

# Impact of the 2008 ADA Amendment on School Districts

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On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (ADA or Amendment) into law. Its provisions are effective on January 1, 2009.

Congress moved to amend the ADA to correct several Supreme Court decisions involving employment that significantly limited the Act's coverage. In this process, however, the Amendment (which also applies to Section 504 of the Rehabilitation Act) may have unanticipated consequences for school districts and their practices. The information below summarizes the Amendment, provides the intent of U.S. Senate and House Managers, and raises questions regarding how the Office for Civil Rights (OCR), US Department of Education (USDE) will interpret Section 504/ADA in light of the newly expanded definition of disability.

This information may be of interest to individuals who coordinate Section 504/ADA services for students to facilitate the development of updated policies and procedures, training, and consideration of the implications of ADA's amendment. Also, it may be of interest to individuals who coordinate Section 504/ADA for employees and the public.

## Definition of Disability

The ADA Amendment did not change the basic definition of disability, which is short but complex. It is an individual:

1. With a physical or mental impairment that *substantially limits* one or more *major life activities*;
2. Who has a *record of such an impairment*; or
3. *Is regarded* as having such impairment

These terms are further discussed below.

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## 1. Substantially Limits

Although the ADA Amendment did not change the term *substantially limits*, the Act clearly establishes that this term is to be construed broadly:

- **Lower Standard.** The term *substantially limits* must be interpreted consistently with new language about the ADA's findings and purposes, which specifically reject two Supreme Court and various lower court decisions. Congress found that these decisions incorrectly ruled that individuals with a range of substantially limiting impairments did not have disabilities. House Managers advise that the Amendment lowers the standard for determining whether an impairment constitutes a disability and reaffirms the intent of Congress that the ADA's definition of disability is to be interpreted broadly and inclusively. They intend to reduce the depth of analysis related to the severity of the impairment limitation and instead focus on the question of discrimination.
- **Analytical Framework.** Senate Managers view the analysis of *substantially limits* to be: whether a person's activities are limited in condition, duration and manner.
- **Episodic or in Remission.** Specific language clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. For example, a student with a seizure disorder that is in remission would meet this requirement.

## 2. Mitigating Measures

New language now requires the *substantially limits* determination to be made without regard to any ameliorative effects of mitigating measures. For example, school districts cannot consider the effect of medication on a student with asthma. Mitigating measures include but are not limited to:

- Medication, medical supplies, equipment, or appliances, *low-vision devices*, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.

Low vision devices do NOT include *ordinary eyeglasses or contact lenses*. However, one must consider their ameliorative effects in determining whether the impairment substantially limits a major life activity. Also, qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision may not be used unless they are shown to be job-related for the position in question and consistent with business necessity.

*Ordinary eyeglasses or contact lenses* are those that are intended to fully correct visual acuity or eliminate refractive error; and

*Low-vision devices* are those that magnify, enhance, or otherwise augment a visual image.

- Other mitigating measures include: assistive technology, reasonable accommodations, auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

Congress added these provisions to correct a Supreme Court decision that required mitigating measures to be considered when determining *significantly limits*. Senate Managers expect that when such mitigating measures are ignored, some individuals previously found not to be disabled will now be protected under the ADA. They also believe that individuals should not be penalized because they manage their own adaptive strategies or receive accommodations (including informal or undocumented ones) that have lessened the deleterious impact of the disability. Thus, while a student's medication may alleviate many symptoms of ADHD, this factor may not affect the assessment of whether the student has a disability. It may be considered, however, in determining what the student needs in terms of accommodation.

## 3. Major Life Activities

In the past, the definition of major life activities included but was not limited to:

Caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning and working

The Amendment adds the following activities:

Eating, sleeping, walking, standing, lifting, bending, *reading, concentrating, thinking*, and communicating

In addition, Congress clarified that an impairment substantially limiting one major life activity does not need to limit others to be considered a disability. *Thus, for example, a student will be considered to have a disability if his/her impairment substantially limits reading even if it does not substantially limit learning.* The Senate Managers explain that this change corrects court decisions that have required individuals to show that their impairment substantially limited more than one life activity. It is additionally intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude ADA coverage.

*Students with Learning Disabilities who Perform Well Academically.* Of special interest to schools, the Senate Managers address the consideration of condition, manner, or duration in which an individual with a specific learning disability performs a major life activity. They specifically rejected the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.

#### 4. Regarded As Having a Disability

The Amendment makes clear that the ADA covers an individual who has been subjected to discrimination because of an actual or perceived physical or mental impairment, whether or not the impairment actually limits or is perceived to limit a major life activity. However, the provision has two limitations.

1. It does not apply to impairments that are transitory and minor (i.e., actual or expected duration of six months or less).
2. A district does not have to provide reasonable accommodations and modifications to an individual under this section.

According to the Senate Managers, this section addresses unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities that are often just as disabling as actual impairments, and prohibits discrimination based on such perceptions.

#### Implications for School Districts

The Amendment narrows a school district's determination that a particular student does not have a disability under the ADA or Section 504. [It has no effect on the definition of disability under the Individuals with Disabilities Education Act (IDEA).] The amended language puts a greater emphasis on the question of what is necessary in order to provide a student with a nondiscriminatory education. The Senate Managers state that they do not anticipate that OCR will need to extensively change its current regulations and guidance. They believe that most schools currently operate in a manner consistent with the original congressional intent of Section 504/ADA and should be minimally affected by the Amendment. While it may be true that USDE may not need to significantly modify its regulations, it is not clear that the Amendment will have a minimal impact on schools. Such impact will depend in major part on OCR's interpretation of its current regulation based on the expanded definition of disability and the related practices required of school district staff.

To explore this issue, several regulatory provisions of Section 504 that apply to elementary and secondary schools receiving Federal financial assistance are summarized briefly below.

- ***Free Appropriate Public Education.*** Schools must provide a free appropriate public education to students with disabilities through implementation of an individualized education program (IEP). An IEP developed in accordance with IDEA is one means districts may use to meet this standard.
- ***Evaluations.*** School districts must conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to initial placement in a regular or special education program and any subsequent change in placement. The evaluation procedures are similar to the nondiscriminatory provisions outlined in IDEA. Also, reevaluations must be conducted periodically and compliance with IDEA is one means of meeting this requirement.
- ***Placement Procedures.*** In interpreting evaluation data and in making placement decisions, staff must follow procedures similar to those in IDEA. In addition, placements include those in regular education with the provision of supplementary aids and services.
- ***Procedural Safeguards.*** School districts must establish and implement, with respect to actions regarding the identification, evaluation, or educational placement a system of procedural safeguards that includes notice, an impartial hearing with opportunity for participation by parents/guardians and their counsel, and a review procedure. Also, compliance with IDEA is one means of meeting this requirement.

#### These requirements raise the following issues:

- Do students with dyslexia who are involved in a Response to Intervention (RtI) process have a disability under Section 504? If so, what type of documentation and procedures will OCR require for

each student? Will the RtI process and documentation suffice? What type of procedural safeguards notice is required?

- Will school districts be required to evaluate for ACT/SAT accommodations high performing high schoolers with reading impairments who never before asked for any accommodations?
- Currently, school districts frequently provide students with health impairments an informal health plan. Will OCR consider these plans to meet its regulatory requirements? As above, what type of procedural safeguard notice is required?

While there are no immediate answers to these questions, school districts may ask their regional OCR office for technical assistance and work with local, state and national educational associations to advocate for interpretations that are reasonable and do not have unanticipated consequences.

## Provisions of the Americans with Disabilities Act Amendment of 2008

### I. Requirements

**Disability.** Means, with respect to an individual--

1. ***Substantially Limits.*** A physical or mental impairment that substantially limits one or more ***major life activities*** (MLA) of such individual
2. ***A record*** of such an impairment; or
3. ***Being regarded*** as having such impairment

#### **Substantially Limits**

1. ***Findings & Purposes.*** Substantially limits shall be interpreted consistently with the above findings and purposes;
2. ***Episodic or in Remission.*** An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
3. ***Mitigating Measures.*** The determination of whether an impairment is substantially limiting shall be made without regard to the ameliorative effects of mitigating measures, such as:
  - a. 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;

***Ordinary Eyeglasses.*** Ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

***Uncorrected Vision.*** A covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless they are shown to be job-related for the position in question and consistent with business necessity

#### ***Definitions:***

- ***Ordinary eyeglasses or contact lenses*** means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
  - ***Low-vision devices*** means devices that magnify, enhance, or otherwise augment a visual image.
- b. ***Assistive technology*** use;
  - c. ***Reasonable accommodations or auxiliary aids or services;*** or
    - Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
    - Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
    - Acquisition or modification of equipment or devices; and
    - Other similar services and actions.
  - d. ***Learned behavioral or adaptive neurological modifications.***

#### **Major Life Activities**

1. ***In General.*** 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.

2. **Major Bodily Functions.** 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.
3. **Need Not Limit Other MLA.** An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

***Regarded as Having such an Impairment***

1. **Actual or Perceived.** The individual establishes that (s)he has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
2. **Transitory & Minor.** This shall not apply to impairments that are transitory and minor (i.e., actual or expected duration of 6 months or less).
3. **No Need to Accommodate or Modify.** Do not need to provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to individuals regarded as having an impairment.

**Rules of Construction.** The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

## **II. Findings & Purposes**

**Findings.** The Congress finds that

1. In enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage;
2. In enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
3. While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of handicap under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
4. The holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
5. The holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
6. As a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
7. In particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and
8. Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

***Purposes.***

1. To carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;
2. To reject the requirement enunciated by the Supreme Court in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
3. To reject the Supreme Court's reasoning in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
4. To reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';
5. To convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress 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 to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
6. To express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

*Effective Date: January 1, 2009*