

NaBITA Position Statement on §504 and Campus Direct Threat Determinations

The National Behavioral Intervention Team Association (NaBITA) is a membership association for those who staff campus behavioral intervention and threat assessment teams. Every day, these teams are tasked with managing students and employees who may pose a direct threat of harm to themselves and/or others, all while balancing the mandate for campus safety with the protection of individual rights.

Some administrators have earned a bad name for all of higher education by pressuring students with mental health issues to withdraw, but NaBITA's members earnestly strive to support students and employees who are struggling. In doing so, our members feel the pressure of government investigations, media sensationalism and lawsuits that seek to hold colleges and universities accountable for every harmful or violent act that a student or employee (or former student or employee) commits on or off-campus.

At present, campuses feel paralyzed by the lack of federal guidance. The Department of Education's decisions in investigations such as Spring Arbor University, Mt. Holyoke College, and St. Joseph's College and most recently, Western Michigan University, seem to severely limit the actions that campuses can take under §504 to remove a student who is at risk for suicide. At one level, this interpretation of the law has had positive impacts on some campuses, forcing innovation, expansion of counseling services, and case management, much as campuses have been forced to create wheelchair access, tutors and note-takers for students with learning disabilities and access needs. But, NaBITA's concerns lie not in retaining the 95% of suicidal students who are non-acute, but in retaining the 5% who are, when caring administrators sincerely believe that their best chance for survival is elsewhere, be it back at home, a school closer to home, an in-patient care facility, or just taking a break. NaBITA's concerns lie in forcing expansion of services without additional resources from the government to support mental health on college campuses. Expanding services at a large, four-year, public institution is fundamentally different than at a community college with not a single counselor, but the law makes no distinction. Can it be the intention of the Department of Justice that these students should remain on campus if they exhibit a dire need for the treatment, support and resources available from external mental health agencies and facilities? Does the DOJ appreciate that it has placed campus attorneys and the administrators they advise in the impossible position of choosing between an ADA/504 lawsuit if they over-react to self-harm or suicidal ideation, and wrongful death lawsuits by the families of deceased students if the campuses don't do enough to protect suicidal students from themselves? Can the Department of Justice truly believe that an acutely suicidal student is best left on campus, where they are sure to embroil fellow students and employees in constant disruption, the impossible demand for vigilant monitoring, and the possibility of copycat acts or suicide clusters?

Recently, the Department of Justice (DOJ) announced that it will undertake negotiated rulemaking for the ADA Amendments Act of 2008, the regulations for which also govern §504 of

the Rehabilitation Act of 1973. This presents another opportunity¹ for substantive guidance from the DOJ on its expectations for how colleges and universities should best address situations involving acutely suicidal students and employees? on college campuses. At present, campuses are at the mercy of Department of Education interpretations of DOJ expectations, which lack clarity and consistency. Meanwhile, students are in limbo as campuses try to do the right thing amidst a vacuum of essential guidance from the government. As the negotiated rulemaking process unfolds, NaBITA and its 1,400 members ask the negotiators to please consider the following:

- Campuses are experiencing a mental health crisis involving students and employees that is well-documented by recent research and studies. To address this crisis, most campuses are bolstering their counseling programs, case management capacity, and efforts at early behavioral intervention. However, most colleges cannot be expected to provide the same services as community mental health clinics, hospitals, and in-patient psychiatric units.
- NaBITA understands the concern that campuses might remove students or employees who are ideating about self-harm well before they pose any realistic risk to themselves or others, which could create discrimination on the basis of disability.
- To address this concern, NaBITA encourages its members to work cooperatively with students, employees and their families to engage voluntary options that allow for students and employees to get the help they need, when campus resources cannot do so.
- Yet, sometimes the level of risk that an individual poses may be unclear. What are the parameters for referring and/or mandating students for psychological assessment for self-harm and/or suicidal behaviors?
 - How do these parameters differ for employees?
 - How do these parameters differ for violence risk assessments in cases of potential harm to others?
- NaBITA seeks clarification of when and how students and employees are protected by ADA/504 as individuals who are regarded as having a disability:
 - At what point is a suicidal person to be considered a person with a disability?
 - At what point is a self-harming person to be considered a person with a disability?
 - At what point is a person who represents a risk of harm to others to be considered a person with a disability?
 - Is recognition by a behavioral intervention team of suicidality, self-harming behaviors and/or risk of harm-to-others enough to protect a person under disability law, based on the “regarded as” prong of ADA?
 - If not, what is the threshold?
- NaBITA seeks a clarification that provides campuses with effective tools to address behavior encompassing acute self-harm and harm-to-others by students and employees.
 - Are we to use our codes of conduct, as we do for all other acts of misconduct for any individuals with disabilities?
 - Under what circumstances can a self-harming or suicidal individual be addressed with campus rules on disruptive behavior?

¹ ADA/504 regulations were last updated in 2010.

- Can any other rules be used without risking allegations of discrimination?
 - Under what circumstances can a person representing a threat of harm to others be addressed by campus rules prohibiting threatening behavior?
 - If a direct threat standard is to be used in such cases, how does a campus reconcile that with what may be differently defined threat standard in the campus code of conduct?
 - Is the risk of differential treatment based on disability a concern if two different threat standards are used?
 - At the extremes of risk, if we must make a direct threat determination, are we to do that within our existing codes of conduct and disciplinary structures, or should it be done outside the conduct process, with some sort of involuntary medical leave mechanism?
 - Will regulations guide the best practices for whatever process is permissible?
- Under what circumstances may campuses impose conditions for return of an individual who has taken a leave or been hospitalized for self-harm, suicidal ideation or the potential for harm to others?
 - What conditions may we legally impose?
- Finally, NaBITA’s members struggle to distinguish self-harm and/or suicidal ideation from the potential for harm-to-others, but also recognize that in some cases, an individual poses both a risk to self and to others or that we cannot be sure if they do. Will the DOJ be providing guidance for campus BITs in such cases where the risk of harm to the community must be balanced against the individual rights of the person who may pose such risk?
- Vis-à-vis the actual direct threat standard, campuses are obligated to determine “the likelihood that the potential injury will actually occur.” Can the DOJ point to resources that campuses can use to objectively and accurately assess “likelihood”?

On behalf of the membership of NaBITA, we thank you for this consideration.

Very truly yours,

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