



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

March 31, 2014

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Deputy Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Ave., NW
Washington DC 20005

Dear Ms. Betts-Johnson:

On behalf of the Consortium for Citizens with Disabilities (CCD) Rights Task Force, we submit these comments on the Notice of Proposed Rulemaking, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, RIN 1190-AA59. CCD is a coalition of national disability-related organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We support the overall structure and content of the Department's proposed regulation, and we urge the Department to promulgate a final regulation as soon as possible, as it has been more than five years since the underlying statutory changes became effective. Our specific comments on the regulation follow.

I. Incorporation of Provisions of EEOC Regulations

We strongly support the incorporation of much of the language from the EEOC's regulations implementing the ADA Amendments Act (ADAAA), including the incorporation of the EEOC's definitions and particularly the nine rules of construction for applying the term "substantially limits." As the Department notes, "[c]onsistency among the title I, title II, and title III rules will ensure consistent application of the requirements of the ADA Amendments Act." (79 Fed. Reg. 4839, 4843 (Jan. 30, 2014)).

In addition, the EEOC's regulations have a proven track record of success. These regulations were promulgated through a bipartisan Commission vote, and were well-received by stakeholders in both the disability community and the business community. The application of these regulations by federal courts has resulted in important changes in the employment context; far fewer individuals are inappropriately losing ADA cases on the ground that they do not have a disability. While a number of courts have continued to misinterpret the ADA, applying the pre-Amendments Act standards, such misreadings have not occurred due to the EEOC's regulations but rather due to courts' failure to consider and apply those regulations.

II. Focus on Specific Learning Disabilities

We agree with the Department's decision to focus special attention on the ADAAA's coverage of individuals with specific learning disabilities. As the Department notes, the vast majority of the decisions interpreting the ADA too narrowly involved employment discrimination claims; in the context of Titles II and III, the area where courts seem to have most commonly misconstrued the ADA's scope of coverage prior to the ADA Amendments Act is that of individuals with learning disabilities seeking modifications to testing by higher education institutions, testing entities, and licensing entities. Moreover, Congress made clear in the ADAAA that a number of courts analyzing coverage of individuals with learning disabilities had not even considered the right measures in determining when an individual is substantially limited in learning, and had inappropriately analyzed outcomes and test scores rather than how a person learns. Accordingly, the Department's decision to include additional explanation beyond the EEOC's discussion of specific learning disabilities, and a number of examples concerning specific learning disabilities, makes sense.

We do have some concern, however, that the exclusive focus of the cost impact analysis for the regulation on specific learning disabilities may be misinterpreted to suggest that the ADAAA did not make significant changes with respect to other disabilities, or that pre-ADAAA decisions narrowing coverage of other disabilities were correct. For this reason, if the Department believes that it is appropriate not to include any other disabilities in the cost impact analysis, it should include a clear statement that this decision reflects the Department's view that learning disabilities were subjected to improper analysis with the greatest frequency, but that many other types of disabilities were also analyzed using standards that were too strict as well and the exclusion of those disabilities from the cost impact analysis does not constitute an approval of pre-ADAAA decisions concerning coverage of these disabilities.

III. Major Life Activities

We urge the Department to include two additional major life activities: writing and executive function. Particularly in light of the Department's focus on learning disabilities in the proposed rule, we think it makes sense to include these two activities. They are indisputably

major life activities, and their inclusion would make the analysis of coverage clearer for individuals with impairments with which the Department is particularly concerned in this rule.

IV. Condition, Manner or Duration

A. Changing the Subheading

The subheading should be titled “Condition, Manner, *or* Duration”—paralleling the subheading in the EEOC’s regulations, rather than “Condition, Manner, *and* Duration.” The former accurately reflects the content of both the Department’s proposed regulation and the EEOC’s final regulation, which state that *any* of these factors may be used to demonstrate a substantial limitation in how a person performs a major life activity compared to most people. See 29 C.F.R. § 1630.2(j)(4)(i); 79 Fed. Reg. 4839, 4859, 4861 (proposed regulations for 28 C.F.R. § 35.108(d)(3)(i) and § 36.105(d)(3)(i)). A person need not demonstrate a substantial limitation in all of these ways (the condition, manner, *and* duration of how he or she performs a major life activity) in order to establish coverage.

B. Condition, Manner or Duration Analysis Not Necessary in All Cases

The Department should add the language below that was included in the EEOC’s parallel regulations concerning the definition of “substantially limits” and the “application of condition, manner or duration,” but deleted from the Department’s proposed regulations. This language serves an important purpose and makes clear that the “condition, manner or duration” analysis—which may not be necessary to establish coverage in many cases, and particularly with respect to impairments that are described as “virtually always” being disabilities. In such cases, as described by the EEOC, establishing coverage should be “particularly simple and straightforward.”

(iv) Given the rules of construction set forth in paragraphs (d)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

C. Comparison to Most People Rather than to Subpopulations

We strongly urge the Department to remove the following language in the “supplementary information” section, 79 Fed. Reg. 4839, 4848:

The Department also notes that although in general the comparison to “most people” means a comparison to most people in the general population, there are a few circumstances where it is only appropriate to make this comparison

in reference to a particular population. For example, it would be inappropriate to evaluate whether a young child with a learning disability that affected her or his ability to read was substantially limited in reading compared to most people in the general population, because clinical assessments of such an impairment (e.g., dyslexia), are always performed in the context of similarly-aged children or a given academic year (e.g., sixth grade), and not in comparison to the population at large.

First, we are concerned about a principle that “when it is only appropriate” to compare a person’s limitations to those of a particular population rather than to those of the general population, the former comparison must be done to determine whether the person’s impairment is a disability. Such a principle has the potential to create unintended consequences. It is unclear under what circumstances it would be “only appropriate” to compare a person to a particular population, and to what type of population. For example, this principle may invite arguments that an 80-year old person is not substantially limited in major life activities compared to other 80-year olds. It also invites a wide variety of similar arguments that individuals should be compared to similarly situated individuals rather than to “most people”: for example, that an individual is not substantially limited compared to other individuals residing in nursing homes.

This principle also seems to be premised on the very notion that Congress rejected with respect to coverage of learning disabilities: that a learning disability should be measured by an individual’s test scores rather than the condition, manner or duration under which he or she learns. As is clear from the EEOC’s regulations and from statements elsewhere in the Department’s proposed regulation, the fact that a learning disability may be diagnosed by taking into account a person’s age, measured intelligence and age-appropriate education does not mean that the person’s limitations cannot be compared with those of the general population. The EEOC states:

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees. This does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual’s aptitude and that individual’s actual versus expected achievement, taking into account the person’s chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.

29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v).

Similarly, the Department’s “supplementary information” section states:

Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that “[a]n impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” The Department cautions that this rule of construction addresses how to determine whether the individual’s impairment substantially limits a major life activity and not how the impairment is diagnosed. For example, when a person is diagnosed with the impairment of a learning disability, one accepted method of arriving at that diagnosis is the administration of specific tests to determine whether there is a significant discrepancy between the individual’s intelligence or aptitude and the individual’s academic achievement.

79 Fed. Reg. 4839, 4845.

While a child’s learning disability would typically be diagnosed with respect, in part, to the abilities of other children at his or her grade level, the child’s coverage under the ADA would be established by showing how the disability affected his or her learning compared to that of most people—for example, that it is more difficult for the child to read, write, take tests, or perform other aspects of learning than it is for most people, and/or that the discrepancy between the child’s aptitude and the child’s achievement is greater than the discrepancy for most people.

V. Predictable Assessments

We urge the Department to include in its list of impairments that will virtually always be found to substantially limit a major life activity “specific learning disabilities.” These neurologically-based impairments—which make the basic mechanics of learning, reading and writing cumbersome, painful, deliberate, and slow—by their nature, should easily be found to be disabilities that substantially limit major life activities including learning, reading, writing, and neurological function. *See, e.g.*, 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v) (“Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.”). *See also* Cong. Rec. H8286 (Sept. 17, 2008) (Stark) (“Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration.”).

Moreover, in light of the extensive attention that the Department gives to the ADAAA’s application to learning disabilities and its repeated references to these disabilities throughout the proposed regulation, the absence of specific learning disabilities from the “virtually always” list

seems to raise an inference that they are not impairments that should easily be found to be disabilities. Such an inference would be incorrect.

We support inclusion of Intellectual Disability (ID) in the list of impairments that will virtually always be disabilities. We urge you, however, to list the major life activities that are substantially limited by ID as “cognitive function and learning” rather than “reading, learning, and problem solving.” The three organizations that define ID—the American Association on Intellectual and Developmental Disabilities (AAIDD), the American Psychiatric Association (APA), and the World Health Organization (WHO)—all agree on the three prongs of the definition/diagnostic criteria for this condition, which are: substantial limitations in intellectual function, substantial limitations in adaptive behavior, and onset during the developmental period. The suggested substitution more accurately describes the limitations in intellectual function and adaptive behavior experienced by individuals with intellectual disabilities.

Similarly, we support inclusion of autism in the list of impairments that will virtually always be disabilities, but urge you to remove “learning” from the listed major life activities in which virtually all people with autism are substantially limited. It is inaccurate to characterize learning as one of the activities in which virtually all people with autism experience substantial limitations. The inclusion of learning here seems to confuse autism with intellectual disabilities.

VI. “Regarded As” Prong

A. Description of “Regarded As” Prong

We urge the Department not to describe the revised definition of “regarded as” coverage as “*limiting*” the regarded as prong. To the contrary, the new analysis of “regarded as” claims under the ADAAA represents a significant *expansion* in comparison to much of the prior caselaw interpreting the “regarded as” prong. *See, e.g.*, Senate Statement of Managers, Cong. Rec. S8840, Sept. 16, 2008 (ADAAA “broadens application of this third prong of the disability definition”). In addition, it is misleading and confusing for the discussion of the “regarded as” prong to begin by describing a narrow exception to coverage under this prong. Instead, the discussion should begin by describing the new standard for determining coverage under this prong rather than by describing the “transitory and minor” exception.

B. Transitory and Minor Defense to the “Regarded As” Prong

The Department should make clear in its final regulations, as the EEOC did in its Title I regulations, that the issue of whether an actual or perceived impairment is “transitory and minor” is an affirmative defense and not part of the plaintiff’s burden of proof. *See* 29 C.F.R. § 1630.15(f). As the Department recognizes in the “supplementary information” section, the regulations implementing Titles II and III of the ADA should be consistent with the regulations implementing Title I. There is no reason why the “transitory and minor” exception to coverage under the “regarded as” prong should be an affirmative defense under Title I but not under Titles II and III. Moreover, the Department’s statement in the “supplementary information” section that “[i]t may be a defense to a charge of discrimination by an individual claiming coverage

under this prong *if the covered entity demonstrates that the impairment is both ‘transitory and minor’*” suggests that it agrees that this is an affirmative defense.

Indeed, longstanding rules of statutory construction require this interpretation. As the Supreme Court observed in concluding that certain exemptions from prohibited conduct under the Age Discrimination in Employment Act were affirmative defenses:

After looking at the statutory text, most lawyers would accept that characterization [of the exemptions as affirmative defenses] as a matter of course, thanks to the familiar principle that “[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it.” (citations omitted) (“[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits ...”). . . .

Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84, 91 (2008).

If the final regulation does not clarify (in the text of the regulation itself) that the “transitory and minor” exception is an affirmative defense, however, it may be misinterpreted by some to require that individuals with disabilities demonstrate that their impairments are not “transitory and minor” in order to establish “regarded as” coverage.

C. Example of a Transitory and Minor Impairment

We recommend that the Department delete the example of an “uncomplicated sprained ankle with an expected recovery time of three months” as an impairment that is both transitory and minor. This example may cause confusion, as a sprained ankle will often create very significant limitations on major life activities such as walking and standing, even though the sprain may not be “complicated.”

D. Dyslexia As Example of an Impairment

We urge the Department to include in its list of examples of specific learning disabilities more than merely one such disability—dyslexia. The Department explains that it has chosen to include dyslexia as an example of specific learning disabilities because some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. In fact, this is equally, if not more, true of other specific learning disabilities as well. Moreover, singling out dyslexia in describing specific learning disabilities is a peculiar choice that may suggest that other specific learning disabilities are typically not impairments. We recommend that the Department include examples of several specific learning disabilities, such as dyslexia, dysgraphia and dyscalculia.

V. Cost Analysis

In response to the Department's request for comments concerning the accuracy of the assumptions underlying the cost analysis, including the burden imposed by the proposed rule, we note that while the ADAAA expanded coverage under Title II and III to apply to a greater universe of individuals with disabilities, the ADAAA has already been in effect for three years. In addition, covered entities have also had the benefit of the EEOC's Title I regulations implementing the ADAAA, which have been in effect since March 2011. While these regulations apply to employers, courts and others have looked to the EEOC's regulations for guidance in interpreting the ADAAA's application to Titles II and III, since the same definition of disability applies to all three titles. Furthermore, in 2009, the Department of Education's Office of Civil Rights issued guidance concerning the application of the ADAAA to elementary and secondary schools. Accordingly, for the most part the obligations in the proposed rule should already have been clear to covered entities.

Thank you for the opportunity to comment on this important proposed rule.

Sincerely,

ACCSES

American Association of People with Disabilities

American Association on Intellectual and Developmental Disabilities

American Diabetes Association

American Speech-Language-Hearing Association

The Arc of the United States

Association of University Centers on Disabilities

Attention Deficit Disorder Association

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Council of Parent Attorneys and Advocates

Disability Power and Pride

Disability Rights Education and Defense Fund

Disability Rights Legal Center

Easter Seals

Epilepsy Foundation Institute for Educational Leadership

Learning Disabilities Association of America

National Association of Councils on Developmental Disabilities

National Center for Learning Disabilities

National Council on Independent Living

National Disability Rights Network

Paralyzed Veterans of America

United Cerebral Palsy

United Spinal Association