# Direct Threat and Caring for Students at Risk for Self-Harm: Where We Stand Now

## 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 to the health or safety of themselves or others - then the institution may take reasonable steps to eliminate that threat without violating federal anti-discrimination laws.

Back in March 2011, the U.S. Department of Justice ("DOJ") appeared to have fundamentally changed the legal framework in which colleges and universities could address students at risk for self-harm without running afoul of disability discrimination laws. At issue is the definition of "direct threat" - when is a student no longer qualified because he or she poses a direct threat to health or safety? Previously, schools relied on the long-standing interpretation of the U.S. Department of Education, Office of Civil Rights ("OCR") that direct threat included both a threat to others and a threat to self. OCR's interpretation was consistent with how the U.S. Equal Employment Opportunity Commission has defined direct threat in the workplace, an interpretation that had been upheld by the U.S. Supreme Court.[1] The DOJ upset this legal framework by defining direct threat for purposes of Title II of the Americans With Disabilities Act (applicable to public institutions) to include only those disabled students who pose significant risk to the health or safety of others, omitting any reference to a risk for self-harm. The Title II regulations and how they affect the direct threat analysis for colleges and universities was examined in depth in an earlier article.[2]

Where do we stand now? Three years later, OCR has stopped referring to and relying on a direct threat to self analysis, but there is still no formal guidance from OCR or DOJ regarding how colleges and universities, without applying a direct threat analysis, can properly care for students at risk for self-harm while maintaining compliance with disability laws. How then should institutions answer this question in the absence of formal guidance? This article reviews the current regulatory environment, examines the few self-harm cases that OCR has investigated since the regulatory change took effect in March of 2011, and proposes some guidelines for safeguarding students and avoiding disability discrimination in the absence of formal federal guidance.

## DISCUSSION:

### 1. NACUA's Efforts to Obtain Federal Guidance

Following the publication of the November 2011 NacuaNote on this subject, NACUA representatives met with OCR leaders on January 20, 2012, to discuss the need for more

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[1] *Chevron v. Echazabal*, 536 U.S. 73 (2002).

[2] Paul Lannon and Elizabeth Sanghavi, *New Title II Regulations Regarding Direct Threat: Do they Change How Colleges and Universities Should Treat Students Who Are Threats to Themselves?*, NACUANOTES, Vol. 10, No. 1 (Nov. 1, 2011).

guidance on direct threat to self situations. The meeting did not result in any concrete recommendations or guidance. NACUA sent a follow-up letter, dated February 24, 2012, outlining several issues of immediate importance to colleges and universities. These included:

- The commitment to create a safe, nondiscriminatory environment for students;
- The need for affirmative institutional action when students pose a threat to themselves;
- Parental expectations that institutions will take action in the face of known risks;
- The practical necessity of emergency removals when students in physical or emotional distress refuse to engage with counseling or other needed medical services;
- The reality that institutions of higher education are not residential in-patient treatment facilities and that some students cannot safely stay on campus;
- The fact that threats to self can become threats to others, leading to an inability to clearly distinguish between self-harming and generally threatening students;
- Questions about the viability of reentry or readmission conditions when students leave campus and then seek to return;
- The necessity for maintaining involuntary withdrawals as a last resort to facilitate safety on campus.

These and other issues remain pressing. They are frequently the focus of student complaints and OCR investigations, as shown in the cases analyzed below.

OCR did not respond in writing to NACUA's letter, but assurances were given that further guidance was under consideration. Since then, OCR has not indicated when, if ever, formal guidance will be issued. No drafts have been circulated for public comment, and informal guidance from regional offices has been inconsistent and indefinite.

## 2. Recent OCR Resolution Agreements Involving Self-Harm

Since the DOJ Title II regulations were published in September 2010, OCR has issued a handful of resolution agreements involving complaints of disability discrimination by students considered at risk for self-harm. While resolution agreements may not be relied upon as legally binding precedents,[3] they do provide insight on how OCR is analyzing these situations and what steps by colleges and universities have met with approval or disapproval. A few consistent

[3] As stated at the end of OCR letters regarding the conclusion of a complaint investigation: "Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public." *See* OCR Letter to Spring Arbor University, Complaint No. 15-10-2098, 15 (Dec. 16, 2010) (hereinafter "OCR Letter to Spring Arbor").

principles can be discerned in these decisions and absent formal guidance from the OCR, may help provide some much needed help to institutions grappling with similar circumstances.

Spring Arbor University (December 16, 2010)

Spring Arbor University was the first OCR resolution agreement addressing self-harm after the new Title II regulations were published. Conspicuously absent is any reference to a direct threat against self. Consequently, Spring Arbor is frequently cited as a watershed, the case where OCR stopped using a direct threat to self analysis.

In Spring Arbor, OCR investigated a complaint of disability discrimination against a private university subject to Section 504 of the Rehabilitation Act of 1973. The Complainant disclosed in his admission materials some information about his medical history,[4] but after his enrollment, he did not identify himself as a student with disabilities, nor did he request any specific accommodations. Having received complaints from students about the Complainant's "disruptive" behavior, University officials met with the student and required him to enter into a "behavior contract" as a condition of continued enrollment.[5] The proposed behavior contract included the following obligations: (1) attend mandatory therapy; (2) provide written confirmation of attendance from the therapist; (3) provide a release permitting the Director of the Health Center to discuss his case with the therapist; (4) comply with his therapist's treatment plan; (5) maintain composure during classes; (6) avoid stressful social situations that might trigger a crisis; and (7) contact certain University officials when in a crisis situation. Rather than submit to the behavior contract, the student withdrew from the University. No restrictions were placed on his return at the time he withdrew. He was in good academic standing and faced no disciplinary charges.

When the student sought readmission, Spring Arbor imposed the same conditions contained in the behavior contract, including documentation that he was receiving appropriate medical treatment and was able to resume a full course load. Spring Arbor's readmission policy did not contain any references to documentation of medical treatment. The University had, nevertheless, imposed similar conditions on at least two other students, both of whom were suspected of having psychiatric disabilities and who had withdrawn. No determination was made as to whether the Complainant posed a threat to others, but the University believed that the student had demonstrated that he was a threat to himself.[6]

Without mentioning direct threat to self, OCR recited the direct threat to others analysis and determined that Spring Arbor could not avail itself of that defense because the University had failed to conduct an individualized assessment based on current medical advice or the best available objective evidence. OCR then assessed the disability discrimination claim under a disparate treatment analysis, asking whether similarly situated non-disabled students were treated differently. OCR found that the University perceived the Complainant as a qualified student with a mental impairment and then, on the basis of that perception, treated him differently from other students who were disruptive or withdrew. OCR found the University in violation of

[4] Exactly what information was disclosed is unclear. OCR redacted that information from the resolution agreement. OCR Letter to Spring Arbor, p. 2.
[5] *Id.* p. 3-4.
[6] *Id.* p. 11-12.

Section 504 when "it conditioned [the student's] ability to remain enrolled at the University upon signing the behavior contract, and then refused to consider his readmission until he provided medical documentation to establish his condition and treatment."[7]

OCR's approach in Spring Arbor suggests that after the revised Title II regulations, OCR will apply a disparate treatment analysis to Section 504 complaints involving self-harm instead of the direct threat to self analysis it had applied previously. Under a disparate treatment analysis, the central question is whether colleges and universities have applied the same standards to similarly-situated students with respect to behavior, withdrawal, and readmission. If students with disabilities are treated differently, then the institutions must be prepared to explain the disparate treatment with reference to an individualized assessment of particular risk factors. As for what terms an institution may validly impose in a behavior contract or as conditions for readmission, Spring Arbor provides little guidance, except a caution that "educational institutions cannot require that a student's disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications."[8]

Purchase College, State University of New York (January 14, 2011)

Just a month after Spring Arbor, OCR published another resolution agreement involving self-harm and a complaint of disability discrimination, but this time OCR applied both Section 504 and Title II of the ADA. The Complainant, a student suffering from bipolar disorder, alleged that Purchase College, State University of New York ("SUNY-Purchase") discriminated against him by placing him on involuntary medical leave when he attempted to return to the college after emergency hospitalization for a "psychiatric crisis" that involved a medication overdose and police intervention.[9]

Once again, OCR applied a disparate treatment analysis without referring to, or applying, direct threat to self. Three policies were at issue: interim suspension, involuntary medical leave, and return to campus after emergency medical situations. The interim suspension policy permitted SUNY-Purchase to temporarily remove "any student whose behavior presents an immediate danger … to the life, health, welfare, safety or property of any member of the College community . . . ."[10] 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."[11] Under both of these policies, the Vice President for Student Affairs or a designee made a removal determination after collecting information, which could include a mandatory medical assessment. Students were also afforded an appeal. 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

[7] *Id.* p. 12.
[8] *Id.* p. 9.
[9] OCR Letter to Purchase College, State University of New York, Complaint No. 02-10-2181, 1-2 (Jan. 14, 2011) (hereinafter "OCR Letter to SUNY-Purchase").
[10] *Id.* p. 2.
[11] *Id.*

needed follow-up care … and assuring the safety and well-being of the whole campus community."[12] Importantly, OCR found that none of the three policies, as written, discriminated against students with disabilities because, in each case, the policies also applied to non-disabled students who exhibited the same behavior.

With respect to the application of the policies to the Complainant, OCR found insufficient evidence of disability discrimination. After hospitalization the student was required, pursuant to the involuntary medical leave of policy, to schedule a mandatory medical assessment with a psychologist at the College's counseling center. In addition to an interview, the College psychologist reviewed a self-assessment completed by the student, hospital records, and an assessment prepared by the student's personal psychiatrist. After completing this review, the College psychologist issued a written evaluation report that stated that the student should not be allowed to return to the College until he had demonstrated a "significant period of psychological stability and the ability to manage life stressors."[13] Relying on the College psychologist's assessment, the College decided to place the student on medical leave. The student accepted the option to leave voluntarily and waive her appeal. OCR determined that the medical leave was not discriminatory because the College applied neutral policies of general applicability to disabled and non-disabled students alike, and then conducted and relied upon an individualized assessment when determining whether leave should be imposed. Due process was satisfied by the written, published policies and a right of appeal.

The differences between the OCR determinations in Spring Arbor and SUNY-Purchase are enlightening. In the former case, OCR found a violation where the administrators acted without a written policy, medical information, or an individualized assessment. By contrast, OCR found no violation in the latter case where the administrators acted in accordance with written policies of general applicability and an individualized assessment based on current medical information. This comparison suggests that OCR is more likely to uphold a removal decision in situations where (i) the institution combines a general policy regarding prescribed conduct or emergencies with (ii) an individualized assessment of a particular student's risk factors, incorporating current medical information and the opinions of the student's own healthcare providers.

Is this just another way of conducting a direct threat to self analysis without using that label? Does a rose by any other name smell as sweet? The answer appears to be yes. The individualized risk assessment is the heart of OCR's direct threat analysis, but in SUNY-Purchase there was no direct threat to others. To the contrary, the College was clear that it was assessing the student for risk of self-harm. Nevertheless, OCR applied the same individualized risk assessment requirement that it would have applied in a direct threat to others scenario. The inference is inescapable: OCR still expects the equivalent of a direct threat analysis in cases involving students at risk for self-harm.

Given that OCR expressly found that none of the policies used by SUNY-Purchase were discriminatory, those policies offer helpful models. Some of the key qualities of the SUNY-Purchase polices were: (i) applicability to all students; (ii) focus on observable conduct or

[12] *Id.* p. 2-3.
[13] *Id.* p. 3-4.

emergency medical situations; (iii) individualized assessment that included current medical information, and (iv) a right of appeal. Notably, the three policies at issue in this case recited concerns about the health and welfare of the school community, which expressly included harm to any member, including the students themselves. OCR did not instruct SUNY-Purchase that it could not consider a threat to self, at least when that threat is part of a policy protecting the health, safety, and welfare of the larger community. 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.[14] 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.[15]

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."[16] The policy must explain 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.[17] OCR prohibited Georgetown from requiring that students on medical leave "engage in employment or volunteer positions or to submit letters of recommendation from an employer as a condition for return," or to require that the students "demonstrate a decrease in or amelioration of their disability-related behavior or symptoms," although Georgetown could instead "require students to demonstrate their readiness to resume studies and be a successful member of the campus community, with or without accommodations."[18]

Abiding by these guidelines, Georgetown adopted new procedures for voluntary medical leaves as of May 9, 2012. Students experiencing "significant health issues that are interfering with their academics or university life" may request a voluntary medical leave.[19] The student must first consult with the Georgetown's Health Service, which will make a recommendation to the Dean's Office. The recommendation must be based on an individualized assessment and will be approved when the health issues have "compromised" the student's "health, safety or

[14] OCR Letter to Georgetown University, Complaint No. 11-11-2044, 1 (Oct. 13, 2011) (hereinafter "OCR Letter to Georgetown").
[15] OCR Voluntary Resolution Agreement, Georgetown University, Complaint No. 11-11-2044, 1-2 (Oct. 13, 2011) (hereinafter "Georgetown Voluntary Resolution Agreement").
[16] *Id.* p. 1.
[17] *Id.*
[18] *Id.* p. 1-2.
[19] Georgetown University Voluntary Medical Leave of Absence (MLOA) Policy, In Effect as of May 9, 2010, 2 (hereinafter "Georgetown MLOA Policy").

academic success."[20] The length of recommended leave will be determined on a case-by-case basis, but indefinite leaves are not permitted.

A student on medical leave seeking to return to the University must submit required documentation by certain dates to be consider for reenrollment in the fall or spring semesters. What documentation is required in a given case is determined individually. In general, students must release to the Health Service reports from their medical providers describing the treatment, the student's current clinical status, and the provider's opinion as to the student's readiness to return. In "extraordinary circumstances," Georgetown may require an additional assessment to ensure the student's "readiness for return."[21] The student shoulders the burden of establishing "reasonable capability of day-to-day functioning, with or without accommodations."[22] The University may also require a personal statement from the student, focusing on understanding the factors that resulted in the leave, the student's experience while on leave, and the plan for ensuring a successful return. Upon a satisfactory review, Health Service may require a check-in to evaluate the student's safety and treatment plans. The Dean's Office makes the final determination regarding whether the student is able to return. Students may appeal an adverse decision to the Associate Vice President for Student Health. Conspicuously absent from the policy is any reference to a threat to self or others, or under what conditions an involuntary leave may be imposed.

The OCR-approved Georgetown policy sheds some light on what issues are of particular concern to OCR in the medical leave and readmission processes. First, voluntary leave is favored over involuntary removals. In the ordinary course, students should be given the option of a voluntary medical leave. Second, leave policies should apply equally to the disabled and non-disabled. Third, an individualized risk assessment is necessary to establish both the grounds for removal and the conditions for return, even when there is no explicit direct threat to self or others. Fourth, OCR is concerned about due process. Students should be given a thorough explanation of the process, an opportunity to present information for consideration in the risk assessment, and an appeal option.[23] Fifth, institutions may require evidence of readiness to return, but OCR is concerned that requirements of employment or 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.

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[20] *Id.*
[21] *Id.* p. 4.
[22] *Id.* p. 3.
[23] 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, 5 (Jan. 24, 2011). The case involved a student who was not considered at risk for self-harm, but who appeared delusional and emotionally unstable. St. Joseph's employed a "Behavioral Assessment Committee (BAC)" but only for students with mental health conditions. *Id.* p. 2-3. The student alleged that the College violated Section 504 by excluding her from classes and barring her from campus. 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. 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.* p. 5.

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. 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. Fordham had no specific policy for medical leaves at that time, but required all withdrawn students to apply again for readmission. Fordham approved the medical leave and conditioned readmission on the submission of unspecified medical documentation.

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. When mental health was at issue, the University required: (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.[24] One of the questions asked of the mental health professionals was whether the student had "suicidal thoughts or behaviors, homicidal thoughts, self-injurious behaviors, substance abuse behaviors, eating disorder, [or] impairment upon initial presentation."[25] Fordham applied these conditions to the Complainant's request for readmission.

The University objected to the documentation submitted by one of the student's outside providers. The student was ultimately evaluated by an independent social worker, as well as a University psychologist. Both recommended readmission. After the student objected to the University's requirement in the SOE that he engage in a semester of therapy, the requirement was dropped. The student later complained to OCR that Fordham violated Section 504 by discriminating on the basis of disability when the University required as a condition of readmission that he submit "excessive" medical documentation, engage in periodic counseling, and permit the University to review his medical records.[26]

Once again OCR conducted a disparate treatment analysis. There was no discussion of a direct threat to self or others. OCR found that Fordham failed to conduct an individualized assessment when setting the conditions for the student's return. Instead, OCR concluded that Fordham had "categorically" required all students with actual or perceived mental health impairments to provide responses to a standard set of questions, in contrast to students withdrawn for physical illness or injury whose conditions were determined on a case-by-case basis.[27]

The case settled without a finding as to liability. In its settlement with OCR, Fordham resolved to establish a written procedure for readmission after any type of medical withdrawal. The procedure would require the University to conduct a case-by-case determination of what

[24] OCR Letter to Fordham University, Complaint No. 02-10-2013, 2 (Nov. 7, 2011) (hereinafter "OCR Letter to Fordham").
[25] *Id.* p. 2, n. 1.
[26] *Id.* p. 1.
[27] *Id.* p. 4.

documentation is required to "demonstrate that the student is medically able to return and to fulfill the fundamental responsibilities of academic and residential life, if applicable."[28]

The result in the Fordham case suggests that while institutions have discretion to set conditions for medical leave and for readmission after medical leave, categorical approaches are fundamentally inconsistent with OCR's requirement for an individualized risk assessment, even where there is no explicit threat of harm to self or others. OCR expressed no objection, when appropriate to a particular case, of requiring a release of medical records and a medical evaluation by both by an independent and University healthcare professional, in addition to a review by the student's own health care provider.

Princeton University (January 18, 2013)

While OCR has refrained from holding out this investigation as a model of its legal position under the new Title II regime, the case is particularly useful as heuristic because it addresses many issues common to student threat to self cases - removal, withdrawal, readmission - and underscores OCR's concerns about the processes by which college and universities address these issues.[29]

The Complainant was a freshman who attempted suicide by an overdose of medication and was hospitalized. 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 Princeton violated Section 504 be discriminating him on the basis of his disabilities, which OCR described as "depression and/or bi-polar disorder."[30] Consistent with its practice since December 2010, OCR's inquiry 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."[31] 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."[32] Tellingly, the code focused generally on student health, welfare and safety, without using direct threat terminology. 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."[33] OCR found no evidence of pretext due to the second determinative factor: Princeton conducted an individualized risk assessment that included medical recommendations

[28] OCR Resolution Agreement, Fordham University, Complaint No. 02-10-2013, 1 (Nov. 17, 2011).
[29] Just this year, the student who brought this OCR complaint filed suit against Princeton in the U.S. District Court for the District of New Jersey. The student alleges disability discrimination along with a host of tort and contract claims. *See W.P. v. Princeton, et al.*, No. 3:14-cv-01893-JAP-TJB (D.N.J. filed Mar. 26, 2014). If the case is not dismissed or settled, it could offer insight into how federal courts view these issues, including whether institutions may validly consider threats to self without running afoul of the ADA and Section 504.
[30] OCR Letter to Princeton University, Complaint No. 02-12-2155, 2 (Jan. 18, 2013) (hereinafter "OCR Letter to Princeton").
[31] *Id.* p. 5.
[32] *Id.*
[33] *Id.*

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."[34] 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.

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. Faced with the prospect of an involuntary withdrawal, the student opted for voluntary withdrawal and later argued that Princeton discriminated against him by "compelling him to voluntarily withdraw . . . ."[35] OCR determined that the withdrawal was not discriminatory. The critical factors were, once again, a written policy of general applicability, coupled with an individualized assessment that relied on current medical advice. OCR found that Princeton had a policy permitting "involuntary withdrawal" when a student exhibited behavior that posed "a serious and imminent health or safety risk to him/herself or others."[36] The examples in the involuntary withdrawal policy of behavior that may pose a serious and imminent health or safety risk included "anorexia, serious substance abuse, life-threatening behavior, repeat psychotic episodes, etc. "[37] OCR determined that Princeton's concerns for student health, well-being and safety, as expressed in this policy, were legitimate and non-discriminatory reasons for recommending withdrawal. Princeton's individualized assessment countered the student's claim of pretext. OCR noted that Princeton met with the student and his parents, considered the information provided by the student's medical providers, and afforded him an appeal. OCR also emphasized that Princeton considered multiple risk factors in weighing the necessity of withdrawal, including prior suicide attempts, current substance abuse, outpatient treatment, failure to adhere to treatment plans, and the incompatibility of the recommended treatment plan with the University's academic requirements.

The final dispute involved the conditions under which the student could return to campus after his withdrawal. According to University policy, all "extremely high-risk" students who withdraw for psychological reasons were required to comply with a personalized treatment plan and submit a release for medical information, prepare a personal statement about activities pursued while on leave, and to submit any recent treatment records and a questionnaire from the treatment providers. Pursuant to this policy, the Dean of Student Life and the Associate Dean imposed the following conditions: (i) follow the University's treatment recommendations; (ii) demonstrate increased ability to handle safely the stresses that arise from studying at the University; (iii) undergo a readmission evaluation at the University health center; and (iv) follow any recommendations for ongoing treatment. Princeton's recommended treatment plan included: (a) regular psychotherapy; (b) proper management of prescribed medications; (c) submission to the University of treatment provider forms to confirm treatment; and (d) readmission evaluation at the University health center.

OCR did not object to any of the readmission conditions. Rather, OCR confirmed that its regulations "do not prohibit the University from establishing conditions of readmission for

[34] *Id.* p. 4.
[35] *Id.* p. 5.
[36] *Id.* p. 5, n. 5.
[37] *Id.*

students who have withdrawn from the University for psychological reasons."[38] Moreover, OCR expressly found that it was legitimate and non-discriminatory for the University to ensure that the student would not be a "risk to himself" upon his return.[39] The personalized assessment and treatment plan, as opposed to a categorical or stereotypical approach, meant that the conditions were not a pretext for disability discrimination.[40]

The Princeton resolution agreement reaffirms several key aspects regarding how OCR has analyzed threat to self cases since December 2010:

- While no longer applying a direct threat to self analysis, OCR still requires institutions to conduct the same type of individualized risk assessment to justify removals, withdrawals and conditions on readmission.

- OCR will apply a disparate treatment analysis to claims of disability discrimination in violation of the ADA or Section 504.

- Institutions should ensure that disabled students are treated the same as similarly-situated non-disabled students.

- Removal and readmission decisions should be based on generally applicable conduct policies concerned with student health, well-being, and safety.

- Institutions should consider multiple risk factors.

- OCR will investigate whether the student received due process in the form of notice regarding applicable policies, an opportunity to present medical and other relevant information, and the ability to appeal.

- Institutions have fairly wide discretion in setting conditions for readmission after withdrawal for medical reasons; depending on the individualized assessment, the conditions may include medical evaluations, treatment plans, release of medical records, personal statements, and evidence of the ability to meet academic and conduct requirements.

### 3. Recommended Guidelines

There are no OCR approved or widely-accepted model policies for safeguarding students at risk for self-harm; nor is there one best policy on how to make decisions on removal, withdrawal, or readmission. What works well in some circumstances may not work as well in others. Our understanding of best practices is constantly developing. Flexibility and adaptability are hallmarks of an effective response to this challenge. Nonetheless, despite the lack of established professional models or formal government instruction, some guiding principles have emerged from the struggle of colleges and universities to respond to self-harming students in caring and responsible ways, while maintaining compliance with non-discrimination laws.

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[38] *Id.* p. 9.
[39] *Id.*
[40] The student ultimately met these conditions, and Princeton readmitted him.

The following recommendations are guidelines from which institutions may craft policies and procedures in light of their own particular circumstances, resources and experiences.

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, and 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 student safety, health and well-being.

B. **Conduct individualized risk assessments in a team environment**.

The *sine quo non* of an effective and legally compliant response to self-harm situations is the individualized risk assessment. Institutions cannot respond in ways that are stereotypical or categorical. Rather, decision-makers must consider each situation on a case-by-case basis, examining multiple risk factors and incorporating the best objective evidence and medical advice available. The focus of the assessment should be determining first whether the student has exhibited behavior which creates a risk of harm that requires intervention, and then determining the appropriate level of intervention.

These assessments are best conducted in a team environment where members can share information, expertise and recommendations. Too often tragedies result from a failure to gain a full picture of the risks in time to intervene successfully. No one person has all the information or all the answers. Collaboration is essential. Accordingly, care or assessment teams should include members representing the broadest spectrum of student experience, most often including campus safety, faculty or academic advisors, student affairs, residence life, health services, and legal counsel.

C. **Assess observable conduct that affects the health, safety or welfare of the campus community**.

When conducting individualized risk assessments, institutions should not rely on speculation, stereotypes, or unexamined fears. Decisions must be based on observed or recorded behavior that indicates a significant health, safety or welfare concern. Institutions should not adopt an overly parental approach, focused on attempting to determine what is in the student's own "best" interests. The institution's interests are broader. While attempting to safeguard students at-risk for self-harm, institutions must also consider effects on other students, employees, the larger community, as well as the impact on academic, residential and extracurricular activities. Thus, the more proper questions are what are the health, safety or welfare concerns raised by a student's behavior? Do they rise to a level where the student is no longer qualified to remain in a residence hall or enrolled in classes? Are there support measures or other accommodations that would adequately manage those risks?

D. **Enforce conduct codes applicable to all students**.

Codes and policies that single out those students with documented or perceived mental or emotional disabilities are likely to be held discriminatory in intent or application. To avoid discrimination claims, it is more effective to rely on conduct codes of general applicability to all students. For example, to respond to students at risk for self-harm, institutions can rely on policies prohibiting students from harming members of the school community or from creating a substantial health or safety risk, regardless of whether the student is disabled or regarded as disabled. Violations of these general conduct policies can be used as proper justification for intervention and removal decisions, and for imposing conditions on readmission or continued enrollment.

While the student disciplinary process is not 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 an at-risk student situation. 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 treatment, is it justified by an individualized assessment?

F. **Absent emergency circumstances, consider first voluntary leave or other voluntary restrictions**.

Involuntary actions to remove students from campus or restrict their access, while sometimes necessary, are disfavored. They are often contentious and traumatic, and they are also much more likely to trigger legal action by students and their families. Accordingly, involuntary actions should be considered measures of last resort, at least in the absence of emergency circumstances.

In the first instance, institutions should seek the agreement of students and their families in the plan of care for at-risk students. Obtaining voluntary compliance requires effective communication and education regarding the concerns at issue and the options reasonably available to the parties. In engaging in these communications, however, institutions should take care to comply with FERPA by limiting disclosures to school officials with a legitimate need-to-know and obtaining consents where appropriate. In some cases, a leave of absence may be unavoidable. In other cases, as noted below, students and institutions may be able to agree on

certain conditions for continued participation in the education program. Regardless, the voluntary nature of the restriction will benefit both the student and the institution.

G. **Consider behavioral contracts with reasonable, tailored terms**.

OCR's resolution agreements confirm that behavioral contracts with students are permissible when designed to reduce or manage the conduct at issue. The terms must reflect an individualized risk assessment and should be tailored to fit each student's particular situation. The conditions should be protective, not punitive, in nature. Behavioral contracts may require, among other things, compliance with a medical treatment plan, regular consultations with health care professionals, meetings with administrators, disclosure of relevant medical records and information, and restrictions on participation in residential housing or other activities. Behavioral contracts may also require a reduction of the conduct at issue sufficient to enable safe participation in the campus community, but may not go so far as to require that a disability be "cured" or that its symptoms not reoccur. Failure to satisfy the conditions of a behavioral contract can be grounds for dismissal.

H. **Resort to involuntary removal in emergency or direct threat situations**.

Even though the ADA and Section 504 regulations do not expressly provide for a direct threat to self defense, OCR has not yet penalized a college or university for removing a student at risk for self-harm when, in good faith, the institution believed there were emergency or direct threat circumstances. Thus, in situations requiring immediate medical care, or where a reasonable threat assessment determines that there is a significant risk of serious harm that cannot be managed adequately, institutions should not hesitate to resort to involuntary removal procedures if the student is not cooperative. In such extreme cases, prudence dictates erring on the side of health and safety. The conditions for involuntary removal should be expressed in a written policy and should be applicable regardless of whether a student is disabled or perceived as disabled.

I. **Satisfy due process concerns by providing adequate notice, an opportunity to present information, and an appeal**.

Institutions are more likely to run into legal trouble from failure to provide due process than from anything else. Exactly what process is due is not specified in the regulations. OCR letters do not resolve the issue, but provide helpful hits around familiar themes. For example, OCR will review whether an institution provided the student with sufficient notice, an opportunity to provide information, and an appeal or grievance process. With respect to notice, questions arise as to whether the student had sufficient advance notice of the applicable standards and procedures. Were the policies and procedures published and easily accessible? Did a school official explain those policies to the student? Were the policies followed? With respect to providing information, was the student given an opportunity to provide relevant information, including medical advice, after an emergency removal decision? Before an assessment was finalized? Before conditions for return were set? An appeal option gives institutions an opportunity to correct procedural or substantive errors before litigation or government enforcement actions ensue, and provides students and their families with another opportunity to have their concerns heard and addressed. Beyond appellate rights, all institutions subject to the

ADA or Section 504 must provide a grievance process for students who believe they may have been victims of disability discrimination.

J. **Establish reasonable conditions for a student's return**.

Institutions may establish reasonable conditions for students to return to campus after a medical leave or emergency removal. As with behavior contracts, conditions for return must be based on individualized risk assessments that address the particular conduct at issue. The focus should be on confirming that the student is, from a health and safety perspective, qualified to rejoin the student body. Depending on the circumstances, conditions for return may include examinations by independent or school employed medical health professionals, release of relevant medical records, compliance with treatment plans, demonstrated ability to meet the institution's academic and conduct standards, interviews with school officials, personal statements, and a decrease in the conduct at issue. Conditions may not require that the student be "cured" of a mental or emotional disability or become symptom-free.

**CONCLUSION:**

The federal government has yet to provide colleges and universities with formal guidance on how best to comply with disability discrimination laws when caring for students at risk for self-harm. Nor has the federal government provided a coherent explanation for recognizing a lawful defense in cases of direct threat to others, but not in cases of direct threat to self. Nevertheless, colleges and universities cannot remain idle while waiting for guidance. By reviewing how OCR has investigated such cases in recent years, institutions can discern general principles to guide their policies and procedures for self-harm situations. Two foundational principles are individualized assessments and equal treatment. Developing policies and procedures consistent with those principals will help ensure legal compliance.

These cases will always be challenging because the circumstances vary and the stakes are always high. There is no panacea, no philosopher's stone. Institutions must continue to evaluate their experiences with these cases, seek expert assistance, and regularly review and revise their policies and procedures to incorporate the developing best practices. If the result is better care for students and fewer instances of discrimination, then the effort is well worth it.