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How The ADA Amendments Act Of 2008 Affects Student Eligibility For Section 504 Accommodation Plans

by Andrea R. Kunkel

In October, 2008, President Bush signed the long-awaited ADA Amendments Act of 2008 (the "Act"). The Act alters definitions under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by which school districts and other entities determine whether a person is an "individual with a disability." The Act takes effect on January 1, 2009, although implementing regulations will take much longer to develop. The Act will certainly impact the legal definition of an "individual with a disability" in the context of employment. However, it also impacts the determination of which student is an "individual with a disability" in the context of student eligibility for a Section 504 Accommodation Plan. This article addresses student eligibility issues under the Act.

In the introduction to the Act, Congress states its intent that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Congress rejected the decision of the United States Supreme Court in *Sutton v. United Air Lines, Inc.* and its two companion cases, finding that they improperly eliminated protections for persons Congress intended to fall within the ADA's scope. In the Act, Congress specifically states that the Supreme Court's decision in *Toyota Motor Manufacturing v. Williams* incorrectly narrowed the scope of the ADA by interpreting the term "substantially limits" to require a greater degree of limitation than it intended. In essence, Congress "overruled" the Supreme Court's decisions through the Act.

"The Act alters definitions under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 . . . ."

These Supreme Court decisions dealt with employees, not students. However, the Office for Civil Rights and administrative and judicial decisionmakers have applied standards from these employment cases to Section 504 student eligibility cases. The Act also effectively "overrules" these decisions as to students.

Typically, school districts first consider a student's eligibility for a Section 504 Accommodation Plan after a multidisciplinary team has determined that the student does not meet the eligibility criteria for services under the Individuals with Disabilities Education Act. Under some circumstances, though, a district may choose to consider Section 504 eligibility for a student without first ruling out his or her eligibility for services under the IDEA.

Whatever the point at which Section 504 eligibility is first considered, individuals knowledgeable about the child and the suspected disability must make the Section 504 eligibil-

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OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE

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". . . that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures . . . "

ity determination based upon current evaluation data. The group will find that a child is an individual with a disability under the Section 504/ADA definition only if the child has a mental or physical impairment that substantially limits one or more of the child's major life activities.

Under the Act, the definition of a "physical or mental impairment" remains the same. The term means 1) 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 or 2) any mental disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation and emotional illness.

If the group finds that the child has a "physical or mental impairment," then it must consider whether that impairment substantially limits one or more of the child's major life activities. The Act broadens the specific list of "major life activities" and provides guidance concerning the circumstances under which the impairment should be found to "substantially limit" an activity.

Under the Act, "major life activities" include, but are not limited to: 1) caring for oneself; 2) performing manual tasks; 3) seeing; 4) hearing; 5) eating; 6) sleeping; 7) walking; 8) standing; 9) lifting; 10) bending; 11) speaking; 12) breathing; 13) learning; 14) reading; 15) concentrating; 16) thinking; 17) communicating; and 18) working. A "major life activity" also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. Although this list contains a number of the activities listed in the pre-Act version of Section 504, it also includes some that are particularly significant in the context of education, such as reading, concentrating and thinking.

The Act does not specifically define the term "substantially limits." However, Congress specifically states in the Act that the term is to be interpreted consistently with the Act's findings and purposes. In other words, Congress intends that the term be interpreted broadly. The Act also makes clear that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. Furthermore, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

In "overruling" previous Supreme Court precedents, the Act provides that the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as:

- Medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

  (The term "low-vision devices" means devices that magnify, enhance or otherwise augment a visual image.)

  (The term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error.)

- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services;

  (The term "auxiliary aids and services" includes:

  1. Qualified interpreters or other effective methods of making aurally delivered materials available to indi-

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viduals with hearing impairments.
2. Qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;
3. Acquisition or modification of equipment or devices; and
4. Other similar services and actions.)

or

- Learned behavioral or adaptive neurological modification.

However, the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses will be considered in determining whether an impairment substantially limits a major life activity.

The big question is how the Act will affect group decisions concerning student eligibility for Section 504 Accommodation Plans. If a school district has been broadly interpreting the "substantially limits" language and the list of major life activities contained in the pre-Act version of Section 504, then it may have very little impact. However, for a school district that took the ameliorative effects of mitigating measures into account when applying the "substantially limits" language or considered only the specific major life activities listed in the pre-Act version of Section 504, the impact could be quite significant.

To illustrate the potential impact of these changes, consider this example concerning the "substantially limits" language. A student takes medication to manage the effects of physician-diagnosed attention deficit hyperactivity disorder. Following a comprehensive evaluation, the multidisciplinary group determines that the student does not meet the eligibility criteria for IDEA eligibility for an other health impairment or specific learning disability. Then, as required by Section 504, a group of knowledgeable people meets to consider the student's eligibility for services under Section 504. The group agrees that the student has an impairment based upon the information concerning the ADHD diagnosis. However, the group determines that the impairment does not substantially limit the student's ability to learn or perform any other major life activity because the impairment, with medication, only mildly limits the student's learning. Therefore, the group determines that the student does not meet Section 504 eligibility criteria. For eligibility decisions made after January 1, 2009, however, the group cannot consider the ameliorative effect of the mitigating measure – the medication – in deciding whether the impairment substantially limits a major life activity. Furthermore, the group will need to consider whether the impairment substantially limits not just learning generally, but also the student's ability to think or concentrate. If the group determines that the impairment limits just one major life activity, then the student is eligible for services under Section 504.

The obvious question arising from this example is how to determine whether an impairment for which a student consistently takes medication substantially limits a major life activity when the student does not take the medication. From what sources does the district obtain that information when it does not see the "unmedicated" child? Parents are the most obvious source of that information, but districts can also review education records, including student performance data, and use teacher observations that reflect historical information about the student before he or she took medication or during breaks from medication. What school districts will do when that information does not exist is a question that will certainly be debated in many Section 504 eligibility meetings.

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This is just one example of a common situation expected to arise under the Act. Others involve students who use hearing aids, auxiliary aids and services or learned behavioral or adaptive neurological modifications or who have limitations on their ability to read or even sleep. The regulations

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implementing the Act will likely shed additional light on these areas, but they are not expected for months, at least. In the meantime, school district personnel need to educate themselves about the Act's changes and begin thinking about how to address them in their districts. In addition, district personnel need to make sure that their Section 504 eligibility forms reflect the Act's changes and that their staff members who serve as Section 504 coordinators and eligibility group members are knowledgeable of and ready to implement the new standards for determining eligibility.

Many school employees already consider the determination of student eligibility for services under Section 504 a confusing and subjective process, unlike the more objective eligibility process to which they are accustomed under the IDEA. The Act eliminates some mystery by making clear Congress' intention that Section 504 be interpreted broadly, in favor of eligibility. Until the Office for Civil Rights adopts regulations that establish more objective eligibility criteria – an event that may never occur – it remains up to each school district to determine how it will implement this process.

RF&R SPEAKERS/EVENTS SHOWCASE

Andrea R. Kunkel will be speaking at the Oklahoma Federation of the Council on Exceptional Children conference on February 4, 2009 and the OSSBA school law workshop on February 17, 2009. She will be presenting information about student issues under the IDEA, Section 504 and the ADA.

RF&R HIRES NEW ATTORNEY

Rosenstein, Fist & Ringold takes pleasure in announcing that Micah T. Zomer has joined the firm as an associate attorney. Mr. Zomer was admitted to the Oklahoma bar in 2008. His undergraduate degree is from the University of Tulsa (B.S., with honors, 2002), and his law degree is from the University of Oklahoma (J.D., 2008). While in law school, Mr. Zomer was Symposium Editor of the *American Indian Law Review* and in Fall 2005, was awarded an Academic Achievement Award for Legal Research & Writing. Mr. Zomer's article, "Returning Sovereignty to the Osage Nation: A Legislative Remedy Allowing the Osage to Determine Their Own Membership and System of Government," was published in the Fall 2008 issue of the *American Indian Law Review*.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.