EDUCATION FOR AMERICANS WITH DISABILITIES: RECONCILING IDEA WITH THE 2008 ADA AMENDMENTS

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I. INTRODUCTION

The typical American student spends at least thirteen years in school, kindergarten through twelfth grade. Students graduating from high school or college in the spring of 2010 went to kindergarten in the same classrooms as students with Down syndrome and cerebral palsy.[1] They had gym, music, and art classes with children who were physically, visually or hearing impaired.[2] They worked on projects for Advanced Placement (AP) History with other students who had attention deficit hyperactivity disorder (ADHD) or dyslexia.[3] They have never known a system that did not include students with disabilities, and they have conceptualized the inclusive environment modeled in the school system as a way of life.[4]

The Individuals with Disabilities Education Act (IDEA)[5] is largely to be credited with the creation of this inclusive culture in American schools. Two additional federal enactments, the Americans with Disabilities Act (ADA)[6] and Section 504 of the Rehabilitation Act of 1973 (Section 504),[7] also are at the heart of the nation's inclusive culture. The Americans with Disabilities Act Amendments Act (ADAAA), which took effect in January 2009, however, might upset this culture as state departments of education, individual school districts, and educators begin to find they are overwhelmingly facing even more students

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1. Education Resources Information Center, *Including Students with Disabilities in General Education Classrooms* (1997), http://www.eric.ed.gov/PDFS/ED358677.pdf (discussing the 1975 Individuals with Disabilities Education Act's requirement that children with disabilities are educated with children who are not disabled to the greatest extent possible).

2. *Id.*

3. *Id.*

4. *Id.*

5. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006).

6. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006) (amended 2008).

7. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006). The basic purpose of the ADA was to extend Rehabilitation Act protection beyond just federal agencies to the private sector. *E.g.* Steven S. Lockey, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under The Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 110 (1997).

with a greater variety of disabilities requiring accommodation.[8] Educators may find they are without the guidance or resources to adequately provide services in compliance with all of these laws.[9] While the ADAAA broadens the definition of disability, the IDEA retains a strict construction of the term.[10] Because the ADAAA broadens the definition, the court cases in the future will turn primarily upon the reasonableness of the educators' accommodations.[11] The disability analysis under the ADAAA no longer considers performance with mitigating measures or devices, and a child's performance is no longer compared with the average.[12] At the same time, provisions of the IDEA proscribe procedures for identifying more "subtle" learning disabilities that require long-term observation of a student, which are known as "child find" provisions.[13] However, the recent Supreme Court decision in *Forest Grove School District v. T.A.* leaves schools without time to comply with more long-term methods required to identify specific learning disabilities (SLD).[14] Thus, schools are left with potential increased liability because students with disabilities, especially subtle or newly diagnosed learning disabilities that do not necessarily manifest in obvious achievement deficiencies, now have more protection under the ADA.[15]

This article examines the educational impact of the ADAAA by applying it to factual scenarios presented in ADA education cases from the late-1990s. Each case illustrates the former analysis of an ADA claim, from defining disability to determining reasonable accommodations.[16] The Analysis section of this article sets out a foreseeable shift in the analysis of an ADA claim after the ADAAA. Specifically, the focus will move away from a determination of whether a disability exists, which the ADAAA broadens.[17] Instead, courts will place more emphasis on whether a school discriminated against or reasonably accommodated each student, regardless of a student's own mitigating measures

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8. Americans with Disabilities Act Amendments Act, 42 U.S.C.A. §§ 12101-12213 (West 2008); *see also* ROBERT J. NOBILE, HUMAN RESOURCES GUIDE § 1:7 (2010) ("Beginning in January 2009, for purposes of the ADA, 'disability' is to be broadly construed and coverage will apply to the 'maximum extent' permitted by the ADA and the ADAAA.").

9. Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 642 (2009).

10. *Id.* at 654-55.

11. *See* 42 U.S.C.A. § 12101 (West 2008); *see also* Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs after the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 873-74 (2009).

12. Hensel, *supra* note 9, at 685-86.

13. *See* 20 U.S.C. § 1412(a)(3) (2006); *see also* Hensel, *supra* note 9, at 692-93.

14. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 (2009).

15. *See id.*

16. *See* Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); McPherson v. Mich. High Sch. Athletic Ass'n., 119 F.3d 453 (6th Cir. 1997).

17. *See* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. LAW. MAG., Feb. 2009, at 37, *available at* http://www.employmentlawwatch.com/uploads/file/Disabling%20the%20ADAAA.pdf.

or his achievement compared with an "average" student's performance.[18] The new analysis of an ADA claim is contrasted with the new analysis of an IDEA claim in light of *Forest Grove.*[19] Finally, this article highlights the unique challenges that public schools face as a result of the ADAAA and IDEA provisions, including accommodating a diverse population of abilities and disabilities.

II. BACKGROUND & FACTS

This section provides an overview of three federal acts that work towards educating and accommodating students with disabilities: the IDEA, Section 504, and the ADAAA. Next, this section provides the background, holdings, and court reasoning in three ADA claims from the 1990s, illustrating the traditional analysis of an ADA claim in the school setting, as well as the way ADA protections overlap with those under Section 504 and the IDEA. Finally, this section provides an overview of the recent Supreme Court decision in *Forest Grove,* regarding specific provisions for identifying and serving disabilities under the IDEA.[20]

A. Overview of the Individuals with Disabilities in Education Act & Special Education in Public Schools

Before 1975, public education institutions could exclude most children with even minor disabilities.[21] In 1975, however, Congress passed the Education for All Handicapped Children Act of 1975, which later became the IDEA, which provides protection for students with special educational needs.[22] Congress recognized that "the educational needs of millions of children with disabilities were not being fully met" for four main reasons: (1) "the children did not receive *appropriate* educational services;" (2) "the children were *excluded entirely* from the public school system and from being educated with their peers;" (3) "*undiagnosed disabilities* prevented the children from having a successful educational experience;" and (4) "a lack of *adequate resources* within the public school system forced families to find services outside the public school system."[23] Since 1975, the number of students with disabilities receiving public education in the United States has risen dramatically.[24]

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18. Hensel, *supra* note 9, at 685-86.
19. *Forest Grove*, 129 S. Ct. at 2484.
20. *See id.* at 2484.
21. U.S. Dep't of Educ., Thirty Years of Progress in Educating Children with Disabilities through IDEA, http://www.ed.gov/policy/speced/leg/idea/history30.html (last visited March 25, 2010).
22. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006).
23. 20 U.S.C. § 1400(c)(2)(A)-(D) (emphasis added).
24. U.S. Dep't of Educ., Thirty Years of Progress in Educating Children with Disabilities through IDEA, *supra* note 21.

The purpose of the IDEA is to ensure a free appropriate public education (FAPE) that meets the unique needs of children with disabilities to "prepare them for further education, employment, and independent living."[25] Additionally, the IDEA was designed to "assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities" by enacting a scheme for funding special education programs at the state and local levels.[26]

However, the IDEA narrowly defines a "child with a disability" to include a child identified with one of the following impairments: "mental retardation, hearing impairments . . . , speech or language impairments, visual impairments . . . , serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."[27] Because doctors, therapists, and other professionals who diagnose disabilities oftentimes do not refer to disorders in the same language as the categories the IDEA provides, educators must attempt to "fit" professional diagnoses within the categories provided under the IDEA when they initially identify a child for special education services.[28] Additionally, to fall under the IDEA, the identified disability must actually create a need for special education and services.[29] In other words, the impairment itself must create a clear adverse effect on the child's academic achievement to trigger IDEA protections and services.[30]

For children ages three through nine, the definition of "child with a disability" under the IDEA is slightly different. At those early ages, state and local education agencies have discretion to include children who experience impairments beyond the general list, including developmental delays, as defined by the state, in one or more of the following areas: "physical development; cognitive development; communication development; social or emotional development; or adaptive development."[31] Again, the developmental delay must mandate the child's need for special education and related services.[32]

Case law has analyzed disorders that fall within each category under the IDEA, including specific diseases and disorders that have been "approved" by courts to support a student's disability claim. For instance, courts have held that chronic fatigue syndrome and fibromyalgia are ailments sufficient to qualify a student as a "child with a disability" under the IDEA.[33] In one New York case, a "serious emotional disturbance," as defined by state and federal regulations, was

25. 20 U.S.C. § 1400(d)(1)(A).
26. *Id.* at § 1400(d)(1)(C).
27. *Id.* at § 1401(3)(A)(i).
28. *Id.*
29. *Id.* at § 1401(3)(A)(ii).
30. 34 C.F.R. § 300.541 (2006).
31. 20 U.S.C. § 1401(3)(B)(i) (2006).
32. *Id.* at § 1401(3)(B)(ii).
33. *See* Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 150 (2d Cir. 2002).

enough to qualify a student with a disability under the IDEA.[34] Other courts have held that orthopedic impairments that accompany cerebral palsy constitute a disability under the IDEA.[35] Additionally, a student in Illinois, although performing at an age appropriate educational level, was found to be a "child with a disability" because his speech impairment was severe enough to affect his educational performance and overall ability to communicate.[36]

Additionally, courts have found students who performed well in school entitled to the protections and services offered under IDEA. For example, a student with an Intelligence Quotient (IQ) of 130, ranked in the "very superior" range of intelligence, was found to qualify as a "child with a disability" because of regular uncontrollable seizures that sometimes impaired his academic success.[37] Similarly, a child with Asperger's syndrome was a "child with a disability" even though she excelled academically, because Maine regulations considered social interactions related to educational performance, and the disorder caused the child to withdraw from her peers and mutilate herself during school hours.[38] Thus, regardless of the child's achievement, it is the way her disability affects her individualized aptitude that qualifies her for protection under the IDEA.[39]

The IDEA mandates that public schools are responsible for identification of students' disabilities, referred to as "child find" provisions.[40] In relevant part, the "child find" provision of the IDEA states that:

> All children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.[41]

This article is most concerned with the Response to Intervention (RTI) method of identifying a student's specific learning disability.[42] The RTI method

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34. Muller *ex rel.* Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 (2d Cir. 1998).

35. *See* Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996).

36. Mary P. v. Ill. State Bd. of Educ., 934 F. Supp. 989, 990-92 (N.D. Ill. 1996).

37. Corchado v. Bd. of Educ., Rochester City Sch. Dist., 86 F. Supp. 2d 168, 175-76 (W.D.N.Y. 2000).

38. Mr. I v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 17-23 (1st Cir. 2007).

39. 34 C.F.R. § 300.541 (2006).

40. *See* 20 U.S.C. § 1412(a)(3) (2006); *see also* 20 U.S.C. § 1414(a)(1)(A) (2006) ("A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.").

41. *See* 20 U.S.C. § 1412(a)(3)(A).

42. *See* Hensel, *supra* note 9, at 685-86.

involves a longitudinal study of an at-risk student's specific learning disability (LD).[43]

Much of RTI assessment involves progress monitoring.[44] It involves "tiers" of intervention.[45] In other words, the teacher starts with the least intense form of intervention, such as getting the parent involved in monitoring the student's work at home or spending a few extra minutes working one-on-one with that student during class activities that involve the area of suspected disability.[46] After a period of several weeks, progress data is recorded.[47] If the data indicates that the student has not responded to the intervention, the teacher moves to the next intervention "tier" and intensifies instruction.[48]

Some schools follow a specific "tiered" plan for every student,[49] whereas other schools let the teacher decide the appropriate levels of intervention. The second tier may involve reducing the number of homework problems assigned and providing after school help to complete the assigned problems, or it may involve working with the student on specific reading strategies like summarizing or paraphrasing. After working at the second tier for several weeks, progress data is again recorded.[50] If the student still has not responded to intervention, the teacher and student move to a third tier of intense intervention, which may involve collaboration with a special education teacher or resource teacher in the area of suspected disability.[51] Progress data is again recorded, and, if the student is still not responding, the teacher and student move to the most intense intervention tier.[52] Because schools use RTIs to identify disabilities, 15% of the budget can be allocated to RTIs.[53]

Once a child's disability is identified, a team of educational experts – teachers, administrators, school counselors and psychologists, special education coordinators and experts, and the child's parents – create an Individual Education Plan (IEP) for the child.[54] An IEP lays out the specific

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43. Jack M. Fletcher, Identifying Learning Disabilities in the Context of Response to Intervention: A Hybrid Model, http://www.rtinetwork.org/Learn/LD/ar/HybridModel.

44. Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why, and How Valid Is It?*, READING RES. Q., Jan. – Mar. 2006, at 93-94, *available at* http://www.reading.org/Publish.aspx?page=RRQ-41-1-Fuchs.html&mode=retrieve&D=10.1598/RRQ.41.1.4&F=RRQ-41-1-Fuchs.html&key=B147EDFA-EAD4-4710-AAD8-B242DD9F23F5.

45. *Id.* at 94.

46. *See* RTI Action Network, What is RTI?, http://www.rtinetwork.org/Learn/What/ar/WhatIsRTI (last visited March 25, 2010).

47. *See id.*

48. *See id.*

49. *See* Fuchs & Fuchs, *supra* note 44, at 95.

50. *See* RTI Action Network, *supra* note 46.

51. *See* Fuchs & Fuchs, *supra* note 44, at 94.

52. *See* RTI Action Network, *supra* note 46.

53. *See* Fuchs & Fuchs, *supra* note 44, at 93.

54. U.S. Dep't of Educ., A Guide to the Individualized Education Program, http://www.ed.gov/parents/needs/speced/iepguide/index.html#process (last visited March 25, 2010).

accommodations and specialized instruction that the school district will implement to help the child reach her individual educational goals.[55] Through IDEA, the federal government provides some funding to states, which is then allocated to individual districts, to assist with paying for the specialized provisions for each child with an IEP.[56]

B. Limits of Coverage

While the IDEA accommodates students who need specialized instruction because of their disabilities, courts have distinguished impairments that do not fit within the IDEA because the impairment does not constitute the cause of the child's inability to attain her potential aptitude.[57] For instance, in 2008 an Illinois court held that a student with diabetes mellitus, adjustment disorder, and social anxiety disorder was not a "child with a disability" under the IDEA because the reasons for the student's poor educational performance proved to be her poor attendance and neglect of make-up work, rather than her disabilities.[58] Similarly, a Texas court held that a child with attention deficit disorder (ADD) was not a "child with a disability" under the IDEA because he skipped class, failed to attempt homework, used marijuana, and did not take his prescribed ADD medication, all factors that inhibited his educational success more than the ADD itself.[59]

The ADA, via Section 504, protects some students who are not otherwise protected by the IDEA.[60] While the IDEA provides specific assistance and protection geared toward ensuring a FAPE, Section 504 instead focuses on the civil rights of Americans with disabilities who access federally funded programs or institutions.[61] Protection under the ADA and Section 504 is broader than under the IDEA because Congress's articulated purpose under Section 504 is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society."[62] Therefore, Congress articulated broader protection under these laws, going beyond educational contexts.[63] Section 504 states:

> It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter . . . shall be carried out

55. *Id.*

56. Memorandum from Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, U.S. Dep't of Educ., to State Directors of Special Education (Mar. 9, 2005), *available at* http://www.ed.gov/policy/speced/guid/idea/letters/2005-1/osep0507funds1q2005.pdf.

57. *See, e.g.*, Loch v. Bd. of Educ. of Edwardsville Comm. Sch. Dist. No. 7, 573 F. Supp. 2d 1072 (S.D. Ill. 2008).

58. *Id.* at 1084-85.

59. Austin Indep. Sch. Dist. v. Robert M., 168 F. Supp. 2d 635, 639-40 (W.D. Tex. 2001).

60. *See* 29 U.S.C. § 794a (a)(4) (2006).

61. *See id.* at § 701.

62. *Id.* at § 701(b)(1).

63. *Id.*

> in a manner consistent with the principles of (1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities; (2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals; (3) inclusion, integration, and full participation of the individuals; (4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and (5) support for individual and systemic advocacy and community involvement.[64]

Thus, Section 504 sets forth a general policy of inclusiveness for publicly funded programs and articulates the federal government's general policy of accommodating people with disabilities.[65] However, how those accommodations will be funded is minimally addressed.[66] Therefore, public schools that receive state and federal funding must adhere to the policy of accommodating students with disabilities, but unlike under the IDEA, they do not necessarily receive directed resources to do so.[67]

The purposes of the ADAAA are even more direct. Congress states that its four purposes are:

> (1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[68]

Like Section 504, the ADA contains no built-in funding scheme for ensuring resources to pay for the mandate.[69]

Often a student who does not qualify as a "child with a disability" under the IDEA can still find protection under Section 504 to obtain assistance to

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64. *Id.* at § 701(c).

65. *Id.*

66. *See* 29 U.S.C. § 703.

67. *See* U.S. Dep't of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, http://www.ed.gov/about/offices/list/ocr/504faq.html#interrelationship (last visited March 25, 2010).

68. 42 U.S.C.A. § 12101(b) (West 2008).

69. U.S. Dep't of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, *supra* note 67.

accomplish educational tasks the disability would otherwise impair.[70] Much like the creation of an IEP for a student with special education needs under IDEA, a student who has a "disability" as defined under the ADA is often provided with a "504 plan" that sets forth educational modifications for accommodating the student's disability.[71]

One of the biggest changes resulting from the enactment of the ADAAA was in defining "disability."[72] While the plain language of the definition from the ADA has not changed, other provisions of the ADAAA expand the scope of the term. Under the ADA, a "disability" is defined as: "with respect to an individual – a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[73] With regard to defining disability, the new rules of construction under the ADAAA provide:

> The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as – (I) medication, medical supplies, equipment, or appliances, low-vision devices, . . . prosthetics, . . . hearing aids and cochlear implants, . . . mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) *reasonable accommodations* or auxiliary aids or services; or (IV) *learned behavioral or adaptive neurological modifications.*[74]

This prohibition on considering mitigating measures under the ADAAA will broaden coverage for many individuals.[75] These new rules of construction will loosen courts' initial determinations of whether a protected disability exists.[76] In fact, Congress specifically noted in the ADAAA that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter," thus lowering the threshold determination as to whether a disability exists, and turning the focus to whether the school actually discriminated against an individual because of a disability by failing to offer a reasonable accommodation.[77]

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70. U.S. Dep't of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, *supra* note 67.

71. *See* JACQUIE BRENNAN, THE DISABILITY LAW HANDBOOK 23 (2009), http://www.bcm.edu/ilru/dlrp/html/publications/dlh/disabilitylawhandbook.pdf.

72. *See* 42 U.S.C.A. § 12102 (West 2008); *see also* Wilson & Krulewicz, *supra* note 17, at 37-38.

73. 42 U.S.C.A. § 12102(1) (West 2008).

74. 42 U.S.C.A. § 12102(4)(E)(i) (West 2008) (emphasis added).

75. U.S. Dep't of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, *supra* note 67.

76. 42 U.S.C.A. § 12102(4) (West 2008).

77. *Id.* at § 12102(4)(A).

C. A Cross-Section of Cases: The K-12 Disability & Reasonable Accommodation Analysis

In the education setting, ADA claims are uncommon because students with the most obvious or severe disabilities are protected under the IDEA.[78] In the mid-1990s, however, a series of education cases involving ADA claims were decided. These cases provide a cross-section of K-12 claims, illustrating pre-amendment ADA claims in the education setting and focusing on a two-part inquiry as to the existence of a disability and whether the school made reasonable accommodations.[79] These cases are representative of the type of issues that will emerge in the wake of the ADAAA.

1. *Kindercare* and the Undue Burden

In 1996, the Eighth Circuit examined the reasonableness of an accommodation requested for a four-year-old with disabilities.[80] The child's parents intended to enroll the child in Kindercare day care services.[81] Brandon, the four-year-old child, was developmentally delayed, suffered from seizures, was diagnosed with attention-deficit hyperactivity disorder (ADHD), and had a "tendency to commit self-injurious acts and to run away."[82] There was no question that Brandon qualified as a disabled individual under both the ADA and the IDEA definitions.[83] The IDEA and its protections eliminated the question of defining disability because the child's IEP served as a record of his disability.[84] His IEP required a continuous personal care attendant (PCA), funded by Brandon's Medicaid for up to thirty hours per week, to provide one-on-one care for him.[85] When Brandon's mother attempted to enroll him full-time at the local Kindercare Learning Center, forty to fifty hours per week, the director agreed to accept Brandon for the thirty hours a week when a PCA was provided, but not for any time when a PCA was not available.[86] In other words, the center refused to hire someone to supplement Brandon's one-on-one PCA.[87] The court held that the requested accommodation – that the center provide a one-on-one aide to the student – was not "reasonable" within the meaning of the ADA.[88]

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78. 20 U.S.C. § 1400 (2006).

79. *See* Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997); Roberts *ex rel.* Rodenberg-Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844 (8th Cir. 1996).

80. *Kindercare*, 86 F.3d at 844.

81. *Id.* at 845.

82. *Id.*

83. *Id.* at 845-46.

84. *Id.* at 846.

85. *Id.* at 845.

86. *Kindercare*, 86 F.3d at 845-46.

87. *Id.* at 846.

88. *Id.* at 847.

Title III of the ADA, which applies to private services such as the day care center involved here, prohibited discrimination against any individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[89] The court determined that daycare centers, such as the Kindercare Center in this case, were public accommodations under Title III of the ADA, and therefore that they must:

> [E]nsure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the . . . service[s] . . . being offered or would result in an undue burden.[90]

The important language in the quoted statute is the two exemptions for public accommodations: the undue burden and the fundamental alterations of the nature of the service.[91]

In *Kindercare*, the court specifically examined the burden imposed on the day care center if it were required to provide a one-on-one PCA for Brandon.[92] 28 C.F.R. §36.104 provided some guidelines:

> Significant difficulty or expense in making an accommodation constitutes an undue burden. . . . To determine whether a burden is undue, we consider (1) the nature and cost of the action; (2) the financial resources of the site involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative and financial relationship of the site to the corporation; (4) if applicable, the overall financial resources of the parent corporation and the number of facilities; and (5) if applicable, the type of operation of the parent corporation.[93]

Kindercare paid full-time aides an estimated $200 per week, and a child of Brandon's age paid only $105 per week in tuition, meaning that Brandon's requested accommodation would result in a net loss to Kindercare of about $95 per week.[94] The court found that because the Kindercare had a monthly operating budget of only $9,600, providing a full-time aide to Brandon would

89. 42 U.S.C.A. § 12182(a) (West 2008).
90. *Kindercare*, 86 F.3d at 846 (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).
91. *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (2006).
92. *Kindercare*, 86 F.3d at 846.
93. *Id.* (citing 28 C.F.R. § 36.104).
94. *Id.*

amount to a substantial financial burden on the center.[95] Therefore, Brandon's requested accommodation was not reasonable under the ADA.[96]

2. Elementary School, Ritalin, and Reasonable Accommodations

A year after the Eighth Circuit's decision in *Kindercare,* it heard a case involving the administration of Ritalin to an elementary school student.[97] Shane, the plaintiff, was prescribed a daily dosage of 360 milligrams of Ritalin to treat his ADHD, 120 milligrams of which was to be administered during the school day.[98] The school nurse at Shane's elementary school administered the school day dosage for over a year before she expressed concerns to Shane's parents that the dosage was not in compliance with the recommended maximum of sixty milligrams in the Physician's Desk Reference.[99] Shane's parents provided another doctor's opinion stating that the prescribed amount was not harmful to Shane, but the school nurse notified Shane's parents that she would no longer administer the medication.[100] "According to the district's policy on medication procedures, the school nurse has the right and obligation to question and verify potentially inappropriate prescriptions and 'to refuse to give any medication . . . .'"[101] As an accommodation for the school's refusal to administer Shane's medication, the district offered to allow one of Shane's parents, or someone designated by them, to come to the school to give Shane the medicine each day.[102]

The court held that the district's refusal to administer Ritalin did not violate either the ADA or Section 504 because allowing parents to give children medication during the school day was a reasonable accommodation.[103] Under the ADA at the time of the *Davis* decision, and under Section 504, a plaintiff claiming discrimination had to show that he was a qualified individual with a disability and that he was denied the benefits of a program, activity, or service by reason of that disability.[104] Although it was clear that Shane suffered from a disability, for which he took daily medication, the court held that the Davises could not "show that the district's policy [was] discriminatory because it 'applie[d] to all students regardless of disability' and rest[ed] on concerns 'unrelated to disabilities or misperceptions about them.'"[105] The court reasoned that because the district's refusal to administer the Ritalin was based on a

95. *Id.*
96. *Id.* at 847.
97. Davis v. Francis Howell Sch. Dist., 138 F.3d 754, 755 (8th Cir. 1998).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Davis*, 138 F.3d at 757.
104. *Id.* at 756 (referencing 42 U.S.C. § 12123; 29 U.S.C. § 794(a)).
105. *Id.* (citing DeBord v. Bd. of Educ., 126 F.3d 1102, 1105 (8th Cir. 1997)).

conflict about the dosage of medicine rather than a conflict about Shane's disability, the district policy itself did not deny services to Shane on the basis of his disability.[106]

Under Section 504, reasonable accommodations may be required when a student with a disability is denied access to a service.[107] The ADA regulations expand upon the reasonable accommodation requirement by mandating such accommodations when necessary to avoid discrimination on the basis of disability.[108] Again, programs, activities or services are exempted from changing their policies when "doing so would fundamentally alter the nature of the service" or "would create undue financial and administrative burdens."[109] The court found that, in this case, waiving the drug administration policy would impose undue financial and administrative burdens on the district because it would be required to determine the safety of dosages, the medication's potential harms, and the district's own liability in each case where a student was to receive medication at school, rather than allowing the school nurse to exercise discretion as to whether the dosage was safe.[110] The court determined that "[b]y offering an alternative arrangement the district did not prevent Shane from receiving his medication and reasonably accommodated his disability as a matter of law."[111]

3. A Middle School Student's ADHD and ODD Are Too Disruptive to Be Accommodated

In 1998 the First Circuit heard a case involving the indefinite suspension of a middle school student with a disability from a private school when the student repeatedly violated school codes of discipline and proper behavior.[112] Jason, the student in this case, attended the same school from pre-kindergarten until he was suspended from the sixth grade.[113] It was not until after filing a lawsuit against the school that his parents indicated that Jason suffered from ADHD, although roughly a month before the filing of the lawsuit Jason's psychologist diagnosed him with ADHD, as well as with oppositional defiance disorder (ODD) and childhood depression.[114] Jason's behavior had become so problematic that he completely disrupted the teaching and learning process in any classroom in which he was present.[115] The school previously made several attempts to

106. *Id.*
107. *Id.* at 756 (referencing Alexander v. Choate, 469 U.S. 287, 301-02 (1985)).
108. *Id.*
109. *Davis*, 138 F.3d at 756 (referencing 28 C.F.R. § 35.130(b)(7)).
110. *Id.* at 756-57.
111. *Id.* at 757 (referencing DeBord v. Bd. of Educ., 126 F.3d 1102, 1105-06 (8th Cir. 1997)).
112. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998).
113. *Id.* at 145.
114. *Id.*
115. *Id.*

accommodate and treat Jason's behavior, including making minor exceptions to the school discipline code in several instances.[116]

After Jason was suspended indefinitely, his parents sued the school under the ADA and Section 504, but because the school did not receive public funding, the Section 504 claim was dropped.[117] However, the court of appeals noted that the ADA and Section 504 claims were similar and imposed "parallel requirements."[118] While the lower court granted an injunction ordering the school to readmit Jason for the remainder of his sixth grade year and later extended that injunction to include enrollment for Jason's seventh grade year,[119] the court of appeals reversed, holding that Jason's parents did not meet their burden of showing that Jason was "otherwise qualified" to meet the disciplinary requirements with reasonable accommodations because the school's code of conduct was an integral aspect of a productive learning environment.[120] The court of appeals also found that Jason's parents did not meet their burden of showing that Jason suffered a substantial limitation in a major life activity; therefore, he was not disabled under the definitions then employed by the ADA.[121] In other words, the First Circuit held that the parents' request that their child be exempted from the normal operation of his school's disciplinary code was not reasonable under the ADA.[122]

4. A High School Athlete with ADHD Held Back One Year Not Allowed to Play Ball

In 1997 the Sixth Circuit heard a case involving a high school athlete with ADHD attending a public school in Michigan.[123] Dion, the student and plaintiff, attended his public high school for more than eight semesters, as he had to repeat the eleventh grade.[124] The school was a part of the Michigan High School Athletic Association (MHSA), which governed eligibility for players at member public and private schools.[125] While Dion was repeating eleventh grade, he was diagnosed with ADHD, a specific learning disability which was determined to be the cause of his retention.[126] During Dion's senior year, he attempted to play basketball at his school, but was refused eligibility because of a MHSA rule that

116. *Id.*
117. *Id.*
118. *Bercovitch*, 133 F.3d at 151 n.13 ("For present purposes, we treat the ADA and the Rehabilitation Act as imposing parallel requirements.... § 504 of the Rehabilitation Act 'is interpreted substantially identically to the ADA.'" (citations omitted)).
119. *Id.* at 144.
120. *Id.* at 154-55.
121. *Id.*
122. *Id.* at 145.
123. McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997).
124. *Id.* at 456.
125. *Id.* at 455.
126. *Id.* at 456.

prohibited students from participating in high school athletics beyond their eighth semester enrolled in high school.[127] The association's reason for the eight-semester eligibility rule was that it "creates a fair sense of competition by limiting the level of athletic experience and skill of the players in order to create a more even playing field for the competitors."[128]

Dion claimed that the rule discriminated against him because of his learning disability and sued under both the ADA and Section 504.[129] The district court issued an injunction that allowed Dion to play basketball during his senior year, but the court of appeals later concluded that he had "*no* possibility of success on the merits of his ADA or Rehabilitation Act claims," and overruled the district court's decision.[130] The court of appeals held that the eight semester eligibility rule did not violate Section 504 or the ADA.[131]

The issue at the appellate level was again whether requiring the athletic association to waive the eight-semester eligibility requirement for Dion would "impose undue financial and administrative burdens or require a fundamental alteration in the nature of the program."[132] The court found that both undue burden and fundamental alterations would make a waiver an unreasonable accommodation because a "waiver of the age restriction fundamentally alters the sports program," and it was impossible to consider on a case by case basis the physical maturity and athletic skill of every learning disabled student who requested a waiver of the eligibility rule.[133]

D. Forest Grove and Private School Reimbursement under the IDEA

While the four cases above illustrate the traditional analysis of an ADA claim, the recent Supreme Court decision in *Forest Grove School District v. T.A.* provides a new precedent for evaluating reimbursement to parents for private school education when they unilaterally remove their children from public schools they believe are not in compliance with the IDEA.[134]

T.A. attended public schools in the Forest Grove District from kindergarten through eleventh grade.[135] T.A's kindergarten through eighth grade teachers noticed he had trouble paying attention in class and completing homework.[136] In ninth grade, T.A.'s mother contacted the school to discuss T.A.'s problems, and T.A. was subsequently evaluated by the school psychologist, who determined

127. *Id.* at 455-56.
128. *Id.* at 456-57.
129. *McPherson,* 119 F.3d at 459.
130. *Id.* (emphasis in original).
131. *Id.* at 455.
132. *Id.* at 461.
133. *Id.* at 462.
134. *See* Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 (2009).
135. *Id.* at 2488.
136. *Id.*

T.A. did not need testing for ADHD.[137] T.A.'s parents did not seek review of the decision at the time.[138] In T.A.'s second semester of his eleventh grade year, his parents sought professional advice; soon thereafter T.A. was diagnosed with ADHD and other disabilities related to learning and memory.[139] T.A.'s parents enrolled him in a private academy for educating children with special needs, but did not notify the school district until four days after his new placement, and soon thereafter requested a hearing regarding T.A.'s eligibility for special education.[140] Between T.A.'s eleventh and twelfth grade years, the Forest Grove District's school psychologist evaluated T.A. again and concluded that the ADHD did not have a significant adverse impact on T.A.'s educational performance. As a result of the conclusions drawn by school administrators, the district declined to provide an IEP for T.A.[141] Nevertheless, for his twelfth grade year, T.A.'s parents left him enrolled in the private school.[142]

T.A.'s parents requested an administrative hearing, and the hearing officer determined that T.A.'s ADHD did adversely affect his educational performance, that the district failed to identify him pursuant to child find provisions of the IDEA, and that the district must reimburse T.A.'s parents for the cost of his private education.[143] When the school district sought judicial review, the district court held that "'[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities,' the facts of this case do not support equitable relief."[144] However, on appeal, the Ninth Circuit reversed the district court's holding, finding that the IDEA does not impose a categorical bar to reimbursement when a parent unilaterally places in private school a child who has not previously received special education services through the public school.[145]

The issue before the Supreme Court was whether the IDEA categorically prohibits reimbursement for private education costs if a child has not "previously received special education and related services under the authority of a public

137. *Id.*
138. *Id.*
139. *Id.*
140. *Forest Grove*, 129 S. Ct. at 2488.
141. *Id.* at 2488-89.
142. *Id.* at 2489.
143. *Id.* The primary determination of deficiency as it relates to the provisions of IDEA was the school's failure to offer a FAPE to a disabled student, particularly in light of the Court's prior decision in *Burlington*. *Id.* at 2495.
144. *Id.*
145. *Id.* at 2495. Prior to the 1997 amendments to IDEA, the provision was silent on the issue of private school reimbursement, yet courts permitted reimbursement to occur under the principles of equity in accordance with 20 U.S.C. § 1415(i)(2)(C). Congress specifically addressed the issue in 20 U.S.C. § 1412 (a)(10)(C) that provided the remedy of reimbursement for parents that relocated students in order to accommodate a disability.

agency."[146] The Court held that the IDEA authorizes reimbursement for the cost of private special education services when "a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."[147] The Court determined that a public school district is required to reimburse parents who unilaterally removed students with suspected disabilities from public schools when: (1) the district failed to provide a FAPE; and (2) the private placement was appropriate.[148] Even then, the court or hearing officer has discretion to determine whether the private placement was appropriate, and it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child.[149] Thus, *Forest Grove* is an important decision in terms of public schools' liabilities to children with disabilities, especially unidentified or subtle disabilities that may be encompassed in the broader definition of the term under the ADAAA.[150]

III. ANALYSIS

In each of the five cases above,[151] the courts' analysis began with whether the student was "disabled" under the legal definition.[152] Before the court would consider whether the school had made a reasonable accommodation in each student's circumstance, each student's unique disability was examined thoroughly.[153] With the ADAAA's broader definition of disability, the emphasis on fitting a unique disability into a pre-conceived ADA or IDEA definition will all but vanish, and the court's analysis will focus on whether discrimination occurred because of failure to implement a reasonable accommodation.

The shift presents unique challenges in the public school setting because, as discussed below, the analysis under the ADAAA begins to intrude on the IDEA's child find requirements, specifically the RTI method of identifying a

146. *Forest Grove*, 129 S. Ct. at 2488.

147. *Id.* at 2496.

148. *Id.* Lower courts have relied upon the *Forest Grove* decision to support broad determinations granting equitable relief to parents seeking educational opportunities for their children. *See* Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175, 1183 (9th Cir. 2009); Blake C. *ex rel.* Tina F. v. Dept. of Educ., 593 F. Supp. 2d 1199, 1208 (D. Haw. 2009).

149. *Forest Grove*, 129 S. Ct. at 2496.

150. 42 U.S.C.A. § 12102 (West 2008). *See* H.R. REP. NO. 101-485(II), at 51 (1990) (emphasizing the list of possible "disabilities" is too large to establish an exhaustive list, but rather legislation should be inclusive to encompass all disabilities).

151. *Forest Grove*, 129 S. Ct. 2484; Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997); Roberts *ex rel.* Rodenberg-Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844 (8th Cir. 1996).

152. 42 U.S.C.A. § 12102(1)(A) (West 2008); 20 U.S.C. § 1401 (2006) (defining disability).

153. *Forest Grove*, 129 S. Ct. at 2491; *Davis*, 138 F.3d at 756; *Bercovitch*, 133 F.3d at 143; *McPherson*, 119 F.3d at 459-60; *Kindercare*, 86 F.3d at 845.

child's specific learning disability.[154] The Supreme Court's decision in *Forest Grove* further complicates identification procedures in schools because parents can unilaterally pull their children from public schools and seek reimbursement for private school education,[155] or elect to sue under the ADA without regard for whether the school has had a real chance to reasonably accommodate the students' needs.

A. Defining and Proving a Disability Under Section 504

Definitions of disability have previously collided in the education setting.[156] For example, in *Bowers v. National Collegiate Athletic Association*, a college applicant was classified under the IDEA as having a "perceptual impairment," and he received special education services under his IEP.[157] However, the court found that such classification did not establish a "record" of disability for the purposes of an ADA claim.[158] Under the new amendments, however, a "record" of disability would most certainly be established by the existence of an IEP.[159] Remember Brandon, the student in *Kindercare* who was identified under the IDEA as developmentally delayed.[160] Although the *Kindercare* court began its analysis by defining disability under the ADA, it quickly concluded that Brandon's IEP served as a record of a disability even without documentation.[161]

In the school setting, disabilities such as ADHD, ODD, childhood depression, and specific learning disabilities are often difficult to diagnose because they often manifest as symptoms such as erratic behavior, inconsistent achievement on school assignments, and mood swings, all of which are arguably just characteristics of adolescence. Therefore, a court's attempt to fit symptoms of a disorder into Congress's legal definition proves difficult unless there is some "record of disability," oftentimes in the form of an IEP or a doctor's diagnosis.

Courts have struggled in the past to fit less obvious disabilities within the ADA definition. The petitioners from *Davis*, *Bercovitch*, and *McPherson* each had "subtle" disabilities that manifested through behaviors rather than through obvious physical deficiencies; therefore the courts meticulously analyzed the disabilities under the ADA definition.[162]

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154. *See Forest Grove*, 129 S. Ct. at 2484.
155. *Id.*
156. Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508 (D.N.J. 2008).
157. *Id.* at 531.
158. *Id.* at 532.
159. *See* 42 U.S.C.A. § 12102 (West 2008).
160. Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844, 845 (8th Cir. 1996).
161. *Id.* at 846.
162. *See* Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997).

Before the ADAAA, terms such as "major life activity" and "substantially limits" were vague concepts with which courts struggled in the employment context, but these terms are now made clearer for both the employment and educational contexts.[163] According to the ADAAA, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[164] In other words, in the educational setting there is no longer a question whether learning, reading, concentrating, thinking, and communicating are major life activities, and therefore defining a student's impairment as a disability has become a much simpler task.

While the definition of disability technically remains the same, the definitions of associated terms have broadened, opening the door for protection of more students with ADA claims.[165] To further expand the definition, the new amendments now expressly state that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[166] Furthermore, the new amendments state that "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]" to promote a Federal policy against discrimination on the basis of disability.[167]

Therefore the student with ADHD who disrupts class, as in *Bercovitch,* or the student who needs medication to learn, as in *Davis,* need not prove that communicating and learning are major life activities under the new ADA because the new definitions already account for such activities.[168] In *Bercovitch,* while agreeing that learning is a major life activity,[169] the court still refused to hold that Jason's ADHD substantially limited the major life activity of learning because his grades did not seem to suffer as a result of the disorder.[170] Under the 2008 ADA amendments, Jason would have greater protection because his ADHD did affect his concentration, thinking, and communication, all of which are now explicitly listed as major life activities.[171] His inability to work with peers or to communicate appropriately with his teachers and authority figures

163. 42 U.S.C.A. § 12102 (West 2008).
164. *Id.* at § 12102(2)(A)(1).
165. *Id.* at § 12102.
166. *Id.* at § 12102(4)(A).
167. *Id.* at § 12102(4)(B).
168. *See* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); *see also* 42 U.S.C.A. § 12102 (West 2008).
169. *Bercovitch,* 133 F.3d at 155.
170. *Id.*
171. 42 U.S.C.A. § 12102(4)(E) (West 2008).

certainly substantially limited the pragmatic aspect of his communication, while his inability to concentrate affected his thinking.[172]

Under the ADAAA, students still must establish a nexus between their disability and subsequent discrimination.[173] As in *Bercovitch*, Jason's behaviors were a manifestation of his disabilities, and his behaviors were exactly the reason the school chose to suspend and eventually expel him.[174] Thus, he would still establish the necessary nexus.

At the same time, the ADAAA would eliminate a discussion of medication or accommodations provided to the students to ameliorate the effects of their disabilities. Take away Shane's medication, the ameliorating element of Shane's ADHD in *Davis*, and the school is still left with a child with a disability who is denied the service of administration of medication from the public school nurse.[175] Take away Jason's behavioral accommodations in *Bercovitch,* and Jason is still a student with a disability who is denied access to the school because of that disability.[176] In fact, the new rules of construction under the ADAAA eliminate consideration of *any* reasonable accommodation the school may already be providing for a student in the determination of whether a disability exists.[177]

The elimination of this consideration is where the ADAAA collides somewhat with child find provisions of the IDEA.[178] Schools that employ RTI methods for identifying specific learning disabilities in reading or in math spend weeks or months implementing and documenting the results of many different types of accommodations for the student's suspected disability. Therefore, while a public school attempts to identify a student's disability under child find provisions of the IDEA, especially when employing RTI methods of identification, the school creates a record of disability and is left with no practical option to avoid intervening ADA liability, but to create a "504 plan" for the student for the duration of the identification period. Even still, during the RTI identification period, under *Forest Grove,* schools risk liability for reimbursement if the student's parents unilaterally place the student in an appropriate private setting.[179]

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172. *See Bercovitch*, 133 F.3d 141; *see also* Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) ("[C]oncentration is not itself a major life activity. Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself.").

173. *Davis*, 138 F.3d 754; *Bercovitch*, 133 F.3d at 141; McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997).

174. *Bercovitch*, 133 F.3d at 152.

175. *Davis*, 138 F.3d at 756.

176. *Bercovitch*, 133 F.3d at 156.

177. *See* 42 U.S.C.A. § 12201(h) (West 2008).

178. *See* 20 U.S.C. § 1400 (2006).

179. *See* Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009).

B. Discrimination or Reasonable Accommodations under the ADAAA

With the ADAAA, less emphasis will be placed on determining whether a disability exists, instead shifting the focus toward determining whether a student has been discriminated against because of that disability.[180] Naturally, the analysis of that discrimination in the school setting involves a determination of whether reasonable accommodations were made for the student's disability, or if he or she was denied appropriate educational services because of a lack of reasonable accommodation.[181] The shift toward analyzing reasonable accommodation will undoubtedly still involve a determination of public versus private accommodations, undue burdens, and fundamental alterations in policies, thus creating new challenges for administrators to work through in the public school setting.

1. Discrimination: Public vs. Private Schools and Who Is "Otherwise Qualified"

A significant difference between the ADA and Section 504 of the Rehabilitation Act exists in the plain language of the acts. Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[182] Title II of the ADA, which covers public services like schools, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[183]

The similarities in the statutes are obvious, but it is also difficult to ignore the absence of the "*otherwise* qualified" language in the ADA provision. As Section 504 is distinguished by the fact that it applies to public accommodations receiving federal funding, the specific language of Section 504 includes protections only for plaintiffs with disabilities who are *otherwise qualified* to participate in the services offered by the institution.[184] In essence, Section 504 applies protections to students in public schools, but not to students in private schools that do not receive federal funds.[185] Therefore, in *Kindercare* and

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180. *See* Hensel, *supra* note 9, at 654 ("The statute's antidiscrimination focus is reinforced by the bill's direction to courts to give 'primary . . . attention . . . [to] whether entities covered under the ADA have complied with their obligations.'").

181. Bissonnette, *supra* note 11, at 873-74.

182. 29 U.S.C. § 794(a) (2006) (emphasis added).

183. 42 U.S.C. § 12132 (2006).

184. Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & EDUC. 185, 194 (2001).

185. *See* U.S. Dep't of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, *supra* note 67.

Bercovitch, the private schools involved did not have to comply with Section 504,[186] while the public schools in *Davis* and *McPherson* did.[187] However, the ADA provides protections in the private school setting that Section 504 would otherwise omit.[188] The court in *Bercovitch* addressed the "otherwise qualified" language of the ADA, noting that the student was not otherwise qualified to attend the private school, where discipline was an important part of the school code.[189] The court of appeals cited the United States Supreme Court's decision in *Se. Cmty. Coll. v. Davis* to hold that "an otherwise qualified person [under Section 504] is one who is able to meet all of a program's requirements *in spite of* his handicap."[190] In contrast, Title II of the ADA defines a "qualified individual with a disability" as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[191]

While the 2008 Amendments to the ADA change the language within Title I that addresses employment discrimination, there is no change to the "qualified" language in Title II, which applies to public services, such as schools.[192] However, other changes in the 2008 ADA Amendments would in fact create a different analysis of who is a "qualified individual *with a disability*" as the language remains in Title II.[193]

In *Bercovitch*, the court of appeals reversed the district court's determination that Jason's "conduct cannot be the measure of his qualification because his conduct is, to a significant extent, a manifestation of his disability."[194] The court of appeals further explained that "[a] school's code of conduct is not superfluous to its proper operation; it is an integral aspect of a productive learning environment."[195] So in *Bercovitch*, as with most of the other cases discussed, the court struggled with a balance: defining the student's disability as

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186. *See* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Roberts *ex rel.* Rodenberg-Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844 (8th Cir. 1996).

187. *See* Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997).

188. *See* O'Neill, *supra* note 184, at 194.

189. *Bercovitch*, 133 F.3d at 154-55.

190. *Id.* at 154 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979)).

191. 42 U.S.C. § 12131(2) (2006).

192. *See* Bissonnette, *supra* note 11, at 871.

193. *See* Bissonnette, *supra* note 11, at 873 -874 (emphasizing that the courts will likely place more emphasis upon the analysis of the element of "reasonable accommodation" as less congressional guidance has been provided for that phrase, thus providing more opportunity for interpretation and litigation).

194. *Bercovitch*, 133 F.3d at 154 (citation omitted).

195. *Id.*

manifested, weighted against what types of accommodation requirements would burden or fundamentally alter the nature of the school's services.[196] The ADA Amendments create a slightly different analysis in each of these cases that reaches substantially the same conclusion as the court of appeals in *Bercovitch.*

2. Reasonable Accommodation: Undue Burden or Fundamental Alteration of the Nature of the Service

With the push to liberally construe the definition of an individual with a disability, the focus of an ADA claim analysis in the educational setting will surely shift to whether or not an accommodation made by a school was reasonable,[197] and in turn, to whether a requested accommodation would create a fundamental alteration in the nature of the services the school provides.[198] Because each of the four cases above turned primarily on the reasonable accommodation analysis, the outcomes of each would most likely not change under the ADAAA.

However, reasonableness of accommodation is a difficult question in the public school setting because a school provides access to learning, socialization, reading, and communication skills to many different students with different abilities in each of those major life activities. For a school, public or private, to say that accommodating a student's individual abilities or disabilities is "burdensome" or an "alteration of policy" is in sharp contrast with widely accepted pedagogical theories that every student has different learning needs.[199]

Accommodating the needs of all students is at the heart of good teaching practices, regardless of whether a statutorily defined ability or disability exists. Dion's specific learning disability in *McPherson* is a good example of the type of different learning needs individual students may have.[200] His deficiencies did not eliminate him from entitlement to an education. Perhaps some accommodation of his desire to play ball could have been made. It is the same with Shane and Jason's ADHD, which caused difficulties with concentration and thinking, and manifested in behavioral problems.[201] Good educators accommodate students with ADHD by specializing instruction to meet their learning needs.[202] Theoretically, the ADA is unnecessary in the public school setting because every single student is already receiving enough individual

196. *Id.* at 152.

197. *See* Bissonnette, *supra* note 11, at 873-74.

198. *See* Hensel, *supra* note 9, at 680.

199. U.S. Dep't of Educ., Thirty Years of Progress in Educating Children with Disabilities through IDEA, *supra* note 21.

200. *See* McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 456 (6th Cir. 1997).

201. National Resource Center on ADHD, Symptoms and Diagnostic Criteria, http://www.help4adhd.org/en/treatment/guides/dsm (last visited March 25, 2010).

202. SANDRA F. RIEF, HOW TO REACH AND TEACH ADD/ADHD CHILDREN: PRACTICAL TECHNIQUES, STRATEGIES, AND INTERVENTIONS FOR HELPING CHILDREN WITH ATTENTION PROBLEMS AND HYPERACTIVITY 83 (2d ed. 2005).

accommodation for his or her level of ability or disability.[203] In practice, this is most likely the reason ADA claims in the public schools setting are rare.[204]

At the same time, at some point the financial and administrative burden on a school to provide individualized accommodations to each student outweighs the benefit to individual students. Financially and administratively, schools do not have the resources necessary to accommodate the variety and multitude of abilities or disabilities within each school, especially with looming liability for failing to accommodate borderline cases.[205] The ADA mandates accommodation, but provides no specific mechanism to fund those accommodations.[206] When a student has a specific learning disability, schools need more staff, training, and other resources to appropriately accommodate the disability to provide an equal education.[207] In the public school setting, IDEA provides a funding structure to ensure that students with certain types of disabilities are accommodated and educated appropriately.[208] In contrast, in *Kindercare*, the court determined that providing Brandon a one-on-one personal aid would be an undue burden for the private center without ever reaching the issue of whether the accommodation would fundamentally alter the program.[209] If Brandon had been in a public school setting, rather than a private day care, his IEP accommodation would have been honored under the IDEA, which provides funding mechanisms for expensive accommodations such as one-on-one personal aids.[210]

Similarly, in *Bercovitch*, if Jason had been in a public school setting, the IDEA would mandate that the school hold a manifestation hearing to determine if Jason's behaviors were a result of his disability, or else lose funding eligibility.[211] If his behaviors were a result of his disability, the school would be limited in how it could punish Jason via suspension and expulsion.[212] Because the school was private, under the ADA the school could claim that accommodating Jason's extreme behaviors was unreasonable in that it disrupted the strict discipline policy.[213] Because the ADAAA maintains that a program

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203. U.S. Dep't of Educ., Thirty Years of Progress in Educating Children with Disabilities through IDEA, *supra* note 21.

204. Lexis Nexis search using terms "public school" w/p "ADA" Federal & State Cases Combined date restricted from Jan. 1, 1990 to March 4, 2010 on March 4, 2010.

205. PBS, Online NewsHour: Education Backgrounder – School Funding, http://www.pbs.org/newshour/backgrounders/school_funding.html (last visited March 25, 2010).

206. 42 U.S.C. § 12132 (2006).

207. *See* Bacon v. Richmond, 475 F.3d 633 (4th Cir. 2007) (funding to accommodate the disabled); *see also* 20 U.S.C. § 1411 (2006).

208. 20 U.S.C. § 1411.

209. Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844, 847 (8th Cir. 1996).

210. 20 U.S.C. § 1412.

211. *Id.* at § 1400 (d)(1)(A); *see also* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998).

212. *Bercovitch*, 133 F.3d at 153.

213. *Id.*

does not have to fundamentally alter its policies to accommodate a person's disability, the outcome in *Bercovitch* would most likely also remain unchanged, even though the focus of the analysis would shift away from a determination of Jason's disability.[214]

IV. CONCLUSION

In conclusion, with the new amendments to the ADA, where learning, reading, concentrating, and thinking are defined as "major life activities," and the "substantial limitation" of those activities is to be liberally construed, schools face new challenges in creating individualized accommodations for a greater number of students with limited resources to do so. Furthermore, the ADAAA begins to encroach on child find provisions of the IDEA, specifically where schools employ RTI methods for identifying specific learning disabilities, because such methods almost by definition generate a record of disability. The problem is compounded by increased liability exposure in borderline cases. Finally, one can only speculate as to the increased pressure in a time of tight federal, state and local budgets.

214. *Id.*