

# **ADA Issues in the Schools**

**2013 Oregon School Law Conference**

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- 1. ADA and hiring practices**
  - \* What questions can be asked on an application form
  - \* What questions can be asked in a job interview
  - \* What questions can be asked after an offer of employment has been made
  
- 2. Who is protected under the ADA and what response is required**
  - \* Determining who qualifies as disabled under the ADA
  - \* The role of essential functions of a job in determining accommodations
  - \* The role of an interactive meeting in determining accommodations
  
- 3. Addressing employee medical issues and absenteeism**
  - \* How to address attendance issues for ADA-covered employees
  - \* How to address performance issues for ADA-covered employees
  
- 4. Handling student and parent demands for accommodation**
  - \* Building accessibility
  - \* Interpreters
  - \* Tape recording
  - \* Section 504 processes

## I. ADA Basics

Both federal and state law prohibit discrimination against a qualified individual with a disability. The laws also require employers to provide reasonable accommodation to qualified individuals with disabilities. On January 1, 2009, amendments to the ADA went into effect which substantially alter the definition of disability and will result in more people qualifying as disabled under the federal Act.

### ◆ Definition of Qualified

- Employee must meet job-related requirements (e.g. education, training, skills)
  
- Employee must be able to perform essential functions of the position (i.e. its fundamental duties) *with or without* reasonable accommodation

### ◆ Definition of Disability

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment

### ◆ *New Guidance on Meaning of “Substantially Limits”*

Court decisions strictly interpreted the phrase “substantially limits.” The 2008 Amendments do not provide a new definition of the term, but do explicitly reject the prior strict interpretations and instruct that “the term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008” to provide broad coverage of individuals with disabilities.

### ◆ *New, Broader Definition of Major Life Activity*

The 2008 Act now provides an expansive category of “major life activities” which 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.”

The 2008 Act also adds a provision that specifically includes as major life activities “the operation of major bodily functions,” which itself includes, without limitation, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

### ◆ Use Of Mitigating Measures Cannot Be Considered

The 2008 Act rejects the Supreme Court's interpretation of the law on the use of mitigating measures. As of January 1, 2009, 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 use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications." The 2008 Act does, however, allow for consideration of "the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses."

### ◆ Episodic Conditions Can Be Disabilities

Under the new law, "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

### ◆ Duty of Reasonable Accommodation

- Reasonable accommodations are adjustments or modifications provided by an employer to enable an individual with a disability to perform the essential functions of the position
  
- Reasonable Accommodations may include:
  - Making existing facilities used by employees readily accessible to and usable by persons with disabilities;
  - Job restructuring, modifying work schedules, reassignment to a vacant position; or
  - Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters
  
- Employer must provide reasonable accommodation unless it would impose undue hardship. An undue hardship is an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation

### ◆ Interactive Process

- When employee requests an accommodation for a disability or an employer otherwise knows an employee needs an accommodation, employer must engage in interactive process with employee to determine whether a reasonable, effective accommodation exists

- Interactive process means a meeting or meetings involving an exchange of information between the employer and employee to determine what potential accommodations exist, are effective and are reasonable
- Employer need not provide specific accommodation requested by employee if there is another effective accommodation

#### ◆ **Changes to “Regarded As” Claims**

The 2008 Amendments clarify that a “regarded as” claim can prevail if discrimination occurred “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.” Thus, an employee need only show that he/she was perceived as being impaired and need not prove that the impairment was perceived as being substantially limiting to a major life activity.

The 2008 Amendments also state that reasonable accommodation is not required for people “regarded as” disabled.

#### ◆ **Obtaining Medical Information from Employee under the ADA**

- Prior to a conditional job offer, ADA prohibits employer from asking questions about employee’s disability or requiring medical examination
  - Can ask if employee is able to perform essential functions of position
  - Can ask questions about employee’s past attendance record
- After job offer, employer may ask any disability-related questions and conduct medical examinations as long as you do this for everybody in the same job category
- Once employee has begun work, ADA strictly limits the circumstances under which you may ask questions about disability or require medical examinations of employees. Such questions and exams are only permitted where you have a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition
  - Objective evidence can be based on observation of employee, self-report by employee, or report from third-party
  - All questions and exams must be job-related and consistent with business necessity

## II. Application of These Laws to Employee Discipline

### ◆ Attendance

- In evaluating attendance, you cannot consider absences covered by OFLA/FMLA
- Leave beyond OFLA/FMLA leave (or where employee does not qualify for OFLA/FMLA) may be a reasonable accommodation for a disability and so required by ADA
- Attendance is typically seen as an essential job function so tolerating erratic and unpredictable attendance would rarely be viewed as a reasonable accommodation under ADA

Even in light of FMLA/OFLA and the ADA, school district can still enforce attendance policies:

- Adopt attendance policies that define attendance expectations
- Communicate those attendance expectations with all employees
- Ensure that supervisors regularly monitor attendance and inform employees when attendance is not meeting expectations
- Unsatisfactory attendance can be addressed either through corrective discipline or through a plan of assistance. Plans of assistance can be effective for attendance issues because they can be short, rarely require any assistance from supervisors, and allow you to focus on the pattern of attendance rather than whether one particular absence warrants dismissal under a corrective discipline approach.

### ◆ Conduct Standards

- The ADA does not protect employees from the consequences of violating conduct requirements even where the misconduct is caused by a disability.
- If the misconduct is caused by a disability, the workplace rule must be job-related and consistent with business necessity.

### ◆ Performance Standards

- An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.
- Employers are not required to lower or change a production standard as a reasonable accommodation, although employers may be required to provide a reasonable accommodation to enable the employee to meet a production standard.

### ◆ Employee's Request for Reasonable Accommodation Or Leave *After* Poor Performance or Misconduct Occurs

- If an employee requests FMLA/OFLA leave after poor performance or a

misconduct issue has been raised with the employee, consider the FMLA/OFLA request as you would for any other employee. You can also move forward on the performance or misconduct issue, even if you have to wait to do so until the employee returns from leave

- If an employee mentions a potential disability after a poor performance or misconduct issue has been raised, you can still move forward based on the performance or misconduct that has occurred. You may have a prospective duty to accommodate that now-known disability, but it does not need to eliminate any action you were taking based on the performance or misconduct before you were aware of the disability, even if the contemplated action was dismissal. However, there is often an allegation by the employee that the District was aware or should have been aware of the need for accommodation. In such cases, determine whether anyone in the District was aware of the disability or the need for accommodation prior to moving forward with any discipline.
- When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:
  - tolerate or excuse the poor performance;
  - withhold disciplinary action (including termination) warranted by the poor performance;
  - raise a performance rating; or
  - give an evaluation that does not reflect the employee's actual performance

#### ◆Drug and Alcohol Use

- Current illegal use of drugs is not protected by the ADA. You do not need to hire or retain someone who is currently engaging in the illegal use of drugs. Tests for the current illegal use of drugs are permitted at any time prior to or during employment
- While people with alcoholism may be individuals with disabilities, the ADA still allows employers to hold them to the same performance and conduct standards as all other employees, including rules prohibiting drinking on the job

*Example:* An employer may fire an employee who is drinking alcohol while on the job if it has a uniformly applied rule prohibiting such conduct. **But:** There may be times when you may have to accommodate an employee with alcoholism. For example, an employer may have to modify a rule prohibiting personal phone calls at work for an employee with alcoholism who periodically has to contact his "AA sponsor," if the employee has a need to do so during work hours

# ADA PHYSICIAN QUESTIONNAIRE

[Date]

To: Treating Physician of [employee]

[Employee] is employed as a [position] by [District]. [Employee] has informed the District that he has medical issue(s) that may impact his job performance [OR] employee's job performance and information provided by [employee] has raised a question of whether [employee] is physically and mentally able to satisfactorily meet all job requirements. For instance [provide information here about any statements the employee has made, or situations that have arisen].

It is important to determine whether [employee] is mentally and physically fit for duty and able to perform his job duties, with or without reasonable accommodation. To assist us in making this determination, the District has requested that [employee] have her treating physician complete the attached questionnaire to adequately assess his ability to perform her job duties and the need for reasonable accommodation, if any. Please review the following information regarding [employee's] job duties, then complete the attached questionnaire and return it directly to the District at [address / fax].

A job description is attached to provide you with information about [employee's] duties. The position of [name position here] requires a minimum eight hour work day, which at times may be off of the work site, five days per week. During an average day, [employee] will be working with middle school students delivering instruction, working with students, interacting and communicating with students, parents and other adults, grading papers, etc. (see attached job description).

I have attached a list of questions, the answers to which would be very helpful in assisting the District in determining whether [employee] is physically and mentally capable of fulfilling his job duties and what assistance and accommodations, if any, [employee] requires. Please feel free to provide any additional information that you believe would be informative or helpful to the parties in this matter.

Thank you for your assistance.

Sincerely,

Director of Human Resources

enc. (job description)

1. Describe your area of medical specialty, if any, or the nature of your practice.
  
2. Does [employee] have a physical or mental impairment that substantially impacts a major life activity, including working? If so, is [employee] physically and mentally able to perform the duties listed in the cover letter, as well as those listed on the job description?
  - a. List the specific duty(ies) which [employee] cannot perform or may need modifications and/or accommodations to perform. Please specify what is the expected duration of any limitations noted.
  
  - b. If you have noted any area where [employee] cannot perform a specific job duty, please comment on the type of job accommodation that would enable [employee] to perform the duty (if any such accommodation is possible).
  
3. Is [employee]'s ability to perform the job responsibilities impaired or improved by medication(s)? If so, what is the prognosis for continued medication at this level? (The District does not need to know what kind of medication is currently being used, but only its effects on job performance).
  
  
4. Do you recommend further assessment by any other medical care professional?

I certify that the above information is correct, in my professional judgment, as of \_\_\_\_\_, 2013.

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Treating Physician



“Some commenters asked for clarification about the responsibilities of public school systems under Section 504 and the ADA with respect to programs, services and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aid results neither in an undue burden or in a fundamental alteration of the program.” 56 Fed Reg 35696 (July 26, 1991).

**28 CFR § 35.160(a)(1) provides that:**

“(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”

**28 CFR § 35.160(b)(1) further states that**

“A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.”

Any time a school building is altered or constructed, the building must meet the minimum standards in the ADA Accessibility Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS), 28 CFR § 35.151. The ADAAG standards are published as Appendix A to 28 CFR Part 36.

A federal court has ruled that school systems must provide interpreters when deaf parents meet with teachers or attend school programs such as orientation programs. *Rothschild v. Grottenthaler*, 907 F2d 286 (2nd Cir. 1990); *Aikins v. St. Helena Hosp.*, 843 F Supp 1329 (ND Cal 1994) (agreeing with analysis in *Rothschild*).

The Office for Civil Rights for the U.S. Department of Education has held that PTA programs and activities are covered by the ADA, in that the school district provides significant indirect assistance to the PTA. *Irvine Unified School District*, 19 IDELR 883 (OCR 1993).