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The ABC's of the ADAAA:

Understanding the Scope of the new Disability Law

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On September 25, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”). The ADAAA dramatically broadened the scope of individuals protected by the Americans with Disabilities Act (“ADA”). Today, we will explore the changes wrought by the ADAAA, as well as the ADAAA’s impact on other statutes. A firm understanding of these changes can be important for any employer, but is all the more vital for school districts, which are impacted by these changes on two separate fronts.

A: About the ADAAA

The ADAAA became effective on January 1, 2009. As its name implies, the ADAAA amends the ADA by redefining several key provisions. Most significantly, the ADAAA expands upon the definition of “disability” and includes a new standard for interpreting the definition of “disability.” It is important to keep in mind that the ADAAA does not create new substantive rights. Instead, the ADAAA extends those rights articulated in the ADA to a wider group.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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Section 504 of the Rehabilitation Act (“Section 504”) also applies to people with disabilities. The ADAAA specifically changes the definitions of “disability” and “person with a disability” to reflect the new, broader, definitions of those terms found in the ADAAA. Therefore, the ADAAA also affects school districts’ Section 504 obligations.

B: Background of the ADA

Congress enacted the ADA for four basic purposes. Each of these purposes was intended to protect individuals with disabilities from discrimination. The specific purposes are:

1. To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. To ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities;
4. To invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

In addition to a general prohibition against discrimination, the ADA contains specific provisions related to employers. *See, generally*, 42 U.S.C. §§ 12111-12117. Most significantly, the ADA imposes a duty upon employers to provide “reasonable accommodations” to “qualified individuals with disabilities” that allow the individual to perform the essential functions of their job.

In order to benefit from any of the protections of the ADA, employment related or otherwise, an individual must have a “disability.” The ADA defined the term disability, with respect to any individual, as:

1. A physical or mental impairment that substantially limits one or more major life activities of such individual;
2. A record of such an impairment; or

3. Being regarded as having such an impairment.

42 U.S.C. § 12102(2). Because whether an individual is disabled within the meaning of the ADA is a threshold question that must be answered before determining whether the individual is entitled to any protections under the ADA, these definitions were the subject of extensive litigation.

I. Impairment that Substantially Limits a Major Life Activity

The United States Supreme Court interpreted the phrase “substantially limits” as establishing a “demanding standard for qualifying as disabled.” *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). Relying on the *Toyota* decision, many courts required that a condition impose a “considerable” impairment on “activities that are of central importance to most people’s daily lives.”

The United States Supreme Court also interpreted the ADA to only apply to impairments that were unmitigated by outside measures. *Sutton v. United Airlines*, 527 U.S. 471 (1999). After the *Sutton* decision, courts would routinely dismiss ADA cases once it was proven that the plaintiff’s disabling condition was controlled by some external factor not controlled by the defendant, including the plaintiff’s own adaptations, such as extra studying to overcome attention deficiencies.

II. Regarded as Having a Disability

Under the ADA, a person is considered to have a disability if the person is “regarded as” having such a disability. With respect to employers, this means that an individual is entitled to the protections of the ADA if the employer treats the person as having a disability. In some cases, this definition extended the protections of the ADA to individuals, even though they were not disabled, or suffered even the slightest impairment. This section often applied to situations where an employer treated an employee as disabled based on myths, fears, or stereotypes about a perceived medical condition (even though the employee was not disabled).

C: Changes Made by the ADAAA

As stated by the Congress, the primary purpose of the ADAAA is “to carry out the ADA’s objectives of providing a ‘clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards for addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.” H.R. 3195 § 2(b)(1). To “reinstate” these broad protections, the ADAAA also specifically overrules United States Supreme Court decisions, including *Toyota* and *Sutton*, that limited the scope of the ADA to a relatively narrow group of individuals. *See* H.R. 3195 § 2(b)(2), (3).

In addition to overturning those specific Supreme Court decisions, the ADAAA includes specific provisions addressing the interpretation of the term “substantially limits,” the effect of mitigating factors, episodic conditions, and other provisions of the ADA that relate to the scope of covered individuals. The ADAAA reduces the obligations of employers to those employees that are considered disabled solely because they are “regarded as” having a disability. Finally, the ADAAA specifically amends the definitions section of Section 504 to incorporate certain definitions found in the new, amended, ADA.

I. Textual Changes and Effect on Employers’ Obligations Under the ADA

A. Major Life Activities

The *Sutton* court defined the term “major life activities” as activities that are of “central importance to most people’s daily lives.” The ADAAA specifically rejects that definition and alters the ADA to include a non-exclusive list of major life activities. After January 1, 2009, the term “major life activities” includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” S.F. 3406 § 4.

The ADAAA also expanded the term “major life activities” to include “major bodily functions.” The ADAAA contains a non-exhaustive list of major bodily functions, including, but not limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.*

These definitions are non-exhaustive, and sufficiently broad in their own right, that almost all aspects of human life can be considered a major life activity. Because bodily functions are now considered as “major life activities,” a person is considered “disabled” under the ADA if they suffer from a condition that impairs their health, but not necessarily their performance of any actual activity. For example, a person with an immune system deficiency, who is not affected in their day to day activities, is still “disabled” within the meaning of the ADA. If requested, an employer must engage in the “interactive process,” as discussed below, and provide any reasonable accommodations to which such a person might be entitled.

B. Regarded as Having a Disability

The ADAAA specifically addresses the “regarded as” definition of a disability. After January 1, 2009, an individual is regarded as having a disability “if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” *Id.*

However, the ADAAA states that employers need not provide any reasonable accommodation, or modification to practices or policies, to a person who is considered disabled solely because the person is “regarded as” having a disability. S.F. 3406 § 6. Employers are still, however, prohibited from actively discriminating against an individual who is “regarded as” being disabled. *Id.* § 5.

Because an employee is considered disabled whether or not a perceived impairment actually affects any major life activity, employers need to be wary of discriminating against a person because of any rumored disability.

C. Episodic Conditions

In an effort to further expand ADA coverage, the ADAAA states that a person with an “episodic” condition, or a condition that is in remission, must be considered disabled if the condition substantially limits a major life activity during an episode or when the condition is not in remission. *Id.* § 4.

However, the ADAAA does *not* extend coverage to those persons who are regarded as being disabled because of temporary impairments such as broken bones. In order for a condition to be temporary (or “transitory” in the language of the ADAAA), the condition must last, or be expected to last) for less than six months. *Id.*

D. Mitigating Measures

The ADAAA rejects the Supreme Court’s holding in *Sutton* that an individual is not disabled within the meaning of the ADA if the individual’s disability is addressed through mitigating measures. The ADA now applies to any individuals irrespective of any measure taken by that individual to overcome or mitigate their disability.

This change presents significant compliance issues for all employers. Going forward, districts must consider employees’ needs for accommodation without considering any other measure (other than regular glasses or contacts) the employee is using to control their disability. For example, a hard of hearing employee might be entitled to certain accommodations irrespective of the fact that they wear hearing aids which allow them to hear properly. Similarly, an employee who controls their depression with medication, must be considered disabled, and therefore possibly entitled to accommodations, without considering the effect of that employee’s medication.

It is important to note that the reasonableness of accommodations might still be impacted by the employee’s mitigating measures. For example, it might be reasonable to provide an employee with extra batteries for their hearing aids, time to change the batteries

when they need changing, and access to an interpreter on days when they forget to wear them or change the batteries.

E. Single Major Life Activity

Before the enactment of the ADAAA, there was a legal question as to whether an individual was entitled to ADA protection for an impairment that only affected a single major life activity. This debate usually centered around the activities of “learning” and “working,” which were sometimes viewed as compound activities, incorporating many separate major life activities. In some cases, courts found that an individual who suffered from a condition that affected their ability to lift, for example, was not disabled with respect to the major life activity of “working” and therefore, was not entitled to any accommodation.

The ADAAA puts an end to this legal “gray area” by including a section that states that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” *Id.* Because of this section, an individual is considered to have a disability, and is therefore entitled to the protections of the ADA, even if their disability is very narrow in scope.

For employers, this change is significant because it opens the door to ADA protections and reasonable accommodations to employees whose disabilities do not affect their job performance or any skill needed to perform their job. For example, an employee with a severe reproductive problem is considered disabled within the meaning of the ADA, even though that issue does not affect the employee’s job performance. While it is difficult to imagine the types of accommodations such an employee might require, other than time off for doctor visits, the employee is protected from discrimination on the basis of their disability.

F. General Rule of Construction

In addition to the inclusions and rules of construction discussed above, the ADAAA contains a general rule of construction for the definition of the term “disability.” Pursuant to the ADAAA, the “definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA].” *Id.* Moreover, the “term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.” Those purposes are discussed above.

While the other changes made by the ADAAA expand upon the group covered by the ADA, the inclusion of this general rule of construction creates the possibility that even more people will be found to be covered by the ADA. Bearing in mind this rule of construction, school districts should err on the side of caution, and when faced with a request for accommodations from an individual whose condition might be considered a disability, and should assume that the person qualifies for ADA protection. Note that this is a general rule,

and districts are encouraged to consult with counsel before making any determinations as to ADA eligibility.

The ADA does not require employers to believe that employees actually have the medical conditions which they claim. The ADA provides a mechanism for determining whether an employee actually suffers from a claimed condition. The ADAAA does not alter this mechanism.

II. Effect on Districts' Obligations Under Section 504

Section 7 of the ADAAA alters the definitions of “disability” and “person with a disability” found in 29 U.S.C. § 705. Section 705 is the definitions section on which Section 504 is based. The ADAAA modifies that section to define “disability” and “person with a disability” in accordance with the definitions found in the newly amended ADA.

Section 504 applies to students as well as employees. School districts have certain obligations to students who are covered by Section 504. The scope of these obligations is broad and exceeds the scope of today's presentation. It is important to note; however, that the ADAAA does not impose any new obligations on school districts with respect to those students covered by Section 504. Instead, it expands the scope of Section 504 coverage to more students.

By requiring school districts to examine a student's disability without respect to any mitigating measures, the legislature has set a trap for unwary districts. Districts may find themselves faced with students who have performed well academically, have shown no signs of requiring any special services in the past, but are now eligible for such services. Districts must be prepared to evaluate these students as they would all other requests for Section 504 services.

Similarly, the inclusion of “episodic” conditions greatly expands the types of students for which school districts should prepare Section 504 plans. For example, a student with severe asthma is considered disabled under the ADAAA even though most of the time the condition does not adversely affect the student. The student has an “episodic” condition which, during an attack, “substantially limits” his ability to breathe, a function of the respiratory system. Similarly, students with epilepsy, severe allergies or other “periodic” conditions are considered disabled under the ADAAA, as are students with cancer or other diseases that are in remission.

Because of the inclusion of “episodic” conditions in the ADAAA, as well as the inclusion of “major bodily functions” within the definition of “major life activity,” districts should consider evaluating and preparing Section 504 plans for many students with formal or informal health plans. The contents of such plans will likely conform with the contents of the student's existing health plan, but such students do now fall within the reach of Section 504.

Finally, the ADAAA, by increasing the number of students who potentially qualify for Section 504 services, increases school districts' so-called "child find" obligations. 34 C.F.R. 104.32, one of the rules promulgated by the United States Department of Education ("DOE") under Section 504, requires districts to "identify and locate every" disabled person in the district who is not receiving a Free Appropriate Public Education ("FAPE"). Because of the expanded definition of "disabled" in the ADAAA, this "child find" requirement now obligates districts to "identify and locate" a wider range of people.

D: Don't Panic – the Practical Effect of the ADAAA

The practical effect of all of the ADAAA's changes is that more people will be covered by the ADA and Section 504. The accommodations to which people covered by the ADAAA and Section 504 are entitled; however, have not changed.

I. Reasonable Accommodations

An extensive discussion of employers' duty to provide reasonable accommodations to disabled employees is beyond the scope of today's presentation. The ADAAA does not amend, or even address, the process for identifying employees' needs for accommodations, or the process for providing such accommodations. The ADAAA only expands the group of employees for which districts must engage in the interactive process or provide reasonable accommodations.

In essence, the ADA imposes a duty upon employers to engage in an "interactive process" with employees whenever the employer has knowledge of the employee's disability. An employer is not required to offer a reasonable accommodation when it does not know about the employee's disability. *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995). Therefore, unless an employee's need for accommodation is obvious, the employee bears the burden of requesting the accommodation. *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1998). Where the employer is aware that the employee has a disability which impairs the employee's ability to communicate his needs, the employer should make a reasonable effort to understand those needs. *See Miller v. Illinois Dept. of Corrections*, 107 F.3d 483 (7th Cir. 1997).

Once an employer is aware of the employee's needs for accommodation, the employer must engage in a four step interactive process for addressing those needs. The failure to engage in this process may be considered an act of bad faith on the part of the employer. *Ballard v. Rubin*, 284 F.3d 957 (8th Cir. 2002). The four steps to the interactive process are:

1. The employer should identify the essential functions of the employee's job.

2. The employer and employee should work together to determine how the disability limits the performance of one or more essential job functions.
3. Both parties should seek to identify accommodations which will overcome the functional limitation(s) and the feasibility of those accommodations.
4. The employer should consider the employee's preference and select an appropriate accommodation for the employer and the employee.

An employer's duty to make reasonable accommodations for an employee with a disability does not mean the employer must lower its performance expectations, reallocate essential job duties, create new jobs, or reassign a disabled employee to the position of another employee.

II. Provision of Section 504 Services to Students

Nothing in the ADAAA affects the types of accommodations, modifications, or other services which districts are required to provide students who qualify under Section 504. Nothing in the ADAAA affects the processes through which districts must evaluate students for section 504 services. As discussed above, the expanded definition of a "disability" does increase the number of students who must be evaluated, and may qualify, for Section 504 services, as well as increasing districts' child find obligations.

III. Disciplining Employees with Disabilities

Disciplining an employee with a disability is often a difficult situation. Whenever an employer disciplines such an employee, there is the possibility that the employee will argue that they are being discriminated or retaliated against because of their disability. While reiterating the ADA's prohibition against discriminating on the basis of disability, the ADAAA includes very little clarification or modification to what constitutes prohibited discrimination. Therefore, the ADAAA does not drastically alter the types of conduct which might give rise to discrimination claims. Because it greatly increases the numbers of employees who are entitled to ADA protection; however, the ADAAA does increase the number of possible plaintiffs in discrimination lawsuits.

While each case must be reviewed based upon its individual facts, here are some general considerations:

1. An employee generally cannot avoid discipline by arguing that his misconduct resulted from his disability (*e.g.*, falling asleep on the job). *See Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891 (8th Cir. 1999); *see also EEOC Enforcement*

Guidance: Reasonable Accommodation and Undue Hardship (Oct. 17, 2002); 42 U.S.C. § 12112(b)(6); 34 C.F.R. 1630.10; 34 C.F.R. 1630.15(c).

2. The ADA and other anti-discrimination laws only protect employees against adverse employment actions taken because of their disabilities. Employers may discipline employees with disabilities for engaging in misconduct, if it would impose the same discipline on an employee without a disability.

E: Examples

The following hypothetical examples illustrate some of the ways which the ADAAA, and the corresponding changes to Section 504, might impact a school.

I. The Student with Allergies.

Student A is enrolled in District B. Student A has severe, life threatening, allergies. Specifically, she is allergic to peanuts. Exposure to peanuts causes her to go into anaphylactic shock, seriously affecting her nervous system, respiratory system, and circulatory system. Student A suffers from no other health conditions, has a high grade point average, is not eligible to receive special education, and is otherwise a perfectly normal, healthy, student.

Before January 1, 2009, Student A had a health plan designed to respond to her peanut allergies. Among other things, the health plan provided that Student A could carry an “Epi Pen” with her all day, that Epi Pens would be kept in the school nurse’s office, the lunch room, and in Student A’s classroom. The health plan also incorporated training on the use of an Epi Pen for all school employees and volunteers.

As of January 1, 2009, is Student A covered by Section 504? If so, what should District B do? If District B develops a Section 504 plan for Student A, what types of things should/could be in that plan?

II. The Recovering Patient.

District C employs Teacher D. Teacher D was diagnosed with cancer 10 years ago. At the time, Teacher D was very weak, could hardly stand up, and was otherwise, very seriously ill. However, Teacher D responded well to treatment. His cancer went into remission 6 years ago and he has been in great shape ever since. Teacher D has no other medical conditions or injuries, and has had no problems performing his job. He is a well liked teacher whose students consistently perform well on standardized tests. He has even joined the lecture staff at a local college, teaching summer courses.

Under the ADA, as it now reads, is Teacher D disabled? If so, what types of accommodations would be reasonable with respect to his disability?

III. The Hard of Hearing Receptionist.

District E employs Receptionist F. Due, in part, to her habit of attending rock concerts in her younger days, Receptionist F is legally deaf. Receptionist F wears hearing aides, small invisible hearing aides that completely mitigate her hearing problems. She speaks very clearly, and has no trouble communicating verbally. Just in case; however, she has also learned American Sign Language, to the point where she is the school's unofficial interpreter for hard of hearing students and parents. Receptionist F has just completed a class on lip reading. Receptionist F also has excellent penmanship. It is impossible to tell that she is hard of hearing just from talking with her, or looking at her. Receptionist F always keeps a spare set of hearing aides in her desk drawer, and another in her purse. She also keeps several spare batteries in her desk, purse and car. Other than her (completely controlled) hearing problem, Receptionist F has no health impairments of any nature.

After the ADAAA amendments to the ADA, is Receptionist F considered disabled? Does District E have any obligation to provide her with accommodations? What about if she asks for them? If District E is obligated to provide her with accommodations, what types of accommodations would be reasonable for District E to provide?

IV. The P.E. Teacher with a Broken Leg.

District G employs Teacher H. Teacher H teaches physical education, and also coaches high school soccer. Last week, during soccer practice, while demonstrating a particularly difficult maneuver, Teacher H fell and broke his leg. It was a pretty bad break, and his doctors have told him that the break will take "somewhere between six and seven months" to heal. Teacher H was provided with crutches by the hospital. He is able to walk using the crutches. All of the students who were selected to be on the soccer team have signed his cast.

Is Teacher H disabled within the meaning of the ADAAA? If so, what accommodations would be reasonable for District G to provide him? Does your answer change if the doctors told him that his leg would heal in two months instead of six or seven?

V. The Perfectly Healthy Employee.

District I employs Employee J. Employee J is perfectly healthy. On the other hand, Employee J's relative was recently diagnosed with Alzheimer's disease. Employee J has been doing online research during on Alzheimer's disease during his lunch break. Several of Employee J's coworkers, including his immediate supervisor, Supervisor K, have noticed him looking at Alzheimer's disease resources on the computer.

Despite Employee J's fervent assertions that his relative, not he, has Alzheimer's disease, a rumor develops in the office that Employee J has the disease. Worried about

potential ADAAA liability, Supervisor K begins to subtly reduce Employee J's workload, removing projects that involve long-term memory or sophisticated problem-solving skills. Eventually, Supervisor K reassigns Employee J to a different position; one that she feels is better suited to a person with Alzheimer's disease. The new position is part-time, giving Employee J mornings off. Supervisor K read somewhere that Alzheimer's patients performed better in the afternoon, so she thought that Employee J should only work afternoons.

Has District I, through Supervisor K, violated the ADA, as amended?

VI. The Custodian With a Bad Back.

District L employs Custodian M. Over the summer, Custodian M, an avid musician, injured his back while playing "air guitar" at a rock concert. As a result of his injury, Custodian M is (at least for the next year or so) unable to lift objects weighing more than ten pounds, which, incidentally, includes his actual guitar.

Is Custodian M disabled under the definition of the ADAAA? If so, what accommodations would be reasonable for District L to provide him? Does it make any difference that Custodian M injured his back during a recreational activity off of school property, during the summer?

F: Future Areas of Concern and Development

At this point, there is almost no case law interpreting the ADAAA. Three courts in Minnesota have addressed the ADAAA since its inception. All three addressed the narrow issue of whether the ADAAA could be retroactively applied to cases pending (or events occurring) before January 1, 2009. In all three instances, the court found that the ADAAA could not apply retroactively. *See Stusse v. Von Maur, Inc.*, 2009 WL 1789379, *3 n. 2 (D. Minn. 2009); *Nyrop v. Independent School District No. 11*, 2009 WL 961372, * 3, n. 2 (D. Minn. 2009); and *Kirkeberg v. Canadian Pacific Railway*, 2009 WL 169403, * 5, n. 7 (D. Minn. 2009).

Indeed, virtually every court that has tackled the ADAAA since January 1, 2009, has examined it only to determine whether it is applicable retroactively. As with the courts in Minnesota, other courts have found that the ADAAA does not apply retroactively. *See, e.g., E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 469, n. 8 (5th Cir. 2009). The U.S. Department of Labor ("DOL") also takes the position that the ADAAA is not retroactive.¹

Neither the DOL nor the Equal Employment Opportunity Commission ("EEOC"), the two entities primarily responsible for issuing regulations under the ADA, have officially

¹ *The ADA Amendments Act of 2008: Frequently Asked Questions*, U.S. Department of Labor, <http://www.dol.gov/esa/ofccp/regs/compliance/faqs/ADAFaqs.htm#Q3> (August 6, 2009)

promulgated any regulations regarding the ADAAA or the changes it makes to the ADA. Without any such clarifying regulations, or any case law interpreting the ADAAA, we are left with just the bare language of the ADAAA.

There is a lot of room for clarification. Much of the ADA case law that defines such terms as “major life activity” or “substantially limits” was overturned by the ADAAA.

Prior to the ADAAA, many ADA cases were dismissed because defendants were able to demonstrate that the plaintiff’s disability did not “severely” impact a major life activity, or that the plaintiff’s disability was controlled by mitigating measures. After January 1, 2009, these defenses are unavailable to defendants. Instead, employers will have to focus on the reasonableness of the accommodations that they have provided. This means, the employer’s interactive process is critically important. All defendants will have to focus on the non-discriminatory reasons for their actions.

Because of the changes wrought by the ADAAA and the relative novelty of these changes, there is a great potential for confusion. If you are faced with a situation involving a student or employee and you are uncertain whether that student or employee is now covered by Section 504 or the ADA, we advise you to consult with your legal counsel.

G: Goodbye (Conclusion)

This concludes our abecedarian look at the ADAAA. As the song says, “now you know your ABCs.”

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