**August 19, 2016**

**Thinking for Yourself (and Knowing What to Think!)**

I felt compelled to write about ESAs today (again!). But I really WANTED to write about precedents and case-by-case consideration. Then I realized I wanted to write about the second because of the first.

In the run up to the opening of a new school year, our listservs have once again been consumed with questions, discussions, and frustrations surrounding the issue of ESAs on campus (and, to a lesser extent, service animals). Here is a piece I wrote to the DSSHE-L earlier this week:

-----

*Over the last couple of weeks (actually, for much longer than that!), the list has been filled, on an almost daily basis, with discussions of ESAs, when to say "yes", how to say "no", what to look for in documentation, who is qualified to provide documentation, and so on, and so on, and so on.  Yesterday was no exception.  I get my posts in digest format, so I read the daily discussions in a chain, rather than as single posts.  It seems to me that these chains, spread across time and triggered by different initial scenarios, have one thing in common.  They focus on one thing.*

*I don't mean that they always focus on the SAME thing.  I mean that these chains of responses tend to offer advice and suggestions based on an analysis of a single part of the larger "whole" that is the issues of ESAs on campus.  Yesterday was no exception.  The discussion centered around the credentials of the professional (a CNP) and the fact that the professional was practicing out of an Urgent Care facility.  That may LOOK like two things, but it really isn't.  Both of those issues are centered on concerns for the validity of the documentation.  Before that, there was a prolonged discussion about what would/could/should be done about the presence of animals in case of an emergency or when the owner/handler is not able to care for the animal.  Before that, there was a discussion about the relevancy of whether the animal was/was not a pet before it was tapped for the role of ESA.*

*Periodically, thrown in among these discussions there is a statement from the person who started the inquiry that says, "I know this student and I can see where an ESA might be appropriate as a means of supporting this student who has been struggling here."  Those statements are almost invariably followed by, "BUT..."  And then the service provider goes on to state why they are hesitant to approve the animal.  And it is rare for someone else, in responding to that hesitancy, to reference the fact that the service provider started out by saying that this student is, in their opinion/observation, a good candidate for an ESA.  Instead, the discussion seems to focus on what the DSS provider should say -- and why -- instead of what the student needs.*

*I understand the hesitancy to accept bogus paperwork regarding ESAs.  Heck... I'm one of the people who has promoted that idea for some time now.  But somewhere along the line, I have the feeling that the discussion of ESAs (and SPECIFICALLY a discussion of ESAs) has centered on how/when/if we can avoid them, rather than when/how/if they may be appropriate for students (which is the focus we generally have in considering accommodation requests).*

*This isn't meant of a criticism of the necessary discussions we've been having, just an observation.  I don't think I am pressing for there to be less discussion.  I think there needs to be BROADER discussion of the interaction of issues.*

-----

I don’t think what I am reading on the lists is backlash to the idea of having ESAs on campus. I honestly believe it results from ongoing confusion about all this. But that confusion seems to have shifted the way we look at this issue, and the way we draft our responses. It’s kind of the difference between a multiple choice test and an essay test. In a multiple choice test, your objective is to choose the right answer from among the possible options provided. In an essay test, you begin by considering ALL the information available and weaving together a narrative that justifies your (right) answer.

I have had at least one contact a week, since returning from the AHEAD conference, from a service provider who says, “I think I am looking at bogus paperwork for an ESA. How do I check that out, and what should I do about it?” In each case, the DSS provider was right. The paperwork was easily shown to be bogus. (I am adding a new lesson to the ESA class on how to research that for yourself!) But what to do about it? That’s something else. In all but one case, the student who brought the paperwork was a returning student. That student already had a diagnosis on file of a mental health disability. Indeed, part of the concern expressed by the service provider was, “the student has been receiving accommodations for the mental health disorder since they got here, and they have been living in the dorm with no problem. Why do they suddenly need an ESA?” ***And in EACH case***, somewhere within the conversation, there was concern expressed that if they accepted this bogus paperwork, they would be setting a precedent for accepting bogus paperwork from anyone and everyone.

Hold that thought, while I tell you about a different set of conversations I have had this week. I have been having separate, lively discussions with two very knowledgeable, very savvy attorneys (nice guys, honest!) who work in the higher education arena. Those conversations have reminded me that we may work in the same area, but we are from different worlds. Their reality is not MY reality (and, apparently, *vice versa*!).

When the attorneys are confronted with a decision to be made or a course of action to be chosen, they look at all the possibilities that could result from one decision over another. Since they are schooled to be “risk aversive” in their actions, once they have determined what the consequences could be, they are inclined to follow the path with the least likelihood of triggering legal action. They examine existing precedents and shy away from setting up the possibility of a negative (legal) outcome, even if they are dealing with the least likely scenario. “Better to be safe than sorry?” The one annoying piece of this that crept into both conversations was the attorneys’ recognition that there were no immediately applicable precedents, so they drew their precedents from something similar that MIGHT be applied to the case at hand.

When I looked at those same scenarios (from my perspective as a DSS professional), I was inclined to look at the *likelihood* of negative consequences, based on past history in the practice of DSS in higher education. Rather than avoiding a course of action because it MIGHT create a problem, I looked to see whether the possibility of a problem in the future was worth risking the certainty of what I felt was the right thing to do in this instance.

The lawyers look at past precedents to guide their decisions (and, I would suggest, to limit their options). As a DSS provider, I look at existing precedents as important information to have when making decisions, because they suggest what options might be available and what I would need to do (how to justify) if I don’t follow the precedent. In the end, it comes down to taking action for this student because of what has happened to/with others (the attorneys), versus taking action for this student because of the circumstances for this student (DSS providers). Does the phrase “case-by-case” ring any bells?

Let’s circle back to the discussion of ESAs and bogus documentation. I have no problem with being honest with a student and saying (politely, of course), “this documentation is not adequate or appropriate in establishing the need for an ESA.” It worries me, though, when it seems that statement is rarely followed by, “If you want to establish the need for an ESA, here is what I will need you to bring me instead.” Remember, in the scenarios presented to me over the last month, the student’s diagnosis as someone with a mental health disability was already in hand. That doesn’t make the bogus paperwork any more legitimate, but it seems to me that it SHOULD shift the conversation.

If you are talking to a student that has just been diagnosed as having a mental health disorder by filling out an online questionnaire, and sending in $69.95 for their letter, you SHOULD say “no.” And I probably wouldn’t hesitate to throw in a little polite-but-firm education about the true purpose of an ESA and the idea that they are only allowed for someone who has a *significant* mental health problem. If you are talking to a student who has been on campus, struggling, for more than a year, who is receiving extended time, quiet proctored settings, and other accommodations in response to their established significant disability, who filled out the SAME online questionnaire and sent the SAME $69.95 for their letter, I think you should say, “Not on the basis of this. Here’s what you need to do, instead.” And what is the difference? A case-by-case review of the circumstances.

But… but… if you eventually approve an ESA for a student who brought you faulty paperwork, aren’t you setting a precedent for needing to work with and eventually approve an ESA for every student, no matter how bogus the claim AND the paperwork? Way back in 2011, right after the UN-Kearney case first broke and was reported, Scott Lissner gave a great quote in an article for *Inside Higher Education*:

*"I understand the concern, but it is never legitimate to make an accommodation decision based on what other people will try to do. In terms of determining your accommodation, the other 10 million people in the universe are irrelevant."*

Are the attorneys wrong? Do legal precedents have no place in our consideration of disability accommodation decisions? Of course they have a place. It is important for the DSS provider to know and understand what has gone before. But as a DSS provider, I am more concerned with WHY the precedent came about than with the yeah/nay decision it encompasses. KNOWING those legal precedents and acknowledged “good practice” parameters is vital in being prepared to make case-by-case decisions (which is WHY you should consider taking that Beginner’s course!!!).

In the end, though, each decision we make should be case-by-case, considering the WHOLE of the circumstances. Does each decision either set its own precedent, or ignore all precedents? Not at all. When fair-minded individuals consider all the circumstances and make a “good faith” determination of what should happen, the only precedent that is established is that the next request will receive the same fair-minded, good faith consideration – NOT that the decision will be the same, but that the process of deciding will be the same. That is a precedent we should be able to live with!

Janie

*Mere precedent is a dangerous source of authority.*

*I would rather create a precedent than find one.*

*Every bad precedent originated as a justifiable measure.*

*I have an almost complete disregard of precedent, and a faith in the possibility of something better. It irritates me to be told how things have always been done. I defy the tyranny of precedent. I go for anything new that might improve the past.*

Clara Barton

-----