

THE
Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

ADAAA Final Regulations Issued-

On March 25, 2011, the Equal Employment Opportunity Commission ("EEOC") issued [final regulations](#) to implement the *ADA Amendments Act of 2008* ("ADAAA"), which took effect January 1, 2009.

As previously reported in the [October 2008, Extra Mile](#), the ADAAA retains the basic definition of "disability" but greatly expanded the scope of what is a "disability" under the *Americans with Disabilities Act* ("ADA") to make it easier for individuals with medical conditions seeking protection under the ADA to establish that they have a "disability."

The final regulations, which take effect on May 24, 2011, make several changes to the Title I ADA regulations and the "Interpretive Guidance" which appears in the appendix to the regulations.

The ADA defines disability as "(1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment." The regulations make two significant revisions to two terms ("substantially limits" and "major life activities") used to define an "actual disability" (*i.e.*, a physical or mental

Continued on Page 2

OCR Issues Response to NSBA's Concern Over OCR's Position on Harassment and Bullying--

On March 25, 2011, the U.S. Department of Education's Office of Civil Rights (OCR) issued a [response](#) to the National School Board Association's (NSBA's) concerns over the OCR's position on harassment and bullying, as expressed in its "Dear Colleague" [letter](#) ("DCL") of October 26, 2010.

OCR advised school officials that, in addition to action required under applicable state anti-bullying and harassment laws, student misconduct may trigger educators to take action under one or more of the federal antidiscrimination laws enforced by OCR, which prohibit harassment based on race, color, national origin, sex or disability.

The NSBA in its [written response](#), dated December 7, 2010, expressed concern that, absent clarification, the OCR's "expansive reading of the law" could "invite misguided litigation" and be difficult for school officials to implement.

Specifically, the NSBA's response stated the OCR's position is problematic because: (1) it "significantly expands" the standard of liability for school districts relating to peer harassment, as set forth by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); (2) its suggestion

Continued on Page 2

Consumer Price Index

Percent change for the month of **March 2011**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.8	1.0
12 Mth	2.3	2.8
St. Louis-6 Mth	1.3	1.4
12 Mth	2.5	2.7
U.S. Mthly	1.0	1.1
12 Mth	2.7	3.0

April CPI figures will be released May 14, 2011. For the most recent CPI, visit our website at: www.hlerk.com.

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Adopt and publish your Board's prevailing rate resolution. Contact **Bob Kohn** with questions.
- **Nancy Krent** has been invited to write a column on major legal issues impacting schools in *The School Administrator*, AASA's magazine.
- As we go to press, major "school reform" legislation impacting a wide variety of employment and labor matters is pending in the Illinois legislature. Visit www.hlerk.com for breaking information as it develops.
- Join **Bennett Rodick** at the upcoming IAASE Spring Conference in Collinsville.

Offices

Arlington Hts. 847-670-9000
Peoria 309-671-9000
Belleville 618-355-7850

ADAAA Cont. impairment that substantially limits one or more major life activities).

Concerning the definition of “substantially limits,” the final regulations do not contain any list of impairments that may or may not “substantially limit” a major life activity. Instead, the final regulations set forth nine rules of construction to determine whether a condition “substantially limits” a major life activity.

By way of example only, these rules of construction provide that an impairment does not need to “prevent or severely or significantly restrict” multiple major life activities to constitute a substantial limitation, as was required under prior law, and further provide that the term “substantially limits” should be construed “broadly” to expand coverage to the maximum extent permitted under the ADA.

The second major revision to the “actual disability” definition involved the expansion of the definition of “major life activities” to include “interacting with oth-

ers” and the operation of major bodily functions, including, but not limited to, the nervous, circulatory, respiratory and reproductive systems and major organs. Consistent with the purpose of the ADAAA, these revisions will dramatically expand the group of individuals who may qualify for protection under the ADA.

The final regulations also insert a new definition of the “regarded as” coverage (*i.e.* being regarded as having an actual or perceived impairment that substantially limits a major life activity) and now allow individuals to establish “regarded as” coverage by showing they were treated differently because of an impairment that is not transitory or minor, without having to establish the covered entity’s beliefs concerning the severity of the impairment as previously required.

Given the dramatic revisions to the Title I ADA regulations, school districts facing leave or accommodation requests for medical reasons should consult with legal counsel. ***Please contact John Di John or Tina Christofalos for more information.***

OCR Cont. that “publicly labeling” harassing conduct as a remedial measure may violate the *Federal Educational Rights and Privacy Act* (FERPA); (3) only minimally acknowledges students’ free speech rights under the First Amendment (especially with regard to disciplining students for off-campus speech); and (4) suggests that school districts will be responsible for identifying race and gender-based harassment that overlaps conduct that falls outside the OCR’s area of enforcement (*e.g.*, that school officials should recognize that harassment based on sexual orientation (not enforced by OCR) also may constitute gender-based harassment (enforced by OCR)).

In its response, OCR disagreed that its position taken in the DCL would invite misguided litigation. OCR asserted that the letter did not expand the standard of liability for administrative enforcement of federal civil rights laws. Remarkably, OCR also asserted that the standard in *Davis*, which applies to private actions for monetary damages, is different from the standard used by the OCR to determine whether a school district is in compliance with federal civil rights laws.

OCR also explained that nowhere did OCR state or imply that districts should repeat harassing language verbatim or attribute a statement to a particular student; rather, the DCL included the example of publicly labeling incidents as harassment to illustrate the importance of communicating to students the types of behaviors that may constitute harassment.

Additionally, OCR rejected the NSBA’s assertions regarding students’ free speech rights. Specifically, OCR noted that the DCL provides that peer harassment may constitute a violation of the antidiscrimination law only if it is sufficiently serious that it creates a hostile environment. The DCL also explained that districts may consider a number of remedies, apart from discipline, that do not implicate First Amendment concerns. ***Nancy Krent, past Chair of the National Council of School Attorneys, assisted NSBA in their letter to OCR. OCR’s response is symbolic of their heightened vigilance and involvement in student harassment matters. School districts should carefully review their harassment policies and practices. Please contact Nancy for more information.***