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Legal Issues Pertaining To The Postsecondary Student With ADD

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Abstract

Attention Deficit Disorder (ADD) has received considerable attention in the media. Is it real- Is it a disability under federal laws- What are the obligations of postsecondary institutions to students with ADD- ADD is real, and, like other impairments, it is a disability when it substantially limits a major life activity. Qualified postsecondary students with this disability are entitled to appropriate accommodations to make the courses, examinations and activities accessible to them. Legally required services must be provided at no additional charge. Services that are not legally required may be offered on a fee for service basis.

Attention Deficit Disorder (ADD) is a neurological disorder that impacts upon learning and behavior. ADD is a disability when it substantially limits a major life activity, such as learning. This article explores the nature of ADD and the legal rights of the postsecondary student with ADD. (Please see Introduction in this issue for a discussion of terminology.)

Attention Deficit Disorder

The Disorder

ADD is a complex disorder with three primary types of symptoms that are described in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM - IV)* (American Psychiatric Association, 1994), Section 314, as follows: Combined Type, Predominately Inattentive Type, and Predominately Hyperactive/Impulsive Type. Symptoms are listed under the categories: inattention, hyperactivity, and impulsivity.

As a practical matter the disorder may involve difficulty directing attention appropriately, impulsive behavior, hyperactivity, mood swings, low stress tolerance, and difficulty in following rules. It is an invisible disability that often affects an individual's performance in the early school years, postsecondary education, and throughout life.

Over the course of this century, ADD has received increasing recognition as an impairment that does significantly affect learning and behavior. A brief review of that historical development is helpful in understanding the current status of ADD.

History

ADD is a current term for a condition previously termed hyperactivity, minimal brain dysfunction, and minimal brain damage. Symptoms of the condition were first observed in the late 19th century in connection with insult to the brain. Over the years, the occurrence of behavioral symptoms, without a history of brain insult, was termed minimal brain damage, and then minimal brain dysfunction (Interagency Committee on Learning Disabilities, 1987).

By the late 1970s, there were findings that ADD, long thought to be a disorder of childhood, does not go away but rather persists into adulthood (Hallowell & Ratey, 1994). In the 1980's and 1990's ADD gained increasing recognition as an impairment that may significantly affect learning and behavior. A compelling discussion of ADD was presented by the Administrator of the Drug Enforcement Administration of the Department of Justice on December 16, 1988:

ADD (officially named attention deficit disorder with hyperactivity [ADD/H] and sometimes simply called 'hyperactivity') is a developmental disorder in which children find it difficult to sit still and pursue attentional tasks for any length of time. ADD, which affects boys more than girls, is characterized in schools by frequent out-of-the-seat behavior in the classroom which is obviously disruptive for the other students. ADD children commonly are unable to complete academic assignments, have attention problems in the classroom, and often are unable to write legibly. Many such children physically provoke others nearby and most lack appropriate social skills. ADD children are also frequently unmanageable at home, which can easily aggravate or create a variety of domestic problems.

ADD in children, while not necessarily a life-threatening disorder, is a very disturbing handicap which, if untreated, will affect the child for his entire life. (DEA Docket No. 86-52; 53 Fed. Reg. 50591, 1988 pp. 5-9)

Further, ADD was recognized as a condition with significant impact on an individual's life by the Interagency Committee on Learning Disabilities (1987):

... attention deficit disorder (ADD) should be a central focus of any discussion of learning disabilities, since ADD is found to coexist so frequently in persons with LD, and to complicate their diagnosis and treatment. It affects children from their earliest infancy, through school age, and into adolescence and adult life(pp. 194-195)

In 1991, the U. S. Department of Education issued an important memorandum clarifying the status of ADD, recognizing that ADD can result in significant learning problems and confirming that children with ADD may be eligible for services under the Individuals

with Disabilities Education Act (IDEA), which was passed in 1975 as The Education for All Handicapped Children Act, and under the Rehabilitation Act of 1973 (29 U.S.C. § 701). In the *Memorandum to Chief State School Officers, Subject: Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education*, (U.S. Department of Education, 1991), specified examples of adaptations that would be useful in general education programs for students with ADD were noted including:

providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer-aided instruction, and other audiovisual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a 'services coordinator' to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education (p. 7).

Thus, over the years, ADD has come to be recognized as a significant impairment that may impact upon learning and behavior from early childhood into the adult years. Having considered ADD in general terms, problems that may arise as a result of the condition in postsecondary education will now be addressed.

ADD at the Postsecondary Level

Postsecondary students with ADD may have problems with directing attention appropriately, organizing, prioritizing, consistency of performance, completing assignments on time, writing lengthy papers, completing examinations within the customary time, meeting mathematical requirements, meeting expectations that are more subtle, following rules, and interacting with faculty and students in an appropriate manner. These problems are often compounded when college living conditions are noisy and full of distractions. Finally, because college is more demanding than prior schooling, compensations that worked previously may not continue to be successful.

Particularly in the case of ADD, where there are traits that may lead to a negative perception of the student by others, it is most helpful to remember the positive traits often seen in individuals with ADD, such as high energy, intensity about interests, and creativity. These positive traits may promote success in postsecondary education. Some individuals with ADD report doing well in courses that have a practical purpose or that are a good fit for their learning styles. Since there is a greater opportunity to select courses in postsecondary education than in earlier schooling, students with ADD may be able to take a greater number of courses that are a good fit.

The availability of support services at postsecondary institutions also may facilitate success for many students with ADD. Postsecondary institutions offer learning disability support services ranging from basic to comprehensive. Some offer separate programs for students with learning disabilities. Generally, services fall into three categories: remediation of specific learning weaknesses, academic support services, and related services.

Remediation services may address learning weaknesses in various areas including: reading, spelling, mathematics, organization, speaking, listening, writing, time management, studying, test taking, inputting information, memory enhancement, and vocabulary improvement.

Academic support services may include special orientation program, priority registration, reduced course load, academic advising, assistance with learning strategies, assistance with networking and advocacy with faculty, supervised study, tutors, peer tutors, textbooks on tape, talking books, audiotaped lectures, videotaped lectures, tape recorders, notetakers, readers, proofreaders, large print examinations and answer sheets, extra time on tests, extra time on papers and assignments, separate room for tests, oral tests, computer assistance, and special computer equipment and software.

Related services may address such issues as frustration, social skills issues, low-self esteem and other psychosocial problems. Such services may include: support groups, psychological counseling, career counseling, and transition to employment.

Determining which services are appropriate for a particular student with a disability is a complex process. Many students with ADD also have learning disabilities. The types of ADD and learning disabilities and the degrees of impairment may vary considerably among these students. Some services are legally required to make the institution's program accessible to the student, and other services are not legally required but are offered by the institution, often on a fee-for-service basis. The legal rights of postsecondary students with ADD will be explored next.

Legal Rights

Source of Rights

The rights of postsecondary students with ADD stem primarily from three sources: the Constitution, statutes and regulations which prohibit discrimination, and cases decided by courts, departments and agencies. In some instances, cases involving other disabilities will be cited because the principles apply broadly and are not limited to the particular disability involved in that case. Similarly, licensing cases will be cited because the principles are broadly applicable.

The 5th and 14th amendments to the Constitution are the most important sources of the rights of individuals with disabilities. The 14th Amendment provides in pertinent part that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws" or "deprive any person of life, liberty or property without due process of law." Section 5 of the 14th Amendment provides that the "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," The 5th Amendment contains the identical due process language and has incorporated the "equal protection" concept.

The Constitutional requirements of due process and equal protection are made specific by statutes which are authorized by and implement these Constitutional provisions. In general, the statutes prohibit discrimination, require affirmative action or provide funds for specific activities and programs. In the latter case, the institution is required to agree that it will conduct its programs without discrimination.

The two principal statutes which give rise to the legal rights of postsecondary students with ADD are the Rehabilitation Act of 1973 (RA) and the Americans with Disabilities Act of 1990 (ADA). Section 504 of the RA applies to postsecondary institutions that receive federal funds. Title II of the ADA applies to public postsecondary institutions, and Title III of the ADA applies to private postsecondary institutions.

Postsecondary institutions must operate their programs and activities in a nondiscriminatory manner, including recruitment, admission, academic programs, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation and transportation (U.S. Department of Education, Office for Civil Rights, 1992).

Discrimination

To establish a claim of discrimination, a student must demonstrate that he or she is a qualified individual with a disability and that the institution has discriminated against him or her on the basis of the disability. The term "disability" includes an impairment that substantially limits a major life activity, such as learning (42 U.S.C. § 12102(2)).

Impairment

To invoke the ADA and RA, an individual must have a physical or mental impairment. That term includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." (29 CFR § 1613.702(b)). ADD has been recognized as an impairment by federal departments and agencies, such as the Department of Education, and in court cases. One court stated :

The plaintiff, Jack Straube III ('Jack'), has a physical condition called dyslexia which is 'a developmental disorder selectively affecting a child's ability to learn to read and write which creates educational problems.' Bantam Medical Dictionary (Bantam Books 1982). The dyslexia is compounded by a condition known as attention deficit disorder. As a result of this condition, Jack is classified as 'learning disabled' within the meaning of the Act, 20 U.S.C. § 1401 (1), and is entitled to receive, at public expense, specially designed instruction to meet his unique needs. (*Straube et al., v. Florida Union Free School District et al.* 1991)

The Office for Civil Rights of the U.S. Department of Education has issued letters of findings recognizing ADD as a "physical or mental impairment" (Letter of Findings issued to *Gaston County School District*, 1990; Letter of Findings issued to *Hopkins County Board of Education*, 1992).

Finally, arguably ADD is within the definition of "specific learning disabilities" set forth in the Individuals with Disabilities Education Act, (1990). That definition expressly includes the term "minimal brain dysfunction," a predecessor term for ADD.

Disability

ADD is a disability when it substantially limits a major life activity. ADD has been recognized as a disability in court cases and letters of findings of the Office for Civil Rights of the U.S. Department of Education. In *Weintraub v. Board of Bar Examiners* (1992), a lawyer with ADD and learning disabilities sued the Board for examination accommodations of separate, private room and double time for the two day exam spread over four days. For the first test, the Board had allowed a lesser amount of additional time and a separate room with other applicants with disabilities. The Board had also allowed an alternative method of marking answers. The lawyer failed and then took the test a second time in a private room and with a greater amount of extra time, but not double time. Again, he failed. The Supreme Judicial Court ordered the Board to provide the requested accommodations. On his third try, with the requested accommodations, he passed.

In Letter to *San Antonio College* (1993), the Office for Civil Rights found that a student with ADD was a qualified individual with a disability. However, OCR concluded that there was no discrimination because the student had not provided the institution with notice of his disability and had not requested academic adjustments or auxiliary aids.

In another case, the Office for Civil Rights found that a student with Post Traumatic Stress Disorder that affects attention span and ability to concentrate was a qualified individual with a disability (Letter of Findings issued to *University of Utah*, 1993). However, OCR concluded that the student had not submitted documentation of his disability to the institution prior to the events giving rise to his complaint, and that the institution was in compliance with applicable regulations.

In Letter of Findings issued to *Florida Department of Education* (1993), the Office for Civil Rights concluded that a teacher with a diagnosis of specific dyscalculia and associated attention deficit was a qualified person with a disability. However, OCR found that he was not entitled to a requested test waiver in connection with his effort to obtain a professional certificate. This letter will be discussed in greater detail below.

Accommodations

Postsecondary students with ADD, who provide documentation of their disabilities in a timely manner and are qualified for the program, are entitled to appropriate academic adjustments and auxiliary aids and services. These accommodations must be provided at no additional expense to the student, unless such provision would pose an undue hardship (*Southwestern Community College v. Davis*, 1979). An undue hardship may be a financial burden or a fundamental alteration in the nature of the program. A review of cases involving ADD and learning disabilities will illustrate when accommodation is required and what types of accommodations may be appropriate for these disabilities.

1. Accommodations may be denied when the student is not qualified for the program, and/or the accommodation would pose an undue burden for the institution.

In *Wynne v. Tufts University School of Medicine* (1991), a medical student with a learning disability was dismissed from medical school after failing numerous courses including biochemistry three times. During his second year the University had provided him with notetakers and other aids and services. He sued the University alleging that it had an obligation to provide him with accommodations in the form of permission to take written multiple choice examinations in a different format. The District Court rejected his claim and granted summary judgment. The 1st Circuit reversed the District Court finding that the record did not show that alternative testing methods had been explored. On remand, the District Court, on the basis of the supplemented record, ruled in the University's favor, finding that the University had evaluated the alternatives and had concluded that the requested change in format was not practicable. The 1st Circuit affirmed that decision in *Wynne v. Tufts University School of Medicine* (1992).

In *Pandazides v. Virginia Board of Education et al.* (1991), the Court considered the extent and nature of accommodations which could be provided to an applicant for teacher certification who had learning disabilities. She was given accommodations on the National Teaching Exam (NTE), none of which enabled her to pass. She requested an untimed test and interactive testing or a waiver of the test. Her request was denied. She brought suit and lost in the District Court. The 4th Circuit reversed and remanded, with

instructions for the District Court to conduct an individualized inquiry. The District Court considered the case, on remand, and found that Pandazides was not otherwise qualified (*Pandazides v. Virginia Board of Education et al.* 1992).

In Letter of Findings issued to *Florida Department of Education* (1993), a teacher with specific dyscalculia and associated attention deficit, who had experience as a teacher in other states, sought to obtain a professional certificate in Florida. He filed a complaint alleging that the Florida Department of Education, a public educational institution, had discriminated against him on the basis of his learning disability by failing to waive the requirement that he pass the mathematics subtest of the College Level Academic Skills Test (CLAST), a prerequisite to obtaining the professional certificate. The Office for Civil Rights found that the CLAST is validated to measure achievement and is used to insure teacher competency, a legitimate purpose. OCR further found that there was no discrimination in refusing to waive the mathematics subtest because modifications in the administration of the CLAST are available but had not been requested, and because alternative means of obtaining the professional certificate are available to experienced teachers from other states without taking the CLAST.

The *Pandazides*, *Wynne* and *Florida Department of Education* cases demonstrate that educators and licensing authorities will not be required to alter the fundamental nature of the program or to provide accommodations to individuals with disabilities who are not qualified for the program.

2. In a number of cases in which the student or applicant for certification is a qualified individual with ADD and/or a learning disability and the requested accommodation does not pose an undue burden, the student has established discrimination by the institution.

In *Weintraub v. Board of Bar Examiners* (1992), the board of bar examiners was ordered to provide to an applicant, who had ADD and learning disabilities, these examination accommodations: separate, private room and double time for the two day exam spread over four days.

In Letter of Findings issued to *Educational Testing Service* (1993), a student, who had learning disabilities affecting reading, writing and mathematics, requested modifications on the National Teaching Exam (NTE), consisting of a person to read the examination questions to her and 300% of the testing time. The Director of the University's special program confirmed the disability, the need for the requested testing modifications, and the fact that similar modifications had been provided in the past. During the administration of the NTE, the student was provided with a reader, a separate, private room, a cassette player, and 100% of the testing time. OCR found that the Educational Testing Service's provision of testing modifications was based solely on a categorical determination by types or groups of disabilities and not on an individual basis. OCR concluded that the policy of categorically denying requests and failing to consider specific documented requests was discriminatory.

In Letter of Findings issued to *University of Arizona* (1991), The Arizona Center for Law in the Public Interest, the complainant, alleged that a fine arts graduate student and other students with learning disabilities were being denied required services, and that these services were available only through the University's Strategic Alternative Learning Techniques (SALT) Program, on a fee-for-service basis. The complainant asserted that the fine arts aids "to enable him to participate in and benefit from his educational program: taped tests or a reader, special test administration, assistance in preparing written materials, tutoring services, and liaison and advocacy services." The Office for Civil Rights found that the University of Arizona had discriminated against the graduate student with learning disabilities in failing to provide, at no additional charge, certain academic adjustments and auxiliary aids, including taped texts in a timely manner and assistance needed for typing papers. Further, OCR concluded that the University failed to provide academic adjustments and educational auxiliary aids to the alleged injured parties. OCR also concluded that the practices of charging a fee for the SALT program services and of requiring potentially costly current diagnostic testing, as a prerequisite for services, discriminated against students with learning disabilities. In that connection, OCR found that students with other disabilities were subjected to less stringent documentation requirements.

3. The obligation of postsecondary institutions to provide to qualified students with disabilities appropriate academic adjustments and auxiliary aids and services, at no additional charge, has been confirmed in regulations that implement the ADA (28 CFR § 35.130(f) and 28 CFR § 36.301 (c)). Such obligation has also been confirmed in court cases and letters of findings of the Office for Civil Rights (Letter of Findings issued to *University of Arizona, 1991*; *United States v. Board of Trustees for the University of Alabama, 1990*).

In Letter of Findings issued to *Western State University College of Law* (1993), the Office for Civil Rights found that the University failed to provide a notetaker to a student with cerebral palsy and learning disabilities. The University took the position that it would not provide the notetaker, because of the cost involved, and directed the student to the state Department of Rehabilitation. OCR found that the University, in maintaining a policy of denying students with disabilities accommodations that cost money, was in violation of Section 504 of the RA and Title 11 of the ADA.

The U. S. Department of Education has stated that, in making undue hardship determinations, the primary consideration will be the size and budget of the institution, compared with the cost of the requested aids and not the amount of tuition paid by the student (Letter from W. Smith, 1990).

4. Surcharges may be permissible for programs intended to increase the skill level of students who are not qualified for admission to a regular program offered by the institution.

In *Hazlasz v. University of New England* (1993), the Court considered two programs maintained by the University: the Individual Learning Program (ILP), which offered

support services for students with learning disabilities, and the First Year Option program (FYO), a program for first year students not qualified for admission to a degree program. There were different fee arrangements for the programs. The Court held that the University did not violate Section 504 of the RA by maintaining a separate, and potentially more expensive, fee structure for its FYO program. Since the FYO program was for students who were not qualified for regular programs, even with accommodations, the University had no legal obligation to offer the FYO program and so could charge separate fees for it.

5. In two recent consent orders involving hearing impairments, principles were articulated that may have applicability to other disabilities, including ADD. The orders stress the importance of providing an equal opportunity to participate in the complete educational experience. (*United States v. Becker C. P. A. Review, 1994; United States v. Harcourt Brace and Professional Publications, Inc., 1994*).

The *Becker* Order provides for a consultation process involving the student to determine if an aid or service offered by the institution meets the needs of the student. In *Harcourt Brace*, the Order provides for consultation with the student and consideration of the nature of the student's disability and particular communication needs. It provides that the institution may request documentation of or verify particular aids and services provided in recent similar settings. The Order also provides that the institution may require reasonable medical or professional documentation of the disability and the need for the requested aids and services. The aids and services are to be provided at no cost to the students.

Separate Programs

Some postsecondary institutions offer separate learning disability programs in which students with learning disabilities are educated separately from those who do not have these disabilities. A few offer special programming for students with ADD. Such programs are permissible, provided that qualified students with these disabilities are offered a choice between the separate program and comparable degree programs offered by the institution with the modifications and auxiliary aids required by law. The educational program must be offered in the "most integrated setting appropriate to the needs of the individual" (28 CFR § 36.203(a)). Separate benefits may be provided, but qualified individuals with disabilities may not be denied an opportunity to participate in programs and activities that are not separate or different. (28 CFR § 36.203). As noted previously, in the discussion of *Hazlasz v. University of New England* (1993), an institution may charge separate and higher fees for special programs offered to students who are not qualified for admission to its regular programs, because there is no legal requirement to offer such special programs.

Summary

ADD is a neurological disorder that affects learning and behavior. Many students with ADD also have learning disabilities. The two statutes that principally give rise to the

rights of postsecondary students with ADD are the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. They apply to most postsecondary institutions. ADD is an impairment. An impairment that substantially limits a major life activity, such as learning, is a disability. Qualified postsecondary students with disabilities are entitled to appropriate accommodations to make the courses, examinations, and activities of the institution accessible to them. Services that are legally required must be provided by the institution to the student at no additional charge. Services that are not so required may be offered by the institution on a fee-for-service basis.

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