

U.S. Department of Justice

Civil Rights Division

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August 11, 2014

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
Office of the Clerk
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *David Rawdin, M.D. v. American Bd. of Pediatrics*, No. 13-4544

Dear Ms. Waldron:

This letter brief responds to the Court's June 30, 2014, request for our views on "whether appellant David Rawdin has a 'disability that impairs sensory, manual, or speaking skills,' 28 C.F.R. 36.309(b)(1)(i), and the extent to which the answer to this question affects the applicability of the 'best ensures' standard." Although we explain here the proper standard for assessing whether an individual has a disability covered by Section 36.309, in our view, a remand is appropriate to allow the district court to address this issue in the first instance.

1. The Americans with Disabilities Act (ADA) broadly protects an individual who has a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. 12102(1). A "major life activity" includes "seeing, hearing, * * * learning, reading, concentrating, thinking, communicating, and working," and major bodily functions including neurological and brain functions. 42 U.S.C. 12102(2). Title III of the ADA requires any person offering certain examinations, including licensing examinations, to offer them "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements." 42 U.S.C. 12189. The Department of Justice's (DOJ's) implementing regulation requires a testing entity to:

best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

28 C.F.R. 36.309(b)(1). To trigger an entity's obligations under Sections 12189 and 36.309, an individual must establish that he has a disability under the ADA that impairs a sensory, manual or speaking skill and a need for a change in the manner of examination so that his test performance will reflect the individual's aptitude, achievement, or skill the test intends to

measure rather than the impact of his disability. See 28 C.F.R. 36.309(b)(1). This Court has held that Section 36.309's "best ensure" standard applies to licensing examinations. See *Doe v. National Bd. of Med'l Exam'rs*, 199 F.3d 146, 149, 155-156 (3d Cir. 1999). It is well established that an agency's interpretation of ambiguous language in the agency's own regulations, including an interpretation of a regulation set forth in an amicus brief, is entitled to deference as long as that interpretation is not "plainly erroneous or inconsistent with the regulation." *Chase Bank, U.S.A., N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (citation omitted); see *Regents of Mercersburg Coll. v. Republic Franklin Ins. Co.*, 458 F.3d 159, 166-168 (3d Cir. 2006) (court gives deference to DOJ's ADA regulations, technical assistance documents, and an amicus brief filed in another case interpreting the ADA and regulations).

The meaning of "a disability that impairs sensory, manual, or speaking skills" is admittedly ambiguous. For example, a disability that impairs a "sensory" skill could be defined narrowly as relating only to disabilities that impair the physical sensation of the five traditional senses (seeing, hearing, tasting, touching, and smelling), or it could be defined more broadly to encompass cognitive and neurological disabilities that impair the exercise of sensory functions. See, e.g., sensory defined as "conveying nerve impulses from the sense organs to the nerve centers." Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/sensory> (last visited July 29, 2014). In our view, a disability that impairs a "sensory" skill can impair an individual's physical, neurological or cognitive processing of what an individual sees, hears, touches, tastes, and smells. An individual's sense of sight includes not only the physical ability to see, but also the neurological and cognitive processing to identify the image, store the image in memory, associate the image with one's knowledge, and recall the image. All of these processes are integrated and occur seemingly without effort by an individual without a disability. An individual with a disability that impairs a sensory skill will not be able to identify or process the visual or aural information in the same manner as an individual without a disability. Defining and limiting the sensory skills associated with vision to the physical act is an artificial distinction that ignores that vision is meaningless without the neurological ability to understand, identify what one sees, relate that information to stored knowledge, and recall that image, especially in immediate, short term, and long term memory. The same image is distorted whether an individual has a physical vision impairment or, instead, has a neurological or cognitive impairment that interferes with his ability to understand or recall what he has seen or read.

Several disabilities that impact learning, reading, concentrating, and thinking interfere with how an individual processes information that he sees, reads, or hears and exemplify how an individual's neurological responses are inextricably intertwined with visual or aural stimuli. An individual with dyslexia may not hear or read words correctly, and therefore cannot store the information accurately, respond accurately to what he has heard or read, or recall what he has seen or heard in the same manner as an individual without a disability. An individual with dysgraphia may not be able to process words he sees or hears, resulting in an inability to write them down. While the disability and its impact differ, these are examples of disabilities that impair a "sensory" skill. Absent a testing accommodation for an individual with a disability that impairs sensory, manual, or speaking skills, the individual's performance on an examination will not fully reflect his knowledge, aptitude, and ability, but rather the impact of the disability.

Not every disability impairs a "sensory skill." Individuals may have a range of medical or other conditions that qualify as a disability under the ADA but do not affect a sensory ability.

For example, an individual who has cancer has a disability that is covered under the ADA, but if the cancer does not interfere with the applicant's alertness or ability to perform on the examination, he would not be entitled to modifications or auxiliary aids and services under Section 36.309.

2. This interpretation is consistent with the purposes of Sections 12189 and 36.309, and the historic and current implementation of this and similar testing provisions. The ADA and Section 504 do not define "sensory, manual, or speaking skills." However, Section 36.309 addresses appropriate auxiliary aids and services for individuals who have a disability that impairs "sensory, manual, or speaking skills" with examples of aids for individuals who are blind or deaf, or have a learning disability. See 28 C.F.R. 36.309(b)(3); see also 28 C.F.R. 35.104 (auxiliary aids defined); Title III Technical Assistance Manual III-4.6100 (examples include auxiliary aids and services for an individual with a learning disability), available at <http://www.ada.gov/taman3.html> (last visited July 17, 2014).

Section 36.309 derives from and is identical in all relevant respects to the Department of Education's (D.Ed.'s) testing regulation, first promulgated in 1980, implementing Section 504 of the Rehabilitation Act in postsecondary education programs. See 34 C.F.R. 104.42(b)(3). Other D.Ed. and other agencies' regulations implementing Section 504 have identical or nearly identical language, as does the Individuals with Disabilities in Education Act (IDEA). See, *e.g.*, 34 C.F.R. 104.13(b), 104.35(b)(3), and 104.44(c) (D.Ed.); 28 C.F.R. 42.512(b) (DOJ); 45 C.F.R. 84.13(b), 84.35(b)(3), 84.42(b)(3), and 84.52(d)(1) (Health and Human Services); 34 C.F.R. 300.304(c)(3) (D.Ed.).

3. Providing special education, modifications, and auxiliary aids and services under the IDEA and Section 504 to applicants with physical and mental disabilities, including learning disabilities, has been and remains commonplace in classrooms and for examinations from elementary school through college and graduate school. See 20 U.S.C. 1401(3)(A); 34 C.F.R. 300.8(c) (IDEA definitions of child with a disability); 34 C.F.R. 104.3(j) (Section 504 definition of handicapped child). The D.Ed.'s Office of Civil Rights has investigated numerous claims by individuals with learning disabilities and other neurological impairments who sought accommodations in classrooms and for examinations. See, *e.g.*, Letter to Dr. Donald D. Shook, President, St. Charles Cnty. Cmty. Coll., No. 07-91-2008, 1991 NDLR Lexis 980, at *11-13 (Mar. 22, 1991) (school complied with Section 504's testing provision when it provided a student with a learning disability unlimited time for an examination, but the school failed to appropriately identify auxiliary aids necessary for the student's full participation in the classroom and educational program); Letter to Mr. Hilary Hsu, Chancellor, San Francisco Cmty. Coll. Dist. 33, No. 09-90-2032, 1990 NDLR Lexis 572, at *2-4 (Aug. 6, 1990) (college violated Section 504 when it failed to provide all appropriate testing accommodations to a student with a brain injury that caused "lapses and loss of memory and disorientation in her thought process").

Section 36.309 requires a testing entity to give "considerable weight" to modifications and auxiliary aids and services previously afforded to applicants, including those provided under Section 504 and the IDEA, when determining what modifications are appropriate for its examination. 28 C.F.R. 36.309(b)(1)(v). This provision was added in 2011, expands upon commentary to the testing regulation issued in 1991, was based on the Department of Justice's enforcement experience and was promulgated after public notice and comment, including extensive comments from testing entities, disability rights groups, applicants, and others. See 28

C.F.R. Pt. 36, App. A, Section 36.309, at 794-798 and App. C, Section 36.309, at 921-923 (2013). Requiring entities to consider past modifications for students who received services under Section 504 and the IDEA is consistent with a definition of “sensory, manual, or speaking skills” that includes individuals with physical disabilities, learning disabilities, and other cognitive and neurological disabilities.

4. This approach is consistent not only with implementation by academic institutions but also industry practice. See GAO Report, Higher Education and Disability, Improved Federal Enforcement Needed To Better Protect Students’ Rights To Testing Accommodations, at 9-10 (Nov. 2011), <http://www.gao.gov/assets/590/581367.pdf>. GAO found that of approximately 179,000 applicants who sought and were granted testing accommodations by ten testing entities in one year, approximately half the applicants had a learning disability, one-quarter had ADHD or ADD, and the remainder had other disabilities, including orthopedic, vision, and psychiatric impairments. See *id.* at 2, 9-10.

5. As noted above, to receive a testing accommodation, an applicant must establish that the results on an examination will not reflect his or her abilities, but rather will reflect the impact of the disability. See 28 C.F.R. 36.309(b)(1). Demonstration of the need for an accommodation imposes an appropriate limit on the scope of applicants who benefit from Section 36.309. This requirement also is consistent with the regulatory provision that a testing entity may make reasonable requests for documentation only of “the [individual’s] need for” the modification or auxiliary aid; that is, the evidence and nature of the disability and its nexus to the applicant’s potential performance on the examination. See 28 C.F.R. 36.309(b)(1)(iv). As explained above, an individual who has a learning disability that affects how he reads, processes, and responds to written text likely can establish a connection between his disability or sensory skill and the manner in which he can take a written examination. However, an individual with dyslexia may not be able to show a nexus between his ability to perform on an examination that, for example, measures a purely manual skill. Moreover, consistent with the regulation, this interpretation would not include individuals with a learning disability or mental impairment who seek a modification of an examination where the impaired knowledge or skill is the factor the examination purports to measure. See 28 C.F.R. 36.309(b)(1).

6. Very few courts have addressed claims under Section 12189, and fewer still have addressed the issue of the definition of “sensory skills.” This dearth of cases may be due in large part to the fact, as reflected in the GAO report, that requests for modifications and auxiliary aids and services are afforded in most instances. In *Rothberg v. Law School Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1103-1105 (D. Col.), rev’d on other grounds, 102 F. App’x 122 (10th Cir. 2004), the district court fully assessed the plaintiff’s disability in the context of test accommodations. The district court granted a preliminary injunction to a plaintiff who had learning disabilities and requested additional time to take the LSAT. See *id.* at 1103-1105. The court concluded that Rothberg established she had a learning disability that substantially limited major life activities of learning and reading as she “cannot read and process information in the condition, manner or duration under which the average persons can perform that activity.” *Id.* at 1104. While not citing 28 C.F.R. 36.309, the court further found that “this impairment impairs Plaintiff’s ability to take the LSAT, and that without accommodation, the examination results will not accurately reflect her aptitude or achievement level.” *Id.* at 1105. On appeal, the panel reversed the preliminary injunction based on the district court’s inadequate findings regarding

irreparable harm and an improper balance of harms to the parties. See *Rothberg*, 102 F. App'x at 125-126.

Other courts addressing claims in the testing context have not addressed whether the asserted disability impairs sensory, manual or speaking skills and, at best, only summarily addressed, at times incorrectly, the requirements or standards of Section 12189 or 36.309.¹ See *Healy v. National Bd. of Osteopathic Med'l Exam'rs, Inc.*, 870 F. Supp. 2d 607, 618-621 (S.D. Ind. 2012) (plaintiff failed to establish that his asserted impairments of anxiety, reading disorder, and ADHD satisfied the ADA's definition of a disability); *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 224-228 (E.D. Pa. 2007) (applicant failed to establish that he had ADHD or that his learning disability substantially limited a major life activity); *Bartlett v. New York State Bd. of Law Exam'rs*, No. 93-4896, 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001) (plaintiff with dyslexia had a disability under the ADA and Section 504 and was entitled to compensatory damages for defendant's failure to provide testing accommodations); *Gonzales v. National Bd. of Med. Exam'rs*, 60 F. Supp. 2d 703, 706-709 (E.D. Mich. 1999) (plaintiff did not establish that he had a learning disability); *Price v. National Bd. of Med. Exam'rs*, 966 F. Supp. 419, 427-428 (S.D. W. Va. 1997) (plaintiffs failed to establish they had a disability that substantially impaired the major life activity of learning).

The United States does not take a position on whether Dr. Rawdin qualifies as an individual with a disability. We do not believe there is sufficient evidence in the record to determine whether Dr. Rawdin meets all of the criteria of Section 36.309. Because the district court assessed the claims under the wrong standard, we believe a remand and opportunity to supplement the record is appropriate.

Sincerely,

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¹ Given the space limitation and the narrow issue raised by the Court, we are not addressing other aspects of the cited courts' opinions with which we disagree, including describing Section 12189 as applying a reasonable modification standard.