Implementing the “New” ADA and DOJ Regulations

A Policy Tele-Institute for Higher Education
Session 5: Documentation Policies under the ADA As Amended

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AHEAD
• President Elect
• Co-Chair, Public Policy & Government Relations Committee

OTHER
• Appointed, Ohio Governor's Council For People With Disabilities
• Chair, ADA-OHIO
• Appointed, State HAVA Committee
• Appointed, Columbus Advisory Council on Disability
• The Literal Definition of Disability is the Same
  – 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

• Rules on Applying the Definition Have Changed
• Rules on Applying the Definition Have Changed
  – An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be “substantially limiting.”
  – Disability “shall be construed in favor of broad coverage”
  – An individual’s ability to perform a major life activity is compared to “most people in the general population,” often using a common-sense analysis without scientific or medical evidence.
  – Major life activities clarified and expanded
CONTEXT

• 1973 - Section 504
• 1977 - 504 Regulations
• 1990 – ADA
• 1999 – Sutton Trilogy
• 2002 – Toyota v. Williams
• 2009 – ADAAA
Justice William J. Brennan
Arline v. Nassau County, 1987

“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.”
THE ADA AS AMENDED & DETERMINE DISABILITY

- 2008 Congressional Intent Becomes Law
- 2010 DOJ Title III Regulations Touch Documentation
- Final EEOC Regulations?
- Will be followed by DOJ, DOE, HHS....
DEFINITION OF DISABILITY

• A physical or mental impairment that substantially limits a major life activity
• A record of such an impairment
• Being regarded as having such an impairment
WHAT IS SUBSTANTIAL?

- Disability should be construed broadly
  - Not Toyota’s “prevents or severely restricts”
  - Not limited to activities “of central importance to daily life” (activities of daily living) used in Toyota
- Exclude ameliorative impact of mitigating measures in determining coverage (not Sutton)
- Episodic conditions or those in remission are considered based on their active/acute state (not Garrett)
LIMITED IN WHAT WAY?

• The comparison of an individual's limitation to the ability of most people in the general population often may be made using a common sense, without resorting to scientific or medical evidence.

• Relevant inquiry: how a major life activity is substantially limited, not what an or can do in spite of an impairment.
MAJOR LIFE ACTIVITIES

Includes but 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.
Major Life Activities” also include the operation of major bodily functions including but not limited to:

- Immune
- Respiratory
- Circulatory
- Endocrine
- Digestive
- Reproductive
- Neurological
- Brain
- Normal Cell Growth
- Bowel
- Bladder
ALSO OF NOTE:

- Discrimination is now on the “basis of disability”
- No reverse discrimination
- Changes Section 504 to match
- Does not change the definition of reasonable accommodation
- Does not impact the use of rationally based qualification standards
NEW RULES
“The primary focus should be on the questions of whether accommodations are reasonable or if discrimination occurred, not on whether an individual meets the definition of ‘disability.’”
WHY LISTEN TO THE EEOC?

- Tasked by Congress to Take the Lead
- Advanced Rule Making Stayed Close to the Statute
- Employment Law has Driven Practice
• Primary Focus
  – Reasonable accommodation & discrimination not whether an individual meets the definition of disability

• Major Life Activities (MLAs)
  – MLAs include “major bodily functions,” such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions
• Major Life Activities (MLAs)
  – MLAs also include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working
Common-Sense Assessment

- An impairment need not substantially limit more than one major life activity
- Impairments need not prevent, significantly restrict or severely restrict performance of a major life activity to be substantially limiting
- An individual’s ability to perform a major life activity in a similar manner under comparable conditions as “most people in the general population”
- Should not require extensive analysis
- Typically using a common-sense analysis without scientific or medical evidence
CONSISTENTLY LIMITING IMPAIRMENTS REQUIRING MINIMAL INQUIRY (The “J5” list)

“In addition to examples such as deafness, blindness, intellectual disability, partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair, other examples of impairments that will consistently meet the definition include, but are not limited to—”

PRM 29 C.F.R. § 1630.2(j)(5)
Examples of Consistently Limiting Impairments
(approach being per se disabilities)

Deafness
Blindness
Autism
Cerebral Palsy
Intellectual Disability
Bipolar Disorder
Major Depression
Post-Traumatic Stress Disorder
Obsessive-Compulsive Disorder
Schizophrenia
Muscular Dystrophy
Multiple Sclerosis
Cancer
HIV/AIDS
Epilepsy
Diabetes
IMPAIRMENTS REQUIREING SOME INDIVIDUALIZED INQUIRY

• Interpret in favor of “broad coverage”
• May require “more analysis” But “should not demand an extensive analysis”
• For Example
  An individual with a back or leg impairment who is substantially limited compared to most people in
  • the length of time she can stand,
  • the distance she can walk, or
  • the weight she can lift
These dimensions should guide your inquiry
MORE EXAMPLES FROM THE EEOC

Asthma
An individual with asthma who is substantially limited in respiratory functions and breathing compared to most people, as indicated by the effects experienced when exposed to substances such as cleaning products, perfumes, and cigarette smoke, [has] a disability
Learning Disability

An individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.
Psychiatric Impairments

A person with a psychiatric impairment (e.g., panic disorder, anxiety disorder, some forms of depression other than major depression), who is substantially limited compared to most people, as indicated by the time and effort required to think or concentrate, the diminished capacity to effectively interact with others*, the length or quality of sleep, or eating patterns.

*Proposed by EEOC not explicitly addressed in statute
NOT DISABILITIES

• Non-chronic impairments of short duration with little or no residual effects.

• Transitory (six months or less) and minor
  – Common cold or influenza
  – Seasonal allergies
  – Sprained joint
  – Minor and non-chronic gastrointestinal disorders
  – Broken bone that is expected to heal completely

• Pregnancy without complications

• Recovering/abstaining alcoholic or illegal drug user

• Correctable vision
WHAT DOES JUSTICE SAY?
(Preamble for Title III regulations)

• Based on DOJ’s enforcement experience, research, comments
• Addresses concerns about sometimes inappropriate and burdensome requests for documentation about existence of disability and need for accommodations
• Note: title III preamble says same principles apply to title II entities
• Examples of documentation that should generally be accepted
  – Recommendations of qualified professionals familiar with the individual
  – Results of professional evaluation
  – History of diagnosis
  – Observations by educators
  – Past use of accommodations.

• Generally, a testing entity should accept, without further inquiry, documentation
  – provided by a qualified professional who has made an individualized assessment of the applicant
  – that supports the need for the modification
BASIC PROVISIONS REMAIN

• Specific ADA provision applies to private entities that offer exams or courses related to applications, licensing, certification, or credentialing.
• Exams or courses must be given in a place and manner accessible to persons with disabilities, or alternative accessible arrangements provided.
• Purpose: to prevent exclusion from educational, professional, or trade opportunities because of inaccessible exams or courses.
Title III  Section 36.309 (b)(1)

- Request for documentation should be narrowly tailored to ascertain the individual's need for the requested modification or auxiliary aid.
- Entity must respond in timely manner to requests
Give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations including those provided in response to an Individualized Education Program or Section 504 Plan.
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.
WHAT LEVEL OF EVIDENCE?
(A reasonable person -)

• Substantial
  – accepts the facts as adequate to support a conclusion; not the result speculation or conjecture

• Preponderance
  – is persuaded that the facts more probably support the position asserted than alternatives

• Clear and Convincing
  – is persuaded by the evidence that it is highly probable that facts support the position asserted

• Beyond a Reasonable Doubt
  – must be all but certain of the position asserted
QUESTIONS?
NEXT STEPS!

• Consider the purpose of documentation
• Review policies and communications about documentation
• Focus on need for accommodation
• Give weight to accommodation history
• Give deference to treating professionals
• Give deference to clinical and professional narrative
• Diagnosis
• Describing impairment
• Guiding treatment or rehabilitation
• Eligibility (benefits, services, programs and scholarships)
• Establishing statutory rights
• Informing accommodation requests & decisions
• Understand individual to anticipate or improve interactions within the institution’s physical, social and virtual environments

• Assist the individual’s development (identity, social, career...) through counseling, advising and mentoring

• Budget planning, resource management and catalyst for environmental change
Decision & Planning Base

- Physiological Function & Structure (*Impairment*)
- Program or Activity Structure & Requirements
- Barriers & Facilitators to Participation

- Environmental Factors
- Individual History & Factors

Adapted from the UN’s Classification of Functioning, Disability and Health Model
It is reasonable for an institution’s designated office to request information addressing the current level of functioning, the criteria used to reach diagnosis, recommended accommodations, and how the requested accommodation would address the impact of the disability.
"A university is prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation."


42
“It would be inconsistent with the broad remedial goals of the ADA to find Abdo's doctors' letters insufficient simply for failure to recite a precise medical diagnosis where they adequately set forth the effect of Abdo's disability on several of her major life activities.”

When considering documentation for a Learning Disability, institutional guidelines should not rely exclusively on psychometrics. Guidelines should give deference to the "clinical judgment" of the evaluator.

- *Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321 (2nd Cir. 1998)
- Mt. San Antonio College, OCR Docket Number 09-96-2151
SEVEN ELEMENTS OF QUALITY DOCUMENTATION

• The credentials of the evaluator(s).
• A diagnostic statement identifying the disability or an description of the impairment
• Conveys the general diagnostic methodology used (more detail if atypical)
• A description of the current functional limitations or impacts of the impairment
• A description of the expected progression or stability of the disability

• A description of current and past accommodations, services and/or medications

• Recommendations for accommodations, adaptive devices, assistive services, compensatory strategies, and/or collateral support services
THE VALUE OF SELF-REPORT

It is only through understanding an individual's experience in context that we can translate diagnostic evaluations into useable information on the barriers and facilitators to access and full participation.
SELF-REPORT FILTERED BY PROFESSIONAL JUDGEMENT

The weight given to the individual’s description will be influenced by its clarity, internal consistency, observed behaviors, congruency with available formal documentation results, and clinical narrative.
“A learning disability is not measurable in the same way a blood disease can be measured in a serum test. By its very nature, diagnosing a learning disability requires clinical judgment.”

Judge Sotomayor, Bartlett v. New York State Bd. of Law Examiners; 2001
PAST HISTORY & CURRENT IMPACTS FROM NARATIVES

- Successful & unsuccessful experiences
- Barriers & problem situations
- Facilitators & accommodations
- Tools & adaptive devices
- Social networks & assistive services
- Skills & compensatory strategies
- Resources & collateral support services
DEscribes the Condition

• Identifies Condition
  – Formal Taxonomy
  – Descriptive Narrative
  – Exemplars
• Cyclical or episodic nature of impacts
• Known/suspected environmental triggers
• Date of last Evaluation
• Date of Original Diagnosis
FOCUSES ON SPECIFIC CONTEXTS

- Listening
- Note taking
- Speaking
- Writing (timed and untimed)
- Keyboarding
- Mousing
- Reading
- Sitting
- Attendance
- Group Participation
– Tests (different formats)
– Papers
– Oral Reports
– Group Projects
– Computer Use
– Timed Reading
– Writing
– Calculating
– Keyboarding
– Library work
– Short deadlines (timed tasks in minutes or hours)
– Long deadlines (days, weeks, semester)
– Schedules (Class, work, internships)
– Manipulating objects
– Getting around
– Transportation
– Diet
– Sleep
– Interacting with others on (residence hall, bookstore...
say

Yes when you can and no when you have to.

rather than

No when you can and yes when you have to.
QUESTIONS?
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OTHER OPORTUNITIES

• AHEAD AUDIOCONFERENCE March 17, 2011
  – **Mining Learning Disability Documentation for Clues in Determining Eligibility for Specific Accommodations.**
  – Manjushri Banerjee, University of Connecticut
  – Loring Brinckerhoff, Educational Testing Service

• Next NAADAC conference April 11-14, 2011, Miami, FL
  [www.NAADAC.info](http://www.NAADAC.info)

• AHEAD Audioconference Packet:
  – CD-Rom, transcripts, and PowerPoint
  – **Documentation: What do we really need to know?**
    Aired: February 18, 2010; L. Scott Lissner
  – **Demystifying the ADAAA, ADAAG and Other New Laws and Regulations**
    Aired: March 4, 2010; Irene Bowen & Jo Anne Simon