



WHAT WE KNOW

## Legal Rights: Higher Education and the Workplace

Individuals with ADHD often seek accommodations in the workplace or in higher education to help them reach their full potential and achieve success. Although a diagnosis of ADHD is usually the first step toward finding treatments and interventions to address the symptoms

of ADHD, a formal diagnosis itself does not guarantee that the adult with ADHD has the right to receive accommodations in the workplace or higher education setting. This information sheet provides an overview of the legal requirements and protections afforded individuals appropriately diagnosed with ADHD.<sup>1</sup>

Specifically, this sheet will:

- explain how the Rehabilitation Act of 1973<sup>2</sup> (RA), and the Americans with Disabilities Act of 1990<sup>3</sup> (ADA) including the ADA Amendments Act of 2008 (ADAAA), prohibit discrimination against individuals with disabilities.
- describe the documentation required to afford individuals with protection under RA or ADA.<sup>4</sup>
- explain how RA and ADA apply to higher education and the workplace.

Two federal laws – the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, including the ADA Amendments Act of 2008 – generally prohibit discrimination against individuals with disabilities in higher education and the workplace. Some state laws may go further than these federal laws in prohibiting discrimination. State governments or attorneys who practice within

a particular state or jurisdiction should be consulted for further information about applicable state laws, in addition to applicable federal laws, concerning people with disabilities. Adults with ADHD may sometimes be eligible for protection and accommodations in higher education and the workplace under these state laws.

### **RA AND ADA: WHAT ARE THEY?**

The RA prohibits discrimination against individuals with disabilities in three areas: (1) employment by the executive branch of the federal government, (2) employment by most federal government contractors, and (3) activities funded by federal subsidies or grants, including companies or organizations receiving federal funding. The federally-funded category includes all

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public elementary and secondary schools, many private schools, and most higher education institutions. The RA, in the discrimination context, is often referred to by the name of one of its sections: Section 504.

The ADA and its amendments extend the concepts of the RA to (1) private employers with 15 or more employees (Title I), (2) all activities of state and local governments, including employment and education (Title II), and (3) “places of public accommodation,” including most private schools and higher education institutions (Title III). Most educational institutions and virtually all private schools are covered by the ADA and RA, depending upon the type of government funding they receive. Religiously controlled educational institutions that do not receive government funding, however, are exempt from these laws. The ADAAA requires that the RA must meet the requirements of the ADAAA.

### **RA AND ADA: WHO IS ELIGIBLE?**

Having a diagnosis of ADHD does not automatically make an individual eligible for protection or accommodations under the RA or ADA. The protections of these laws extend to individuals who meet these four conditions:

1. they are individuals with disabilities under the law;
2. they are otherwise qualified for the position, with or without reasonable accommodations;
3. they are being excluded from employment or education solely by reason of their disability; and
4. they are covered by the applicable federal law.

These laws require that covered employers and institutions of higher educational institutions may not discriminate against qualified persons with disabilities. Persons with disabilities are individuals with impairments, such as ADHD, that substantially limit a major life activity.

#### **Important Terms to Know**

For a correct understanding of these laws and how they may apply to someone with ADHD, the following legal concepts are important to understand: *disability* and *physical or mental impairment*; *substantially limits*; *major life activity*; and *qualified*.

- **Disability:** A person with a disability is defined under the law as “any individual who has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, has a record of such an impairment, or is regarded as having such an impairment.”<sup>5</sup> The definition of a “physical or mental impairment” includes “any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>6</sup> Although ADHD is not specifically mentioned in the regulations implementing these laws, ADHD has been recognized in many court cases as a “mental or psychological disorder” and is therefore covered subject to its degree of impairment on a major life activity. In addition, the ADAAA now also includes *episodic* impairments or impairments that are in remission, and considers these

as disabilities if the impairment would substantially limit a major life activity when active. **Chronic** impairments with symptoms or effects that are episodic rather than present all the time may be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active (examples of impairments that may be episodic include, but are not limited to epilepsy, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia).

- **Substantially Limits:** The impact of the impairment must be *substantial*. The laws compare the individual with a disability to most people *in the general population* to determine what is substantial. “Substantially limits” is to be considered broadly in favor of expansive coverage to the extent allowed by the ADAAA. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. However, not every impairment constitutes a disability within the meaning of the ADAAA. The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis.

The ADAAA overturned previous Supreme Court decisions that had narrowed the definition of disability. In addition to restoring the intent of the original 1990 ADA, the Amendments Act of 2008 also required that decisions of substantial limitation must be made without regard to the ameliorative (beneficial) effects of mitigating measures. Mitigating measures eliminate or reduce the symptoms or impact of an impairment. They include, but are not limited to: medication, medical supplies, equipment, prosthetics including limbs and devices, hearing aids and cochlear implants; mobility devices; use of assistive technology; reasonable accommodations or auxiliary aids or services; learned behavioral or adaptive neurological modifications; and psychotherapy, behavioral therapy, and/or physical therapy. An exception to this standard is the use of “ordinary eyeglasses or contact lenses.” In addition, the non-ameliorative

effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered in determining whether an individual’s impairment substantially limits a major life activity (e.g., someone with diabetes may need more frequent breaks to take insulin and monitor blood sugar levels). However, the origin of the impairment, whether its effects can be mitigated, and/or any ameliorative effects of the mitigating measure used may not be considered in determining if the impairment is substantially limiting.

- **Major Life Activity:** What constitutes a major life activity under RA and ADA has been expanded with the ADA Amendments Act of 2008 through two non-exhaustive lists. Previous major life activities included self-care activities, manual tasks, walking, seeing, hearing, speaking, breathing, learning, and work.<sup>7</sup> Additions to this first list now include reading, concentrating, thinking, communicating, and interacting with others. The second list includes major bodily functions such as neurological and brain functions, special sense organs, etc. The operation of a major bodily function includes the operation of an individual organ within a body system (e.g., Diabetes substantially limits functions of the endocrine system; muscular dystrophy substantially limits neurological function; major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function).

Learning and work are the two major life activities most relevant to adults with ADHD. Regulations implementing the RA and ADAAA provide that the “condition, manner, or duration” of an individual’s performance of a major life activity may be useful in determining whether an impairment results in a substantial limitation. Condition, manner, or duration may suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. The outcome an individual with a disability is able to achieve

is not determinative of whether he or she is substantially limited in a major life activity.

With regard to learning, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population. “When considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking.”<sup>8</sup>

In order to be substantially limited in the major life activity of working, the impairment must prevent the individual from succeeding in an entire class of jobs, not just a particular job. In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person’s ability to work usually substantially limit one or more other major life activities. In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.

- **Qualified:** The term “qualified” with respect to an individual with a disability means that the individual satisfies the requisite skill, experience, education and other job or education related requirements of the position or school program such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such a position or school program. In short, this means that despite the presence of a disability, the individual meets the basic requirements for a particular job or school

program. In one legal case on this point, the Court upheld the employment termination of a neurologist with ADHD, arguing that there was no duty to accommodate him because he was a direct threat to his patients.<sup>9</sup> The Court found that he had made errors in patient charts

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and dispensing medicine and that he had stated that it was only a matter of time until he hurt someone. The neurologist was not qualified for his job because of his deficits. Despite his disability, he was not eligible for protection under the ADA. It should be noted that for the most part, current regulations implementing the ADAAA no longer refer to a “qualified individual with a disability.” Rather, consistent with the statute itself, these regulations now refer to “individual with a disability” and “qualified individual” as separate terms. The regulations also now prohibit discrimination “on the basis of disability” rather than “against a qualified individual with a disability because of the disability of such individual.” The changes to the regulations reflect changes made in the law itself. These changes are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether an individual meets the definition of “disability.”

## **WHAT DOCUMENTATION IS REQUIRED?**

Some reports written by clinicians to document the diagnosis of ADHD may often be insufficient to receive protection under RA or ADA. For a report from a mental health professional to be sufficient documentation under RA or ADA, it should include the following elements:

- The professional’s report should clearly identify the individual’s physical or mental impairment,

using the current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM) whenever possible.

- The report should clearly describe the impairment's impact on the individual's ability to perform one or more of the major life activities (learning, work). A description of the positive and negative effects of any medication and compensatory strategies should be included.
- The report should compare the individual's ability to perform the identified major life activity to the same major life activity as performed by most people in the general population. The level of limitation required is "substantial" as compared to most people in the general population, which "does not require a significant or severe restriction."
- The report should demonstrate that the individual is qualified for the job or educational program, despite the disability.
- The report should recommend accommodations necessary to address the disability described, showing why these accommodations are necessary and how they are reasonable. Reasonable accommodations may not create an undue financial burden on the employer or school program.

## HOW DO RA AND ADA APPLY TO HIGHER EDUCATION?

Under the RA and ADA, most higher education institutions must accommodate qualified individuals with disabilities. It is the responsibility of the student requesting accommodations to disclose his/her disability to educational institution and to show that s/he is qualified for the program. Colleges and universities are under no obligation to seek out students with disabilities. The accommodations requested by the student must be both *reasonable* and *necessary* because of the particular disability. The institution is not required to make modifications in courses or examinations that would alter the essential nature of its program, as this would constitute an undue hardship on the institution. Unlike primary and secondary public education where "free and appropriate public education" (FAPE) is required, at the post-secondary and higher education level, the appropriate standard is for reasonable accommodation.

Examples of reasonable accommodations include note-

taking assistance, extended time, and/or an individual room for taking tests and examinations. Examples of accommodations that may not always be legally required include foreign language or mathematics requirement waivers or course substitutions. If the educational institution can justify the need for mastery of a foreign language or mathematics in a particular course of study, then it can compel students with disabilities to meet this requirement. For example, if mastery of calculus and differential equations is required for a major in physics, an individual with a learning disability or ADHD cannot be excused from these mathematics classes on the basis of the disability.

## HOW DO RA AND ADA APPLY IN THE WORKPLACE?

The bar against discrimination in the workplace applies to recruitment, advertising and job application processes, hiring, upgrading, promotion, awarding of tenure, discharge, demotion, transfer, layoff, rehiring, compensation, leave, and various benefits. To be eligible for such protection, an employee must disclose the disability to the employer. Employees with disabilities who are qualified for their jobs may be entitled to reasonable accommodations in the workplace. However, in many cases it may be difficult for the employee, especially where cognitive impairments are involved, to establish that he or she is both substantially limited in a major life activity and at the same time qualified for the job. The accommodations sought must also be *reasonable*, and reasonableness depends upon the nature of the particular job.

In one legal case a senior-level executive with ADHD requested a non-distracting workplace, multi-staged tasks, written instructions, intermediate deadlines, a single supervisor, and assistance in setting up a time management system. The court denied these accommodations, ruling that senior-level employees must be able to exercise independent judgment and juggle tasks when necessary. Such accommodations may be reasonable for junior level employees but not for senior employees. In another case, a school district required that its teachers take turns driving school buses. A qualified teacher who had a disability that prevented him from driving was denied a job and took legal action. The court ruled that since driving a school bus was not an essential part of teaching, the school district could not deny the otherwise qualified teacher a job because he could not drive a school bus.

In addition to being reasonable, a requested accommodation must be *specific*. For example, an employer would not be required to provide “reduced stress” in the workplace because the employer would not be able to control all of the factors that produce stress. Furthermore, compliance by the employer would depend upon the employee’s assessment of his or her stress level at any given time. The employee must prove that there is a need for the accommodations based upon the disability; the employee’s desire for the accommodations is not sufficient. For example, the employee cannot insist upon the day shift rather than the night shift simply because the employee prefers the day shift.

It is important to know one’s rights in the workplace. However, employees should thoroughly evaluate their legal position and thoroughly understand their rights before considering legal action. Prior to such action, an employee who wishes an accommodation based on a disability such as ADHD will often have success by seeking an informal and mutually acceptable solution with an employer. Many employers will agree to make reasonable accommodations in order to improve the performance of the employee. In the event legal action is pursued, professional documentation of the disability and the need for accommodations will be of great importance.

## REFERENCES

1. This information and other materials produced by the National Resource Center on ADHD: A Program of CHADD are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.
2. The Rehabilitation Act of 1973 (RA) (29 U.S.C. § 791 et seq.)
3. Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.)
4. Although the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 is the most current version of this law, “ADA” is still a commonly used shorthand. Throughout this What We Know sheet, “ADA” should be understood as referring to the ADAAA, unless indicated otherwise.
5. 29 U.S.C. § 706(8)(B)
6. 29 CFR § 1613.702(b)(2)
7. 29 CFR § 1630.2(I)
8. Federal Register, Vol. 76, No. 58, pgs. 17012 – 17013. EEOC 29 CFR Part 1630 – Appendix of the Regulations to implement the Equal Employment Provisions of the ADA as amended.
9. *Robertson v. Neuromedical Center*, Docket No. 97-31169 (5th Cir. December 3, 1998), cert. denied, Docket No. 98-1377 (May 3, 1999)

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