



Jeanne A. Carpenter

Epilepsy Legal Defense Fund newsletter

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*Protecting the civil rights
of people with epilepsy
through education,
advocacy and increased
access to legal services.*

Bill Introduced to Restore the Protections of ADA for those with Epilepsy and other Disabilities

On July 26, 2007, the 17th anniversary of the Americans with Disabilities Act, the ADA Restoration Act (H.R. 3195) was introduced in Congress. The bill was introduced with 144 original co-sponsors and the number of co-sponsors continues to grow! The lead sponsors in the House included Majority Leader Steny Hoyer (D-MD) and Rep. Jim Sensenbrenner (R-WI). Senators Harkin (D-IA) and Specter (R-PA) have introduced a corresponding ADA Restoration bill in the Senate. This initiative was made possible in no small part by the very hard and sustained advocacy of the Epilepsy Foundation, along with other disability rights advocacy groups, including the American Diabetes Association. The Foundation, along with the Diabetes Association, represent two constituencies that have been particularly disadvantaged by the Supreme Court's narrow and unreasonable interpretation of the ADA reached in decisions issued in 1999 — which this legislation is intended to reverse.

Under these Supreme Court decisions, persons with so-called “correctable conditions” — that is, those controlled with medication or other “mitigating” measures — are generally no longer protected from discrimination in employment under the ADA. As a

result, the Supreme Court has created an absurd Catch-22 by allowing employers to say a person is “too disabled” to do the job but not “disabled enough” to be protected by the ADA. People with conditions like epilepsy, diabetes, HIV, cancer, hearing loss, and mental illness that manage their disabilities with medication, prosthetics, hearing aids, etc. are viewed as “too functional” to have a disability and are denied the ADA's protection from employment discrimination.

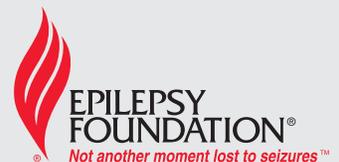
The Bill would amend the ADA to cover individuals with a physical or mental impairment as defined in the bill (or a record of an impairment or a perceived impairment), and to specify that the determination whether one has a covered impairment shall be made without regard to the individual's use of mitigating measures or whether the impairment is episodic. With this bill, the ADA's clear and comprehensive national mandate for the elimination of discrimination on the basis of disability will be properly restored.

Your help is urgently needed to garner support and passage of the ADA Restoration Act of 2007. Call your Representative today and ask him/her to co-sponsor the bill. For more information see www.epilepsyfoundation.org.

inside

- 2 Selected Recent Cases
- 5 The Advocates' Corner
- 7 Cooperating Attorney Profile
- 7 Resources

The Legal Defense Fund (a program of the Epilepsy Foundation®) provides legal guidance to individuals experiencing epilepsy-related discrimination and their families, along with referrals to a nationwide network of cooperating law offices. The Fund was established in memory of Jeanne A. Carpenter, a lawyer, Epilepsy Foundation® Board member, and a person with epilepsy. She was a tireless advocate for people with epilepsy from the time she was first diagnosed with the condition until her untimely passing in 2003.



States Expand their Anti-discrimination Laws to Cover Epilepsy and Other "Correctable" Conditions

As a result of recent legislation, laws in Washington and Maine — similar to laws in about eight other states, including California and New York — provide significantly greater protections than the ADA for persons with epilepsy and other so-called correctable conditions. Under Washington's new law (RCW Section 49.60.040, effective July 21, 2007), covered disabilities include medically cognizable or diagnosable sensory, physical or mental impairments, a record of such impairments or such perceived impairments. The statute also provides that a "disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job." The Maine law (MRSA section 4553-A, effective June 21, 2007) adopted a new definition of "disability" that covers "significant impair[ments] to physical or mental health." The law clarifies that "significant impairments" are impairments having an expected duration of more than 6 months and impair health to a significant degree as compared to what is ordinarily experienced in the general population, and that they are determined without regard to the use of mitigating measures. Importantly, the law expressly covers — "without regard to severity" — 27 specified conditions including epilepsy, diabetes and MS. The Foundation provided testimony in support of this law.

responder applied pressure with a knee to the man's back to restrain him. He was handcuffed behind the back at the same time. Responders transported the man to the ER, at which time he was unconscious. He was placed on life support for 36 hours. The treating doctor indicated that the man was suffocated. A lawsuit was filed in Denver in September 2006, seeking compensatory and punitive damages. Discovery in the case is ongoing. For information on other cases involving inappropriate first responder handling of seizures, go to www.epilepsyfoundation.org and click on "First Responders" under "Quick Links."

- *Cases Involving Access to Emergency Anti-Seizure Medication in Schools and Child Care.*

The Fund is working with a number of attorneys in various states who are advocating to ensure that schools and child care providers administer medication to treat prolonged or repetitive seizures. If treatment is greatly delayed, these seizures may result in severe brain damage or death. The standard out-of-hospital treatment is Diastat[®] Acudial[™], a rectally administered preparation of diazepam (a central nervous system depressant). The medication is FDA-approved and was specifically developed to be administered by people without medical training, such as parents, teachers and other caregivers. Many schools which do not have nurses on staff rely on calling 911 to provide medical care, even though state law may permit school staff without medical training to administer the medication. For a variety of reasons, this approach may violate federal law protecting the rights of students with disabilities (see Back to School article).

Similarly, many child care programs, including large chains, also refuse to allow staff to administer the medication to children in their care. However, child care centers are required under title III of the ADA to provide this type of medication as a reasonable modification of their standard care practices — to ensure that that services for children with epilepsy are

Selected Recent Cases

The following outlines some cases and advocacy initiatives in which the Fund is providing support to its cooperating attorneys. For more information about these and other cases handled by the Fund's cooperating attorneys, and for copies of briefs and other litigation documents, contact the Fund at legalrights@efa.org.

- *Gates v. Broomfield County* – Inappropriate Police Seizure Response (pending). In this case, a 42-year old man died when he was restrained in his home by Colorado paramedics and police officers. The responders were called to the home by the man's wife, who witnessed her husband having a complex partial seizure. The facts alleged in the complaint are as follows: The responders attempted to prevent the man from leaving his bedroom by forcing him onto his bed face down; at least one

comparable to services provided to children without disabilities. Most child care centers already provide comparable types of care — such as dispensing over-the-counter and prescription medications, administering EpiPen injections to treat allergic reactions, performing glucose finger prick tests to monitor children with diabetes, and providing toileting assistance and diaper changing. Accordingly, they may not argue that administering this medication would “fundamentally alter” the nature of their activities (which is not required by the ADA).

The Fund is assisting with administrative complaints concerning the failure of several school districts to administer emergency anti-seizure medication. It is also providing support related to litigation filed in California concerning a large child care provider that refuses to allow its staff to administer such medication, as well as legal guidance to various families and attorneys addressing the child care/medication issue in other states.

- *Employment Cases Involving Police Officers and Firefighters.* The Fund is working with several attorneys who are representing individuals with epilepsy who have been

denied jobs as police officers or firefighters, because they have had seizures in the past (sometimes five to ten or more years ago), and are regarded as a safety threat on the job. In a number of these cases, it appears that the departments have failed to adequately consider whether the individual’s particular condition actually poses an unacceptable risk of harm on the job. This practice may violate the ADA and state anti-discrimination law, which require individualized evaluations as to whether a person with a disability is qualified for a particular job opportunity. Employer evaluations of persons with epilepsy seeking police officer and firefighter jobs (or any other jobs) should take into account the required tasks of the particular position, the degree of seizure control, the type(s) of seizures, whether the person has an aura (warning) prior to a seizure, the person’s reliability in taking prescribed anticonvulsant medication, any side effects of such medication, and any accommodations which would help the person do the job. For more information see <http://epilepsyfoundation.org/epilepsylegal/legalinfoctr.cfm> (see Legal Fact sheets and then go to “Safety-sensitive Jobs” fact sheet).

State Emergency Anti-Seizure Medication Bill Introduced

The Fund, together with its affiliates and other advocacy groups, drafted a bill, introduced into the Tennessee State Legislature this year, that would help ensure that schoolchildren in Tennessee have prompt access to appropriate emergency anti-seizure medication. The bill would amend current Tennessee law, which specifies that only registered nurses may administer medication in schools. Because nurses are not available in most Tennessee schools, school administrators sometimes have been relying on calls to 911 to treat children in need of emergency medication, possibly resulting in unnecessary trips to the emergency room. The bill would require public schools to

ensure that a variety of school staff members are available to administer emergency anti-seizure medication to students in need. The bill specifies that public school districts must identify and train volunteer staff to administer the medication, and that they must retain the services of a full-time nurse until trained volunteers are in place. For more information on the bill, see the Web site of the Tennessee State Legislature, at <http://www.legislature.state.tn.us>, then click on “Legislation,” and insert the bill number – SB0461 – in the search box. The Legislature is on recess until January 2008; it is expected that the bill will be taken up again at that time.

The Fund, together with its affiliates and other advocacy groups, drafted a bill, introduced into the Tennessee State Legislature this year, that would help ensure that schoolchildren in Tennessee have prompt access to appropriate emergency anti-seizure medication.

- *Russo v. SYSCO Food Services*, 488 F.Supp.2d 228 (N.D. N.Y. 2007) – Employment Discrimination Decision. In this case, the court ruled in favor of a trucking company employee with epilepsy who was denied reassignment to non-driving jobs as an accommodation. Mr. Russo, who had worked for the company 20 years as an interstate truck driver, lost his interstate driver's license after being diagnosed with epilepsy. SYSCO refused to reassign Mr. Russo to positions as either a supervisor or warehouse worker, which were then available. This decision was based on the company doctor's finding that he could not operate commercial vehicles or equipment unless he was seizure-free for two years. The court, applying relevant

ADA regulations, ruled that Mr. Russo had shown that SYSCO believed he was unable to work in a class of jobs (those requiring heavy equipment operation), and thus, "regarded his epilepsy as a substantial limitation on his ability to work. Therefore, as a matter of law, plaintiff is an individual with a disability."

Turning to the issue of Mr. Russo's qualifications for the supervisor job, the court noted that because the written job description states that driving a truck "on occasion" is a principal requirement, Mr. Russo may be able to perform that job with reasonable accommodation," thus, raising a question of fact as to whether he was qualified for the job. With regard to the warehouse position, the court noted that this job apparently requires as an essential function the operation of a pallet jack and forklift. Mr. Russo's neurologist provided an opinion that he can safely perform these duties, while the company's doctor stated that he must remain seizure-free for two years before being considered qualified. The Equal Employment Opportunity Commission (EEOC), in its investigative of the case, the court noted, found that the latter opinion is arbitrary and capricious. The court ruled that, in any event, there are questions of fact as to whether plaintiff is qualified for this position. A trial is pending on these issues.

This case shows that protection under the ADA (notwithstanding the narrow definition of disability adopted by the Supreme Court) is available even for persons with epilepsy whose condition is controlled with medication or other means. Workers can win cases under the "regarded as" provisions of the ADA if they can show that the employer erroneously believed the individual's condition renders him/her unable to perform a broad range of jobs. Courts continue to find employers liable under both the ADA and state law when they rely on an inadequate medical assessments in determining the employee or applicant presents a safety risk or is otherwise unqualified.

Seeking the Fund's Assistance

The Fund's goals are to help individuals fight unfair practices towards people with epilepsy, to create case law that protects their rights, and to change laws and policies that discriminate against them. To carry out these goals, the Fund:

- Maintains a clearinghouse of information related the rights of people with epilepsy,
- Provides direct legal guidance to individuals experiencing epilepsy-related discrimination and their families, and
- Makes referrals to a nationwide network of cooperating attorneys, who provide these individuals legal representation; in turn, the Fund tracks the progress of these cases, assisting attorneys to help ensure positive outcomes.

Individuals experiencing discrimination related to epilepsy and their representatives are invited to request legal guidance or a referral to an attorney through the Fund's Web site, www.epilepsylegal.org, or by calling 1-800-332-1000. The Fund's staff will provide prompt legal guidance and determine whether a referral to a lawyer is necessary for direct legal advice or representation. The majority of lawyers to which the Fund refers cases have agreed to provide an initial consultation and services to a maximum of three hours at no cost. Once a referral is made, the lawyer will evaluate a potential case and advise on the next steps.

Attorneys representing persons experiencing such discrimination may contact the Fund for assistance via email (legalrights@efa.org) or by calling 301-459-3700. Individual attorneys and law offices that wish to assist the Fund by accepting case referrals may register with the Fund on-line directly from the Fund's Web site. Simply go to www.epilepsylegal.org, click on "Attorney Registration," and provide the requested information. Soon after a registration is completed, the Fund sends out a welcome package, with resources and background information.

THE ADVOCATES' CORNER

Back to School – Advocating for Students with Epilepsy

The hundreds of thousands of children living with epilepsy are affected in a variety of ways. For some, it will be a temporary problem, easily controlled with medication and outgrown after a few years. For others, it may be a lifelong challenge affecting many areas of life. Medical treatment of childhood epilepsy is getting better, and research towards a cure continues. However, children with epilepsy, just like adults, continue to be subject to discrimination, particularly in school. For instance, schools frequently fail to provide to children with epilepsy adequate special education services or accommodations to address learning problems caused by their seizures or the side effects of anti-seizure medication. And schools may refuse to administer emergency medication for seizures, placing a child's health at risk. The following outlines the federal legal protections for students with epilepsy.

The Individuals with Disabilities Education Act (IDEA) is the main law that governs special education for students with disabilities. If students with epilepsy have trouble making educational progress because of their condition, they can qualify for special education services under this law. The IDEA sets out a framework for referring and testing students for special education, identifying them as having disabilities that have an adverse impact on their ability to benefit from education, developing an individualized education program (IEP), placing them into special education, and reviewing their placements on a regular basis. The law contains a number of requirements designed to protect the rights of children and parents in the special education process.

If students with epilepsy need special education, they are entitled to IEPs that set out the special education and any related services they will receive, which are necessary to educate the child. (Related services are corrective and other supportive services that are needed to assist a child with a disability to benefit from special education. Such services may include speech-language or physical therapy and school health services.) The IEP must be implemented in the least restrictive environment in which the student's needs can be met. This means that, to the greatest extent possible, a student with disabilities

must be placed in general education and that supports and services are to be provided to make this placement successful. Only if a student cannot

Resources to Fight Discrimination in Schools

The Fund has been advocating, along with the Foundation's affiliates and its cooperating law offices, to ensure that children with epilepsy have equal educational opportunities. Parents of children with epilepsy who have concerns or questions about these and other issues are invited to contact the Fund for information and referrals to attorneys, if appropriate. Also, the Fund has developed a range of resources to assist parents of children with epilepsy self-advocate for school services. These materials may be downloaded from the Fund's Web site at <http://epilepsyfoundation.org/epilepsylegal/legalinfoctr.cfm>. Attorneys representing children in these matters also will find a number of helpful legal resources on the Fund's Web site, at <http://epilepsyfoundation.org/epilepsylegal/genattyresources.cfm>. The Fund is in the process of developing a comprehensive legal manual for attorneys and families regarding the rights of elementary and high school students with epilepsy, which should be completed in the coming months. Individual chapters will be posted as they are completed at <http://epilepsyfoundation.org/epilepsylegal/genattyresources.cfm> — please check back frequently for updates.

successfully be placed in the general education setting with supplementary aids and services can the student be removed to a more restrictive setting. School districts are required to maintain a continuum of placements to meet the needs of students.

For a child with epilepsy, commonly requested related services include: health services (such as administration of medication in the event of a prolonged seizure), specialized recreation services (for a child with difficult-to-control seizures), counseling (to compensate for the social adjustment aspects of epilepsy), and other non-instructional services. Specialized instruction may also be necessary to compensate for accompanying learning disabilities or other cognitive impairments resulting from frequent losses

of consciousness or other impairment of attention or learning ability.

In many cases, a student's epilepsy might not adversely affect his or her educational performance, but the student may need some accommodations to be successful or safe at school. Such students would be afforded the right to such accommodations under another federal law, Section 504 of the Rehabilitation Act — which prohibits discrimination against people with disabilities in programs that are operated or funded by the federal government. In these cases, the student should have a plan that outlines all necessary accommodations. Examples of accommodations might be: administration of routine anti-epileptic medication or emergency medication such as Diastat Acudial, extra time for tests (seizures or medication side effects may interfere with tests), or reduced workloads during medication adjustments. For these students, a Section 504 plan would be appropriate. The plan would set out the reasonable accommodations to be provided to the student on the basis of his or her epilepsy.

The Americans with Disabilities Act (ADA) provides to students with epilepsy in private schools rights which are comparable to those enjoyed in public schools. They have the right to reasonable accommodations that do not fundamentally alter the program, if the school is subject to the ADA.

Parochial School Obligations

Oftentimes, parents find that parochial schools may be reluctant to accept or accommodate a child with epilepsy, given their budgetary concerns, misconceptions about the needs of such children — and the fact that such schools may not be covered by federal anti-discrimination laws. Although the ADA applies to private schools and requires them to make reasonable accommodations, similar to the requirements of Section 504, the ADA does not apply to parochial schools or other programs operated by religious organizations. (The ADA contains a specific exemption for “religious organizations or entities controlled by religious organizations, including places of worship.”) Such schools would be subject to the non-discrimination requirements of Section 504 only if they receive funding (directly or indirectly) from a federal agency. Therefore, schools operated by religious organizations that do not receive federal funding are not covered by

either law (and there would be no protection against discrimination, unless there is an applicable state law).

Examples of direct funding that would establish coverage under Section 504 include school food and nutrition programs, assistance for at-risk students, and grants for technology, school improvement, or other purposes. Indirect funding occurs, for example, where a federal grant is made to the state which, in turn, allocates funds to local agencies that then provide funds to individual schools. At least one court has found that a parochial school within a Roman Catholic diocese was covered under Section 504 as a recipient of federal funds, although the funds were disbursed by the state through a local public school district. See *Dupre v. The Roman Catholic Church of the Diocese of Houma-Thibodaux*, 1999 U.S. Dist. LEXIS 13799, 31 IDELR 129 (E.D. La. 1999).

Section 504 obligations are enforced by the government agency that administers the federal funding the school receives. For programs administered by the U.S. Department of Education, these obligations are enforced by its Office for Civil Rights. If a program is administered by another federal agency, that agency will be responsible for enforcement. The U.S. Department of Agriculture (USDA), for instance, would enforce Section 504 where the only federal funds a school receives are for the school lunch program.

One Section 504 complaint against a parochial school, in which the Fund provided assistance, has had preliminary success. This complaint involves a California parochial school's refusal to allow a third grader with epilepsy to occasionally arrive at school late and leave early as an accommodation. The school also refused to provide the child with missed work assignments for times when she could not be in attendance. The mother of the child filed a Section 504 complaint with the USDA. USDA determined that it had jurisdiction over the matter because it funds the National School Lunch Program and the relevant archdiocese was a recipient of these funds through the California Department of Education. (A complaint was also filed with the U.S. Department of Education, but that agency found no jurisdiction, claiming the school did not benefit from any of its funding programs; that decision is being appealed.) USDA also found preliminarily that the school discriminated in

continued on p. 8

Cooperating Attorney Profile

The Fund greatly appreciates the strong advocacy of Timothy Salansky on behalf of people with epilepsy experiencing discrimination. Tim practices with the firm of Clay, Kenealy, Wagner & Adams PLLC, in Louisville, Kentucky. He focuses on general civil litigation, with particular emphasis on civil rights and employment discrimination and harassment based on race, gender, age and disability. Tim has successfully handled hundreds of personal injury and other claims and tried dozens of cases. Most notably, he was co-counsel in the trial of a medical malpractice case in which the jury awarded the plaintiffs \$2,500,000 in damages, the largest verdict ever rendered in the county.

Tim is an active member in the Kentucky Bar Association, the Louisville Bar Association, the Kentucky Justice Association, and the National Employment Lawyers Association. He is a Fellow of the National College of Advocacy. Tim has participated in the Volunteer Lawyer Program of the Legal Aid Society and was recognized as the Outstanding Volunteer Attorney in 1989. He intends to spend the remainder of his legal career helping working people whose constitutional and statutory rights have been violated by their employers and others.

Tim became interested in the legal rights of people with epilepsy when his son, Nicholas, was diagnosed with epilepsy after having a seizure several years ago. He became familiar with the Epilepsy Foundation and the Fund while representing a deputy sheriff who was fired from his job because he had a seizure off-duty. Tim was successful in defeating the Sheriff Department's motion to dismiss the case (receiving considerable assistance on the brief from the Fund). The case was recently settled. In her order overruling the motion for dismissal, the judge in this case found that epilepsy is indeed a disability covered under the ADA, even though the effects of the condition can be mitigated by medication. (This favorable decision is contrary to many other

recently decided ADA cases involving epilepsy. See the article on page 1.)

Tim has also handled several insurance-related matters referred by the Fund: One case involved an individual, who, after experiencing a prolonged seizure, was unresponsive and taken to a hospital emergency room and hospitalized overnight. Her health insurance carrier refused to pay for the services, classifying the incident as a non-emergency hospital visit not covered under her policy without prior authorization. She was left with a \$10,000 hospital bill. After Tim submitted an appeal, the insurer reversed its position and paid the bill.

Resources for Attorneys, Affiliates and Consumers

WEB SITE — www.epilepsylegal.org

We have recently enhanced the Attorney Resources Section of our Web site. For example, see the newly added materials in our brief bank. Also, there are a number of consumer resources that may be helpful (go to "Legal Information Center").

ON-LINE DISCUSSION FORUMS FOR ATTORNEYS AND AFFILIATES

An on-line discussion forum is available for the Fund's cooperating attorneys. The forum may be accessed directly through our Web site, by going to "Attorney Resources." This forum is intended for sharing information on epilepsy-related cases and general attorney networking. Users of the forum can receive automatic email notices when a new message has been posted in an area of interest (simply click on the "subscribe to this message"). To access this forum, it is necessary to plug in the user name and password that were created for cooperating attorneys when registering with the Fund. A similar discussion forum has been established for the Foundation's affiliates. This forum may be accessed on the intranet site, FoundatioNet. Once at the site, go to "Forums" and then to "Legal Advocacy" and click on "latest topics" near top of page. Any questions on use of these forums may be sent to legalrights@efa.org.

CASE LISTS AND BRIEFS

The Fund is continually updating its case lists around critical issues areas, which we are glad to make available. These lists summarize, for instance, court decisions on coverage of epilepsy as a disability under the ADA, and employment discrimination cases handled by cooperating attorneys. We are glad to make available a variety of briefs filed in these cases upon request (in addition to those found on our Web site).

Advocates' Corner • *continued from p. 6*

violation of Section 504 and the investigation is continuing. There has also been preliminary success in pursuing remedies under California State law (settlement discussions are ongoing).

Families with concerns involving parochial schools should consider pursuing similar complaints with USDA, as many parochial schools may participate in the school lunch program. For information on the complaint filing process established by USDA, see the Web site for its Office of the Assistant Secretary for Civil Rights at http://www.ascr.usda.gov/complaint_filing.html. More information and assistance may be

obtained by making a request through the Fund's Web site, www.epilepsylegal.org, or by emailing Legalrights@efa.org.

The fund gratefully acknowledges the assistance provided in preparing this article by Leslie Seid Margolis, Managing Attorney, Maryland Disability Law Center. For more detailed information on these and other issues concerning the rights of children with epilepsy, including the right to access emergency anti-seizure medication, see the July 2007 issue of Exceptional Parent Magazine — available at www.eparent.com (see the Organizational Spotlight column).

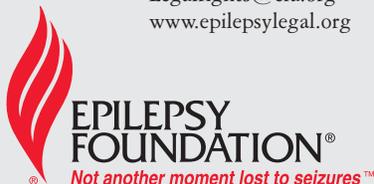
DONATING TO THE FUND

Won't you consider making a contribution to help support the Jeanne A. Carpenter Epilepsy Legal Defense Fund? Your donation will expand our capacity to provide legal assistance to the many people around the country who experience epilepsy-related discrimination every day. To make a tax deductible contribution, simply go to www.epilepsylegal.org/donate.cfm or click on "make a donation," which appears at the top of the Defense Fund's Web site (www.epilepsylegal.org).



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