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Government Relations

ADA AMENDMENTS ACT OF 2008 POLICY IMPLICATIONS FOR ACCOMMODATING STUDENTS WITH DISABILITIES

The ADA Amendments Act of 2008 ([S. 3406](#))

<http://www.ahead.org/uploads/docs/resources/ada/ADA%20Amendments-Enrolled.doc> were passed by congress on September 17th , signed by the President on September 25, and becomes law on January 1st 2009. Their purpose is to clarify congressional intent concerning the Americans With Disabilities Act of 1990 (ADA) by rejecting several [holdings](#) <http://www.ahead.org/uploads/docs/resources/ada/Toyota%20v.%20Williams.doc> (Sutton v. United Air Lines, Inc., 527 U.S. 471; Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184) by the Supreme Court that narrowed the definition of disability, and providing clarification and guidance to courts and agencies on the interpretation and enforcement of the ADA. This article does not catalog all of the changes in the ADA Amendment nor does it address its potential impact beyond the context of accommodating postsecondary students with disabilities.

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DEFINITION OF DISABILITY

Since passage of the ADA the courts have narrowed the definition of disability. Cases

have tended to focus on the procedural question of class membership “Is the individual disabled?” rather than the substantive questions of “Has there been discrimination or a reasonable accommodation request?” The majority of these cases were in the employment arena, a few focused on high stakes testing such as the Medical Boards, Bar Examinations and Law School Admissions Tests and even fewer were about accommodations and services within higher education. This distribution may reflect that there are more people working than in college or it may reflect that students have fewer resources for litigation and rely more heavily on administrative complaints. Whatever the reason for the lower volume of postsecondary cases it seems clear that institutions took their cues from these employment cases in crafting policy, particularly documentation policies.

Under the Amendments the definition of disability will still be a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment or being regarded as having such an impairment. So what has changed? Senator Harkin summarized the changes this way

This bill better defines who Congress intends to meet the definition of disabled. It clarifies that mitigating measures, such as medication, may not be taken into account. It provides guidance as to what is a major life activity. And, most critically, it lowers the threshold for how limiting a condition must be, and insists that courts interpret the ADA broadly. For all these reasons, this bill returns the focus of the ADA to where it was meant to be – on whether a person with a disability is being discriminated against.”

<http://harkin.senate.gov/blog/?i=f0b8bd21-242b-4058-bf5a-3dd134ad0045>

[<http://harkin.senate.gov/blog/?i=f0b8bd21-242b-4058-bf5a-3dd134ad0045>] [Harkin](#)

[Statement On House Passage Of The ADA Amendments Act](#)

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SUBSTANTIALLY LIMITS

Since there has been no change to the term “physical or mental impairment” institutions and service providers can continue existing practices that exclude social and economic circumstances or general physical traits as impairments. The Amendments do change the meaning of “substantial limitation a number of ways.

First, the Amendments reinstate the pre-Sutton principle that when considering if an individual is protected by the ADA you do not consider the ameliorative effects of mitigating measures. Mitigating measures include medication, prosthetics, assistive technology, accommodations and compensatory or adaptive strategies.

“As we stated in the committee report on H.R. 3195, the committee supports the finding in [Bartlett](#)

[\[http://www.ahead.org/uploads/docs/resources/ada/Bartlett%20%20156%20F%20%203d%20321.doc\]](http://www.ahead.org/uploads/docs/resources/ada/Bartlett%20%20156%20F%20%203d%20321.doc)

. Our report explains that “an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.” Representative George on the floor of the House; [Congressional Record 9/17/2008, Page: H8294](#)

[\[http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24\]](http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24)

While mitigating measures may reduce the impact of an impairment on the individual’s functioning they can not address exclusion based on prejudice. Justice William J. Brennan summarized the need for an inclusive definition of disability stating “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment” in [Arline v Nassau County](#)

[\[http://www.ahead.org/uploads/docs/resources/ada/Arline.doc\]](http://www.ahead.org/uploads/docs/resources/ada/Arline.doc) (480 U.S. 273) a decision under the Rehabilitation Act that Congress included in Amendments as a positive model for the courts. (School Board of Nassau County v. Arline, 480 U.S. 273)

The accommodation process under the ADA has not been amended. While mitigating

measures may be irrelevant to the question of discrimination that is analogous to discrimination on the basis of race or sex; when evaluating a request for a particular accommodation both the positive and negative impacts of mitigating measures are relevant to determining an effective accommodation.

Another important clarification related to mitigating measures and particularly relevant to Learning Disabilities was highlighted in the Colloquy between Representatives Miller and Stark.

Stark

“Would the Chairman agree that the measure before us rejects the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning reading, writing, thinking, or speaking?”

Miller

“Yes, I would. As chairman of the Education and Labor Committee, I agree that both H.R. 3195 and S. 3406 reject the holding that academic success is inconsistent with the finding that an individual is substantially limited in such major life activities. As such, we reject the findings in Price v. National Board of Medical Examiners, Gonzalez v. National Board of Medical Examiners, and Wong v. Regents of University of California.”

Stark

“I thank the Chairman. Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration.”

Colloquy between Representatives George Miller and Fortney Stark on the floor of the House; [Congressional Record 9/17/2008, Page: H8286](#)

[\[http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24\]](http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24)

The [Senate Managers Report](#)

<http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc> for the Amendments emphasizes that the analysis of substantial limitation is anchored to the conditions, manner and duration under which an individual can undertake an activity not their ultimate performance outcome. The analysis used in *Bartlett v. New York State Board of Law Examiners* in contrast to the reasoning in the cases Representative Miller lists as rejected by the amendments (Price, Gonzalez and Wong)

Transitory illnesses or injuries (lasting less than six months) remain outside the scope of the ADA. However the Amendments clarify that a chronic condition that is “episodic or in remission is a disability if it would substantially limit a major life activity when active” even if acute episodes are shorter than six months.

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MAJOR LIFE ACTIVITIES

The Amendments expands Section 504’s original non-inclusive list of major life activities so that it clearly includes major bodily functions such as normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, immune system; and reproductive functions. Additionally it expands the more familiar list of activities (caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, communicating, and working) by adding concentrating and thinking.

Some concern has been raised that these new sample activities, concentrating and thinking, will pose particular problems for higher education. These concerns will be addressed more fully in the general discussion of the expanded definition but there is a specific point that is more appropriate here. First the list of major life activities has always been presented as a non exhaustive set of examples useful in looking at a particular individual and request. Thinking and concentrating are easily understood as major life activities when you consider reading and learning as examples. Evaluating and accommodating thinking or concentrating has considerable overlap with learning and reading since like many major life activities they are in reality complex tasks with component processes. Often it is an impairment of a component or sub process that changes how (the manner, conditions or duration that individuals need) people

successfully engage in the larger activity.

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REGARDED AS

The Supreme Court Decision in Sutton suggested to lower courts that for an individual to be protected from discrimination under the “Regarded as” portion of the definition of disability that had to demonstrate that the employer believed that they were substantially limited in a major life activity. Having to prove what beliefs motivated an action resulting in disparate treatment was considered to high a burden by Congress. The Amendments clarify that “if the individual establishes that he or she 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” they are protected by the ADA.

Reinforcing the clarification to the regarded as prong the Amendments change the prohibition from discriminating against a person “with a disability because of the disability of such individual” to prohibiting discrimination against a qualified individual “on the basis of disability.” Shifting the focus from the threshold question of disability to the substantive question of the treatment the individual received.

The Amendments clarify that under the individuals who are regarded as having a disability are protected from discriminatory treatment but are not entitled to reasonable accommodations. Similarly the Amendments states that the change to “on the basis of disability” does not create a basis for a reverse discrimination complaint that the ADA never intended. The principle that the provision of accommodations to individuals who have disabilities is not discriminatory remains intact.

Before moving on to a discussion of the impact of these changes it is important to note that the Amendments also amend the definition of disability in Section 504 of the Rehabilitation Act so that they are the same.

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IMPACT OF RETURNING TO THE ORIGINAL DEFINITION

What are the practical implications of these clarifications? Clearly, the Amendments will broaden the scope of who is covered by the ADA. The ADA provides two core rights for individuals with disabilities; non-discrimination and reasonable accommodation. While no hard data exists clearly the number of individual protected the reset definition of disability will increase. Institutions and offices should be prepared to review more requests for accommodation.

There are a number of states (including Illinois, California, Minnesota, Maryland, New Jersey and New York) that have dropped “substantial limitation” from the definition of disability in their state statutes over the years. There is nothing in the literature to indicate that this cause a burdensome increase in disclosures to, accommodation requests of or formal complaints against higher education institutions in those states. Without good estimates how can you predict staffing needs surrounding the potential increase in disclosures to your office. A prudent approach is to consider what maximum increases are possible. Surveys suggest that six to nine percent of the potential college population has a [disability](#)

[\[http://www.ahead.org/uploads/docs/resources/ada/Opportunities%20for%20Students%20with%20Disabilities.pdf\]](http://www.ahead.org/uploads/docs/resources/ada/Opportunities%20for%20Students%20with%20Disabilities.pdf) .

The level of under representation of students with disabilities on campus would provide a conservative estimate of the maximum increase in disclosures over the next few years.

On their passage Representative Miller commented that

“We intend that the ADA Amendments Act will reduce the depth of analysis related to the severity of the limitation of the impairment and return the focus to where it should be: the question of whether or not discrimination, based upon the disability, actually occurred.”

Representative George Miller on the floor of the House; Congressional Record 9/17/2008, Page: H8294

(<http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24>)

Since the primary protections are non-discrimination and reasonable accommodations, institutions will want to review both their training and policies ensuring compliance and [dispute resolution](#)

[\[http://ada.osu.edu/legal/grievanceprocess/tocgrievanceprocess.html\]](http://ada.osu.edu/legal/grievanceprocess/tocgrievanceprocess.html).

Whether there is a noticeable increase or not institutions will need to review their documentation policies to bring them in line with the Amendments. The Senate [Managers Report](http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc) [\[http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc\]](http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc) states that

Educational, testing, certification and licensing entities covered by the ADA also maintain discretion to establish appropriate and reasonable documentation requirements related to the determination of disability, as is true under current law... We expect that the less demanding standard applied to the definition of disability will allow students and licensure candidates with documented disabilities to more readily access appropriate accommodations on examinations when needed”

Representative Miller also emphasized these changes stating

“The bill returns the proper emphasis to whether discrimination occurred rather than on whether an individual's impairment qualifies as a disability. ...and students with physical or mental impairments will have access to the accommodations and modifications they need to successfully pursue an education.” Representative George Miller on the floor of the House; [Congressional Record 9/17/2008, Page: H8294](#)

[\[http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24\]](http://www.govtrack.us/congress/record.xpd?id=110-h20080917-24)

Under the Amendments documentation policies and shift the focus from diagnostic evidence of disability to supporting the need for requested accommodations. Documentation requirements need to focus on the effectiveness of formal and informal accommodations, adaptive strategies. This information is often lacking in diagnostic scores and is too often omitted from clinician’s narratives but can be found

in self report, observational and narrative evaluations from past teachers. For a number of conditions it will be particularly important to understand past adaptive strategies and informal accommodations. This will require giving weight to self report and intake interview narratives. I recommend reading AHEAD's [Best Practices: Disability Documentation in Higher Education](http://www.ahead.org/resources/best-practices-resources) [<http://www.ahead.org/resources/best-practices-resources>] and [The Structured Interview as Documentation](http://www.ahead.org/uploads/docs/resources/articles/SWD/structured_interview.rtf) [http://www.ahead.org/uploads/docs/resources/articles/SWD/structured_interview.rtf].

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ACCOMMODATIONS AND THEIR LIMITS

“We expect that the Secretary of Education will promulgate new regulations related to the definition of disability to be consistent with those issued by the Attorney General under this Act. We believe that other current regulations issued by the Department of Education Office of Civil Rights under Section 504 of the Rehabilitation Act are currently harmonious with Congressional intent under both the ADA and the Rehabilitation Act.” [Senate Managers Report](#)

[<http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc>]

The Amendments do not directly impact the process of determining reasonable accommodations. In a restatement of current law the amendments assure institutions of higher education that the existing principle that entities need not make modifications to policies, practices or procedures that would fundamentally alter the nature of programs or services remains intact. The [Senate Managers Report](#)

[<http://www.ahead.org/uploads/docs/resources/ada/Senate%20Managers%20Report.doc>] reminds us that

“For example, a university would not be expected to eliminate academic requirements essential to the instruction being pursued by a student, although the school may be required to make modifications in order to enable students with disabilities to meet those academic requirements. Current regulations provide that “Modifications may

include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."

Once a request has been made and supported by the student's documentation and presented to program or faculty member, what process is in place to determine if the accommodation is reasonable or a fundamental alteration? [Wynne v. Tufts University School of Medicine](#)

[<http://www.ahead.org/uploads/docs/resources/ada/WYNNE%20v%20%20Tufts%20932%20F%202d%2019.doc>] (976 F.2d 791, 932 F.2d 19) outlines the process an institution should go through before refusing to provide an accommodation because they believe it would lower academic standards or fundamentally alter a program of study. The institution should show that:

1. officials with relevant duties and experience considered the accommodation request;
2. that they meaningfully considered the impact on the program and the availability of alternatives; and
3. that they reached a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or a substantial alteration to the program of study.

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TECHNICAL STANDARDS

Not all essential requirements are academic, particularly in clinical or field based programs. The Amendments increased emphasis on the questions of appropriate accommodation suggests proactively establishing a process for reviewing and creating technical standards. Technical standards are nonacademic criteria for admission and continued program participation. They may include such things as abilities in context (ability to discriminate breath sounds) Behaviors in the present (compliance with an established code of conduct) or Safety (a direct threat to health and safety).

A collaborative process analogous to the one discussed in Wynne is useful in establishing technical standards. Standards should be anchored to the curriculum, supported in policy and practice and utilize objective performance criteria that can be reliably applied to all program applicants or participants. Finally, an individualized interactive process must be used to determine if reasonable accommodations would allow a student to meet technical standards. -30-

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