

Legal and Ethical Issues in the Practice of College Mental Health

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“To be good is noble,
but to teach others to be good
is nobler and less trouble.” -
Mark Twain-



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Outline

I. Introduction

II. Review of Core Principles and
Range of Responses

III. Discussion of Privacy and
Confidentiality

IV. Disability Law and Student Mental
Health Concerns



Outline

- IV. Legal and Ethical Issues Related to
Delivering Mental Health Services
- V. Liability Risks for Student Suicide
- VI. Liability for Violence to
 - A. Students of Concern Committees
 - B. Threat Assessment Process
- VII. Conclusion



Introduction

- Increasingly counseling and health services are confronted with making difficult decisions about students who may be distressed, suicidal, or threatening to others.
- These decisions can often be very difficult on many levels, balancing the interests of the individual with those of the community.



Introduction

- Decisions about these students must take into account what is considered good practice in the field and what is permitted by law.
- Understanding these issues is the best way to respond appropriately and in a way that is non discriminatory.



Introduction

- This presentation will draw heavily from The Jed Foundation's **College Student Mental Health and the Law: A Resource for Institutions of Higher Education**
- Developed to explore how the law impacts challenging decisions, as well as how it should inform overall campus policy (not professional legal advices).
- Convened a roundtable of experts in higher education and disability law as well as leading IHE professionals .



Core Principles for Managing Disruptive and Disturbing Students

1. Collaboration among systems
2. Clarification of roles and functions
3. Understanding of laws, ethics and policies and procedures
4. Distinctions in student behaviors related to conduct processes vs. mental health issues
5. Collecting local data about students
(Hollingsworth & Dunkle)



Core Principles for Managing Disruptive and Disturbing Students

- Make caring, well-reasoned, and clinically-appropriate decisions about students.
- Understanding legal and ethical guidelines should be only one element of a comprehensive plan for working with students in distress.



Core Principles for Managing Disruptive and Disturbing Students

- Any plan must involve preparation for possible student violence toward others
- By far the larger public health problems are suicide, deaths from eating disorders, and alcohol related deaths.
- Intervening with at-risk students can reduce the risk of potential violence.



Core Principles for Managing Disruptive and Disturbing Students

- Keeping students safe, protecting students' rights and promoting the educational mission are, most often complementary goals.
- They can reinforce one another when decisions about at-risk students are made in an informed and thoughtful manner.



Pertinent Legal and Ethical Issues

- Any appropriate course of action must be determined on a case-by-case basis.
- Any policy requiring automatic dismissal or withdrawal of a student who expresses disturbing behavior (i.e., "zero tolerance" policy) is legally vulnerable.
- The issue is often about assessing risk.



Pertinent Legal and Ethical Issues

- "A significant risk constitutes a high probability of substantial harm, not just a slightly increased, speculative, or remote risk" (OCR to De Salles.)
- In determining whether a student is a "direct threat," there needs to be an *individualized* and *objective* assessment as to whether the student can safely be a member of the community.



Pertinent Legal and Ethical Issues

- Any assessment must be "...based on a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence" (OCR to DeSalles.)
- The assessment must consider the following issues:
 - Nature, duration and severity of the risk;
- Probability that the risky behavior will actually occur
- Whether reasonable accommodations will sufficiently reduce the risk.



Pertinent Legal and Ethical Issues

- If a student has been assessed as a "direct threat" and a mental health professional states that a particular course of treatment will mitigate the threat,
- A college or university can require a student to participate in treatment as a condition to remaining in or returning to school (OCR to Woodbury.)



Range of Responses-Clinical to Administrative

- Review on call procedures with student
- Refer for psychiatric consult
- Establish a verbal safety plan
- Establish a written safety plan
- Increase frequency of sessions



Range of Responses-Clinical to Administrative

- Schedule between session phone contacts
- Enlist collaterals to treatment team
- Involve Student of Concern/Alert Team
 - Threat Assessment Process
- Hospitalize
 - Partner with hospital team around assessment and disposition
- Parental or Significant Other Notification
- Voluntary Medical Leave
- Involuntary Withdrawal



Privacy and Confidentiality

- There are two primary sources of legal and ethical standards that govern how campus personnel can communicate about students among themselves and to others
- The Family Educational Rights and Privacy Act (FERPA) protects the privacy of the student “education record.” This federal law applies to all campus personnel, whether clinical or not.



Privacy and Confidentiality

- FERPA applies to all IHEs that receive federal funds and regulates the release of student record information.
- Student's rights access his/her own “education record” upon request, even if younger than 18, limit the disclosure of his/her record to third parties, with certain exceptions
- A student may *not* limit access to his or her record by a school official who has a “legitimate educational interest” in the record or in the event of a “health and safety” emergency



Privacy and Confidentiality

- Education Record (covered by FERPA)
All records directly related to a student and maintained by or on behalf of an IHE. Aggregate of recorded information, preserved in written or electronic form, which identifies a student. (exams, papers, and attendance records, e-mails discipline complaints and materials financial account information, disability accommodation records and parking tickets.)



Privacy and Confidentiality

What **is not** an Education Record

- *Notes that are created solely for an individual's personal use and not shared or available to others.*
 - *Medical and mental health records that are not used for any purpose other than treatment and that are not shared with anyone not directly involved in treatment.*
- Once information from a student's medical record is shared or used for a purpose other than treatment FERPA then applies to those shared records.



Privacy and Confidentiality

What **is not** an Education Record

- State and federal laws, as well as professional practice guidelines, govern the circumstances under which medical records can be shared.
- *Personal observations of and direct interactions with a student*
- *Law enforcement records created for a law enforcement purpose.*
- *Employment records and Alumni records*



Privacy and Confidentiality

- Following may be disclosed under FERPA (some require student notification in annual FERPA update)
- Information necessary to “protect the health or safety of the student or other persons.”
- Information communicated to any "school official" with a legitimate educational interest in having such information.
- If a student is considered to be a dependent of his/her parents/guardians for federal tax purposes, information *may* be disclosed to parents once this status is verified. Does not need to be in connection with a health and safety emergency.



Privacy and Confidentiality

- If a student under 21 has violated an IHE's alcohol or other drug use policy, can disclose to parents.
- Information *may* be disclosed to another IHE in which the student seeks or intends to enroll.
- Information about a disciplinary action taken against a student for conduct that put him/herself or others at risk of harm *may* be shared with teachers and school officials at other IHEs who have a legitimate educational interest in the student's behavior.



Privacy and Confidentiality

- More restrictive confidentiality protection that applies to medical records and to communications between clients and their physical or mental health care providers.
- Limits communications between campus health care professionals and others on- or off-campus, including parents, unless a student provides consent or poses a substantial risk of harm to self or others.
- Legal sources for confidentiality include professional licensing requirements, ethical guidelines, and state and federal laws.
- State laws are particularly important in this area.



Privacy and Confidentiality

- **Clinician-Client Confidentiality**

- Confidentiality obligations are essential and save lives but are not absolute.
- Limits of are defined by licensure rules and professional codes of ethics and standards of practice in addition to state and federal law. The disclosure of communications with a student client to appropriate persons or entities may be permitted or required under certain circumstances, such as when the client is assessed to be at a certain level of risk of harm to self or to others.



Privacy and Confidentiality

- **Clinician-Client Confidentiality**

- Determining this level of risk is a matter of professional judgment on the part of a clinician,
- Without the student's consent, a clinician is almost always unable to discuss information learned as part of a therapeutic relationship with campus administrators.
- If an administrator feels that it is necessary to have information, the student may be asked by a clinician to sign an ROI



Privacy and Confidentiality

- (b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services, (2) obtain appropriate professional consultations, (3) protect the client/patient, psychologist, or others from harm, or (4) obtain payment for services from a client/patient..
- APA Ethics Code



Privacy and Confidentiality

- **Health Insurance Portability and Accountability Act (HIPAA)**

- goal of HIPAA was to establish national standards for protecting medical records and other personal health information.

- Covers three types of entities: health plans, health care clearinghouses, and health care providers who conduct certain types of electronic transactions. *HIPAA rules do not apply to treatment records exempted from FERPA.*



Disability Law and Student Mental Health Concerns

- Federal law protects students and employees from discrimination on the basis of disability. The Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 are the major laws in this area, although state laws may add further protection.
- The Office for Civil Rights (OCR) of the U.S. Department of Education enforces both the ADA and Section 504 with respect to the rights of college students.



Disability Law and Student Mental Health Concerns

- The law prohibits an IHE from discriminating either directly or indirectly against a “qualified” student with a disability, *on the basis of disability*, in any program or activity.
- Direct discrimination could include not allowing a student who has attempted suicide to remain enrolled solely on the basis of the suicide attempt.
- Indirect discrimination could occur if certain requirements have a disproportionately adverse impact on students with disabilities.



Disability Law and Student Mental Health Concerns

- A student with a disability is expected to comply with all essential academic standards and requirements of an IHE's student code of conduct.
- a qualified student with a disability can be removed from class, college housing, or the IHE altogether after suitable due process procedures (e.g., notice of the reason for adverse action, hearing, right to appeal).



Disability Law and Student Mental Health Concerns

- The student must not face an “adverse action that is based on unfounded fear, prejudice, or stereotypes.”
- *Would you tolerate the same behavior from a student without a disability?*
- *Have you provided reasonable accommodations for the disability?*
- *Should you consider mitigating factors?*



Disability Law and Student Mental Health Concerns

- An IHE may offer a student facing potential disciplinary removal with the option of a voluntary leave of absence (LOA).
- An automatic "zero-tolerance" policy requiring dismissal or withdrawal of a student who expresses suicidal ideation or makes a suicide attempt circumvents the necessary analysis.



Disability Law and Student Mental Health Concerns

- Such a policy is legally vulnerable, clinically questionable, and ethically dubious.
- An IHE's actions based on concerns that a student might engage in behavior that poses a risk to his/her health or safety should be based on an individualized assessment as described in the direct threat discussion above.



Disability Law and Student Mental Health Concerns

- Requiring treatment of a student who is not a direct threat (e.g., student whose disability-related behavior violated the conduct code but did not rise to the level of a direct threat) as a condition of remaining in school may be in violation of disability law.
- It is important to remember that students who decline mandated treatment (or assessment) are still protected under disability law and, therefore, have the right to due process procedures.



Issues Related to Delivering Mental Health Services

- IHEs are not obligated to offer mental health services, but they should be transparent about what services are in place.
- Any services it does provide must be delivered in keeping with professional codes of ethics and standards of practice.



Issues Related to Delivering Mental Health Services

- It has become increasingly common for a third party, such as a peer, resident assistant, or professor, to refer a student to the counseling center.
- If a third party refers a student for counseling and notifies the counseling center, the counseling center has no obligation to follow up with the student if s/he does not make or keep an appointment.



Issues Related to Delivering Mental Health Services

- Some consider it good professional practice to reach out to the student, while others may consult with the third party about his or her ability to follow-up with the student or about other options.
- When a referred student meets with counseling center staff, the clinician should address any discrepancies between concerns expressed by the referring party and the student's statements.



Issues Related to Delivering Mental Health Services

- Confidentiality laws will generally preclude informing the referring source, without the student's consent.
- Documenting conversations with third parties, attempts to contact the student, and risk assessment findings is both good professional practice and legally useful.



Issues Related to Delivering Mental Health Services

- Creating a strong mental health safety net is educating students, faculty, staff, and families about the signs of mental health issues and advising them about what to do if they are concerned about a student.
- Do not ask faculty or other non-healthcare personnel to serve in the capacity of a health/mental health professional.



Issues Related to Delivering Mental Health Services

- Avoid asking untrained individuals to assume responsibility for a student who poses a risk of suicide or violence.
- Faculty and staff should avoid taking on a professional role for which they are not trained. Non-mental health professionals need to understand the limits of what they can provide to students and focus on making appropriate referrals.



Issues Related to Delivering Mental Health Services

- It is not uncommon for a student who has expressed suicidal ideation or thoughts of harm toward others to drop out of treatment.
- Professional standards suggest that the provider should attempt to contact the student at least once.
- If the student is at imminent risk for suicide or violence, more exhaustive attempts at follow-up are indicated.



Issues Related to Delivering Mental Health Services

- When uncertainty exists the provider should consider consulting with professional colleagues before deciding upon a course of action.
- Professional standards also call for documentation of all conversations with or attempts to contact a student who has discontinued treatment as well as any professional consultations.



Issues Related to Delivering Mental Health Services

- Unless unfeasible due to the location of an IHE, an at-risk student should be transported to the hospital only in an emergency vehicle such as an ambulance or police car.
- When a student has been discharged from a hospital -- whether from emergency or inpatient care -- a health professional has deemed him/her safe to return to the community, and the student will have a follow-up plan.



Issues Related to Delivering Mental Health Services

- It is thus arguable that the student can safely live in campus housing and/or resume classes.
- The treating professional at the hospital may not appreciate the difference between returning to the community and returning to the IHE environment.
- Given that inpatient hospitalizations are often brief and that suicidal thoughts tend to wax and wane, IHEs may consider requiring another mental health assessment upon the student's return to campus.



Issues Related to Delivering Mental Health Services

- If a conflict arises between a campus mental health professional and an IHE administrator regarding the appropriate response to a student in distress, every effort should be made to discuss available options in light of the best interests of the student and community and in the context of applicable laws and professional practice guidelines.
- Mental health providers may need to remind non-health professionals about their professional obligations to at-risk students.



Issues Related to Delivering Mental Health Services

- Administrators can remind mental health providers about institutional interests.
- Clinician should carefully document the decision-making process, including all options discussed with the administration.
- To avoid conflict, it can be helpful for campus mental health providers, campus counsel, and administrators to discuss a variety of hypothetical scenarios in advance.



Liability for Student Suicide

- The potential for an IHE to be held liable for a student's suicide is a recent phenomenon.
- Suicide was considered to be a wrongful act, solely the fault of the suicidal individual.
- Recently, a few courts have begun to consider lawsuits alleging that an IHE has a responsibility to provide some level of care to prevent suicide or to mitigate suicide risk.
- However, to date, no court has held an IHE liable for failure to prevent suicide, and the law, in its current state, is largely inconclusive regarding such responsibility.



Liability for Student Suicide

- IHEs could conceivably be held legally responsible in the following unlikely situations:
- The IHE caused physical trauma that resulted in physical and mental health consequences, including suicide.
- The IHE caused emotional distress and suicide through some exceptionally abusive and deliberate process.
- The IHE caused the suicide or serious injury of a student by illegally or negligently prescribing, dispensing, or giving access to medication.
- The IHE failed to use reasonable care to prevent the suicide of an individual under "suicide watch."



Liability for Student Suicide

- The law relating to medical malpractice for suicide will continue to be tested. Providers of health/mental health services, subject to professional standards of care, will likely face increasing litigation over treatment, intervention and medication issues.
- There is also the possibility that non-health care professionals who participate in decision-making concerning at-risk students will face responsibility as part of a care-giving team.

Liability for Student Suicide

- Concerns about liability should not control professional decision-making.
- Appropriate professional decisions, made in good faith and with the interests of the student and the community in mind, are very unlikely to result in individual liability.
- There has been a flurry of litigation claiming that IHE's have an independent duty to notify parents of a student's dangerous, suicidal and/or self-destructive behavior. To date, the courts have not offered much consistent guidance about this.



Liability for Violence Toward Others

- An IHE's responsibility regarding students who express violence toward others and/or recklessly put the lives of others at risk is significant.
- IHEs must use reasonable care to protect against foreseeable danger.
- IHEs must use reasonable care to protect against background risk such as the risk of rape in dormitories.
- IHEs must also use "reasonable care" when a specific individual presents a "foreseeable danger" to others, which could be mitigated by using reasonable care-come to be known as "threat assessment."
- The law remains generous, especially to non-medically trained persons, with regards to the predictive value of such assessments.



Liability for Violence Toward Others

“All violence is a search for justice.”
- Ted Calhoun



Students of Concern Committees

- Many colleges and universities had these committees prior to the more recent campus tragedies.
- There is a growing consensus on college and university campuses on how these teams operate.
- Becoming the standard of care. Some states requiring schools to have teams (IL & VA)
- 77% of schools have these committees (AUCCCD, 2008)



Students of Concern Committees

- Purpose to collect information and intervene early
- Challenge of blurring lines between mental health issues and conduct issues
- Composition-Question of how large.
- Usually a student affairs administrator, CAPS director, 3-5 other key players also considered (police, health, residence life, judicial officer, Greek life academic advisors)



Students of Concern Committees

- United Educators survey:
- 100% JA /student discipline
- 93% counseling
- 87% campus safety
- 87% student affairs
- 67% residence life
- 67% health services
- 27% academic affairs



Students of Concern Committees

- **Really exist as a Safety Net :**
 - Weekly meeting
 - Pre/early crisis coordination of:
 - Communication
 - Information gathering
 - Case management
 - Identify, train and support reporting sources (academic units)
 - Identification of policy issues
 - Document



Students of Concern Committees

- Counseling center director role- Contextual and role determined by unique university.
- Always operating as a mental health professional governed by ethics code and state law.
- Help everyone understand mental health context.



Threat Assessment Process

- Campuses face a range of threats: murder or targeted violence is statistically rare (~8-16/ year). Suicide (~1,400 deaths) Alcohol related deaths (~1,700) Forcible Sex (~2,700)
- View specific threat assessment as a process used by Student of Concern committee and smaller group of others.
- Can act quickly in response to any posed threat.



Threat Assessment Process

- Facts About Targeted Violence:
- Perpetrators don't "just snap" though there are triggers.
- No useful profile but others are concerned.
- Most are suicidal with no escape plan.
- Must act quickly to determine if the person is on a pathway to violence.

Threat Assessment Process

- Designed to:
 - Identify persons of concern.
 - Investigate persons and situations that have come to attention.
 - Assess the information gathered.
 - If necessary, manage persons and situations to reduce threat posed.
- (Deisinger & Randazzo, 2009)

Threat Assessment Principles

- Prevention is possible
- Violence is a dynamic process
- Targeted violence is a function of several factors **S**ubject characteristics, **T**arget vulnerability, **E**nvironmental elements, **P**recipitating events.
- Corroboration is critical
- About behaviors not profiles

Threat Assessment Principles

- Cooperating systems are critical resources
- Does the person **pose** a threat (not made)
- Keep victim in mind
- Early identification and intervention helps everyone
- Multiple reporting mechanisms enhance early identification

Threat Assessment Principles

- Multi-faceted resources can provide effective intervention and monitoring
- Safety is the primary focus
- (from Deisinger & Randazzo, 2009)

Threat Assessment Strategies

Non Confrontational:

- Take no further action at this time
- Watch and wait: passive or active
- 3rd Party Leverage or Monitoring (CCI, Case Managers)
- Subject interview (psychologist, campus safety): information gathering, refocus or assist, warn or confront

Threat Assessment Strategies

Confrontational:

- Persona non grata, prohibit from campus
- Leave: involuntary with option of voluntary health leave
- Involuntary psychiatric hospitalization
- Arrest

Adapted from Ted Calhoun



Conclusion

Litigation risk can be substantially reduced by doing the following:

Use good professional judgment.

- Develop a comprehensive suicide/violence reduction program.
- Follow policies and protocols whether written or unwritten
- Ensure that available mental health services are in keeping with professional ethics and standards of practice.



Conclusion

- Do not exaggerate the extent of services available.
- Work with resident advisors, faculty members, and other "gatekeepers" to encourage distressed students to seek professional help.
- Avoid "zero tolerance" policies that eliminate individualized assessment of students



Conclusion

- The best way to respond to students at risk is to proactively build more caring communities.
- This caring can take many forms.
- Hopefully this discussion has helped facilitate a better understanding of how we can all work together to build these communities on our campuses.



Resources

The Jed Foundation. (2008). *College Student Mental Health and the Law: A Resource for Institutions of Higher Education*. New York, NY: The Jed Foundation.

www.jedfoundation.org.

Bazelon's Model Policy for Colleges and Universities:

<http://www.bazelon.org/pdf/SupportingStudents.pdf>



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Resources

- Pavela, *Questions and Answers on College Student Suicide: A Law and Policy Perspective*, College Administration Publications, Inc., 2006
- Dunkle, Silverstein, Warner, “Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus”, *Journal of College and University Law*

