

Legal Rights: Higher Education and the Workplace

Although a diagnosis of AD/HD is the first step in initiating medical, educational, and mental health treatments, the diagnosis itself does not guarantee that the adult with AD/HD has the right to receive accommodations in the workplace or higher education. This sheet provides an overview of the legal requirements and protections afforded individuals appropriately diagnosed with AD/HD.

This sheet will:

- explain how the Rehabilitation Act of 1973 (RA) and the Americans with Disabilities Act of 1990 (ADA) prohibit discrimination against individuals with disabilities
- describe the documentation required to afford individuals with protection under RA or ADA
- explain how RA and ADA apply to higher education and the workplace
- Two federal laws — The Rehabilitation Act of 1973 (RA)¹ and the Americans with Disabilities Act of 1990 (ADA)²— prohibit discrimination against individuals with disabilities in higher education and the workplace. Some state laws may go further than these federal laws in prohibiting discrimination so check with your state government or an attorney who practices in your jurisdiction to determine your rights under state law in addition to the applicable federal laws. Adults with AD/HD may sometimes be eligible for protection and accommodations in higher education and the workplace under these laws.

RA and ADA: What are they?

The RA prohibits discrimination against individuals with disabilities in three areas: (1) employment by the executive branch of the federal government, (2) employment by most federal government contractors, and (3) activities funded by federal subsidies or grants, including companies or organizations receiving federal funding. The federally-funded category includes all public elementary and secondary schools, many private schools, and most higher education institutions. The RA, in the discrimination context, is often referred to by the name of one of its sections: Section 504.

The ADA extends the concepts of the RA to (1) private employers with 15 or more employees (Title I), (2) all activities of state and local governments, including employment and education (Title II), and (3) "places of public accommodation," including most private schools and higher education institutions (Title III). Most educational institutions and virtually all private schools are covered by the ADA and RA, depending upon the type of government funding they receive. Religiously controlled educational institutions that do not receive government funding, however, are exempt from these laws.

Recent court cases demonstrate that there are limitations in the protections of the RA and ADA as applied to state governmental agencies, particularly with regard to suits for monetary damages. For example, in *Board of Trustees of the University of Alabama v. Garrett*³, the U.S. Supreme Court ruled that a suit seeking money damages, based upon the failure of Alabama to accommodate employees with disabilities under Title I of the ADA, was barred by the Constitution. Other cases suggest that suits for money damages brought against state educational institutions by students with disabilities for failure to accommodate under Title II of the ADA are also barred by the Constitution. It has even been suggested that the ADA and RA do not require states to provide accommodations for individuals with disabilities but only to refrain from intentional discrimination against them.

RA and ADA: Who is Eligible?

It is important to realize that being diagnosed as having AD/HD does not

automatically make an individual eligible for protection or accommodations under the RA or ADA. The protections of these laws extend to individuals who meet four conditions: (1) they are individuals with disabilities under the law; (2) they are otherwise qualified for the position, with or without reasonable accommodations; (3) they are being excluded from employment or education solely by reason of their disability; and (4) they are covered by the applicable federal law. These laws essentially require that covered higher educational institutions and employers may not discriminate against qualified persons with disabilities. Persons with disabilities are individuals with impairments, such as AD/HD, that substantially limit a major life activity. We will clearly define the legal concepts of "impairment," "physical or mental impairment," "substantially limits," "major life activity," and "otherwise qualified."

Disability: A person with a disability is defined under the law as — any individual who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment."⁴ The definition of a "physical or mental impairment" includes — any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."⁵ Although AD/HD is not specifically mentioned in the regulations, it has been recognized in many court cases as a "mental or psychological disorder" and is therefore covered.

Substantially Limits: The impact of the impairment must be *substantial*, e.g., a major degree of impairment. The laws compare the individual with a disability to *the average person in the general population* to determine what is substantial. "Substantially limits" means that the individual is "unable to perform a major life activity that the average person in the general population can perform" or is "significantly restricted as to the condition, manner, or duration" of performing the major life activity in question, when measured against the "average person in the general population."⁶

What if an individual with AD/HD uses effective coping strategies to deal with the AD/HD (e.g., medication or behavioral/psychological techniques), and as a result no longer has a substantial limitation to his performance compared to the average person? Under these circumstances, that adult with AD/HD is no longer eligible for accommodations under the RA or the ADA. The U.S. Supreme Court has ruled that we must assess the individual's actual functioning, taking into account the positive and negative effects of all the treatments such as medication or compensatory behavioral/psychological interventions that the person is receiving.⁷ We cannot exclude the effects of medication or other helpful compensatory techniques when comparing the individual to the average person; the individual still must be unable to perform the activity compared to the average person, even with medication and other compensations. Clearly, some people with AD/HD who are benefiting from effective treatment may no longer pass this test of having substantially lower performance on a major life activity than the average person in the population.

Major Life Activity: The major life activities under RA and ADA include self-care activities, manual tasks, walking, seeing, hearing, speaking, breathing, learning, and work.⁸ Learning and work are the two major life activities most relevant to adults with AD/HD. With regard to learning, the individual's impairment must substantially limit him or her in a broad area of learning, not just in a particular course of study.⁹ A medical student at the University of New Mexico School of Medicine argued in court that his anxiety when taking chemistry and physics tests should be sufficient evidence of substantial impairment to his learning ability; the Court ruled against him, arguing that he failed to show that he had a disability because he did not present evidence that his mental impairment (anxiety) impedes

his performance in a wide variety of disciplines, not just chemistry and physics.

In order to be substantially limited in the major life activity of working, the impairment must prevent the individual from succeeding in an entire class of jobs, not just a particular job. A secretary with AD/HD requested her own office to avoid distractibility; the request was denied because her disability did not prevent her from succeeding in all secretarial jobs. In fact, a circuit court has ruled that for the impact of a disability to be sufficient under the ADA, it must not only be confined to the workplace, but must also affect other aspects of the individual's life.¹⁰

Otherwise Qualified: "Otherwise qualified" means that the individual would be eligible for the educational program or the job with or without a reasonable accommodation, e.g., despite their disability, they meet the basic requirements for a particular job or school program. In one case on this issue, the court upheld the employment termination of a neurologist with AD/HD, arguing that there was no duty to accommodate him because he was a direct threat to his patients.¹¹ The court found that he had made errors in patient charts and dispensing medicine and that he had stated that it was only a matter of time until he hurt someone. The neurologist was not qualified for his job because of his deficits. Despite his disability, he was not eligible for protection under the ADA.

What Documentation is Required?

Some reports written by clinicians to document the diagnosis of AD/HD may often be insufficient to receive protection under RA or ADA. For a report from a mental health professional to be sufficient documentation under RA or ADA, it must include the following elements:

- The professional's report should clearly identify the individual's physical or mental impairment, using the current version of the Diagnostic and Statistical Manual whenever possible.
- The report should clearly describe the impairment's impact on the individual's ability to perform one or more of the major life activities (learning, work). A description of the positive and negative effects of any medication and compensatory strategies should be included.
- The report should compare the individual's ability to perform the identified major life activity to the average member of the population. Bear in mind that the average person may perform the life activity in question imperfectly. The comparison should demonstrate that the limitation is substantial compared to the average person.
- The report should demonstrate that the individual is qualified for the job or educational program, despite the disability.
- The report should recommend accommodations necessary to address the disability described, showing why these accommodations are necessary and how they are reasonable.

How do RA and ADA apply to higher education?

Under the RA and ADA, most higher education institutions must accommodate qualified individuals with disabilities. It is the student's responsibility to disclose his/her disability to the college and show that s/he is qualified for the program; the college is not required to seek out students with disabilities. The accommodations requested by the student must be both reasonable and necessary because of the particular disability. The institution is not required to make modifications in courses or examinations that would alter the essential nature of its program, or would constitute an undue hardship on the institution.

Examples of reasonable accommodations include note-taking assistance and extended time and an individual room for taking tests and examinations. Examples of accommodations that may not always be legally required include foreign language or mathematics requirement waivers or course substitutions. If the educational institution can justify the need for mastery of a foreign language or mathematics in a particular course of study, then it can compel students with disabilities to meet this requirement. If calculus and differential equations are required for a major in physics, an individual with a learning disability or AD/HD cannot be excused from these mathematics classes on the basis of the disability.

How do RA and ADA apply in the workplace?

The bar against discrimination in the workplace applies to recruitment, advertising and job application processes, hiring, upgrading, promotion, award of tenure, discharge, demotion, transfer, layoff, rehiring, compensation, leave, and various benefits. To be eligible for such protection, an employee must disclose the disability to the employer. Employees with disabilities who are qualified for their jobs may be entitled to reasonable accommodations in the workplace. However, in many cases it may be difficult for the employee, especially where cognitive impairments are involved, to establish that he or she is both substantially limited in a major life activity and at the same time qualified for the job. The accommodations sought must also be reasonable, and reasonableness depends upon the nature of the particular job.

In one case a senior-level executive with AD/HD requested a non-distracting workplace, multi-staged tasks, written instructions, intermediate deadlines, a single supervisor, and assistance in setting up a time management system. The court denied these accommodations, ruling that senior-level employees must be able to exercise independent judgment and juggle tasks when necessary. Such accommodations may be reasonable for junior level employees but not for senior employees. In another case, a school district required that its teachers take turns driving school buses. A qualified teacher who had a disability that prevented him from driving was denied a job and took legal action. The court ruled that since driving a school bus was not an essential part of teaching, the school district could not deny the otherwise qualified teacher a job because he could not drive a school bus.

The accommodation must be specific. For example, an employer is not required to provide reduced stress in the workplace because the employer would not be able to control all of the factors that produce stress. Furthermore, compliance by the employer would depend upon the employee's assessment of his or her stress level at any given time. The employee must prove that there is a need for the accommodations based upon the disability; the employee's desire for the accommodations is not sufficient. For example, the employee cannot insist upon the day shift rather than the night shift simply because the employee prefers the day shift.

Over 90 percent of ADA cases are won by employers because of the difficulties showing the reasonableness of the accommodations and proving that the employee is substantially limited but nonetheless qualified for the job. Before taking legal action, it is important to evaluate your legal position and to consider the possibility of informally working out a mutually acceptable solution with your employer. Many employers will agree to make reasonable accommodations in order to improve the performance of the employee. In the event legal action is pursued, professional documentation of the disability and the need for accommodations will be of great importance.

References

1. The Rehabilitation Act of 1973 (RA) (29 U.S.C. § 791 et seq.)
2. Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.)
3. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)
4. 29 U.S.C. § 706(8)(B)
5. 29 CFR § 1613.702(b)(2)
6. 29 CFR ¶¶ 1630.2(j)(1)(I)-(ii)
7. Albertsons, Inc. v. Kirkingburg, 527 U.S. 516 (1999), Murphy v. United Parcel Service, Inc., 527 U.S. 555 (1999)
8. 29 CFR ¶ 1630.2(I)
9. McGuinness v. University of New Mexico School of Medicine, 170 F. 3d 974 (10th Cir. 1998), cert. denied, 119 S. Ct. 1357 (1999)
10. McGuinness v. University of New Mexico School of Medicine, 170 F. 3d 974 (10th Cir. 1998), cert. denied, 119 S. Ct. 1357 (1999)
11. Robertson v. Neuromedical Center, Docket No. 97-31169 (5th Cir. December

3, 1998), cert. denied, Docket No. 98-1377 (May 3, 1999)

For those who have an account and access, these references can be accessed through Westlaw online (www.westlaw.com).

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