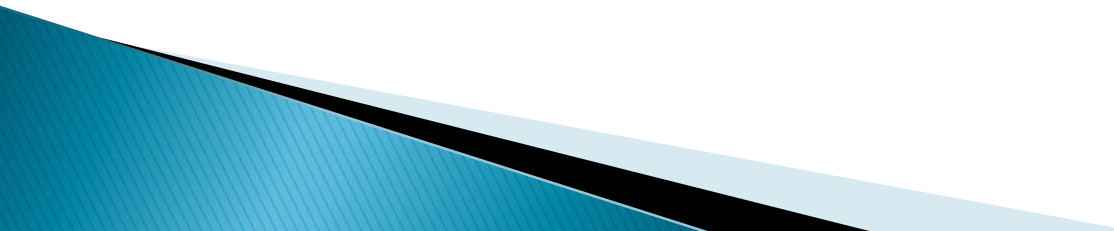


Student Mental Health, Direct Threat and Voluntary/Involuntary Medical Withdrawals

Peter Lake, J.D.
Professor of Law, Charles A. Dana Chair, and Director of the
Center for Excellence in Higher Education Law and Policy,
Stetson University College of Law


First, Let's Celebrate the Success of Disability Law

- ▶ More higher education—including graduate level—learners with disabilities
 - ▶ More complex disability signatures
 - ▶ Continuing federal commitment to protecting the rights of the disabled
 - ▶ Intersectionality
- 

Overview of the Basics of Disability Law

- ▶ “Disabled” *vel non*
- ▶ “Qualified” / “Otherwise Qualified”
 - No fundamental alteration
 - “Technical requirements”
 - Academic
 - Behavioral
 - Competency/“Job” qualifications
- ▶ Accommodation
 - K–12 vs. Higher Ed
 - “Reasonable”
- ▶ Direct Threat
 - Spring Arbor/Title II

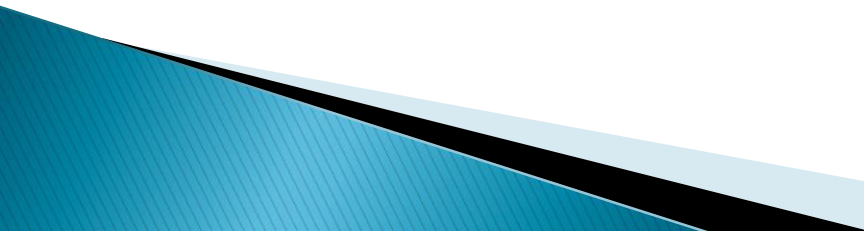
Key Points about Disability Law and Compliance

- ▶ Compliance with disability law is complex—special training in disability law and accommodation is needed.
 - ▶ Accommodation changes as students move from K-12 to higher education (IEPs)
 - ▶ In higher education the law typically requires a student to self-identify and request accommodation before the institution has such an obligation. Emphasis should be on facilitating self-disclosure.
 - ▶ Disability law defines protected disabilities quite broadly.
- 

Key Points about Disability Law and Compliance Continued...

- ▶ Students must be “qualified/otherwise qualified.”
- ▶ No fundamental alteration of program.
- ▶ Individual assessment.
- ▶ Disability law does not guarantee success in higher ed, just equal opportunity.
- ▶ The law allows institutions to enforce “technical requirements.”
- ▶ OCR has taken the position that disabled students are entitled to due process.
- ▶ Institutions of higher education can intervene proactively with students with disabilities if a student creates a “direct threat.”

Direct Threat

- ▶ A direct threat is a “significant risk to health or safety.”
 - ▶ Individualized assessment
 - ▶ Reasonable judgment based on medical knowledge OR available objective evidence
 - ▶ Nature, severity and duration of risk
 - ▶ Probability of potential injury
 - ▶ Can reasonable efforts/services mitigate the risk?
- 

Spring Arbor Matter


In December 2010, the Department of Education's Office of Civil Rights (OCR) issued a letter to Spring Arbor University as a result of a discrimination complaint under Section 504 of the Rehabilitation Act of 1973.

Office of Civil Rights, *Letter to Spring Arbor University* (December 16, 2010), available at http://www.nacua.org/documents/OCRLetter_SpringArborU.pdf.

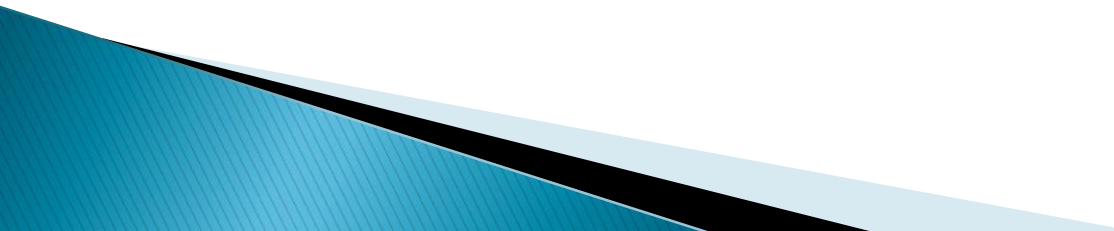
The Spring Arbor Matter Continued

- ▶ A complaint was made against Spring Arbor University by a student, who had been diagnosed with a disability at some point in his K-12 career, but he did not formally inform the college's disability services office of the disability.
- ▶ This student's behavior began to concern staff members and landed him in a meeting with school administrators to discuss "success" (not a discipline meeting). In the meeting, the student became upset and decided to medically withdraw from the university. He then sought readmission some time later.
- ▶ Spring Arbor claimed "direct threat."

OCR Found Spring Arbor University DID Discriminate Against the Student

- ▶ Even though the student never formally registered his disability with the proper disabilities services staff, the university knew he had a disability based on the behavior contract they created for him.
 - ▶ The student was qualified for the program due to the fact that he completed one term successfully and had no formal discipline or academic sanctions against him. He was also qualified for readmission because his previous withdraw had been voluntary and did not prevent him for reapplying and continuing in the program.
 - ▶ The university imposed undue requirements on him for readmission due to his disability. The university had not formally stated any policy for requiring medical information or proof of treatment for readmission.
 - ▶ The university did not conduct an adequate direct threat assessment.
- 

Direct Threat After Spring Arbor

- ▶ Can a student only be removed if a threat to others, not a threat to self?
 - ▶ College attorney response to Spring Arbor
 - ▶ DOE/DOJ “reply”
- 

Important Takeaways

- ▶ Don't play "Calvin-ball."
- ▶ You cannot round up all of your suicidal students and expel them.
- ▶ Suicide statistics show the vast majority of suicide threats don't evolve into completed suicides.
- ▶ But the reality is, suicide attempts and threats do effect others in the learning environment!
- ▶ Growing unease in DOE over allowing business as usual in higher education? – Poorly articulated standards of competency for students (a job description equivalent/qualification standards), for starters...(Brown Medical School example)

Qualification Standards May Be the Answer: The Brown Medical School Example

“Brown’s nine abilities encompass a broad range of expectations for future physicians, ranging from traditional clinical skills to the more elusive aspects of the art of medicine. Each of the abilities includes a list of specific criteria that the student is expected to master at a certain level of achievement, depending upon the student’s stage of professional development.”

The nine abilities are:

1. Effective Communication
2. Basic Clinical Skills
3. Using Basic Science in the Practice of Medicine
4. Diagnosis, Management, and Prevention
5. Lifelong Learning
6. Professional Development and Personal Growth
7. Social and Community Contexts of Health Care
8. Moral Reasoning and Clinical Ethics
9. Problem Solving

Voluntary/Involuntary Medical Withdrawals*


- ▶ Focus on conduct, not disability
- ▶ Ensure that an individualized assessment is made
- ▶ Ensure consideration of reasonable accommodations
- ▶ Ensure due process to the student

Protocols that spell out the specific procedures and conditions for voluntary and involuntary leaves of absence (as well as conditions for re-entry), including due process safeguards, are always a good idea. Zero tolerance policies are not. Schools considering mandated treatment policies should proceed with caution and make these determinations on a case-by-case basis.

*Jed Foundation and HEMHA, *Balancing Safety and Support on Campus: A Guide for Campus Teams.*

DOJ/The University of Tennessee Health Sciences Center

After placing a student on mandatory medical leave of absence, the student alleged the school did not make reasonable modifications to policies and practices and did not consider how to keep her enrolled. DOJ required the University to:

- ▶ “conduct an individualized assessment of each student and give careful consideration to the opinions and recommendations of the student’s health care provider(s), along with the opinions and recommendations of the health care professional(s);
 - ▶ respect the student’s confidentiality and only require the student to provide a medical release for access to the student’s health records as reasonably necessary to complete an individualized assessment;
 - ▶ determine on an individualized basis whether and what reasonable modifications can be made that would be effective to allow the student to continue to attend classes and participate in the educational programs. . . while seeking treatment for, or recovering from, any health condition(s);”
- 

DOJ/The University of Tennessee Health Sciences Center Cont'd

- ▶ “require a student to take an involuntary medical leave only if: (a) the University concludes after conducting an individualized assessment that the student’s continued participation would require modifications that would be unreasonably or fundamentally alter the nature of the educational programs; (b) the student rejects all reasonable modifications offered and cannot meet the essential eligibility requirements of the programs; or (c) even with all reasonable modifications offered, the student cannot meet the essentially eligibility requirements of the programs.”

Scott Warner, Recent DOJ Settlement Agreement Offers Valuable Guidance Regarding Mandatory Medical Leaves of Absence (Aug. 12, 2016), <http://www.lexology.com/library/detail.aspx?g=1b295e54-9e25-46f1-a93c-f2076393bc54>.

DOJ/The University of Tennessee Health Sciences Center Cont'd

“14. a. Nothing in this Agreement shall be construed to prevent UTHSC from requiring students to at all times meet the essential eligibility requirements and technical standards. Absent exigent circumstances concerning a potential safety threat, UTHSC shall ensure that any process used by SASS to evaluate a student’s request for accommodation or reasonable modification of UTHSC policies, is conducted independently from other campus processes. Further, that information provided to the SASS is used solely to evaluate the student’s request for accommodation or reasonable modification. UTHSC also shall, to the extent practicable, complete the process for evaluating any pending request for accommodation or reasonable modification and notify the student of the result of that process and appeal rights, prior to imposing a leave of absence or dismissal of the student. UTHSC must reasonably modify policies, practices, and procedures where necessary to avoid discrimination against students with disabilities.”

Dept. of Justice, Civil Rights Division, *Settlement Agreement Between the United States of America and the Univ. of Tennessee Health Sciences Center Under the Americans with Disabilities Act* (July 22, 2016).

DOJ/The University of Tennessee Health Sciences Center Cont'd

“14. b. Nothing in this Agreement shall be construed to prevent UTHSC from engaging in a process to identify and assess whether a student poses a threat to the health or safety of themselves or others, although UTHSC must reasonably modify policies, practices, and procedures where necessary to avoid discrimination against students with disabilities. Absent exigent circumstances, UTHSC shall explain its threat assessment process and appeal rights in detail to any student with a disability in a mode of communication accessible to the student before obtaining any information about the student from his or her health care provider otherwise authorized by law and/or making any referrals or recommendations concerning the student. UTHSC also shall ensure that any threat or safety assessment and subsequent actions are based on legitimate safety concerns, and not on speculation, stereotypes, or generalizations about people with disabilities. The Agreement also does not require UTHSC to permit an individual to continue to participate in or benefit from UTHSC’s services, programs, or activities after UTHSC conducts an individualized assessment and documents on the record that the individual poses a direct threat to the health or safety of others in accordance with 28 C.F.R. § 35.139(b).”

Dept. of Justice, Civil Rights Division, *Settlement Agreement Between the United States of America and the Univ. of Tennessee Health Sciences Center Under the Americans with Disabilities Act* (July 22, 2016).

Questions?

