

UPDATE ON NEW LEGISLATION AFFECTING SECTION 504

Will it change how Section 504 eligibility teams do business?

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As reported in the Fall 2008 edition of the *Human & Civil Rights Reporter*, the ADA Amendments Act (ADAA) of 2008 became effective on January 1, 2009. Designed to protect disabled individuals in the workplace and school settings, this new civil rights law was passed to ensure that the law was interpreted in a manner consistent with its original intent of being inclusive.

In adopting these changes, Congress expressed its disapproval of a string of United States Supreme Court cases that it viewed as overly restrictive. Although the legislation specifically amends the Americans with Disabilities Act, it includes a conforming amendment to the Rehabilitation Act of 1973 (Section 504) and thus will impact 504 determinations made in the public schools.

The U.S. Department of Education's Office for Civil Rights (OCR), the federal agency that enforces Section 504, currently is evaluating the impact of the ADAA, including whether any changes in regulations, guidance, or other publications are necessary. As a result, the law's precise impact on Section 504 cases in the public schools is not yet clear.

However, the law does make the following changes:

- An individual's use of "mitigating measures" such as hearing aids and cochlear implants, prosthetics, low-vision devices (excluding ordinary eyeglasses or contact lenses) or medication to alleviate the effects of a disability can no longer be considered when determining whether he or she is, in fact, disabled.
- The law clarifies what kinds of activities constitute "major life activities" by including in the law a nonexhaustive list of specific examples—"caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, and working."
- It provides that the interpretation of whether a disability "substantially limits" a major life activity should be interpreted broadly and that it should not require "extensive analysis." It also states that the cur-

rent regulation that defines this term as "significantly restricted" should be revised as it is too limiting.

Until OCR issues further clarification, it remains somewhat unclear about how these changes were intended to apply in the school setting. However, some analysts have noted that these changes were primarily directed at improperly decided cases in the employment sector rather than the public school setting, noting that there has not been such a significant problem with limiting students' rights under Section 504. In fact, some have argued that over- rather than under-identification of students under Section 504 has been the real problem for school districts nationally. Researchers have found that typically 1-2 percent of a district's student population should qualify for Section 504 services, yet in some districts, they account for 20-30 percent. This overidentification problem often can be attributed to Section 504 teams agreeing to a parent's request for services under Section 504 or a physician's recommendation without ever applying the appropriate legal standard. This standard, despite the new ADAA changes discussed above, remains unchanged. If a child clearly does not have a disability (i.e., his/her school performance could be caused by other non-disability issues such as lack of attendance or family problems), or if that disability does not impact a major life activity in any way, the student should not qualify for Section 504 protections. The ADAA does seem to indicate that in cases where the Section 504 team feels it is a close call, the decision should be made in favor of coverage. But in clear cases, a Section 504 teams acting reasonably can deny Section 504 coverage to a student. Ultimately, it is important for team members to remember that by qualifying a student for Section 504 coverage, they have officially determined that the student is disabled and that the district is legally responsible for writing and implementing a Section 504 plan. Both of these represent significant decisions with serious implications for the student, staff, and school district.