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TOPIC:

DIRECT THREAT AND CARING FOR STUDENTS AT RISK FOR SELF-HARM: WHERE WE STAND NOW

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INTRODUCTION:

For many years, the legal framework by which colleges and universities addressed students at risk for self-harm was well recognized and fairly well understood: If students posed a "direct threat"—a significant risk of substantial harm—

life, health, welfare, safety or property of any member of the College community."[16] The involuntary medical leave policy allowed SUNY Purchase to remove "any student whose behavior renders them unable to effectively function in the residential or College community without harming themselves, others, or disrupting the College community and who refuse and/or cannot be helped by emotional and/or medical treatment."[17] Under both of these policies, either the Vice President for Student Affairs or a designee would make a removal determination after collecting whatever information may be needed, which could include a mandatory medical assessment.[18] Students were also afforded an appeal.[19] The return policy required that "any student who needed an emergency medical evaluation and/or treatment and requests to return to campus must either contact the College's Counseling Center . . . or the College's Health Services Center" and that the "College will determine each student's 'appropriateness to return . . . including planning for needed follow-up care . . . and assuring the safety and wellu

all students, not just students with actual or perceived disabilities. In such circumstances, presumably, the risk of discriminatory treatment is acceptably low.

Georgetown University (October 13, 2011)

The Complainants in this case alleged that Georgetown University violated Section 504 by discriminating against their daughter on the basis of her disability when it imposed certain conditions on her reenrollment following a medical leave.[28] OCR disclosed very few facts about this situation, and because the complaint was resolved without a finding, there is no legal analysis. The case is noteworthy, nonetheless, because of the detailed "Voluntary Medical Leave of Absence" policy adopted by Georgetown and endorsed by OCR to resolve the complaint.[29]

According to the resolution agreement, Georgetown was required to revise its voluntary medical leave polices to provide for an individualized assessment of the grounds for removal and conditions for return. In making these determinations, the University was required to "give significant weight to documentation of the opinion of the student's treatment provider" and provide "prompt and reasonable timeframes within which the University will complete its review."[30] The revised policy explains to the students what medical documentation may be required, what criteria will be applied, whether a "check-in" is necessary, and how determinations will be made.[31] OCR prohibited Georgetown from requiring students on medical leave to engage in employment or volunteer positions or to solicit letters of recommendation
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explanation of the process, an opportunity to present information for consideration in the risk assessment, and an appeal option.[47] Fifth, institutions may require evidence of readiness to return, but OCR is concerned that requirements related to the amelioration of disability-related behavior would discriminate against the disabled. Lastly, OCR wants institutions to rely on current medical information and, consequently, permits institutions to require a limited release of medical records for that purpose.

Fordham University (November 17, 2011)

The Complainant in this case was a sophomore who requested a voluntary medical leave in the midst of the spring semester.[48] In support of his request, the student submitted medical documentation that he was suffering from chronic fatigue syndrome and panic attacks and was being treated by a psychiatrist.[49] Fordham had no specific policy for medical leaves at that time, but required all withdrawn students to apply again for readmission.[50] Fordham approved the medical leave and conditioned readmission on the submission of unspecified medical documentation.[51]

Lacking a written policy on readmission after medical withdrawal, the University's practice was to require students to submit sufficient medical documentation to establish that they were ready to return.[52] When mental health was at issue, the University required the following, seemingly without regard to the particular facts and circumstances at issue: (i) responses from two mental health professionals to a standard set of questions regarding the student's treatment and current condition; (ii) an in-person evaluation by the University's consulting psychologist; (iii) a signed statement of expectations ("SOE"); and (iv) a waiver permitting the University to review the student's medical records.[53]O One of the questions asked of the men

Princeton University (January 18, 2013)

Although OCR has refrained from holding out its investigation of Princeton University as a model of its legal position under the new harm-to-self regime, the case is particularly useful as a heuristic because it addresses many issues common to student threat-to-self cases—including removal, withdrawal, and readmission—and underscores OCR's concerns about the processes by which colleges and universities address these issues.[65]

The Complainant was a freshman who attempted suicide by an overdose of medication and was hospitalized.[66] Princeton determined that under the circumstances, the student should be temporarily removed from the campus for two months. The student filed a complaint with OCR alleging that Princeton violated Section 504 by discriminating against him on the basis of his disabilities, which OCR described as "depression and/or bi-polar disorder."[67] Consistent with its practice since December 2010, OCR focused on disparate treatment, not direct threat.

OCR determined that the student's emergency removal for a two month period was not discriminatory. Two factors were central to that determination. First, Princeton acted pursuant to a written conduct code that applied "to any student, not solely students with disabilities."[68] According to that code, Princeton could "summarily bar" a student from the University "in circumstances seriously affecting the health or well-being of a student, or where physical safety is seriously threatened," provided that the student is afforded a "reasonably prompt review process."[69] Tellingly, the code addressed student health, welfare and safety, without using direct threat terminology or focusing or students with disabilities. OCR expressed no objections to using this policy for emergency removals, finding the concerns about "health, well-being and safety" to be "legitimate" and "non-discriminatory."[70] OCR found no evidence of pretext due to the second determinative factor: Princeton conducted an individualized risk assessment that included medical recommendations from two clinicians from the University who evaluated the student and believed he was a "danger to himself" with a "very high risk of another [suicide attempt] in the future."[71] In essence, Princeton found that the student posed a direct threat of harm to himself. Without referencing direct threat, OCR approved the process because Princeton incorporated the individualized assessment required in direct threat cases and applied a conduct code applicable to all students, not just the disabled.

Princeton next determined that the student should be withdrawn from the University for a minimum of one year. Administrators strongly recommended to the student that he withdraw voluntarily. Ad42.2(app)4o1o (Pr [(i)3.1(t)-

University’s treatment

A. **Avoid "direct threat to self" language**

As they stand now, federal regulations do not recognize a direct threat-to-self exception under the ADA or Section 504 outside of the employment context. Moreover, since the Spring Arbor decision in December 2010, OCR has conspicuously avoided relying on, or even referring to, direct threat-to-self terminology in its investigations of student disability discrimination complaints involving self-harming conduct. Consequently, in this regulatory environment, institutions stand on infirm ground if they rely expressly on direct threat terminology when addressing self-harm situations in the student context. As suggested by the cases reviewed above, the more prudent course at this time is to employ the direct threat methodology but use language that refers more generally to the safety, health, and well-being of the campus community.

B.

While the student disciplinary process is not generally recommended as a safe or productive means of responding to self-harming behavior, disabled students and others at risk for self-harm are not thereby immune from discipline. For example, if in attempting to harm herself, a student violates rules against starting fires in dormitories, discipline would be warranted for that general rule violation, regardless of any disability. Disabilities may be considered mitigating factors in a disciplinary proceeding, but institutions should not substitute a disciplinary proceeding for an individualized risk assessment in response to self-harming behavior.

E. Compare with similarly-situated, non-disabled students to avoid disparate treatment

In its recent investigations of student disability discrimination complaints, OCR has applied a disparate treatment analysis to determine whether an institution violated Section 504 in responding to at-risk student situations. To avoid disparate treatment, an institution should ask in each case whether its actions treat disabled students differently from similarly situated non-disabled students. Related questions to ask are: Is the same process followed when students without disabilities are involved? What risk factors are being considered? Are the outcomes similar? If there is different tr OCRpa,sf.4(ed)-1.i-0.000 Tw

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2–3.

[21] *Id.* at 4–5.
[22] *Id.* at 3.

[23] *Id.*

[24] *Id.* at 4.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 4–5.

[28] OCR Letter to Georgetown University, Complaint No. 11-11-2044, 1 (Oct. 13, 2011) (hereinafter "OCR Letter to Georgetown").

[29] OCR Voluntary Resolution Agreement, Georgetown University, Complaint No. 11-11-2044 (Oct. 13, 2011) (hereinafter "Georgetown Voluntary Resolution Agreement").

[30] *Id*. at 1.

[31] *Id*.

[32] *Id.*

[33] *Id*. at 1–2.

[34] Georgetown University Voluntary Medical Leave of Absence (MLOA) Policy, In Effect as of May 9, 2012 (hereinafter “Georgetown MLOA Policy”).

[35] *Id.* at 2.

[36] *Id.*

[37] *Id.*

[38] *Id.*

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[45] *Id.*

[46] *Id.*

[47] OCR's emphasis on due process was underscored in a resolution agreement earlier in the year with St. Joseph's College. *See* OCR Letter to St. Joseph's College, Complaint No. 02-10-2171 (Jan. 24, 2011). The case involved a student who was not considered at risk for self-harm but who appeared delusional and emotionally unstable. *Id.* at 2. St. Joseph's employed a "Behavioral Assessment Committee" (BAC), but only for students with mental health conditions. *Id.* at 2–3. The student alleged that the College violated Section 504 by excluding her from classes and barring her from campus. *Id.* at 1. OCR determined that the College had treated the student differently on the basis of her mental health disability and had failed to provide the student with the notice, opportunity to be heard, and right to an appeal promised in the student handbook. *Id.* at 5. The College agreed to publish a written policy regarding the BAC process, which would include an opportunity for the student to provide relevant information and to appeal an adverse determination. *Id.*

[48] OCR Letter to Fordham University, Complaint No. 02-10-2013, 1 (Nov. 7, 2011) (hereinafter "OCR Letter to Fordham").

[49] *Id.* at 1–2.

[50] *Id.* at 2.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2.

[54] *Id.* at 2 n.1.

[55] *Id.* at 2.

[56] *Id.* at 3.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 1.

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federal courts view these issues, including whether institutions may validly consider threats to self without running afoul of the ADA and Section 504.

[66] *Id.* at 1.

[67] OCR Letter to Princeton University, Complaint No. 02-12-2155, 2 (Jan. 18, 2013) (hereinafter "OCR Letter to Princeton").

[68] *Id.* at 5.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 4.

[72] *Id.* at 5.

[73] *Id.* at 5 n.5.

[74] *Id.*

[75] *Id.* at 9.