504 Expansion: How Far Will It Go?

Jeanne M. Kincaid
Drummond Woodsum

What Happened?

- The courts and the ADA
  - 18 years of judicial interpretations that narrowed the definition of who is "disabled."
- The biggest concern
  - Employment
- The biggest hit
  - Public schools

Copyright Drummond Woodsum 2009

Why Schools Should Be Concerned

- Serve the greatest number of individuals with disabilities
- Are the only entity that has a "child find" obligation
- ADA and the Rehabilitation Act (504) apply to many other entities other than public schools and Congress was not concerned about schools, but schools got swept into it

Copyright Drummond Woodsum 2009 3

What Do the Amendments Do?

- Greatly expand who may qualify as disabled
  - Under both the ADA and 504
- Do not alter the physical/mental impairment element
- Significantly expands the list of major life activities
- Significantly weakens the definition of "substantially limits"

Copyright Drummond Woodsum 2009 4

Additional Major Life Activities

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Operation of a major bodily function

Copyright Drummond Woodsum 2009 5

List is Not Exhaustive

- *Proposed EEOC regulations would add:*
  - *Sitting*
  - *Reaching*
  - *Interacting with others*

Copyright Drummond Woodsum 2009 6

Substantially Limits

- Still not defined
- But what it is not:
  - Severely restricts is too strong
  - Significantly restricts is too strong

Copyright Drummond Woodsum 2009

Comparison Group

- Likely will be most people in the general population
  - You might wish to compare students with his/her age/grade-level peers on national vs. local norms

Copyright Drummond Woodsum 2009

Mitigating Measures

- The ameliorative effects of mitigating measures may not be considered when determining whether individual has a disability
  - But may be considered in determining what if any accommodations may be necessary

Copyright Drummond Woodsum 2009

Mitigating Measures Defined

- Broadly defined to include measures such as:
  - Reasonable accommodations
  - Implanted devices and medical equipment
  - Hearing aids
  - Assistive technology
  - Learned behavioral or adaptive neurological modifications (not defined)
- Exception
  - Ordinary eyeglasses and contact lenses

Copyright Drummond Woodsum 2009

Proposed EEOC Regulations

- *Would add surgical procedures that do not permanently eliminate the impairment*

Copyright Drummond Woodsum 2009

Examples

- In determining whether student is disabled
  - Consider severity without regard to use of hearing aids or cochlear implant
  - Consider severity without regard to medication usage if positive

Copyright Drummond Woodsum 2009

Intermittent Conditions

- Intermittent conditions and conditions in remission qualify as disabling if substantially limiting when active

Copyright Drummond Woodsum 2009 13

Temporary Impairments

- Do not qualify for accommodation plans according to OCR's interpretative guidance
  - *EEOC proposed regulations are not as definitive*

Copyright Drummond Woodsum 2009 14

Regarded As Disabled

- Is much easier to establish for discrimination purposes
  - If adverse action is taken against an individual based upon his/her physical impairment, so long as it is not minor and transient (lasting or expected to last six months or less)
- Such a person does not qualify for accommodations
  - Watch out for hostile environment claims

Copyright Drummond Woodsum 2009

Proposed EEOC Regulations

- *Would add discrimination based on disability-related symptoms such as adverse actions due to:*
  - *Tics*
  - *Use of medication*

Copyright Drummond Woodsum 2009

Record Of Disability

- OCR's interpretative guidance indicates that such individuals are not entitled to accommodation plans
  - *EEOC proposed regulations do not go as far*

Copyright Drummond Woodsum 2009 17

Forms Idea

- Schools might wish to consider recognition of 504 plans only for students with current disabling conditions

Copyright Drummond Woodsum 2009 18

For the First Time

- Schools may find that although a student meets the definition of disabled, s/he may not require any accommodations in order to access the school's programs, activities and services

Copyright Drummond Woodsum 2009 19

Child Find Conundrum

- School districts have an obligation to evaluate students who they know or suspect may have a disabling condition that requires special education or related services
  - No money comes with Section 504

Copyright Drummond Woodsum 2009 20

One Thought

- Does the school have sufficient information to establish the existence of a physical or mental impairment and its functional limitations?
  - 504 does not require a diagnosis *per se*
- Does the school have sufficient information to determine what accommodations, if any, would be necessary?

Copyright Drummond Woodsum 2009 21

Health Plans

- Likely need to be reviewed differently
- Does the student now qualify as an individual with a disability?
- Possible differences
  - Composition of the team
  - Procedural safeguards

Copyright Drummond Woodsum 2009 22

And Don't Forget - Discipline

- Although the procedures are somewhat different from the IDEA, manifestation determination reviews are generally required before disciplinary changes of placement

Copyright Drummond Woodsum 2009