Special Webinar

Presented by







The Americans with Disabilities Act Amendments Act of 2008: The Impact on Students with LD and AD/HD

March 18, 2009



About the Presenter: Mr. Matthew Cohen, Esq, has worked on behalf of children with disabilities in disputes with public schools and other governmental agencies since 1979. Cohen has represented hundreds of families in IEP meetings, special education due process proceedings, and litigation, and has been involved in a number of important special education cases.

He is a former national president of CHADD and is a founding board member of the Council of Parent Attorneys and Advocates (COPAA). He has authored numerous articles on special education topics as well as a newly published book, *A Guide to Special Education Advocacy - What Parents, Clinicians and Advocates Need to Know.* He is currently a featured commentator for LDOnline, an online disability news service.

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Children and Adults with Attention Deficit/
Hyperactivity Disorders (CHADD) is a national voluntary health agency with the mission of improving the lives of people affected by AD/HD by providing education, advocacy and support for individuals with AD/HD. CHADD has over 200 chapters with 12,000 members, and extended network of 40,000 individuals. For more information, please visit www.chadd.org



The National Center for Learning Disabilities, Inc., is a nonprofit organization dedicated to ensuring that the nation's 15 million children and adults with learning disabilities have every opportunity to succeed in school, work, and life. NCLD provides essential information to parents, professionals, and individuals with learning disabilities, promotes research and programs to foster effective learning, and advocates for policies to protect and strengthen educational rights and opportunities. For more information, please visit www.LD.org



The National Resource Center on AD/HD (NRC) is a program of CHADD and is a national clearinghouse for science-based information on AD/HD. The NRC is staffed by health information specialists who are able to respond to questions about AD/HD from the public. For more information, please visit www.help4adhd.org



WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 3 of 11

The Americans with Disabilities Act Amendments Act of 2008: Its Impact on Students with LD and AD/HD

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Key Areas of Impact of ADAAA on Students with ADHD & LD

- Ability to qualify as a student with a disability and receive reasonable accommodations within the pubic schools
- Ability to qualify for accommodations on the SAT and ACT and other national admissions, certification and licensing tests
- Ability to qualify for accommodations in college
- Ability to qualify for accommodations in employment – this will be addressed briefly in this presentation

THE ADA and Section 504

- Section 504 of the Rehabilitation Act was enacted in 1973 and applies to all programs and activities receiving federal financial assistance
- The Americans with Disabilities Act of 1990 (amended by the Americans with Disabilities Act Amendments Act of 2008) applies to:
 - all qualifying private employers (Title I),
 - all state and local government programs, including the public schools (Title II), and
 - all places of public accommodation, including nonreligiously controlled colleges and universities and test agencies (Title III)

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WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 4 of 11

Section 504, the ADA and the Schools

- Under the original ADA of 1990 and the new ADAAA of 2008, the rules generally parallel the regulations and interpretations that were developed for Section 504, in relation to public schools and other public entities
- Because Section 504 preceded the enactment of the ADA by many years, Section 504 has generally been the basis for disabilities protections in the public schools
- Since the enactment of the ADA, interpretations of the ADA and Section 504 have generally been regarded as applying equally to both laws

The Impact of ADAAA of 2008

- Because ADA and 504 are interpreted in parallel, the ADA 2008 will be applied to the public schools in their interpretation of both the ADA and Section 504, as well as to test agencies and colleges and universities.
- In other words, even though the Section 504 regulations have not been amended, ADA 2008 effectively changes both sets of rules

ADA Definition of Disability

- The person has a physical or mental impairment that substantially limits one or more major life activities;
- The person has a record of such an impairment; or
- The person is regarded as having such an impairment.
- 28 CFR Sec. 36.104

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WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 \sim Page 5 of 11

Prior Court Interpretations Dramatically Limited the	
Definition of Disability • Sutton vs. United Airlines (527 US 471) 1999	
ruled that if the individual used mitigating measures, such as auxiliary aides or	
medication, which mitigated the effect of the disability sufficiently to allow them to	
function, they were no longer regarded as a person with a disability.	
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Toyota Motors vs. Williams	
 Interpreted "major life activity" very narrowly to limit the ADA's application only to those functions that were 	
of central importance to most people's daily life, such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning	
and walking."Seemed to require that limit on a major life activity	
must impact the person's overall functioning Rejected application of ADA to individuals whose disability or symptoms were episodic or in remission 	
o	
Major Expansions in Eligibility Based on the ADAA of 2008	

WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 6 of 11

Limitation in one major life activity need not impact other major life	
activities in order to trigger ADA protection	
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ADA 2008 Requires that limitation	
on "Major" life activity be broadly, rather than narrowly, interpreted!	
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Conditions that are episodic or in	
remission are covered when they are active –	
This may be of use for people with ADHD that are effected by their	
symptoms differently at different times and under different conditions	
12	

WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 7 of 11

Definition of Major Life Activities Expanded

- 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, working, and non-volitional bodily functions. (emphasis added)
 - Addition of learning, reading, concentrating, and thinking make it much easier for students with LD and AD/HD to qualify for protections of ADA & 504

13

Definition of "major bodily functions" expands:

- ADA 2008 provides that major bodily functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, <u>neurological</u>, <u>brain</u>, respiratory, circulatory, endocrine and reproductive functions."
- Inclusion of neurological and brain functions directly addresses LD and AD/HD, as both conditions involve impairment of these bodily functions!

14

ADAA Eliminates Mitigating Measures Limitation

- New amendments prohibit use of mitigating measures in evaluating whether a person has a disability, except for the use of glasses or corrective lenses if they fully correct vision problem.
- Elimination of mitigating measures limitation relevant for people using stimulants or other psychotropic medications
- Also relevant for people with LD and ADHD requiring accommodations such as books on tape, extra time, preferential seating

15

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Impact of Elimination of Mitigating Measures Rule

- For students in public school, means students may not be excluded from protection because of the use of meds or other measures
- Expands scope of potential eligibility for students applying for accommodations for ACT and SAT and for college accommodations

16

Mitigating measures....

- Mitigating measures include, but are not limited to, medication, prosthetics, hearing aids, medical equipment, learned behavioral or adaptive neurological modifications, assistive technology or accommodations
- For people with ADHD or LD, this could include medication, 1-1 assistance, books on tape, extra time, preferential seating, quiet rooms for work, study or test taking, enlarged or modified texts, organizational aids, extra review or assistance

17

Effect of change....

- Requires determination of disability without consideration of the impact of the mitigating measure(s)
- May allow for clearer argument for accommodations for individuals taking tests, seeking college accommodations, or in employment, who performed well in part because of the ability to use the mitigating measures

18

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WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 9 of 11

Examples...

- A student with ADHD that is able to perform at a superior level on tests with the use of medication, a quiet room and extra time, will still be regarded as having a disability if the ADHD substantially limits their ability to perform without those measures....
- A student with a learning disability may be entitled to extra time or modified testing if their reading disability interferes with their ability to take timed tests or to comprehend material if the test is to test something other than reading....
- A student might even more easily qualify for protection based on recognition that they have to spend 3-4 hours to complete the same amount of work that others complete in 1 hour, even though they ultimately complete it very well.

19

Candidates for employment or for admission to colleges or universities must still be able to establish that they are "otherwise qualified" whether with or without reasonable accommodations

20

Expands protection for people "regarded as having a disability"

- "Regarded as..." category was intended to protect individuals were subject to discrimination that
 - Did not have a disability but were perceived as having one or
 - Had the disability but only with minor symptoms
 - Courts interpreted this to apply only if institution or employer regarded person as having a disability that substantially limited a major life activity

21

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WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 ~ Page 10 of 11

ADA 2008 clarifies meaning of "Regarded as..."

- Under ADA 2008, a person is protected from discrimination based on being regarded as having a disability, whether or not the impairment is perceived to limit a major life activity
- As a result, a person perceived to have LD or ADHD or whose symptoms do not substantially limit their functioning would still be protected from discrimination based on the perception of disability, regardless of the perceived limit on their major life activities.
- For example, a nursing student suspected of having ADHD or with mild symptoms would be protected from discrimination by a professor that believed the student had ADHD and didn't feel they should be in the class as a result.

22

The Bottom Line:

More People will Qualify as Persons with Disabilities Entitled to Protection from Discrimination Based on Their Disability and Eligible to Receive Reasonable Accommodations

23

For More Detailed Information on Special Education and Disability Law for Parents and Advocates

A Guide to Special Education Advocacy — What Parents, Advocates and Clinicians Need to Know

By Matt Cohen
Jessica Kingsley Publications, 2009
To Order, contact Tami Kuipers at
Monahan & Cohen, 312-419-0252
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Or go to our website: www.monahan-cohen.com

24				

WEBINAR: The ADA Amendments Act of 2008: Its Impact on Students with LD and AD/HD March 18, 2009 \sim Page 11 of 11

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