RECENT CHALLENGES WITH ADA & TITLE II

Mississippi State Legal Issues Conference

May 2, 2012
Federal Disability Law

- Governs how a public or private college may act to suspend, place on leave or withdraw a student on the basis of a condition of disability
- Protection under disability law comes from
  - Disclosure and qualification
  - Perceived disability and treatment as such
Is being suicidal a protected disability?

- Being suicidal is not a protected disability, but the behaviors underlying the suicidality are, thus those who attempt suicide may be considered protected by default:
  - Depression
  - Addition
  - Mental illness

- Are almost always seen as qualifying disabilities

- And are protected by the courts
How does this affect us?

- As a result of 2011 changes to federal disability law regulations, it is now unlawful to involuntarily separate a student on the basis of self-harm or suicidal behaviors.

- Institutional officers who “regard” a student as having a disability (even when the student has not provided documentation, nor sought accommodation) and then act on that assumption to deny the student benefits based on that disability assumption will be held to the same standard as if the student established a disability.
The Law

- While the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 are separate statutes, they are subject to a joint set of regulations.

- Direct threat issues arise under Section 504, as they result from questions of discrimination against individuals with disabilities rather than issues of reasonable accommodation, which arise under ADA.
The Law

- ADA Title II regulations are applicable to public institutions, and Title III applies to private institutions.

- Until March of 2011, Titles II and III used different language to address direct threats, with Title II using the broader “harm to self or others” terminology.

- Title III has always applied the direct threat standard only to “harm to others.”
2011 revisions to Title II regulations

Direct threat in Title II is now defined such that "Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139."

The change omits the word "self" that in the prior regulations said "self or others."
Today, then, it is discriminatory to apply the direct threat test to a situation that involves only harm to self.

Note: decisions involving Bluffton University, Guilford College, Marietta College and DeSales University, all of which stated or implied that a private college could apply the direct threat standard to self-harmful behaviors, have now been repudiated by OCR.
DOE Reinterprets 504 to Match Title II

☐ The Title II revisions put the Department of Education’s Office for Civil Rights in the position of having to repudiate its long-standing interpretation of Title III as applying to self-harm.

☐ The narrowing of this language has forced colleges and universities to reconsider what are appropriate and lawful practices when faced with students whose actions indicate self-harm and/or the risk of suicide.
Facts

A student told admissions representative that he had a disability (anxiety and depression).

The student later reported that the admissions representative did not refer him to the school’s Disability Services Office.

The student did not independently seek accommodation from Disability Services, nor identify himself to Disability Services as an individual with a disability.

The summer following the student’s first term of enrollment, he experienced increased emotional symptoms and was diagnosed as bipolar. At school, the student engaged in cutting behaviors, uncontrolled crying and persistently discussed his problems with other students.
Facts (continued)

During this period of time, however, the student remained in good academic standing.

In the fall term following his diagnosis, as a result of his behavior on campus, the vice president and other university officials requested a meeting with the student, under the guise of a meeting with his RD about his “academic success.” The student was assured that this was not a disciplinary meeting, but immediately was confronted with “complaints” about his behaviors. The student became very upset and stated his intent to withdraw from school immediately based on medical necessity.
Facts (continued)

The following spring, the student applied for re-admission to the university. He was informed that before he could return he was required to provide medical documentation, a release of medical treatment records, a student agreement form and other standard elements for re-admission. The university did not require 504 Plans or medical treatment documentation of other students seeking re-admission, and was not informed of these conditions when he “voluntarily” withdrew.

The student was denied re-admission and subsequently filed a complaint with OCR based on disability discrimination under Section 504 of the Rehabilitation Act.
OCR Determination

The OCR initially determined that although the student voluntarily withdrew from school, the institution’s actions in presenting him with a behavior contract that had many elements related to mental health treatment resulted in the student being “regarded” as having a disability.

The OCR further determined that the university then discriminated against the student, based on his disability, by imposing requirements on the student’s re-admission that were not required of other students seeking re-admission to the university.
OCR Determination

The university argued that they were trying to ensure that the student could be successful upon re-admission.

However, the student had never demonstrated that he couldn’t be successful academically and, at the time of his voluntary withdrawal, he was in good academic standing and had never been disciplined.

Thus, OCR determined that the university’s reason was not a legitimate non-discriminatory one and was instead a pretext for disability discrimination.
OCR Determination (continued)

The OCR stated that a university may remove a student with a disability or deny admission to that student if the university applied a “direct threat test.”

This test may be applied only when an individual poses a significant risk to the health and safety of others. The significant risk must represent a high probability of substantial harm and not just a slightly increased, speculative or remote risk. In this matter, the university stated that it believed the student was a threat to himself, but not to others.
Facts

- Complainant was the father of a female student who was required by Mt. Holyoke College (MHC) to take a medical leave for the Spring 2008 term. He averred that she was discriminated against on the basis of her disability.

- The student had identified herself to MHC upon enrollment in 2006 as an individual with learning disabilities and unspecified psychiatric disabilities. Prior to college, she had engaged in cutting and suicidal ideation.
Mt. Holyoke College Decision

- Facts (continued)

- After the break up of a relationship in September of 2007, MHC became aware of self-harm ideation and threats of cutting by the student.

- A cluster of notifications ensued (from residential life staff, faculty, the student’s mother and fellow students) about her threats of cutting, her suicidal ideation and her general instability.
The Director of Residence Life and the Dean of Students spoke to the student’s mother, and then to the student, with the goal of implementing a behavior contract. The contract was designed to modify the student’s behavior with the clear implication that if she could or would not modify her behavior it would impact on her status at the college.
Facts (continued)

By November of 2007, the student’s continued cutting and suicidal ideation came to light through a friend of the student, and it was clear the student was not complying with the behavior contract.

She was given the choice of being immediately withdrawn for the remainder of the semester, or being able to complete the semester if she moved off campus, was living with and under the direct supervision of her parents and that she agreed to a voluntary withdrawal for the Spring of 2008.

She chose the latter but filed a complaint with OCR.
The OCR considered:

- Whether the student was an individual with a disability, and found that she was.
- Whether she was subject to “differential treatment” on the basis of her disability, meaning that she was treated less favorably than similarly situated persons outside of the protected class of individuals with disabilities.

If less favorable treatment is evidenced, the OCR will inquire as to whether there were legitimate (non-pretextual), non-discriminatory reasons for the less favorable treatment.
Here, OCR found that the student was subject to less favorable treatment, because she was excluded from MHC’s educational program.

MHC protested that she had accepted their conditions and had agreed to voluntary withdrawal.

OCR’s position was that she had no choice, and was forced to accept that outcome.
Despite this evidence of less favorable treatment, the OCR concluded that the student was not excluded on the basis of her disability. It had evidence to show that she was subject to similar treatment and proceedings as were other students who engaged in disruptive behaviors, and that it was legitimate to conclude that she was disciplined not for cutting or suicidal gestures, but for the documented disruption those behaviors caused to the college community.
Facts

A female student enrolled at St. Joseph’s College (SJC) in Brooklyn, NY, was suspended in November of 2009 until she was medically cleared after she grabbed and tried to kiss a male student, would not let go of him, insisted she was in love with him and that they were married and had to be forcibly removed by a security guard.

She returned a week later with a letter from her psychiatrist. She repeated the first incident a week later, and was transported to the hospital by ambulance.

During both instances, she appeared delusional and incoherent to witnesses and admitted she was not taking her medications.
Facts (continued)

- The college’s BAC (their version of a BIT) met and placed the student on emergency suspension without notice to her or an opportunity to meet with any member of the BAC.
- The student wrote to the Dean of Students in January of 2010, seeking to return.
- It was determined by the BAC on the basis of the evidence it used to suspend her in December of 2009, that she was not fit to return.
Facts (continued)

The OCR investigation found that SJC regarded the student as an individual with a disability, based on its knowledge of her psychiatric conditions at the time of her delusions, its decision to subject her to an unpublished BAC process rather than the traditional conduct process and its insistence on psychiatric clearance to return after the first incident.
Facts (continued)

The OCR found further that SJC had subjected the student to differential treatment on the basis of that disability by diverting from the traditional conduct process that would have been used for similar behaviors by students who were not disabled, and that it had failed to provide the due process and additional procedural protections that the traditional process would have afforded.

The OCR and SJC then entered into a voluntary resolution agreement.
Mt. Holyoke ratifies the use of the disciplinary system to sanction students on the basis of their behavior, even when that behavior is indicative of crisis.

Many campuses backed away from that path years ago when OCR found our disciplinary actions to be pretextual, but it seems that a narrow, well-documented, progressive use of the discipline process to sanction a student for the disruptive effects of self-harm based behaviors may still be viable.
Implications (continued)

- If we do separate a student for disruption, conditions of the sanction and conditions for return will be subject to the same differential treatment analysis by OCR.

- This appears to indicate that all students suspended through the conduct system should have conditions for readmission placed on them that have a direct nexus to their future success and likelihood of non-recidivism.

- Thus, unless we impose similar conditions on all students who are placed on involuntary leave, and perhaps on all students who request a voluntary leave, we will face difficulty in showing OCR that our conditions for return are not discriminatory.
And that speaks to the need to clarify that they are not actually withdrawn, but on leave.

We have to be careful about imposing readmission v. permitting reinstatement, given the fact that many campuses do not subject similarly situated students who are not disabled to the same conditions.

Additionally, when reviewing these conditions, the presumption should be readmission, not preclusion. In other words, unless the documentation satisfying the condition indicates that there is a compelling reason to deny readmission, they should be readmitted.
The St. Joseph’s decision seems to indicate that if an institution is going to allow its BIT to engage in student conduct actions such as emergency or interim suspension, it must include that authority in its policies and procedures with protections for a student with a disability (or one regarded as having a disability) similar to those that are afforded to students who are not disabled.

This would appear to reinforce the notion that BIT should remain preventive and caring, and leave the conduct actions to the Student Conduct Office.
Implications (continued)

- *Spring Arbor* reminds us that it would never be a good practice to summon a student and then begin that meeting by informing the student of “complaints” made against him.

- We suggest, instead, that the team member or designee should talk to the student initially about the concern that the institution has for his/her success, about how worried they are about how the student is doing and give the student objective feedback on how his or her behaviors have been impacting the community.
Implications (continued)

□ In the course of this meeting, if the student asks about the possibility of taking a leave and the consequences of such a leave, we should take pains to couch the conversation with the student (and with the family) in terms of options for voluntary leave.

□ Additionally, the nuance of informing the student about the potential negative consequences of remaining (academic, student conduct, etc.) is critical, as the meeting cannot be seen as obtaining a “voluntary” withdrawal under duress.
Further, in *Spring Arbor*, it appears that in the initial meeting the student was never given any criteria that he would have to meet for reenrollment.

We need to be sure that our policies and procedures describe a clear process for reinstatement (or readmission, though we do not recommend that path as the default), that any conditions are imposed on all students who take or are placed on leave or that we do not place conditions on return when a leave is a voluntary decision.
Harm to Others

- Procedures for involuntary or emergency suspension or leave can still be applied to a determination that a student is a direct threat of harm to others, whether those procedures exist with a BIT or reside in another mechanism outside the conduct process.

- There are still good reasons to keep that determination outside of a code of conduct, when it is based on behaviors directly related to disability, to avoid the pretextual discrimination argument that may come from charging an individual with a disability with threatening behavior under our code of conduct.
Harm to Self

- These new regulations may return us to a day prior to the creation of formalized Behavioral Intervention Teams when the code of conduct policies (e.g., “harm to self”) were the sole source for dealing with and/or managing students who attempted suicide and thus are, by definition, struggling at the highest level.

- After *Spring Arbor* and *Mt. Holyoke*, students who are suicidal and attempt suicide, who (almost always) disrupt the community in the course of that attempt, may still be held accountable for their disruptive behavior under the code of conduct.
Harm to Self

- We have other tools as well. We still have the latitude to subject a student to assessment by a mental health professional, based on serious, legitimate concerns of harm to self or harm to others and to enforce that mandate with failure to comply charges under our code of conduct.

- When the assessment is on the basis of self-harm, an interim suspension or requirement of medical clearance to be reinstated is now a questionable action, raising again the specter of differential treatment discussed in the decisions above.
This also illuminates the fact that we cannot use the assessment to determine whether the student is a direct threat, because the direct threat test cannot be applied to self-harm situations.
BITs and Differential Treatment

- BITs on campuses all over the country have developed alternative procedures to the student conduct process. Those alternative processes:
  - Must be well-elaborated, defining when they will apply, when they will not, when they supersede the conduct process and when they operate concurrently with it.
  - Should not include significant disparity between the procedural protections under the code of conduct and those offered by BITs.
  - Document that those procedures developed for the BIT are applied equally to students with disabilities as well as to those who are not disabled.
There does not appear to be any question that the involuntary withdrawal policy still has viability for those who present a clear danger to others. It is only in the instances where the involuntary withdrawal policy (or the “voluntary” withdrawal policy that does not appear to be very “voluntary”) is utilized in cases where the student is a danger of harm to self that discrimination comes into question.
BITs and Differential Treatment (cont’d)

- We need to consider a shift in the current medical withdrawal policies that most institutions already have to outline a clear set of criteria that includes documentation from physical and mental health professionals in all cases (everything from an illness to a car wreck to the passing of relative to a suicide attempt) so that it might pass muster under the guidance offered in these decisions.

- For obvious reasons, this type of policy would be untenable for the vast majority of institutions, but re-entry requirements for all would remove the differential treatment concern.
Thank you!
Questions?
Saunie Schuster
Scott Lewis