



GARRETT HEMANN ROBERTSON PC

Reasonable Accommodations and the ADA for Employees and Students

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Title II ADA and Section 504

Americans with Disabilities Act (Title II) as amended.
Civil Rights Acts

- TII Purpose: Prohibits discrimination on the basis of disability by public entities
- 504 Purpose: To eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance
- Interpretation: Section 504/TII Standards are the same; Disability definitions the same
 - IDEA is a funding statute, subsection for students with specific disabilities



TII / ADA and Section 504 Qualifications for "Disability"

1. Mental or Physical Impairment
 - Outside evaluations and documentation will set up expectations for eligibility decisions
 - DSM: changes to mental health diagnoses and criteria
2. Substantial limitation to a major life activity
 - Limitation more than "moderate," does not include mitigating factors.
 - Major life activity list expanded, now includes manual tasks, reading, thinking, concentrating, communicating, eating, sleeping, bowel functions, bladder functions, digestive functions, "OR."



28 CFR 35.101

- Has a record of physical or mental impairments that substantially limits one or more major life activities
- Regarded as having an impairment, whether they have the impairment or not



Qualified Individual

Disabled or not, **is the person qualified?**

- A person with a disability must be able to perform the **essential functions of the job, with or without accommodation**
- An accommodation is usually adjustment to the way a job is customarily performed.
- Whether a job duty is an essential function is a factual determination that must be made on a case-by-case basis, and all relevant evidence should be considered



Discrimination Prevention

Prevents discrimination against “any qualified individual . . . with a disability”

28 CFR 35.101, 28 CFR 35.130 et. seq.

Analyze whether the person is an individual with a disability:

- Has physical impairments or mental impairments that substantially limits one or more major life activities.



Required Public Notice, Procedures

- Shall make information available regarding provisions of TII and applicability “in such a manner as to apprise” of the protections
- Responsible Employee to coordinate efforts to comply with and carry out provisions, do investigations
- Notice of contact information for Employee
- Complaint procedure
 - CFR 28 Sec. 35.106, 35.107



Requires Reasonable Accommodation

- Shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination
- Unless can **demonstrate** that making modifications would fundamentally alter the nature of the service program activity
 - CFR 28 Sec 35.130



ADA Guidance on Inquiries

- “Shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability, as to nature and severity of disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity
 - Disability related inquiries or medical examinations
 - Questions likely to elicit information about disability
 - Direct/Indirect
 - Broad inquiries, “do you have”



Job Related and Consistent with Business Necessity

- **Actual performance** is best measure of ability
- Inquiry should be based on reasonable belief, based on objective evidence
 - Employees ability to perform essential job functions will be impaired by a medical condition, or
 - An employee will pose a direct threat due to a medical condition, or
 - Follow up questions on reasonable accommodation request when disability or need is not known or not obvious



Permitted Inquiries to Employees

- Well-being, if merited by circumstances
- Non-disability related injuries
- Ability to perform job functions
- Whether s/he has been drinking
- Current illegal use of drugs (controlled substances)
- Normal pregnancy related questions
- Emergency contact information



Permitted Examinations

- Current illegal use of drugs/ inebriation
- Physical agility or physical fitness tests (non-medical)
- Tests that evaluate employee's abilities to read/distinguish items as part of a demonstration of ability to perform actual job functions
- Psychological tests that measure personality traits
- Psychological tests



Reasonable Accommodations

- Process
- Based on Individualized Assessment
- Must be qualified for essential functions
 - Restructuring
 - Re-allocate marginal functions
 - Leave
 - Modified/Part-time schedule
 - But not if undue hardship to employer
 - Modified Policies
 - Equivalent reassignment (last resort)



Drug Addictions

- Drug addiction is an impairment;
- However, by definition “individual with a disability” does not include current illegal use of drugs
 - Drug is a controlled substance as defined in schedules I-V section 202 of CSA, 21 U.S.C. 812
 - Cannabis is listed in Schedule I



Drug Addictions

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person’s drug use is current or that continuing use is a real and ongoing problem

- TII 28 Sec. 35.104 Definitions
 - **Can** discriminate against an individual based on that individual's current use of drugs 23 sec 35.131
 - **Shall not** discriminate if individual is not engaging in current illegal use of drugs AND has successfully completed a supervised drug rehabilitation/successfully rehabilitated IF otherwise entitled
 - Drug testing: can adopt or administer policies or procedures designed to ensure an individual formerly engaged in illegal use is not now currently using



Alcohol Addiction

- Alcohol addiction is a disability
- Must be qualified to perform essential functions of the job
 - May be required to provide accommodation
 - Alcohol and drug testing for persons with the disability or impairment is acceptable
 - Can prohibit use/influence at workplace
 - Can discipline, discharge or deny based on adverse affect on job or conduct



Disability Exclusions

Not a disability: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania.

Note: These are not disabilities, but there is protection under federal and state law on the basis of sex, gender, sex characteristics that may be applicable.



DSM-5: What is it?

“Diagnostic Statistical Manual of Mental Disorders”

The American Psychiatric Association (APA) publishes the manual to provide a common language and standard criteria to diagnose mental health disorders. Latest revision since 2000 has some significant changes to mental health disorders that may show up for diagnoses of students or employees.



How Could this Affect Schools?

- **Employees:** New diagnoses for employees could look unfamiliar and very different
 - Hoarding Disorder, Binge Eating Disorder, Disruptive Mood Dysregulation Disorder, Somatic Symptom Disorder, behavioral additions (gambling, considering internet/sex as NOS?)
 - Could affect leave requests, ADA reasonable accommodation requests



How Could this Affect Schools?

- **Students:** New diagnoses may have implications under 504/IDEA and create confusion for parents regarding eligibility.
 - Autism Spectrum Disorder – used to be Pervasive Development Disorder, Not Otherwise Specified (PDD NOS)
 - Specific Learning Disorder – covers a variety of academic issues



How Could this Affect Schools?

Students cont'd:

- Disruptive Mood Dysregulations Disorder (DMDD) – exhibit persistent irritability and frequent episodes of behavior outbursts three or more times per week for more than a year, not diagnosed under the age of 6
- Diagnoses does not = Eligibility under 504/IDEA
- Likely triggers child find, may require evaluation



Gender Dysphoria

Being LGBT is not a disability under the ADA; however, there is both a child and an adult category for the mental disorder regarding the strong feelings/emotions associated with transgender individuals



Gender Dysphoria (cont'd)

- “A marked incongruence between one’s experienced/expressed gender and assigned gender” as manifested between one’s gender and one’s sex characteristics
 - Strong desire (adult) or preference (child) for one’s sexual anatomy and desire to match sex characteristics/roles/treatment with gender
 - Must be evidence of distress
- (*Reminder.* Title IX protected class as well as TII if this also qualifies as a disability.)



New Mental Health Diagnoses: What Do You Do?

1. Proceed with caution when you have an unfamiliar or unusual diagnoses, request documentation from student/employee for further information and processing.
2. Discuss effects of diagnosis for employee/student, gather information within your process
3. The laws and processes have not changed, continue to apply the process to the facts, not to the new title.



Specific Student Issues

- Child find (504, IDEA) overlap
- Medication
- Procedural safeguards
- Disciplinary protections



Medications

- OAR 581-021-0037 Revisions
 - Addresses asthma, food allergies
 - Include use of bronchodilators, epinephrine
 - Policies must include:
 - rules for administration of pre-measured epinephrine
 - information relevant to life-threatening allergic reactions
 - protocols for preventing exposures to allergens
 - Self-administration of medication
 - Rules regarding role of health care provider prescriptions or treatment plans



504

- Resident District must: Evaluate students with a disability that may need special education or related services
- Identify and locate every qualified individual:
 - Use ADA standards for disability, no mitigating measures
- Individualized determination of educational needs for regular or special education or related aids or services
 - "Designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons"
- Procedural safeguards apply
- Discipline: Use or possession of drugs or alcohol, or currently engaging in their illegal use, removes them from the protections of Section 504 as pertains to discipline (as defined in TII, CSA)



IDEA

- District evaluates for eligibility based on specific, defined areas of disability
- Increased procedural safeguards
- Discipline and 'change of placement' have specific protections



TII "Effective Communications"

- 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." 23 CFR 35.160
 - Separate standard and application
 - K.M. v. Tustin Unified School District, 9th Cir. 2013, *cert. denied*



Contact Us

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