Legal Rights – Legal Issues for People with Epilepsy

cases Epilepsy Conference 2008

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Legal Assistance for Discrimination
Carpenter Defense Fund

- Provides legal guidance to consumers
- Case referrals to attorneys
- Go to www.epilepsylegal.org for attorney referrals and fact sheets or call 1-800-332-1000
- Big issues: job discrimination, medication in schools/day care, police response to seizures
- Contact the Epilepsy Institute at www.epilepsyinstitute.org for services (employment, counseling, etc.)
Employment Discrimination

• NYS Human Rights Law prohibits discrimination against qualified individuals with disabilities
  – Applies to employers with 4 or more employees (ADA applies if 15 or more employees)
  – Covered disability = any physical, medical, mental or psychological impairment, or a history or a record of an impairment – which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques
  – Probably covers epilepsy
  – For NYC residents: more information/file complaint, go to www.nyc.gov/html/cchr
  – For NYS residents outside NYC: www.dhr.state.ny.us/hrlaw.html

• As of 1/1/09, ADA coverage is extended to epilepsy
  – Supreme Court had ruled in 1999 that Americans with Disabilities Act does not cover conditions that are corrected through medication (epilepsy, diabetes, cancer); and in 2002 ruled it covers only conditions which “severely restrict” major life activities
  – ADA Amendments Act of 2008, reverses these court decisions (see www.epilepsyfoundation.org)
ADA Now Covers Epilepsy

• The amendments retain the ADA's basic definition of an individual with a "disability" – a person who has:
  – an impairment that substantially limits one or more major life activities
  – or a record of such an impairment
  – or who is regarded as having such an impairment

• However, it changes the way that these statutory terms should be interpreted in several ways:
  – Mitigating measures such as use of medication shall not be considered in assessing whether an individual has a disability
  – Impairments which substantially limit bodily systems -- including the neurological system -- are covered as disabilities
  – Episodic conditions or those in remission are covered disabilities if they would substantially limit a major life activity when active
  – An individual can succeed on a “regarded as” claim by showing that he or she was denied an employment opportunity based on an impairment (real or perceived), whether or not it limits a major life activity
Employment: Accommodations

• Reasonable accommodations – modifications that will not cause an undue hardship
  – Private area to rest after seizure
  – Rubber mat or carpet to cushion falls
  – Allow work on day shift to avoid sleep disruption
  – Checklist to assist in remembering tasks (if memory impairment)
  – Waive non-essential tasks (driving) or reassign to open job
  – No requirement to provide first aid or other personal care

• Employee must make request – no “magic” words needed; employer may ask for documentation
Employment: Disclosure

• Pre-hire – employer may not ask about disability or severity
  – May ask about performing job functions

• Post job offer – may require exam or ask disability-related questions
  – If offer withdrawn, must be job-related and consistent with business necessity or because of direct threat

• Post employment – disability inquiries must be based on reasonable belief one cannot do the job or poses safety risk
Employment: Voluntary Disclosure

- If there is need for an accommodation
- Consider creating voluntary action plan (see EEOC guidance - www.eeoc.gov/facts/epilepsy.html)
  - who to contact in an emergency
  - warning signs of a possible seizure
  - how and when to provide assistance
  - when to call an ambulance
  - who in the workplace should know this information
  - educate co-workers about epilepsy to dispel misperceptions
ADA Complaints

• Complaint Filing Requirements
  – In general, a complaint of discrimination must be filed within 300 days of the alleged discrimination (180 days if the state does not have a fair employment practices agency). State law may permit a longer period. Complaint may be filed with either the EEOC or a state fair employment practices agency.
  – When investigation is done and case is not resolved; a right to sue letter is sent. Can be requested sooner. A suit must be filed within 90 days.
Family and Medical Leave Act

FMLA coverage:

- Private employers with 50 or more employees and all public employers
- Must have worked at least one year and 1250 hours over that year
- Provides right to take up to 12 weeks of unpaid leave during a 12 month period –
  - To care for one’s “serious health condition” or to care for a child, spouse, or parent who has such a condition (or for the birth or adoption of a child)
FMLA Cont’d

• Must have a “serious medical condition” (not a disability)
  – Includes an illness, injury, impairment, or physical or mental condition that either requires inpatient, hospice, or residential medical care or continuing treatment by a health care provider
  – Includes chronic conditions, such as epilepsy, that cause episodic rather than continuing periods of incapacity.

• Can take intermittent leave or work on a reduced schedule if showing such leave is medically necessary and the serious health condition is best accommodated in this way

• The employer must reinstate the employee to the same or equivalent position (with the same pay and benefits) that the employee held before taking leave
FMLA cont’d

• Request for leave -- entitles the employer to documentation on the serious health condition form, including information about: the anticipated duration of the condition, how it interferes with doing work

• An employer may also require periodic reports during the period of leave of the employee's status and intent to return to work, as well as "fitness-for-duty" certification upon return to work in appropriate situations
Educational Rights: IDEA

• Mandates free appropriate public education for kids with disabilities
  – Students with epilepsy having trouble making educational progress are entitled to special education
• Frequent seizures or medication side effects may cause regression, difficulty with concentration or cognitive issues
  – Individualized education plan: sets out specifically designed instruction and measurable goals with related services (counseling, health, etc.)
  – School must assess functional, academic and developmental issues
  – Parents may request second evaluation at school’s expense
IDEA Cont’d

• Disagree with IEP – parents can
  – file complaint with state dept of Ed.
  – seek mediation or
  – due process hearing
Educational Rights: Section 504

• Student whose epilepsy is a disability (but does not interfere with learning) gets accommodations under Section 504 of the Rehabilitation Act
• Establish “504 Plan”
  – Medication administration/trained staff
  – Include seizure action plan – use EF model
  – Supervision of student
  – Dietary restrictions
  – Modified schedule, extra time for work/exams
  – Rest period post-seizure
  – Communication log – home and school
  – Education of peers about seizures

• Dispute – file complaint with U.S. Dept. Education
  [link](https://www.ed.gov/about/offices/list/ocr/complaintintro.html)
Education: Emergency Medication

- Section 504 and IDEA require health services
- Major issue for Diastat AcuDial – rectally administered valium
  - FDA approved for use outside hospital for cluster seizures and prolonged seizures, which may cause brain damage/death
- NYS allows only RNs to give medication in school, unless there is an emergency
  - Unclear if this applies to Diastat
- Schools must ensure it is given, whether by RN or other staff; cannot rely on 911
- School transfer possible, preference for “neighborhood” school
Child Care

• Programs are covered by ADA or Section 504 (parochial providers only covered if getting federal funds)
• May not exclude child with epilepsy based on condition alone or assumptions about care
• Must provide services comparable to those provided other kids – e.g.,
  – First aid for seizures
  – Allow rest after seizure
  – Special diet
  – Medication (e.g., Diastat and other emergency meds)
Criminal Justice

- Arrests and police misconduct may occur when seizures are mistaken for criminal behavior
- Post-seizure confusion and complex partial seizures mistaken as hostility/defiance (flailing, non-responsive, repeated motions, wandering)
- Wearing a medical alert bracelet can help
- Sometimes police use excessive force (Tasers/restraint)
- Testimony from neurologist often needed or video-EEG monitoring of seizure behavior to show pattern
- Epilepsy Foundation has new training video for police departments
Social Security Disability

• SSDI – based on payroll contributions
• SSI – based on financial eligibility (can also qualify for Medicaid/Medicare)
  – Very low income and assets
• Automatic qualification if
  – More than one convulsive seizure/month
  – More than one non-convulsive seizure/week (with change in awareness, interference with activities)
  – Must persist for 3 months after treatment
• Can also qualify if significant functional limitations
• Must see Dr. regularly and take medication
• Most applications denied; more appeals granted
NYS Driver Licensing Law

- One-year seizure-free period required
- But may be licensed if seizure due to medication change by doctor
- A hearing will occur if requested within 30 days
- Persons with epilepsy may not drive trucks or buses, but a waiver may be requested
- Doctors are not required to report patients
- More info: www.epilepsyfoundation.org or NYS DMV
Resources -- ADA

1. EEOC, Questions and Answers about Epilepsy in the Workplace, available at http://www.eeoc.gov/facts/epilepsy.html
2. EEOC, Reasonable Accommodations Guidance http://www.eeoc.gov/policy/docs/accommodation.html
3. EEOC, Filing a Discrimination Charge www.eeoc.gov/charge/overview_charge_filing.html
5. Job Accommodation Network (Jan) – 1-800-526-7234 or www.jan.wvu.edu See www.jan.edu/media/epilepsy.html (accommodations re epilepsy) and https://www.epilepsyfoundation.org/epilepsylegal/upload/accomrequest.pdf (Ideas for Writing a Reasonable Accommodation Request)
6. Regional ADA Technical Assistance Centers; for listing, see www.dbtac.vcu.edu
7. Robert Fraser, “Working Effectively with Employees Who Have Epilepsy,”
   http://digitalcommons.ilr.cornell.edu/edicollect/15/

FMLA
2. Department of Labor, Certification Form for Health Care Provider:
Resources -- Education

• Manual on Legal Rights in School and Child Care
  www.epilepsyfoundation.org/epilepsylegal/LegalFactSheets.cfm

• Questions and Answers about the IDEA
  www.epilepsyfoundation.org/epilepsylegal/upload/niccydidea.pdf