

2013

## It's Not Easy Being G-Free: Why Celiac Disease Should Be a Disability Covered under the ADA

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### Recommended Citation

Trotch, Claudia. "It's Not Easy Being G-Free: Why Celiac Disease Should Be a Disability Covered under the ADA." *American University Journal of Gender Social Policy and Law* 22, no. 1 (2013): 219-236.

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# IT'S NOT EASY BEING G-FREE: WHY CELIAC DISEASE SHOULD BE A DISABILITY COVERED UNDER THE ADA

CLAUDIA TROTCH\*

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## I. INTRODUCTION

There are three million people in the United States who suffer from gluten intolerance or celiac disease.<sup>1</sup> As awareness of celiac disease increases, so do requests for schools to provide special school lunch menus and possibly time to make up missed work if a student is out because of her disease.<sup>2</sup> Current law does not require schools to provide school lunches for students with celiac disease.<sup>3</sup> The only treatment for celiac disease, however, is a lifelong avoidance of gluten.<sup>4</sup> The growing popularity of gluten-free diets threatens to obfuscate the fact that celiac disease sufferers have medically necessary reasons for avoiding gluten.<sup>5</sup> Because celiac

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1. See *Celiac Disease Facts & Figures*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/ceeliac-disease/facts-and-figures> (last visited Apr. 8, 2013) [hereinafter *Celiac Disease Facts & Figures*] (calculating that about one percent of the population of the United States has celiac disease).

2. See, e.g., *At School*, AM. CELIAC DISEASE ALLIANCE, <http://americanceeliac.org/for-families> (last visited Apr. 8, 2013) [hereinafter *At School*] (advising families of their rights and how to get proper accommodations from schools); *Children and Celiac Disease: Going Back to School*, NAT'L INSTS. OF HEALTH, <http://celiac.nih.gov/BacktoSchool.aspx> (last visited Apr. 8, 2013) (reminding parents that public schools must reasonably accommodate children on a gluten-free diet).

3. See *Navigating the School System*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/kids/parents/guides/Kids-Youth/Navigating-The-School-System/209> (last visited Apr. 18, 2013) (stating that schools are not required to provide gluten-free substitutions).

4. *National Digestive Diseases Information Clearinghouse*, NAT'L INSTS. OF HEALTH, <http://digestive.niddk.nih.gov/ddiseases/pubs/ceeliac/#symptoms> (last visited Apr. 18, 2013).

5. Elissa Strauss, *Will Everyone Please Eat Gluten? Please? Because You are*

disease has a more limiting effect on an individual than a gluten sensitivity or allergy, it should be classified as a disability under the Americans with Disabilities Act so that schools are required to accommodate students who suffer from celiac disease.

The federal laws that govern individual accommodations for disabilities in schools are the Americans with Disabilities Act (ADA),<sup>6</sup> the Rehabilitation Act,<sup>7</sup> and the Individuals with Disabilities Education Act (IDEA).<sup>8</sup> In 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA)<sup>9</sup> to provide broader coverage to people with disabilities in order to prevent discrimination and ensure equal access to opportunities.<sup>10</sup> Because no court has determined whether celiac disease is a disability, as defined by the ADA, and because the ADAAA was only recently enacted in 2009, there is little guidance as to how broadly the amended ADA may be extended.<sup>11</sup>

This Article argues that celiac disease is a disability covered under the ADA and the Rehabilitation Act,<sup>12</sup> and focuses on how the ADA impacts students in public schools. Part II will provide an overview of celiac disease and examine the ADA<sup>13</sup> and the Rehabilitation Act<sup>14</sup> which are the federal statutes that require programs receiving federal funding to make accommodations for individuals that have a covered disability.<sup>15</sup> Part II

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*Literally Killing Me, Kind of*, JEZEBEL (Mar. 21, 2013, 6:10 PM), <http://jezebel.com/5991724/willM> (arguing that strictly gluten-free foods are harder to obtain because it has become a popular diet).

6. 42 U.S.C. §§ 12131–12134 (2012).

7. 29 U.S.C. § 794 (2012).

8. 20 U.S.C. §§ 1400–1409 (2012).

9. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12213 (2012)).

10. *See* 42 U.S.C. § 12101 (2012) (describing the continued existence of discrimination against individuals with disabilities and Congress' intent to eliminate such discrimination).

11. *See* *Atencio v. Joint Jerome Sch.* Dist. No. 261, 837 F. Supp. 2d 1158, 1164 (D. Idaho 2011) (explaining that because the ADAAA's statement of congressional intent is silent on the issue, there is a presumption against retroactive application).

12. Because the definition of what constitutes a disability under the IDEA is narrower than under the ADA, this Article will deal exclusively with the ADA and the Rehabilitation Act.

13. 42 U.S.C. §§ 12101–12134 (2012).

14. 29 U.S.C. § 794 (2012).

15. *See infra* Part II (discussing how the statutes define disability and how the rules of construction enacted in the ADAAA have affected the standards for evaluating disabilities).

will also briefly review the recent Department of Education, Office for Civil Rights (OCR) decisions and case law that has applied the ADA to conditions comparable to celiac disease.<sup>16</sup> Part III argues that celiac disease should be covered by the ADA, as expanded by the ADAAA, because courts have found that disorders with similar symptoms substantially limit major life activities.<sup>17</sup> Part IV suggests that the expense of living with celiac disease should be included in the ADA claim analysis to make celiac disease more identifiable within the statutory definition of disability, and it also recommends that the United States should follow other Western countries that have laws covering celiac disease.<sup>18</sup>

## II. BACKGROUND

### *A. Overview of Celiac Disease*

Celiac disease is not a food allergy, but an autoimmune disease.<sup>19</sup> Unlike some food allergies, a person diagnosed with celiac disease cannot grow out of his or her gluten intolerance.<sup>20</sup> Because it is a condition that harms the lining of the small intestine, it prevents the body from absorbing essential nutrients that help keep a person healthy and can possibly lead to malnourishment.<sup>21</sup> The exact cause of the disease is unknown.<sup>22</sup> People can develop the disease at any point in life,<sup>23</sup> though those who have a

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16. See *infra* Part II (reviewing cases involving individuals with disorders that affect their digestive systems or force them to regulate their diet in any way).

17. See *infra* Part III (analyzing how courts decide whether a disorder substantially limits a major life activity and why celiac disease is similarly restrictive).

18. See *infra* Part IV (looking to the economic burden facing those with celiac disease and how that should be viewed as a substantial limitation as well as discussing the celiac disease-friendly policies of other countries).

19. See *Celiac Disease*, NAT'L FOUND. FOR CELIAC AWARENESS <http://www.celiaccentral.org/Celiac-Disease/21> (last visited Apr. 19, 2013) (explaining that celiac is an autoimmune disease because when the affected person eats gluten the immune system responds by damaging the lining of the small intestine).

20. *Id.*

21. See *PubMed Health*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Jan. 20, 2010) <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001280> [hereinafter *PubMed Health*] (detailing the effects of malnutrition, such as fatigue, depression, hair loss, growth delay, and seizures).

22. *Cause of Celiac Disease*, CELIAC DISEASE FOUND., [https://www.celiac.org/index.php?option=com\\_content&view=article&id=5&Itemid=11](https://www.celiac.org/index.php?option=com_content&view=article&id=5&Itemid=11) (last visited Apr. 19, 2013).

23. See *id.* (noting that beginning as early as infancy, individuals can develop celiac disease); see also *Study Finds Increasing Number of Celiac Cases, Particularly in the Elderly*, UNIV. OF MARYLAND MED. CTR., (Sept. 27, 2010),

family member with the disease are more likely to develop the disease themselves.<sup>24</sup> Furthermore, the disease is most common in Caucasians and people with European ancestry.<sup>25</sup> Unlike adults with celiac, children who have the disease are more likely to display gastrointestinal symptoms, such as diarrhea and nausea, and can experience long-term effects like defects in tooth enamel, delayed puberty, and poor weight gain.<sup>26</sup>

While celiac disease cannot be cured, the lining of the small intestine can heal, diminishing the symptoms, if the affected person adheres to a life-long gluten-free diet.<sup>27</sup> Unfortunately, of the estimated three million Americans affected by celiac disease or gluten intolerance, eighty-five percent are undiagnosed or misdiagnosed with other conditions.<sup>28</sup> As evidence of the trendiness of gluten-free diets and the rise of non-celiac gluten-sensitivity, the sales of gluten-free foods and products reached more than \$2.6 billion in 2010, and the total is expected to exceed more than \$5 billion by 2015.<sup>29</sup> Recently, there has also been a rise in non-celiac gluten sensitivity, gluten-related allergies and disorders, and people who embrace gluten-free diets as a matter of personal preference.<sup>30</sup> Gluten sensitivities

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[http://www.umm.edu/news/releases/autoimmune\\_disorder.htm](http://www.umm.edu/news/releases/autoimmune_disorder.htm) (finding that the prevalence of celiac disease in the elderly is about two and a half times higher than in the general population).

24. See *Celiac Disease Facts & Figures*, *supra* note 1 (calculating that five to twenty-two percent of celiac patients have a family member who has celiac disease).

25. See Moises Velasquez-Manoff, *Who Has the Guts for Gluten?*, N.Y. TIMES (Feb. 23, 2013), <http://www.nytimes.com/2013/02/24/opinion/sunday/what-really-causes-celiac-disease.html?pagewanted=all> (explaining that about thirty percent of people with European ancestry carry predisposing genes for celiac disease).

26. See *PubMed Health*, *supra* note 21 (showing that children can be severely impacted in the short-term because of gastrointestinal symptoms and in the long-term because of delayed development).

27. See *id.* (emphasizing that maintaining a gluten-free diet requires the diligent reading of food labels for obscure sources of gluten and ingredients related to it).

28. See *Diagnosis & Treatment*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/Celiac-Disease/Diagnosis-Treatment/33> (last visited Apr. 8, 2013) (mimicking conditions with similar symptoms, celiac disease may be misdiagnosed as irritable bowel syndrome, Crohn's Disease, or lactose intolerance).

29. See *Celiac Disease Facts & Figures*, *supra* note 1 (contributing to the increased spending on gluten-free products, the diagnosis rate for celiac disease is expected to reach fifty to sixty percent by 2019).

30. See, e.g., Anna Sapone et al., *Spectrum of Gluten-Related Disorders: Consensus on New Nomenclature and Classification*, BMC MED., 1, 1 (2012) <http://www.biomedcentral.com/content/pdf/1741-7015-10-13.pdf> (describing three types of gluten reactions: allergic (wheat allergy), autoimmune (celiac disease), and neither autoimmune nor allergic (gluten sensitivity)); Martha C. White, *Why We're Wasting Billions on Gluten-Free Food*, TIME, Mar. 13, 2013,

and allergies are less severe than celiac disease and do not cause intestinal damage or produce gastrointestinal symptoms such as stomach pain, nausea, and vomiting.<sup>31</sup>

### *B. Federal Disability Law Statutes*

#### *1. The Rehabilitation Act of 1973*

Students with celiac disease mostly rely on § 504 of the Rehabilitation Act for protection in programs that receive federal funding which includes public schools.<sup>32</sup> The law defines a handicapped person as someone who has a physical or mental impairment that substantially limits one or more major life activities, including, but not limited to, caring for one's self, walking, seeing, breathing, learning, and working.<sup>33</sup> In particular, the Rehabilitation Act applies to school-age children because it requires school districts to provide qualified students in elementary, middle, and high school a "free appropriate public education" (FAPE).<sup>34</sup> Providing a FAPE requires schools to educate disabled students with the general population when possible and give them an equal opportunity to participate in extracurricular activities.<sup>35</sup> In accordance with the Rehabilitation Act, every school must have a "504 coordinator" to conduct evaluations and

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<http://business.time.com/2013/03/13/why-were-wasting-billions-on-gluten-free-food> (pointing out that many people are avoiding gluten because it is trendy to do so); *Non-Celiac Gluten Sensitivity*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/non-celiac-gluten-sensitivity> (last visited Apr. 19, 2013) [hereinafter *Non-Celiac Gluten Sensitivity*] (stating that six times as many Americans are affected with a gluten intolerance than are affected with celiac disease).

31. See *Celiac Disease Symptoms Can Be Elusive*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/Celiac-Disease/Celiac-Symptoms/32/> (last visited July 30, 2013) (explaining that individuals with gluten sensitivities have non-gastrointestinal symptoms of joint pain, headache, or numbness in the limbs hours or days after ingesting gluten, unlike individuals with celiac disease who can experience nausea or stomach pain immediately after consuming gluten).

32. 29 U.S.C. § 794 (2012); see also *Navigating the School System*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/kids/parents/guides/Kids-Youth/Navigating-The-School-System/209> (last visited Apr. 19, 2013) (advising parents how to request a 504 plan).

33. 29 U.S.C. § 794 (2012).

34. See 34 C.F.R. § 104.33 (2012) (specifying that a handicapped person should not have to pay for any special services that a school provides and that those accommodations should meet the educational needs of the handicapped student, as well as those of non-handicapped students).

35. See 34 C.F.R. § 104.34 (2012) (requiring that schools place handicapped students in regular educational settings unless supplementary aids or disability services are not compatible with that setting).

develop 504 plans with students and parents.<sup>36</sup>

In elementary, middle, and high schools, parents often work with administrators to develop individualized 504 plans that identify a student's disability and establish how the school will ensure that the child has a safe school environment.<sup>37</sup> While this system is in place, not every school can, or does, sufficiently accommodate students with celiac disease. A 504 plan is a useful option for children with celiac disease because it can establish lunchroom and classroom policies.<sup>38</sup> To submit a successful 504 plan, the student must argue why she should qualify as disabled within the meaning of the Rehabilitation Act and why her education would be negatively affected if the school does not accommodate her disability.<sup>39</sup> Some schools handle celiac disease and food allergies on a more informal case-by-case basis and, therefore, do not use 504 plans.<sup>40</sup>

## 2. *The ADA and the ADAAA*

Though the ADA was passed seventeen years after the Rehabilitation Act, these statutes have parallel structures.<sup>41</sup> Like the Rehabilitation Act, the ADA prohibits discrimination on the basis of disability in state and local government programs, which include public schools.<sup>42</sup> The definition of "disability" under the ADA is identical to the definition of "handicapped individual" under the Rehabilitation Act.<sup>43</sup> Accordingly, the two Acts can

36. See 34 C.F.R. § 104.7 (2012) (calling for a school with fifteen or more employees to designate one person to coordinate the school's efforts to comply with § 504).

37. See 34 C.F.R. § 104.33 (2012) (providing that schools meet the individual education needs of each disabled student regardless of the nature or severity of that student's disability).

38. See *At School*, *supra* note 2 (discussing how communication between parents and schools can ensure that students eat healthy meals and that school cafeterias avoid cross-contamination with foods containing gluten).

39. See *id.* (outlining the information that must be included in a 504 plan: a description of the student's disability and how it affects his diet, how his disability restricts his life, and what foods must be "avoided" or "omitted from his diet").

40. See Tess O'Brien-Heinzen, *A Complex Recipe: Food Allergies and the Law*, 83 WIS. L. REV. 8, 10 (2010) (explaining that many elementary and secondary schools address food allergies under the Rehabilitation Act rubric).

41. See S. REP. NO. 102-357, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712, 3718 (highlighting testimony that Congress thought it was essential to amend the Rehabilitation Act after the advent of the ADA).

42. 29 U.S.C. § 794 (2012).

43. See S. REP. NO. 102-357, at 2 (1992) (noting that amendments to the Rehabilitation Act were made to ensure that the Rehabilitation Act reflected the values and intent of the ADA).



be used interchangeably for identifying covered individuals.<sup>44</sup>

To be protected under the ADA, an individual must prove that she is disabled, which historically is not an easy hurdle for plaintiffs.<sup>45</sup> Courts tend to interpret the term “disability” narrowly, looking to the frequency of the impairment and whether an individual is still able to work, and some courts have found that individuals with major illnesses like cancer and diabetes do not have disabilities under the ADA.<sup>46</sup>

In 2008, Congress enacted the ADAAA, wherein it expressly rejected two Supreme Court decisions, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>47</sup> and *Sutton v. United Air Lines, Inc.*,<sup>48</sup> which defined disability more restrictively than legislators had intended in the original ADA.<sup>49</sup> In *Williams*, the Court held that Williams’ carpal tunnel syndrome was not a disability under the ADA because it did not severely restrict her and because she did not show that it was a permanent or long-term condition.<sup>50</sup> In *Sutton*, the Court held that the Suttons’ severe myopia was not a disability within the meaning of the ADA because, with corrective lenses, their vision was perfect.<sup>51</sup> The Court reasoned that, because Congress included language in the ADA that forty-three million Americans were

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44. See 29 U.S.C. § 705 (20)(B) (2012) (explaining that the term “individual with a disability” should comport with the definition of disability in the ADA).

45. See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (construing “substantially limits” to preclude impairments that only interfere in a minor way and also holding that “major life activities” are only those activities that are of “central importance to daily life”); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that courts should evaluate whether an individual is disabled under the ADA in light of any corrective measures the individual makes to mitigate her impairments, such as contact lenses for impaired vision).

46. See, e.g., *Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 35 (1st Cir. 2010) (determining that an employee’s diabetes did not substantially limit his vision or eating and was thus not covered under the ADA); *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 960-61 (E.D. Mo. 2002) (establishing that because a teacher’s breast cancer did not substantially limit her from any major life activities, it was not a “disability” under the ADA).

47. 534 U.S. 184 (2002).

48. 527 U.S. 471 (1999).

49. See ADA Amendments of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2012) (detailing that Congress meant to overrule *Sutton* and *Williams*, which required a high level of limitation to obtain coverage under the ADA and extensive analysis to determine whether an individual was disabled).

50. *Williams*, 534 U.S. at 197-99 (asserting that the fact that a woman had carpal tunnel syndrome was not sufficient to allege a disability because the disease affects people very differently and can have a merely minor impact on major life activities).

51. *Sutton*, 527 U.S. at 488-89 (conceding that with corrective lenses, the Suttons were able to function like people without myopia).

disabled, Congress did not likely intend to include those whose impairments could be easily corrected.<sup>52</sup>

In response to *Williams* and *Sutton*, Congress aimed to ease the burden on individuals looking for protection under the ADA with the passage of the ADAAA, allowing for broader coverage<sup>53</sup> and applying the amendments to the Rehabilitation Act.<sup>54</sup> Congress inserted “rules of construction” in the ADAAA that are important for individuals with disabilities.<sup>55</sup> First, Congress changed the meaning of “major life activities,” emphasizing that one major life activity does not need to limit other major life activities, and it expanded the list of major life activities.<sup>56</sup> Second, Congress rejected the requirement from *Sutton* that courts should consider the ameliorative effects of mitigating measures in deciding whether an impairment substantially limits a major life activity.<sup>57</sup> Finally, Congress reinforced that, when active, an episodic impairment is a disability if it would substantially limit a major life activity.<sup>58</sup>

### C. Relevant Cases and Administrative Decisions

Cases applying pre-ADAAA definitions have not provided coverage for diseases with similar symptoms to celiac disease.<sup>59</sup> In *Atencio v. Joint Jerome School District No. 261*, the Idaho district court found that Atencio’s colitis and Crohn’s Disease, which resulted in frequent use of the restroom, monitoring of her diet, and abdominal pain, was not enough to establish that any major life activities were substantially limited.<sup>60</sup> The

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52. *See id.* at 487 (stating that the number of people with vision impairments alone is far higher than the total number of disabled Americans that Congress cited in the ADA).

53. *See* Pub. L. No. 110–325, § 2 (2012) (expressing that the primary objective of review in cases brought under the ADA should be whether covered entities have complied with their duties).

54. *Id.* at § 7 (codified at 29 U.S.C. § 705 (2012)).

55. *Id.* at § 4 (codified at 42 U.S.C. § 12102 (2012)).

56. *See* 42 U.S.C. § 12102(2),(4)(C) (2012) (including major bodily functions as major life activities).

57. *See id.* at § 12102(4)(E)(i)–(ii) (declaring that courts could not look to mitigating measures such as corrective lenses when determining whether an individual is disabled under the ADA).

58. *Id.* at § 12102(4)(D).

59. *See, e.g.,* *Atencio v. Joint Jerome Sch. Dist. No. 261*, 837 F. Supp. 2d 1158 (D. Idaho 2011) (involving an individual with colitis and Crohn’s disease); *Ingles v. Neiman Marcus Grp.*, 974 F. Supp. 996, 996 (S.D. Tex. 1997) (discussing an individual with diabetes).

60. *See Atencio*, 837 F. Supp. 2d at 1167 (finding that symptoms such as using the restroom frequently and experiencing abdominal pain and headaches were unfortunate,

court reasoned that Atencio could still physically perform many activities with the caveat that she needed to be near a bathroom, which was not enough to substantiate a significant limitation.<sup>61</sup> Similarly, the diabetic in *Ingles*, who was not dependent on insulin and only had to sustain a healthy diet for treating his diabetes, did not meet the disability threshold under the ADA.<sup>62</sup> *Ingles* was able to eat and could still perform all basic tasks; therefore, his diabetes was not a protected disability under the ADA.<sup>63</sup> In dicta, however, the court mentioned that, if *Ingles* could not properly digest food or was prohibited from eating certain foods, his diabetes could qualify as a protected ADA disability because someone cannot train himself to digest or eat specific foods.<sup>64</sup>

Cases invoking the intent of the ADAAA emphasize that courts cannot consider an individual's ability to ameliorate the effects of her disability in determining whether a disability is substantially limiting.<sup>65</sup> In *Rohr v. Salt River Project Agriculture Import & Power Distribution*, the Ninth Circuit held that even though an insulin-dependent, type 2 diabetic could manage his disability by staying on his medicines and watching what he ate, the fact that he could still be exposed to health risks by straying from this regimen was sufficient to establish a substantial limitation on Rohr's eating.<sup>66</sup> The court of appeals rejected the argument that if an individual is able to manage her disability by taking medicine and monitoring her food intake, her eating is not substantially limited by her disability.<sup>67</sup> Similarly, a New York district court, applying the ADAAA, found that a person's adherence to a specific eating routine and diet, even though such a diet prevented Kravtsov from aggravating his condition, could not influence

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but not limiting enough to qualify as a disability).

61. *See id.* at 1166 (explaining how vague assertions that walking and shopping were difficult were not enough to rise to the level of a significant restriction).

62. *See Ingles*, 974 F. Supp. at 1002 (finding that someone who must monitor her food intake more than others is not substantially limited).

63. *See id.* (maintaining that the only changes *Ingles* had to make were eating at regular intervals and eating healthy).

64. *See id.* (stressing that if someone could train herself to perform basic tasks in spite of a disability then that person is not substantially limited).

65. *See Kravtsov v. Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at \*11 (S.D.N.Y. July 9, 2012) (applying post-ADAAA standards to find that the court could not consider the effects of planning meals in analyzing whether Kravtsov was substantially limited in a major life activity).

66. *See Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850, 860-61 (9th Cir. 2009) (looking to the original congressional intent as expressed in the ADAAA in evaluating whether Rohr's diabetes substantially limited his eating).

67. *See id.*

whether the disability substantially limited his ability to eat and the functioning of his digestive and bowel systems.<sup>68</sup>

The Office for Civil Rights (OCR), in the Department of Education, enforces five federal civil rights laws, including the Rehabilitation Act and the ADA.<sup>69</sup> Anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone may file a complaint.<sup>70</sup> While the OCR's decisions are not binding on courts, courts may look to them as persuasive authority.<sup>71</sup> The OCR applied the ADA to a student with a gastrointestinal disorder and ruled that a California school district violated § 504 and the ADA when it improperly concluded that the student did not have a disability.<sup>72</sup> The student was absent for approximately thirty days during his ninth and tenth grade years, but the school district found him ineligible for § 504 services because he was performing well academically.<sup>73</sup> The OCR held that the school district violated § 504 and the ADA by basing its evaluation only on whether the student's food allergy affected his learning.<sup>74</sup> The OCR reasoned that learning is only one of many major life activities that can be considered under the ADA, which permits coverage of several other disabilities.<sup>75</sup>

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68. See *Kravtsov*, 2012 WL 2719663, at \*11 (discussing Kravtsov's testimony stating he was still able to work and plan his meals after having his stomach and parts of his small intestine removed).

69. See *About OCR*, OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Apr. 19, 2013).

70. See *id.*

71. See, e.g., *Mason v. Bd. of Educ.*, No. WMN-10-3143, 2011 WL 89998, at \*3 (D. Md. Jan. 11, 2011) (deferring to OCR's position that suspensions of less than ten days do not amount to a denial of a FAPE); *Hornstine v. Moorestown*, 263 F. Supp. 2d 887, 908 (D.N.J. 2003) (looking to a letter ruling from the OCR to support a decision that a school violated § 504 when it changed a policy for weighing grades by considering a student's disability).

72. *Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21, 89-90 (OCR 2009).

73. See *id.* at 86-87 (rejecting the school's determination that the student's learning was not substantially limited because he continued to receive good grades).

74. See *id.* at 87 (recognizing that § 504 considers whether an individual is limited in one or more life activities).

75. See *id.* (stating that digestive and bowel functions are other life activities that a school district can consider).

### III. ANALYSIS

#### *A. Celiac Disease Should Be a Covered Disability Under the ADA Because It Substantially Limits Major Life Activities and Major Bodily Functions as Expanded in the ADAAA.*

For a disability to be covered under the ADA, it must substantially limit a major life activity, which the ADAAA expanded to include several new life activities and bodily functions.<sup>76</sup> Post-ADAAA regulations also state that “substantially limited” is not meant to be a demanding standard and should not require extensive analysis.<sup>77</sup> Because there is no case law analyzing whether celiac disease is covered under the ADA, courts should begin by looking to the language of the statute; specifically, how the ADAAA affects courts’ review of major life activities.<sup>78</sup> Celiac disease should be covered by the ADA because it affects several life activities and has a large impact on bodily functions.

#### *1. Celiac Disease Substantially Limits Eating.*

Students diagnosed with celiac disease are substantially limited in their eating because they are prohibited from eating foods that contain gluten. More than just requiring the individual to monitor her food intake, like the diabetic in *Ingles v. Neiman Marcus Group*,<sup>79</sup> a student with celiac disease must not eat gluten or she could experience symptoms such as stomach pain, nausea, or vomiting.<sup>80</sup> The diabetic in *Ingles* described his limitation on eating as having to sustain a “normal, healthy diet.”<sup>81</sup> Abstaining from gluten and obtaining gluten-free foods is far more limiting than merely maintaining a healthy diet, which may include gluten-free foods, but allows

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76. See 42 U.S.C. § 12102(2)(A)–(B) (2012) (expanding coverage by adding more life activities and a new section on bodily functions).

77. See 29 C.F.R. § 1630.2(j)(i)–(iii) (2012).

78. While not a court decision, in an agreement with Lesley University to ensure that their meal plan accommodates students with celiac disease and food allergies, the Department of Justice announced, “food allergies *may* constitute a disability under the ADA.” Press Release, Dep’t of Justice, Justice Department and Lesley University Sign Agreement to Ensure Meal Plan is Inclusive of Students with Celiac Disease and Food Allergies (Dec. 20, 2012), *available at* <http://www.justice.gov/opa/pr/2012/December/12-crt-1538.html> (emphasis added).

79. 974 F. Supp. 996, 1001-02 (S.D. Tex. 1997) (finding that Ingles’s diabetes did not rise to a protected ADA disability because he only had to maintain a good diet).

80. See *National Digestive Diseases Information Clearinghouse*, *supra* note 4 (highlighting that the more severe and immediate symptoms are most prevalent among infants and young children).

81. See *Ingles*, 974 F. Supp. at 1001.

for much more variety and is thus less restrictive.<sup>82</sup>

The need to monitor all aspects of an individual's food intake closely is enough to constitute a substantial limitation on eating.<sup>83</sup> In *Rohr*, if the diabetic did not follow his diet regimen of eating one or two moderately sized meals, his blood sugar would rise and aggravate his disease.<sup>84</sup> He had to regulate his diet in this way because taking daily insulin injections did not stabilize his blood sugar levels sufficiently.<sup>85</sup> Rohr was substantially limited because it took so much effort to control his diet. Because those with celiac similarly expend so much effort, celiac disease should also be considered as a substantial limitation on eating.<sup>86</sup> Students with celiac disease must be able to identify foods that might have gluten in them or bring their own food so they do not aggravate their disease or suffer a negative reaction.<sup>87</sup> Furthermore, applying the ADAAA, courts cannot consider the ameliorative effects of planning meals to omit certain foods and adjusting one's daily schedule around when these meals will be when determining whether a disability substantially limits eating.<sup>88</sup> While they do not have to plan their daily schedule around when they will be eating, those with celiac disease must similarly plan what they are eating and must avoid certain foods in such a way that their eating is substantially limited.<sup>89</sup>

Celiac disease makes dining out more than just "problematic."<sup>90</sup> While

82. *See id.* at 1002 (finding that having to eat at regular intervals and maintaining a healthy diet do not substantially limit Ingles' ability to eat under pre-ADAAA standards because he is not prohibited from eating specific types of foods).

83. *See, e.g., Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850, 860 (9th Cir. 2009); *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 259 (D.N.H. 2009) (stating that even if a person is able to manage her disability through medicine and diet, monitoring your food intake could amount to a substantial limitation).

84. *See Rohr*, 555 F.3d at 859 (explaining that Rohr could not schedule vacations because it was so difficult for him to follow his diet when he was traveling).

85. *See id.* at 860.

86. *See id.* (clarifying that planning daily schedules around a dietary regimen and neither skipping meals nor eating large meals are substantial limitations on eating).

87. *See Diagnosis & Treatment*, *supra* note 28 (advising that even a small amount of gluten can damage the small intestine).

88. *See Kravtsov v. Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at \*11 (S.D.N.Y. July 9, 2012) (highlighting that post-ADAAA standards prevent courts from considering mitigating measures when determining whether a disability substantially limits major life activities, such as restricting your diet to certain foods).

89. *See National Digestive Diseases Information Clearinghouse*, *supra* note 4 (explaining that people with celiac cannot eat many processed foods and that they must be careful when they buy lunch at school).

90. *See Atencio v. Joint Jerome Sch.* Dist. No. 261, 837 F. Supp. 2d 1158, 1162 (D. Idaho 2011) (finding that Atencio, who had colitis and Crohn's disease, and had to

the *Atencio* court did not find that *Atencio*'s colitis, and possible Crohn's disease, substantially limited her eating,<sup>91</sup> celiac disease is different in major ways. *Atencio* had to avoid certain foods in order to prevent symptoms such as nausea and vomiting.<sup>92</sup> Eating certain foods may aggravate Crohn's disease or colitis, but there is no evidence that the disorders are directly affected by certain foods.<sup>93</sup> Thus, an individual diagnosed with Crohn's disease or colitis is less restricted in eating than someone with celiac disease because while someone with colitis may experience symptoms after eating, that reaction is caused by the disorder and not by what she has eaten.<sup>94</sup> A student's ability to control her celiac disease is directly affected by what she eats; the only way to treat celiac disease is through a lifelong adherence to a gluten-free diet.<sup>95</sup> Accordingly, a student's eating is more substantially limited by celiac disease than it would be by colitis or Crohn's disease where what the student eats does not directly worsen her condition.

## 2. Celiac Disease Substantially Limits Learning.

The symptoms associated with celiac disease have a significant impact on a student's learning. Like the student suffering from post-infectious gastroparesis and irritable bowel syndrome (IBS) in *Oxnard Union High School District*, a student with celiac disease could also experience recurrent vomiting, nausea, and abdominal pain.<sup>96</sup> Because of these symptoms, the student in *Oxnard* was absent for twenty-eight days in the ninth grade and thirty-five days in the tenth grade.<sup>97</sup> Even though the student continued to do well academically, the OCR held that a student

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avoid certain foods when eating out, was not substantially limited in her eating).

91. See *id.* at 1167.

92. See *id.* at 1162.

93. See *Atencio*, 837 F. Supp. 2d at 1162 (demonstrating that some Crohn's patients need to avoid certain foods). But see *Crohn's Disease and Ulcerative Colitis Diet*, CROHN'S & COLITIS FOUND. OF AM., <http://www.ccfa.org/resources/diet-and-nutrition-1.html> (last visited Apr. 19, 2013).

94. See *id.* (elucidating that inflammation of the intestine is a result of having Crohn's disease and not because of something the person ate).

95. See *Treatment of Celiac Disease*, CELIAC DISEASE FOUND., [http://www.celiac.org/index.php?option=com\\_content&view=article&id=8&Itemid=14](http://www.celiac.org/index.php?option=com_content&view=article&id=8&Itemid=14) (last visited Apr. 19, 2013).

96. Compare *Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21, 86, 88 (OCR 2009), with *National Digestive Diseases Information Clearinghouse*, *supra* note 4 (indicating that digestive issues are most common among young children with celiac disease).

97. See *Oxnard*, 55 IDELR at 86.

would have difficulty learning if she were not able to attend school because of her disorder.<sup>98</sup> Similarly, if a student with celiac disease were to miss a significant amount of school because of symptoms associated with her disease, those absences would be sufficient to constitute a substantial limitation on her learning.

Students with celiac disease are likely to miss school, and it is especially likely that an undiagnosed student with celiac disease will miss more school than a student who is aware of the problem.<sup>99</sup> Even if a school makes accommodations for the student, such as allowing her reasonable time to make up missed assignments from excused absences, her learning is still substantially limited by her disorder because she has to miss class.<sup>100</sup> Additionally, if a student is able to maintain good grades in spite of a disability, her disorder should still be categorized as a disability.<sup>101</sup> Without looking to accommodations that a school may make for a student with celiac disease, how the student is able to control her diet, or whether a student continues to excel academically, celiac disease substantially limits a student's learning.

### *3. Celiac Disease Substantially Limits the Operation of the Digestive and Bowel Functions.*

Individuals with celiac disease are not fully capable of properly digesting food that contains even trace amounts of gluten.<sup>102</sup> In its announcement of its agreement with Lesley University to accommodate students with celiac disease, the Department of Justice explained that celiac denies "vital nourishment" to several organs.<sup>103</sup>

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98. See *id.* at 90 (indicating that a student has difficulty learning if she is not able to attend school regularly).

99. See *School Absences, CELIAC DISEASE & GLUTEN-FREE FORUM* (Apr. 17, 2011, 4:31 PM), <http://www.celiac.com/gluten-free/topic/80133-school-absences> (showcasing students with celiac disease who have missed up to seventy-five days of school in a year).

100. See Oxnard, 55 IDELR at 88-89 (explaining that the positive impact of accommodations is something that the school should evaluate, but it should not influence whether a condition is eligible as a covered disability).

101. See *id.* (highlighting that even if a student is able to maintain average grades, a slight drop may still occur due to school absences and that is proof that the disorder is substantially limiting her learning).

102. See *Treatments and Drugs*, MAYO CLINIC, <http://www.mayoclinic.com/health/celiac-disease/DS00319/DSECTION=treatments-and-drugs> (last visited Apr. 8, 2013).

103. See Press Release, Dep't of Justice, *supra* note 78 (stressing that because celiac disease causes permanent damage to the small intestines and prohibits the body from absorbing nutrients, vital organs are denied necessary nutrition).



As the New York district court explained in *Kravtsov v. Town of Greenburgh*, post-ADAAA, a court should look to whether an individual is substantially limited, compared to the general population, in the functioning of her digestive and bowel systems.<sup>104</sup> Kravtsov had his entire stomach and part of his small intestine removed, and was entirely incapable of digesting certain types of food.<sup>105</sup> A student with celiac disease is more like Kravtsov than the diabetic in *Ingles* who had to maintain a healthy diet, but was still able to properly digest food, because those with celiac cannot digest any food containing gluten.<sup>106</sup> Gluten damages the villi in the small intestines, which then prevents the body from absorbing nutrients, which means the body does not digest the food.<sup>107</sup> Accordingly, celiac disease substantially limits the functioning of the digestive and bowel systems.

#### IV. POLICY RECOMMENDATIONS

##### *A. ADA Analysis Should Specifically Consider the Longevity of a Condition Like Celiac Disease to Ensure That Individuals Receive the Accommodations That Make Living with the Disease More Manageable Because Maintaining a Gluten-Free Diet is a Financial Burden on Those Afflicted with the Disease.*

Celiac disease not only is a substantial limitation on physical functions like eating and digesting food, but it is restrictive in other ways as well. Living with celiac disease is extremely expensive.<sup>108</sup> In addition to the fact that gluten-free food is much more costly than food containing gluten, students living with celiac disease may also have to visit the doctor more than those without celiac disease.<sup>109</sup> Because there is no cure for celiac

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104. See *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at \*11 (S.D.N.Y. July 9, 2012).

105. See *id.* at \*1 (detailing the only types of food that Kravtsov was able to tolerate).

106. Compare *id.* at \*1 (explaining the difficulties and limitations of Kravtsov's ability to digest certain foods) with *Ingles v. Neiman Marcus Grp.*, 974 F. Supp. 996, 1001-02 (S.D. Tex. 1997) (finding that because Ingles was able to properly digest food, he was not substantially limited in a major life activity).

107. See *What Happens with Celiac Disease*, CELIAC DISEASE FOUND., [http://www.celiac.org/index.php?option=com\\_content&view=article&id=4&Itemid=23](http://www.celiac.org/index.php?option=com_content&view=article&id=4&Itemid=23) (last visited Apr. 19, 2013).

108. See Martha C. White, *Why We're Wasting Billions on Gluten-Free Food*, TIME, Mar. 13, 2013, available at <http://business.time.com/2013/03/13/why-were-wasting-billions-on-gluten-free-food> (finding that gluten-free products are 242% more expensive than their gluten-containing counterparts).

109. See *Celiac Disease Facts & Figures*, *supra* note 1 (calculating the financial burden over a four-year period as \$4,019 for women and \$14,191 for men).

disease, students with celiac disease will face this significant economic burden for their entire lives.<sup>110</sup> This financial burden of living with celiac disease is substantially limiting and affects other major life activities.<sup>111</sup> Courts should consider this financial hardship, along with the physical limitations, when determining whether a disability is covered under the ADA to ensure that students who need accommodations will receive them.<sup>112</sup>

*B. The United States Should Follow Other Western Countries That Have Responded to the Growing Prevalence of Celiac Disease by Mandating Gluten-Free Lunches for Students and Tax Breaks for Those with the Disease.*

The United States needs regulations to determine a nationwide baseline for accommodating celiac disease. In several Western countries where celiac disease is highly prevalent, gluten-free foods are available at reduced cost or no cost at all.<sup>113</sup> Italy is one of the most progressive countries in this area in that it provides, by law, gluten-free meals in schools, hospitals, and public eating establishments.<sup>114</sup> Italy also conducts a census to determine the number of people with celiac disease so that it can plan accommodations accordingly.<sup>115</sup>

The United States does offer a tax deduction for gluten-free products as a

110. See Lesley Alderman, *The Expense of Eating with Celiac Disease*, N.Y. Times (Aug. 14, 2009), available at <http://well.blogs.nytimes.com/2009/08/14/the-high-price-of-celiac-disease> (calculating that gluten-free foods are three times as expensive as regular products and that they often need to be supplemented with vitamins).

111. See *id.* (detailing the time-intensive tasks such as cooking food to avoid gluten, making trips to special stores that carry gluten-free products, and itemizing tax returns to deduct excess costs of gluten-free products).

112. See H.R. REP. NO. 101-485(II), pt. 1 at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 313 (supporting the need for legislation with testimony that people with disabilities are much poorer than other Americans).

113. See *International Variations in Government Policy Concerning Celiac Disease*, GLUTINO.COM (Aug. 30, 2010), <http://www.glutino.com/our-story/news/variations-in-international-government-policy-concerning-celiac-disease/> (explaining that countries like the United Kingdom provide allowances for people to buy gluten-free foods and that, in Ireland, gluten-free foods are considered staples and provided free of charge for those that have prescriptions for such foods).

114. See *id.* (explaining that starting at age eleven, Italians who require gluten-free foods may apply for a monthly stipend to purchase gluten-free foods).

115. See *id.* (detailing that in addition to conducting a census, the Italian government also regularly updates a "register of food" that keeps a current list of gluten-free foods that Italians can purchase with their stipend).

medical deduction.<sup>116</sup> To request a deduction, an individual must have a doctor's note for herself, or a dependent, and keep all her receipts.<sup>117</sup> However, the process is quite cumbersome and it requires applicants to go through each purchase and then find and compare that price to a gluten-containing alternative. Conversely, European laws give stipends or allowances to those with celiac disease, which is far more manageable.<sup>118</sup> As the rate of celiac disease diagnosis increases, the United States should consider following European countries that have laws mandating accommodations for people with celiac disease.

## V. CONCLUSION

Celiac disease is a disability within the meaning of the ADA. After considering both the plain meaning of the ADAAA and the way that courts have interpreted whether an impairment "substantially limits a major life activity," celiac disease meets the criteria<sup>119</sup> because celiac disease substantially limits a student's eating, learning, and the functioning of her digestive and bowel systems.<sup>120</sup> Therefore, public schools should be required to provide reasonable services under the ADA and the Rehabilitation Act to accommodate students with celiac disease.

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116. See *Tax Deduction Guide for Gluten-Free Products*, NAT'L FOUND. FOR CELIAC AWARENESS, <http://www.celiaccentral.org/shopping/tax-deduction-guide-for-gluten-free-products> (last visited Apr. 8, 2013) (specifying that these deductions are part of form 1040 schedule A for medical deductions).

117. See *id.* (describing the process of itemizing deductions, which includes calculating the difference between gluten-free foods and their gluten-containing counterparts).

118. See Alderman, *supra* note 110 (detailing the tax return process, which includes deducting the price of regular food products from the price paid for gluten-free food, saving receipts, and including a doctor's letter).

119. See *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at \*10 (S.D.N.Y. July 9, 2012) (elucidating that regulations interpreting the ADAAA state that the "substantially limiting" standard does not require significant review).

120. See, e.g., *Kravtsov*, 2012 WL 2719663, at \*11 (holding that Kravtsov's functioning of his digestive and bowel systems was substantially limited because he could not digest certain types of food); *Ingles v. Neiman Marcus Grp.*, 974 F. Supp. 996, 1002 (S.D. Tex. 1997) (reasoning that a substantial limitation on eating exists if someone is prohibited from eating certain foods); *Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21, 90 (OCR 2009) (finding that a student's gastrointestinal disorder substantially limited his ability to learn because he had a significant number of absences due to his condition).