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ABSTRACT

This paper summarizes requirements of the Americans with Disabilities Act (ADA) and related regulations and judicial decisions as the law pertains to employment at public and private schools. It stresses that the ADA forbids employment discrimination on the basis of disability, and requires employers to make "reasonable accommodation" for employees' disabilities. It notes that the plaintiff has the initial burden to establish that he or she was not hired or promoted due to discrimination but that once the plaintiff makes this initial showing, the burden shifts to the employer or school district to articulate a legitimate, nondiscriminatory reason for not hiring or promoting the plaintiff. Individual sections of the report address the following topics: types of protection under ADA; employment discrimination in the schools (summarizing court cases related to contagious diseases, physical disabilities, mental disabilities, and disability harassment); and avoiding potential liability. Schools are urged to keep adequate documentation concerning employment decisions, use of written job descriptions, and development of written policies concerning such issues as contagious diseases and acceptable and unacceptable interview questions. (Contains 18 references.) (DB)

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Running head: ADA and the Schools

Avoid Potential Liability: The Americans with Disabilities Act and the Public Schools

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Abstract

The American with Disabilities Act (ADA) affects the legal obligations of most public and private entities. Schools are included, but not all schools are affected by ADA in the same way. The ADA forbids employment discrimination on the basis of disability, and requires employers to make "reasonable accommodation" for employees' disabilities. The employers must provide reasonable accommodation for qualified workers with disabilities who request accommodation in order to adequately perform their jobs. Under ADA, the plaintiff has the initial burden to establish the he or she was not hired or promoted due to discrimination based on disability by the employer. Once the plaintiff makes this initial showing, the burden shifts to the employer or school district to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff.

Avoid Potential Liability: The Americans with Disabilities Act and the Public Schools

The Americans with Disabilities Act (ADA) was passed just over 10 years ago. The key events leading up to the ADA were the 1973 passage of Sections 501, 503, and 504 of the Rehabilitation Act and the 1975 predecessor of the Individuals with Disabilities Education Act. The ADA is an ambitious mandate that is intended to eliminate discrimination against persons with disabilities. The Department of Justice's Title II regulations are intended to cover a wide array of public entities including courthouses, town halls, public schools, public health facilities, libraries, and police. Thus, the regulations are written very broadly. It was recognized that disability policy could only be totally effective if virtually all major aspects of life were subject to nondiscrimination. The ADA provides broad coverage that permits a more coordinated effort to ensure full participation by individuals with disabilities. Congress passed the ADA to draw attention to the tendency to segregate disabled individuals that often precluded them from working or carrying on normal lives.

Types of Protection under ADA

The ADA was designed to set clear standards that would eliminate discrimination, and allow for enforceable claims against employers who persisted in treating individuals with disabilities in a disparate manner.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
(ADA of 1990 §102)

The ADA affects the legal obligations of most public and private entities. Schools are included, but not all schools are affected by the ADA in the same way. The extent to which the ADA alters the legal obligations of a particular school depends on several

factors, including whether the school is a "public entity" within the meaning of Title II or a "public accommodation" within the meaning of Title III. Employment related issues for most schools are raised as a result of Title I. Both public and private schools are subject to Title I as long as they employ at least 15 employees, although religious educational institutions may give preference to persons of a particular religion and require employees to conform to its religious tenets (Zirkel & Kincaid, 1995). Title II prohibits public entities from discriminating on the basis of disabilities. Public schools fall under the ADA Title II. Private schools must follow the rules in Title III of the ADA, which prohibits disability discrimination by "public accommodation". Religious organizations are exempt from compliance with Title III.

Title I of the ADA forbids employment discrimination on the basis of disability, and requires employers to make "reasonable accommodation" for employees' disabilities. Employers subject to the ADA are all those in interstate commerce with fifteen or more employees (42 U.S.C. 12111). The employers must provide reasonable accommodation for qualified workers with disabilities who request accommodation in order to adequately perform their jobs. The accommodation shall not impose "undue hardship" on the employer. The reasonableness of the accommodation is determined on a case by case basis.

Persons suffering from physical and/or mental disabilities can seek relief under the ADA. The statute defines disability, with respect to an individual, as a physical or mental impairment that substantially limits one or more of the "major life activities", as having a "record of" such impairment, or as being "regarded as " having such an impairment (42 U.S.C. 12102). Over the years courts have dismissed claims involving left handedness, varicose veins, and chronic lateness as not being covered under discrimination laws (Rothstein, 2000). Courts have also recognized that employers are not required to permit employees to be under the influence of alcohol and/or drugs. In

addition, employers are not required to allow dangerous behavior simply because someone has a mental illness.

Employment Discrimination in the Schools

Discrimination on the basis of disability may violate Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), and analogous state laws. Although Section 504 and the ADA share important similarities, there are significant distinctions. The most striking distinction is that the applicability of the ADA does not hinge on the alleged transgressor's receipt of federal funds (Zirkel & Kincaid, 1995). An employee may claim discrimination on the basis of a disability if she can prove: 1) that she is disabled, 2) is otherwise qualified for the position, 3) if an accommodation is required, it is reasonable, and 4) that she suffered from an adverse employment decision based on the disability (Bennett-Alexander & Hartman, 2001). The following employment discrimination cases in schools arise under Section 504 and the ADA.

Contagious Diseases

In a landmark decision, the Supreme Court ruled that an individual with tuberculosis may be considered an individual with a disability under Section 504 of the Rehabilitation Act (Arline v. School Board of Nassau County, 1987). An elementary school teacher was discharged due to continued recurrence of tuberculosis. The teacher brought suit under 504, but a U.S. District Court dismissed her claims. On appeal, the Eleventh Circuit Court of Appeals reversed the decision and held that persons with contagious diseases fall within 504's coverage. The School Board appealed to the U.S. Supreme Court. The Supreme Court found that the teacher was a person with a disability because her tuberculosis affected the respiratory system and her ability to work. It was unfair to allow an employer to distinguish between a disease's potential effect on others and its effect on the afflicted employee in order to justify discriminatory treatment. The case was remanded to the district court to determine whether the teacher was "otherwise qualified"

for her job and whether the school board could reasonably accommodate her. On remand the district court found the teacher to be "otherwise qualified" to teach and she posed no threat to spreading tuberculosis to her students. The court relied on reasonable medical judgments under 504 concerning (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the probability that the disease will be transmitted and will cause varying degrees of harm. The court ordered reinstatement or front pay until retirement (Arline v. Nassau County, 1988).

In a similar case on contagious disease, Chalk v. U.S. District Court (1988), a teacher of hearing impaired children was transferred to an administrative position when it was discovered that he had Acquired Immune Deficiency Syndrome (AIDS). Chalk was hospitalized and after eight weeks of treatment, his physician found him fit for duty. The school district placed him on administrative leave pending a decision from Disease Control. The Director of Disease Control informed the school district that "nothing in Chalk's role as a teacher should place his students or others in the school at any risk of acquiring HIV infection." Congress intended contagious diseases to be included within the definition of a person with a disability. The test from Arline was applied. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his disability. A person who poses a significant risk to others in the workplace cannot be found to be otherwise qualified for his job if a reasonable accommodation will not eliminate the risk. The teacher in this case was found to be otherwise qualified because the transmission of AIDS is unlikely to occur in the classroom.

Physical Disabilities

There are a variety of types of physical disabilities that may adversely affect a person's performance in a workplace. The following cases represent a sample of situations where the disability affected the employee's work.

A quadriplegic high school guidance counselor was physically unable to write (In the Matter of Chirico v. Office of Vocational and Education Services for Individuals with Disabilities, 1995). He worked regular daytime hours for a New York school district for 20 years. In addition he worked at home two to four hours each night, six days a week to prepare reports for his students. He requested a voice-activated computer system to help him prepare reports at home. His request was denied by the Vocational and Educational Services for Individuals with Disabilities. The Vocational Services argued that the guidance counselor's job was secure and that his disability did not result in a substantial handicap to his employment. They also claimed that the counselor had attained his final employment outcome as defined by the Rehabilitation Act. The counselor claimed that the computer system would remove further obstacles to his advancement and maximize his employability under the Act. The appellate court held that the evidence supported the guidance counselor's position because his preparation of documents at home was a necessary component of his employment that could not be completed during the workday. The Act's intent was to allow individuals with disabilities to become integrated into the competitive workplace and help reach their highest level of achievement. The voice-activated computer system was a reasonable accommodation that helped the counselor prepare written reports, an essential function of the job. The deputy commissioner of Vocational Service's decision to deny the request for a voice-activated computer was overruled.

An Alabama university assistant librarian requested a change in work schedule because of a condition called polycystic kidney disease. The disease caused her pain, sleeplessness, and kidney problems; therefore she was consistently late for work (Lewis v. Board of Trustees of Alabama State University, 1995). Her employer denied her requests. A complaint was filed with the Equal Employment Opportunity Commission, and then subsequently a lawsuit was filed against the university alleging violations of the

ADA. The employee had sufficiently alleged that she was a person with a disability and that her disability limits one of her major life activities. The university claimed that the librarian did not file a complaint within 180 days as allowed in the ADA. The court examined three factors: the subject matter of the discrimination, the frequency of the acts, and the permanence of the decision. In this case, the employer repeatedly denied her requests for schedule changes and the alleged violation was a continuing one because the employee's timely claims were related in subject matter to her non-timely claims. The Board's repeated refusal to accommodate her schedule could be characterized as an ongoing policy to discriminate on the basis of disability and continuing not to accommodate the librarian. The motion to dismiss by the Board was denied.

In one case the employee could not meet all the requirements to prove a claim under the ADA. In Dyer v. Jefferson County School District R-1 (1995), the major issue was the meaning of the phrase "employment position that such individual holds or desires" in the Act. A Colorado school psychologist was hired as a school psychologist for 1990-91 school year. She was injured in a fall that year and it continued to affect her. Her contract for school psychologist was not renewed. Instead she was rehired as an assessment psychologist with the primary duty of testing students during 1992-93. Just after the start of the 1993-94 year, she resigned and claimed that the district had discriminated against her by assigning her to a position that it knew she could not perform. The employee's physician imposed restrictions on the amount of time she should sit at one time and the length of time she should drive. The district stated they could modify her schedule and gave her a permanent extension to turn in reports. The employee rejected the accommodations and continued to demand reinstatement to the school psychologist position. Because the job title that she held at the time of her resignation was assessment psychologist, this was the relevant employment for the ADA

purposes, and the employer's attempts to accommodate her in it had been reasonable. The court granted summary judgment for the school district.

In a similar case with a different outcome, Talavera v. School Board of Palm Beach County (1997), the school district did not offer reasonable accommodations. The employee was required by her physician to sit rather than stand as a result of chronic osteoarthritis and fibroid myalgia. Her job required her to stand at a counter for four or five hours a day making appointments for the guidance counselors. The school board denied her request for a special chair and a parking space for the disabled and later blocked her transfer to a position where she could have sat all day. The board did transfer her to a filing position that required standing all day. She could not perform and took unpaid leave until her contract expired. She was totally disabled under the Social Security Administration and received benefits. She filed an ADA claim against the school board. The claim was ultimately appealed the Eleventh Circuit Court. The court ruled that just because one is totally disabled under Social Security, it does not mean this is always consistent with a qualified individual with a disability under the ADA. The employee did not say that she could not perform the job if offered reasonable accommodations. The school board did not offer reasonable accommodations. The court reversed and remanded to the district court.

The following case is a situation whereby the school district did accommodate but not to the extent necessary. In Hinman v. Yakima School District No. 7 (1993), a school counselor suffered from asthma. The faculty smoking lounge was in her office building and the smoke bothered her. The school installed hydraulic door closers and posted signs. The counselor placed an air purifier in her office. This did not eliminate secondary smoke and the counselor had to take a medical leave. The counselor returned to work in the fall at the urging of the new principal. He promised to relocate the smoking lounge. It was not relocated until the day before the counselor was placed in intensive care for

treatment of asthma. The school counselor filed a claim under Washington law. The court ruled that the counselor had not filed within the three-year statute of limitation, and therefore dismissed the case. On appeal the court ruled that the statute of limitations did not begin to run until a later date because the school administration had failed to keep its promises to move the smoking lounge. There was also an issue with the counselor's emotional distress complaint. The case was reversed and remanded.

Mental Disabilities

The ADA has not necessarily opened doors for persons with mental disabilities. (Spragg, 1999). Persons with mental disabilities have been ignored in scholarship and in the press. There is substantial stigma and confusion about mental disabilities and this gets in the way of enabling persons with mental disabilities to be integrated into the work place. The law covers psychological disorders such as major depression, bipolar disorder, schizophrenia, and panic, obsessive compulsive stress disorders. The ADA does not cover every day stress or behavior stemming from illegal drug use.

An Arkansas teacher was hospitalized for bipolar manic illness including excessive moodiness, extreme irritability, weight loss, impulsivity, hostility, poor judgment, and reckless behavior. Her doctor stated that through medication, the teacher could obtain substantial relief from her symptoms, that her prognosis for a normal life was good, and that she would be able to perform her job duties. She received notice that her contract was not renewed (Rodgers v. Magnet Cove Public Schools, 1994). The teacher requested medical leave and signed a contract with another school district in Arkansas. The school district terminated her when they learned she was on medical leave. She signed on with a third school district that did not renew her contract after a year. She filed a lawsuit against the first two school districts. The court found for the school districts because the teacher's claim was only for monetary damages. On appeal, the Eighth Circuit Court determined that remedies are available. The court reversed and remanded

to determine whether the teacher had a disability and was otherwise qualified to perform her job. The employee needs to prove only that she was qualified at the time she was denied the job, not that she is qualified at this time.

Can a teacher with disabilities insist that her employer provide a teacher's aide as a form of reasonable accommodation under Section 504? A librarian applied for a position as library teacher following years of rehabilitative therapy for major head trauma with serious neurological damage (Borkowski v. Valley Central School District, 1995). She obtained the job and later was denied tenure because she had difficulty controlling her library skills class and that she had remained seated during class. She claimed violation of 504. After finding for the school district, she appealed to the Second Circuit Court of Appeals. The complaining party with the ability to perform the essential functions of a job with or without accommodations is otherwise qualified. If the employer was aware of the disability, it has an obligation to provide reasonable accommodations unless there is undue hardship. In this case the librarian had presented evidence that an aide could help her control unruly students in her classes. The employer must then rebut by showing the proposed accommodation causes undue hardship. The school district failed to present any such evidence. The court vacated and remanded its decision.

Pandazides v. Virginia Board of Education (1992) seems to apply to the general category of mental disabilities, although the employee was learning disabled rather than disabled under the psychiatric definitions. A special education teacher with learning disabilities was hired on probationary status until she passed the National Teacher Exam. She failed the communications portion of the test six times. She was removed from that teaching position because school administrators found her classroom management skills weak. She sued saying that she had been improperly removed from her position. On appeal, the Fourth Circuit Court of Appeals reversed and remanded the case to the district court. The district court said that the teacher had failed to establish

that she had an impairment that substantially limited a major life activity. Psychological opinions at the trial indicated that her alleged learning disability was not found in the nationally recognized directory of mental illnesses. She failed the communications test two more times with the accommodations of an extra hour to complete the test, and was permitted a transcript and a tape recording to listen to recordings more slowly. She was not "otherwise qualified" under the 504 because she could not perform the essential functions of a public school teacher, including the ability to comprehend written and spoken communication and manage a classroom effectively. The special education teacher appealed again requesting a jury trial. She had previously requested legal damages, which entitled her to a jury trial. The court reversed and remanded to district court's decision and ordered a jury trial.

Disability Harassment

Disability harassment is a form of discrimination prohibited by Section 504 and Title II of the ADA. Both provide grievance procedures and due process remedies. Individuals and organizations may file complaints with the Department of Education's Office of Civil Rights (Department of Education, 2001). The U.S. Department of Education sent a letter to educators across the nation stating institutions are responsible for stopping harassment of students. Harassment was defined as "intimidation or abusive behavior toward a student based on disability." It includes "verbal acts and name-calling, as well as nonverbal behavior, such as graphic written statements, or conduct that is physically threatening, harmful, or humiliating."

An employee of Cuyahoga Community College contends he was subject to a hostile work environment and terminated because of his disability (Spells v. Cuyahoga Community College, 1994). A part time instructional aide with a disability stated that his supervisor and coworkers demonstrated negative attitudes toward his disability, and he

complained that one coworker called him names and made offensive comments about him to her class. The coworker told her students, "It sounds like Hop-Along coming down the hall." The district court stated that in order to prevail on a claim of hostile environment, the employee must demonstrate the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; and whether it interferes with an employee's work performance. For the second element, the complainant must show that the employer tolerated or condoned the situation. In this case, the community college responded by transferring the supervisor to another office and admonished the coworker for making derogatory comments. There was insufficient evidence of a hostile work environment. The employee was legitimately laid off because he exceeded the permitted number of work hours for part-time employees.

Avoiding Potential Liability

Even though the ADA was enacted just over 10 years ago, disability discrimination law really began emerging around 1975. Legislation was enacted to protect students with disabilities in the schools and employees working for employers who received federal financial assistance. Discrimination applies to employment practices in the schools as well as in providing the required services for students with disabilities. The benefit of the ADA is that it covers more than employment and more than programs receiving federal financial assistance. The ADA covers public transportation, public accommodations, and physical environment access. This means that a person with a disability is not only covered at the work place, but also has protection getting to and from work, participating in social activities with coworkers, and in attending professional development activities.

For ADA employment discrimination suits premised on disparate treatment, the courts use the McDonnell-Douglas (1973) four-part burden-shifting test. Under ADA, the

plaintiff has the initial burden to establish that he or she was not hired or promoted due to discrimination based on disability by the employer. The plaintiff must show that he or she 1) is disabled, 2) is otherwise qualified for the position, 3) that if an accommodation is required, it is reasonable, and 4) that the employee suffered an adverse employment decision based solely on the disability. Once the plaintiff makes this initial showing, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff.

Schools must identify which ADA requirements that apply to them and wade through the maze to avoid potential liability. One key to avoiding liability is having adequate documentation and teaching school officials to employ the system of documentation. School officials should document in writing their reasons for deciding not to hire, promote, transfer, or accommodate in any manner, an individual who has a covered disability (Zirkel and Kincaid, 1995). It may be that the individual was not qualified for the position or could not perform the essential functions of the position. In attempting to avoid liability, one can obtain a checklist to guide the documentation and training. Consider, for example, whether there is a detailed written job description for all the positions in the school, that includes the "essential functions" that must be performed. Is there a written policy regarding illegal use of drugs and alcohol in the workplace? Is there a similar policy on screening out individuals who pose a threat because of contagious diseases? Are personnel trained not to ask questions as to whether the person has a disability? Are school officials trained to make decisions about what constitutes a "physical and mental impairment that substantially limits a major life function?" Documentation of the training activities (date, subject, amount of time) used, the dates you met with employees to develop job descriptions, and the reasons for denying an individual with a disability employment would be a good start to complying with the ADA.

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