

MO-CASE
SPECIAL EDUCATION ADMINISTRATORS'
CONFERENCE
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GUIN MARTIN MUNDORF
Attorneys at Law

SHELLIE L. GUIN
SGUIN@GMMSCHOOLLAW.COM
(816) 333-1700

**Expansion of 504 and
Trends with OCR**

EXPANSION OF 504

- Driven by amendments to ADA
- Status of EEOC regulations
- Resulting shift in OCR focus

ADAAA 2008
Effective January 1, 2009

**The Amendments to
the Act**

What is still the same?

Definition of Disability

- 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.

Changes to the Act

Major Life Activities

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

Major Life Activities

- Includes the operation of a major bodily function

Major Bodily Functions

- | | |
|----------------------|----------------|
| ○ Immune system | ▪ Neurological |
| ○ Normal cell growth | ▪ Brain |
| ○ Digestive | ▪ Respiratory |
| ○ Bowel | ▪ Circulatory |
| ○ Bladder | ▪ Endocrine |
| | ▪ Reproductive |

Mitigating Measures

- The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.

Must look at student in unmitigated state and determine if the disability would be substantially limiting

Mitigating Measures Include:

- ⦿ Medication
- ⦿ Medical supplies and equipment
- ⦿ Assistive technology
- ⦿ Reasonable accommodations
- ⦿ Auxiliary aids or services
- ⦿ Learned behavioral or adaptive neurological modifications

Only one exception...

- ⦿ Ordinary eyeglasses or contact lenses

Only One Major Life Activity Needed

- ⦿ An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

Episodic Impairments/Remission

- ⦿ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Shift in focus from whether a person is disabled to whether a person was discriminated against on the basis of a disability.

Unanswered Questions

- ◉ "Substantially limits" still not defined
- ◉ Must now be construed broadly rather than narrowly

Too High

- ◉ "Severely restricted"
- ◉ "Significantly restricted"

Proposed EEOC Regulations

- ◉ Definitions
- ◉ Substantially Limits – 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 most people in the general population.

Proposed EEOC Regulations

- ◉ Definitions
- ◉ 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.

Proposed EEOC Regulations

- ◉ Examples of Impairments that Will Consistently Meet the Definition of Disability
 - Autism

Proposed EEOC Regulations

- ◉ Stay tuned....

Applicability to Section 504

Practical Effect

- Increase in eligibility
- May be eligible but not need accommodations
- Increase in discrimination claims
- May impede disciplinary action
- Focus no longer on whether student has disability
- Focus will be on discrimination and services/accommodations

Specific Examples

- Food allergies
- ADHD
- Diabetes
- Seizure disorder
- Asthma

Shift in OCR 504 Focus

- Not referral based anymore
- Reason to suspect may be off the table
- OCR: medical condition/diagnosis = always refer
- Health plans

Heightened need for connectivity between health services and 504 compliance.

CONNECTIVITY ISSUES

- Imperative that the right hand knows what the left hand is doing
- Revisions to health forms
- New forms and processes
- Greater health services involvement in academic issues
- Greater reliance on health services to educate non-health professionals

What is the same?

- Still focused on process over substance
- BUT... have indicated will start looking at "results" in other areas

CHANGES IN OCR FOCUS

- L.A. Unified School District first of at least 32 districts to undergo OCR "federal compliance review."
- OCR "hopes to use these compliance reviews to provide technical assistance to help districts improve their performance."
- Department officials say "the office will be involved to a degree never before seen."

New "sticks"

- Conditional federal funding based on corrective action
- Funding cut off
- District sued by DOJ

What is OCR and its scope of authority?

Historically...

- Focused on compliance
- Whether discrimination had occurred
- Whether equal access had been provided
- Whether due process rights had been afforded

New Focus on Performance Results

- "While the office previously might just have looked to see whether a program for ELLs existed, it will now examine whether the program is achieving results."
- OCR "hopes to use these compliance reviews to provide technical assistance to help districts improve their performance."

Questions Raised

- ⊙ Who is going to be evaluating and assessing performance results?
- ⊙ How are they going to determine whether such results are the product of discrimination?
- ⊙ What corrective action are they going to impose to address the results?
- ⊙ What qualifications in education do they have to develop such corrective action?

Example of disconnect between OCR and practical application in the school setting.

Trends as a Result

- ⊙ District-wide audits
 - "Compliance reviews with technical assistance"
- ⊙ Investigation of global issues based on report of single incident
- ⊙ Conflicting DOE positions

Options for School Districts

- ⊙ Complaint v. Compliance Review
 - Options may be limited
- ⊙ Section 302 Agreement
- ⊙ "Wait and See"
- ⊙ Post-Investigation Resolution Agreement
- ⊙ Request for Reconsideration
- ⊙ Enforcement Action

Trend Toward Early 302 Agreements

- ⊙ OCR looking for more proactive district-wide measures
 - Training
 - Affirmative action

Common Terms Proposed by OCR in Early 302 Agreements

- ⊙ Proactive District-Wide Measures
 - Training
 - Affirmative action
- ⊙ Changes to Process
- ⊙ Reporting Requirements

