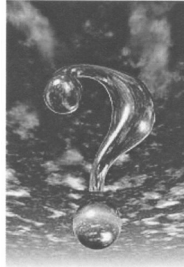


Demystifying the ADAAA, ADA rules and standards, HEOA, and other laws and regulations

- Irene Bowen
- Paul Grossman
- Scott Lissner
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ADA regulations: coming soon

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DOJ's and EEOC's regulations

- What's the latest?
- When will it affect us?
- How will it affect us?

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ADA regulations, ADAAA regulations

- EEOC: ADAAA regulations (delayed as of now): definition of disability
- DOJ: ADA regulations anticipated within a few weeks

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What DOJ proposes to do

First major revisions to the original (and current) ADA regulations (1991/1994) for

- Title II (state and local governments) and
- Title III (private entities, testing entities, commercial facilities)

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Predictions?



Final in July 2010?

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Highlights of proposal (see chart)

- Would adopt new accessibility standards
 - 2004 ADA Accessibility Guidelines (ADAAG)
 - Issued by U.S. Access Board, as ADA accessibility standards
 - DOJ supplements them
- Would update/address/expand provisions on
 - service animals
 - use of Segways® and similar devices
 - ticketing policies for assembly areas
 - program accessibility
 - testing
 - effective communication

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Service animals

Sections 35.104, 35.136, 36.104,
36.302 (c) (2) – (8)

Definition: an animal that
does work or performs tasks
for the benefit of an individual
with a disability (including
psychiatric, cognitive, mental)



M. COLLEEN MCDEVITT, Columbiainmissourian.com

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...Service animals

- Tasks:
 - Assist during seizure
 - Retrieve medicine or other objects
 - Help individual with dissociative identity disorder to remain grounded



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...Service animals

- Types: Dog or other common domestic animal (no wild or farm animals, no monkeys, no reptiles)



Jeff Riedel for The New York Times

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...Service animals

- Emotional support or comfort: if this is the only function, not considered a service animal
- Other agencies may differ (employment, housing, Air Carrier Access Act, state/local)



Dilip Vishwanat/Getty Images, for The New York Times

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Power-driven mobility devices

Sections 35.137, 36.104

- Issues
 - When they must be permitted
 - What inquiries can be made



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Effective communication

Sections 35.104, 35.160, 35.161, 36.104, 36.303

- Additions to examples of auxiliary aids and services
 - Exchange of written notes
 - Accessible electronic and information technology
 - Computer-aided transcription services

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...Effective communication

- Other examples of auxiliary aids and services
 - Brailled displays
 - Screen reader software
 - Video interpreting services (VIS)
 - Standards for performance



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...Effective communication

- “Qualified reader” defined:
 - One who reads effectively, accurately, impartially
 - One who can use necessary vocabulary
- “Qualified interpreter” modified
 - Includes sign language, oral, and cued speech interpreters
 - Oral and cued speech interpreter defined


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...Effective communication


- Companions
 - Covered entities must communicate effectively with companions, as appropriate
 - Family members, friends, associates
- Can't require person to bring own interpreter
- Can't rely on companions to interpret except in emergency or by request

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...Effective communication



- Automated attendant systems, if provided, must provide effective communication




- Entity must answer TTY relay calls in same manner as it answers others

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Event ticketing policies

- Distribution outlets
- Clear seating charts
- Ticket transfers
- “Sell outs” and accessible seats
- Equivalent pricing and access limitations
- Verification
- Captioning at large venues



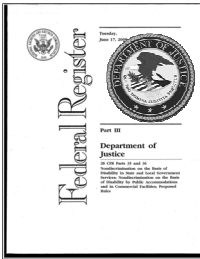
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How to get a grip (on the rules)

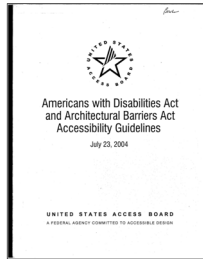
- The rules themselves (DOJ)
 - The actual language of the changes to the regulations (DOJ will clearly indicate changes from proposal too)
- The preamble/explanation
 - Comes before each rule
 - In final, will analyze comments and explain final decisions
 - In layperson's terms

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Two documents to know



DOJ's proposed ADA rules (titles II and III)

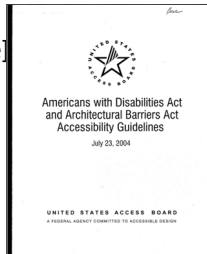


Access Board's 2004 accessibility guidelines (proposed standards)

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New construction and alterations

- Meet new requirements starting six months after effective date (or within the six months, by choice)(section 36.406(a))
[Final may extend this time]
- Follow new Standards



Changes to accessibility standards

- Don't start "complying" with "new" ADA accessibility standards, because there aren't any.
 - If you design to the proposed standards, you may violate the existing ones
 - E.g. reduced scoping for assembly areas
 - BUT if you design to certain provisions in the proposed standards/ADAAG that are stricter, you'll probably be ok
 - E.g., 48" reach range
- Consider state and local accessibility requirements as well

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Guiding your institution

- Start effort to budget time and money for compliance
- Plan to plan:
 - How do you comply without a plan?
 - Do plans need updating?
(Has anything changed in the last 20 years?)

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More on the horizon

- Under review: advance notices of proposed rulemaking
 - Web accessibility (and other technology?)
 - Equipment
 - Captioning in movie theaters
 - NG 911
- After title II and III rules: DOJ rules re: ADA Amendments Act (definition)
- Changes to section 504 regulations

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THE ADA AMENDMENTS ACT OF 2008



In 2008, Congress set the record straight about its intentions regarding protections for people with disabilities

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The ADA Amendments Act provides enhanced protections for:

- Individuals with a physical or mental impairment that substantially limits them in one or more major life activities
- Individuals who have a record of disability
- Individuals who are regarded as being disabled

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Why? What went wrong?

- Federal courts interpreted the words “a physical or mental impairment that substantially limits one or more major life activity” very narrowly
- Measures that mitigated the effects of a disability were considered, and if adaptive measures were too successful, the individual was not protected
- People whose symptoms were evolving or episodic were not protected from discrimination

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Cases that limited the ADA's protections:



- *Gonzalez v. National Board of Medical Examiners* (U.S. Court of Appeals for the 6th Circuit) under *Sutton* analysis, a medical student who had been able to compensate for his disability in the past was not protected by the ADA in seeking accommodations on the U.S. Medical Licensing Examination

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The EEOC was instructed to revise its regulations

- The EEOC's definition of "substantially limits" as "significantly restricts" is too limiting and leaves out disabled individuals who are entitled to the ADA's protections
- Fall 2008, initial NPRM issued
- Jan 22, 2009, rules withdrawn
- Revised NPRM issued Sept 23, 2009
- Comments due Nov. 23, 2009
- Final Rules ???????



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Higher Education Opportunity Act

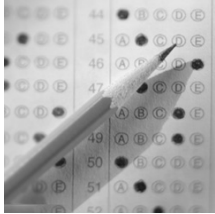
(Reauthorizes the Higher Education Act of 1965)

Addresses financial access to postsecondary education

AHEAD sought to ensure equality of financial aid access for students taking reduced course loads as accommodations for their disabilities

Final regulations take effect July 1, 2010

The 2008 Amendments, Updated Regulations and Standardized Tests



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Congress explicitly rejected the narrow approach taken by the courts

- The Supreme Court's ruling in *Sutton* impermissibly narrowed what was supposed to be a broad scope of protection
- The Supreme Court's interpretation of "substantial limitation" in *Toyota Manufacturing* required a greater degree of limitation than was originally intended by Congress

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and required broadened application of the law



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New provisions ensure broad application

- “The definition of disability...shall be **construed in favor of broad coverage**...to the **maximum extent** permitted...and should **not require extensive analysis**” 42 U.S.C. § 12102(4)(A)
- Enhanced and clarified “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 ”42 U.S.C. § 12102(4)(D)

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**Major Life Activities
now include, but are not limited to:**

- | | |
|---------------------------|------------------------|
| • Caring for one’s self | • Lifting |
| • Performing manual tasks | • Bending |
| • Seeing | • Speaking |
| • Hearing | • Learning |
| • Eating | • Reading |
| • Sleeping | • Concentrating |
| • Walking | • Thinking |
| • Standing | • Communicating |
| | • Working |

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**Major Life Activities also now include,
but are not limited to, major bodily
functions like:**

- | | |
|----------------------------------|--------------------------|
| • Functions of the immune system | • Brain functions |
| • Normal cell growth | • Respiratory functions |
| • Digestive functions | • Circulatory functions |
| • Bladder functions | • Endocrine functions |
| • Neurological functions | • Reproductive functions |

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Whether an impairment substantially limits a major life activity must be determined without regard for mitigating measures like:

- Medication
- Medical supplies
- Equipment
- Appliances
- Low-vision devices (other than ordinary eyeglasses or contact lenses)
- Prosthetics (including limbs and devices)
- Hearing aids, cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations
- Auxiliary aids or services
- Learned behavioral or adaptive neurological modifications

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The 2008 Amendments have major implications for institutions of higher education



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The Statement of the Bill Managers for the Senate bill contained the following language:

“When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking.”

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Therefore postsecondary institutions and testing companies **cannot** determine that a student is not entitled to an accommodation simply because he has been able to succeed academically, *even without a history of accommodations.*

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Congress Endorsed the Reasoning in *Bartlett*

In colloquy on the floor of the House, Representative Stark (D.Calif.) confirmed that the decision in ***Bartlett v. New York State Board of Law Examiners*** where the court ruled that a woman with a learning disability was protected, despite the fact that she used “self-accommodations” to achieve academic success, was consistent with Congressional intent

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AHEAD submitted joint comments to the NPRM with organizational partners:

- Children and Adults with Attention Deficit/Hyperactivity Disorder
- International Dyslexia Association
- IDA- New York
- Learning Disabilities Association of America
- National Center for Learning Disabilities
- Yale Center for Dyslexia and Creativity

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Highlights of Comments to the Proposed Regulations

- *EEOC Proposal*: “[t]he comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common sense standard, without resorting to scientific or medical evidence.”
- *Comment*: Requested an instruction that “this provision was not meant to support the type of “common sense” which in the history of our country has been used to rationalize the myths, fears and stereotypes of bias”

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- *EEOC Proposed Guidance (“compared to most people”)*: [D]isability may be shown where an impairment is diagnosed, or its limitations evidenced, by reference to intra-individual differences (i.e., a disparity between an individual’s aptitude and actual versus expected achievement), or in comparison to a particular class of people rather than how the impairment manifests itself in reference to the general population.

- *Comment*: Include this in the regulation itself.

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Key concern

EEOC Proposed: Three categories of Impairments:

- 1. Impairments that **Will** Consistently Meet the Definition of a Disability
- 2. Impairments that **May** Be Disabling for Some Individuals But Not for Others
- 3. Impairments that Are **Usually Not** Disabilities

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Group's Comment

When the diagnostic criteria for AD/HD, LD, and psychiatric disorders such as panic disorder and anxiety disorders are compared to the Commission's descriptions of each of the three categories of impairments . . . it becomes apparent that AD/HD, LD, and these psychiatric disorders belong with the list of impairments . . . that will consistently meet the definition disability.

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And because...

These disorders . . . are neurobiological disorders that, by definition, substantially limit a major bodily function was recognized by Congress in the colloquy between Representatives Stark and Miller.

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Another Concern:

- *Proposed by EEOC:* eliminate the terms "condition, manner or duration" from the analysis of "substantially limits"
- *Recommendation:* Amend Section 1630.2 (j)(1) as follows:

Substantially Limits—(1) In general. An impairment is a disability within the meaning of this section if it "substantially limits" the ability of an individual to perform a major life activity, **as compared to how the major life activity in question is performed by most people in the general population.** An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.

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Rationale for the Group’s recommendation:

The Senate Statement of Managers states that the “manner in which we understood the intended scope of ‘substantially limits’ in 1990 continues to capture our sense of the appropriate level of coverage”

(“important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”
(1989 Statement of the Managers))

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**ADAAA was effective January 1, 2009 -
*What’s been happening?***

- *Jenkins v. National Board of Medical Examiners* (5th Cir, Feb. 2009)
- *Enyart v. National Conference of Bar Examiners* (ND Ca, Feb 2010)

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DOJ’s ADA regulation: Organizations that administer standardized tests

“Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”

42 U.S.C. § 12189

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In 2008, the U.S. Department of Justice issued updated regulations and guidance on the ADA and standardized tests
29 C.F.R. § 36.309(b)

Section 309 of the ADA is intended to . . . ensure that individuals with disabilities are not excluded from educational, professional, or trade opportunities because examinations or courses are offered in a place or manner that is not accessible. See 42 U.S.C. 12189.

•Through its enforcement efforts, the Department has discovered that the **requests made by testing entities for documentation regarding the existence of an individual's disability** and her or his need for a modification or an auxiliary aid or service **are often inappropriate or burdensome.** . . .

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Section 36.309(b) as revised:

while it is appropriate for a testing entity to require that an applicant document the existence of a disability in order to establish that he or she is entitled to testing modifications or aids, the request for documentation must be **appropriate and reasonable**. Requested documentation should be **narrowly tailored** so that the testing entity can ascertain the nature of the disability and the individual's need for the requested modification or auxiliary aid.

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Generally, a testing entity **should accept without further inquiry** documentation provided by a **qualified professional who has made an individualized assessment of the applicant**. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program.

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