



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 28, 2008

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter expresses the views of the Department of Justice on H.R. 3195, the "ADA Restoration Act of 2007" ("ADARA"), introduced in the House on July 26, 2007. Although we support the idea of improving the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"), we strongly oppose the proposed legislation. The ADARA would dramatically increase unnecessary litigation, create uncertainty in the workplace, and upset the balance struck by Congress in adopting the ADA.

At the outset of his Administration, President George W. Bush announced the New Freedom Initiative, a comprehensive set of goals and a plan of action to ensure that people with disabilities are able to enjoy full participation in our free market economy and society. The Department, responding to the New Freedom Initiative, has increased and improved its implementation of the ADA. In fact, vigorous enforcement of the ADA is one of the top priorities of the Civil Rights Division and we are pleased to have played an active role in its implementation.

Our experience in enforcing the ADA has led us to believe that there is the potential for improvement in the ADA and we support legislation that would *clarify* the treatment of mitigating measures under the ADA. Unfortunately, we believe that the proposed bill goes too far and unnecessarily broadens the scope of ADA protections far beyond the original intent of the ADA or what could fairly be termed its "restoration."

Indeed, as is more fully explained below, the ADARA's definition of disability would reach individuals with virtually any kind of impairment — no matter how minor or temporary, such as the common flu, a cut finger, or a sprained ankle — and therefore would go beyond the original intent of Congress when it enacted the ADA, and would also be unworkable in practice. Furthermore, the proposed legislation would remove the ADA's requirement that an individual be "qualified" in order to receive the benefit of ADA protection; a critical change that would effectively rewrite the ADA and goes beyond mere "restoration."

ADARA's Revisions to the ADA Regarding Definition of Disability

The ADARA's primary revision to the ADA is alteration of the definition of disability. Currently, the ADA defines disability as follows:

The term "disability" means, with respect to an individual —

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

42 U.S.C. § 12102(2). The ADARA would amend this definition to delete reference to the terms "substantially limits" and "major life activities." ADARA § 4(1). Currently, where a physical or mental impairment limits one or more major life activities of an individual, but those limitations do not rise to the level of "substantial" limitations, the individual at issue does not have a "disability" under the ADA and is not entitled to the ADA's protections. Similarly, where an individual has a physical or mental impairment that substantially limits one or more activities, but those activities that are substantially limited are not "major life activities," the individual does not have a disability under the ADA and is not entitled to the ADA's protections.¹

In contrast to the ADA's definition, the ADARA defines disability much more broadly, as any physical or mental impairment. ADARA § 4. The ADARA defines physical and mental impairment in the same way as the current ADA regulations. *See* 28 C.F.R. §§ 35.104, 36.104. It defines mental impairment as any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disability. ADARA § 4. The ADARA defines physical impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. *Id.* Under the ADARA, persons with any impairment meeting the definitions above would be defined as having a "disability" under the ADA and would not be required to show specifically how their impairment impacts any life activity.

¹ The ADA has a three-pronged definition of "disability": (1) a person with a physical or mental impairment that substantially limits one or more major life activities; (2) a person with a record of such an impairment; or (3) a person who is regarded as having such an impairment. In order to simplify the discussion, this paragraph and the remainder of the letter refer only to the first prong of the definition of "disability." However, all discussions about the ADA requirements regarding "substantial limitation" in a "major life activity" also apply to the two other prongs of the definition.

Thus, the ADARA's definition of disability would make it easier for many individuals — including those with actual disabilities as well as those regarded as having a disability — to invoke ADA protections, and it would do so by dramatically expanding the class of persons who could claim ADA coverage. Because most individuals who brought a claim would be covered, it is likely that the majority of cases would turn on whether the alleged discrimination occurred. Section 2 of the ADARA also would revise the Findings and Purposes section of the ADA to make it consistent with the ADARA definition of disability and to clarify the ADARA's purpose in covering a broader group of individuals.

Further, the ADARA specifies that the determination of whether an individual has a physical or mental impairment shall be made without regard to whether the individual uses a mitigating measure. ADARA § 4. This would broaden the class of covered individuals even further.

Finally, the ADARA removes a fundamental requirement of the ADA that plaintiff has the burden of showing that he or she is “qualified for the position at issue.” Instead, the ADARA would shift the burden to the employer, as an affirmative defense, to show that the individual is not qualified. This is unprecedented in our nation's civil rights laws and unnecessary.

Supreme Court Treatment of the Definition of Disability Under the ADA

The Findings and Purposes section of the ADARA asserts that the “decisions and opinions of the Supreme Court² have unduly narrowed the broad scope of protection afforded in the ADA.” ADARA § 2(a)(2). The Department has urged the Court to adopt a more protective stance with respect to persons with disabilities who utilize mitigating measures to perform major life activities such as work³ and would support a legislative amendment to that effect. Indeed, in the preamble to the Department's regulations implementing title III of the ADA, the Department has taken the position that a person's disability — including hearing loss, epilepsy and diabetes

² The ADARA references four Supreme Court cases that, in its view, significantly limited the ADA's coverage. ADARA Sec. 2(a)(4)(B), 2(a)(6), (b)(2). They are *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Sutton, *Murphy*, and *Kirkingburg* were decided on the same day, and addressed similar legal questions. *Sutton* held that a disability must be evaluated with regard to whatever corrective or mitigating measures the individual uses, and thus that few impairments were *per se* disabilities. Further, to be substantially limited in working, the individual must be unable to work in a broad class of jobs. In each case, the Department urged the Court to adopt a more expansive view of the definition of disability.

In *Toyota*, the Department filed an amicus brief arguing that the court of appeals was wrong to limit its analysis to only the manual tasks associated with a particular job, and the Supreme Court agreed with that position. 534 U.S. 184. The Department opposes legislation that would undermine the Supreme Court's decision in *Toyota*.

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— should be assessed without regard to mitigating measures. 28 C.F.R. Part 36, app. B at 691 (2007).

Problems with the ADARA

Scope of the Definition of Disability

The Department has concerns about the seemingly unrestricted scope of the ADARA's definition of disability. This definition would reach individuals with virtually any kind of impairment — no matter how minor or temporary — such as the common flu, a cut finger, or a sprained ankle. There is no evidence that Congress, when enacting the ADA as a civil rights law, intended to include such individuals in its protection. *See* H.R. Rep. No. 101-485, pt. II, p. 52 (1990). Entitling such individuals not only to nondiscrimination in hiring and firing, but also to reasonable accommodations (to the extent that such accommodations would not pose an undue hardship), would go beyond the original intent of Congress and could pose substantial constitutional questions.

For example, the expansion of the definition of disability and, consequently, the protected class under the ADA, is likely to have significant adverse implications for the constitutionality of title II in light of the Supreme Court's interpretation of the Eleventh Amendment. *See U.S. v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004). Because the protected class would include individuals with relatively minor impairments that historically have not given rise to invidious discrimination, the remedies provided under title II likely would not be considered congruent and proportional to historical discrimination. Accordingly, there is a substantial risk that title II would be found unconstitutional as applied to the States.

Removal of the "Qualified Individual" Requirement

Furthermore, the proposed legislation would eliminate the ADA requirement that a plaintiff show that he or she is a "qualified individual" as part of establishing coverage; a critical change that would represent a fundamental rewrite of the ADA, and a major departure from employment discrimination law in general. Such a change shifts the burden of proving an applicant or employee is qualified for a job from the plaintiff to the employer. Under the ADARA, an employer would now have to show that an individual is not qualified as an affirmative defense. And an employer — who currently, and appropriately, has the burden of showing direct threat or justifying qualification standards — would now also bear the burden of demonstrating that the individual is unqualified.

H.R. 3195 purports to call for "restoration" of the ADA. However, deletion of the provision dictating that ADA protection is extended only to a "qualified individual with a disability" can not be portrayed as a "restoration" because it affirmatively removes a key element

of the ADA – a requirement that originates from the Rehabilitation Act of 1973.⁴ Moreover, this change would place a lower burden on ADA plaintiffs than on those pursuing race, sex, religion, or age claims. Indeed, both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act place the burden on plaintiffs to show they are qualified as part of their *prima facie* case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The Department strongly opposes any bill that eliminates the ADA requirement that a plaintiff show that he or she is “qualified” as part of establishing coverage.

Potential Area of Compromise: Treatment of Mitigated Disabilities

Although we have not attempted to craft statutory language that would broaden the ADA’s current definition of disability without over-extending it, we present here an alternative for your consideration.

In general, the Department could support a change to the ADA to clarify that, for purposes of coverage under the ADA, a disability must be evaluated without regard to mitigating measures, provided there was an exception for people who wear glasses. Under this exception, an individual would not have an impairment because of poor vision if, with corrective lenses, he or she would not be legally blind. This exception appropriately would exclude from coverage most people whose visual impairment was minor enough that it could be corrected by wearing glasses. There may be other common impairments that should also be statutorily excepted. Further, the Department believes that if ADA coverage were expanded to persons with mitigated disabilities, employers should only be required to make those reasonable accommodations necessary to enable a person whose disability is mitigated (such that, with their mitigation, they are not substantially limited in a major life activity, and thus not currently covered by the ADA), to utilize his or her mitigating measures.⁵

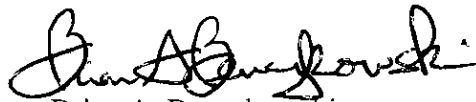
⁵ See 42 U.S.C. §12112(a). See also S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989), that explains that the definition of “qualified” is comparable to the one found in the regulations implementing section 501 of the Rehabilitation Act of 1973. The Senate Report states, “By including the phrase ‘qualified individual with a disability,’ the Committee intends to reaffirm that [the ADA] does not undermine an employer’s ability to choose and maintain qualified workers. [The ADA] simply provides that employment decisions must not have the purpose [or] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.” The House Reports also make similar statements. See H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 55 (1990) (“The basic concept is that an employer may require that every employee be qualified to perform the essential functions of a job.”).

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Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski". The signature is fluid and cursive, with the first name "Brian" being more prominent.

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Joe Barton
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE GEORGE MILLER, CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR, WITH A COPY TO THE HONORABLE HOWARD McKEON, RANKING MINORITY MEMBER; THE HONORABLE JOHN CONYERS, JR., CHAIRMAN, COMMITTEE ON THE JUDICIARY, WITH A COPY TO THE HONORABLE LAMAR S. SMITH, RANKING MINORITY MEMBER; THE HONORABLE JAMES L. OBERSTAR, CHAIRMAN, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WITH A COPY TO THE HONORABLE JOHN MICA, RANKING MINORITY MEMBER



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Principal Deputy Assistant Attorney General

cc: The Honorable John Mica
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Thus, the ADARA's definition of disability would make it easier for many individuals — including those with actual disabilities as well as those regarded as having a disability — to invoke ADA protections, and it would do so by dramatically expanding the class of persons who could claim ADA coverage. Because most individuals who brought a claim would be covered, it is likely that the majority of cases would turn on whether the alleged discrimination occurred. Section 2 of the ADARA also would revise the Findings and Purposes section of the ADA to make it consistent with the ADARA definition of disability and to clarify the ADARA's purpose in covering a broader group of individuals.

Further, the ADARA specifies that the determination of whether an individual has a physical or mental impairment shall be made without regard to whether the individual uses a mitigating measure. ADARA § 4. This would broaden the class of covered individuals even further.

Finally, the ADARA removes a fundamental requirement of the ADA that plaintiff has the burden of showing that he or she is “qualified for the position at issue.” Instead, the ADARA would shift the burden to the employer, as an affirmative defense, to show that the individual is not qualified. This is unprecedented in our nation's civil rights laws and unnecessary.

Supreme Court Treatment of the Definition of Disability Under the ADA

The Findings and Purposes section of the ADARA asserts that the “decisions and opinions of the Supreme Court² have unduly narrowed the broad scope of protection afforded in the ADA.” ADARA § 2(a)(2). The Department has urged the Court to adopt a more protective stance with respect to persons with disabilities who utilize mitigating measures to perform major life activities such as work³ and would support a legislative amendment to that effect. Indeed, in the preamble to the Department's regulations implementing title III of the ADA, the Department has taken the position that a person's disability — including hearing loss, epilepsy and diabetes

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In *Toyota*, the Department filed an amicus brief arguing that the court of appeals was wrong to limit its analysis to only the manual tasks associated with a particular job, and the Supreme Court agreed with that position. 534 U.S. 184. The Department opposes legislation that would undermine the Supreme Court's decision in *Toyota*.

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— should be assessed without regard to mitigating measures. 28 C.F.R. Part 36, app. B at 691 (2007).

Problems with the ADARA

Scope of the Definition of Disability

The Department has concerns about the seemingly unrestricted scope of the ADARA's definition of disability. This definition would reach individuals with virtually any kind of impairment — no matter how minor or temporary — such as the common flu, a cut finger, or a sprained ankle. There is no evidence that Congress, when enacting the ADA as a civil rights law, intended to include such individuals in its protection. *See* H.R. Rep. No. 101-485, pt. II, p. 52 (1990). Entitling such individuals not only to nondiscrimination in hiring and firing, but also to reasonable accommodations (to the extent that such accommodations would not pose an undue hardship), would go beyond the original intent of Congress and could pose substantial constitutional questions.

For example, the expansion of the definition of disability and, consequently, the protected class under the ADA, is likely to have significant adverse implications for the constitutionality of title II in light of the Supreme Court's interpretation of the Eleventh Amendment. *See U.S. v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004). Because the protected class would include individuals with relatively minor impairments that historically have not given rise to invidious discrimination, the remedies provided under title II likely would not be considered congruent and proportional to historical discrimination. Accordingly, there is a substantial risk that title II would be found unconstitutional as applied to the States.

Removal of the "Qualified Individual" Requirement

Furthermore, the proposed legislation would eliminate the ADA requirement that a plaintiff show that he or she is a "qualified individual" as part of establishing coverage; a critical change that would represent a fundamental rewrite of the ADA, and a major departure from employment discrimination law in general. Such a change shifts the burden of proving an applicant or employee is qualified for a job from the plaintiff to the employer. Under the ADARA, an employer would now have to show that an individual is not qualified as an affirmative defense. And an employer — who currently, and appropriately, has the burden of showing direct threat or justifying qualification standards — would now also bear the burden of demonstrating that the individual is unqualified.

H.R. 3195 purports to call for "restoration" of the ADA. However, deletion of the provision dictating that ADA protection is extended only to a "qualified individual with a disability" can not be portrayed as a "restoration" because it affirmatively removes a key element

of the ADA – a requirement that originates from the Rehabilitation Act of 1973.⁴ Moreover, this change would place a lower burden on ADA plaintiffs than on those pursuing race, sex, religion, or age claims. Indeed, both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act place the burden on plaintiffs to show they are qualified as part of their *prima facie* case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The Department strongly opposes any bill that eliminates the ADA requirement that a plaintiff show that he or she is “qualified” as part of establishing coverage.

Potential Area of Compromise: Treatment of Mitigated Disabilities

Although we have not attempted to craft statutory language that would broaden the ADA’s current definition of disability without over-extending it, we present here an alternative for your consideration.

In general, the Department could support a change to the ADA to clarify that, for purposes of coverage under the ADA, a disability must be evaluated without regard to mitigating measures, provided there was an exception for people who wear glasses. Under this exception, an individual would not have an impairment because of poor vision if, with corrective lenses, he or she would not be legally blind. This exception appropriately would exclude from coverage most people whose visual impairment was minor enough that it could be corrected by wearing glasses. There may be other common impairments that should also be statutorily excepted. Further, the Department believes that if ADA coverage were expanded to persons with mitigated disabilities, employers should only be required to make those reasonable accommodations necessary to enable a person whose disability is mitigated (such that, with their mitigation, they are not substantially limited in a major life activity, and thus not currently covered by the ADA), to utilize his or her mitigating measures.⁵

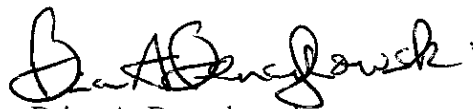
⁵ See 42 U.S.C. §12112(a). See also S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989), that explains that the definition of “qualified” is comparable to the one found in the regulations implementing section 501 of the Rehabilitation Act of 1973. The Senate Report states, “By including the phrase ‘qualified individual with a disability,’ the Committee intends to reaffirm that [the ADA] does not undermine an employer’s ability to choose and maintain qualified workers. [The ADA] simply provides that employment decisions must not have the purpose [or] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.” The House Reports also make similar statements. See H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 55 (1990) (“The basic concept is that an employer may require that every employee be qualified to perform the essential functions of a job.”).

⁶ The Department does not propose any alternative that would entail the prohibition of conduct that does not “actually violate[] the Fourteenth Amendment.” *United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” [emphasis in original]). Moreover, the Department recognizes that any such proposal to expand the definition of “disability” under the ADA must be supported by a legislative record that demonstrates past State discrimination against the expanded class, consistent with constitutional requirements.

The Honorable John Conyers, Jr.
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Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski". The signature is fluid and cursive, with the first name "Brian" being more prominent.

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE GEORGE MILLER, CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR, WITH A COPY TO THE HONORABLE HOWARD McKEON, RANKING MINORITY MEMBER; THE HONORABLE JAMES L. OBERSTAR, CHAIRMAN, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WITH A COPY TO THE HONORABLE JOHN MICA, RANKING MINORITY MEMBER; THE HONORABLE JOHN D. DINGELL, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE, WITH A COPY TO THE HONORABLE JOE BARTON, RANKING MINORITY MEMBER



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 28, 2008

The Honorable George Miller
Chairman
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter expresses the views of the Department of Justice on H.R. 3195, the "ADA Restoration Act of 2007" ("ADARA"), introduced in the House on July 26, 2007. Although we support the idea of improving the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"), we strongly oppose the proposed legislation. The ADARA would dramatically increase unnecessary litigation, create uncertainty in the workplace, and upset the balance struck by Congress in adopting the ADA.

At the outset of his Administration, President George W. Bush announced the New Freedom Initiative, a comprehensive set of goals and a plan of action to ensure that people with disabilities are able to enjoy full participation in our free market economy and society. The Department, responding to the New Freedom Initiative, has increased and improved its implementation of the ADA. In fact, vigorous enforcement of the ADA is one of the top priorities of the Civil Rights Division and we are pleased to have played an active role in its implementation.

Our experience in enforcing the ADA has led us to believe that there is the potential for improvement in the ADA and we support legislation that would *clarify* the treatment of mitigating measures under the ADA. Unfortunately, we believe that the proposed bill goes too far and unnecessarily broadens the scope of ADA protections far beyond the original intent of the ADA or what could fairly be termed its "restoration."

Indeed, as is more fully explained below, the ADARA's definition of disability would reach individuals with virtually any kind of impairment — no matter how minor or temporary, such as the common flu, a cut finger, or a sprained ankle — and therefore would go beyond the original intent of Congress when it enacted the ADA, and would also be unworkable in practice. Furthermore, the proposed legislation would remove the ADA's requirement that an individual be "qualified" in order to receive the benefit of ADA protection; a critical change that would effectively rewrite the ADA and goes beyond mere "restoration."

ADARA's Revisions to the ADA Regarding Definition of Disability

The ADARA's primary revision to the ADA is alteration of the definition of disability. Currently, the ADA defines disability as follows:

The term "disability" means, with respect to an individual —

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

42 U.S.C. § 12102(2). The ADARA would amend this definition to delete reference to the terms "substantially limits" and "major life activities." ADARA § 4(1). Currently, where a physical or mental impairment limits one or more major life activities of an individual, but those limitations do not rise to the level of "substantial" limitations, the individual at issue does not have a "disability" under the ADA and is not entitled to the ADA's protections. Similarly, where an individual has a physical or mental impairment that substantially limits one or more activities, but those activities that are substantially limited are not "major life activities," the individual does not have a disability under the ADA and is not entitled to the ADA's protections.¹

In contrast to the ADA's definition, the ADARA defines disability much more broadly, as any physical or mental impairment. ADARA § 4. The ADARA defines physical and mental impairment in the same way as the current ADA regulations. *See* 28 C.F.R. §§ 35.104, 36.104. It defines mental impairment as any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disability. ADARA § 4. The ADARA defines physical impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. *Id.* Under the ADARA, persons with any impairment meeting the definitions above would be defined as having a "disability" under the ADA and would not be required to show specifically how their impairment impacts any life activity.

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The Honorable George Miller
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Sincerely,

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Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Howard McKeon
Ranking Minority Member

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