

Mental Health Issues in the College: Disability Protections, Campus Counseling Centers and Complications

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MOOTY

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Higher Education Breakfast Briefing, November 14, 2006

Overview

- Legal Considerations
 - Disability discrimination and accommodation
 - Confidentiality
 - Duty to Warn/Duty to Act
- Practical Considerations

Disability Laws

- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act
- Minnesota Human Rights Act

Legal Requirements

- Nondiscrimination (equal treatment)
- Reasonable Accommodations, auxiliary aids and services, and modifications to rules, policies and practices to the extent not an undue financial and administrative burden or a fundamental alteration of the nature of the service, program, or activity provided.

What is a Mental Disability?

- “Mental impairment which substantially limits one or more . . . major life activities.”
- Or having a record of such an impairment, or being regarded as having such an impairment.

What is a Major Life Activity?

- Learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing a manual task, sleeping, or working.

Examples of Mental Disabilities

- Major depression, bipolar disorder, anxiety disorders, schizophrenia, personality disorders, obsessive compulsive disorder
- ADHD, learning disabilities/differences often found not to be disabilities

“Interactive Process” to Accommodation

- Meet with student
- Request information about medical condition and limitations
- Ask the student what accommodations she would prefer
- Consider the student’s request and let her know you have considered it
- Offer alternatives if the request is too burdensome
- Use team of disability services staff and teaching/programmatic staff

Accommodation Goal

- Accommodation, adjustment, modification, auxiliary aid or service necessary to afford student an equal opportunity to “obtain the same results, ... gain the same benefits, ... or reach the same level of achievement”

Confidentiality Issues

- FERPA
- Common Law Privacy
- HIPAA
- Minnesota Health Records Act
- Professional Duty of Confidentiality

FERPA

- Protects confidentiality of “education records”
- Education records =
 - Records directly relating to a student
 - Maintained by school or its agent

FERPA

- Access to educational records
 - Student
 - Within the institution: legitimate need to know
 - Parents of a minor student
 - Parents of an adult student
 - With student's consent
 - Or relates to violation of any law, or discipline regarding violation of school rule on possession of controlled substance and <21
 - In certain emergencies

FERPA Exceptions

- In connection with health or safety emergency
 - To appropriate parties
 - Necessary to protect health or safety of the student or other individuals

FERPA Exceptions, cont.

- Information about bad behavior or disciplinary action to teachers and school officials of the student's institution who have legitimate interests in the behavior of the student.

FERPA Exceptions, cont.

- Victim of crime of violence or nonforcible sex offense results of disciplinary proceedings if college determined that the student committed a violated the college's rules or policies.

FERPA Exceptions, cont.

- Parents may know information regarding any violation of law, and violation of college policies on alcohol or controlled substances if student under 21;
- College law enforcement records may be disclosed for law enforcement purposes.

FERPA Considerations

- Applies only to records
 - Consider: way to communicate needed information without disclosing the record
 - “We’re concerned”
- Risks and benefits
 - Penalties and enforcement riskvs.
 - Benefit of being proactive, preventing harm

Health Records

Number of laws protect confidentiality of health records:

- HIPAA
- Minnesota Health Records Act
- Professional duty of confidentiality
- Minnesota Government Data Practices Act

HIPAA

- Only applies to “covered entity”
- Covered entity =
 - Health care provider
 - That conducts certain electronic transactions (typically billing or insurance coverage determinations)
- Generally protects confidentiality
- Significant administrative requirements

MN Health Records Act

- Applies to health records held by
 - Health care provider
 - any person who furnishes health care services and is regulated to furnish the service under state law
 - E.g., physicians, nurses, athletic trainers, social workers, dentists, any health care facility such as hospitals, etc.
 - Person or institution who received health records from provider i.e., counseling center, health center

MN Health Records Act

- Access to health records
 - Student/patient
 - Among providers within same institution: ok
 - To others in institution who are not health care providers: probably need student/patient consent
 - Parents of a minor student
 - Parents of an adult student: only with student/patient consent
 - In certain emergencies

MN Health Record Exceptions

- In medical emergency:
 - when provider unable to obtain consent
 - due to the patient's condition or the nature of the medical emergency
- To law enforcement if:
 - patient currently involved in emergency interaction with law enforcement; and
 - disclosure is necessary to protect health or safety of patient or of another person

Other Health Records Rules

- Professional Licensure
 - Most mental health professionals also have duty of confidentiality associated with licensure
- Data Practices Act
 - Applies only to public institutions
- Exceptions generally track MN Medical Records Act and common law rules

Health Records Considerations

- MN Health Records Act: “Records” only
 - Professional Duty & HIPPA: All health information
 - Risks and benefits
 - Penalties and enforcement risk
 - Private causes of action
 - Disciplinary issues
- vs.
- Benefit of being proactive, preventing harm

Common Law Privacy

- Intrusion upon seclusion
 - Intentional intrusion
 - Upon the solitude or seclusion of another or personal affairs or concerns, and
 - Intrusion highly offensive to reasonable person
- Publication of private facts
 - Publication of private matter that would be highly offensive to reasonable person
 - Publication not of legitimate concern to public

Duties to Warn or Act

- Duty to warn
 - Warning a third party to prevent harm to the third party
 - Alerting a third party who can act to prevent self-harm to student
- Duty to act
 - Taking steps to prevent violent or self-harming act by student

Duty to Warn

- Statutory Duty to Warn
 - Psychologists or Licensed Psychological Practitioner
 - Specific Trigger
 - communication to licensee
 - specific, serious threat of physical violence
 - against a specific, clearly identified or identifiable potential victim

Duty to Warn – Licensed Professionals

- If duty is triggered:
 - Reasonable efforts to communicate threat
 - Maintain continuity of care for patient
 - Limited exceptions
- Even if duty is not triggered:
 - Good faith effort to warn against violent behavior/suicide may be protected

Duty to Warn or Act

Common Law Duty

- Common Law Duty to Warn or Act
 - Generally no duty exists to warn or protect others from conduct by a third person
 - Affirmative duty may exist when:
 - Special relationship exists
 - With actor and ability to control, or
 - With victim that gives victim right of protection
 - Harm to specific victims is foreseeable
 - fact-specific

Duty to Warn or Act

- Is there a “special relationship” in a higher educational setting?
 - Fact-specific determination, consider:
 - Notice of planned acts or acts that are reasonably foreseeable
 - Existing social values and customs
 - Contract-type promises by institution
 - Statements about services available on campus
 - Trend is for courts to find a special relationship

Duty to Warn or Act

- If a duty is voluntarily assumed, then due care must be exercised even though there was no duty to act in the first instance

Practical Considerations

1. Focus on reasonable steps to prevention
2. Engage in an interactive process to gauge need for accommodations
3. Consider what services are or should be available, communicate to students
 - Consider: on-campus, after-hours, on-call services, identify community resources to fill in gaps
4. Plan ahead

Practical Considerations

5. Consider how threats could arise

- Residential supervisors, faculty, counseling staff, student affairs staff, security/police, roommates, parents
- Through judicial disciplinary process
- Develop policy and train parties on how to respond

Practical Considerations

6. Consider how/when to involve parents

- Anticipate need for information disclosure in advance
 - Obtain FERPA/Medical record consent upon admission?
 - Take advantage of exceptions to confidentiality if needed
 - Consider risks of confidentiality breach vs. risk of harm
- Take clinical considerations into account
- Courts expressing preference for parental involvement

Practical Considerations

7. Evaluate leave policies to ensure mental health considerations adequately addressed

- Involuntary leaves limited to direct threat situations, narrowly tailored, with due process protections
- If disciplinary actions needed, use established process for those actions

Practical Considerations

8. Plan how to re-engage student after crisis has passed

- Evaluate ongoing supports
- Consider reasonable conditions for return
 - Ongoing counseling
 - Ongoing progress reports, evaluation
 - Permission to share information with treating professional

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