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Practical Implications of the 2008 Americans with Disabilities Act Amendments (Title I) for Rehabilitation Counselors and Deaf Job Seekers

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Abstract

The Americans with Disabilities Act Amendments of 2008 rescued many qualified deaf job seekers and deaf workers from U.S. Supreme Court decisions that significantly limited the definition of disability for the purposes of ADA Title I private employment rights. The Title I amendments and decisions are described; practical implications and actions are suggested.

Keywords: job placement with deaf VR consumers, Title I of the 2008 Americans with Disabilities Act Amendments

Despite contentiousness in federal level politics, the rational optimists (Ridley, 2010) in rehabilitation with deaf people have ample reason to celebrate the 20th anniversary of the Americans with Disabilities Act of 1990 (ADA) as well as the Americans with Disabilities Act Amendments of 2008 (ADAAA). Political enemies crossed the aisle of the U.S. Senate to vote unanimously for the ADAAA, as the U.S. House of Representatives voted 402-17 in favor of the ADAAA. This was consistent with overwhelming Congressional support for the 1990 ADA when the U.S. Senate voted 91-6 and the U.S. House of Representatives voted 377-28 in favor of this landmark legislation.

The ADAAA went into effect January 1, 2009. On July 27, 2010 President Obama announced that the U.S. Department of Justice had completed the new, expanded regulations for Titles II (Public Services) and III (Public Accommodations and Services operated by Private Entities) of the ADAAA. The Equal Employment Opportunity Commission (EEOC) is expected to publish ADAAA Title I (Private Employment) regulations very soon. All of these regulations and much more information about the ADAAA will be available on the websites of the government agencies charged with enforcing the ADAAA (www.eeoc.gov, www.ada.gov).

An ADA Refresher

Before discussing the ADAAA amendments as they apply to private sector job placement and retention for deaf, deaf blind, hard of hearing, and

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deaf people with multiple challenges, it is appropriate to briefly remind the reader about the origins and structure of the 1990 ADA.

President Carter created the National Council on Disability (NCD) (www.ncd.gov) in 1978 to be an independent, bipartisan federal agency designed to investigate disability issues, and to guide disability policy in the federal government. Two NCD reports, *Toward Independence* (1986) and *On the Threshold of Independence* (1988) documented the enormous wall of discrimination and exclusion faced by people with disabilities. Congressional leaders and advocates for people with disabilities ultimately contoured the 1990 ADA to address this discrimination and exclusion. Using the Civil Rights Act of 1964 and Section 504 of the 1973 Rehabilitation Act as a legislative models, the ADA attempted to knock down those walls of discrimination and exclusion in private employment (Title I), in state and local government public services (Title II), in the marketplace (Title III), and in telecommunications (Title IV). The ADA sent a strong message to children with disabilities (and their families) that they had a place at the table in a society that should not compound the challenges of disability.

The language of the 1990 ADA Title I said a person claiming private employment rights regarding job applications, hiring, advancement, employee discharge, compensation, job training, and other terms of employment must first prove he or she is a person with a disability. The ADA Title I articulated a comprehensive three prong definition of disability that includes (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or (2) a record of such an impairment (e.g., past hospitalization for a mental illness); or (3) being regarded as having such an impairment (e.g., asymptomatic HIV-AIDS). Subsequently, the individual with a disability must show that they are qualified for the job (can do the essential functions with or without reasonable accommodation) and that they have been discriminated against (e.g., lack of reasonable accommodation, applicant testing that does not focus on the essential functions of the job, exclusion from training, disability oriented interviews and application forms.) Under ADA Title I, Congress authorized the Equal Employment opportunity Commission (EEOC) to be available to investigate and mediate ADA Title I discrimination claims by qualified persons with disabilities at no cost. If the EEOC conciliation effort fails, the person with a disability can get an EEOC right-to-sue letter. The EEOC may well join the person with a disability in suing the private employer. Only 4.7% of EEOC Title I resolutions involve people

with "hearing impairment" (EEOC classification) compared with 17% for people with back injuries and 14.2% for people with mental illness (EEOC, 2010).

From a purely practical perspective, the strong Congressional support for the ADA reflected a desire to see significant economic and social payoffs for the federal investments in medical research, assistive technology, special education, transition services as well as vocational rehabilitation, and Social Security Disability Insurance (SSI/SSDI).

Ruth Colker (2005) provides the best chronicle of the details of the deliberative process for those who want a sense of the legislative heroism involved in passing the ADA. As a 1990 legislative fellow for ADA chief sponsor Senator Tom Harkin, I can confirm that powerful organizations that reject business regulation, such as the National Federation of Independent Business (NFIB), worked hard to defeat the ADA and the Congressional leaders who sponsored it. Joseph Shapiro (2004) offers a good summary of the ADA opposition dynamics.

Readers still unfamiliar with the ADA basics will benefit from reviewing the excellent ADA documents and resources on www.ada.gov before moving on to the section on ADAAA changes and practical implications for rehabilitation counselors and the deaf job seekers they serve.

What Generated the Americans With Disabilities Act Amendments of 2008?

There were three major factors in propelling legislators to pass the American with Disabilities Act Amendments. First, both parties of Congress were put off by the perceived judicial activism of the conservative U.S. Supreme Court (Liptak, 2010) in ADA cases it decided between 1999-2002. A common response from the Supreme Court was that (1) the ADA language was so vague it requires "interpretation" by the Court (Tushnet, 2010), and (2) the court has to rule on disability issues not anticipated when the ADA became law. On the second point, there may be a time when the U.S. Supreme Court will be asked to rule on whether asymptomatic genetic conditions (e.g., Huntington's disease, Polycystic Kidney Disease, and Retinitis Pigmentosa) deserve ADA Title I protections under the third prong of the ADA Title I definition of disability. P.L. 110-233, The Genetic Information Nondiscrimination Act of 2008 is a complimentary federal law

that prohibits discrimination on the basis of how insurers and employers *use* genetic information.

In the U.S. Supreme Court, the employers almost always win ADA Title I cases. A comprehensive survey study (Albright, 2008) of 2007 ADA Title I lower federal court cases showed that the employer won 299 cases. Plaintiffs with disabilities won 14. Too many ADA Title I discrimination claims are thrown out of court quickly by federal judges using the "summary judgment" tool when the judge unilaterally feels the plaintiff with a disability has made an inadequate (prima facie/essential element) claim of ADA Title I discrimination (Albright, 2008).

A second springboard for the Americans with Disabilities Act Amendments of 2008 was Congressional concern about the rehabilitation and employment needs of 37,000 of our military veterans returning from Iraq/Afghanistan wars with significant disabilities (Iraq & Afghanistan Veterans of America, 2010). It was no time for the U.S. Supreme Court to drastically narrow the definition of disability in the ADA.

Third, many disability constituencies fought hard for the ADAAA. The most savvy disability constituencies learned that the fight was not over when the ADA became law in 1990. Political enemies of the ADA have many tools to undermine the ADA. When in power, they appoint federal agency administrators who underfund ADA education and enforcement in the EEOC and U.S. Department of Justice. They stall the promulgation of ADA regulations. State legislatures with token commitments to people with disabilities underfund vocational rehabilitation matching funds.

There are many examples of the Deaf community fighting back and winning in such situations. For example, readers may remember the leadership of Gallaudet University students in conducting 1977 "sit-in" protests to convince Joseph Califano, then President Carter's Secretary of Health, Education, and Welfare, to sign the languishing regulations for Section 504 of the 1973 Rehabilitation Act (Barnartt & Scotch, 2001). Consumers with disabilities also found the unelected, life tenured, conservative majority on the U.S. Supreme Court should not be legislating from the bench regarding the ADA rights of person with disabilities.

The Deaf community has reason to be wary when the Supreme Court cherry-picks cases likely to dim the hopes and limit the rights of people with

disabilities. In the first U.S. Supreme Court ruling on the 1975 Education for All Handicapped Children Act (now The Individuals With Disabilities Education Act), Board of Education v. Rowley (1982,) the deaf parents of a deaf student, Amy Rowley, simply asked for a qualified interpreter in all of her classes. Amy was only getting half the information in her mainstream classes. Chief Justice Rehnquist's majority opinion, still in effect, penalized Ms. Rowley for being a good student by ruling that it was the intent of Congress to provide special education services that provide them only "some benefit" (p.177). This disastrous ruling locked special education students into a world of low academic expectations, and it undercut the ability of these special education students to become "qualified" for ADA Title I private employment protections in an increasingly challenging job market. How school Individual Education Planning (IEP) meetings would be different today had Justice Rehnquist ruled that special education should do what it takes to help children with disabilities achieve their potentials. This U.S. Supreme Court ruling and the ADAAA are intertwined. The fight for the rights of individuals with disabilities requires constant vigilance.

Specific Examples of the Impact of the ADAAA Title I for Rehabilitation Counselors and Deaf Job Seekers

One of the U.S. Supreme Court cases nullified by the 2008 Americans with Disabilities Act Amendments was Sutton v. United Air Lines (1999). In this case, employees with myopia were denied ADA Title I protections because they wore corrective lenses. Had this ADA decision prevailed, the determination of whether a person was disabled for the purposes of ADA Title I protections depended on "mitigating measures." For example, a deaf job applicant with a hearing aid or cochlear implant might not qualify for ADA Title I protections because he or she uses these devices. There is much to be admired about Justice Sandra Day O'Connor (O'Connor & Day, 2005), the first woman on the U.S. Supreme Court, but her tortured majority opinion in Sutton defies logic. Imagine a qualified job seeker with deaf-blindness determined to not be disabled for the purposes of Title I private employment protections because he or she knows Braille and benefitted from vocational rehabilitation services. Under Sutton, persons with artificial limbs and medication for epilepsy could have been denied ADA Title I protections. On p. 482 of her opinion, Justice O'Connor said that her opinion did not call for reviewing the ADA legislative history, the same legislative history that clearly articulated a broad three prong definition of disability for ADA title I purposes. Dissenting Justices Stephens and Breyer

criticized this as an illogical, "miserly construction" (p. 496) of the ADA Title I disability determination noting that the O'Connor opinion was at odds with the ADA legislative history, the overwhelming bipartisan support of the U.S. Congress and White House, eight of the nine Federal Courts of Appeal, the EEOC, and the U.S. Department of Justice. There is also much to admire also about the personal story of Justice Clarence Thomas (2007) a former Director of the EEOC. We are unlikely to see another former EEOC Director on the U.S. Supreme Court in this century. Unfortunately, Thomas voted against the person with a disability in every ADA case remedied by the ADAAA. Thankfully, the ADAAA reverses Sutton and brings us back to a broad interpretation of disability for ADA Title I protections in private employment.

A second Supreme Court decision overruled by the ADAAA is called Toyota Motor Manufacturing, Kentucky, Inc. v. Williams (2002). In this case, the Supreme Court rejected ADA Title I protections for a worker with carpal tunnel syndrome. The unanimous opinion in this case was again written by Justice O'Connor with the current Chief Justice John G. Roberts representing Toyota while Roberts was in private practice. In another effort to constrict the numbers of people who can claim to be disabled for ADA Title I private employment protections, the court found in favor of Toyota, calling for a "demanding standard" in determining disability status for ADA Title I purposes. The court said individuals must have an impairment that "prevents or severely restricts" the individual from doing activities that are of "central importance" to most people's daily lives to be considered disabled for ADA Title I purposes. The impairment's impact must be "permanent or long term." In theory under the Toyota decision, a qualified deaf or hard of hearing person with good lip reading skills may have an "impairment" that is limiting, but not sufficiently limiting to be considered disabled for ADA Title I purposes.

Leaving the Toyota decision in the dust, the ADAAA now redefines the definition of disability to include a condition or impairment that "substantially" limits a major life activity. The ADAAA now fixes the Toyota decision by defining "major life activities" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The full Sutton and Toyota decisions can be found at www.supremecourt.gov.

ADAAA Opponents

The political/legislative process is most robust when it can consider and sustain different points of view. ADAAA opponents such as the Heritage Foundation, the National Federation of Independent Business, the U.S. Chamber of Commerce, the National Association of Manufacturers, the Society for Human Resource Management, and the National Restaurant Association consistently reject regulation. The Heritage Foundation Annual Report for 2009 lists corporate donors such as Coors Beer, Chevron, Comcast, Google, 3M, Lockheed Martin, Samsung, Amway, Johnson & Johnson, Exxon, Allstate Insurance, United Parcel Service, Boeing, and Microsoft. Some of these corporations are moving thousands of U. S. jobs to other countries (Dudley, 2005). Another Heritage Foundation corporate donor is AIG, which took $182.5 billion in U.S. taxpayer bailout funds in May of 2009 (Orol, 2010) while awarding $175 million in AIG executive bonuses (Ng, 2010). With only a $3 billion/year federal investment in vocational rehabilitation, people with disabilities in the U.S. should look into federal bailouts for the help they need while waiting in state vocational rehabilitation "order of selection" lines.

Starting an ADAAA Title I Action Agenda in Serving Deaf Job Seekers

The collective intelligence (Ridely, 2010) of deaf leaders and the rehabilitation professionals who serve them will generate many effective strategies to support the goals of the ADAAA Title I for deaf job seekers. As we generate these strategies, we stand on the shoulders of action-oriented visionaries like Frances Perkins (Downey, 2009), Mary Switzer, Fred Schreiber, Boyce Williams, Edna Adler, Bob Sanderson, Eugene Peterson, Larry Stewart, Doug Watson, and Glenn Anderson. Some strategies will deal with the ADAAA directly. Other strategies will address the underpinnings of the ADAAA for deaf people. Some practical implications for securing ADAAA rights for deaf, deafblind, and hard of hearing people might include:

1. Support the political leaders in both parties who have been there for people with disabilities. This includes those who supported the ADAAA as well as the U.S. Senators who vote for qualified Supreme Court nominees who respect the legislative integrity of federal civil rights legislation like the ADAAA.
2. Channel front line feedback on the next generation of ADAAA (and

Rehabilitation Act) improvements to our federal legislators as well as the rehabilitation organization lobbyists who represent us. Lobbyist accountability means annual evaluations of accomplishments, not just reports of meetings attended and reports defending how lucky we are to maintain the status quo.

3. Work with deaf job seekers to prepare win-win portfolios for potential private employers to help the employers understand the mutual benefits of ADAAA Title I and related tax breaks. Vocational rehabilitation can significantly boost the likelihood of and ADAAA Title I placement by helping the deaf consumer become "qualified" for jobs with a future. Vocational rehabilitation can help with preparing resumes, providing work adjustment training, and practicing job interview skills. Vocational rehabilitation can help by working with private employers in advance to clean up discriminatory job application forms and employment testing not related to essential job functions. Vocational rehabilitation can provide vocational evaluators to accurately assess essential job functions in private employment jobs. Many well-meaning private employers open to an ADAAA Title I job placement still rely on vague and traditional job descriptions.
4. Educate deaf people and those who work with them about the underpinnings of the ADAAA. Too many deaf people as well as parents and teachers of deaf children know nothing about the private employment job protections of the ADAAA of 2008. The ADAAA is a dead letter to deaf people and their allies who don't know about it. How can deaf leaders and rehabilitation counselors collaborate with these individuals to help them better understand what happens to deaf students when they leave school, to help them better understand the minimal subsistence SSI/SSDI trap, the transition and vocational rehabilitation processes, the ADAAA, as well as winning strategies to navigate toward success? How might this information and support influence what parents and teachers do to help deaf children?
5. Hold state vocational rehabilitation agencies accountable. There are so many vocational rehabilitation counselors doing outstanding work with deaf consumers, but closures with deaf vocational rehabilitation consumers have been in freefall (Watson, Jennings, Tomlinson, Boone, & Anderson, 2008) since well before the 2009-10 economic recession (Capella, 2003a; Capella, 2003b; McCrone, 1994; McCrone, 2005). If the Cornell University Center on Disability Statistics (2010) is correct, there are more working age SSI hearing disability recipients in the state of Arizona than there are successful deaf client vocational rehabilitation

closures nationwide. How is it possible that within a year of the 2003 deaf VR client successful closure freefall documentation, Office of Special Education and Rehabilitative Services Assistant Secretary Troy Justesen closed the RSA Office on Deafness and Communication Disorders with the superbly talented Annette Reichman at the helm? A 2009 study conducted by the Council of State Administrators of Vocational Rehabilitation (CSAVR) regarding the implementation of the Model State Plan for Persons Who are Deaf, Deaf blind, Hard of Hearing, and Late Deafened (MSPD) (2008) got responses from only 21 of eighty state VR directors (CSAVR Deafness Committee Minutes, 1/4/10). The MSPD has been in print as a CSAVR endorsed deafness rehabilitation assessment tool since 1973. If this reflects a diminished state VR commitment to high quality vocational rehabilitation services for deaf people, can you see how it can undercut ADAAA Title I job placements with private employers for deaf job seekers? Perhaps it is time to train deaf leaders at the state level, their state legislative representatives, and the local media to use the MSPD to do regular assessments of state vocational rehabilitation services with deaf consumers.

6. Lastly, in the fight to help deaf people benefit from ADAAA Title I protections, demand that the convoluted Rehabilitation Services Administration Annual Report to Congress start to clearly articulate its successes and failures with deaf and hard of hearing vocational rehabilitation clients.(2010)

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