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The Intersection of Student Disability and Discipline Issues

Miriam J. McKendall, Esq.*
Holland & Knight LLP

Introduction

No college or university professional who is responsible for addressing student discipline has escaped the challenges presented by the relationship between student disabilities, in particular mental health issues, and conduct at issue in the student discipline process. This statement, although unsupported by statistics, is not likely a gross generalization, or even an overstatement. It is, instead, the recognition of the facts that student mental health issues have risen to levels of national concern and consequences of those mental health issues include conduct subjecting students to a discipline process.[1]

This intersection between student disability and discipline has the potential to become a collision point, generating liability for the educational institution and its professionals. That intersection need not be a point of legal combustion if the parameters of the disability laws are understood and properly implemented within the institution's approaches to these difficult situations.

The first section of this paper will present an overview of the primary federal laws that prohibit colleges and universities from discriminating against students on the basis of disability. The next section will provide summaries of a selection of cases involving different institutional approaches to student disability issues in the context of discipline actions, and how the courts have viewed those approaches. The last section offers some observations and suggestions for colleges and universities to consider as they further develop and implement their policies addressing student discipline, student disability and reasonable accommodations in order to approach the disability-discipline intersection with both caution and effectiveness.

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* Miriam J. McKendall is a partner of the law firm of Holland & Knight LLP. The author gratefully acknowledges contributions to this paper made by members of the Holland & Knight Education Law Group.

[1] *See, e.g.*, Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis,* 34 J.C. & U.L. 253 (2008) and Barbara A. Lee and Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008).

Section I. Legal Overview[2]

Several federal statutes, as well as many state statutes, prohibit disability discrimination against students by educational institutions. These statutes require public and private schools to provide equal educational opportunities to students with disabilities, including reasonable accommodations to students who are disabled under the meaning of the law and otherwise qualified to participate in the educational programs.

Title II and Title III of the Americans with Disabilities Act, 42 U.S.C §12101, et seq. ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") are two of the primary federal statutes with which educational institutions must comply when addressing student disabilities. The ADA was recently amended by the ADA Amendments Act of 2008.[3] Public Law 110-325 (S.3406), 122 Stat. 3553 (Sept. 25, 2008). For the reader's ease of reference, all ADA citations herein will cite to the U.S. Code. Title II and III of the ADA and Section 504 of the Rehabilitation Act, for the most part, are identical in their prohibitions against disability discrimination against students and mandates as to reasonable accommodations. Case law and federal regulations generally have interpreted these statutes the same.

In brief summary, the ADA and Section 504 provide broad protections for students by prohibiting discrimination on the basis of disability in all aspects of the educational program or activity, including admissions, academic requirements, housing, financial aid, and non-academic services. *See* 34 C.F.R. § 104.41-.47. The laws apply to individuals who are "otherwise qualified," meaning the disabled student must meet the academic and other standards required for admission or participation in the educational program or activity, with or without reasonable accommodations. 34 C.F.R. § 104.3(l)(3). Both the ADA and Section 504 address whether the student has a disability within the meaning of the statutory definition of "disabled." These laws mandate that the disabled students be provided with reasonable accommodations in connection with providing them with equal opportunity, access and enjoyment of the school's programs and offerings. *See* 34 C.F.R. § 104.41-.47.

The ADA and the Americans with Disabilities Act Amendments Act of 2008

The ADA was enacted in 1990. In September of 2008, the ADA was amended by the Americans with Disabilities Act Amendments Act of 2008. The ADA Amendments Act, effective January 1, 2009, will result in the disability laws being interpreted more broadly than they had previously. The primary purpose of the ADA Amendments Act is to restore the broad interpretation and application that Congress intended for the ADA when it was first enacted in 1990. Specifically, the amendments reject two pivotal decisions by the U.S. Supreme Court - *Sutton v. United Air Lines* 527 U.S. 471 (1999) and *Toyota Motor v. Williams* 534 U.S. 184 (2002) – which had narrowed the coverage of the ADA. At the same time, the ADA

[2] This paper presents an overview of certain federal laws relating to disability discrimination in the student context, along with summaries of select cases of general interest to those addressing the interface of student disability and student discipline. It does not provide a comprehensive discussion of all federal and state laws and other legal considerations, nor is it intended to provide legal advice. Readers should consult with their own legal counsel for guidance for specific situations.

[3] This law is referred to as the "ADA Amendments Act of 2008" and the "ADA Amendments Act."

Amendments Act reinstates the reasoning of U.S. Supreme Court decision in *Nassau County v. Arline*, 480 U.S. 273 (1987) in regard to the analysis and interpretation of the ADA. In addition, the ADA Amendments Act reflects the Congressional view that the current EEOC regulations are also too restrictive on the coverage of the ADA and express the expectation that EEOC will revise those regulations to provide for broader coverage of the ADA.

The Meaning of Disability

The newly effective amendments to the ADA[4] have the direct and immediate result of expanding the application of the definition of disability. By explicitly rejecting the U.S. Supreme Court holdings in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* the ADA Amendments Act make clear that the definition of disability does not create the strict, demanding standard for qualifying as disabled as had been held previously by the U.S. Supreme Court.

Under the ADA (and Section 504 of the Rehabilitation Act), the term "disabled" means: (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such impairment. 28 C.F.R. § 36.104. The ADA Amendments Act contains an expansive non-inclusive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 28 C.F.R. §36.104, as amended by 122 Stat. 3553, 3555. The ADA Amendments Act also includes as major life activities the operation of a major bodily function, 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.* With the ADA Amendments Act, the ameliorative effects of mitigating measures, with the exception of glasses and contact lenses, may not be considered in the disability determination. *Id.* at 3556. The term "substantially limits" is to be construed consistently with the purpose of the ADA Amendments Act to broaden the scope of its coverage. *Id.* at 3554. The ADA Amendments Act states further that an individual is not "regarded" as disabled if the impairment is transitory and minor. *Id.* at 3555. (Transitory impairment has an expected duration of six months or less.) An impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active. *Id.* at 3556.

Focus on Reasonableness of Request for Accommodation

A primary result of the ADA Amendments Act is the de-emphasis of complicated analyses regarding whether or not an individual meets the statutory definition of disabled. In this regard, the amendments speak clearly of Congressional intent that "primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* at 3554.

[4] For further discussion of the Americans with Disabilities Act Amendments Act of 2008, see the PowerPoint slides entitled "The ADA Amendments Act: Effective January 1, 2009." Also, for a summary of the Americans with Disabilities Act Amendments Act of 2008 and related information, *see* www.eeoc.gov/ada/amendments_notice.html.

The ADA Amendments Act will impact every entity which is covered by the ADA, including educational institutions addressing matters involving disabled students. Decisions made by schools as to whether a student is qualified for the programs at issue (with or without reasonable accommodations) will be the primary focus. To determine if a disabled student meets the academic and other standards required for admission or participation in the educational program or activity (with or without accommodations), the institution must be able to identify and articulate the essential requirements and standards of the educational program in which the student is, or seeks to be, enrolled. The institution must engage in meaningful and appropriate interactive processes and discussions as to whether the requested accommodation is reasonable. Ultimately, the institution is to evaluate the reasonableness of requested accommodations in the context of the essential requirements and standards of the educational programs.

Title II and Title II of the ADA

Title II of the ADA prohibits discrimination based on disability in *public entities*, and thus applies to public educational institutions. Its current regulations are found at 28 C.F.R. 35.

Title III of the ADA provides, in relevant part, that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation*..." 42 U.S.C. § 12182(a). Private educational institutions have long been held to be places of public accommodation and therefore are subject to Title III. *See* 42 U.S.C. § 12181(7)(J). Title III also makes it unlawful to "coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed . . . any right granted or protected by this chapter." 42 U.S.C. § 12203(b). The ADA also prohibits retaliation against an individual for filing a complaint regarding disability discrimination. 42 U.S.C. § 12203(a).

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act provides, in relevant part, that: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance* . . ." 29 U.S.C. § 794(a). For the purposes of the applicable Section 504 regulations, federal financial assistance is defined as "any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department [of Education] provides or otherwise makes available assistance in the form of: (1) funds; (2) services of federal personnel; or (3) real and personal property or any interest in or use of such property, including: (i) transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government." 34 C.F.R. § 104.3(h). Educational institutions whose programs or activities receive such federal funding are subject to Section 504.

Section 504 of the Rehabilitation Act requires a recipient of federal financial assistance with fifteen or more employees to "designate at least one person to coordinate its efforts to comply" with the Rehabilitation Act and its regulations, and to "adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable

resolution of complaints alleging any action prohibited" by the Rehabilitation Act and its regulations. 34 C.F.R. § 104.7.

The regulations do not specify the duties of the coordinator, but limited guidance is available from the Office of Civil Rights. The Office for Civil Rights has noted that the role of the disability coordinator at an institution of postsecondary education involves evaluating documentation, working with students to determine appropriate services, assisting students in arranging services or testing modifications, and dealing with problems as they arise. The OCR has noted that this coordinator "may have contact with a student with a disability only two or three times a semester" and "usually will not directly provide educational services, tutoring or counseling, or help students plan or manage their time or schedules", as students in the higher education setting are "expected to be responsible for their own academic programs and progress." *See* Office of Civil Rights' *Transition of Students With Disabilities To Postsecondary Education: A Guide for High School Educators*, March 2007, available at http://www.ed.gov/about/offices/list/ocr/transitionguide.html.

The regulations do not specify the specific procedures for the grievance procedures because of "the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply." 34 C.F.R. § 104, Appendix A §12. Opinion letters that the Department of Education issued in the student suicide and mental health context indicate that notice, a process to allow the student to be heard in a meaningful way, and an appeal process of some sort should be provided. See *OCR Letter to Bluffton University*, Dec. 22, 2004, OCR Complaint #15-04-2042; *OCR Letter to Guilford College,* March 6, 2003, OCR Complaint #11-02-2003.

Students Presenting Direct Threats

Institutions faced with students believed to present a threat to their own safety or that of others have sometimes acted precipitously and taken disciplinary actions (typically, removal of the student from housing or campus, or both) before undertaking an appropriate analysis. As a general principle, to determine if a student is a "direct threat" to himself or to others, the institution must perform an individualized assessment of the risks posed by the individual.[5] The threshold for proving that an individual presents a direct threat is relatively high. The assessment must be based on a reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk. 28 U.S.C. § 36. 208. While this standard is not always easy to apply, it is clear that an educational institution must be able to defend its determination as being objectively accurate. Generally speaking, a school cannot expect to rely on the subjective good faith determination of its administrative personnel to meet the direct threat requirements.

[5] There is a difference between the "direct threat" analysis under Title I (employment) and Title III (public accommodations) under the ADA. This is argument that while the regulations for Title I include the direct threat analysis for both threat-to-self and threat-to-others, Title III extends that analysis to threat-to-others only. The Office of Civil Rights ("OCR") has interpreted the Rehabilitation Act in the higher education context as permitting both the threat-to-others and the threat-to-self analyses. *See* the OCR opinions referenced herein.

The Fair Housing Act and Other Bases for Legal Actions Related to Student Disabilities and Discipline

Some students (including Jordan Nott and Jane Doe in the cases detailed below) have included violations of the Fair Housing Act, 42 U.S.C. §3604(f), as part of their lawsuit. That section of the Fair Housing Act makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap. 42 U.S.C. §3604(f)(1)-(2). However, that section also states that it does not require that "a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." U.S.C. §3604(f)(9).

Also, as illustrated by the cases discussed below, other legal claims brought against colleges and universities by students with disabilities who challenge disciplinary actions include violations of constitutional rights, state disability statutes and housing laws, claims involving breach of contract and privacy rights, and harm to reputation through defamation and slander, and similar tort claims.

Section II. Case Law Summaries[6]

***Tylicki v. St. Onge,* 2008 WL 4726328 (2d Cir. (N.Y.) Oct. 28, 2008)**

Case Background – Suspension Following Violent Outbursts

Student Raymond Tylicki was suspended from the Clinton Community College following a number of violent outbursts, which he blamed on a mental impairment. Tylicki filed a suit against the College under the ADA, the Individuals with Disabilities Education Act (IDEA), and Rehabilitation Act, among other claims.

The lower court (U.S. District Court for the Northern District of New York) dismissed the complaint for failure to state a claim. Tylicki appealed. The Court of Appeals found that the complaint did not allege necessary elements of an ADA or Rehabilitation Act claim and that postponement of the student's disciplinary hearing was not a reasonable accommodation. (It was held that the IDEA did not apply to Tylicki.)

The Court of Appeals, treating Title II of the ADA and Section 504 of the Rehabilitation Act identically, stated that to establish a *prima facie* violation of the ADA and the Rehabilitation Act, Tylicki must demonstrate (1) that he is a qualified individual with a disability; (2) that the defendants are subject to the ADA or the Rehabilitation Act; and (3) that he was denied the opportunity to participate in or benefit from the defendants' services, programs, or activities, or was otherwise discriminated against by the defendants because of his disabilities. The Court also

[6] The reader is reminded and cautioned that the ADA Amendments Act of 2008 is effective January 1, 2009. Therefore, all of the cases discussed in this Section II pre-date this new law.

noted that an individual is considered disabled in this context if he has a physical or mental impairment that substantially limits one or more major life activities.

Tylicki's complaint did not contain any allegations describing how his alleged mental condition substantially limited a major life activity. Moreover, even if he had adequately pled a disability, he failed to allege that he was denied access to the College's programs because, although he was suspended from the College, he subsequently had been admitted and had attended classes.

Interesting Aspect of this Case

As the court succinctly stated: "In other words, the ADA and the Rehabilitation Act permit [the College] to discipline a student even if the student's misconduct is the result of disability" and thus the College was not required to postpone the disciplinary hearing while Tylicki gathered evidence of his alleged disability, as such a delay was not a reasonable accommodation. *Tylicki*, 2008 WL at *1.

***Bhatt v. The University of Vermont*, 958 A.2d 637 (Vermont S.Ct. 2008)**

Case Background – Dismissal of Student for Fraudulent Conduct; Refusal to Readmit After Student Received Medical Treatment for Condition Leading to Fraudulent Conduct; Honesty and Personal Accountability as Essential Qualifications

Rajan Bhatt, a former medical student, brought suit against the University of Vermont in November of 2004 claiming the University violated the Vermont Public Accommodations Act (the "VPAA," which is based on Title III of the ADA) by not accommodating his disability-based misconduct (namely, forgery), and not adequately considering measures that might have accommodated his disability. He also claimed the lower court's conclusion that plaintiff posed a direct threat of harm was procedurally defective and not allowed under the statute.

Bhatt falsified an evaluation for a surgery rotation. He claimed during a hearing before an internal University's Committee on Fitness that the incident was isolated. The University's ethical rules provided that a student whose behavior is considered to render him/her unfit for a career in medicine may be dismissed at any time and included examples of such behavior, including lack of personal integrity and lack of personal accountability.

Instead of dismissal, the Committee chose to impose less serious sanctions, including postponement of graduation, monitoring, and inclusion of the incident in the student's record.

The University later became aware that Bhatt had forged other surgical rotation evaluations and an undergraduate diploma. During the second hearing to address these additional forgeries, Bhatt stated, for the first time, that his misconduct was caused entirely by Tourette's Syndrome and a related obsessive behavior disorder.

The Committee voted to dismiss Bhatt. Bhatt subsequently sought treatment for his disability and six months later requested his medical condition be reevaluated by the school. Bhatt was permitted to apply for readmission. He did so. He was denied readmission. He completed his medical degree at a different school and entered a residency program. He sued the University of

Vermont, seeking equitable relief, including the award of his degree or reinstatement in order to obtain his degree, because his degree from the other medical school is not recognized in every state and limits where he can practice.

In December of 2006, the trial court entered summary judgment for the University. The court found that Bhatt did not meet the essential eligibility requirements of the medical program citing federal case law. The court stated that "medical schools are not required to alter their policies or programs in such a way as would compromise the integrity of their programs" and noted that a court should generally "defer to an academic institution's professional judgment of the competency required for award of an academic degree." Specifically, the court stated:

> "The College, hospitals, and a student's patients must all be able to trust the student to ... maintain confidentiality, give candid advice, obey regulations regarding controlled substances, and be forth-coming, even if it means disclosing her own errors. We would defer to [the University's] judgment in imposing this graduation requirement even if we did not agree it was sound." *Bhatt*, 958 A.2d at 641.

In the alternative, the trial court concluded that summary judgment should be granted because the requested accommodation would be an unreasonable modification that would undermine the justification for the privileges inherent in a medical degree. The court also agreed with the University's conclusion that Bhatt posed an unreasonable risk of harm to his patients.

Bhatt appealed the trial court's decision to the Vermont Supreme Court.

The Vermont Supreme Court affirmed the trial court's entry of summary judgment for the University, concluding that Bhatt lacked a *prima facie* case and the action had been properly dismissed by the lower court. Bhatt could not show that he met the essential qualifications of the University, even with reasonable accommodations, as the University has the academic discretion to make honesty and personal accountability essential qualifications for its students and it would fundamentally alter the nature of the College if those actions by students were tolerated by the College and the student was allowed to enter the profession. Even though Bhatt showed that he had sought medical care for himself, the Court held that providing such care to others as a medical student can be high-stress, so the circumstances leading to his misconduct could reoccur. Additionally, the University had no guarantee that Bhatt would continue to seek medical treatment or that it would be effective in curbing the misconduct.

Additionally, it held that Bhatt had the burden to establish that he can meet the University's essential requirements with reasonable accommodation and thus he is "otherwise qualified" to continue in medical school. Bhatt never requested accommodations for his disability, and only disclosed the alleged disability in the second hearing in an attempt to mitigate punishment. Therefore he did not meet his burden of identifying the need for accommodations. Interestingly, the Vermont Supreme Court, without elaboration, noted that Bhatt had raised his disability and the need for an accommodation during or after the first disciplinary hearing, the analysis might be different. Finally, the Court also noted that this type of situation, in which Bhatt attempts to have the University ignore the egregious misconduct and "wipe the slate clean and [] obtain a

second chance" is not what the ADA or the VPAA were intended to remedy. *Bhatt*, 958 A.2d at 646.

Interesting Aspect of this Case

As the Vermont Supreme Court noted: The University is entitled to defend the ethical and academic standards for its students. The underlying conduct at issue, fraud and dishonesty, is the focus. That the alleged cause of that conduct is disability related does not require the alteration of the University's standards and essential qualifications. *Bhatt*, 958 A.2d at 644-45.

***Millington v. Temple University School of Dentistry*, 261 Fed.Appx. 363 (3d Cir. (Pa.) 2008)**

Case Background - Focus on Academic Requirements of Program and Accommodations That Are Reasonable

ZsaZsa Millington sued Temple University after she was dismissed from dental school, claiming a violation of her rights under the ADA and the Rehabilitation Act. Millington claimed she suffered from orthopedic, arthritic, and neurological impairments, hearing loss, IBS (irritable bowel syndrome), PMDD (premenstrual dysphoric disorder), chronic migraine cephalgia, chronic pain syndrome, neck sprain and strain and she alleged that Temple had failed to provide reasonable accommodations in response to her requests, denied extensions of time to complete her schoolwork, administered make-up exams in inappropriate settings, and did not allow her to take leaves of absence, then dismissed her from her program of dental studies.

The United States District Court, for the Eastern District of Pennsylvania, granted summary judgment for Temple. Millington appealed. The Court of Appeals affirmed the holding of the District Court, noting that even if Millington suffered from a disability, she was not otherwise qualified to participate in the dentistry program because she failed to meet Temple's academic requirements.

In 1997, Millington enrolled in Temple as a dental student. She was on and off academic probation from 1997 to 1999 due to many missed classes and failed exams. She was granted many accommodations, such as double time for taking tests, proctored testing, the use of a computer and other devices during tests, permission to tape-record lectures, and a seat in the front of the class. However, she continued to fail her examinations, as had happened in previous semesters, claimed sometimes that she was ill and sometimes not appearing for scheduled make-up tests.

In 2000, Millington requested accommodations relating to her clinical rotations, including limited her work to two days in the clinic, and allowing her to steady her dental drill with two hands and take rests while drilling, stand periodically, and have a clinical tutor-partner to explain to her how to complete clinical tasks efficiently. The University objected to the limited work schedule and modified use of the drill, but provided some of the other accommodations, and recommended that she take a leave of absence due to her inability to complete the clinical requirements. Millington took a leave of absence after migraines forced her to miss classes and fail her courses that semester.

When Millington returned in 2001, Temple provided her with extended time to complete classroom and clinical assignments, preferred seating, permission to stand and walk around, alterations to her clinic cart, and a dental assistant's help with some procedures, but denied her request for a reduced (non-consecutive half-days only) schedule for her clinical work, because such a schedule would interfere with patient care and Millington's ability to complete the required course work. Millington again missed many classes, missed examinations, and was granted a second leave of absence on the condition that she repeat her third year of dental school.

She returned one year later for the 2002 summer session. For that summer and the subsequent fall and spring semesters, she requested and was granted similar accommodations, including a dental assistant and permission to see the minimum number of patients. Despite the accommodations, she continued to miss classes and miss and fail examinations. In the spring of 2003, she failed or took "incompletes" in many of her classes, and her doctor recommended she be given several extra months to complete her clinical requirements because she was suffering from a re-injury to her spine. One week after this recommendation, the University's Promotions Committee voted to dismiss Millington for failure to satisfy the dental program's requirements. This decision was upheld by the Appeals Committee. Millington's appeal to the dean resulted in "one last chance" to remediate her failing grades by the end of the summer. When Millington requested an extension through September, her request was denied because the University requires students to complete all work before the start of the next school year. Millington was dismissed.

The District Court and Appeals Court both determined Millington did not have a disability. Because that determination was based upon analyses relying on the *Toyota Motor Mfg.* case, which was explicitly rejected by the ADA Amendments Act of 2008, we will not provide details of those analyses. It is important to note, however, that both courts extended it analyses beyond the inquiry of whether Millington was disabled, and found that even if she could prove she had a disability, Millington did not demonstrate that she was otherwise qualified to participate in the dental program, which would require that she meet all of the program's requirements in spite of her disability, with or without reasonable accommodation.

The Appeals Court affirmed the District Court conclusion that Millington was dismissed due to her failure to meet the University's academic requirements and not due to discrimination on the basis of any disability.

Interesting Aspect of this Case

Courts afford deference to educational institutions for decisions relating to their academic standards. An institution must be able to articulate these standards. Then, the institution must view any requests for accommodations in light of its academic standards. The institution is not required to alter those standards, but must diligently review reasonable accommodation requests and resist temptation to deny a request outright because of a student's seemingly endless invocation of the reasonable accommodation process.

***Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097 (D.C. Cir. 2007)**

Case Summary – Dismissal, Academic Requirements and Requests for Accommodation

Carolyn Singh, a former medical student, filed suit against George Washington University after being dismissed for academic reasons in 2003, alleging that her dismissal was a violation for failing to accommodate her alleged learning disabilities under Title III of the ADA.

After a bench trial, the United States District Court for the District of Columbia found that Singh had failed to prove she had a disability under the ADA and entered a judgment for the University. Singh appealed.

The Court of Appeals vacated the lower court judgment and remanded the case for a new determination, based on a need for further analysis as to whether (1) Singh was disabled, and (2) whether the University's refusal to accommodate the student at time of her request was unreasonable; and (3) Singh was otherwise qualified for medical school (because the district court had ruled this on partial summary judgment).

Though Singh was very successful in high school and college, she performed poorly on multiple choice tests including the MCAT. She was thus admitted to a decelerated medical program at GW, which had a reduced course load and heightened standards for academic dismissal. In the program, she received unsatisfactory or failing grades in several courses, based in part on multiple-choice examinations, and a faculty committee recommended she be dismissed. After the committee recommendation, but before the dean made his decision, Singh was diagnosed with dyslexia and a mild disorder of processing speed by a psychologist who provided recommended accommodations to improve her performance. Singh requested the accommodations from the dean, but the dean still dismissed Singh from the medical school.

The Appeals Court disagreed with the University on the issue of whether Singh had timely requested the accommodations. The Appeals Court noted the University did not demonstrate that any major commitment of resources would have been wasted as a result of the University considering the accommodation claim. The Appeals Court vacated the judgment and remanded the case to the district court for a determination of whether Singh was disabled, due to a variety of inconsistencies in the district court's original determination and opinion.

Interesting Aspect of this Case

A request made for an accommodation cannot be ignored simply because the request is made prior to the conclusion of the disciplinary process. Also of interest is that in response to the University's argument that Singh was not otherwise qualified because she would have been incapable of completing her studies even if she had received her requested accommodations, the Appeals Court addressed the legal question about whether a Title III plaintiff must be "otherwise qualified," noting that although the Rehabilitation Act and Titles I and II of the ADA Title address the "otherwise qualified" or "qualified individual" issues, Title III does not include those phrases. The Appeals Court did not address this issue, however, because the University did not

object to the district court's summary judgment finding that Singh was indeed "otherwise qualified."

***Jordan Nott v. The George Washington University, et al.*, Superior Court of the District of Columbia, Civil Case No. 05-8503** – Settled 2006

Case Background - Discipline *Because* of a Disability

Student Jordan Nott reportedly had a close friend and intended roommate who had committed suicide by jumping out the window of his dorm room while Nott and two friends stood in the hallway trying to open his locked door. Nott was allegedly depressed and thinking about that close friend, under the strong influence of medication and was unable to sleep. He allegedly asked his roommate to go with him to George Washington Hospital for psychiatric help. George Washington University administrators were informed of Nott's request for psychiatric help by hospital personnel. Within 12 hours of admission to the hospital, Nott alleged he was given a disciplinary letter banning him from the dorm. Within about 36 hours, the University made disciplinary charges against Nott and told him he had to withdraw from the University or face suspension, expulsion and/or criminal charges, according to Nott, merely because he sought help for his depression. As alleged, Nott was not actively suicidal and never made a suicide threat, gesture or attempt. He was simply depressed and sought help. Reportedly, Nott withdrew from the University.

Nott sued the University, the Hospital, various medical personnel and University administrators. His complaint contained eight causes of action including statute violations of the ADA, Section 504 of the Rehabilitation Acts, the Fair Housing Amendments Act, 42 U.S.C. § 3604(f), the D.C. Human Rights Act, District of Columbia Mental Health Information Act of 1978, as well as claims for intentional infliction of emotional distress; common law invasion of privacy, and breach of confidential relationship.

The case was reported as settled at the end of 2006.

Interesting Aspect of this Case

This case raised claims regarding George Washington University using its disciplinary system to address concerns about a student with mental health issues who was perceived to be a danger to himself. The U.S. Department of Education, which enforces Section 504, has stated its position that using the disciplinary system in the manner alleged may, depending on the particular facts, violate Section 504.[7] While students with mental health disabilities are not immune from a school's disciplinary system or standards of conduct applied to all other students, a student cannot be disciplined *because* of the disability. Rather, discipline must result from conduct which is unacceptable for any student, e.g., harassing other students, threatening other students, dealing drugs and so on.

[7] *See*, *generally* United States Department of Education, Office for Civil Rights letter determination in OCR Complaint #09-00-2079 (Woodbury University); OCR Complaint #15-04-2042, (Bluffton University); OCR Complaint #03-04-2041 (DeSales University).

To the extent mitigating factors are considered in the disciplinary process for other students who exhibit the same unacceptable conduct but who are not disabled, the fact of disability of the disabled student generally must be considered as a mitigating factor.

***Jane Doe v. Hunter College of the City University of New York, et al.,* United States District Court for the Southern District of New York, No. 04-CV-6740 (SHS) – Settled 2006**

Brief Background - Automatic Suspension From Housing After Suicide Attempt

Jane Doe, a student at Hunter College, allegedly suffered from Manic Depressive Disorder and Attention Deficit Hyperactivity Disorder. At times, her depression was so severe that she claimed it limited her major life activities, such as sleeping, eating, socializing and perceiving. The student admitted she had engaged in suicidal gestures but claimed she had never been a threat to other students. The student made one trip to a local hospital emergency room in January, 2004, when her boyfriend became concerned about her several migraine headaches, nausea and medication. Then, in June, 2004, the student swallowed 20 Tylenol PM pills, dialed 911 and was taken by ambulance to Cabrini Hospital Medical Center where she was voluntarily admitted. Four days later, when it was determined that she was no longer a threat to herself or others, she was released with arrangements in place for follow up care. When she returned to her dormitory room, she learned that the locks had been changed, and that she would be allowed to retrieve her possessions but would not be allowed to continue to live in the dormitory. Allegedly, an administrator stated that her request to be allowed to continue to reside in the dormitory could not be granted because of the possible harm she may cause herself or others in the dormitory. Moreover, the College pointed out that the Housing Contract provided that:

> A student who attempts suicide or in any way attempts to harm him or herself will be asked to take a leave of absence for at least one semester from the Residence Hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the Residence Hall. Additionally, students with psychological issues may be mandated by the Office of Residence Life to receive counseling.

The student filed a lawsuit, claiming that these actions and policies discriminated against her by evicting her from dormitory housing because of her disability; conditioning her return to the dormitory on her agreement to terms not imposed on students who did not have a disability; and discriminating against her by refusing to provide her with an accommodation that was necessary to afford her an equal opportunity to use and enjoy dormitory housing. Her complaint alleged violations of the Fair Housing Amendments Act of 1988, 42 U.S.C. §3604(f) - Title II of the ADA, 42 U.S.C. 12131 and 12132, et seq., and Section 504 of the Rehabilitation Act.

A motion to dismiss was filed on the grounds that the claims were barred by the Eleventh Amendment, that the student lacked standing and that there was a failure to state a claim for relief under Section 504 and Title II. The motion to dismiss was denied. Reportedly the case was settled in August of 2006.

Interesting Aspect of this Case

Is it appropriate to discipline a student with mental health issues by suspending housing privileges as alleged in this case? The settlement of this case prevented the court from answering this question. However, an automatic suspension of an emotionally disturbed student from student housing because the student is deemed a danger to himself is, no doubt, subject to legal action.

Colleges and universities must address issues with students claiming a mental health disability through mental health providers, engaging with the student administratively in an interactive process, doing individualized assessments and providing reasonable accommodations rather than through discipline. See the discussion, above, on "Students Presenting Direct Threats," and Section 504 of the Rehabilitation Act for further details.

Steere v. George Washington University School of Medicine and Health Sciences,
439 F. Supp.2d 17 (D. D.C. 2006)

Case Background – Consideration of "Late" Disclosure That Disability Led to Student's Failing Academic Requirements

Eric Steere, a medical student, claimed that the University dismissed him because of his disability in violation of the ADA and by failing to offer him reasonable accommodations before dismissing him.

Steere struggled during his first semester of medical school, receiving one "Conditional" and one "Failing" grade his first semester, both of which individually place a student at risk of academic dismissal at the Medical School. He went before the Medical School Evaluation Committee (MSEC), and blamed his grades on feeling anxious and having difficulty studying effectively. The MSEC recommended Steere take a leave of absence during the spring semester, and the dean concurred. Steere returned after his leave and performed satisfactorily for one semester, then received a grade of "Conditional" the following spring semester. The MSEC allowed him to remain at the school pending successful completion of the course over the summer, which Steere did. However, the following semester, he received "Failing" and "Conditional" grades in two courses, and the MSEC voted to recommend he be dismissed for academic reasons.

After this hearing, Steere met with a psychologist, who diagnosed him with attention deficit hyperactivity disorder ADHD, (inattentive type), a learning disability, and recommended several accommodations. The dean read the psychologist report, but nevertheless decided to dismiss Steere per the MSEC's recommendation.

Steere sued the University, claiming he was dismissed in violation of Title III of the ADA. The University filed a motion for summary judgment, which was granted in part and denied in part by the District Court. Following trial, the District Court held that the student failed to show he was disabled, under the ADA, and found for the University.

The Court did not find that the plaintiff had a disability, because he had submitted insufficient evidence that his academic struggles were due to a learning disability and he had failed to prove

by a preponderance (more likely than not standard) that his symptoms satisfy the elements of an ADHD diagnosis. Because the Court found he did not have a disability under the ADA, the Court did not address whether he was otherwise qualified or discriminated against on the basis of his disability.[8]

Interesting Aspect of this Case

Whether or not this student would be found to be disabled under the Americans with Disability Act Amendments Act of 2008 is an interesting question. Even more interesting, however, is the Court's concluding comment to the University:

> As a final note, the Court would like to caution defendant that, as an educational institution, it is obligated to provide reasonable accommodations to students who demonstrate that they are entitled to them under the ADA. Defendant's practice of dismissing a student after receiving documentation of the student's disability − and without even considering whether the disability exists − is imprudent given the possibility that the student actually does suffer from a disability under the ADA. If the request for reasonable accommodations is received prior to the official dismissal, as it was in this case, defendant must consider it before issuing its final decision whether to dismiss the student. This is necessary not only so that defendant can avoid being held liable in a lawsuit where a plaintiff prevails, but also because defendant ought to be concerned about whether students truly have learning disabilities. A well-regarded institution of higher learning, such as George Washington University, should be committed to the success of all its students, and surely that entails a sincere evaluation of their abilities and needs before issuing a decision to dismiss them. (Emphasis supplied.) *Steere*, 439 F. Supp.2d at 26.

Section III. Observation and Suggestions

Statutory requirements and the recent amendments to the ADA, case law analyses, and practical considerations lead to the following observations and suggestions for colleges and universities to contemplate as they further develop and implement their discipline policies and disability assessment processes.

1. **Update Student Disability and Reasonable Accommodation Policies**

- Make certain these policies include prohibitions against disability discrimination and an explanation of the reasonable accommodation process, including how a student makes a request for a reasonable accommodation.

- Centralize the reasonable accommodation review, determination and approval process to the extent practicable to maximize expertise and consistency of response.

[8] Application of the ADA Amendments Act of 2008, effective January 1, 2009, may lead to a different conclusion as to whether such student is disabled.

- Train individuals who are likely to receive reasonable accommodation requests on how to respond to these requests and/or refer students to the established processes.

- Comply with Section 504 regulations requiring compliance coordinators and a grievance process, if the institution is otherwise covered under Section 504. (A coordinator and simple (but meaningful) grievance process can be useful even if the school is not covered by Section 504.)

2. **Update Student Discipline Policies**

- Include language in policies granting the institution flexibility to take actions separate from, and outside of, the regular discipline process and procedures to address situations involving issues of safety to self or others, disabilities, unlawful conduct, and matters in conflict with the reputation and business interests of the institution.

- Include disclaimer that the discipline procedures do not constitute a contract between the student and the institution, and the institution has the right to modify the procedures at any time as it deems to be in the best interest of the institution.

- Be cautious of untrained members of disciplinary or judicial boards (especially boards comprised of students) addressing disability related aspects of a student discipline case.

3. **Update Student Leave Policies**

- Examine criteria, conditions and processes for all types of leave available to students (*e.g.*, voluntary vs. involuntary leave, leave to pursue education elsewhere, leave for personal reasons, leave for medical reasons).

- Identify any differences in criteria, conditions and processes for medical leaves vs. non-medical leaves. Evaluate the reasons for those differences. Be ready to reconcile those differences as necessary to eliminate violations of disability (or perceived disability) laws.

- Be able to articulate educational rationale for prohibitions of leaves in excess of a certain number of weeks of a semester. Is this policy applied consistently to all leaves (and not just medical leaves)? Why? Why not?

- Be able to articulate educational rationale for any mandate that leaves be of a minimum duration. Is this policy applied consistently to all leaves (and not just medical leaves)? Why? Why not?

4. **Criteria for Student's Readiness to Return After Medical Leave for Mental Health Issues**

Many institutions have struggled with the issue of when to permit a student to return to school after the student has been on leave for serious mental health issues, such as a suicide attempt. Below are some suggestions to consider. These suggestions may have limited

application depending upon a number of factors, including the size and involvement of the institution's mental health clinic and the institution's related policies and procedures.

- As a threshold matter, be able to articulate the fundamental qualifications and requirements of being a student and/or residing on campus.

- Ask for open-ended statement from student requesting to return. For example, "Provide a statement demonstrating your readiness to return to, and meet the expectations of, the institution (academic program, etc.), and how you plan to do so."

- Obtain medical verification from student's outside mental health care provider based on criteria directly related to the school's expectations of the student once the student returns, is enrolled in classes and is residing on campus. Examples include:

  — The degree to which the student has achieved a reasonable degree of psychiatric and symptomatic stability with respect to his/her ability to function without substantial risk to such stability in a demanding academic environment at [describe nature of academic program/institution and/or residential environment].

  — In the case of a student returning after a suicide attempt: The degree to which the student has achieved a reasonable degree of psychiatric and symptomatic stability with respect to his/her ability to function without substantial risk of suicide in [describe nature of academic program/institution and/or residential environment].

  — The degree to which the student understands and acknowledges that he/she suffers from a mental illness, is aware of those situations that may exacerbate or trigger his/her symptoms, and has developed, and intends to follow, reasonable strategies for responding to the same.

- Clarify that the institution is relying on information and certification provided by the student's outside health provider as to the student's readiness to return. Therefore, the student should not equate the institution's acceptance of that outside provider's certification as the institution's own independent assessment of the student's readiness to return. Consider obtaining written representations from the student along the lines of the student confirming that he/she has been cleared for return by a qualified mental health professional who is not affiliated with the institution and that he/she is not relying on the institution's assessment as to his/her readiness to return, and that the student will comply with his/her health care provider's recommendations as to his/her continued treatment during the period of time he/she is a student at the institution.

5. **When a Student Discloses a Disability as an Explanation for Conduct During a Disciplinary Proceeding . . .**

Once a student's conduct is being addressed through the disciplinary process, many institutions have struggled with how to respond to the student's sudden disclosures that he or she has medical or mental health impairment that was the cause of the conduct at issue. The cases instruct about the imprudence of ignoring such "late" disclosures (*see Steere v. George*

Washington University, discussed above). They also confirm that such a disclosure does not require the disciplinary process to be paralyzed either (*see Tylicki v. St. Onge*, discussed above). Generally, a student's conduct is not forgiven simply because it was the direct or indirect result of a disability. As these cases demonstrate, the law does require the institution to consider each situation on an individual basis, as opposed to applying a mechanical approach that is void of any disability analysis. Other considerations include:

- When was the disclosure made in connection with the timing of conduct at issue and the resulting disciplinary process? Was an accommodation requested prior to the conduct at issue? Would an accommodation have been reasonable, or is now reasonable?

- Would the conduct at issue result in discipline for another student, if that student was without a disability?

- How do mitigating factors, in general, impact the disciplinary process and/or the sanctions process?

- Should the disability disclosure result in the institution addressing the conduct at issue (and/or sanctions for such conduct) outside of the disciplinary process?

- Are the persons conducting the disciplinary process trained about the institution's obligations under the disability laws?

Conclusion

The student disability-discipline intersection presents many challenges – legal and otherwise – for any educational institution. This area, like many facets of higher education, is evolving through legal developments within the legislature and the courts, along with practical realities seen on campuses each day. While the case law to date leaves many issues unresolved, it does provide specific guidance for colleges and universities to apply while navigating through this challenging intersection.

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