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## ***STUDENT ACCOMMODATIONS AND SECTION 504/ADA COMPLIANCE***

## ***LEGAL ISSUES FACING WISCONSIN TECHNICAL COLLEGES***

*Presented by:*

**Michael Aldana**

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Waukesha, Wisconsin

# STUDENT ACCOMMODATIONS AND SECTION 504/ADA COMPLIANCE

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- I. **Obligations of Elementary and Secondary Schools vs. Post-Secondary School's Obligations**
  - A. **Great Expectations:** Students with disabilities who received special education and/or related services during elementary and secondary school will have great expectations about a post-secondary school's obligations to accommodate them
  - B. **Governing Law**
    - 1) **Elementary/Secondary** → Individuals with Disabilities Education Act & Section 504 of the Rehabilitation Act of 1973
    - 2) **Post-Secondary** → Section 504 of the Rehabilitation Act of 1973 & Title III of the Americans with Disabilities Act
  - C. **Eligibility**
    - 1) **Elementary/Secondary** → Under the IDEA anyone who is diagnosed with an impairment and who needs special education to receive educational benefits is eligible to receive accommodations
    - 2) **Post-Secondary** → Under the Rehabilitation Act and the ADA a person with a physical or mental impairment which substantially limits a major life activity is eligible to receive accommodations
  - D. **Identifying Students with Disabilities**
    - 1) **Elementary/Secondary** → Under the IDEA school districts have a duty to find students who potentially have a disability and evaluate the students
    - 2) **Post-Secondary** → Students have the duty to notify school officials of their disability and to request accommodations

- i) School may require that the student provide documentation of an evaluation/examination
- ii) Evaluation/examination expenses are the responsibility of the student

**E. Entitlements**

**1) Elementary/Secondary**

- i) A team of people (including parents, teachers, counselors, etc.) develop an Individualized Education Plan (IEP) to ensure the student receives his/her statutorily entitled education
- ii) IEP could require extensive personal instruction/accommodations

**2) Post-Secondary**

- i) School must provide reasonable accommodations
- ii) Personal instruction/accommodations are not required

**F. Enforcement**

**1) Elementary/Secondary** → Under the IDEA there is an elaborate dispute resolution process that includes administrative hearings to determine eligibility for services/accommodations and whether services/accommodations are adequate

**2) Post-Secondary** → Section 504 requires post-secondary schools to develop grievance procedures which are prompt and equitable

**II. Section 504 of the Rehabilitation Act**

**A. In General**

**1)** "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a)

- 2) Receipt of federal funds:
  - i) "any public or private agency, institution, organization, or any person to which Federal financial assistance is extended directly or through another recipient . . . ." 34 CFR § 104.3(f)
  - ii) In all probability, by accepting students who receive federal financial aid, private post-secondary educational institutions receive Federal financial assistance
- 3) Designation of a Responsible Employee: "A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply" with § 504 34 CFR § 104.7(a)
- 4) Grievance Procedures
  - i) Any institution that employs more than 15 people must establish "grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by" § 504.
  - ii) The grievance procedures do not have to apply to complaints from applicants for admission to the institution
  - iii) Students who are dissatisfied with the grievance procedure can file a complaint with the Department of Education's Office of Civil Rights or in a court

**B. Covered Persons**

- 1) A student with a physical or mental impairment which substantially limits a major life activity, a student who has a record of having such an impairment, or a student who is regarded as having such an impairment 34 CFR § 104.3(j)(1)
- 2) Substantially limited - Previous regulations under 504
  - i) Unable to perform a major life activity that the average person in the general population can perform; or
  - ii) Significantly restricted as to the condition, manner, or duration under which the average person in the general population can perform the same major life activity
  - iii) The extent to which an impairment is limiting must be viewed in the context of mitigating factors, e.g. personal corrective lens may

mitigate a person's sight impairment that limits his/her ability to see; therefore, an institution would not be obligated to provide additional accommodations

- iv) Even if an individual has an impairment, he or she is not “disabled” under the act unless that impairment substantially affects one or more major life activities. Temporary, non-chronic impairments of short duration, with little or no longer term or permanent impact, such as broken bones, the flu, or appendicitis, are usually not disabilities. 29 C.F.R. §1630.2(J)
- 3) Major Life Activity: walking, seeing, hearing, speaking, breathing, learning and working
- 4) Qualified: "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity" 34 CFR § 104.3(1)(3) In the educational context, courts have given colleges and universities a great deal of deference in setting the qualification standards for their institutions. Academic decisions have a presumption of validity, and schools are not required to accommodate a student by substantially modifying academic programs.
- 5) A student who notifies the institution that accommodations are necessary and provides documentation of his or her disability and the need for the requested accommodations
  - i) Documentation of a disability may require: a diagnosis of the student's current disability, the date of the diagnosis, how the diagnosis was reached, the credentials of the professional, how the student's disability affects a major life activity, how the disability affects the student's academic performance
  - ii) If a student has not had an appropriate evaluation to provide sufficient documentation of his/her disability, the institution may require that the student undergo an appropriate evaluation at his/her cost
  - iii) If a student is being evaluated to determine eligibility under § 504, any academic adjustments, including auxiliary aids should be provided in the interim

### **C. Academic Adjustments**

- 1) All academic adjustments should be determined on a case-by-case basis with input from the student with a disability

- 2) An institution may not charge a student for an academic adjustment or charge the student more for its programs or activities than it charges students without disabilities
- 2) Modification of academic requirements:
  - i) Required to modify academic requirements to "ensure that such requirements do not discriminate or have the effect of discriminating . . ." 34 CFR § 104.44
  - ii) No modification is required if an educational institution can demonstrate that the academic requirements "are essential to the instruction being pursued . . ." 34 CFR § 104.44
  - iii) Examples: changes in the length of time permitted for the completion of a degree, substitution of specific courses required for the completion of a degree, specific course instruction adaptation
- 3) Modification of academic policies:
  - i) An institution can not impose rules or policies that "have the effect of limiting the participation" of the student with a disability 34 CFR § 104.44
  - ii) Examples: policies prohibiting tape recorders in classrooms or the use of dog guides may have to be altered
- 4) Examinations
  - i) An institution must "provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course . . ." 34 CFR § 104.44
  - ii) Examples: extended time for test taking, submission of oral answers, a room with reduced distractions for test taking, assistance of a reader
- 4) Auxiliary Aids

- i) An institution must provide a student with a disability auxiliary aids if failure to do so will result in the denial of benefits, exclusion from participation or other discrimination
- ii) An institution has flexibility in choosing which auxiliary aid to provide a student, but such aid must be effective in meeting the student's needs; therefore, the institution must analyze the appropriateness of an aid or service in its specific context
- iii) **Not Required to Provide Personal Devices or Services:** An institution does not have to provide personal attendants or individual devices
- iv) Examples: taped texts, interpreters, readers in libraries, adapted classroom equipment, appropriate aids needed to locate and obtain library resources

#### **D. Housing Adjustments**

- 1) Only applies to educational institutions that provide housing to its students without disabilities
- 2) An institution must "provide comparable, convenient, and accessible housing . . . at the same cost . . . ." 34 CFR § 104.45
- 3) Examples: TTY device

### **III. The ADA Amendments Act of 2008 ("ADAAA")**

#### **A. Congressional Intent**

The amendments are designed to restore the scope of the ADA's protections to what Congress originally envisioned. Congress makes clear its intent to contradict Supreme Court jurisprudence and expand the class of individuals protected by the ADA. Further evidencing Congress's expansion objective, the amendments delete language in the ADA characterizing disabled individuals as a "discrete and insular minority."

#### **B. Broader Definition of "Disability"**

While the amendments leave intact the actual definition of "disability," they add new provisions designed to broaden the medical conditions encompassed by the definition. Until now, courts have narrowly construed "disability," especially when it comes to what constitutes a substantial limitation, a major life activity, and a perceived disability.

### C. “Substantially Limited” Standard Relaxed

The ADAAA overturns several United States Supreme Court cases that have narrowly interpreted “disability,” including *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that a plaintiff was “substantially limited” only if he or she could show that an impairment *prevented* or *severely restricted* performance of activities of central importance to daily life. The amendments state that “substantially limited” need not rise to the level of severity suggested in *Toyota*.

The ADAAA also invalidates EEOC regulations that equate “substantially limits” with “significantly restricted” and characterizes such an elevated standard as “inconsistent with congressional intent.” While the amendments reject the courts’ and the EEOC’s overly restrictive interpretations, they do not elaborate on what the correct standard or test should be. They do, however, direct the EEOC to modify its regulations to comport with the ADAAA and make it easier for individuals to establish that an impairment “substantially limits” them in a major life activity.

The ADAAA also instructs, “[T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Thus, we are informed that a more relaxed standard will apply when determining whether a physical or mental impairment renders one substantially limited, albeit without any guidance as to how relaxed that standard will be.

### D. “Major Life Activities” Added

The amendments also call for a broader interpretation of “major life activity.” The ADAAA not only adds specific examples of major life activities but expands the phrase to include “operation of a major bodily function.”

- The new (and non-exhaustive) list of major life activities include: “caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”
- Major bodily functions include: “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

The amendments also clarify that the impairment at issue need only limit *one* major life activity.

### E. Expansion and Clarification of “Regarded As”

Another significant change implemented by the amendments is that plaintiffs alleging discrimination based on a perceived disability no longer must prove that

their employer perceived them as substantially limited in a major life activity. Thus, the ADAAA overturns the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which held ADA "regarded as" plaintiffs must show the impairment at issue actually limited or was perceived to limit a major life activity. Now, the ADA prohibits taking an adverse action against someone because of an impairment or the belief that he or she has an impairment. This easily met standard guarantees proliferation of litigation under the "regarded as" prong of the disability definition.

Notably, while the amendments do not address how long an impairment must last, they do clarify that impairments properly characterized as "minor *and* transitory" *do not* qualify for "regarded as" claims. "Transitory" is defined as six (6) months or less. "Minor" is not defined. Unfortunately, the amendments do not address whether minor and transitory impairments are excluded from the other two prongs of the disability definition, substantially limiting impairment and a record of such an impairment.

The ADAAA also provides long-awaited clarification on whether employers are obligated to accommodate "regarded as" plaintiffs. The amendments make clear that a plaintiff with no actual impairment has no cause of action under the ADA for failure to accommodate, recognizing that forcing employers to accommodate someone with a misperceived impairment contradicts logic and common sense.

#### **F. Other Significant Amendments**

The ADAAA makes other significant clarifications and changes to the ADA that will effectively expand its coverage. The two most important deal with treatment of "mitigating measures" and episodic medical conditions.

#### **G. "Mitigating Measures" No Longer Considered**

In *Sutton*, the U.S. Supreme Court held that any measures employed to mitigate the effect of an impairment on daily life activities, such as medication or prosthetic devices, could be taken into consideration when determining one's eligibility under the ADA. The ADAAA rejects *Sutton's* holding and explicitly *prohibits* consideration of "the ameliorative effects of mitigating measures" in determining whether an impairment substantially limits a major life activity. Mitigating measures include medication, prosthetic limbs, mobility devices, hearing aids, use of assistive technology, reasonable accommodations or auxiliary aids or services, or the very broad and ambiguous "learned behavior or adaptive neurological modifications." In other words, the ADA analysis cannot take into consideration any adaptive measures used, even if these measures allow the individual to successfully manage their impairments (e.g., someone with insulin-controlled diabetes). Therefore, employers may need to reasonably accommodate individuals, even if they are fully able to perform their job duties or are unimpaired in all other major life activities, while taking medication or using

prescribed medical devices.

One exception to this prohibition allows for consideration of a person's usage of "ordinary eyeglasses or contact lenses" when analyzing whether an individual with vision problems is covered under the ADA.

#### **H. Episodic Conditions Covered if Substantially Limiting When Active**

The amendments also extend ADA protection to those individuals with episodic impairments or conditions in remission if their impairment substantially limits a major life activity in its active state (e.g., cancer in remission, multiple sclerosis).

### **IV. Title III of the ADA**

#### **A. In General**

- 1) "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" 42 U.S.C. § 12182(a)
- 2) Place of Public Accommodation: "postgraduate private school, or other place of education" 42 U.S.C. § 12181(7)(J)
- 3) Students may file a complaint against the educational institution with the Attorney General or in a court
  - i) In an individual suit, monetary damages are not available, but attorneys' fees are available
  - ii) In a suit brought by the Attorney General alleging a "pattern or practice" of discrimination, monetary damages are available and civil penalties may be awarded

#### **B. Covered Persons - the same individuals are eligible for protection under Title III of the ADA as under § 504 of the Rehabilitation Act**

#### **C. Modification of Policies**

- 1) An institution must make "reasonable modifications in policies, practices, or procedures, when the modifications are necessary . . . ." 28 CFR § 36.302

- 2) A modification is not necessary if it would fundamentally alter the institution's academic programs
- 3) Examples: policies prohibiting tape recorders in classrooms or the use of dog guides may have to be altered

**D. Auxiliary Aids & Services**

- 1) An institution must "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently . . . because of the absence of auxiliary aids and services . . . ." 28 CFR § 36.303
- 2) An institution is not required to provide an auxiliary aid that would fundamentally alter its academic programs or financially or administratively unduly burden the institution
- 3) School officials are expected to consult with the student to determine the appropriate aid or service
- 4) Examples: interpreters, readers, brailled materials, telecommunication devices
- 5) **Not Required to Provide Personal Devices or Services:** "[A] public accommodation [is not required] to provide . . . personal devices, such as wheelchairs; individually prescribed devices . . . ; or services of a personal nature including assistance in eating, toileting, or dressing." 28 CFR § 36.306

**E. Examinations**

- 1) If the institution gives any examinations related to applications, licensing, certification or credentialing for secondary, postsecondary education, professional or trade purposes, such exams must be offered in a place and manner accessible to people with disabilities
- 2) This may require a modification of the examination format and/or the provision of auxiliary aids

**V. Reasonable Accommodations**

**A. Fundamental Alteration**

- 1) An institution is not required to provide an accommodation that would *fundamentally alter* the institution's programs See 28 CFR §§ 36.302(a), 36.303(a)
- 2) *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)
  - i) Supreme Court case involving a hearing impaired woman who sought enrollment in Southeastern's Nursing Program
  - ii) For her to participate, Southeastern would have had to provide individual supervision by faculty members and/or allow her to graduate without taking required courses
  - iii) Regulations state that personal accommodations are not required
  - iv) An alteration that would result in a student "not receiv[ing] even a rough equivalent" of the education of other students in the same program would be fundamental and not required by § 504
  - v) There is "no requirement upon an educational institution to lower or effect substantial modification of standards to accommodate a" student with a disability

**B. Undue Burden**

- 1) An institution is not required to provide an accommodation, if providing such accommodation would constitute an undue burden. 28 CFR § 36.303
- 2) "Undue burden means significant difficulty or expense." 28 CFR § 36.104
- 3) Factors:
  - i) Nature and cost of the accommodation
  - ii) Overall financial resources of the institution and/or its parent corporation
  - iii) Location of the institution in relation to its parent corporation
  - iv) Fiscal relationship between the institution and its parent corporation
  - v) If applicable, the type of operations of the institution's parent corporation