

*The U.S. Equal Employment Opportunity Commission*

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*EEOC Office of Legal Counsel staff members wrote the following letter to respond to a request for public comment from a federal agency or department. This letter is an informal discussion of the noted issue and does not constitute an official opinion of the Commission.*

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**ADA: Qualification Standards; Disparate Impact**

November 17, 2011

[ADDRESS]

Dear \_\_\_\_\_:

This is in response to your letter, dated October 9, 2009, and postmarked October 12, 2011, asking whether the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), prohibits the State of Tennessee from requiring students with learning disabilities to take "Gateway tests" or "end-of-course assessments" in order to receive their full high school diplomas. We responded to the same inquiry when we received it in December of 2010, by referring you to the Department of Education. Please find the earlier response attached.

In the event that you found our earlier response incomplete or were seeking additional clarification, however, we are responding to a statement in your letter that raises a concern under Title I of the ADA, 42 U.S.C. §§ 12101 *et seq.*, which EEOC enforces. You correctly point out that some individuals cannot obtain a high school diploma, and therefore cannot obtain jobs requiring a high school diploma, because their learning disabilities caused them to perform inadequately on the end-of-course assessment.

Under the ADA, a qualification standard, test, or other selection criterion, such as a high school diploma requirement, that screens out an individual or a class of individuals on the basis of a disability must be job related for the position in question and consistent with business necessity. A qualification standard is job related and consistent with business necessity if it accurately measures the ability to perform the job's essential functions (i.e. its fundamental duties). Even where a challenged qualification standard, test, or other selection criterion is job related and consistent with business necessity, if it screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation. See 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, 1630.15(b) and (c); 29 C.F.R. pt. 1630, app §§ 1630.10, 1630.15(b) and (c).

Thus, if an employer adopts a high school diploma requirement for a job, and that requirement "screens out" an individual who is unable to graduate because of a learning disability that meets the ADA's definition of "disability," the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma.

Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation. It may do so, for example, by considering relevant work history and/or by allowing the applicant to demonstrate an ability to do the job's essential functions during the application process. If the individual can perform the job's essential functions, with or without a reasonable accommodation, despite the inability to meet the standard, the employer may not use the high school diploma requirement to exclude the applicant. However, the employer is not required to prefer the applicant with a learning disability over other applicants who are better qualified.

We hope this information is helpful. This letter is an informal discussion of the issues you raised and should not be considered an official opinion of the EEOC.

Sincerely,

/s/  
Aaron Konopasky  
Attorney Advisor  
ADA/GINA Policy Division

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[Return to Home Page](#)