

Americans With Disabilities Act Amendments Act of 2008 (ADAAA)

On January 1, 2009 the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") went into effect. The ADAAA specifically reverses two prior United States Supreme Court decisions in the employment arena as we discuss below. **The impact on students who may be "disabled persons" under the ADA or under Section 504 is less clear.** The following is a brief review of the changes. The Minnesota Department of Education published a new Section 504 Manual on its website that provides some guidance. We have provided some specific suggestions at the end of this document.¹

A Shift from Whether a Disability Exists to Whether Discrimination has Occurred

In enacting the ADAAA, Congress intended to shift the focus of ADA compliance from the question of whether a person's impairment is a disability under the Act, to the interactive process through which the school and parents (or employer / employee) determine what is necessary to reasonably accommodate the disability. In this vein the ADAAA instructs courts that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Broadening the Class of Protected Persons

Concerned that the U.S. Supreme Court, lower courts, and federal agencies had restricted the definition of "disability," thereby wrongly narrowing the class of persons protected by the ADA, Congress expressly rejected two Supreme Court decisions: (1) *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), in which the Supreme Court required that the determination of whether an impairment substantially limits a major life activity be balanced against the "ameliorative effects of mitigation measures," such as medication or medical devices, and (2) *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that the terms "substantially limited" and "major life activities" should be read narrowly and that an individual must show that a disability prevents or severely restricts him/her from doing activities that are of central importance to most people's

¹ This memorandum was prepared by Laura Tubbs Booth with the significant assistance of Roseann Schreifels. It is not intended as legal advice but was designed to provide a brief review of the new ADAAA. Contact your attorney for advice regarding specific factual situations or applications of the ADAAA. This document is not legal advice.

lives. The rejection of these decisions calls into question numerous court decisions that have denied protection for various conditions, including diabetes, epilepsy, heart disease, mental disabilities, and cancer, among others.

Providing Guidance

In addition to rejecting these Supreme Court decisions, Congress provided guidance for determining whether an individual's impairment is considered a disability. Most significantly, the ADAAG:

- emphasizes that the definition of "disability" should be interpreted broadly,
- directs the EEOC to revise (broaden) that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:
 - "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"
 - "major life activities" also includes "major bodily functions," including, but not limited to "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions"
- clarifies that the determination of whether an individual has a disability must be made without considering the ameliorative effects of mitigating measures such as medication, medical supplies, prosthetics, hearing aids, mobility devices and assistive technology (except that prescription eyeglasses and contact lenses may be considered when assessing whether an individual has a disability). Thus, for example, an individual with diabetes may be found to have a disability under the law, even if when taking medication he has no symptoms whatsoever. Note that while this change may broaden the class of students covered, in some cases it may not actually change the service/accommodations a school would need to provide, e.g., if a student's hearing aid allows him to hear his teacher and classmates, he would not need a sign language interpreter as an accommodation for his disability.

- clarifies that an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation;

Trending Toward Broader Coverage

Even before the enactment of the ADAAA, things had been trending toward broader ADA and Section 504 coverage for students. For example, in January of 2007 the OCR questioned a school district's determination that a student with a peanut allergy was ineligible for a Section 504 Plan. The OCR found that in light of evidence from the student's doctor regarding the nature and severity of the student's peanut allergy (which included significant sensitivity and potential anaphylaxis), and given "the likelihood, nature, and severity of the harm that could result from the school district's failure to find the student eligible for Section 504 services," the school district likely violated Section 504 and the ADA by refusing to develop a plan for the student. The district subsequently entered into a Voluntary Agreement with the OCR.

Similarly, even before the enactment of the ADAAA, some schools had begun developing Section 504 plans for students with celiac disease, diabetes, allergies and other disabilities.

In Many Ways, the Same as Before

Although the ADAAA makes some significant changes, educators should remember that the ADA Amendments retain the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

More importantly, educators should remember that although the coverage will be broader, the Section 504 process remains the same. That process remains, as it always has been, an individual (case by case) determination. Whether a student qualifies for a 504 Plan and what that plan looks like is highly individual and must be made on a case by case basis.

As a result of the Amendments, many students who were not previously protected under the ADA may now be considered to have a disability. This

may result in an increased number of requests for accommodations made by parents.

Conclusion and Recommendations

As before, educators should not lightly dismiss a parent's request for school-related help in connection with a student's medical problem or disability. Educators should recognize that the definition of disability under the ADA is broad and requires a case-by-case, individualized analysis. Similarly, the determination of appropriate accommodations requires individualized consideration and an interactive process between school and parents. Finally, schools should continue to follow the process requirements of Section 504 and Title II of the ADA including: (1) drawing upon a variety of sources in the evaluation process; (2) ensuring that information obtained from all sources is documented and carefully considered; and (3) ensuring that decisions are made by a group knowledgeable about the student, the meaning of the evaluation data, and the placement options.

Our specific recommendations as we wait for OCR guidance in this area are:

1. Review the District's Section 504 policy and the implementing regulations or administrative guidelines. Ensure that the policy affords parents and adult students the right to a hearing. If your policy has a grievance procedure appropriate for employee/volunteer claims; consider whether a simpler process might be appropriate for student claims. If your district does not have a policy and clear guidelines, you should not delay in implementing a policy and guidelines as soon as possible. We can't stress how important having a policy and teaching staff about the policy is in avoiding claims and defending claims of discrimination.
2. Continue to evaluate a student's potential disability by:
 - a. Requesting current medical documentation of a disability (not required by law but allowed by law and best practice in our view)
 - b. Accept the medical/mental health diagnosis as true (unless there is a strong reason to challenge it – seek legal advice if you decide to challenge the disability)
 - c. Consider the "total student" and as much objective data as you can including:
 - i. Attendance data – is the disability impacting the student's ability to come to school or stay at school for the entire day
 - ii. Behavioral data – suspensions, referrals, behavioral tracking, in-school suspensions. As importantly does the disability impact the student's ability to work in groups

- with peers on academic tasks? Does the student have decent relationships with adult educators? Do the relationships (or lack thereof) with others impact the student's ability to access education?
- iii. Grades – is the student earning passing grades? (how much modification is being done if any)
 - iv. Standardized testing – is the student passing these?
3. Keep in mind that Congress has informed that the question of whether a disability exists should not require much debate. (I.e. either the doctor or psychologist says there is a disability or there is not). The central question is does that disability impact some major life activity? Not just learning or education but any major life activity. If so, the student is probably a “disabled person” under Section 504 and the ADA.
 4. The next inquiry is whether that student requires a 504 Plan (accommodations) in order to have meaningful access to education. If the answer is “yes”, the District would be discriminating against the student if it failed to provide the accommodations.
 5. Consider the import of your decisions on the issue of equity. In other words, are majority students receiving 504 Plans while students of color with similar issues are referred to special education? Are students of color being referred for 504 Plans because of cultural differences instead of true disabilities? Are students who receive English Language Learner (ELL) support not being referred for special education because of their lack of English proficiency or are they not being referred for 504 or special education evaluations because staff are uncertain if language might rule out eligibility.
 6. Train staff. General education staff and administrators must know how these general education statutes work and how they intersect with Response to Intervention and ELL work in particular.

In other words, we recommend that you do not dramatically change the implementation of your current 504 policy and practices but that you carefully consider them now in light of the trend toward a broader definition of who is “disabled” under the ADA and probably under Section 504, carefully examine each request for a 504 evaluation and plan and do so on an individual basis and be alert to new guidance and cases that are sure to be forthcoming shortly.

References

Disability Discrimination, The U.S. Equal Employment Opportunity Commission (www.eeoc.gov/tpes/ada.html) (last visited January 26, 2009)

ADA Amendments, J. L. Horton and L. R. McBride; Inquiry and Analysis (Feb. 2009)

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