TASC/NDRN

Q&A ON CHALLENGES TO MENTAL HEALTH POLICIES IMPOSED BY COLLEGES

MAY 2006

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Q. I have a client who is a straight-A student at a private college. The school has a policy which requires that students who threaten or attempt suicide take a medical leave of absence and move out of the residence hall. My client had suicidal thoughts and sought counseling with the school counselor. After agreeing to be hospitalized to treat her depression, she was placed on mandatory leave of absence and told to vacate her dorm room. Can I challenge this policy?

A. There has been an increase in these policies in recent years, especially in the wake of a 2002 lawsuit filed against the Massachusetts Institute of Technology by the parents of a student, Elizabeth Shin, who claimed that MIT failed to prevent their daughter's suicide. Since the *Shin* case, based in part on fears of liability and prejudices and stereotypes about people with mental illnesses, more and more schools have adopted mandatory-leave policies.

Such policies often require a student who exhibits self-injurious behaviors or ideas to take a leave of absence from school for either a semester or the remainder of the academic year. Some schools also have adopted housing contracts or residence hall rules and regulations which prohibit acts of violence, including self-injury. These schools treat self-injurious behaviors or ideas as a violation of the housing contract or rules and, while allowing the student to remain enrolled, require him or her to take a leave of absence from the residence hall. Finally, some schools have enacted codes of conduct which prohibit violence or dangerous behavior, including harm to the self. These schools bring disciplinary charges against students who express self-injurious behaviors or ideas. These schools may also impose an immediate interim suspension and/or eviction on the student, as well as a ban from campus until a "due process" hearing is conducted to determine

the validity of the disciplinary charges. Often, these policies are enforced immediately upon the school learning that a student has been hospitalized.

In addition, schools that impose mandatory leaves of absence often impose conditions on the student's return from leave. These conditions include requiring that the student receive clearance from the school counselor and/or the director of the residence hall before being allowed to return to the dormitory, receive continuing and regular treatment during their leave, have in place a continuing care plan for the academic year with oversight by the school counselor, and/or be evaluated by a psychiatrist before he or she can return to school. Policies imposing intrusive conditions of return have been challenged on the same grounds as the mandatory-leave policies.

Schools defend these policies on the grounds that they are necessary to protect the life of the student and others in the community. However, rather than making students and school communities safer, these policies may increase the risk that students will harm themselves. Expelling a student who has experienced self-injurious behaviors or ideas sends that student a message that they are a failure or that there is something wrong with them. It also may isolate the student from friends and support systems at a time when the student needs them the most. Finally, these policies have exactly the wrong effect – they discourage students from getting help due to fear that there will be negative consequences or punishment if the college administration learns about the student's thoughts or actions.

Affirmative challenges can be made to these policies, and litigation should be considered. While there is no published case law analyzing the legality of such policies under the ADA, there are currently pending challenges (including several cases brought by the Bazelon Center) alleging that blanket policies that impose automatic leaves or disciplinary action violate the ADA and Section 504. These cases assert that the schools' actions constitute intentional discrimination, have a disparate impact on people with disabilities, and violate the obligation to provide reasonable accommodations. Similar claims have also been brought challenging the imposition of mandatory leaves of absence from residence halls under the Fair Housing Act.[1]

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1 The argument is that the policy violates the Fair Housing Amendments Act by discriminating in the rental or otherwise making unavailable or denying a room because of handicap and by discriminating in the terms, conditions, or privileges of rental of a dwelling and in the provision of services or facilities in connection with such dwelling because of handicap.

As with any ADA or Section 504 claim, advocates must carefully consider whether the potential plaintiff meets the definition of a person with a "disability." In addition to persons whose mental illnesses substantially limit major life activities, given the mandatory nature of many of these policies, someone with a psychiatric impairment that does not rise to the level of disability or that is temporarily disabling may also be impacted and can argue that by taking action the school has regarded him or her as having a disability.

1. Defenses

The colleges sued to date have raised a series of defenses to these claims, including that the plaintiff was not "otherwise qualified" and/or posed a direct threat to self or others. The following paragraphs discuss these defenses and how advocates can respond.

a. Not Otherwise Qualified

Under Section 504, a student must demonstrate that he or she is "otherwise qualified [to participate in a] program or activity receiving Federal financial assistance." 29 U.S.C. §794. Under the ADA, a student must show that he or she is a "qualified individual with a disability." 42 U.S.C. §12131(2). As long as a student meets the academic and technical criteria for admission to the university, and for continued matriculation as a student, a school's claims that a student is not qualified should fail.

Schools also argue that the very conditions that qualify the student as a person with a disability disqualify him or her for admission to the dormitory. These arguments generally rely on discriminatory rules or criteria. For example, schools have asserted that students are not "otherwise qualified" since their conduct violates the housing contract, which bars people whose depression results in a suicide attempt. Such rules themselves violate the ADA, however, since that statute prohibits subjecting an individual on the basis of a disability directly, or through contractual arrangements, to a denial of the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity. 42 U.S.C. §12182 (b)(1)(A)(i). *See also* 42 U.S.C. §12182 (B)(1)(D)(I) ("An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability").

Similarly, schools have argued that students with self-injurious thoughts or behaviors are not "otherwise qualified" because they are not able to live independently in the dormitory, another standard that, by itself, discriminates on the basis of disability. Federal courts have routinely held that such "independent living" requirements are illegal under the Fair Housing Act, whose definition of disability and whose proscription of discrimination on the basis of disability are virtually identical to those applicable under Section 504 and the ADA. For more than 15 years, beginning with *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990), a series of cases has interpreted the FHA to prohibit housing providers from imposing a requirement that their tenants be capable of "independent living." *See also Niederhauser v. Independence Square Housing*, 4 Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 16,305, at 16,305.2, 16,305.6 (N.D. Cal. 1998), (striking down an apartment complex's practice of requiring that tenants "be capable of tending to their needs independently" and "have a successful history of living independently"); *Jainniney v. Maximum Independent Living*, No. 00CV0879 (N.D. Ohio Feb. 9, 2001) (slip op.), at http://www.bazelon.org/issues/housing/ cases/janniney_v_maxindliv.pdf (a landlord's rejection of a disabled applicant on the ground that he was "not ready to live independently" violated FHA).

b. Direct Threat Defense

All of the schools in the pending cases have suggested that the students have been placed on leave due to safety concerns and pose a "direct threat" to others in the academic community. Specifically, schools argue that they have to protect other students from either the negative effects of a friend successfully harming himself or herself or from undue distress, concern, and worry that their friend might harm himself or herself. Schools also argue that they must protect other students from "suicide contagion."

A person with a disability may not be considered "otherwise qualified" if he or she poses a "direct threat" to the health or safety of others. A "direct threat" is defined as "a significant risk to the health or safety of others. . . ." 28 C.F.R. Pt. 35, App. A, § 35.104 (definition of "qualified individual with a disability"); *see also* 24 C.F.R. §100.202(d).[0]

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0 [2] In *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court determined that under Title I of the ADA the "direct threat" defense can be asserted when the person with a disability, rather than others, is at significant risk The differences between, on the one hand, the "direct threat" language of Title I and, on the other hand, the comparable "direct threat" provisions of the ADA's other titles and the FHA, strongly suggests that the *Echazabal* holding

The school has the burden to establish that a student poses a "direct threat" of harm to others. *Hargrave v. Vermont*, 340 F.3d 27, 35-36 (2nd Cir 2003), *citing Lovejoy-Wilson v NOCO Motor Fuel, Inc*., 263 F.3d 208, 220 (2001) (discussing the legislative history of the ADA, H.R.Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469); *Roe v. Housing Authority of Boulder*, 909 F. Supp. 814 (D. Colo. 1995). To meet this burden, a school must demonstrate that any alleged threat to other students is real and imminent, based upon an individualized assessment of the precise nature and likelihood of the risk posed, and supported by a reasonable medical judgment. *School Bd. of Nassau County v. Arline*, 480 U.S. 282 & n.7 (1987); *Hargrave*, 340 F.3d at 36, *quoting Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999). The assessment must consider "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm." *Hargrave*, 340 F.3d at 36. *See also* 29 C.F.R. 1630.2(r).

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will only be applicable in Title I cases. Some question whether the "direct threat" defense applies outside of the employment context at all. *See Hargrave v. Vermont*, 340 F.3d 27, 35-36 (2nd Cir 2003).

All of the arguments presented by schools in support of mandatory leave policies arguably fail under this test. The "suicide contagion" argument – that the student may engage in some act which *may* cause other students concern, worry, or distress, and those other students *might* emulate the behavior – is too speculative to prove that the threat is imminent or likely. In addition, blanket policies that impose suspensions or leaves of absence upon students who express or seek treatment for self-injurious thoughts or acts by definition fail to provide an individualized assessment of risk. A school's failure to consider the opinion of mental health treatment providers further supports an inference that the mandatory imposition of a leave of absence is improperly based on myth, fear, and stereotype, rather than an individualized assessment.

c. Conduct vs. Disability

Another argument raised by schools in defense of mandatory leave policies is that the school's actions are based on conduct, not disability. Schools argue that students are placed on leave because of the suicide attempt (conduct) and not because of discrimination based on disability. In essence, the schools claim that their policy is neutral – it prohibits actions, *i.e.,* attempts at self-harm, including those by students without disabilities.

Policies that evict or impose mandatory leaves of absence on people who attempt suicide are not disability-neutral, however, and, in fact, do take into account the mental disability behind the suicide attempt. The ADA prohibits discrimination "by reason of" disability. Such discrimination includes not only discrimination based on a disability itself but also discrimination based on the effects of that disability, whether those include the effects on the person himself or the effects on others. *School Bd. of Nassau County v. Arline*, 480 U.S. 282 & n.7 (1987) (interpreting Section 504). In *Arline*, the Supreme Court noted that the disability at issue, tuberculosis, "gave rise" not only to an impairment but also to contagious effects, and Section 504 prohibited discrimination based on the contagious effects of the disability. *Id*. at 282 n.7

Imposition of mandatory leave or eviction because of a self-injurious thoughts or actions is exactly the type of discrimination based on disability-caused conduct that is prohibited. *See Teahan v. Metro-North C. R. Co.*, 951 F.2d 511, 517 (2d Cir. 1991) ("an employer "relies" on a handicap when it justifies termination based on conduct caused by the handicap."); *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1140 (9th Cir. 2001) ("For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part

of the disability, rather than a separate basis for termination."); *Laporta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 768-769 (D. Mich. 2001) (rejecting the conduct/disability dichotomy and the argument that plaintiff was fired for her refusal to appear for work, not on account of a disability); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995) (finding that a teacher's discharge because of performance inadequacies was in fact discharge based on disability when the performance inadequacies resulted from the disability); *McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001) (the denial of employment based on the plaintiff's conduct, including cutting her wrists, was improper because plaintiff was protected by the ADA from adverse employment action based on conduct related to her illness as long as she did not pose a direct threat).

Even if a school's policy imposing eviction or leave of absence for self-injurious thoughts or actions is found to be neutral, the policy still has a disparate impact on people with mental illness such as depression. Disparate impact analysis focuses on facially neutral policies or practices that may have a discriminatory effect. *Tsombanidis*, 352 F.3d at 574. To show that a seemingly neutral policy has a discriminatory effect, the student must prove the practice "actually or predictably results in ... discrimination." *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90 (2d Cir. 2000). Since studies have demonstrated that at least 85 percent of students that attempt suicide have depression, a disparate impact argument should survive a motion to dismiss.

d. Standing

Schools also at times challenge a student's standing to bring suit. This challenge arises in situations where the student has already been placed on mandatory leave and, in order to return to the school or dormitory after the leave period, must comply with certain, often intrusive, conditions. If a student does not agree to comply with the conditions, prolonging their absence from school, the school may argue that the student does not have an actual intent to return to the school or dormitory and therefore lacks standing to sue for injunctive relief.

The crux of the argument is that if the student is taking classes elsewhere, the student does not evince a plausible intention to return because it may take the Court several years to decide the case, at which time the student's case may be moot. Schools argue that willingness to wait so long for resolution renders the student's desire to return to the school a so-called "some day intention" insufficient to confer standing. Schools maintain that if the student were sincere in his or her desire to return, he or she would seek a preliminary injunction.

However, there is nothing that requires a student to seek immediate relief. It is well settled that a preliminary injunction is an extraordinary remedy that should not be routinely granted. *See JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2nd Cir. 1990); *Patton v. Dole*, 806 F.2d 24, 28 (2nd Cir.1986); *Medical Society v. Toia,* 560 F.2d 535, 538 (2nd Cir. 1977). A school's argument that a preliminary injunction is essential to preserve standing would turn the idea of "extraordinary remedy" on its head. A student need only show that he or she has an intention and a desire to return to the school and concrete plans to do so.

Some schools have also challenged the standing of students to bring suit for eviction from dormitory housing under the FHA. For students who live in dormitory housing, especially on scholarship, schools have claimed that the FHA applies only to a sale or rental for consideration. They argue that since the student does not "rent" the dormitory room, the student lacks standing under the FHA to challenge the eviction policy.

The scope of the FHA is not limited to those who pay for their own housing, however. In addition to barring discrimination in the sale or rental of dwellings, the FHA specifically makes it unlawful to "otherwise make unavailable or deny" the right to use property because of a handicap. 42 U.S.C. § 3604 (f)(1), 42 U.S.C. § 3604 (f)(1)(B), 42 U.S.C. § 3604 (f)(2)(B). "Otherwise make unavailable or deny" is not limited to situations involving a "sale or rental." *Woods v. Foster*, 884 F. Supp. 1169, 1174-1175 (D. Ill., 1995); *N.A.A.C.P. v. American Family Mutual Insurance Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992) (dealing with the provision of insurance), *cert. denied*, 113 S. Ct. 2335 (1993); *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 549 (D. Va., 1975) (finding that the FHA applies to a home for dependent, neglected, or needy children that does not engage in commercial sale or rental of residential facilities; "the Act also reaches noncommercial activities, and that the [children's] Home is protected from discrimination even with respect to residents for whom no payment is made").

Students may also be able to argue that they provided consideration for the right to occupy the dormitory room, or that the school induced the student to live in the residence hall by the exchange of promises. Finally, the written terms of the housing contract that students execute with schools may also constitute consideration.

2. OCR Decisions

While there are no court rulings in cases challenging these policies, the Department of Education's Office of Civil Rights has determined that eviction or imposition of mandatory leave of absence for self-injurious thoughts or behavior violates Section 504. For example, in OCR Complaint #15-04-2042, regarding Bluffton University, a student cut herself and took an overdose of pills in an apparent suicide attempt. She was hospitalized for approximately one week, during which time she was diagnosed with bipolar disorder. During her hospitalization, mental health professionals agreed that it would be beneficial to the student to return to her studies upon her discharge.

Three days after the student's suicide attempt, while she was still in the hospital, the University unilaterally withdrew the student from the University. The University claimed that the move was in the best interests of both the student and the University for her to leave and "receive the kind of professional help" not available at the school. If the student wanted to return, she would have to apply for readmission and submit assurances from her doctors that she was fully capable of functioning as a student. The University did not contact the student or any of the student's treating physicians or counselors before withdrawing the student. Nor did the University review any of the student's medical or counseling records in making this decision.

OCR found that the University withdrew the student following her suicide attempt because of its perception that she was mentally ill and incapable of functioning as a student, as evidenced by the letter the University sent to the student imposing withdrawal. Finally, the OCR found that the University could not avail itself of the direct threat defense as the University did not consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, or consider mitigating the risk of injury to the student or other students.

Similarly, in OCR Docket # 03-04-2041, concerning DeSales University, the student had clinical depression and sought counseling from the campus mental health center. After posting suicide notes on campus in an effort to raise awareness of suicide, he was asked to leave campus until he could be medically evaluated and denied university housing. He was medically cleared to return to campus and was required to complete three psychiatric consultation sessions and submit a doctor's assessment. He did so. The report stated that psychological treatment was indicated. The University's Health Review Committee (HRC) determined that the student's three consultations with his doctor were not sufficient evidence of a

strong commitment to the counseling process because his motive was to get back on campus, not seek help with his problems. The HRC also determined that the Complainant was in a persistent state of conflict with the University environment, and this would not improve if he did not get treatment for his mental disorder. The HRC assessment did not include interviews with either the student or his doctor.

OCR determined that the student was a qualified person under 34 C.F.R. §104.3(j)(1) and that the University treated the student as having such an impairment and took adverse action against him on that basis when it required him to leave campus and later denied him housing privileges. The OCR further found that the University failed to make an individualized and objective assessment of the student's ability to safely participate in the University's program in violation of Section 504. In particular, the University did not determine whether the student had a psychiatric disability and did not consult with the student's doctor concerning the nature of any threat the student might have posed based on his behavior. Finally, OCR determined that the HRC conditioned the student's receipt of housing, in part, on a showing that he had eliminated behaviors they believed were manifestations of a psychological impairment, including behaviors that no one claimed to have created a direct threat.

As the above discussion demonstrates, policies imposing eviction or mandatory leaves of absence on students who exhibit self-injurious thoughts or actions may violate the ADA, Section 504, and the FHA. Advocates should strongly consider taking action if they have clients with mental disabilities who are evicted or suspended from school due to their self-injurious thoughts or actions.