

School Alert

December 2008

CONGRESS EXPANDS THE AMERICANS WITH DISABILITIES ACT: HOW WILL THIS CHANGE SECTION 504?

On October 1, 2008, we provided you with a School Alert regarding the expansion of the Americans with Disabilities Act (“ADA”). Since this Fall, we have received questions from some of our public school district clients regarding the impact, if any, of the Amendments to the ADA on the application of Section 504 of the Rehabilitation Act in the public schools. While there is currently no additional information or updates from the Office of Civil Rights (“OCR”) with regard to the ADA Amendments, we believe it prudent generally to respond to these concerns, particularly as we approach the January 1, 2009 implementation date for the ADA Amendments.

First, both the ADA and Section 504 are broad anti-discrimination statutes that prohibit discrimination on the basis of disability. Despite the fact that the ADA was enacted after Section 504, the language of the ADA tracks most substantive provisions of Section 504. Accordingly, over the years, the courts have interpreted the language of these two laws similarly despite the fact that Section 504 applies only to recipients of federal funds such as public schools, and the ADA is more expansive in its application. For this reason, changes to the ADA are generally likely to impact the interpretation of Section 504.

Second, the Amendments to the ADA make only limited explicit changes to the existing language of Section 504. Specifically, the Amendments revise definitions contained in Section 504 to explicitly adopt the ADA’s revised definitions for the terms “disability” and “individual with a disability.” This change alone signifies an intent to ensure continued overlap between these two laws. Nonetheless, when the Amendments to the ADA become effective on January 1, 2009, most of the remaining statutory and regulatory language of Section 504 will not technically change. Therefore, the practical impact on Section 504 practices within the school context remains to be seen. As stated, however, because these two laws have historically been interpreted in the same manner, we recommend that school districts review the coming changes to the ADA in order to anticipate the practical impact these changes may have on Section 504 as it applies to schools.

Third, as we explained in our last School Alert, the new law significantly expands what a “major life activity” is under the ADA. Individuals suffering from certain relatively common afflictions, such as insomnia, dyslexia, stuttering and attention deficit disorder, will now, statutorily, be considered disabled. Please remember that the list of major life activities has never been exhaustive.



Additionally, the Amendments make clear that an individual may be disabled even if he or she has a condition that is controlled by medication, physical aids, or similar ameliorative measures other than eyeglasses or contact lenses. Further, episodic conditions or conditions in remission will be considered disabilities if the conditions would substantially impair a major life activity when active. These will be significant changes for school teams considering eligibility issues.

Congress has instructed the Equal Employment Opportunities Commission (“EEOC”) to revise its interpretive regulations to address the Amendments in the employment context. The OCR has indicated that it is also reviewing the changes to the ADA to evaluate the effect, if any, these changes may have on Section 504 in the school context. We therefore hope to receive interpretive guidance in the near future. In the meantime, however, neither schools nor employers have been given formal guidance on how to implement the Amendments in their respective institutions. Until the EEOC and/or the OCR provide guidance on the implication of this new law on our schools, we recommend that school districts take the following steps:

- Maintain current procedures for identifying students as eligible under Section 504. Specifically, Section 504 teams must continue to engage in an individualized discussion concerning whether a student has a physical or mental impairment that substantially limits one or more major life activities.
- As a practical matter, school districts may wish to amend their forms to alert Section 504 team members to the definitional changes for “major life activity” and the minor changes to the terms “disability” and “individual with a disability.”
- Section 504 teams should continue to request updated documentation of a student’s disability to ensure that teams have conducted a complete, thorough inquiry as to the student’s current eligibility status. This thorough inquiry should include an analysis, as appropriate, of the level of the student’s abilities without the use of mitigating measures, such as medication or hearing aids.
- We continue to encourage Section 504 teams to continually review existing 504 plans on a regular basis, and to continue to refer students with medical or other health conditions that may qualify as a disability to Section 504 Teams for appropriate evaluation.

QUESTIONS OR ASSISTANCE?

We will continue to provide updates to you as new information and/or guidance becomes available. In the meantime, please contact Julie C. Fay at (860) 251-5009 or Gwen J. Zittoun at (860) 251-5523, with any questions or concerns regarding this matter.

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