



The New ADA and Section 504

Missouri Association of School Administrators 2009 Spring Conference

March 25-27, 2009
Lodge of the Four Seasons
Lake Ozark, MO

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PURPOSE

Prohibit discrimination on
the basis of disability

APPLICATION

ADA	Section 504
<p>1990 Law</p> <p>Applies to all employers that employ 15 or more</p>	<p>Part of Rehabilitation Act of 1973</p> <p>Applies to program/activities that receive federal financial assistance from the U.S. Dep't of Education</p>

Who is disabled?

- ▶ Both laws have the same definition.
- ▶ Courts have interpreted the definition of disabled under the two laws the same.

Definitions of Disability

- ▶ A person who has a physical or mental impairment that substantially limits one or more major life activities.
- ▶ A person who has a record of having an impairment that is substantially limiting.
- ▶ A person who is regarded as having a substantially limiting impairment.

Pre January 2009 Court Interpretation

- *School Board of Nassau County v. Arline* (1987) – U.S. Supreme Court – set forth a broad view of the regarded as disabled prong.
- *Sutton v. United Air Lines, Inc.* – (1999) – Supreme Court – law requires a strict and demanding construction of the definition of disability. Holds that substantial limitation is to be viewed with mitigating measures in place.

Pre-2009 Court Cases

- ▶ *Toyota Motor Mfr. Kentucky, Inc. v. Williams* (2002) – Supreme Court – requires a strict and demanding construction of definition of disability.

2008 Amendments

- ▶ Effective January 1, 2009
- ▶ Purposes:
 - To reinstate a broad scope of protection to be available under the ADA and 504.
 - To reject the *Sutton* requirement that substantially limits is to be determined with reference to the ameliorative effects of mitigating measures.
 - To reinstate the *Arline* reasoning that regarded as is also to be interpreted broadly.

2008 Amendments

- ▶ ***“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”***

2008 Amendments

- To reject that standards of the Toyota case that “substantially” and “major” “need to be interpreted strictly to create a demanding standard for qualifying as disabled” and that to be substantially limited in performing a major life activity “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”

2008 Amendments

- Convey Congressional intent that the Toyota standard for substantially limits has created an inappropriately high level of limitation necessary to obtain coverage under the ADA and that the question of whether an individual’s impairment is a disability should not demand extensive analysis.

2008 Amendments – Congressional Findings

- In enacting the 1990 law,
 - Congress intended that the ADA provide broad coverage.
 - Congress expected that the definition of disability would be interpreted broadly, but that expectation has not been fulfilled.
 - Congress determined that the Supreme Court cases have narrowed the broad scope of protection intended and, thus, eliminated protection for many individuals intended to be protected.

Congressional Findings

- Congress rejected the Supreme Court holdings of Sutton and Williams.
- Congress concluded that the lower courts, as a result of those Supreme Court cases, incorrectly found that people with a range of impairments were not people with disabilities.
- Congress concluded that the Toyota cases interpreted the term “substantially limits” to require more limitation than Congress intended.

Old v. New

- ▶ A person is disabled if that person has a physical or mental impairment that substantially limits one or more major life activities.
- ▶ Disability means that an individual has a physical or mental impairment that substantially limits one or more major life activities of such individual.

Old v. new

- ▶ Disability also means that an individual has a **record of** having an impairment that is substantially limiting.
- ▶ A person is disabled if that person has a **record of** such an impairment.

Old v. New

- ▶ A person is disabled if that person is **regarded as** having such an impairment.
- ▶ A person is disabled if the person is **regarded as** having such an impairment.

Old v. New

- ▶ Record of means the individual has a history of, or has been misclassified as having an impairment that is substantially limiting.
- ▶ Same

Old v. New

- **Regarded as** means that the individual has an impairment that is not substantially limiting, but is treated as through he or she does; or has an impairment that is substantially limiting only because of the attitude of others; or has no impairment but is treated by the recipient as having such an impairment.
- An individual meets the **regarded as** having such an impairment if the individual establishes that he or she has been subjected to an action prohibited by the law 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.

Old v. New

- ▶ Supreme Court – the impairment’s impact must be permanent or long term.
- ▶ EEOC – temporary, nonchronic impairment of short duration, with little or no permanent long-term impact are usually not disabilities.
- ▶ OCR – temporary impairments might be covered depending on severity or duration.
- ▶ Regarded as does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

Old v. New – Major Life Activities

- ▶ Functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
- ▶ Major life activities 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.
- ▶ Courts – major means important. These terms need to be interpreted strictly to create a demanding standard for qualifying as disabled.

Old v. New – Major Life Activities

- ▶ Courts took a global view.
- ▶ The activity should be viewed as central to daily living.
- ▶ Don’t use small subsets of the activity, such as with learning.
- ▶ A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Old v. New – Substantially Limits

- ▶ The individual must be significantly restricted as to the condition, manner or duration in which the individual can perform the major life activity compared to the condition, manner or duration under which the average person can perform that same major life activity.
- ▶ The term substantially limits shall be interpreted consistently with the findings and purposes of the 2008 Amendments.
- ▶ The EEOC regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressional intent by expressing too high a standard.

Old v. New – Substantially Limits

- ▶ Eighth Circuit – means limited considerably or to a large degree.
- ▶ Supreme Court – impact must be permanent or long term.
- ▶ Individualized assessment of the effect of the impairment is necessary when the impairment is one whose symptoms vary widely from person to person.
- ▶ An impairment that substantially limits one major life activity need not limit other major life activities.
- ▶ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Old v. New – Substantially Limits and Mitigating Measures

- ▶ Sutton case – Substantial Limitation is determined on an individual basis and by looking at the individual with mitigating measures in place.
- ▶ The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measure such as --

Old v. New – Mitigating Measures

- ▶ Mitigating measures are devices or practices that a person uses to correct for or reduce the effects of the mental or physical impairment.
- ▶ Examples – glasses, medication, body’s ability to compensate.
- ▶ Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye-glasses 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;

Old v. New – Mitigating Measures



- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services; or
- Learned behavioral or adaptive neurological modifications.

Old v. New – Mitigating Measures



- ▶ The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a MLA.

Old v. New - Mitigating Measures



- Auxiliary Aids and Services includes:
 - Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
 - Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairment.

Old v. New - Mitigating Measures



- Acquisition or modification of equipment or devices; and
- Other similar services and actions.

So What About Students in Public Schools?

Who is disabled under 504?

- ▶ A person is disabled if that person has a physical or mental impairment that substantially limits one or more major life activities.
- ▶ If a student satisfies this definition, the student is entitled to FAPE if the school is a recipient of federal financial assistance.

Other definitions of disability

- ▶ A person is disabled and subject to the nondiscrimination aspects of the law, but not the FAPE obligation, if the student meets the other two definitions.

Medical Diagnoses

- ▶ OCR - a medical diagnosis, including medication, is neither necessary or controlling in determining disability status.
- ▶ A medical diagnosis is simply evidence that the individual has an impairment.
- ▶ Use terminology correctly.

Medical Diagnoses

- ▶ OCR – finding a student eligible simply on the basis of a diagnosis violates 504.
- ▶ Don't second guess medical diagnoses, simply consider them as one part of the process.

BOTTOM LINE FOR STUDENTS

- ▶ Numbers of students 504 eligible will increase.
- ▶ District has child find and evaluation responsibility.
- ▶ Be very careful of regarded as prong.
- ▶ Increase in OCR investigations and what that means with the new law.

EMPLOYEES AND PATRONS

- ▶ Accurate job descriptions for EVERY position are critical.
- ▶ The District can **not** wait for a request. Must accommodate obvious disabilities which interfere with job performance.
- ▶ The District has a duty to discuss possible reasonable accommodations. Employee must participate and cooperate with the interactive process giving requested medical info.
- ▶ Punitive Damages can be awarded if District does not have, or properly implement its own anti-discrimination/accommodation policy.
- ▶ All administrators should get training on recognizing possible disability/accommodation issues.
