

**DISABILITY LAW:
CASES, MATERIALS, PROBLEMS (4th edition)
Lexis/Nexis
2008 Supplement**

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Chapter 2. Who Is Protected Under the Laws?

**B. Statutory Definitions
Americans with Disabilities Act**

Page 32, add the following after the definition of who is covered under the Americans with Disabilities Act:

In September 2008, Congress overwhelmingly passed the ADA Amendments Act of 2008, which takes effect on January 1, 2009. The definition of coverage clarifies that the intent of the ADA was to provide for broad coverage. This responded to concerns raised after the Supreme Court decisions in 1999 (*Sutton* trilogy) and 2002 (*Toyota*) narrowing the definition (see Section C. Judicial Interpretations). The definition's amendment applies to both the ADA and to the Rehabilitation Act. Its findings and purposes specifically state that the Supreme Court had narrowed the definition in a way that was not intended by Congress. P.L. 110-325 (2008).

The definition of disability basically remains the same and provides as follows:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment...

Major life activities are defined in the Act. Previously they were included in the regulations. While the major life activities continue to not be limited to the listed categories, Congress added a number of major life activities to that list, probably in response to some of the cases that had narrowed the coverage after 1999 and 2002. Section 3(2) provides that

- (A) **IN GENERAL** – For purposes of paragraph (1), major life activities include, but are 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.
- (B) **MAJOR BODILY FUNCTIONS** – For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function,

including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Regarded as having such an impairment means:

(A) An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

Disability should be construed with the following rules of construction.

- (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- (B) The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
- (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –
 - (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
 - (II) use of assistive technology;
 - (III) reasonable accommodations or auxiliary aids or services; or
 - (IV) learned behavioral or adaptive neurological modifications.
- (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- (iii) As used in this subparagraph—
 - (I) the term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

- (II) the term ‘low-vision devices’ means devices that magnify, enhance, or otherwise augment a visual image.

The amendments allow for considering the ameliorative affect of mitigating measures of “ordinary eyeglasses or contact lenses in determining whether there is a substantial limitation.” The amendments prohibit covered entities, however, from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. It is not clear if this clarification applies only to employment.

Page 52 and 59, add to Notes and text:

The Section on Definitions (above) set out the language of the ADA Amendments Act of 2008. Does this amendment to the definition address the post-*Sutton* and post *Toyota* concerns?

C. Otherwise Qualified and Reasonable Accommodation

Page 85, add to Notes:

The ADA Amendments Act of 2008 added definitions of auxiliary aids and services to the statute. The definitions are the following:

Section 4.

(1) AUXILIARY AIDS AND SERVICES. – The term ‘auxiliary aids and services’ includes--

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of equipment or devices; and
- (D) other similar services and actions

The Amendments further clarify what is meant by a “fundamental alteration” in determining reasonable accommodation. The statute now provides that

Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved. Section 6(f).

Chapter 3. Employment

C. Reasonable Accommodation and Undue Hardship

4. Job Restructuring and Job Reassignment

Page186, add to Notes:

An unresolved issue by the Supreme Court is whether individuals with disabilities should be given preference over those who do not have disabilities where there is an available position. The Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007) held that providing preferential reassignment created an unreasonable imposition on employers and coworkers.

Chapter 4. Public Accommodations and

Chapter 5. Governmental Services and Programs

In fall 2008, the Department of Justice proposed new regulations under Titles II and III of the ADA. 73 Fed. Reg. 34466 (June 17, 2008). The comment period ended on August 18, 2008, but final regulations responding to the comments have not been promulgated. These proposals added the following areas of concern: service animals, power driven mobility devices for locomotion in pedestrian areas, ticketing policies and distribution methods for accessible seating in performance venues, safe harbor limitations on expenditures for alterations, play areas and recreation facilities (such as parks), swimming pools, exercise facilities, boating facilities and fishing piers and platforms, miniature golf courses, social service establishments (such as homeless shelters), postsecondary housing, medical care facilities, detention and correctional facilities, and obligations to ensure effective communications to family members, friends, or associates of individuals with hearing impairments (particularly in health care settings). Comments to the proposed changes can be viewed online at <http://www.regulations.gov>. These regulations are available in an accessible format on the ADA Home Page at <http://www.ada.gov>.

Chapter 6. Higher Education

C. The Enrolled Student

3. Architectural Barrier Issues

Page437, add to Notes:

As noted previously, the Department of Justice has recognized the need for clarification about accessibility issues in postsecondary housing. See 73 Fed. 34466, 34545 (June 17, 2008).

4. Behavior and Conduct Issues

Page 445, add the following:

The following is an edited excerpt from Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 *Journal of College & University Law* 169, 182-184 (2007) (citations to footnotes are omitted).

The April 2007 shootings at Virginia Tech University raised extensive concern and reaction across the country. Everyone wanted to know how to keep dangerous and “crazy” people off campus. One frequent reaction was that the students should be required to disclose mental health status and that this should be reported to a wide variety of university and law enforcement offices to ensure the safety of these students. This is not only inappropriate in most cases under current legal doctrine, but such a practice would have a deterrent effect on students who might want treatment. In addition it might violate the treating professional’s confidentiality obligation of a therapist.

It should be emphatically noted that most individuals with mental illness are not violent or dangerous and do not present a direct threat. Some, however, are disruptive and may seem threatening in some instances because of their behavior. This behavior may or may not be a result of the mental illness. For that reason, it is critical to focus on behavior and conduct and not diagnosis or history of treatment.

Some would suggest that asking about mental health problems during the admissions process might reduce problems on campus. While the courts have upheld narrow questions about mental health status and substance abuse in the context of professional licensing certification, they are unlikely to do so in the context of higher education admission. The public protection issues that arise in professional licensing are not the same as those in higher education. The appropriate and permissible questions in higher education are those relating to behavior and conduct, not to diagnosis and status. While institutions need not admit or continue enrollment of students who present a direct threat to self, others, or property, they should not treat adversely those who are diagnosed with a mental illness or a substance abuse problem, unless that individual’s condition has raised direct threat concerns in the past or there is a justifiable basis for the likelihood of concerns in the future. It is also important that the institution keep this information confidential.

Misconduct and misbehavior need not be excused even if caused by a mental impairment or a substance abuse problem. * * * A difficult situation is presented to a university where a student exhibits self destructive behaviors, including threats of suicide, eating disorders, engaging in substance or alcohol abuse, and engaging in antisocial behaviors. While there may not be a threat to

others, there can be a disruption or interference with the educational process in the classroom or in a campus living situation. Roommates, other students, instructors, and even patients in health care settings may be challenged by such conduct. For example, a roommate who feels the need to keep a constant eye on a student who is suicidal will be disrupted in the educational process. The focus should be on documenting the destructive behavior, and determining the best course of action based on that. One of the challenges is to identify what code of conduct or disciplinary code is being violated by such behaviors and to ensure that university policies are in place that address that.

See also Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 University of Pittsburgh Law Review 531 (2008).

Chapter 7. Education

A. HISTORICAL PERSPECTIVE

Page 464, add to Note:

No Child Left Behind: In 2002, Congress passed the No Child Left Behind statute which requires states to ensure high quality programming and high expectations, appropriate assessment standards, and requirements for teachers and other educational personnel. 20 U.S.C. § 6311.

The 2004 IDEA amendments incorporated NCLB standards for special education teachers and included requirements for paraprofessionals. While there is support for creating high expectations for all students, for ensuring educators are highly qualified, and for appropriate accountability measures, the penalties to schools who do not perform adequately have been quite controversial. It is likely that Congress will revisit No Child Left Behind generally as well as its application to special education students.

B. Substantive Protections under the Individuals with Disabilities Education Act

1. Education During Dispute Resolution

Page 514, following the Florence County decision:

The following case addresses the question of whether a child must have previously received educational programming from the school in order to receive reimbursement.

Board of Education v. Tom F.

2005 U.S. Dist. LEXIS 49 (S.D.N.Y. 2005)

The 1997 amendments to the IDEA provide, in pertinent part:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. (emphasis added). [20 U.S.C. § 1412(a)(10)(C). This language is reiterated in the applicable federal regulation. 34 C.F.R. § 300.403(c).]

The clear implication of the plain language, however, is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school.

Defendant advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit. "Only the most extraordinary showing of a contrary intention from the legislative history would justify interpretive departure from a statute's plain language." Here, however, evidence of congressional intent from the legislative history is *consistent* with the plain meaning of the text. The relevant House Report from the Committee on Education and the Workforce states: Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

As Plaintiff suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide every child with a disability a free and appropriate public education. See 20 U.S.C. § 1400(d)(1)(A).

Finally, Defendant relies on an opinion given by the Office of Special Education Programs ("OSEP") in response to the question of whether the 1997 Amendments to the IDEA preclude private school tuition reimbursement for children who had not previously received special education from a public agency. OSEP concluded that it did "not appear that [this] question ... [was] answered by § 612(a)(10)(C) of IDEA '97."

"Deference to an OSEP policy letter may be appropriate where statutory language is ambiguous." However, "if the intent of Congress is clear," a court reviewing an agency's construction of a statute that it administers "must give effect to the unambiguously expressed intent of Congress." Here, where there is no ambiguity in the statutory language, deference to the OSEP letter would be inappropriate.

For the reasons set forth above, Plaintiff's motion for summary judgment reversing the SRO's grant of tuition reimbursement to Defendant is granted, and Defendant's motion is denied.

This opinion was overruled by the Second Circuit, and in 2007, the Supreme Court, by an equally divided Court (Justice Kennedy not participating), 128 S. Ct. 1 (2007), affirmed the circuit court decision allowing reimbursement where the child had not previously received education from the public school. Because of the divided Court, the decision is not binding outside the Second Circuit. It is likely that the Supreme Court may again address this issue in the future, unless Congress issues additional clarifying language.

E. ENFORCEMENT

Page 540, add to the section on procedural safeguards:

In *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), the Court considered "whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attorneys." The Court concluded that "IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child."

Yet another Supreme Court decision has addressed which party has the burden of proof in special education case. Justice O'Connor delivered the opinion in *Schaffer v. Weast*, 546 U.S. 49 (2005) and held that the burden of proof in an administrative hearing challenging an IEP is placed on the party seeking relief.

The Supreme Court in 2006 addressed the question of whether expert fees were available as a remedy. The Court held that they were not. See *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006).

Chapter 9. Health Care

B. Health Insurance

Page 630, add to Note 3:

In September 2008, Congress passed the Mental Health Parity and Addiction Equity Act of 2008. This prohibits insurers from requiring higher copayments, higher deductibles or stricter limits on visits and hospitalizations for mental health and substance abuse treatment. It does not apply to all insurance plans and may limit coverage to certain kinds of conditions.