



C-3:

Minimizing ADA Barriers to Medical Leaves

**CME: 1.5; CNE (Nursing): 1.5; PsyCE: 1.5; CHES: 1.5;
NBCC: 1.5; NASW: 1.5**

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MINIMIZING ADA BARRIERS TO MEDICAL LEAVES

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CAVEAT!

- Do not treat the information contained in these slides or during the actual presentation as legal advice

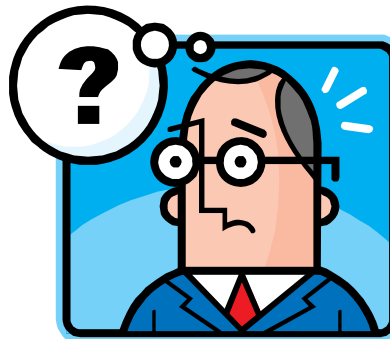
History

- The U.S. Department of Education's Office for Civil Rights (OCR) has long interpreted the Rehabilitation Act as authorizing postsecondary institutions to impose an involuntary withdrawal upon students who present a direct threat to themselves or others
 - Even though the Rehabilitation Act regulations do not address "direct threat" or "safety" in any express manner



What Happened?

- The United States Department of Justice (DOJ) amended the Americans with Disabilities Act (ADA) regulations effective in 2011 which created some confusion
 - Unlike Title I (employment), Titles II (state and local government) and III (places of public accommodation) address the concept of “direct threat” in terms of harm to others only



Ideas

- Assume the ADA/Rehabilitation Act apply even if student has not registered as a student with a disability
 - “Regarded as” prong is likely at play
- It may be wise to continue with two models
 - Conduct code for certain violations
 - Another process for self-harm
 - In some cases, would it be wise to use both tracks?

Query?

- May a campus address the concern responsibly and avoid the “direct threat” analysis altogether?



One Approach: Disruption

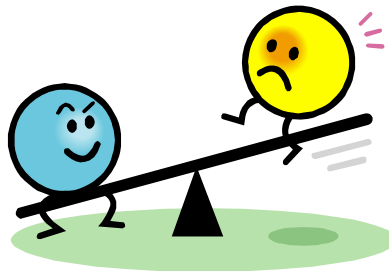
- OCR upheld a campus' decision to require a student who engaged in a pattern of self-harm to take a leave of absence based upon the disruption the student's conduct (cutting) had on the campus community
 - Not one mention of "direct threat" appears in the Letter
 - Campus did not pursue resolution using its conduct code
 - *Mount Holyoke (OCR 2008)*

Second Approach: Safety

- Both Title II and Title III of the ADA contain a provision authorizing entities to establish safety as an “eligibility” criterion:
 - A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.
 - ADA - Title II: 28 C.F.R. § 35.130(h)
 - A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.
 - ADA - Title III: 28 C.F.R. § 36.301(b)

Notice the Difference

- “Direct threat” is a much higher standard to demonstrate than “safety”
 - And the burden of proof rests with the institution in direct threat cases



Elements of Procedures

- Individualized decision-making
- Campuses are wise to involve mental health expertise in making decisions
- Direct threat is still an option
 - But focus on “safety” and “disruption” as essential eligibility criteria that are legitimate and defensible
 - Is a student’s health so compromised that s/he is unable to handle the rigors of postsecondary life?

Elements of Procedures

- Factor in reasonable accommodation request
 - Would the student be qualified with reasonable accommodation?
- Carefully consider conditions of readmission whether voluntary or involuntary
 - How much time away as a “guide”
 - Any requirements for “engagement” while away
 - Evidence of treatment compliance
 - Evidence that student is prepared to return to academic rigors and community life
 - Agreement to continue to engage in active treatment if recommended
 - Release to confer with campus health care official
 - Reserve option to conduct own independent medical evaluation

Elements of Procedures

- Should the campus involve family?
- Regardless of process, due process, at least in terms of a “grievance” option appears to be required
 - At involuntary withdrawal stage
 - At voluntary withdrawal stage if challenging conditions
 - At readmission stage
- When in doubt, and when there is resistance, always wise to consult with legal counsel
- What to do if student refuses to withdraw?

Other Cases

- OCR refused to analyze a campus' decision denying a student readmission even though the student did not pose a "direct threat"
 - OCR was satisfied that the campus made an individualized inquiry using clinical judgment and consultation in concluding that the student was not otherwise qualified to return
 - OCR did not review case under "direct threat" standard
 - OCR upheld College's imposition of conditions of readmission
 - *Purchase College, State University of New York, No. 02-10-2181 (OCR 2011)*

Other Cases

- OCR concluded that the University did not violate the Rehabilitation Act in the manner in which it addressed a student's withdrawal following a suicide attempt
- Agency rejected all four allegations of discrimination concluding that University had “legitimate, non-discriminatory” reasons for the actions it took
 - Key was the University's individualized decision-making
 - *Princeton University, No. 02-12-2155 (OCR 2013)*

Western Michigan University

- Unfortunately, a student who gained readmission following a resolution agreement with OCR committed suicide
 - Student's complaint alleged that he was involuntarily withdrawn from campus after he was hospitalized for one week following suicidal thoughts

Take Aways

- This area is very complex and the stakes are high
- Many lawyers prefer to defend ADA claims rather than wrongful death claims



Minimizing ADA Barriers to Medical Leaves

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University of New Hampshire

At a Glance...

Founded 1866 - Land Grant, Sea Grant and Space Grant Charter

Colleges and Schools

- Graduate School
- College of Engineering and Physical Sciences
- College of Liberal Arts
- College of Life Sciences and Agriculture
- College of Health and Human Services
- Peter T. Paul College of Business and Economics
- Thompson School of Applied Science
- UNH School of Law
- University of New Hampshire at Manchester

University of New Hampshire

Number of Full-time Faculty:	976
Number of Full-time Staff Members:	1,702
Number of Students:	14,500
Undergraduate	12,200
Graduate	2,300

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Number of Withdrawals in the last 5 years

- Involuntary: 6
- Voluntary:
 - Total 516
 - Range per year 93 - 112
 - Average per year 103
 - Percent Psychological 70%
 - Percent Medical 30%

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Processes:

- Involuntary (Administrative Separation) – Dean of Students
- Voluntary – AVP/Executive Director of Health Services

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Self-harm (no suicidal tendencies)

- Mandated referral to the Counseling Center. From there, student must follow their instructions for continued counseling, including getting outside help

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Parental/Family Involvement

More frequent nowadays

Although respecting FERPA, the DoS calls parents:

- *When there is evidence of significant incapacity that is affecting academic performance*
- *When self-harm is evident or imminent*
- *When she needs their help*

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Notification of Family, Roommates, Faculty, and Others

*"In deciding whether and how to notify family, roommates, teachers and others regarding a student's threatening behaviors, the team shall comply with FERPA. **The team shall consider what prevents it from notifying significant others in a student's life about the student's potentially threatening behaviors and there shall be a presumption in favor of providing timely notice to persons affected by a student's threatening behaviors.**"*

--UNH BIT Policy Statement

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Behavioral Contracts – UNH does not use them

Why not?

- 1. It holds the institution accountable for, and responsible to monitor and enforce, the contract.*
- 2. We believe it is the responsibility of the student to pursue and receive help.*

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Behavioral Intervention Team (BIT)

The Behavioral Intervention Team shall provide consultation to the Assistant Dean of Students regarding students who are at risk of harming themselves or others. The Assistant Dean of Students shall act as Case Manager.

BIT is consulted about every case; the DoS seeks their endorsement

The Team consists of:

Assistant Dean of Students (Case Manager), Dean of Students, AVP for Student and Academic Services & Director of Residential Life, Director of the Counseling Center, Director of Education and Promotion, Health Services, Associate Provost for Academic Achievement and Support, and Chief of the University Police Department.

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Residence Halls versus Full Withdrawal?

UNH does not remove only from the residence hall.

Why not?

- We believe that moving the problem does not help the student or the community.
- If a student is not emotionally able to be at UNH, then the student must leave and get help in order to be prepared for university life.

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Readmission

- Length of leave: *Every case is different*
- Conditions of return: *Students must demonstrate sustained and active involvement in their recovery*
- Process to determine readiness to return: *At least a letter from outside helpers, with consultation with Counseling Center, and sometimes an interview with the DoS.*

Appeal/Due Process:

- Central part of process; ensured and outlined in correspondence

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Role of the Counseling Center

- Complete role every step along the way

Do we seek second opinions?

- We consult with any and all professionals who have a need to know and who can offer skilled input.