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LEGAL UPDATE

January 7, 2009

To: Superintendents/Presidents, Member Community College Districts

From: Loren Soukup, Schools Legal Counsel 

Subject: **ADA Amendments Act of 2008**
Memo No. 02-2009(CC)

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 ("Act") which became effective January 1, 2009. The Act makes important changes to the definition of the term "disability" by rejecting several United States Supreme Court decisions that it viewed as improperly narrowing ADA coverage. Specifically, the Act expands the protections of the original ADA to include more individuals with less severe impairments. The Act also modified Section 504 of the 1973 Rehabilitation Act ("Section 504") to align with the changes to the ADA. The key amendments of the ADA focus on the below listed provisions:

Defining an Individual with a Disability

Under the Act, Congress rejected the U.S. Supreme Court's holdings in *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Mfr., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) which both narrowed the scope of the ADA by requiring a limited construction of the definition of disability. Congress specifically included in the Act that "[T]he 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."

Additionally, Congress directed the U.S. Equal Employment Opportunity Commission ("EEOC") to revise the ADA regulations, stating that the current regulations defining the term "substantially limits" as "significantly restricted" expressed too high of a standard and was inconsistent with congressional intent. Further, Congress instructed that an impairment that is

episodic or in remission is a disability if it would substantially limit a major life activity when active.

Major Life Activities

An individual is considered to have a “disability” if he or she has or is regarded as having or has had a history of a physical or mental impairment that substantially limits one or more major life activities of such individual. Under the Act, Congress expanded the definition of “major life activities” by including two non-exhaustive example lists which contain, but are not limited, to the following activities:

Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, 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.

Mitigating Measures

In determining whether an impairment substantially limits a major life activity, the Act specifically provides that the disability determination shall be made without reference to the ameliorative effects of mitigating measures. The Act defines “mitigating measures” to include the following:

1. Medication, medical supplies, appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants, mobility devices, or oxygen therapy equipment and supplies;
2. Use of assistive technology;
3. Reasonable accommodations or auxiliary aids or services; or
4. Learned behavioral or adaptive neurological modifications.

“Regarded As” Disabled

Under the Act, an individual meets the requirement of “being regarded as having such an impairment” if the individual can establish that he or she has been subjected to an action prohibited under the 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. The “regarded as” definition does not apply to impairments that are transitory or minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

Implications Concerning Students

In light of the above, it is recommended that districts prepare their disability resources department (or whichever department develops Section 504 plans) to accommodate a new group of students with health impairments who were previously not considered “disabled” under the ADA. Districts must continue to provide certain accommodations, such as: extended time, note-taking services, textbooks on audiocassettes or permission to retake exams. However, the new changes do not require districts to provide any additional accommodations that they have not had to provide in the past, such as a one-to-one aide.

In summary, while more students may qualify as disabled under the revisions to the Act/Section 504, districts must consider:

1. Whether the disability “substantially limits” a major life activity, and if so,
2. What accommodations does the student require to afford him or her an equal opportunity to participate in a district’s program.

Implications Concerning Employees

As an employer, it is recommended that districts review job descriptions to ensure that elements of the job listed as essential functions are truly job-related and consistent with business necessity. Districts should update policies and procedures to reflect the changes made by the Act and ensure there is a formalized process in place for addressing requests for reasonable accommodations.

Additionally, districts should educate administration about the changes and advise them to consult with its human resources office whenever an employee requests an accommodation. If a district decides to take adverse action against an employee with a medical condition, the district must ensure it has a well drafted documentation of the legitimate, non-discriminatory reason for the action.

Please contact any of our attorneys if you have any questions regarding this or any other issue.