

National Association
for Behavioral Intervention
and Threat Assessment

# ADA/504 and your BIT

# The reality

- A greater percentage of students arrive at college these days with a history of emotional or mental health problems, and even more will be diagnosed during their period of enrollment at your institution.

- The trajectory is alarming.

- Both the ADA (Title II & III) and 504 of the Rehabilitation Act would apply.

# A psychiatric disability is

- **Defined as a mental impairment that substantially limits one or more major life activities**
- **Examples of mental disabilities include:**
  - Major depression
  - Bipolar disorder
  - Schizophrenia
  - Anxiety & panic disorders
  - Post-traumatic stress disorders
  - Autism Spectrum Disorders



MENTAL HEALTH ? BEHAVIOR

# Is being suicidal a protected activity?

- Being suicidal is not a protected disability, but the behaviors underlying the suicidality are, thus those who attempt suicide may be considered protected by default:
    - Depression
    - Addiction
    - Mental illness
- Are almost always seen as qualifying disabilities
- And are protected by the courts

# The law

- While the Americans With Disabilities Act, Sec II & III (ADA) and Section 504 of the Rehabilitation Act of 1973 are separate statutes, they are subject to a joint set of regulations.

- ADA Title II regulations are applicable to public institutions, and Title III applies to private institutions.

- 504 applies to any entity accepting federal funds

# The law

- The challenge for college and universities and the element of the ADA that impacts our BITS is when an individual's conduct/behavior creates a heightened risk of harm, or a "Direct Threat".

- "Direct Threat" means a significant risk to the health or safety of self or others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

# What is the challenge?

- As a result of amendments to federal disability law (ADAA), it is now considered unlawful to involuntarily separate a student from the institution on the basis of self-harm or suicidal behaviors, although this is also controversial among legal scholars.

- However, it's important to recognize that the narrowing of this language has forced colleges and universities to reconsider what are appropriate and lawful practices when faced with students whose actions indicate self-harm and/or the risk of suicide.

# What is a “Direct Threat”?

- OCR says DUE PROCESS is necessary to challenge an assumption that a person’s behavior is a “Direct Threat” that would support involuntarily removing a student from the institution.

- A “Direct Threat” analysis must be applied to any individual who poses a “significant risk” of substantial harm or safety to others that cannot be eliminated or reduced by reasonable accommodation.

- To rise to the level of a direct threat, there must be a high probability of substantial harm and not just a slightly increased, speculative, or remote risk;

# What is the “Direct Threat Test”?

- In a direct threat situation, a college needs to make an individualized and objective assessment of the individual's ability to safely participate in the college's program or work environment;
- This assessment must be based on a reasonable medical judgment relying on the most current medical knowledge or the best available objective (non-medical) evidence;
- The assessment must determine the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk, or if removal is required.


Northern Michigan University

# Northern Michigan University Case Facts

- Katerina Klawes was a student at Northern Michigan University when she shared with a friend that she had Major Depressive Disorder and her doctor was concerned about her being suicidal.
- When her friend reported it, the Dean of Students attempted to contact her unsuccessfully, and then had campus and local police locate her. Local police determined she was not a threat to herself.
- NMU threatened to disenroll her and required her to sign a behavioral agreement, requiring her to not speak to others about her suicidal thoughts and to attend a psychological assessment as a condition for remaining in school.

# Decision

- Klawes filed a complaint with DOJ for violation of Title II of the ADA.
- DOJ upheld complaint and required NMU to update its “Policy relating to student self-destructive behavior, its ADA and reasonable accommodations policies, and its withdrawal policies, practices, and procedures.
- DOJ required NMU to create a process for individualized assessments and train faculty, counseling, DOS and staff.
- NMU settled for $173,500.



# Takeaways

- NMU overreacted to the risk presented and acted based on speculation and assumption.
- Threatening a student with separation or conduct code action for suicidal thoughts is problematic.
- Don’t use of gag orders.
- BITS should take a position of genuine interest in identifying a success plan rather than threatening a student with disenrollment.
- If institutions use behavioral agreements, they should be designed to reinforce Codes of Conduct - not add additional standards and sanctions.



# Considerations for BITS: Balancing Support while Managing Risk

- Use of Mandated Assessment
  - Risk assessment by your BIT provides an understanding of the risks and protective factors
  - Requirement to attend an assessment based on risk determined by BIT
  - Understand difference between Psychological Assessment vs. Risk Assessment

- Case Management and BIT as Collaborative Support
  - Engagement with the student at time of hospitalization is critical
  - Serves to help support the student during and after hospitalization
  - Can assist with accessing resources, navigating academics, etc.
  - Involve other support networks such as parents

# THANK YOU

Saunie Schuster
Saundra.Schuster@tngconsulting.com