 General prohibitions against discrimination.

* * * * *

(b) * * *

(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of "disability" at § 35.108(a)(1)(iii).

(i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

* * * * *

6. Add Appendix C to part 35 to read as follows:

APPENDIX C TO PART 35—GUIDANCE TO REVISIONS TO ADA TITLE II AND TITLE III REGULATIONS REVISING THE MEANING AND INTERPRETATION OF THE DEFINITION OF “DISABILITY” AND OTHER PROVISIONS IN ORDER TO INCORPORATE THE REQUIREMENTS OF THE ADA AMENDMENTS ACT

NOTE: This appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR parts 35 and 36 published on August 11, 2016.

Guidance and Section-by-Section Analysis

This section provides a detailed description of the Department’s changes to the meaning and interpretation of the definition of "disability" in the title II and title III regulations, the reasoning behind those changes, and responses to public comments received on these topics. *See* Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III

Regulations to Implement ADA Amendments Act of 2008, 79 FR 4839 (Jan. 30, 2014) (NPRM).

Sections 35.101 and 36.101—Purpose and broad coverage.

Sections 35.101 and 36.101 set forth the purpose of the ADA title II and title III regulations. In the NPRM, the Department proposed revising these sections by adding references to the ADA Amendments Act in renumbered §§ 35.101(a) and 36.101(a) and by adding new §§ 35.101(b) and 36.101(b), which explain that the ADA is intended to have broad coverage and that the definition of "disability" shall be construed broadly. The proposed language in paragraph (b) stated that the primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in ADA cases should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" should not demand extensive analysis".

Many commenters supported inclusion of this information as reiterating the statutory language evincing Congress' intention "to restore a broad definition of 'disability' under the ADA...." Several commenters asked the Department to delete the last sentence in §§ 35.101(b) and 36.101(b), arguing that inclusion of this language is inconsistent with the individualized assessment required under the ADA. Some of these commenters acknowledged, however, that this language is drawn directly from the "Purposes" of the ADA Amendments Act. *See* Public Law 110–325, sec. 2(b)(5). The Department

declines to remove this sentence from the final rule. In addition to directly quoting the statute, the Department believes that this language neither precludes nor is inconsistent with conducting an individualized assessment of whether an individual is covered by the ADA.

Some commenters recommended that the Department add a third paragraph to these sections expressly stating that “not all impairments are covered disabilities.” These commenters contended that “[t]here is a common misperception that having a diagnosed impairment automatically triggers coverage under the ADA.” While the Department does not agree that such a misperception is common, it agrees that it would be appropriate to include such a statement in the final rule, and has added it to the rules of construction explaining the phrase “substantially limits” at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

Sections 35.104 and 36.104—Definitions.

The current title II and title III regulations include the definition of “disability” in regulatory sections that contain all enumerated definitions in alphabetical order. Given the expanded length of the definition of “disability” and the number of additional subsections required in order to give effect to the requirements of the ADA Amendments Act, the Department, in the NPRM, proposed moving the definition of “disability” from the general definitional sections at §§ 35.104 and 36.104 to a new section in each regulation, §§ 35.108 and 36.105, respectively.

The Department received no public comments in response to this proposal and the definition of “disability” remains in its own sections in the final rule.

Sections 35.108(a)(1) and 36.105(a)(1) Definition of “disability”—General.

In the ADA, Congress originally defined “disability” as “(A) a physical or

mental impairment that substantially limits one or more major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Public Law 101–336, sec. 3 (1990). This three-part definition—the “actual,” “record of,” and “regarded as” prongs—was modeled after the definition of “handicap” found in the Rehabilitation Act of 1973. H.R. Rep. No. 110–730, pt. 2, at 6 (2008). The Department’s 1991 title II and title III ADA regulations reiterate this three-part basic definition as follows:

Disability means, with respect to an individual,

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.

56 FR 35694, 35717 (July 26, 1991); 56 FR 35544, 35548 (July 26, 1991).

While the ADA Amendments Act did not amend the basic structure or terminology of the original statutory definition of “disability”, the Act revised the third prong to incorporate by reference two specific provisions construing this prong. 42 U.S.C. 12102(3)(A)–(B). The first statutory provision clarified the scope of the “regarded as” prong by explaining that “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. 12102(3)(A). The second statutory provision provides an exception to the “regarded as” prong for impairments that are both transitory and minor. A transitory impairment is defined as “an

impairment with an actual or expected duration of 6 months or less.”

42 U.S.C. 12102(3)(B). In the NPRM, the Department proposed revising the “regarded as” prong in §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) to reference the regulatory provisions that implement 42 U.S.C. 12102(3). The NPRM proposed, at §§ 35.108(f) and 36.105(f), that “regarded as” having an impairment would mean that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both “transitory and minor.”

The first proposed sentence directed that the meaning of the “regarded as prong” shall be understood in light of the requirements in §§ 35.108(f) and 36.105(f). The second proposed sentence merely provided a summary restatement of the requirements of §§ 35.108(f) and 36.105(f). The Department received no comments in response to this proposed language. Upon consideration, however, the Department decided to retain the first proposed sentence but omit the second as superfluous. Because the first sentence explicitly incorporates and directs the public to the requirements set out in §§ 35.108(f) and 36.105(f), the Department believes that summarizing those requirements here is unnecessary. Accordingly, in the final rule, §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) simply reference paragraph (f) of the respective section.” *See also*, discussion in the Guidance and Section-by-Section analysis of §§ 35.108(f) and 36.105(f), below.

Sections 35.108(a)(2) and 36.105(a)(2) Definition of "disability" —Rules of construction.

In the NPRM, the Department proposed §§ 35.108(a)(2) and 36.105(a)(2), which set forth rules of construction on how to apply the definition of "disability." Proposed §§ 35.108(a)(2)(i) and 36.105(a)(2)(i) state that an individual may establish coverage under any one or more of the prongs in the definition of "disability"—the “actual disability” prong in paragraph (a)(1)(i),

the “record of” prong in paragraph (a)(1)(ii) or the “regarded as” prong in paragraph (a)(1)(iii). *See* §§ 35.108(a)(1)(i) through (iii); 36.105(a)(1)(i) through (iii). The NPRM’s inclusion of rules of construction stemmed directly from the ADA Amendments Act, which amended the ADA to require that the definition of “disability” be interpreted in conformance with several specific directives and an overarching mandate to ensure “broad coverage ... to the maximum extent permitted by the terms of [the ADA].”

42 U.S.C. 12102(4)(A).

To be covered under the ADA, an individual must satisfy only one prong. The term “actual disability” is used in these rules of construction as shorthand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of “disability.” *See* §§ 35.108(a)(1)(i); 36.105(a)(1)(i). The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under the first prong has any greater rights under the ADA than an individual who is covered under the “record of” or “regarded as” prongs, with the exception that the ADA Amendments Act revised the ADA to expressly state that an individual who meets the definition of “disability” solely under the “regarded as” prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h).

Proposed §§ 35.108(a)(2)(ii) and 36.105(a)(2)(ii) were intended to incorporate Congress’s expectation that consideration of coverage under the “actual disability” and “record of disability” prongs of the definition of “disability” will generally be unnecessary except in cases involving requests for reasonable modifications. *See* 154 Cong. Rec. H6068 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner). Accordingly, these provisions state that, absent a claim that a covered entity has failed to provide reasonable modifications, typically it is not necessary to rely on the “actual disability” or “record of” disability prongs. Instead, in

such cases, the coverage can be evaluated exclusively under the “regarded as” prong,” which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Whether or not an individual is challenging a covered entity’s failure to provide reasonable modifications, the individual may nevertheless proceed under the “actual disability” or “record of” prong. The Department notes, however, that where an individual is challenging a covered entity’s failure to provide effective communication, that individual cannot rely solely on the “regarded as prong” because the entitlement to an auxiliary aid or service is contingent on a disability-based need for the requested auxiliary aid or service. *See* 28 CFR 35.160(b), 28 CFR 36.303(c).

The Department received no comments objecting to these proposed rules of construction. The final rule retains these provisions but renumbers them as paragraphs (ii) and (iii) of §§ 35.108(a)(2) and 36.105(a)(2) and replaces the reference to “covered entity” in the title III regulatory text with “public accommodation.”

The Department has added a third rule of construction at the beginning of §§ 35.108(a)(2) and 36.105(a)(2), numbered §§ 35.108(a)(2)(i) and 36.105(a)(2)(i). Closely tracking the amended statutory language, these provisions state that “[t]he definition of disability shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.” *See* 42 U.S.C. 12102(4)(A). This principle is referenced in other portions of the final rule, but the Department believes it is important to include here underscore Congress’s intent that it be applied throughout the determination of whether an individual falls within the ADA definition of “disability.”

Sections 35.108(b) and 36.105(b)—Physical or mental impairment.

The ADA Amendments Act did not change the meaning of the term “physical or mental impairment.” Thus, in the NPRM, the Department proposed only minor modifications to the general regulatory definitions for this term at §§ 35.108(b)(1)(i) and 36.105(b)(1)(i) by adding examples of two additional body systems—the immune system and the circulatory system—that may be affected by a physical impairment.

In addition, the Department proposed adding “dyslexia” to §§ 35.108(b)(2) and 36.105(b)(2) as an example of a specific learning disability that falls within the meaning of the phrase “physical or mental impairment.” Although dyslexia is a specific diagnosable learning disability that causes difficulties in reading, unrelated to intelligence and education, the Department became aware that some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. Therefore, the Department sought public comment regarding its proposed inclusion of a reference to dyslexia in these sections.

The Department received a significant number of comments in response to this proposal. Many commenters supported inclusion of the reference to dyslexia. Some of these commenters also asked the Department to include other examples of specific learning disabilities such as dysgraphia²⁰ and dyscalculia.²¹ Several commenters remarked that as “research and practice bear out, dyslexia is just one of the specific learning disabilities that arise from ‘neurological differences in brain structure and function and affect a person’s ability to receive, store, process, retrieve or communicate information.’” These commenters identified the most common specific learning disabilities as: “dyslexia, dysgraphia, dyscalculia, auditory processing disorder, visual processing disorder and non-verbal learning disabilities,” and recommended that the Department rephrase its reference to specific learning disabilities to make clear that there are many other specific learning disabilities besides dyslexia. The Department has considered all of

these comments and has decided to use the phrase “dyslexia and other specific learning disabilities” in the final rule.

Another commenter asked the Department to add a specific definition of dyslexia to the regulatory text itself. The Department declines to do so as it does not give definitions for any other physical or mental impairment in the regulations.

Other commenters recommended that the Department add ADHD to the list of examples of “physical or mental impairments” in §§ 35.108(b)(2) and 36.105(b)(2).²² Some commenters stated that ADHD, which is not a specific learning disability, is a very commonly diagnosed impairment that is not always well understood. These commenters expressed concern that excluding ADHD from the list of physical and mental impairments could be construed to mean that ADHD is less likely to support an assertion of disability as compared to other impairments. On consideration, the Department agrees that, due to the prevalence of ADHD but lack of public understanding of the condition, inclusion of ADHD among the examples set forth in §§ 35.108(b)(2) and 36.105(b)(2) will provide appropriate and helpful guidance to the public.

Other commenters asked the Department to include arthritis, neuropathy, and other examples of physical or mental impairments that could substantially impair a major life activity. The Department declines to add any other examples because, while it notes the value in clarifying the existence of impairments such as ADHD, it also recognizes that the regulation need not elaborate an inclusive list of all impairments, particularly those that are very prevalent, such as arthritis, or those that may be symptomatic of other underlying impairments already referenced in the list, such as neuropathy, which may be caused by cancer or diabetes. The list is merely illustrative and not exhaustive. The regulations clearly state that the phrase “physical or

mental impairment” includes, but is not limited to” the examples provided. No negative implications should be drawn from the omission of any specific impairment in §§ 35.108(b) and 36.105(b).

The Department notes that it is important to distinguish between conditions that are impairments and physical, environmental, cultural, or economic characteristics that are not impairments. The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, or left-handedness, or height, weight, or muscle tone that are within “normal” range. Moreover, conditions that are not themselves physiological disorders, such as pregnancy, are not impairments. However, even if an underlying condition or characteristic is not itself a physical or mental impairment, it may give rise to a physical or mental impairment that substantially limits a major life activity. In such a case, an individual would be able to establish coverage under the ADA. For example, while pregnancy itself is not an impairment, a pregnancy-related impairment that substantially limits a major life activity will constitute a disability under the first prong of the definition.²³ Major life activities that might be substantially limited by pregnancy-related impairments could include walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment, or may be covered under the “regarded as” prong if it is the basis for a prohibited action and is not both “transitory and minor.”

Sections 35.108(c) and 36.105(c)—Major life activities.

Prior to the passage of the ADA Amendments Act, the ADA did not define “major life activities,” leaving delineation of illustrative examples to agency regulations. Paragraph 2 of the definition of “disability” in the Department’s

current title II and title III regulations at 28 CFR 35.104 and 36.104 states that “major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADA Amendments Act significantly expanded the range of major life activities by directing that “major” be interpreted in a more expansive fashion, by adding a significant new category of major life activities, and by providing non-exhaustive lists of examples of major life activities. The amended statute’s first list of major life activities includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

42 U.S.C. 12102(2)(A). The ADA Amendments Act also broadened the definition of “major life activity” to include physical or mental impairments that substantially limit the operation of a “major bodily function,” which include, but are not limited to, the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B). These expanded lists of examples of major life activities reflect Congress’s directive to expand the meaning of the term “major” in response to court decisions that interpreted the term more narrowly than Congress intended. See Public Law 110–25, sec. 3 (b)(4).

Examples of major life activities, other than the operations of a major bodily function.

In the NPRM, at §§ 35.108(c) and 36.105(c), the Department proposed revisions of the title II and title III lists of examples of major life activities (other than the operations of a major bodily function) to incorporate all of the statutory examples, as well as to provide additional examples included in the

EEOC title I final regulation—reaching, sitting, and interacting with others.
See 29 CFR 1630.2(i)(1)(i).

A number of commenters representing persons with disabilities or the elderly recommended that the Department add a wide variety of other activities to this first list. Some commenters asked the Department to include references to test taking, writing, typing, keyboarding, or executive function.²⁴ Several commenters asked the Department to include other activities as well, such as the ability to engage in sexual activity, perform mathematical calculations, travel, or drive. One commenter asked the Department to recognize that, depending upon where people live, other life activities may fall within the category of major life activities. This commenter asserted, for example, that tending livestock or operating farm equipment can be a major life activity in a farming or ranching community, and that maintaining septic, well or water systems, or gardening, composting, or hunting may be a major life activity in a rural community.

On consideration of the legislative history and the relevant public comments, the Department decided to include “writing” as an additional example in its non-exhaustive list of examples of major life activities in the final rule. The Department notes Congress repeatedly stressed that writing is one of the major life activities that is often affected by a covered learning disability. *See, e.g.*, 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008).

Other than “writing,” the Department declines to add additional examples of major life activities to these provisions in the final rule. This list is illustrative, and the Department believes that it is neither necessary nor possible to list every major life activity. Moreover, the Department notes that many of the commenters’ suggested inclusions implicate life activities already included on the list. For example, although, as commenters pointed out,

some courts have concluded that test taking is a major life activity,²⁵ the Department notes that one or more already-included major life activities—such as reading, writing, concentrating, or thinking, among others—will virtually always be implicated in test taking. Similarly, activities such as operating farm equipment, or maintaining a septic or well system, implicate already-listed major life activities such as reaching, lifting, bending, walking, standing, and performing manual tasks.

The commenters' suggested additions also implicate the operations of various bodily systems that may already be recognized as major life activities. *See* discussion of §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii), below. For example, it is the Department's view that individuals who have cognitive or other impairments that affect the range of abilities that are often described as part of "executive function" will likely be able to assert that they have impairments that substantially limit brain function, which is one of the major bodily functions listed among the examples of major life activities.

Examples of major life activities—operations of a major bodily function.

In the NPRM, the Department proposed revising the regulatory definitions of disability at §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii) to make clear that the operations of major bodily functions are major life activities, and to include a non-exhaustive list of examples of major bodily functions, consistent with the language of the ADA as amended. Because the statutory list is non-exhaustive, the Department also proposed further expanding the list to include the following examples of major bodily functions: the functions of the special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems. These six major bodily functions also are specified in the EEOC title I final regulation. 29 CFR 1630.2(i)(1)(i).

One commenter objected to the Department's inclusion of additional

examples of major life activities in both these lists, suggesting that the Department include only those activities and conditions specifically set forth in the ADA as amended. The Department believes that providing other examples of major life activities, including major bodily functions, is within the Attorney General's authority to both interpret titles II and III of the ADA and promulgate implementing regulations and that these examples provide helpful guidance to the public. Therefore, the Department declines to limit its lists of major life activities to those specified in the statute. Further, the Department notes that even the expanded lists of major life activities and major bodily functions are illustrative and non-exhaustive. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulation.

Rules of Construction for Major Life Activities.

In the NPRM, proposed §§ 35.108(c)(2) and 36.105(c)(2) set out two specific principles applicable to major life activities: “[i]n determining other examples of major life activities, the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability,” and “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’” The proposed language furthered a main purpose of the ADA Amendments Act—to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that (1) strictly interpreted the terms “substantially” and “major” in the definition of “disability” to create a demanding standard for qualifying as disabled under the ADA, and that (2) required an individual to have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives to be considered as “substantially limited” in performing a major life activity under the ADA. Public Law 110–325, sec. 2(b)(4).

The Department did not receive any comments objecting to its proposed language. In the final rule, the Department retained these principles but has numbered each principle individually and deemed them “rules of construction” because they are intended to inform the determination of whether a particular activity is a major life activity.

Sections 35.108(d)(1) and 36.105(d)(1)—Substantially limits.

Overview. The ADA as amended directs that the term “substantially limits” shall be “interpreted consistently with the findings and purposes of the ADA Amendments Act.” 42 U.S.C. 12102(4)(B). *See also* Findings and Purposes of the ADA Amendments Act, Public Law 110–325, sec. 2(a)–(b). In the NPRM, the Department proposed to add nine rules of construction at §§ 35.108(d) and 36.105(d) clarifying how to interpret the meaning of “substantially limits” when determining whether an individual’s impairment substantially limits a major life activity. These rules of construction are based on the requirements of the ADA as amended and the clear mandates of the legislative history. Due to the insertion of the rules of construction, these provisions are renumbered in the final rule.

Sections 35.108(d)(1)(i) and 36.105(d)(1)(i)—Broad construction, not a demanding standard.

In accordance with Congress’s overarching directive to construe the term “disability” broadly, *see* 42 U.S.C. 12102(4)(A), the Department, in its NPRM, proposed §§ 35.108(d)(1)(i) and 36.105(d)(1)(i), which state: “The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.” These provisions are also rooted in the Findings and Purposes of the ADA Amendments Act, in which Congress instructed that “the question of whether an individual’s impairment is a disability under the ADA should not demand

extensive analysis.” *See* Public Law 110–325, sec. 2(b)(1), (4)-(5).

Several commenters on these provisions supported the Department’s proposal to include these rules of construction, noting that they were in keeping with both the statutory language and Congress’s intent to broaden the definition of "disability" and restore expansive protection under the ADA. Some of these commenters stated that, even after the passage of the ADA Amendments Act, some covered entities continued to apply a narrow definition of "disability."

Other commenters expressed concerns that the proposed language would undermine congressional intent by weakening the meaning of the word “substantial.” One of these commenters asked the Department to define the term “substantially limited” to include an element of materiality, while other commenters objected to the breadth of these provisions and argued that it would make the pool of people who might claim disabilities too large, allowing those without substantial limitations to be afforded protections under the law. Another commenter expressed concern about the application of the regulatory language to the diagnosis of learning disabilities and ADHD.

The Department considered all of these comments and declines to provide a definition of the term “substantially limits” or make any other changes to these provisions in the final rule. The Department notes that Congress considered and expressly rejected including language defining the term “substantially limits”: “We have concluded that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act. The resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination.” 154 Cong. Rec. S8441.

(daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department believes that the nine rules of construction interpreting the term “substantially limits” provide ample guidance on determining whether an impairment substantially limits a major life activity and are sufficient to ensure that covered entities will be able to understand and apply Congress’s intentions with respect to the breadth of the definition of “disability.”

Moreover, the commenters’ arguments that these provisions would undermine congressional intent are unsupported. To the contrary, Congress clearly intended the ADA Amendments Act to expand coverage: “The managers have introduced the ADA Amendments Act of 2008 to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA. It is our expectation that because this bill makes the definition of disability more generous, some people who were not covered before will now be covered.” 154 Cong. Rec. S8441 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department has also considered the comments expressed about the interplay between the proposed regulatory language and the diagnosis of learning disabilities and ADHD disorders. The Department believes that the revised definition of “disability,” including, in particular, the provisions construing “substantially limits,” strikes the appropriate balance to effectuate Congress’s intent when it passed the ADA Amendments Act, and will not modify its regulatory language in response to these comments.

Sections 35.108(d)(1)(ii) and 36.105(d)(1)(ii)—Primary object of ADA cases.

In the ADA Amendments Act, Congress directed that rules of construction should ensure that “substantially limits” is construed in accordance with the findings and purposes of the statute. *See* 42 U.S.C. 12102(4)(B). One of the

purposes of the Act was to convey that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with the obligations and to convey that the question of whether an individual’s impairment is a disability should not demand extensive analysis.” Public Law 110–325, sec. 2(b)(5). The legislative history clarifies that: “Through this broad mandate [of the ADA], Congress sought to protect anyone who is treated less favorably because of a current, past, or perceived disability. Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage. Nevertheless, as the courts began interpreting and applying the definition of disability strictly, individuals have been excluded from the protections that the ADA affords because they are unable to meet the demanding judicially imposed standard for qualifying as disabled.”). H.R. Rep. No. 110–730, pt. 2, at 5 (2008) (House Committee on the Judiciary).

In keeping with Congress’s intent and the language of the ADA Amendments Act, the rules of construction at proposed §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii) make clear that the primary object of attention in ADA cases should be whether public or other covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. In particular, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

A number of commenters expressed support for these rules of construction, noting that they reinforced Congress’s intent in ensuring that the primary focus will be on compliance. Several commenters objected to the use of the word “cases” in these provisions, stating that it lacked clarity. The word “cases” tracks the language of the ADA Amendments Act and the Department declines to change the term.

A few commenters objected to these provisions because they believed that the language would be used to supersede or otherwise change the required analysis of requests for reasonable modifications or testing accommodations. *See* 28 CFR 35.130(b)(7), 36.302, 36.309. The Department disagrees with these commenters. These rules of construction relate only to the determination of coverage under the ADA. They do not change the analysis of whether a discriminatory act has taken place, including the determination as to whether an individual is entitled to a reasonable modification or testing accommodation. *See* discussion of §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) below.

The Department retained the language of these rules of construction in the final rule except that in the title III regulatory text it has changed the reference from “covered entity” to “public accommodation.” The Department also renumbered these provisions as §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii).

Sections 35.108(d)(1)(iii) and 36.105(d)(1)(iii) – Impairment need not substantially limit more than one major life activity.

Proposed §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) stated that “[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.” *See* 42 U.S.C. 12102(4)(C). This language reflected the statutory intent to reject court decisions that had required individuals to show that an impairment substantially limits more than one major life activity. *See* 154 Cong. Rec. S8841–44 (daily ed. Sept. 16, 2008) (Statement of the Managers). Applying this principle, for example, an individual seeking to establish coverage under the ADA need not show a substantial limitation in the ability to learn if that individual is substantially limited in another major life activity, such as walking, or the functioning of the nervous or endocrine systems. The proposed rule also was intended to

clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA. *See* H.R. Rep. No. 110–730, pt. 2, at 19 & n.52 (2008) (House Committee on the Judiciary). For instance, an individual with cerebral palsy could have a capacity to perform certain manual tasks yet nonetheless show a substantial limitation in the ability to perform a “broad range” of manual tasks.

The Department received one comment specifically supporting this provision and none opposing it. The Department is retaining this language in the final rule although it is renumbered and is found at §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii).

Sections 35.108(d)(1)(iv) and 36.105(d)(1)(iv)—Impairments that are episodic or in remission.

The ADA as amended provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. 12102(4)(D). In the NPRM, the Department proposed §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) to directly incorporate this language. These provisions are intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent. The legislative history provides that “[t]his ... rule of construction thus rejects the reasoning of the courts in cases like *Todd v. Academy Corp.* [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff’s epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002)] where the courts have discounted the impact of an

impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.” H.R. Rep. No. 110–730, pt. 2, at 19-20 (2008) (House Committee on the Judiciary).

Some examples of impairments that may be episodic include hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

The Department received three comments in response to these provisions. Two commenters supported this provision and one commenter questioned about how school systems should provide reasonable modifications to students with disabilities that are episodic or in remission. As discussed elsewhere in this guidance, the determination of what is an appropriate modification is separate and distinct from the determination of whether an individual is covered by the ADA, and the Department will not modify its regulatory language in response to this comment.

Sections 35.108(d)(1)(v) and 36.105(d)(1)(v)—Comparisons to most people in the population, and impairment need not prevent or significantly or severely restrict a major life activity.

In the legislative history of the ADA Amendments Act, Congress explicitly

recognized that it had always intended that determinations of whether an impairment substantially limits a major life activity should be based on a comparison to most people in the population. The Senate Managers Report approvingly referenced the discussion of this requirement in the committee report from 1989. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (citing S. Rep. No. 101–116, at 23 (1989)). The preamble to the Department’s 1990 title II and title III regulations also referenced that the impact of an individual’s impairment should be based on a comparison to most people. *See* 56 FR 35694, 35699 (July 26, 1991).

Consistent with its longstanding intent, Congress directed, in the ADA Amendments Act, that disability determinations “should not demand extensive analysis” and that impairments do not need to rise to the level of “prevent[ing] or severely restrict[ing] the individual from doing activities that are of central importance to most people’s daily lives.” *See* Public Law 110–325, sec. 2(b)(4)–(5). In giving this direction, Congress sought to correct the standard that courts were applying to determinations of disability after *Toyota*, which had created “a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court’s narrower standard.” 154 Cong. Rec. S8840–8841 (daily ed. Sept. 16, 2008) (Statement of the Managers). The ADA Amendments Act thus abrogates *Toyota*’s holding by mandating that “substantially limited” must no longer create “an inappropriately high level of limitation.” *See* Public Law 110–325, sec. 2(b)(4)–(5) and 42 U.S.C. 12102(4)(B). For example, an individual with carpal tunnel syndrome, a physical impairment, can demonstrate that the impairment substantially limits the major life activity of writing even if the impairment does not prevent or severely restrict the individual from writing.

Accordingly, proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that an impairment is a disability if it substantially limits the ability of an individual

to perform a major life activity as compared to most people in the general population. However, an impairment does not need to prevent, or significantly or severely restrict, an individual from performing a major life activity in order to be substantially limiting.” The proposed language in the NPRM was rooted in the corrective nature of the ADA Amendments Act and its explicit rejection of the strict standards imposed under *Toyota* and its progeny. See Public Law 110–325, sec. 2(b)(4).

The Department received several comments on these provisions, none of which recommended modification of the regulatory language. A few commenters raised concerns that are further addressed in the “Condition, manner, or duration” section below, regarding the Department’s inclusion in the NPRM preamble of a reference to possibly using similarly situated individuals as the basis of comparison. The Department has removed this discussion and clarified that it does not endorse reliance on similarly situated individuals to demonstrate substantial limitations. For example, the Department recognizes that when determining whether an elderly person is substantially limited in a major life activity, the proper comparison is most people in the general population, and not similarly situated elderly individuals. Similarly, someone with ADHD should be compared to most people in the general population, most of whom do not have ADHD. Other commenters expressed interest in the possibility that, in some cases, evidence to support an assertion that someone has an impairment might simultaneously be used to demonstrate that the impairment is substantially limiting. These commenters approvingly referenced the EEOC’s interpretive guidance for its ADA Amendments Act regulation, which provided an example of an individual with a learning disability. See 76 FR 16978, 17009 (Mar. 25, 2011). In that example, evidence gathered to demonstrate the impairment of a learning disability showed a discrepancy between the person’s age, measured intelligence, and education and that person’s actual

versus expected achievement. The EEOC noted that such individuals also likely would be able to demonstrate substantial limitations caused by that impairment to the major life activities of learning, reading, or thinking, when compared to most people in the general population, especially when the ameliorative effects of mitigating measures were set aside. The Department concurs with this view.

Finally, the Department added an explicit statement recognizing that not every impairment will constitute a disability within the meaning of the section. This language echoes the Senate Statement of Managers, which clarified that: “[N]ot every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability under this prong.” 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Sections 35.108(d)(1)(vi) and 36.105(d)(1)(vi)—“Substantially limits” shall be interpreted to require a lesser degree of functional limitation than that required prior to the ADA Amendments Act.

In the NPRM, proposed §§ 35.108(d)(1)(iv) and 36.105(d)(1)(iv) state that determining whether an impairment substantially limits a major life activity requires an individualized assessment. But, the interpretation and application of the term “substantially limits” for this assessment requires a lower degree of functional limitation than the standard applied prior to the ADA Amendments Act.

These rules of construction reflect Congress’s concern that prior to the adoption of the ADA Amendments Act, courts were using too high a standard to determine whether an impairment substantially limited a major life activity. *See* Public Law 110–325, sec. 2(b)(4)–(5); *see also* 154 Cong. Rec.

S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.”).

The Department received no comments on these provisions. The text of these provisions is unchanged in the final rule, although they have been renumbered as §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi).

Sections §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii)—Comparison of individual’s performance of major life activity usually will not require scientific, medical, or statistical analysis.

In the NPRM, the Department proposed at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v) rules of construction making clear that the comparison of an individual’s performance of a major life activity to that of most people in the general population usually will not require scientific, medical, or statistical evidence. However, this rule is not intended to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

These rules of construction reflect Congress’s rejection of the demanding standards of proof imposed upon individuals with disabilities who tried to assert coverage under the ADA prior to the adoption of the ADA Amendments Act. In passing the Act, Congress rejected the idea that the disability determination should be “an onerous burden for those seeking accommodations or modifications.” *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). These rules make clear that in most cases, people with impairments will not need to present scientific, medical, or statistical evidence to support their assertion that an impairment is substantially limiting compared to most people in the general population.

Instead, other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes, should, in most cases, be considered adequate to establish that an impairment is substantially limiting. The Department's proposed language reflected Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of an overbroad, burdensome, and generally unnecessary requirement.

The Department received several comments in support of these provisions and a number of comments opposing all or part of them. One commenter representing individuals with disabilities expressed support for the proposed language, noting that “[m]any people with disabilities have limited resources and requiring them to hire an expert witness to confirm their disability would pose an insurmountable barrier that could prevent them from pursuing their ADA cases.”

Commenters representing testing entities objected to this language arguing that they needed scientific, medical, or statistical evidence in order to determine whether an individual has a learning disability or ADHD. These commenters argued that, unlike other disabilities, assessment of learning disabilities and ADHD require scientific, medical, or statistical evidence because such disabilities have no overt symptoms, cannot be readily observed, and lack medical or scientific verifiability. One commenter stated that the proposed language “favor[s] expedience over evidence-based guidance.”

In opposing these provisions, these commenters appear to conflate proof of the existence of an impairment with the analysis of how an impairment substantially limits a major life activity. These provisions address only how to evaluate whether an impairment substantially limits a major life activity,

and the Department's proposed language appropriately reflects Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of overbroad, burdensome, and generally unnecessary evidentiary requirements. Moreover, the Department disagrees with the commenters' suggestion that an individual with ADHD or a specific learning disability can never demonstrate how the impairment substantially limits a major life activity without scientific, medical, or statistical evidence. Scientific, medical, or statistical evidence usually will not be necessary to determine whether an individual with a disability is substantially limited in a major life activity. However, as the rule notes, such evidence may be appropriate in some circumstances.

One commenter suggested that the words "where appropriate" be deleted from these provisions in the final rule out of concern that they may be used to preclude individuals with disabilities from proffering scientific or medical evidence in support of a claim of coverage under the ADA. The Department disagrees with the commenter's reading of these provisions. Congress recognized that some people may choose to support their claim by presenting scientific or medical evidence and made clear that "plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The language "where appropriate" allows for those circumstances where an individual chooses to present such evidence, but makes clear that in most cases presentation of such evidence shall not be necessary.

Finally, although the NPRM did not propose any changes with respect to the title III regulatory requirements applicable to the provision of testing accommodations at 28 CFR 36.309, one commenter requested revisions to § 36.309 to acknowledge the changes to regulatory language in the definition of "disability." Another commenter noted that the proposed changes to the

regulatory definition of "disability" warrant new agency guidance on how the ADA applies to requests for testing accommodations.

The Department does not consider it appropriate to include provisions related to testing accommodations in the definitional sections of the ADA regulations. The determination of disability, and thus coverage under the ADA, is governed by the statutory and regulatory definitions and the related rules of construction. Those provisions do not speak to what testing accommodations an individual with a disability is entitled to under the ADA nor to the related questions of what a testing entity may request or require from an individual with a disability who seeks testing accommodations. Testing entities' substantive obligations are governed by 42 U.S.C. 12189 and the implementing regulation at 28 CFR 36.309. The implementing regulation clarifies that private entities offering covered examinations need to make sure that any request for required documentation is reasonable and limited to the need for the requested modification, accommodation, or auxiliary aid or service. Furthermore, when considering requests for modifications, accommodations, or auxiliary aids or services, the entity should give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations or provided in response to an Individualized Education Program (IEP) provided under the IDEA or a plan describing services provided under section 504 of the Rehabilitation Act of 1973 (often referred as a Section 504 Plan).

Contrary to the commenters' suggestions, there is no conflict between the regulation's definitional provisions and title III's testing accommodation provisions. The first addresses the core question of who is covered under the definition of "disability", while the latter sets forth requirements related to documenting the need for particular testing accommodations. To the extent that testing entities are urging conflation of the analysis for establishing

disability with that for determining required testing accommodations, such an approach would contradict the clear delineation in the statute between the determination of disability and the obligations that ensue.

Accordingly, in the final rule, the text of these provisions is largely unchanged, except that the provisions are renumbered as §§ 35.108(d)(1)(vii) and 36.108(d)(1)(vii), and the Department added “the presentation of,” in the second sentence, which was included in the corresponding provision of the EEOC final rule. *See* 29 CFR 1630.2(j)(1)(v).

Sections 35.108(d)(1)(viii) and 36.105(d)(1)(viii)—Determination made without regard to the ameliorative effects of mitigating measures.

The ADA as amended expressly prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual’s impairment substantially limits a major life activity, except for the ameliorative effects of ordinary eyeglasses or contact lenses.

42 U.S.C. 12102(4)(E). The statute provides an illustrative, and non-exhaustive list of different types of mitigating measures. *Id.*

In the NPRM, the Department proposed §§ 35.108(d)(2)(vi) and 36.105(d)(2)(vi), which tracked the statutory language regarding consideration of mitigating measures. These provisions stated that the ameliorative effects of mitigating measures should not be considered when determining whether an impairment substantially limits a major life activity. However, the beneficial effects of ordinary eyeglasses or contact lenses should be considered when determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses refer to lenses that are intended to fully correct visual acuity or to eliminate refractive errors. Proposed §§ 35.108(d)(4) and 36.105(d)(4), discussed below, set forth examples of mitigating measures.

A number of commenters agreed with the Department's proposed language and no commenters objected. Some commenters, however, asked the Department to add language to these sections stating that, although the ameliorative effects of mitigating measures may not be considered in determining whether an individual has a covered disability, they may be considered in determining whether an individual is entitled to specific testing accommodations or reasonable modifications. The ADA Amendments Act revised the definition of "disability" and the Department agrees that the Act's prohibition on assessing the ameliorative effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." The Department declines to add the requested language, however, because it goes beyond the scope of this rulemaking by addressing ADA requirements that are not related to the definition of "disability." These rules of construction do not apply to the requirements to provide reasonable modifications under §§ 35.130(b)(7) and 36.302 or testing accommodations under § 36.309 in the title III regulations. The Department disagrees that further clarification is needed at this point and declines to modify these provisions except that they are now renumbered as §§ 35.108(d)(1)(viii) and § 36.105(d)(1)(viii).

The Department notes that in applying these rules of construction, evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure or evidence concerning the expected course of a particular disorder absent mitigating measures.

The determination of whether an individual's impairment substantially limits a major life activity is unaffected by an individual's choice to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or auxiliary aids and services that might alleviate the

effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures will serve as the foundation for a determination of whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures that are employed may not be considered in determining if the impairment is substantially limiting.

Sections 35.108(d)(1)(ix) and 36.105(d)(1)(ix)—Impairment that lasts less than six months can still be a disability under first two prongs of the definition.

In §§ 35.108(d)(1)(ix) and 36.105(d)(1)(ix), the NPRM proposed rules of construction noting that the six-month “transitory” part of the “transitory and minor” exception does not apply to the “actual disability” or “record of” prongs of the definition of “disability.” Even if an impairment may last or is expected to last six months or less, it can be substantially limiting.

The ADA as amended provides that the “regarded as” prong of the definition of “disability” does “not apply to impairments that are [both] transitory and minor.” 42 U.S.C. 12102(3)(B). “Transitory impairment” is defined as “an impairment with an actual or expected duration of six months or less.” *Id.* The statute does not define the term “minor.” Whether an impairment is both “transitory and minor” is a question of fact that is dependent upon individual circumstances. The ADA as amended contains no such provision with respect to the first two prongs of the definition of “disability”—“actual disability,” and “record of” disability. The application of the “transitory and minor” exception to the “regarded as” prong is addressed in §§ 35.108(f) and 36.105(f).

The Department received two comments on this proposed language. One commenter recommended that the Department delete this language and “replace it with language clarifying that if a condition cannot meet the lower threshold of impairment under the third prong, it cannot meet the higher threshold of a disability under the first and second prongs.” The Department declines to modify these provisions because the determination of whether an individual satisfies the requirements of a particular prong is not a comparative determination between the three means of demonstrating disability under the ADA. The Department believes that the suggested language would create confusion because there are significant differences between the first two prongs and the third prong. In addition, the Department believes its proposed language is in keeping with the ADA Amendments Act and the supporting legislative history.

The other commenter suggested that the Department add language to provide greater clarity with respect to the application of the transitory and minor exception to the “regarded as prong.” The Department does not believe that additional language should be added to these rules of construction, which relate only to whether there is a six-month test for the first two prongs of the definition. As discussed below, the Department has revised both the regulatory text at §§ 35.108(f) and 36.105(f) and its guidance on the application of the “transitory and minor” exception to the “regarded as” prong. *See* discussion below.

Sections 35.108(d)(2) and 36.105(d)(2)—Predictable assessments.

In the NPRM, proposed §§ 35.108(d)(2) and 36.105(d)(2) set forth examples of impairments that should easily be found to substantially limit one or more major life activities. These provisions recognized that while there are no “per se” disabilities, for certain types of impairments the application of the various principles and rules of construction concerning the definition of “disability”

to the individualized assessment would, in virtually all cases, result in the conclusion that the impairment substantially limits a major life activity. Thus, the necessary individualized assessment of coverage premised on these types of impairments should be particularly simple and straightforward. The purpose of the “predictable assessments” provisions is to simplify consideration of those disabilities that virtually always create substantial limitations to major life activities, thus satisfying the statute’s directive to create clear, consistent, and enforceable standards and ensuring that the inquiry of “whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” *See* Public Law 110–325, sec. 2(b)(1), (5) The impairments identified in the predictable assessments provision are a non-exhaustive list of examples of the kinds of disabilities that meet these criteria and, with one exception, are consistent with the corresponding provision in the EEOC ADA Amendments Act rule. *See* 29 CFR 1630.2(j)(3)(iii).²⁶

The Department believes that the predictable assessments provisions comport with the ADA Amendments Act’s emphasis on adopting a less burdensome and more expansive definition of “disability.” The provisions are rooted in the application of the statutory changes to the meaning and interpretation of the definition of “disability” contained in the ADA Amendments Act and flow from the rules of construction set forth in §§ 35.108(a)(2)(i), 36.105(a)(2)(i), 35.108(c)(2)(i) and (ii), 36.105(c)(2)(i) and (ii). These rules of construction and other specific provisions require the broad construction of the definition of “disability” in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. In addition, they lower the standard to be applied to “substantially limits,” making clear that an impairment need not prevent or significantly restrict an individual from performing a major life activity; clarify that major life activities include major bodily functions; elucidate that impairments that are

episodic or in remission are disabilities if they would be substantially limiting when active; and incorporate the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability.

Several organizations representing persons with disabilities and the elderly, constituting the majority of commenters on these provisions, supported the inclusion of the predictable assessments provisions. One commenter expressed strong support for the provision and recommended that it closely track the corresponding provision in the EEOC title I rule, while another noted its value in streamlining individual assessments. In contrast, some commenters from educational institutions and testing entities recommended the deletion of these provisions, expressing concern that it implies the existence of “per se” disabilities, contrary to congressional intent that each assertion of disability should be considered on a case-by-case basis. The Department does not believe that the predictable assessment provisions constitutes a “per se” list of disabilities and will retain it. These provisions highlight, through a non-exhaustive list, impairments that virtually always will be found to substantially limit one or more major life activities. Such impairments still warrant individualized assessments, but any such assessments should be especially simple and straightforward.

The legislative history of the ADA Amendments Act supports the Department’s approach in this area. In crafting the Act, Congress hewed to the ADA definition of “disability”, which was modeled on the definition of “disability” in the Rehabilitation Act, and indicated that it wanted courts to interpret the definition as it had originally been construed. *See* H.R. Rep. No. 110–730, pt. 2, at 6 (2008). Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition “broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental

disabilities ... even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual.” *Id.*; *see also id.* at 9 (referring to individuals with disabilities that had been covered under section 504 of the Rehabilitation Act and that Congress intended to include under the ADA—“people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities”); *id.* at 6, n.6 (citing cases also finding that cerebral palsy, hearing impairments, intellectual disabilities, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); *id.* at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that “[w]e could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of “disability””); 2008 Senate Statement of Managers at 3 (explaining that “we [we]re faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities [under the Rehabilitation Act] [we]re not considered disabilities” and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Some commenters asked the Department to add certain impairments to the predictable assessments list, while others asked the Department to remove certain impairments. Commenters representing educational and testing institutions urged that, if the Department did not delete the predictable assessment provisions, then the list should be modified to remove any impairments that are not obvious or visible to third parties and those for which functional limitations can change over time. One commenter cited to a pre-ADA Amendments Act reasonable accommodations case, which included language regarding the uncertainty facing employers in determining

appropriate reasonable accommodations when mental impairments often are not obvious and apparent to employers. *See Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998). This commenter suggested that certain impairments, including autism, depression, post-traumatic stress disorder, and obsessive-compulsive disorder, should not be deemed predictable assessments because they are not immediately apparent to third parties. The Department disagrees with this commenter, and believes that it is appropriate to include these disabilities on the list of predictable assessments. Many disabilities are less obvious or may be invisible, such as cancer, diabetes, HIV infection, schizophrenia, intellectual disabilities, and traumatic brain injury, as well as those identified by the commenter. The likelihood that an impairment will substantially limit one or more major life activities is unrelated to whether or not the disability is immediately apparent to an outside observer. Therefore, the Department will retain the examples that involve less apparent disabilities on the list of predictable assessments.

The Department believes that the list accurately illustrates impairments that virtually always will result in a substantial limitation of one or more major life activities. The Department recognizes that impairments are not always static and can result in different degrees of functional limitation at different times, particularly when mitigating measures are used. However, the ADA as amended anticipates variation in the extent to which impairments affect major life activities, clarifying that impairments that are episodic or in remission nonetheless are disabilities if they would be substantially limiting when active and requiring the consideration of disabilities without regard to ameliorative mitigating measures. The Department does not believe that limiting the scope of its provisions addressing predictable assessments only to those disabilities that would never vary in functional limitation would be appropriate.

Other commenters speaking as individuals or representing persons with

disabilities endorsed the inclusion of some impairments already on the list, including traumatic brain injury, sought the inclusion of additional impairments, requested revisions to some descriptions of impairments, or asked for changes to the examples of major life activities linked to specific impairments.

Several commenters requested the expansion of the predictable assessments list, in particular to add specific learning disabilities. Some commenters pointed to the ADA Amendments Act's legislative history, which included Representative Stark's remarks that specific learning disabilities are "neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities." 154 Cong. Rec. H8291 (daily ed. Sept. 17, 2008). Others recommended that some specific types of specific learning disabilities, including dyslexia, dyscalculia, dysgraphia, dyspraxia, and slowed processing speed should be referenced as predictable assessments. With respect to the major life activities affected by specific learning disabilities, commenters noted that specific learning disabilities are neurologically based and substantially limit learning, thinking, reading, communicating, and processing speed.

Similarly, commenters recommended the inclusion of ADHD, urging that it originates in the brain and affects executive function skills including organizing, planning, paying attention, regulating emotions, and self-monitoring. One commenter noted that if ADHD meets the criteria established in the DSM-5, then it would consistently meet the criteria to establish disability under the ADA. The same commenter noted that ADHD is brain based and affects the major life activity of executive function. Another commenter suggested that ADHD should be included and should be identified as limiting brain function, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Other

commenters urged the inclusion of panic disorders, anxiety disorder, cognitive disorder, and post-concussive disorder. A number of commenters noted that the exclusion of impairments from the predictable assessments list could be seen as supporting an inference that the impairments that are not mentioned should not easily be found to be disabilities.

The Department determined that it will retain the language it proposed in the NPRM and will not add or remove any impairments from this list. As discussed above, the list is identical to the EEOC's predictable assessments list, at 29 CFR 1630.2(g)(3)(iii), except that the Department's NPRM added traumatic brain injury. The Department received support for including traumatic brain injury and did not receive any comments recommending the removal of traumatic brain injury from the list; thus, we are retaining it in this final rule.

The Department's decision to track the EEOC's list, with one minor exception, stems in part from our intent to satisfy the congressional mandate for "clear, strong, consistent, enforceable standards." A number of courts already have productively applied the EEOC's predictable assessments provision, and the Department believes that it will continue to serve as a useful, common-sense tool in promoting judicial efficiency. It is important to note, however, that the failure to include any impairment in the list of examples of predictable assessments does not indicate that that impairment should be subject to undue scrutiny.

Some commenters expressed concern about the major life activities that the Department attributed to particular impairments. Two commenters sought revision of the major life activities attributed to intellectual disabilities, suggesting that it would be more accurate to reference cognitive function and learning, instead of reading, learning, and problem solving. One commenter recommended attributing the major life activity of brain function to autism

rather than learning, social interaction, and communicating. The Department determined that it will follow the EEOC's model and, with respect to both intellectual disabilities and autism, it will reference the major bodily function of brain function. By using the term "brain function" to describe the system affected by various mental impairments, the Department intends to capture functions such as the brain's ability to regulate thought processes and emotions.

The Department considers it important to reiterate that, just as the list of impairments in these sections is not comprehensive, the list of major bodily functions or other major life activities linked to those impairments are not exhaustive. The impairments identified in these sections, may affect a wide range of major bodily functions and other major life activities. The Department's specification of certain major life activities with respect to particular impairments simply provides one avenue by which a person might elect to demonstrate that he or she has a disability.

The Department recognizes that impairments listed in §§ 35.108(d)(2) and 36.105(d)(2) may substantially limit other major life activities in addition to those listed in the regulation. For example, diabetes may substantially limit major life activities including eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

One commenter noted that the NPRM did not track the EEOC's language with respect to the manner in which it identified a major bodily function that is substantially limited by epilepsy, muscular dystrophy, or multiple sclerosis in 29 CFR 1630.2(j)(3)(iii). While the EEOC listed each of these three impairments individually, noting in each case that the major bodily function

affected is neurological function, at 29 CFR 1630.2(j)(3)(iii), the NPRM grouped the three impairments and noted that they affect neurological function. In order to clarify that each of the three impairments may manifest a substantial limitation of neurological function, the final rule incorporates “each” immediately following the list of the three impairments. Similarly, the Department added an “each” to §§ 35.108(d)(2)(iii)(K) and 36.105(d)(2)(iii)(K) to make clear that each of the listed impairments substantially limits brain function.

Some commenters representing testing entities and educational institutions sought the insertion of language in the predictable assessment provisions that would indicate that individuals found to have disabilities are not, by virtue of a determination that they have a covered disability, eligible for a testing accommodation or a reasonable modification. The Department agrees with these commenters that the determination of disability is a distinct determination separate from the determination of the need for a requested modification or a testing accommodation. The Department declines to add the language suggested by the commenters to §§ 35.108(d)(2) and 36.105(d)(2), however, because the requirements for reasonable modifications are addressed separately in §§ 35.130(b)(7) and 36.302 of the title II and III regulations and the requirements related to providing appropriate accommodations in testing and licensing are found at § 36.309.

Sections 35.108(d)(3) and 36.105(d)(3)—Condition, manner, or duration.

Overview. Proposed §§ 35.108(d)(3) and 36.105(d)(3), both titled “Condition, manner[,] and duration,” addressed how evidence related to condition, manner, or duration may be used to show how impairments substantially limit major life activities. These principles were first addressed in the preamble to the 1991 rule. At that time, the Department noted that “[a] person is considered an individual with a disability. . . when the individual’s

important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” 56 FR 35544, 35549 (July 26, 1991); *see also* S. Rep. No. 101–116, at 23 (1989).

These concepts were affirmed by Congress in the legislative history to the ADA Amendments Act: “We particularly believe that this test, which articulated an analysis that considered whether a person’s activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.” 154 Cong. Rec. S8346 (Sept. 11, 2008). Noting its continued reliance on the functional approach to defining disability, Congress expressed its belief that requiring consistency with the findings and purposes of the ADA Amendments Act would “establish[] an appropriate functionality test for determining whether an individual has a disability.” *Id.* While condition, manner, and duration are not required factors that must be considered, the regulations clarify that these are the types of factors that may be considered in appropriate cases. To the extent that such factors may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these factors often will not be necessary to establish coverage.

In the NPRM, proposed §§ 35.108(d)(3)(i) and 35.105(d)(3)(i) noted that the rules of construction at §§ 35.108(d)(1) and 35.105(d)(1) should inform consideration of how individuals are substantially limited in major life activities. Sections 35.108(d)(3)(ii) and 36.105(d)(3)(ii) provided examples

of how restrictions on condition, manner, or duration might be interpreted and also clarified that the negative or burdensome side effects of medication or other mitigating measures may be considered when determining whether an individual has a disability. In §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii), the proposed language set forth a requirement to focus on how a major life activity is substantially limited, rather than on the ultimate outcome a person with an impairment can achieve.

The Department received comments on the condition, manner, or duration provision from advocacy groups for individuals with disabilities, from academia, from education and testing entities, and from interested individuals. Several advocacy organizations for individuals with disabilities and private individuals noted that the section title's heading was inconsistent with the regulatory text and sought the replacement of the "and" in the section's title, "Condition, manner, and duration," with an "or." Commenters expressed concern that retaining the "and" in the heading title would be inconsistent with congressional intent and would incorrectly suggest that individuals are subject to a three-part test and must demonstrate that an impairment substantially limits a major life activity with respect to condition, manner, and duration. The Department agrees that the "and" used in the title of the proposed regulatory provision could lead to confusion and a misapplication of the law and has revised the title so it now reads "Condition, manner, *or* duration." Consistent with the regulatory text, the revised heading makes clear that any one of the three descriptors—"condition," "manner," or "duration"—may aid in demonstrating that an impairment substantially limits a major life activity or a major bodily function.

Condition, manner, or duration.

In the NPRM, proposed §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) noted that the application of the terms "condition" "manner," or "duration" should at all

times take into account the principles in § 35.108(d)(1) and § 36.105(d)(1), respectively, which referred to the rules of construction for “substantially limited.” The proposed regulatory text also included brief explanations of the meaning of the core terms, clarifying that in appropriate cases, it could be useful to consider, in comparison to most people in the general population, the conditions under which an individual performs a major life activity; the manner in which an individual performs a major life activity; or the time it takes an individual to perform a major life activity, or for which the individual can perform a major life activity.

Several disability rights advocacy groups and individuals supported the NPRM approach, with some referencing the value of pointing to the rules of construction and their relevance to condition, manner, or duration considerations. Some commenters noted that it was helpful to highlight congressional intent that the definition of “disability” should be broadly construed and not subject to extensive analysis. Another commenter recommended introducing a clarification that, while the limitation imposed by an impairment must be important, it does not need to rise to the level of severely or significantly restricting the ability to perform a major life activity. Some commenters sought additional guidance regarding the meaning of the terms “condition,” “manner,” and “duration” and recommended the addition of more illustrative examples.

In response to commenters’ concerns, the Department has modified the regulatory text in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) to reference all of the rules of construction rather than only those pertaining to “substantially limited.” The Department also added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv), further discussed below, to clarify that the rules of construction will not always require analysis of condition, manner, or duration, particularly with respect to certain impairments, such as those referenced in paragraph (d)(2)(iii) (predictable assessments). With these changes, the Department believes

that the final rule more accurately reflects congressional intent. The Department also believes that clarifying the application of the rules of construction to condition, manner, or duration will contribute to consistent interpretation of the definition of "disability" and reduce inadvertent reliance on older cases that incorporate demanding standards rejected by Congress in the ADA Amendments Act.

It is the Department's view that the rules of construction offer substantial guidance about how condition, manner, or duration must be interpreted so as to ensure the expansive coverage intended by Congress. Except for this clarification, the Department did not receive comments opposing the proposed regulatory text on condition, manner, or duration in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) and did not make any other changes to these provisions.

Some commenters objected to language in the preamble to the NPRM which suggested that there might be circumstances in which the consideration of condition, manner, or duration might not include comparisons to most people in the general population. On reconsideration, the Department recognizes that this discussion could create confusion about the requirements. The Department believes that condition, manner, or duration determinations should be drawn in contrast to most people in the general population, as is indicated in the related rules of construction, at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

Condition, manner, or duration examples, including negative effects of mitigating measures.

Proposed §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) set forth examples of the types of evidence that might demonstrate condition, manner, or duration limitations, including the way an impairment affects the operation of a major

bodily function, the difficulty or effort required to perform a major life activity, the pain experienced when performing a major life activity, and the length of time it takes to perform a major life activity. These provisions also clarified that the non-ameliorative effects of mitigating measures may be taken into account to demonstrate the impact of an impairment on a major life activity. The Department's discussion in the NPRM preamble noted that such non-ameliorative effects could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. The preamble also provided further clarification of the possible applications of condition, manner, or duration analyses, along with several examples.

Several commenters supported the proposed rule's incorporation of language and examples offering insight into the varied ways that limitations on condition, manner, or duration could demonstrate substantial limitation. One commenter positively noted that the language regarding the "difficulty, effort, or time required to perform a major life activity" could prove extremely helpful to individuals asserting a need for testing accommodations, as evidence previously presented regarding these factors was deemed insufficient to demonstrate the existence of a disability. Some commenters requested the insertion of additional examples and explanation in the preamble about how condition, manner or duration principles could be applied under the new rules of construction. Another commenter sought guidance on the specific reference points that should be used when drawing comparisons with most people in the general population. The commenter offered the example of delays in developmental milestones as a possible referent in evaluating children with speech-language disorders, but noted a lack of guidance regarding comparable referents for adults. The commenter also noted that guidance is needed regarding what average or acceptable duration might be with respect to certain activities. An academic commenter

expressed support for the Department's reference to individuals with learning impairments using certain self-mitigating measures, such as extra time to study or taking an examination in a different format, and the relevance of these measures to condition, manner, and duration.

The Department did not receive comments opposing the NPRM language on condition, manner, or duration in §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) and is not making any changes to this language. The Department agrees that further explanation and examples as provided below regarding the concepts of condition, manner, or duration will help clarify how the ADA Amendments Act has expanded the definition of "disability."

An impairment may substantially limit the "condition" or "manner" in which a major life activity can be performed in a number of different ways. For example, the condition or manner in which a major life activity can be performed may refer to how an individual performs a major life activity; *e.g.*, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that most people in the general population would perform the same tasks. Condition or manner also may describe how performance of a major life activity affects an individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. An individual with specific learning disabilities may need to approach reading or writing in a distinct manner or under different conditions than most people in the general population, possibly employing aids including verbalizing, visualizing, decoding or phonology,

such that the effort required could support a determination that the individual is substantially limited in the major life activity of reading or writing.

Condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment “causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion.” *See* H.R. Rep. No. 110–730, pt. 2, at 17 (2008). For example, the endocrine system of a person with type I diabetes does not produce sufficient insulin. For that reason, compared to most people in the general population, the impairment of diabetes substantially limits the major bodily functions of endocrine function and digestion. Traumatic brain injury substantially limits the condition or manner in which an individual’s brain functions by impeding memory and causing headaches, confusion, or fatigue—each of which could constitute a substantial limitation on the major bodily function of brain function.

“Duration” refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. However, “[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.” *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (quoting S. Rep. No. 101–116, at 23 (1989)). Some impairments, such as

ADHD, may have two different types of impact on duration considerations. ADHD frequently affects both an ability to sustain focus for an extended period of time and the speed with which someone can process information. Each of these duration-related concerns could demonstrate that someone with ADHD, as compared to most people in the general population, takes longer to complete major life activities such as reading, writing, concentrating, or learning.

The Department reiterates that, because the limitations created by certain impairments are readily apparent, it would not be necessary in such cases to assess the negative side effects of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, there likely would be no need to consider the burden that dialysis treatment imposes for someone with end-stage renal disease because the impairment would allow a simple and straightforward determination that the individual is substantially limited in kidney function.

One commenter representing people with disabilities asked the Department to recognize that, particularly with respect to learning disabilities, on some occasions the facts related to condition, manner, or duration necessary to reach a diagnosis of a learning disability also are sufficient to establish that the affected individual has a disability under the ADA. The Department agrees that the facts gathered to establish a diagnosis of an impairment may simultaneously satisfy the requirements for demonstrating limitations on condition, manner, or duration sufficient to show that the impairment constitutes a disability.

Emphasis on Limitations Instead of Outcomes.

In passing the ADA Amendments Act, Congress clarified that courts had misinterpreted the ADA definition of "disability" by, among other things,

inappropriately emphasizing the capabilities of people with disabilities to achieve certain outcomes. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As the House Education and Labor Committee Report emphasized:

[S]ome courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to “most people.” When 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 or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price v. National Board of Medical Examiners*, *Gonzales v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*.

The Committee believes that the comparison of individuals with specific learning disabilities to “most people” is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual’s impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual

with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008).

Sections 35.108(d)(3)(iii) and 36.105(d)(3)(iii) of the proposed rule reflected congressional intent and made clear that the outcome an individual with a disability is able to achieve is not determinative of whether an individual is substantially limited in a major life activity. Instead, an individual can demonstrate the extent to which an impairment affects the condition, manner, or duration in which the individual performs a major life activity, such that it constitutes a substantial limitation. The ultimate outcome of an individual's efforts should not undermine a claim of disability, even if the individual ultimately is able to achieve the same or similar result as someone without the impairment.

The Department received several comments on these provisions, with disability organizations and individuals supporting the inclusion of these provisions and some testing entities and an organization representing educational institutions opposing them. The opponents argued that academic performance and testing outcomes are objective evidence that contradict findings of disability and that covered entities must be able to focus on those outcomes in order to demonstrate whether an impairment has contributed to a substantial limitation. These commenters argued that the evidence frequently offered by those making claims of disability that demonstrate the time or effort required to achieve a result, such as evidence of self-mitigating measures, informal accommodations, or recently provided reasonable modifications, is inherently subjective and unreliable. The testing entities suggested that the Department had indicated support for their

interest in focusing on outcomes over process-related obstacles in the NPRM preamble language where the Department had noted that covered entities “may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity.” NPRM, 79 FR 4839, 4847–48 (Jan. 30, 2014). The commenters representing educational institutions and testing entities urged the removal of §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii) or, in the alternative, the insertion of language indicating that outcomes, such as grades and test scores indicating academic success, are relevant evidence that should be considered when making disability determinations.

In contrast, commenters representing persons with disabilities and individual commenters expressed strong support for these provisions, noting that what an individual can accomplish despite an impairment does not accurately reflect the obstacles an individual had to overcome because of the impairment. One organization representing persons with disabilities noted that while individuals with disabilities have achieved successes at work, in academia, and in other settings, their successes should not create obstacles to addressing what they can do “in spite of an impairment.” Commenters also expressed concerns that testing entities and educational institutions had failed to comply with the rules of construction or to revise prior policies and practices to comport with the new standards under the ADA as amended. Some commenters asserted that testing entities improperly rejected accommodation requests because the testing entities focused on test scores and outcomes rather than on how individuals learn; required severe levels of impairment; failed to disregard the helpful effect of self-mitigating measures; referenced participation in extracurricular activities as evidence that individuals did not have disabilities; and argued that individuals diagnosed with specific learning disabilities or ADHD in adulthood cannot demonstrate

that they have a disability because their diagnosis occurred too late.

Commenters representing persons with disabilities pointed to the discussion in the legislative history about restoring a focus on process rather than outcomes with respect to learning disabilities. They suggested that such a shift in focus also would be helpful in evaluating ADHD. One commenter asked the Department to include a reference to ADHD and to explain that persons with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in one or more major life activities, such as reading, writing, speaking, concentrating, or learning. A private citizen requested the addition of examples demonstrating the application of these provisions because, in the commenter's view, there have been many problems with decisions regarding individuals with learning disabilities and an inappropriate focus on outcomes and test scores.

The Department declines the request to add a specific reference to ADHD in these provisions. The Department believes that the principles discussed above apply equally to persons with ADHD as well as individuals with other impairments. The provision already references an illustrative, but not exclusive, example of an individual with a learning disability. The Department believes that this example effectively illustrates the concern that has affected individuals with other impairments due to an inappropriate emphasis on outcomes rather than how a major life activity is limited.

Organizations representing testing and educational entities asked the Department to add regulatory language indicating that testing-related outcomes, such as grades and test scores, are relevant to disability determinations under the ADA. The Department has considered this proposal and declines to adopt it because it is inconsistent with congressional intent. As discussed earlier in this section, Congress specifically stated that the outcome an individual with a disability is able to achieve is not

determinative of whether that individual has a physical or mental impairment that substantially limits a major life activity. The analysis of whether an individual with an impairment has a disability is a fact-driven analysis shaped by how an impairment has substantially limited one or more major life activities or major bodily functions, considering those specifically asserted by the individual as well as any others that may apply. For example, if an individual with ADHD seeking a reasonable modification or a testing accommodation asserts substantial limitations in the major life activities of concentrating and reading, then the analysis of whether or not that individual has a covered disability will necessarily focus on concentrating and reading. Relevant considerations could include restrictions on the conditions, manner, or duration in which the individual concentrates or reads, such as a need for a non-stimulating environment or extensive time required to read. Even if an individual has asserted that an impairment creates substantial limitations on activities such as reading, writing, or concentrating, the individual's academic record or prior standardized testing results might not be relevant to the inquiry. Instead, the individual could show substantial limitations by providing evidence of condition, manner, or duration limitations, such as the need for a reader or additional time. The Department does not believe that the testing results or grades of an individual seeking reasonable modifications or testing accommodations always would be relevant to determinations of disability. While testing and educational entities may, of course, put forward any evidence that they deem pertinent to their response to an assertion of substantial limitation, testing results and grades may be of only limited relevance.

In addition, the Department does not agree with the assertions made by testing and educational entities that evidence of testing and grades is objective and, therefore, should be weighted more heavily, while evidence of self-mitigating measures, informal accommodations, or recently provided

accommodations or modifications is inherently subjective and should be afforded less consideration. Congress's discussion of the relevance of testing outcomes and grades clearly indicates that it did not consider them definitive evidence of the existence or non-existence of a disability. While tests and grades typically are numerical measures of performance, the capacity to quantify them does not make them inherently more valuable with respect to proving or disproving disability. To the contrary, Congress's incorporation of rules of construction emphasizing broad coverage of disabilities to the maximum extent permitted, its direction that such determinations should neither contemplate ameliorative mitigating measures nor demand extensive analysis, and its recognition of learned and adaptive modifications all support its openness for individuals with impairments to put forward a wide range of evidence to demonstrate their disabilities.

The Department believes that Congress made its intention clear that the ADA's protections should encompass people for whom the nature of their impairment requires an assessment that focuses on how they engage in major life activities, rather than the ultimate outcome of those activities. Beyond directly addressing this concern in the debate over the ADA Amendments Act, Congress's incorporation of the far-reaching rules of construction, its explicit rejection of the consideration of ameliorative mitigating measures—including “learned behavioral or adaptive neurological modifications,” 42 U.S.C. 12102(4)(E)(i)(IV), such as those often employed by individuals with learning disabilities or ADHD—and its stated intention to “reinstat[e] a broad scope of protection to be available under the ADA,” Public Law 110–325, sec. 2(b)(1), all support the language initially proposed in these provisions. For these reasons, the Department determined that it will retain the language of these provisions as they were originally drafted.

Analysis of condition, manner, or duration not always required.

As noted in the discussion above, the Department has added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv) in the final rule to clarify that analysis of condition, manner, or duration will not always be necessary, particularly with respect to certain impairments that can easily be found to substantially limit a major life activity. This language is also found in the EEOC ADA title I regulation. *See* 29 CFR 1630(j)(4)(iv). As noted earlier, the inclusion of these provisions addresses several comments from organizations representing persons with disabilities. This language also responds to several commenters' concerns that the Department should clarify that, in some cases and particularly with respect to predictable assessments, no or only a very limited analysis of condition, manner, or duration is necessary.

At the same time, individuals seeking coverage under the first or second prong of the definition of "disability" should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Such evidence may comprise facts related to condition, manner, or duration. And, covered entities may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts unrelated to condition, manner, or duration that are not pertinent to the substantial limitation of a major life activity that the individual has proffered.

Sections 35.108(d)(4) and 36.105(d)(4)—Examples of mitigating measures.

The rules of construction set forth at §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) of the final rule make clear that the ameliorative effects of mitigating measures shall not be considered when determining whether an impairment substantially limits a major life activity. In the NPRM, proposed §§ 35.108(d)

(4) and 36.105(d)(4) provided a non-inclusive list of mitigating measures, which includes medication, medical supplies, equipment, appliances, low-vision devices, prosthetics, hearing aids, cochlear implants and implantable hearing devices, mobility devices, oxygen therapy equipment, and assistive technology. In addition, the proposed regulation clarified that mitigating measures can include “learned behavioral or adaptive neurological modifications,” psychotherapy, behavioral therapy, or physical therapy, and “reasonable modifications” or auxiliary aids and services.

The phrase “learned behavioral or adaptive neurological modifications,” is intended to include strategies developed by an individual to lessen the impact of an impairment. The phrase “reasonable modifications” is intended to include informal or undocumented accommodations and modifications as well as those provided through a formal process.

The ADA as amended specifies one exception to the rule on mitigating measures, stating that the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether a person has an impairment that substantially limits a major life activity and thereby is a person with a disability. 42 U.S.C. 12102(4)(E)(ii). As discussed above, §§ 35.108(d)(4)(i) and 36.105(d)(4)(i) incorporate this exception by excluding ordinary eyeglasses and contact lenses from the definition of “low-vision devices,” which are mitigating measures that may not be considered in determining whether an impairment is a substantial limitation.

The Department received a number of comments supporting the Department’s language in these sections and its broad range of examples of what constitutes a mitigating measure. Commenters representing students with disabilities specifically supported the inclusion of “learned behavioral or adaptive neurological modifications,” noting that the section “appropriately supports and highlights that students [and individuals in other settings] may

have developed self-imposed ways to support their disability in order to perform major life activities required of daily life and that such measures cannot be used to find that the person is not substantially limited.”

The Department notes that self-mitigating measures or undocumented modifications or accommodations for students who have impairments that substantially limit learning, reading, writing, speaking, or concentrating may include such measures as arranging to have multiple reminders for task completion; seeking help from others to provide reminders or to assist with the organization of tasks; selecting courses strategically (such as selecting courses that require papers instead of exams); devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts (including strategies such as highlighting and margin noting); being permitted extra time to complete tests; receiving modified homework assignments; or taking exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether formal or informal, documented or undocumented, can improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. However, when the determination of disability is made without considering the ameliorative effects of these measures, as required under the ADA as amended, these individuals still have a substantial limitation in major life activities and are covered by the ADA. *See also* discussion of §§ 35.108(d)(1) and 36.105(d)(1), above.

Some commenters argued that the Department’s examples of mitigating measures inappropriately include normal learning strategies and asked that the Department withdraw or narrow its discussion of self-mitigating measures. The Department disagrees. Narrowing the discussion of self-mitigating measures to exclude normal or common strategies would not be

consistent with the ADA Amendments Act. The Department construes learned behavioral or adaptive neurological modifications broadly to include strategies applied or utilized by an individual with a disability to lessen the effect of an impairment; whether the strategy applied is normal or common to students without disabilities is not relevant to whether an individual with a disability's application of the strategy lessens the effect of an impairment.

An additional commenter asked the Department to add language to the regulation and preamble addressing mitigating measures an individual with ADHD may employ. This commenter noted that “[a]n individual with ADHD may employ a wide variety of self-mitigating measures, such as exertion of extensive extra effort, use of multiple reminders, whether low tech or high tech, seeking a quiet or distraction free place or environment to do required activities.” The Department agrees with this commenter that these are examples of the type of self-mitigating measures used by individuals with ADHD, but believes that they fall within the range of mitigating measures already addressed by the regulatory language.

Another commenter asked the Department to add language to the regulation or preamble addressing surgical interventions in a similar fashion to the approach taken in the EEOC's title I preamble, 76 FR 16978, 16983 (Mar. 25, 2011). There, the EEOC noted that a surgical intervention may be an ameliorative mitigating measure that could result in the permanent elimination of an impairment, but it also indicated that confusion about how this example might apply recommended against its inclusion in the regulatory text. Therefore, the EEOC eliminated that example from the draft regulatory text and recommended that, “[d]eterminations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.” The Department agrees with the EEOC and underscores that surgical interventions may constitute mitigating measures that should not be

considered in determining whether an individual meets the definition of "disability." The Department declines to make any changes to its proposed regulatory text for these sections of the final rule.

The ADA Amendments Act provides an "illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered." 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) at 9; *see also* H.R. Rep. No. 110-730, pt. 2, at 20 (2008). The absence of any particular mitigating measure should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. *Id.* This principle applies equally to the non-exhaustive list in §§ 35.108(d)(4) and 36.105(d)(4).

Sections 35.108(e) and 36.105(e)—Has a record of such an impairment.

The second prong of the definition of "disability" under the ADA provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability.

42 U.S.C. 12102(1)(B).

Paragraph (3) of the definition of "disability" in the existing title II and title III regulations states that the phrase "has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 28 CFR 35.104, 36.104. The NPRM proposed keeping the language in the title II and title III regulations (with minor editorial changes) but to renumber it as §§ 35.108(e)(1) and 36.105(e)(1). In addition, the NPRM proposed adding a new second paragraph stating that any individual's assertion of a record of impairment that substantially limits a major life activity should be broadly construed to the maximum extent permitted by the ADA and should not require extensive analysis. If an individual has a history

of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment, then that individual will satisfy the third prong of the definition of “disability.” The NPRM also proposed adding paragraph (3), which provides that “[a]n individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.”

The Department received no comments objecting to its proposed language for these provisions and has retained it in the final rule. The Department received one comment requesting additional guidance on the meaning of these provisions. The Department notes that Congress intended this prong of the definition of “disability” to ensure that people are not discriminated against based on prior medical history. This prong is also intended to ensure that individuals are not discriminated against because they have been misclassified as an individual with a disability. For example, individuals misclassified as having learning disabilities or intellectual disabilities are protected from discrimination on the basis of that erroneous classification. *See* H.R. Rep. No. 110–730, pt. 2, at 7–8 & n.14 (2008).

This prong of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual’s major life activities. The terms “substantially limits” and “major life activity” under the second prong of the definition of “disability” are to be construed in accordance with the same principles applicable under the “actual disability” prong, as set forth in §§ 35.108(b) and 36.105(b).

There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment

records. The Department notes that past history of an impairment need not be reflected in a specific document. Any evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a “record of” a substantially limiting impairment—and thus establish coverage under the “record of” prong of the statute—even if a covered entity does not specifically know about the relevant record. For the covered entity to be liable for discrimination under the ADA, however, the individual with a “record of” a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

Individuals who are covered under the “record of” prong may be covered under the first prong of the definition of “disability” as well. This is because the rules of construction in the ADA Amendments Act and the Department’s regulations provide that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. *See* §§ 35.108(d)(1)(iv); 36.105(d)(1)(iv). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the “actual disability” prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the “record of” prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, these provisions of the regulations clarify that an individual with a record of a disability is entitled to a reasonable modification currently needed relating to the past substantially limiting impairment. In the legislative history, Congress stated that reasonable modifications were available to persons covered under the second prong of the definition. *See* H.R. Rep. No. 110–730, pt. 2, at 22 (2008) (“This makes clear that the duty to accommodate ... arises only when an individual establishes coverage under the first or

second prong of the definition.”). For example, a high school student with an impairment that previously substantially limited, but no longer substantially limits, a major life activity may need permission to miss a class or have a schedule change as a reasonable modification that would permit him or her to attend follow-up or monitoring appointments from a health care provider.

Sections 35.108(f) and 36.105(f)—Is regarded as having such an impairment.

The “regarded as having such an impairment” prong of the definition of “disability” was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition, but who were subject to adverse decisions by covered entities based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The rationale for the “regarded as” part of the definition of “disability” was articulated by the Supreme Court in the context of section 504 of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline*, the Court noted that, although an individual may have an impairment that does not diminish his or her physical or mental capabilities, it could “nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.” *Id.* at 283. Thus, individuals seeking the protection of the ADA under the “regarded as” prong only had to show that a covered entity took some action prohibited by the statute because of an actual or perceived impairment. At the time of the *Arline* decision, there was no requirement that the individual demonstrate that he or she, in fact, had or was perceived to have an impairment that substantially limited a major life activity. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, if a daycare center refused to admit a child with burn scars because of the presence of the scars, then the daycare center regarded the

child as an individual with a disability, regardless of whether the child's scars substantially limited a major life activity.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court significantly narrowed the application of this prong, holding that individuals who asserted coverage under the “regarded as having such an impairment” prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that “an actual, nonlimiting impairment substantially limit[ed]” a major life activity, when in fact the impairment was not so limiting. *Id.* at 489. Congress expressly rejected this standard in the ADA Amendments Act by amending the ADA to clarify that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act. 42 U.S.C. 12102(3)(A). This amendment restores Congress’s intent to allow individuals to establish coverage under the “regarded as” prong by showing that they were treated adversely because of an actual or perceived impairment without having to establish the covered entity’s beliefs concerning the severity of the impairment. *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008).

Thus, under the ADA as amended, it is not necessary, as it was prior to the ADA Amendments Act and following the Supreme Court’s decision in *Sutton*, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the “regarded as” prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be “regarded as having such an impairment.” In short, to be covered under the

“regarded as” prong, an individual is not subject to any functional test. *See* 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“The functional limitation imposed by an impairment is irrelevant to the third ‘regarded as’ prong.”); H.R. Rep. No. 110–730, pt. 2, at 17 (2008) (“[T]he individual is not required to show that the perceived impairment limits performance of a major life activity.”) The concepts of “major life activities” and “substantial limitation” simply are not relevant in evaluating whether an individual is “regarded as having such an impairment.”

In the NPRM, the Department proposed §§ 35.108(f)(1) and 36.105(f)(1), which are intended to restore the meaning of the “regarded as” prong of the definition of “disability” by adding language that incorporates the amended statutory provision: “An individual is ‘regarded as having such an impairment’ if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor.”

The proposed provisions also incorporate the statutory definition of transitory impairment, stating that a “transitory impairment is an impairment with an actual or expected duration of six months or less.” The “transitory and minor” exception was not in the third prong in the original statutory definition of “disability.” Congress added this exception to address concerns raised by the business community that “absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu.” *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008). However, as an exception to the general rule for broad coverage under the “regarded as” prong, this limitation on coverage should be construed narrowly. *Id.* The ADA Amendments Act did not define “minor.”

In addition, proposed §§ 35.108(f)(2) and 36.105(f)(2) stated that any time a public entity or covered entity takes a prohibited action because of an individual's actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action, that individual is "regarded as" having such an impairment. Commenters on these provisions recommended that the Department revise its language to clarify that the determination of whether an impairment is in fact "transitory and minor" is an objective determination and that a covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed that the impairment is transitory and minor. In addition, a number of commenters cited the EEOC title I rule at 29 CFR 1630.15(f) and asked the Department to clarify that "the issue of whether an actual or perceived impairment is 'transitory and minor' is an affirmative defense and not part of the plaintiff's burden of proof." The Department agrees with these commenters and has revised paragraphs (1) and (2) of these sections for clarity, as shown in §§ 35.108(f)(2) and 36.105(f)(2) of the final rule.

The revised language makes clear that the relevant inquiry under these sections is whether the actual or perceived impairment that is the basis of the covered entity's action is objectively "transitory and minor," not whether the covered entity claims it subjectively believed the impairment was transitory and minor. For example, a private school that expelled a student whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the student's impairment was transitory and minor, because bipolar disorder is not objectively transitory and minor. Similarly, a public swimming pool that refused to admit an individual with a skin rash, mistakenly believing the rash to be symptomatic of HIV, will have "regarded" the individual as having a disability. It is not a defense to coverage that the skin rash was objectively transitory and minor because the covered entity

took the prohibited action based on a perceived impairment, HIV, that is not transitory and minor.

The revised regulatory text also makes clear that the “transitory and minor” exception to a “regarded as” claim is a defense to a claim of discrimination and not part of an individual’s prima facie case. The Department reiterates that to fall within this exception, the actual or perceived impairment must be *both* transitory (less than six months in duration) *and* minor. For example, an individual with a minor back injury could be “regarded as” an individual with a disability if the back impairment lasted or was anticipated to last more than six months. The Department notes that the revised regulatory text is consistent with the EEOC rule which added the transitory and minor exception to its general affirmative defense provision in its title I ADA regulation at 29 CFR 1630.15(f). Finally, in the NPRM, the Department proposed §§ 35.108(f)(3) and 36.105(f)(3) which provided that an individual who is “regarded as having such an impairment” does not establish liability based on that alone. Instead, an individual can establish liability only when an individual proves that a private entity or covered entity discriminated on the basis of disability within the meaning of the ADA. This provision was intended to make it clear that in order to establish liability, an individual must establish coverage as a person with a disability, as well as establish that he or she had been subjected to an action prohibited by the ADA.

The Department received no comments on the language in these paragraphs. Upon consideration, in the final rule, the Department has decided to retain the regulatory text for §§ 35.108(f)(3) and 36.105(f)(3) except that the reference to “covered entity” in the title III regulatory text is changed to “public accommodation.”

Sections 35.108(g) and 36.105(g)—Exclusions.

The NPRM did not propose changes to the text of the existing exclusions contained in paragraph (5) of the definition of “disability” in the title II and title III regulations, *see* 28 CFR 35.104, 36.104, which are based on 42 U.S.C. 12211(b), a statutory provision that was not modified by the ADA Amendments Act. The NPRM did propose to renumber these provisions, relocating them at §§ 35.108(g) and 36.105(g) of the Department’s revised definition of “disability.” The Department received no comments on the proposed renumbering, which is retained in the final rule.

Sections 35.130(b)(7)(i)—General Prohibitions against Discrimination and 36.302(g)—Modifications in policies, practices, or procedures.

The ADA Amendments Act revised the ADA to specify that a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, “need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability” solely on the basis of being regarded as having an impairment. 42 U.S.C. 12201(h). In the NPRM, the Department proposed §§ 35.130(b)(7)(i) and 36.302(g) to reflect this concept, explaining that a public entity or covered entity “is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the ‘regarded as’ prong of the definition of disability.” These provisions clarify that the duty to provide reasonable modifications arises only when the individual establishes coverage under the first or second prong of the definition of “disability.” These provisions are not intended to diminish the existing obligations to provide reasonable modifications under title II and title III of the ADA.

The Department received no comments associated with these provisions and retains the NPRM language in the final rule except for replacing the words “covered entity” with “public accommodation” in § 36.302(g).

Sections 35.130(i) and 36.201(c)—Claims of no disability.

The ADA as amended provides that “[n]othing in this [Act] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”

42 U.S.C. 12201(g). In the NPRM the Department proposed adding §§ 35.130(i) and 36.201(c) to the title II and title III regulations, respectively, which incorporate similar language. These provisions clarify that persons without disabilities do not have an actionable claim under the ADA on the basis of not having a disability.

The Department received no comments associated with this issue and has retained these provisions in the final rule.

Effect of ADA Amendments Act on academic requirements in postsecondary education.

The Department notes that the ADA Amendments Act revised the rules of construction in title V of the ADA by including a provision affirming that nothing in the Act changed the existing ADA requirement that covered entities provide reasonable modifications in policies, practices, or procedures unless the entity can demonstrate that making such modifications, including academic requirements in postsecondary education, would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations involved. *See* 42 U.S.C. 12201(f). Congress noted that the reference to academic requirements in postsecondary education was included “solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic. Specifically, the reference to academic standards in post-secondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting

the definition of "disability." 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers). Given that Congress did not intend there to be any change to the law in this area, the Department did not propose to make any changes to its regulatory requirements in response to this provision of the ADA Amendments Act.

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

7. Revise the authority citation for part 36 to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b) and 12205a.

8. Revise § 36.101 to read as follows:

§ 36.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by covered public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this

part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part should not demand extensive analysis.

* * * * *

9. Amend § 36.104 by revising the definition of "Disability" to read as follows:

§ 36.104 Definitions.

* * * * *

Disability. The definition of *disability* can be found at § 36.105.

* * * * *

10. Add § 36.105 to subpart A to read as follows:

§ 36.105 Definition of "disability."

(a)(1) *Disability* means, with respect to an individual,

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (f) of this section.

(2) *Rules of construction.*

(i) The definition of "disability" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of "disability" in paragraph (a)(1) of this section, the "actual disability" prong in paragraph (a)(1)(i) of this section, the "record of" prong in paragraph (a)(1)(ii) of this section, or the "regarded as" prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a public accommodation's failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of "disability", which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" or "record of" prong regardless of whether the individual is challenging a public accommodation's failure to provide reasonable modifications.

(b)

(1) *Physical or mental impairment* means—:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),

cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) *Physical or mental impairment* does not include homosexuality or bisexuality.

(c)

(1) *Major life activities* include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a *major bodily function*, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal,

and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.* (i) In determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a *major life activity* is not determined by reference to whether it is of *central* importance to daily life.

(d) *Substantially limits.*

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under title III of the ADA should be whether public accommodations have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(vii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month “transitory” part of the “transitory and minor” exception in paragraph (f)(2) of this section does not apply to the “actual disability” or

“record of” prongs of the definition of “disability.” The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.*

(i) The principles set forth in the rules of construction in this section are intended to provide for more generous coverage and application of the ADA’s prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the “actual disability” prong) or paragraph (a)(1)(ii) of this section (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments, set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

- (C) Intellectual disability substantially limits brain function;
- (D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
- (E) Autism substantially limits brain function;
- (F) Cancer substantially limits normal cell growth;
- (G) Cerebral palsy substantially limits brain function;
- (H) Diabetes substantially limits endocrine function;
- (I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;
- (J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and
- (K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.*

- (i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of "disability," the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices

(defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment.*

(1) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of "disability" if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification.* An individual with a record of a substantially

limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the “regarded as” prong of the definition of “disability” (paragraph (a)(1)(iii) of this section):

(1) Except as set forth in paragraph (f)(2) of this section, an individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the public accommodation asserts, or may or does ultimately establish, a defense to the action prohibited by the ADA.

(2) An individual is not “regarded as having such an impairment” if the public accommodation demonstrates that the impairment is, objectively, both “transitory” and “minor.” A public accommodation may not defeat “regarded as” coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the public accommodation must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both “transitory” and “minor.” For purposes of this section, “transitory” is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under title III of the ADA only when an individual proves that a public accommodation discriminated on the basis of disability within the meaning of title III of the ADA, 42 U.S.C. 12181–12189.

(g) *Exclusions.* The term “disability” does not include—

- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) Compulsive gambling, kleptomania, or pyromania; or
- (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

* * * * *

Subpart B—General Requirements

11. Amend § 36.201 by adding paragraph (c) to read as follows:

§ 36.201 General.

* * * * *

(c) *Claims of no disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

Subpart C—Specific Requirements

12. Amend § 36.302 by adding paragraph (g) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

* * * * *

(g) *Reasonable modifications for individuals “regarded as” having a*

disability. A public accommodation is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of "disability" at § 36.105(a)(1)(iii).

* * * * *

13. Add appendix E to part 36 to read as follows:

APPENDIX E - GUIDANCE TO REVISIONS TO ADA TITLE II AND TITLE III REGULATIONS REVISING THE MEANING AND INTERPRETATION OF THE DEFINITION OF "DISABILITY" AND OTHER PROVISIONS IN ORDER TO INCORPORATE THE REQUIREMENTS OF THE ADA AMENDMENTS ACT

For guidance providing a section-by-section analysis of the revisions to 28 CFR parts 35 and 36 published on August 11, 2016, see appendix C of 28 CFR part 35.

Loretta E. Lynch
Attorney General

1 The Findings and Purposes of the ADA Amendments Act are also referenced in the codification of the ADA as a note to 42 U.S.C. 12101.

2 For ease of reference for purposes of the discussion of costs in the Regulatory Assessment, the Department will use the term "accommodations" to reference the provision of extra time, whether it is requested as a reasonable modification pursuant to 28 CFR 35.130(b)(7) and 28 CFR 36.302, or as a testing accommodation (modifications, accommodations, or auxiliary aids and services) provided pursuant to 42 U.S.C. 12189 and 28 CFR 36.309. The Department wishes to preserve the legal distinction between these two terms in its guidance on the requirements of the ADA Amendments Act so it will use both terms where appropriate in the Section by Section Analysis and Guidance.

3 The Department is using the term ADHD in the same manner as it is currently used in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5), to refer to three different presentations of symptoms: predominantly inattentive (which was previously known as “attention deficit disorder); predominantly hyperactive or impulsive; or a combined presentation of inattention and hyperactivity-impulsivity. The DSM-5 is the most recent edition of a widely-used manual designed to assist clinicians and researchers in assessing mental disorders. See *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition DSM-5*, American Psychiatric Association, at 59 – 66 (2013).

4 On September 23, 2009, the EEOC published its NPRM in the Federal Register proposing revisions to the title I definition of disability. See 74 FR 48431. The EEOC received and reviewed more than 600 public comments in response to its NRPM. In addition, the EEOC and the Department held four joint “Town Hall Listening Sessions” throughout the United States and heard testimony from more than 60 individuals and representatives of the business/employer industry and the disability advocacy community.

5 A number of commenters on the NPRM expressed concern that the Department’s focus on the economic impact of the ADA Amendments Act with respect to individuals with learning disabilities and in the area of education and testing might lead the public to think that the Department did not believe the ADA Amendments Act would benefit persons with other disabilities or in the full range of situations and contexts covered by titles II and III of the ADA.

6 Coleen A. Boyle, *et al.*, *Trends in the Prevalence of Developmental Disabilities in US Children, 1997–2008*, 127 *Pediatrics* 1034 (2011), available at <http://pediatrics.aappublications.org/content/pediatrics/early/2011/05/19/peds.2010-2989.full.pdf> (last visited April 22, 2016); see also Matt Krupnick, *Colleges respond to growing ranks of learning disabled*, *The Hechinger Report* (Feb. 13, 2014), available at <http://hechingerreport.org/colleges-respond-to-growing-ranks-of-learning-disabled/> (last visited Feb. 3, 2016).

7 U.S. Department of Education, National Center for Education Statistics, *Fast Facts: Enrollment*, available at <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Feb. 3, 2016).

8 See Stephen B. Thomas, *College Students and Disability Law*, 33 J.

Special Ed. 248 (2000), *available at* <http://www.idonline.org/article/6082/> (last visited Apr. 22, 2016).

9 Centers for Disease Control and Prevention, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years – Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, MMWR 2014; 63 (SS-02), *available at* <http://www.cdc.gov/mmwr/pdf/ss/ss6302.pdf> (last visited April 22, 2016).

10 See Justin Pope, *Students with Autism, Other Disabilities Have More College Options Than Ever Before*, *Huff Post Impact*, *available at* http://www.huffingtonpost.com/2013/09/16/autism-college-options_n_3934583.html (Sept. 16, 2013) (last visited Feb. 3, 2016).

11 Cornell University – Disability Information, *Institutional Disability Access Management Strategic Plan for Cornell University, July 1, 2013 - June 30, 2014*, *available at* <http://disability.cornell.edu/docs/2013-2014-disability-strategic-plan.pdf> (last visited Feb. 3, 2016).

12 As in other types of housing environments, students who wish to have emotional support animals in housing provided by their place of education may make those requests under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and not the ADA.

13 Under the IDEA, a “child with a disability” is a child “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance ... orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities [and] who, by reason thereof, needs special education and related services.” 20 U.S.C. 1401(3). The IDEA regulation elaborates on each disability category used in the statute. See 34 CFR 300.8.

14 See Mark Schneider, *How Much Is That Bachelor’s Degree Really Worth?: The Million Dollar Misunderstanding*, American Enterprise Institute, AEI Online (May 2009), *available at* <http://www.aei.org/article/education/higher-education/how-much-is-that-bachelors-degree-really-worth/> (last visited Feb. 3, 2016); U.S. Census Bureau, *Work-Life earnings by Field of Degree and Occupation for People with a Bachelor’s Degree: 2011*, American Community Survey Briefs (Oct. 2012), *available at* <http://www.census.gov/prod/2012pubs/acsbr11-04.pdf> (last visited Feb. 3, 2016); Anthony P. Carnevale *et al.*, *The College Payoff—Education, Occupations, Lifetime Earnings*, Georgetown University

Center on Education and the Workforce (2011), *available at* <https://cew.georgetown.edu/wp-content/uploads/2014/11/collegepayoff-complete.pdf> (last visited April 22, 2016).

15 U.S. Department of Education, National Center for Education Statistics (2015). *Digest of Education Statistics, 2013* (NCES 2015-011), Chapter 2. 2011-2012 academic year - Number of Title IV institutions, by level and control of institution and state or other jurisdiction, available at <https://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Feb.3, 2016).

16 U.S. Census Bureau, Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Receipt Sizes for the United States, NAICS Sectors: 2012, available at <http://www.census.gov/econ/susb/> (last visited Feb. 3, 2016).

17 North American Industry Classification System.

18 U.S. Small Business Administration, *Table of Small Business Size Standards*, available at <https://www.sba.gov/content/small-business-size-standards> (last visited April 22, 2016).

19 Using data reported by the Census Bureau for 2007, the most recent year for which information on NAICS 6117102 was available.

20 Dysgraphia is a learning disability that negatively affects the ability to write.

21 Dyscalculia is a learning disability that negatively affects the processing and learning of numerical information.

22 The Department is using the term ADHD in the same manner as it is currently used in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5), to refer to three different presentations of symptoms: predominantly inattentive (which was previously known as "attention deficit disorder); predominantly hyperactive or impulsive; or a combined presentation of inattention and hyperactivity-impulsivity. The DSM-5 is the most recent edition of a widely-used manual designed to assist clinicians and researchers in assessing mental disorders. See *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition DSM-5*, American Psychiatric Association, at 59-66 (2013).

23 Pregnancy-related impairments may include, but are not limited to: disorders of the uterus and cervix, such as insufficient cervix or uterine fibroids; and pregnancy-related anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms,

limited circulation, or depression. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, June 25, 2015, available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Feb. 3, 2016).

24 “Executive function” is an umbrella term that has been described as referring to “a constellation of cognitive abilities that include the ability to plan, organize, and sequence tasks and manage multiple tasks simultaneously.” See, e.g. National Institute of Neurological Disorders and Stroke, *Domain Specific Tasks of Executive Functions*, available at grants.nih.gov/grants/guide/notice-files/NOT-NS-04-012.html (last visited Feb. 3, 2016).

25 In *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 970 F. Supp. 1094, 1117 (S.D.N.Y. 1997), *aff’d in part and vacated in part*, 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated on other grounds*, 527 U.S. 1031 (1999), and *aff’d in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000), then-Judge Sotomayor stated, “[I]n the modern era, where test-taking begins in the first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of ‘major life activity.’” See also *Rawdin v. American Bd. of Pediatrics*, 985 F. Supp. 2d 636 (E.D. Pa. 2013), *aff’d on other grounds*, 2014 U.S. App. LEXIS 17002 (3d Cir. Sept. 3, 2014).

26 In the NPRM, the Department proposed adding “traumatic brain injury” to the predictable assessments list.