

Conduct Issues for Students with Disabilities: Current Practices - Emerging Issues

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Program Purpose

- Purpose of session is not to answer all questions or deal with all issues, but to help understand the issues and create a forum for discussion
- The material provided in this presentation is provided for informational and educational purposes only and should not be construed as legal advice or a recommendation for a specific course of action. The presenters recommend consulting with competent legal counsel in the appropriate jurisdiction and the Office of Civil Rights for specific guidance.

Issues for Consideration

- More serious disabilities for students on campus which may impact their ability to control behavior even with medication or treatment
 - Aspergers and other Autism Spectrum Disorders
 - Traumatic Brain Injury
 - PTSD
 - Others?

Issues for Consideration

- Virginia Tech
 - Threat Assessment Teams
 - Care Teams
 - Interim Suspensions
- ADA
- Section 504
- Having a disability does not excuse acts of misbehavior that violate University Rules

Academic Context

- Singh v. George Washington University School of Medicine and Health Services, 508 F.2d 1097 (D.C. Cir. 2007)
 - “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 have 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 (p. 15).”

Section 504 of the Rehabilitation Act of 1973

- “No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...”

29 U.S.C. § 794(a) (1973)

- Primarily concentrates on access to programs and facilities

(OCR, 2009)

The Americans with Disabilities Act

- “The ADA was passed in 1990, and seems to pick up where the Rehabilitation Act left off. Borrowing from the §504 definition of disabled person, and using the familiar three-pronged approach to eligibility **(has a physical or mental impairment, a record of an impairment, or is regarded as having an impairment)**, the ADA applied those standards to most private sector businesses, and sought to eliminate barriers to disabled access in buildings, transportation, and communication. To a large degree, the passage of the ADA supplants the employment provisions of §504 [and] reinforces the accessibility requirements of §504 with more specific regulations. . . . **The courts have interpreted 504 and the ADA almost identically, applying doctrines and interpretations freely between the two** [emphasis added].”

(Council of Educators for Students with Disabilities, 2009)

The Americans with Disabilities Act

- The term "disability" means, with respect to an individual
 - (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 an impairment

(Americans with Disabilities Act of 1990, As Amended, 2009)

“Otherwise Qualified”

- Under Title II
- [A] n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services meets the essential eligibility for the receipt of services or the participation in programs or activities provided by the public entity.

42 U.S.C § 12131(2).

“Otherwise Qualified”

- In 1979, the Supreme Court in *Southeastern Community College v. Davis* defined an individual who is “otherwise qualified” as “one who is able to meet all of the program’s requirements in spite of his handicap.”
- The Department of Justice, however, interpreted Title II’s requirements to exclude coverage for persons who pose a direct threat, defined as “a significant risk to the health and safety of others that cannot be eliminated by modification of policies, practices, or procedures, or a provision of auxiliary aids or services.”
- Decisions made on a case by case basis.

(Parry, 2008, p. 193-194)

Accommodations

- Accommodations are designed to provide equal access to programs and services for qualified individuals with disabilities
- Do not fundamentally alter the nature of a program/service and do not represent an undue financial/administrative burden

Process for Determining Accommodations

- Appropriate recent documentation from a qualified evaluator
 1. Credentials of the evaluator(s)
 2. Diagnostic statement identifying the disability
 3. Description of the diagnostic method used
 4. Description of the current functional limitations
 5. Description of the expected progression or stability of the disability
 6. Description of current and past accommodations, services and/or medications
 7. Recommendations for academic accommodations, adaptive devices, assistive services, compensatory strategies, and/or collateral support services

(AHEAD, n.d.)

Non-Academic Accommodations = Reasonable Modifications

- Disability Service Providers routinely provide the following non-academic services/accommodations:
 - Single housing requests
 - Access to non-academic programs and activities

Non-Academic Accommodations = Reasonable Modifications

- Do Disability Service Providers need to provide reasonable modifications, accommodations, or services for students whose documented disability predict a high probability of behaviors that may result in disciplinary problems?

Student Conduct Perspective

- “...the institution need not compromise ‘essential’ academic and technical requirements...[which] include those essential provisions found in a College’s code of conduct...”

(OCR Letter to Woodbury University, 2001, p. 5)

- “Focus on the Conduct” approach consistently advocated by Pavela

(Pavela, 1990; Pavela, 2007)

Student Conduct Perspective

- “Usually a student’s disability should not play a role in the disciplinary process except in two limited mitigating circumstances:
 1. Where the student’s inability to comply with the conduct code is the result of the institution’s failure to provide a requested lawful reasonable accommodation, or
 2. Where, as part of the regular disciplinary process, the college or university takes into account mitigating situational factors”

(OCR Letter to San Diego Community College District, 1999, p. 8).

Institutions MAY...

- Hold students with disabilities accountable for codes of conduct violations , provided:
 - Students are provided with sufficient due process, and;
 - Students without disabilities would be subjected to the same standards of conduct
- Use discretion as to whether to utilize formal code pathways versus other complaint resolution methods

Institutions MAY...

- Suspend, on an interim basis, students whose behavior poses a threat to themselves or others
 - “In exceptional circumstances, such as situations where safety is of immediate concern, a college may take interim steps pending a final decision regarding an adverse action against a student as long as minimal due process, such as notice and an opportunity to address the evidence, is provided in the interim and full due process, including a hearing and the right to appeal, is offered later”

(OCR Letter to Marietta College, 2005, p. 3).

Institutions MAY NOT...

- “...dismiss or sanction a student with a disability for behavior that it does not sanction when undertaken by students who are not disabled”
- “...charge a student with a code of conduct breach merely to force the student to reveal his/her medical condition”

(OCR Letter to Woodbury, 2001, p. 5)

Institutions MAY NOT...

- Enact student conduct procedures as a pretext for discrimination (i.e. based on unfounded fear, prejudice, or stereotypes)
- Sanction a student with a disability more harshly than the institution would sanction students without a disability
- Sanction or dismiss a student with a disability if the student's conduct results from the institution's failure to provide a reasonable accommodation

(The Jed Foundation, 2008)

Student Conduct Considerations

- Do any student conduct policies, practices or procedures disproportionately and adversely impact students with disabilities?
- Are complaint resolution procedures sufficiently flexible to ensure the full and equitable participation of students with disabilities in the conduct process?
 - E.g., provisions for advocates/hearing advisors, breaks, continuances, interpreters, assistive technology devices, etc.

American University: Advisor v. Advocate

(2007, OCR Complaint #11-06-2025)

- Complainant challenged the institution's practice of only permitting an **advisor** to attend a disability grievance hearing and not allowing "an **advocate or representative** [emphasis added] as a modification for students with disabilities who require assistance with self-advocacy because of their disability" (p. 4)
- OCR determined that "[t]he University has not provided...sufficient evidence to establish that it is essential to the disability grievance process to restrict a grievant to no more assistance than an advisor during a hearing" (p. 7)
- OCR found "the University did not adequately engage the Complainant in a deliberative, interactive process for determining what modifications were necessary for his effective participation at the hearing...in the future it could benefit the University to pay particular attention to following a deliberative, interactive process when processing requests for disability modifications to the disability grievance process" (p. 10).

Student Conduct Considerations

- If a student subject to your conduct system self-identifies as having a disability and requests a procedural accommodation, do you have a formal mechanism in place to address this request?
 - Student Conduct Office?
 - Disability Services Office?
 - Section 504 Coordinator?
- How, if at all, do you provide notice to all students regarding the process for requesting modifications to published student conduct procedures?
 - Code of Student Conduct
 - Language in Notice of Charge/Notice to Appear

Student Conduct Considerations

- Are there state legal provisions which impact your ability to respond to certain types of conduct
 - E.g. Code of Virginia § 23-9.2:8. Policies addressing suicidal students (“...policies shall ensure that no student is penalized or expelled solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behavior”)

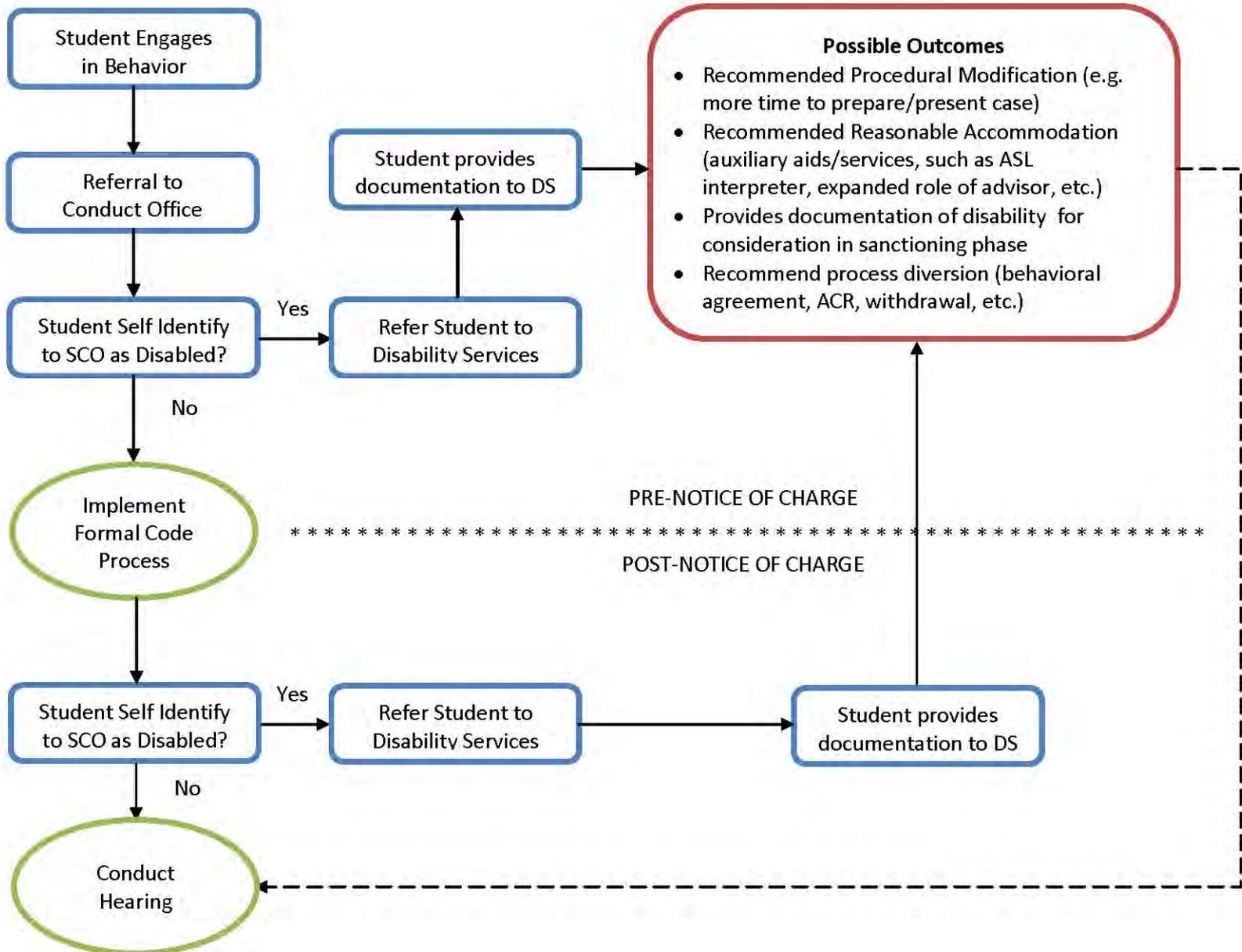
Questions to Ponder

1. Do we need to reexamine the concept regarding whether there are incidents in which the disability IS an acceptable reason for “misbehavior”?
2. Where there is medical or psychological evidence that a behavior is caused by a disability and that the student is unable to avoid such behavior as a result, does failure to make a modification in the conduct process and/or a mitigation in the sanction serve as a failure to provide a reasonable accommodation and thus make this failure a type of unlawful discrimination?

Questions to Ponder

- What processes need to be put in place?
 - Charge Process/Disability Related Counseling
 - Post Charge alternative options
 - Adjudication/procedures
 - Sanctioning

STUDENTS WITH DISABILITIES IN THE CONDUCT PROCESS



Questions to Ponder

3. If a determination is made that exceptions cannot be given with regards to determining whether or not a behavior is excused by a disability, should alternative forms of student conduct complaint resolution be offered as a “reasonable accommodation?” If so, what kinds of alternatives should be provided?
4. Could failure to take a student’s disability into account when assigning sanctions be regarded as disability discrimination?

Questions to Ponder

5. How should an institution respond to a student who claims their disability may impede their opportunity to fully participate in a student conduct hearing?
6. Are there circumstances in which an institution should consider modification of its student conduct procedures as a reasonable accommodation for students with disabilities who are involved in the student conduct process?
7. Are there some cases in which the severity of the disability and/or the inability of the student to control their behavior may result in the student not being “otherwise qualified” to continue as a student?

Questions to Ponder

8. If so, who should make this determination? Should it be Disability Services, Health Center, Counseling Center, Student Conduct Office, Legal Counsel, Threat Assessment Team or some other internal body or administrator?
9. At what point should this determination be made? Before adjudication? After adjudication but before sanctioning? After sanctioning? Once a sanction is completed?

Questions to Ponder

10. What does “otherwise qualified” mean in a conduct sense?
- Is a person who is unable to control their behavior due to a disability “otherwise qualified”?
 - Who makes that determination?
 - Should this be determined before the fact based upon a disability or after an alleged violation occurs?

Resources

- Association on Higher Education And Disability [AHEAD]. (n.d.). Foundational principles for the review of documentation and the determination of accommodations. Accessed October 29, 2010 from <http://www.ahead.org/resources/best-practices-resources>
- Americans with Disabilities Act of 1990, As Amended. (2009). Section 12102. Definition of disability. Accessed November 2, 2010 from <http://www.ada.gov/pubs/adastatute08.htm#12102>.
- Council of Educators for Students with Disabilities. (2009). Overview of Section 504. Accessed January 26, 2009 from <http://www.504idea.org/504overview.html>.
- Office of Civil Rights [OCR]. (1999). Letter to San Diego Community College District [Docket Number 09-98-2154].
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- Office of Civil Rights [OCR]. (2009). Protecting students with disabilities: Frequently asked questions about Section 504 and the education of children with disabilities. Accessed October 29, 2010 from <http://www.ed.gov/about/offices/list/ocr/504faq.html>
- Parry, J. (2008). Disability discrimination law, evidence and testimony: A comprehensive reference manual for lawyers, judges and disability professionals. Chicago, IL: American Bar Association.
- Pavela, G. (1990). The dismissal of students with mental disorders. Washington, DC: National Association of College and University Attorneys.
- Pavela, G. (2007). Focus on the conduct (II). *The Pavela Report* 07(31).
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1973).
- The Americans with Disabilities Act, Publ. L. No. 110-235, 42 U.S.C. 126 §12132 et. Seq
- The Jed Foundation. (2008). Student mental health and the law: A resource for institutions of higher education. New York, NY: The Jed Foundation.