Podcast Transcript:

Candace Cortiella: Welcome, Ms. Simon. Let's get started with this question: Many young adults with learning disabilities may not understand the importance of the provisions of the ADA, thinking that it duplicates the protection they receive under the Individuals with Disabilities Education Act (IDEA), the special education law. But that's not the case, is it?

Jo Anne Simon: No, it's not. There are some things that are similar but there are many things that are different about the ADA and Section 504. The first is that IDEA is a special education statute. So while it's based in civil rights law, it's also based in education and the way that is seen under IDEA for a student's rights to be protected is to ensure that they have a free, appropriate public education.

The ADA and Section 504 cut a much broader swath, and they protect people with disabilities at all areas of life, including (but not limited to) education. So it affects people in employment. It affects their ability to not be discriminated against by being excluded from certain activities. For example, people who use wheelchairs are allowed to go into a restaurant. A lot of times, people had been kicked out of restaurants because they used wheelchairs and the owner might think they would scare the other patrons. People have all sorts of stories like that, so the ADA and Section 504 make it illegal for people to engage in that kind of activity.

Candace Cortiella: There's been a lot happening over the past few years with regards to the ADA. Can you give a brief overview of the events that have occurred, including these regulations?

Jo Anne Simon: Sure. I'll explain where [the new regulations] fit into the picture. But there are two basic things that have happened in the last few years. One is that the ADA Amendments Act was passed in 2008. That was legislation that sought to restore the original intent of the Americans with Disabilities Act in terms of the people it sought to protect. And I'll explain a little bit about that.

When you go to court to assert your rights under the ADA, there will be lawyers on both sides, your lawyers and the other person's lawyers. And the other person's lawyers

were taking the definition of disability and parsing it out and then picking it apart, phrase by phrase. For example, they would latch on to whether you were “substantially limited” and what did that [phrase] mean. They would latch on to whether you were “substantially limited in a major life activity” and what were [those] major life activities. And so that got picked apart (oftentimes in cases where it was absolutely ridiculous) that the person was found not to have a disability. But that’s because at some level, it’s been blamed on just an unhelpful articulation of what it meant to have a disability.

And so the ADA Amendments Act, which was originally called the ADA Restoration Act, was meant to change and to confirm that the people that the law meant to protect were still protected, that this was meant to be liberally construed. It was meant to protect more people than not. It was meant not to exclude people with impairments that weren’t extraordinarily severe impairments because those people are discriminated against too.

And the whole nature of the ADA was to not discriminate against people who had disabilities. Not that you could only discriminate against those with minor disabilities. That’s not what the law was meant to do. And so the ADA Amendments Act brought it back full circle to where Congress originally intended, for people with disabilities to be protected.

In September of 2008 that law was finalized. The Equal Employment Opportunity Commission (EEOC) was given the charge to go back and fix the regulations and specifically to look at what they interpreted “substantially limits” to mean a significant restriction.

And Congress said, “We don’t need a significant restriction. You have to go back and fix that language and make sure that it’s clear that people are protected who might not have a significant restriction in a major life activity.” So the federal rule-making process began. The EEOC, the agency responsible for doing this, got together. They came up with proposed regulations. Those were issued late in 2008. But then we had a presidential election. Whenever there’s a new administration all the regulations that are in the middle of being done are put on hold. The new administration then staffs it differently, and they may or may not make some changes. And then they issue them for a public comment.

They issued new proposed ADA regulations in September of 2009, with public comments due in November (after a 60-day comment period). They received a lot of comments on a number of things, including the way they try to elaborate how it is that people would fit into categories where it's a given that you're protected and those who really are not people they intended [to be protected]. It's what I call the "hangnail category"; they didn't expect that everybody who had a boo-boo was going to be protected by the law, but you have to find a way of saying that.

They came up with three categories:

- a group that would generally be covered
- a group that might or might not be covered, depending on circumstances
- the group that generally wouldn't be covered.

The problem with that middle group is that part of what the statute said was that this is not supposed to be a focus of the law. The law really doesn't want you to focus your attention on whether someone has a disability. The law wants you to focus your attention on eliminating discrimination. And so many people felt that that middle category undid the general purpose in amending the ADA by drawing people's attention once again to the issue, to this battle over whether or not you have a disability.

I understand that there were many, many comments to that effect. We do not yet have revised regulations from the EEOC. It's now been over a year that they are going through the comments and massaging them and drafting revised regulations that will then be put out as final regulations. We don't have a date [for the final regulations]. We had hoped to have something in time for the 20th anniversary of the ADA in July 2010 but that clearly did not happen. There is some hope that we would have it before the first of the year (2011), but I don't see that happening either.

So right now, we're sort of relying only on the statutory language and on the comments by congressional members on the floor when they discuss what it was they meant by who is supposed to be protected by the statute. So that's one thing we're waiting for and we will have further guidance on.

The other thing that happened was that, in the general course of business, the U.S. Department of Justice, which has the authority to enforce Titles 2 and 3 of the ADA—Title 2 applies to state and local governments or public services, and Title 3 applies to

public accommodations, meaning private entities whose services are open to the public. So it might be the stadium. It might be a private school. It might be the gas station. It might be the mom-and-pop shop. Those kinds of entities are subject to Title 3.

There are specific regulations that are part of this revised regulation by the Justice Department that deal with a lot of issues that we're not going to address today…things like service animals, stadium seating in big arenas and football stadiums.

But one particular area that is relevant to students with learning disabilities is Section 309 of Title 3 of the ADA, which covers courses and testing that wouldn't be part of a regular school program. By that I'm thinking of things like the course that somebody might take if they wanted to become a cosmetologist or a plumber, or somebody who might want to take the accountant's exam, who would take a Kaplan course or a Princeton Review course. Those kinds of courses are subject to the ADA and have to be made accessible to students with disabilities of all kinds.

In addition to the courses, the test that you're studying for would also be covered by Section 309, whether it's the plumber's exam or the cosmetician's exam or the massage exam or the law school admissions exam or the Bar exam or the medical boards. Those would all be covered by Section 309.

Those regulations were put out to the public in 2008. Responses went back in. On the 20th anniversary of the ADA the Justice Department issued new regulations, final regulations for the sections that they were revamping for Titles 2 and 3. A good deal of those regulations will go into effect March 15, 2011, including the regulation for Section 309 that I just mentioned.

Candace Cortiella: And Section 309 also covers tests like the SAT and the ACT which many, many students at the high school level take.

Jo Anne Simon: Yes, absolutely, and that's where there's a little overlap between where IDEA and ADA Section 504 gets confusing for many people because there are different laws and they're protecting students in similar ways but for different reasons and in connection with different parts of their secondary school career.

So when I talked about taking the plumber's exam or the law school admissions exam and the Kaplan courses, I was also talking about courses like SAT prep courses or ACT prep courses as well as the SAT and the ACT itself, and any of the other tests they

might give like the SAT 2 or the AP exams. Those are all covered. Those are all required to be accessible to people with disabilities under Section 309.

Candace Cortiella: Also, these regulations that were revised and issued by the Department of Justice also seek to address some issues they had identified with regard to the amount of documentation that testing entities were asking for when students were requesting an accommodation on tests such as the SAT or the ACT. Is that correct?
Jo Anne Simon: Yes. And here's what happens: the courts became more narrow about who they thought had a disability. The big case that has shifted the landscape, involved twins (one who wore glasses and one wore contact lenses) who both they applied for a job as an airline pilot. United Airlines said their vision wasn't good enough. And the twins said, "But when we have corrective lenses we see just like everybody else." And the court said, "That's not good enough." And the twins said, "Well, if it's not good enough when we're wearing our glasses, when we're not wearing our glasses then maybe we're protected on the ADA as a person with a disability." Then the court said, "Oh no. That doesn't count either."

Because of that kind of duality, that case went up to the Supreme Court which found that if you use the mitigating measure (e.g., you put your glasses on and you can see 20/20), then you really weren't protected by the law. That's not what the law meant. But that also extended to people who use hearing aids or took medication. These things, called mitigating measures, then became part of the mix.

That then complicated terribly the analysis of who had a disability. And so the standardized testing industry, which had not been particularly responsive in the first place, became even more resistant to providing accommodations to students and made them provide more and more information so that they could be doubly sure that they had a disability.

Because of that, the Justice Department, which wasn't looking at the definition of disability but was saying, "Wait a second, we're looking at these records and we're getting complaints from people who say, 'I was diagnosed when I was seven. I was in special education. I got accommodations in high school. I got accommodations in college. But when I applied for accommodations on a graduate admissions test, I was told I don't qualify anymore, that I'm doing too well in school.'"

Parents had kids who had spent a lot of time on extra tutoring or whose kids took an SAT prep course. Sometimes their children were being denied accommodations by the SAT or by the ACT because the child was doing too well in school. But many times, they were doing well in school because something about the environment was being accommodating. Let's say it was a very small class size. If you're in a school with 10 or 15 kids in a class, it's much easier to get the individual attention you need that you would get, for example, maybe in a special education classroom. But because it's a general education program, but it's a small class size, it's helping to accommodate your needs. Or, [some students] were getting formal accommodations, but the SAT and the ACT were saying, "Well no, you don't have a disability because your score on one particular item is not low enough." And we interpret the ADA definition of "substantially limits" to mean that you have to be below the average range. But if you're taking the SAT, you're going to be a better student as opposed to a worse student, right? And you wouldn't necessarily expect to see many scores below the 16th percentile.

And so it became a very complicated picture with a lot of dancing around of terminology. What the Justice Department realized was that people were being required to put in tons and tons of information, go back to doctors and psychologists, spend a lot of money to get revised reports.

One thing the [testing] organizations do is insist that the data be no more than three years old. That may make some sense when you're in high school. Let's say you're 16 and the last time you were assessed was at 14, okay that's fine. But beyond the age of 16 or 17, the brain doesn't change all that much. You're not going to all of a sudden not have a learning disability that you had earlier on. And we now know that learning disabilities are chronic, lifelong impairments.

But organizations such as the graduate admissions like the LSAT and the MCAT (and maybe the GRE or the accountant people) were asking for them to go back and get retested because their testing was maybe three-and-a-half or four years old.

And, of course, there's no science to support that because there's no science that indicates that people will get over these disorders or that something drastic will have changed. And if something does happen, let's say somebody gets in a car accident and has a head injury, well of course there is some additional circumstance there that might very well makes sense to have some additional assessment done. But that's not to

protect the entity because somehow or other you area no longer disabled. But that's the way it's being used.

So the Justice Department said in its regulations that if you request documentation, it has to be reasonable and be limited to the need for the modification, accommodation, or aid or service requested. I always say (and I goof around with this) is that if what you really need is extended time you need to show that you read slowly. Then it really doesn't matter what age you were toilet-trained.

But sometimes the level of information that's been requested is extraordinarily intrusive and goes very far afield. The other thing the new regulation says is that when an organization is considering a request from somebody who wants accommodations, they have to give considerable weight to the documentation of past modifications or accommodations, received in similar situations, as well as accommodations and related aids and services provided in response to an IEP or a 504 plan in school.

So for example, I often find that people are rejected even though they had an IEP or a 504 plan because the testing entity just discounts that. And here the Justice Department is saying, "You have to give a lot of weight to the fact that they have that evidence." They're not saying you have to have exactly what's in the IEP or the 504 plan. But they're saying they have to give considerable weight to that history and those recommendations.

The Justice Department also says that the entity has to respond in a timely manner because sometimes people will find that they wait and wait, and it's months and months, and the time goes by and they can no longer apply for that program for the next year because it's taken too long. So the Justice Department said that similarly, they can't wait forever before they give you a response. And when they do, they have to tell you why, what it is that has led to their thinking that you don't have a disability. Those are the new changes to the Justice Department regulations. You no longer need to show as much limitation.

Candace Cortiella: Back to these new regulations with regard to the examinations and courses that are associated with those examinations. When the Department of Justice issued these draft regulations back in 2008, they commented that through their enforcement efforts, they had discovered that requests made by testing entities for

documentation regarding the existence of a disability and requests for a modification were often inappropriate or burdensome. I think you've just done a great job of articulating how burdensome some of them have made it in the history of students with learning disabilities. But do you think that these new regulations will actually correct the issues that the department had sought to address?

Jo Anne Simon: I think that the department has done a good job in revising its regulations. Being a person who has to deal with so many organizations who would like not to comply, or are making it difficult to comply, I think that in my heart of hearts, I would probably like it to be a little stronger. On the other hand, I think they did a very good job of being very reasonable in their approach to a situation that has been, on the whole, unreasonable in terms of the kinds of burdensome requests.

When I look at their direction for some of these organizations, in what you have to give them to demonstrate disability, there are some 30 pages of instructions on how to make sure you comply. And if you have a learning disability and Attention Deficit Disorder and perhaps an anxiety disorder, you've got three sets of requirements to keep track of and to massage.

By the way, if you have an anxiety disorder, you're going to be so anxious about looking at all that stuff you're probably just going to turn off. If you have a reading disability, why do they give you 30 pages of instructions to read? Just to make it difficult? There's no need for that kind of level of specificity.

In many cases, they require particular types of tests and then respond that those tests aren't very good. Well then, why are you suggesting them? In other cases, organizations require certain types of tests for psychological disabilities that any psychologist will tell you, you don't need give that type of test to show that type of disorder. That's ridiculous. So it's costing people more money. Again, they're raising barriers by their requirements.

We'll see once the Justice Department regulations are effective in March. It's very clear from the ADA that proving a disability wasn't meant to be an extensive analysis. That language, "was not meant to be extensive analysis," is in the statute. There's no question what the statute says. The regulations basically tell you how to enforce the statute. The statute itself says it's not supposed to be an extensive analysis.

So with these pages and pages of documentation requirements, one could argue right there that they are requiring an extensive analysis that Congress says isn't needed. So I think that even before March of 2011, it would behoove organizations that have to comply with the law to take another look at what they're doing and make some judgment calls with regards to common sense and indicate a common sense way, which is another word that's used in the statute of determining whether someone has a disability, giving courtesy to those professionals who have actually evaluated the person and not fighting everything so much. It would make sense for everybody that they would be protected by the fact that somebody has submitted documentation of having a disability. That should be the end of the discussion.

I hope that by March 2011, if they're not doing it until then, they will take this very seriously and indeed give considerable weight to the evidence and to the opinions of the treating clinicians who have written up these reports.

Candace Cortiella: What types of specific changes might we see with regard to students with learning disabilities?

Jo Anne Simon: Certainly the current proposed ADA regulations indicated examples of people who would be protected by the law, and they indicate that would include somebody who is potentially extremely bright, maybe went to college (even without accommodations) but reads slowly because of a learning impairment. That also is language that appears in the Congressional records in the Congress' discussion of the law in 2008. But it also appears in a similar form in the draft regulations. I'm assuming that similar language will continue to be in the final regulations.

So I think one change we might see is leading by example. I don't think the new regulations will have a definition of what "substantial limitation" means. But they will do it by giving examples that people can relate to. Everyday examples like the person with dyslexia who has difficulty with [certain tasks], they're covered. And everybody says, "Oh that sounds like every dyslexic I've ever met." Okay, they've taught by example. And I think that is going to make things a little bit easier for students with learning disabilities, I certainly hope so.

The other thing, though, is that where you have an industry that is not particularly interested in compliance but is fearful about their product (which is the test), you might see some greater wrangling with people about what an accommodation is. We have a

rule-of-thumb accommodation, which is time-and-a-half [to take a test]. But many people need more than time-and-a-half. And I'm seeing a retrenching of that and a greater resistance to giving double time. I think that's a reaction to the law becoming obviously more liberally construed. I hope that that does not continue to be the case, but I'm concerned that there might be some differences in the responses to the request for accommodation.

I also see changes (and this has nothing to do with the law at all) but will be something to deal with under the law, and that is the changes in technology. So many of these tests are now (or will be) given on computer. I believe that the industry has not given as much attention to how putting a test on a computer changes the cognitive impact of that test, i.e., reading on a computer screen as opposed to a [printed] page where students mark up the text. That's part of what such students do to negotiate the text that they've been taught as a compensatory means to deal with their learning disabilities. You can't do that on a screen. How does that make the student need more time? What about students who can't fill in those little boxes, but on a computer, that won't be an issue. So perhaps that will change some things for the better.

So I see technology [improvements] but then there are also the [specific] programs and their use. We've seen a few cases of blind students who need voice-activated testing. They need to a way to respond and have that computer-based test made more accessible. That's something we will be working out in the next few years.

Candace Cortiella: So it seems that it's critical that we take these regulations with regard to documentation in partnership with the changes made to the fundamental definition of disability that was made by the ADA Amendments Act.

Jo Anne Simon: Yes, they're sort of hand-in-glove. Part of the documentation requirements' madness has really revolved around this notion that everybody's going to send you a letter but they're not really disabled. Now that the law is saying, "Look, stop arguing. That's not the point here." If somebody says that they have a disability and they have a professional who documents that, take it on faith. Hopefully that will make a difference. I'm not sure that's what's going to happen in the field but hopes springs eternal as they say.

Candace Cortiella: Yes. I know that this has been a difficult issue for many students with LD, and their parents, who have gone through these burdensome requests with

testing people. So we can hope that there will be some improvement. Thank you very much, Ms. Simon, for spending some time with us today. We are grateful for your expertise in this important area and for helping us understand what's happening and how it should play itself out and what we might look forward to.