Section 504 Compliance Handbook

Education Series | THOMPSON | May 2009 | No. 366

OCR Responds to ADA Amendments With Revised Section 504 Guidance

Before the ADA Amendments Act, which also amended the Rehabilitation Act, went into effect Jan. 1, many school districts did not consider a student with epilepsy taking medication to control seizures to have a disability, making the student ineligible for a Section 504 plan.

The amended law changed that, specifying that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." To reflect this change and others, the Department of Education's Office for Civil Rights recently revised its guidance, "Frequently Asked Questions About Section 504 and the Education of Children With Disabilities," to address the new, broader interpretation of disability.

Mitigating Measures

The new guidance instructs school districts to "***not*** consider the ameliorating effects of any mitigating measures that [a] student is using." There are two exceptions to that rule, which Congress said may be considered: ordinary eyeglasses or contact lenses.

While the law does not define "mitigating measures," it does provide examples: medication; medical supplies, equipment or appliances; low-vision devices, defined as magnifying, enhancing or augmenting a visual image; prosthetics, including limbs and devices; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy

See *OCR*, p. 2

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Featured Columnist

Kendra Johnson, Ed.D.

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equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

'Regarded As,' 'Record of'

There are three ways in which an individual can qualify as a person with a disability: by having a physical or mental impairment that substantially limits one or more major life activities, by having a record of such an impairment or by being regarded as having an impairment. "The phrases 'has a record of disability' and 'is regarded as disabled' are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such," the OCR said.

In such cases, the OCR said, "unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a 'record of disability' or is 'regarded as' is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriation public education (FAPE)."

Major Life Activities

Section 504 regulations include a non-exhaustive list of major life activities: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working (34 C.F.R. §104.3(j)(2)(ii)). The ADA Amendments Act includes additional examples of major life activities that are not included in the Section 504 regulations: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. The OCR guidance says that the regulatory provision's list is "still valid," because it is not intended to be exclusive.

The ADA amendments also delineated major bodily functions that are considered major life activities. Many of the bodily processes are already mentioned in Section 504 regulatory language describing physical and mental impairments in 34 C.F.R. §104.3(j)(2)(i). New additions in the amendments are: functions of the immune system, normal cell growth, bowel, bladder, brain and circulatory system.

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>
> *— OCR*

Transitory Impairments

A temporary impairment is not considered a disability under Section 504 unless it is severe enough to substantially limit a major life activity for a significant length of time. The definition of "temporary" was unclear prior to the passage of the ADA Amendments Act. The law clarified that a transitory impairment is "an impairment with an actual or expected duration of six months or less" and individuals with impairments that meet that definition are not "regarded as" having a disability. The OCR reminded school districts of the new interpretation.

Episodic Impairments, Impairments in Remission

The ADA Amendments Act made clear that episodic impairments such as bipolar disorder and diseases that may go into remission such as cancer are considered disabilities if they would substantially limit a major life activity when active. The same protections are extended to elementary and secondary school students. "A student with such an impairment is entitled to a free appropriate public education under Section 504," the OCR said.

For More Information

The revised "Frequently Asked Questions About Section 504 and the Education of Children With Disabilities" is available at http://www.ed.gov/about/offices/list/ocr/504faq.html.

Section 504 Compliance Handbook

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The *Section 504 Compliance Handbook* (USPS 478-750) is published monthly by Thompson Publishing Group, Inc., 805 15th St. NW, 3rd Floor, Washington, DC 20005. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. ISSN: 1068-6533

POSTMASTER: Send address changes to: *Section 504 Compliance Handbook*, Thompson Publishing Group, Inc., 5201 W. Kennedy Blvd., Suite 215, Tampa, FL 33609-1823.

This newsletter for the *Section 504 Compliance Handbook* includes a looseleaf update to the *Handbook*. For subscription service, call 800-677-3789. For editorial information, call 202-872-4000. Please allow four to six weeks for all address changes.

Employers Should Take Four Proactive Steps To Ensure Compliance With ADA Amendments

Despite the absence of regulations and guidance, the ADA Amendments Act of 2008 is in effect and employers must be in compliance, said employment law experts at a recent conference.

Attorneys speaking at the Society for Human Resource Management's Employment Law and Legislative Conference in Washington, D.C., offered suggestions for several proactive steps employers should take to ensure compliance while awaiting regulations from the Equal Employment Opportunity Commission.

Employers should review accommodation requests that were denied in the past, train front-line supervisors on the new requirements, update internal documents and implement a formalized accommodation process, according to Camille A. Olson, a partner in the Chicago law offices of Seyfarth Shaw LLP.

These steps can help employers prepare for the forthcoming regulations, even though there is no estimate of when the rules will be issued. "There was a draft regulation … that was supposed to come out in December," said Olson, "but in the end there was quite a bit of debate amongst the EEOC commissioners. We all believed it would come out … before Jan. 1, [but] nothing has come out yet and there's been no discussion."

1. Revisit denied accommodation requests.

Because the amended ADA significantly expands the definition of "disability," employers should consider revisiting accommodation requests that were previously denied. The Amendments Act specifies that the term "disability" should be construed broadly. "Forget all the old cases. Think of individuals with disabilities or physical or mental impairments as being intended to be covered by the law," Olson said.

"Instead of trying to determine whether somebody is disabled, there are two focuses that you should have. One is whether they are qualified for the job. So the question of qualifications becomes critically important. And the second is, if they are qualified, do they need a reasonable accommodation and is one available for them that will allow them to perform the essential functions of the job?"

The committee report shows that Congress does "not expect human resource professionals and supervisors and managers to be spending the time they used to spend on [disability determinations]," Olson said. Congress wants "them to be spending that time focusing on whether the individual before them is qualified for the job and whether the individual before them needs an accommodation and if so, if there's a reasonable one that can be made."

As a best practice, some employers are beginning to look at past accommodation requests and make sure they are still comfortable with those decisions, said Olsen. If a current employee has an ongoing problem for which he or she was previously denied an accommodation, "you should know that you may need to revisit that issue and your decision may be very different going forward," she added.

The law does not require employers to affirmatively go back and engage employees in a new interactive process. However, Olson said, "I will tell you that [many employers are] going back and reviewing their logs and talking to those individuals."

2. Train supervisors and managers.

Employers should ensure managers and supervisors understand that disability as defined under the new act is

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Conference (continued from p. 3)

much broader and includes individuals who may use a mitigating measure and may not seem disabled to them, Olson said.

Supervisors also need to be able to recognize accommodation requests and respond appropriately. "You are going to see many more requests for accommodation than you saw before, so it's important for your managers to know what [to do with] requests for accommodation. It's also going to be much more common for there to be internal complaints of alleged discrimination on the 'regarded as' issue as well as retaliation if there was a request for accommodation that was not granted."

Managers also should be trained on when to engage human resource or legal departments. "I think it is very important that supervisors and managers understand that their responsibility is generally to elevate the issue, to know when … they need assistance from somebody [who] knows more about these issues than they do as a manager."

3. Update internal documents.

"You're going to need to take a look at your job descriptions, job postings, your applications," Olson said. "Any internal documents that you have that describe qualifications and functions of the job are really where the focus is now, so it's going to be critical for you [to ensure] those are accurate and current."

The best way to figure out whether job descriptions are really accurate is to ask the employees who perform the job what they actually do, said Olson. Documents should include jobs' essential functions, nonessential functions, qualifications, physical requirements and required experience.

4. Implement a formal accommodation policy and process.

Employers should implement a formalized accommodation policy and process, which first involves an accommodation request form, or an accommodation request confirmation form. It should include all details of the initial request. "Usually, it's very difficult looking back to get one consistent description from both the employee or the applicant and the company manager as to what really happened in the discussion. Somebody says something or believes they said something and somebody else hears something completely different, which is why it really will help if you document the accommodation request," Olson said.

"Also, document possible accommodations that you considered … to show the interactive process. You've got the burden, without a question, under the law to show that an interactive process was engaged in once the issue of accommodation [arose]." Furthermore, employers should document subsequent interactive steps, including any consultation sought from outside resources.

Consider involving higher management in the process, Olson said. The decisionmaker should not be the person who has day-to-day interaction with the employee requesting the accommodation because he or she may be concerned about the department's budget or what effect the accommodation may have on other employees.

Some companies have reasonable accommodation committees that review accommodation requests. "It's helpful because they're also able to look at the company's experience in terms of making similar determinations with other people in other departments," said Olson, explaining that without a committee, an employer could find itself in the position of having to explain why it granted an accommodation in one department, but not another.

It is important for decisionmakers to know the company's history, she said. Accommodation committees should keep a log of accommodation requests for this purpose. If sensitive information is used, consider deleting employee names, or using identification numbers.

Finally, remember to ask the employee what they are looking for as an accommodation, Olson said. "They sometimes come up with the best [ideas] because they know best what their limitations are."

Online Professional Development Opportunity Available for Free

The University of Hawaii's Center on Disability Studies provides an online professional development training program at no cost to postsecondary faculty and staff called "Teaching All Students, Reaching All Learners."

The training program is intended to enhance awareness of universal design for learning, assistive technology, students with invisible disabilities and rights and responsibilities related to college and university students.

The materials are designed to prepare participants to complete the test that may be taken before, during or after the modules are completed. If test takers answer at least 80 percent of the questions correctly and provide demographic information, they will receive a certificate.

The project, which is supported by the Department of Education's Office of Postsecondary Education, is expected to improve the quality of teaching and support faculty in achieving tenure and promotion. For students, the goal is to improve learning, performance and retention.

The training program is available at http://www.ist.hawaii.edu/training.

Expert Offers Guidance on How to Prepare for GINA's Requirements Before Regs Are Released

The Genetic Information Nondiscrimination Act, the newest federal nondiscrimination law since the 1990 Americans With Disabilities Act, impacts the older law and its predecessor, the Rehabilitation Act, in unforeseen ways. An employer may accidentally obtain genetic information during the interactive process when determining a reasonable accommodation. Similarly, an employer may discover family medical history when an employee requests Family and Medical Leave Act leave. How should that information be handled so as not to violate GINA?

The Equal Employment Opportunity Commission is developing regulations for Title II of GINA, although the provisions of the law that address the acquisition and use of genetic information in employment will not become effective until Nov. 21. The agency's final Title II regulations reportedly will be issued by May 21. In the meantime, employers are advised to take the following nine precautions, said Camille A. Olson, a partner in the Chicago law offices of Seyfarth Shaw LLP.

1. Avoid questioning employees about genetic testing or test results. For example, if an employee tells his supervisor he will need to miss a day to undergo genetic testing, the supervisor should not ask the employee how the test went, Olson told attendees at a session of the Society for Human Resource Management's recent Employment Law and Legislative Conference in Washington, D.C. Even though obtaining the information is not a violation of GINA, what the supervisor does with this information may be.

If the employee mentions he was going for a medical test and does not specify what kind, it is still best not to follow up with the employee. The supervisor may be asking out of compassion or friendliness, but the test could have been a genetic test, and the interaction would be fraught with possible complications.

2. Do not ask if a medical condition runs in the family. "This is obviously the type of comment which you don't think of the same as the other kind of comments that you know aren't appropriate under some of the other civil rights laws," Olson said. If an employee reveals her own medical condition or that of a family member, it is a natural response to ask if it runs in the family, but Olson recommended employers stifle the urge.

3. Revise policies, and train managers. Olson said employers are going to need to revisit their policies on interviewing, reasonable accommodations and family and medical leave. "Train managers regarding what they may not follow up on even if that information is volunteered to them by an employee," she said. For example, an employer that requires a medical examination after an employment offer is made may not inquire about family medical history, even if it seems relevant. Genetic information that may be acquired during the ADA's interactive process must be kept confidential. The same applies to information acquired through FMLA leave requests.

4. Safeguard information so it does not enter the employment decisionmaking process. Olson expects many of the claims under GINA will be related to an employer's desire to reduce medical expenses. A potential case could involve a plaintiff who has provided information in the workplace about the health condition of a family member, and shortly thereafter the employee is terminated. The employee could then claim the termination was the result of genetic discrimination.

5. Screen all medical information on receipt to determine whether you must keep it confidential and under what circumstances it may be released. Disclosure is permitted if the employee requests it in writing, for the purposes of occupational health research, if ordered by the court (although not in response to discovery requests), if a government official is investigating, in connection with FMLA compliance certification or if a public health agency requests the information for purposes of monitoring contagious diseases. The employee must be notified if his or her genetic information is released at the request of a public health agency.

6. Keep any genetic information confidential, unless special circumstances dictate otherwise. Genetic information and information about someone's propensity for a medical condition or a relative's medical condition must be kept confidential unless it falls under a specific exemption, Olson said. Keep the information in a medical file that is separate from the personnel file.

The proposed regulations clarify that genetic information and medical information may be filed together and do not need to be separated by subfolders. Genetic information should be treated the same as any other medical record under the ADA. For example, if an employee fills out a bereavement leave form and writes: "I am requesting bereavement leave for the death of my aunt from ovarian cancer," that information should be put in a medical file, Olson said. If the reason for the death is not cited, it may go in the personnel file.

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Obama Shows Support for Disability Inclusion

President Obama received a lot of criticism about the disparaging comment he made on the Tonight Show about the Special Olympics, but Kareem Dale, special assistant to the president on disability policy, said that Obama's record stands for itself.

Joking about his poor bowling score with Jay Leno, Obama said: "It was like Special Olympics, or something." Realizing how his remark would be taken, he called Tim Shriver, chairmen of the Special Olympics, to apologize before the show aired.

One way to gauge the president's commitment to addressing the needs of individuals with disabilities is by the nominations and appointments he has made, Dale told attendees at the National Council on Disability meeting in Washington, D.C.

Dale, who is partially blind, said he will have responsibilities for "all things disability" and will help implement "one of the most aggressive agendas put forth by any president in the history of this country." His is the first position of its kind in a presidential administration, according to the White House. Dale was national disability director for Obama's campaign for president and previously worked on disability policy in Obama's Senate office.

In addition to Dale, Obama brought on Paul Steven Miller as a special assistant whose primary responsibility will be for managing appointments for positions that impact disability programs and individuals with disabilities and for broader appointments throughout the federal government.

"I actually think it is great because it allows for integration," Dale said. "He's not just focused on disability issues. He's not just focused on people with disabilities, but he's focused on a variety of areas, such as justice, so he is able to incorporate people with disabilities in nondisability-specific jobs."

Miller, who has a genetic condition that causes dwarfism, is a former commissioner at the Equal Employment Opportunity Commission and was director of the University of Washington's disability studies program.

Obama appointed Jeff Crowley as the director of the Office of National AIDS Policy and a senior disability policy advisor on the Domestic Policy Council. Crowley is a senior research scholar at Georgetown University's Health Policy Institute and a senior scholar at Georgetown University Law Center's O'Neill Institute for National and Global Health Law.

"If you're going to go around and you're going to tell other people to hire people with disabilities, then you better hire them yourself," Dale said. "That's what [Obama's] done by putting three people in senior positions at the White House to focus on the disability area. …There's never even been even one at the level of special assistant or a director."

Kathy Martinez is Obama's pick to be director of the Office of Disability Employment Policy. Martinez, who is blind, sits on the National Council for Disability and is the executive director of the World Institute on Disability in Oakland, Calif.

Seth Harris was nominated by Obama to be the deputy secretary of the Department of Labor. While he is not a person with a disability, Harris is a longtime advocate of people with disabilities and is a senior fellow of the Life Without Limits Project of the United Cerebral Palsy Association. He also is director of labor and employment law programs at New York Law School.

"That team approach is going to allow us to begin to reverse the dismal employment of people with disabilities," Dale said.

He added that the economic stimulus act is another example of Obama's consideration of the disability community, which included funds for the Individuals With Disabilities Education Act, vocational rehabilitation, and Medicare and Medicaid. Additional funds were also made available for The National Council on Independent Living and a $250, one-time payment for all recipients of Social Security.

GINA (continued from p. 5)

7. Do not raise insurance rates for or deny coverage to an individual based on genetic information. Olson suggested employers review questions regarding family medical history contained in health plan forms or similar questions asked verbally of employees. "You can't ask that information," Olson said. "You can't require that that information be given."

8. Do not use genetic information to limit benefit claims, benefit costs or workers' compensation claims. Given that there are few employers that are not "trying to do everything they can to try to minimize medical expenses," Olson said, this is something employers need to be cautious of.

9. Do not disclose to third parties absent a court order. The proposed regulations do not say if an employer receives "a subpoena or a notice to produce documents in connection with a lawsuit that that is an exception," Olson said. Therefore, a subpoena is not enough, unless it is court-ordered, she added.

Office of Disability Employment Policy Releases Updated Job Board With Nearly 2,000 Candidates

Individuals with disabilities have historically faced barriers in finding employment, but a new online tool will help match employers looking to hire with job candidates who have disabilities and are just starting out in the employment world.

The Workforce Recruitment Program for College Students With Disabilities, which is sponsored by the Department of Labor's Office of Disability Employment Policy and the Department of Defense, has helped connect nearly 5,000 students with jobs since 1995.

Recruitment efforts at 250 college campuses in January and February of 2009 have produced a database with more than 1,900 students and recent graduate job candidates in a variety of majors.

The database is available for free to all public and private sector employers and nonprofit organizations seeking summer or permanent hires. Federal employers can take advantage of the resource at http://WRP.gov, and all other employers can access it by contacting the Department of Labor's Employer Assistance and Recruiting Network at 866-327-6669. Employers can search by institution, major, position type, length of position and location.

If your college or university would like to participate, send your contact information to wrp@dol.gov. Your school must have at least eight eligible students to interview. Eligible students are full-time undergraduates or graduate students with a disability, or students who have graduated within a year of when the database is updated each March. Information is sent each summer to set the recruitment schedule for the next January and February.

House Bill Would Apply 'Visitability' Concept

A measure proposed in the House would require homes built with federal funds to comply with accessibility standards.

Rep. Jan Schakowsky, D-Ill., introduced the Inclusive Home Design Act, which would call for all new homes — single-family houses and townhouses — constructed with federal dollars to be accessible for visitors with mobility disabilities and other impairments, and to residents who may become disabled. The bill was proposed with five co-sponsors, and is supported by numerous disability advocacy groups, including the American Association of People With Disabilities, National Council of Independent Living and The Arc of the United States.

The measure would also provide a way for physically able individuals who may develop disabilities as they age to stay in their own homes and avoid costly renovations to retrofit their homes. Only 5 percent of homes built with federal assistance have any accessible features, according to Schakowsky's office.

"It makes no sense to build new homes that block people out when it's incredibly easy and cost effective to build new homes that let people in," Schakowsky said in a press release. "We have the ability to increase mobility and improve quality of life for America's disabled; failure to act is a moral crime."

The bill is modeled on the principles of "visitability" (see *Handbook*, ¶446). Similar standards have been adopted by some states, including Kansas, Texas and Vermont and the cities of Atlanta and Chicago. The concept of visitability does not imply an entirely accessible house, but would allow a person with a disability to visit a friend "without having to be lifted up stairs, to enjoy a meal and be able to use the first floor bathroom or powder room," according to Department of Housing and Urban Development materials.

Schakowsky's proposed legislation would require each home to have an accessible entrance without any steps or a threshold higher than 0.5 inch and for all rooms on that level to have an accessible path between them, which would include at least 32 inches of space between passages. Homes would need to have accessible electrical and thermostat controls that could be reached from a sitting position in a wheelchair. The main floor would be required to have at least one wheelchair-accessible bathroom, including reinforced walls with grab bars.

For More Information

The text of the Inclusive Home Design Act of 2009, H.R. 1408, is available at http://thomas.loc.gov.

National Council on Disability

Council: U.S. Needs Comprehensive Disability Policy

The federal government's disability policies must be updated due to an aging population and a poor economy, the National Council on Disability said in its annual progress report.

The report offers proposals the council said are "consistent with a fiscal policy aimed at unlocking the potential of America and thereby improving the quality of life and opportunities for the American people."

Previously, the report has served as "a retrospective review and analysis of federal programs," said the NCD in the report's executive summary. This year, however, "members have chosen to depart from a retrospective approach, and, instead, … focus on the current status of the quality of life of people with disabilities, and the emerging trends that warrant changes in the federal government's disability policies and programs," the report said.

In addition to calling for a comprehensive overhaul, the council made many specific recommendations to Congress, the president and federal agencies on how to achieve this undertaking.

- The president should:
  - sign the U.N. Convention on the Rights of Persons with Disabilities;
  - establish a commission to identify the gaps in health care financing for people with disabilities over the life span, which include gaps that baby boomers will encounter as they age and acquire chronic health conditions and disabilities;
  - issue an Executive Order requiring all federal agencies to educate hiring managers and human resource personnel about the benefits of hiring people with disabilities, and to also educate them about the recently revised Schedule A civil service hiring authority; and
  - establish an Interagency Disability Coordinating Council with required participation of all federal agencies serving people with disabilities.
- Congress should:
  - enact legislation requiring lending institutions to mandate compliance with the accessibility provisions of the Fair Housing Act and the ADA in all real estate and commercial loans;
  - fund a series of anti-stigma demonstrations;
  - reauthorize the Workforce Investment Act and require in the Rehabilitation Act that vocational rehabilitation services be made available to eligible youth no later than three years before an adolescent or young adult exits from secondary education;
  - pass legislation requiring vehicles, including hybrid vehicles, to meet a minimum sound standard so that pedestrians who are blind and who rely on listening for safe travel can maintain mobility and independence; and
  - expeditiously reauthorize and fully fund the No Child Left Behind Act to maintain academic accountability requirements and high expectations for students with disabilities.
- The Department of Defense and the Veterans Administration should develop a plan to ensure continuous availability of mental health services for all service members and veterans.
- The Department of Homeland Security should establish a department-wide office on disability that is responsible for training all DHS employees about including and serving people with disabilities and enforcing compliance with the ADA by local and state governments.
- The Centers for Medicare and Medicaid Services and the Social Security Administration should work together closely to identify and eliminate the many employment disincentives currently built into the Medicaid waiver, Medicaid buy-in, and Health Insurance Premium Payment programs.
- The Department of Transportation should work with Congress to increase transportation options for the growing population of people who do not drive because of disabilities.

Disability Issues Will Have Time in Spotlight in 2009

Disability issues are likely to get more attention this year now that the focus has moved beyond the economic stimulus legislation, congressional aides said.

Congress had to delay action on many items to move the American Recovery and Reinvestment Act quickly through both chambers. For schools that have waited a long time for a cash infusion for programs under the Individuals With Disabilities Education Act and other organizations that will receive a one-time boost, the funding is expected to offer some relief.

But the speed with which the measure was pushed through did not provide an opportunity to shape and improve IDEA policy and is likely to create more problems when the funding runs out in two years, said Sharon Lewis, senior disability policy advisor on the majority staff of the House Education and Labor Committee, during the National Council on Disability meeting in Washington, D.C. The stimulus law will provide the following funds for IDEA programs: $11.3 billion for Part B Grants to States, $400 million for Part B Section 619 grants for preschool children and $500 million for Part C Infants and Toddlers With Disabilities Program.

Legislative Priorities

Lewis said that one of the biggest legislative priorities this year will be the Elementary and Secondary Education Act, more commonly known as No Child Left Behind. Education Secretary Arne Duncan has been pushing for the reauthorization to be completed this year, and Lewis said her committee is in "discussion with the administration in terms of timing."

Connie Garner, policy director for disability and special needs populations for the majority staff of the Senate Health, Education, Labor and Pensions Committee, said there has been an ongoing dialogue on the Hill about better integrating IDEA with No Child Left Behind. "If NCLB gets reauthorized without IDEA, this entire conversation will be a third rail," she said.

Reauthorization of the Workforce Investment Act, which would make changes to the Rehabilitation Act, is also on the agenda. "It is unclear how quickly we'll move on that, but it will be a priority this year," Lewis said. "There will be significant changes to WIA and the approach of WIA. … We are not interested in continuing along the same path we're on."

As an example, there is currently a lot of focus on graduation outcomes of students with disabilities, but Lewis said the interest may shift to younger students in preparing them for the transition after high school.

With the passage of the ADA Amendments Act, Lewis said she has heard some concerns from the education community about the implications of the changes made by the amendments.

She added that the committee is "listening very closely to the ground rumblings" about the application of the new interpretation of Section 504 in education.

Garner said she also expects the Senate to take up the reauthorization of No Child Left Behind and WIA, but she stressed that the Senate committee does not view disability issues in terms of separate laws, but rather tries to integrate "disability as a lens in every single piece of legislation we do."

Seclusion, Restraint

While many states have laws limiting schools from using seclusion and restraint as behavior management techniques, no federal law exists. In response to a rash of cases in which seclusion and restraint resulted in student injury and death, that may soon change.

Lewis said Rep. George Miller, D-Calif., chairman of the House Education and Labor Committee, intends to hold hearings on the topic this spring, as early as May.

Proposed legislation to reauthorize the Substance Abuse and Mental Health Services Administration included a provision addressing seclusion and restraint, but failed to make it into the final version because of objections to overwriting state laws, Garner said.

In light of those concerns, she said the Senate might take the approach of crafting a law with "a floor, but not a ceiling."

Kendra Johnson, Ed.D., is the director of Graduate Management Admission Test Accommodations for the Graduate Management Admission Council. She has an M.A. in rehabilitation counseling from Michigan State University and a doctorate of education in curriculum and instruction from Wayne State University. Prior to joining the council, she served as a director of the Office of Accessibility at the University of Toledo and as the coordinator of Accessibility Services at the University of Michigan-Flint. She also has a private consulting practice assisting high school students with disabilities prepare for the transition to college and is co-author of the book, 100 Things Every College Student with a Disability Ought to Know. *The opinions of this column are the author's own, and do not necessarily reflect those of the* Handbook *or all testing agencies.*

High-Stakes Testing and ADAAA: How Amendments Affect Standardized Testing

By Kendra Johnson, Ed.D.

Since taking effect Jan. 1, the ADA Amendments Act, which also amended the Rehabilitation Act, has broadly expanded the range of individuals eligible for protections in high-stakes testing, as it has in many other arenas.

In drafting the ADAAA, Congress wanted to shift the focus from the procedural question, "Do you have a disability as defined by the statute?" to the substantive question, "Has discrimination taken place?" That change shifts the framework in which standardized test administrators determine eligibility. Examinees seeking test accommodations can expect testing agencies to be exclusively focused on whether the requested accommodations are reasonable and necessary, and less focused on the question, "Are you disabled?"

ADAAA regulations have not yet been finalized, but here is how the ADA's key constructs have and will apply to standardized testing.

Defining 'Accessible'

High-stakes tests, such as the SAT Reasoning Test, American College Test, Graduate Management Admission Test, Law School Admission Test and Medical College Admission Test, have long been responsible for providing accommodations to examinees with disabilities under the Americans With Disabilities Act. Under Title III of the ADA, any private entity "that offers examinations … related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations … in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals" (42 U.S.C §12189). This language appears to focus on ensuring that all examinees have physical access to examinations, but the Department of Justice has interpreted it more broadly, as requiring testing agencies to provide "modifications" or "auxiliary aids" to make the exam accessible. In many instances, testing agencies are required to provide extended testing time (by far the most frequently requested accommodation), modifications to the test format (e.g., large print, Braille), additional rest breaks, readers, scribes, calculators and other accommodations as appropriate.

Dual Mandates for Testing Agencies

Testing agencies have had — and will continue to have — two mandates in making decisions about high-stakes test accommodations: (1) to ensure that access is afforded to any individual identified as having a disability under the ADA, and (2) to safeguard fair testing practices for all test takers. As arbiter of both accessible and fair testing, test administrators take care to provide accommodations only to those examinees meeting the ADA's strict definition of disability under its guidelines.

Defining Disability

Substantial Limitation — The ADA of 1990 defined disability as a "physical or mental impairment that *substantially limits* one or more major life activities" (emphasis added). ADA case law defined "substantial limitation" as a problem beyond that of the average person. Testing agencies, therefore, have considered the severity of the reported impairment as central in determining eligibility.

The decision as to whether an examinee's request for accommodations was reasonable and necessary hinged on the examinee's performance in comparison with the general population. For example, an examinee with an IQ of 140 (very superior) reporting a reading disability with a reading composite score of 100 (average) would in many instances be viewed as not having a substantial limitation in the activity of reading.

This definition of substantial limitation remains under the ADA Amendments Act, although the definition of disability now places less scrutiny on the severity of the impairment,

See *Testing*, p. 11

Testing **(continued from p. 10)**

and more emphasis on whether discrimination has taken place. This shift represents a significant change in perspective for testing agencies, but it is as yet unclear how the "average person standard" — a contentious point for examinees and disability advocates — will be applied under the ADAAA.

As of this printing, the ADAAA regulations are not yet finalized. Because the amendments retain the essential elements of the definition of disability, including the term "substantial limitation," those seeking accommodations on a high-stakes test may find that the "average person" threshold still applies.

Mitigating Measures — The ADA of 1990 took into consideration mitigating measures, such as medication, assistive devices or self-adaptive strategies, when defining whether an individual was substantially limited in one or more major life activities. When making eligibility determinations, testing agencies have considered whether effective use of such mitigating measures has effectively negated a person's disability.

Under the ADAAA, testing agencies may no longer give weight to mitigating measures other than eyeglasses or contacts, when determining if an examinee is substantially limited in a major life activity. The effective use of mitigating measures cannot negate one's disability status. However, testing agencies may still consider whether successful mitigation renders the requested accommodations unnecessary. Thus, if the substantial limitation has been relieved with mitigating measures or self-adaptive strategies, the necessity of the accommodation may be called into question by the testing agency, but not the disability itself.

This consideration will no doubt remain critical to testing agencies and how they view the purpose of accommodations on a high-stakes test. They see accommodations not as a way to facilitate one's best possible score, maximize one's learning potential or accommodate a particular test-taking style. Rather, they regard accommodations as a way to provide individuals with substantial limitations the opportunity to take the test on equal footing with other examinees.

Testing agencies have long recognized that many examinees are quite successful in utilizing their own adaptive or self-accommodation strategies while simultaneously being substantially limited. As with the old statute, the determination of whether the impairment substantially limits an examinee (without consideration of mitigating measures) will continue to be reviewed on an individualized, case-by-case basis.

Bottom Line

As Congress intended, examinees seeking high-stakes test accommodations under the new amendments no longer face the complexities and often frustrations of proving they belong to a protected class. The ADA Amendments Act provides language specificity and expects that a less demanding standard be applied to the definition of disability.

Ultimately, the ADAAA still permits testing agencies to engage in a careful analysis of the necessity and reasonableness of an accommodation request. Examinees seeking accommodations under the ADAAA should continue to provide objective evidence that addresses three fundamental questions: Does the examinee have a substantial limitation in a major life activity, as compared with the average person in the general population? If so, is the limitation relevant to the individual's ability to take the test under standardized conditions? If so, are the accommodations requested reasonable and necessary?

When making accommodations decisions, testing agencies will be less focused on defining an examinee's disabilities and more focused on what the examinee needs to take the test on equal footing with all other examinees. Test takers with disabilities should apply for any accommodations they need, with the understanding that the goal of testing agencies is to ensure that people with disabilities have full access on standardized exams.

International Disability Treaty May Necessitate Changes to U.S. Law Governing Disability Rights

President Obama has promised to sign the Convention on the Rights of Persons With Disabilities, an international disability rights treaty, which may mean altering U.S. disability discrimination laws to conform to the treaty.

The treaty borrows from and expands on the principles of the Rehabilitation Act, the Individuals With Disabilities Education Act and the Americans With Disabilities Act (see "President-Elect Obama Announces Disability Rights Treaty on Agenda," December 2008).

At press time, 139 countries had signed the treaty and 50 countries had ratified it, but the U.S. was not among them. After Obama signs the treaty, as he committed to during his election campaign and restated since being in office, it will still need to be ratified by the Senate.

"The U.S. is going to be playing catch up," said Eric Rosenthal, executive director of Mental Disability Rights International. Rosenthal gave an update to the members of the National Council on Disability (NCD) during its recent meeting in Washington, D.C.

Eighty-two countries have also signed the optional protocol, which provides a way for individuals to pursue action for treaty violations when they have exhausted their own nation's legal options. Twenty-nine countries ratified that.

State Department lawyers are currently examining the treaty to identify areas of disagreement with U.S. law, said Stephanie Ortoleva with the department's Bureau of Democracy, Human Rights and Labor.

NCD issued a report last year analyzing the treaty's differences with U.S. law. Among its findings were that U.S. law lacks equality measures such as affirmative action, job set-asides and vocational training. While children with disabilities have a right to a free appropriate public education under U.S. law, public education is not currently required to help students with disabilities achieve their full potential.

Rosenthal said there is an urgency to get the treaty signed because it prevents the U.S. from participating in world summits of signatories and limits the ability of the U.S. to speak out on disability issues with authority.

"There are major implications for our own operations abroad and for what's going on in other countries," he added. The U.S. is engaged in work in countries that have ratified the treaty and will have to comply with its provisions in those nations.

"At this point, there is no meaningful opposition," Rosenthal said. "It's simply a question of prioritization."