

January 2009

## Independent Schools – Accommodating Students with Disabilities In Compliance With the ADA Amendments Act of 2008

### Contacts

**Cheryl M. Nicolson**

nicolson@nicolsonassoc.com

**Leanne A. Waldie**

waldie@nicolsonassoc.com

**Melissa L. Yemma**

yemma@nicolsonassoc.com

Rose Tree Corporate Center II  
1400 N. Providence Road  
Suite 6050  
Media, PA 19063  
610.891.0300  
www.nicolsonassoc.com

Angered at the way the U.S. Supreme Court has “narrowed the broad scope of protection intended to be afforded by the ADA”,<sup>i</sup> Congress enacted the ADA Amendments Act of 2008 (ADAAA), which was signed into law by President Bush and became effective January 1, 2009. Not only was Congress expressly critical of the Court’s interpretations of the Americans with Disabilities Act of 1990 over the last 10 years, it specifically rejected the reasoning, requirements and standards enunciated in *Sutton v. United Air Lines, Inc.*<sup>ii</sup> and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>iii</sup>. In attempting to undo the damage done by the U.S. Supreme Court, the ADAAA reiterates the purpose and intent of the ADA. The ADAAA specifically addresses the use of “mitigating measures,” including, prosthetics, medication, hearing aids, and behavioral or adaptive neurological modifications.<sup>iv</sup> Rejecting the restrictive holding in *Sutton*, Congress has made clear that whether an impairment substantially limits a major life activity is to be determined *without* reference to any ameliorative effects of mitigating measures.<sup>v</sup> In addition, Congress rejected the *Williams* holding that the definition of disability needs “to be interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>vi</sup> In its report, the House Committee on the Judiciary specifically said that the threshold determination of whether an individual is disabled should not be a means of excluding individuals. Rather, the definition is intended to be inclusive, not exclusive.<sup>vii</sup>

Unless subject to the exemption for religious organizations<sup>viii</sup>, independent schools, because they are considered to be “public accommodation”, must comply with the ADA and ADAAA.<sup>ix</sup> Of particular interest to independent schools is the impact the

ADAAA will have on admissions policies, academic standards, and other programs, practices and procedures. Certainly, the ADAAA mandates broad coverage when it says, “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”<sup>x</sup> *Disability* is defined as a physical or mental impairment that substantially limits one or more *major life activities* including, but not limited to, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, working and caring for oneself.<sup>xi</sup> The definition of *major life activity* also includes *operation of a major bodily function*, including, but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>xii</sup> Clearly, the list of impairments that qualify as disabilities is extensive.

For those individuals who are disabled, and who are otherwise qualified to participate in the programs provided by independent schools, the law requires that *reasonable accommodation* or *reasonable modification* to policies, practices or procedures be provided. However, an independent school is not required to provide modifications in policies, practices, or procedures when the “entity can demonstrate that making such modifications, including academic requirements in postsecondary education, would *fundamentally alter* the nature of the goods, services, facilities, privileges, advantages, or accommodation involved.”<sup>xiii</sup> That means that, for an otherwise qualified student, the school is required to provide reasonable accommodation or reasonable modification, but only if the modification

in policies, practices or procedures *does not fundamentally alter* the nature of the educational services, facilities, privileges or advantages provided by the school.

Accommodations that courts have previously found to be reasonable include: providing medication to students during the school day, making reasonable course substitutions, and altering test environments or time requirements.<sup>xiv</sup> Educational institutions are not required to lower their academic standards in order to accommodate a disabled student.<sup>xv</sup> In addition, schools do not have to accommodate a student whose behavior is dangerous to herself or to others<sup>xvi</sup>, and they do not have to make accommodations that would jeopardize their accreditation.

The new law broadening the protections of disabled students will require some schools to make changes in the way they deal with all of their students. It is important for independent schools to be proactive in ensuring that they are compliant with the ADA and ADAAA. Schools should prepare for an increase in the number students seeking admission who request accommodation for physical and mental disabilities. Although that does not mean that independent schools now have to accept everyone that applies, it does mean that schools need to be prepared to view each student and prospective student individually through the lens of the ADAAA.

The prudent independent school will want to review its policies, practices and procedures to ensure compliance with the law. This will

include creation and implementation of a comprehensive written policy for complying with the ADA and ADAAA. Sound written policies that are in fact implemented will go a long way in protecting the independent school from the expense and angst that comes from both legitimate and frivolous claims of discrimination. Further clarification of the law will likely come from the courts as ADAAA cases are litigated in the future. With the use of good information and counseling, you can ensure that your school is not the school setting the precedent.

For further information about this and other topics of interest to your school, please contact the attorneys at Nicolson Associates, LLC.

---

<sup>i</sup> Pub.Law 110-325, sec. 2(a).

<sup>ii</sup> 527 U.S. 471 (1999)

<sup>iii</sup> 534 U.S. 184 (2002)

<sup>iv</sup> Pub. Law 110-325, sec. 2(b)

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> House Report 110-730, p.7

<sup>viii</sup> 42 USCA § 12187

<sup>ix</sup> Although the ADA and ADAAA also affect schools as employers, this article focuses on the impact the ADAAA will have on how independent schools admit, educate and evaluate students.

<sup>x</sup> Pub.Law 110-325, sec. 3(4)(A).

<sup>xi</sup> Pub.Law 110-325, sec. 3(1)(A) and (2)(A).

<sup>xii</sup> Pub.Law 110-325, sec. 3(2)(B).

<sup>xiii</sup> Pub.Law 110-325.

<sup>xiv</sup> *Alvarez v. Fountainhead, Inc.*, 55 F.Supp. 2d 1048 (N.D.Cal. 1999); *Guckenberger v. Boston Univ.*, 974 F.Supp. 106 (D.Mass. 1997).

<sup>xv</sup> *Mershon v. St. Louis Univ.* 442 F.3d 1069,1076 (8th Cir. 2006).

<sup>xvi</sup> *K.H. v. Vincent Smith School*, WL 845385 E.D.N.Y. 2006.

**Disclaimer**

The contents of this article are for informational purposes only. The information provided may not reflect the most current legal developments. The contents of this article do not constitute legal advice and readers of this article should not act or refrain from acting based on information contained in this article. Receipt of this article does not create an attorney-client relationship.