Q: What are the objectives of this session?

Understanding legal compliance issues regarding self-harming students and –

- Emergency Removal Protocols
- Medical and Voluntary Withdrawals
- Disciplinary Procedures
- Conditions for Readmission
Q. Why is this issue vitally important?

- Over 1,000 college suicides a year
- Many more attempt suicide
- Non-suicidal students require emergency medical treatment
- Accommodations required
- Heavy burden on limited resources

Q. Why is this issue vitally important?

- Self-harm harms others.
  - Suicidal students pose risk of harm to other students.
  - Self-harm can have serious emotional and psychological effects on the school community.
  - Homicidal students frequently have suicidal tendencies as well.
- Schools must respond to foreseeable risks.

Road Map

1. Legal Framework
2. Direct Threat
3. OCR Resolution Agreements
4. Real Life Scenarios
5. Recommendations and Questions
The Legal Framework

Key Federal Statutes:

• ADA Title I, which applies to employment
• ADA Title II, which applies to publics
• ADA Title III, which applies to privates as places of public accommodation

Family Rights and Privacy Act of 1974 (“FERPA”)

• Gives college students the right, in general, to
  (1) control the disclosure of their “education records” to others;
  (2) inspect and review “education records;” and seek amendment of their “education records.”
• Before disclosing records - or information from records - institution must generally obtain student’s signed and dated written consent.

Section 504 of the Rehabilitation Act of 1973, which applies to publics and privates receiving federal funding
• Fair Housing Act, which HUD applies to dorms
• Section 504 interpreted consistent with ADA Title II
• All prohibit disability discrimination
FERPA: Disclosure in Health or Safety Emergency

- Disclosure only to “appropriate parties.”
- Limit to information necessary to protect the health or safety of student or other individuals.
- Institution has discretion to determine what constitutes “emergency,” “appropriate parties,” and “necessary” information.
  - If “rational basis” for determination, DOE will accept institution’s judgment.
- Must record threat that formed basis for disclosure and parties to whom information was disclosed.

Direct Threat - Defense

_Q. What is a “direct threat” to self or others?_

- A defense to a disability discrimination claim.
- Schools need not accommodate a student who poses a direct threat.

Direct Threat - Definition

_Q. How is direct threat defined?_

- Significant risk of substantial harm.
- Individualized assessment relying on the most current medical advice and objective evidence, and assessing multiple risk factors, such as nature, duration, severity, probability, and accommodations that might mitigate the risks.
Direct Threat - Before 2011

**EEOC:**
- ADA Title I: DTTS and DTTO

**OCR:**
- ADA Title II: DTTS and DTTO
- Section 504: DTTS and DTTO

**DOJ:**
- ADA Title II: No Regulations
- ADA Title III: DTTO

Direct Threat - Before 2011

- OCR interpreted direct threat to include both threats to others and self.
- Applied to ADA Title II and Section 504.
- Schools permitted to remove, dismiss and discipline students posing a threat of self-harm.

Direct Threat – Pandora’s Box

DOJ publishes ADA Title II regulations in Sept. 2010, effective March 2011, defining Direct Threat:

“A significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”

28 C.F.R. § 35.104
Direct Threat – Since 2011

- ADA Title I: DTTS and DTTO
- ADA Title II: DTTO
- ADA Title III: DTTO
- 504 Rehab.: No regulations but follows Title II

DOJ: Can’t use direct threat to self as a defense under ADA Titles II and III.
- OCR Regional Offices: We are following the DOJ on this.
- Big question: How can schools address students at risk for self-harm without running afoul of ADA or 504?

Direct Threat

1. Take action when students pose a direct threat of self-harm.

2. Risk disability discrimination lawsuit or OCR investigation.
**OCR – Reading Tea Leaves**

- No official guidance
- OCR Resolution Agreements are not binding precedent

**Spring Arbor** Dec. 2010
- Imposed behavior contract and conditions on readmission
- No DTTS analysis
- Requires individualized risk assessment

**OCR – A Rose By Any Other Name?**

- OCR avoids DTTS terminology
- But demands DTTS methodology – individualized risk assessment
- Is this just semantics?
- Options:
  - Otherwise qualified
  - Health and safety codes

**OCR – Disparate Treatment**

**SUNY-Purchase** Jan. 2011
- No DTTS
- Individualized assessment
- Disparate treatment analysis
- Health and safety rules of general applicability
- Due process
OCR – Disparate Treatment

Princeton University  Jan. 2013

• Removal
• Withdrawal
• Readmission
• Disparate treatment analysis

OCR – Summary

• Avoid DTTS terminology
• Conduct individualized risk assessment
• Rely on general health, safety and welfare policies

OCR – Summary

• OCR will apply disparate treatment analysis
• Equal standards for disabled and non-disabled
• Provide notice, opportunity to present information, and appeal/grievance
Strategies for Response to Self-Harming Behavior

- **Voluntary withdrawal procedures first.**
  - Seek to work cooperatively with student and family.

- **“Threat to others” can be construed broadly.**
  - Impact of behavior on roommates and campus community.
  - Methods of self-harm can be dangerous (weapons, fire, etc.).

- **Determine if student is “otherwise qualified” to continue as a member of the community.**
  - Does student’s conduct falls below minimum thresholds for health and safety?

Use neutral student conduct/disciplinary policies.

- Even-handed application of generally applicable conduct codes is not discriminatory.
- Disability is not a defense to misconduct, but should be considered a mitigating factor.

Alert parents early in process, especially in emergencies.

- Possible exception where treating healthcare professional advises against it.

**Individualized risk assessment:** Can student safely continue participating in the educational program?

Putting it into Practice – Emergency Removal

Danny is a resident undergraduate who is hospitalized after an overdose of prescription pills. He left a suicide note. He says he is “fine” now and wants to return immediately to his dorm and classes.

1. May the college temporarily ban Danny from returning?
2. What policies would help in deciding?
3. What should be the college’s next steps?
Putting it into Practice – Emergency Removal

The college initiates its emergency removal protocol, which temporarily bans Danny from campus. The college begins a risk assessment to determine whether withdrawal/leave is warranted. Danny protests.

1. What should the college do to satisfy Danny’s due process rights?
2. What other options might the college consider?

Putting it into Practice – Emergency Removal

Jenna is a graduate student struggling with an eating disorder. The RN in the college’s health clinic has tracked Jenna’s weight loss and now believes Jenna requires in-patient treatment as she is facing an imminent risk of serious physical harm.

1. Is emergency removal justified?
2. What additional information would be relevant?
3. What records can be reviewed?
4. Does it matter if Jenna’s weight loss is upsetting her classmates? Faculty?

Putting it into Practice – Behavior Contracts

After an individualized assessment, the college concludes that Jenna’s risks are manageable. The college works with Jenna and her treating doctors to develop a behavior contract and a care plan.

1. What conditions may be included?
2. What conditions would be discriminatory?
3. May the college require Jenna to disclose to the Health Center all of her medical and psychiatric records?
Putting it into Practice – Withdrawal

Jenna repeatedly violates her behavior contract. University believes she poses an unacceptable health risk.

1. Can violation of a behavior contract justify involuntary withdrawal/medical leave?
2. What policies would facilitate the risk assessment?
3. What steps should precede a withdrawal determination?

Putting it into Practice – Withdrawal

Gwen is a freshman who was observed cutting herself. In consultations with the College’s therapist, Gwen discloses that she suffers from PTSD and has had suicidal ideations. The Dean of Students determines that she is not qualified to remain enrolled because of the safety risk. The College involuntarily withdraws Gwen. Gwen files a complaint with the OCR.

1. Would the OCR find a violation?
2. What if there is a policy requiring leave of all students exhibiting suicidal behavior?
3. What if the College’s psychologist believes Gwen is a high risk for suicide but her own therapist disagrees?

Putting it into Practice – Discipline

A residential advisor discovers Juan using heroin in his dorm room. Juan tells the RA that he is bipolar and started using heroin only after falling off his medications.

1. Should the College conduct a risk assessment or a disciplinary hearing?
2. How does Juan’s disability impact disciplinary considerations?
3. What if Juan voluntarily withdraws before a disciplinary action is completed?
Putting it into Practice – Discipline

After a semester suspension and completion of a drug rehabilitation program, Juan returns. Students report that Juan is not taking medications. He has extreme mood swings, hits his girlfriend (not a student) and threatens to hurt other students.

1. What factors would justify involuntary withdrawal?
2. What if non-disabled students caught fighting were suspended for a semester?

Putting it into Practice – Readmission

Jenna agrees to a voluntary medical leave. The University wants to impose conditions on her readmission. Are the following permissible?

1. Evaluation by University health center
2. Comply with a treatment plan
3. Release medical records to health center and several University officials
4. Cease cutting
5. Obtain a positive employment review

Practices to Avoid

• “One-size fits all” approach.
• “Zero tolerance” policies, automatic dismissal/withdrawal.
• Requiring elimination of student’s disability-related behavior (unless it constitutes a direct threat).
• Disparate treatment:
  – Ask: Are similarly situated non-disabled students treated the same way?
Practices to Avoid

- Unlimited access to medical and psychological records.
  - Limit review to records necessary to risk assessment.
  - Obtain student’s written consent.

- Rigid conditions that disallow choice of therapist or treatment.

Recommended Guidelines

1. Avoid “direct threat to self” language.
2. Publish written policies and protocols.
3. Employ a team approach.
4. Provide regular training.

5. Conduct individualized risk assessment.
   - Reasonable judgment based on current medical advice and best available objective evidence to determine:
     - Nature, duration and severity of risk;
     - Probability of substantial harm; and
     - Whether reasonable modifications to policies or practices will sufficiently mitigate the risk.
   - Focus on multiple risk factors and ability to participate in educational program.
Recommended Guidelines

6. Assess observable conduct affecting health, safety or welfare.
7. Enforce conduct codes applicable to all students.
8. Compare with similarly situated non-disabled students to avoid disparate treatment.

Recommended Guidelines

10. Consider behavior contracts with tailored terms.
11. Resort to involuntary removal in emergency or direct threat situations.
12. Satisfy due process by providing notice, opportunity to present information, and an appeal.
13. Establish reasonable conditions for return.

Questions?
thank you!