

Threat Assessments and Counseling Interventions - Accommodating Students in Mental Crisis A Review of Direct Threat and Otherwise Qualified Standards for Justifying Accommodation or Temporary Suspension

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Mental Health-Related Crisis on Campus

- The suicide rate for college students is reportedly 7 per 100,000 or approximately 1,100 individuals annually;
- Suicide based on untreated mental health is the second cause of death among American college students. See, Addressing College Student Suicide: A Growing Concern. Brainsway: <https://www.brainsway.com> › knowledge-center › colleg.

Struggles commonly faced by college students 1

- Social anxiety, general anxiety, test anxiety, panic attacks, family expectations;
- Sexual or other physical violence, drug and alcohol abuse, eating disorders;
- Hallucinations, delusions; mood disorder; depression or mania; low self esteem; loneliness; hopelessness; suicidal ideation; PTSD.
- Other preexisting physical, psychiatric, emotional or developmental disorders—autism, MS, Diabetes, Cancer, unplanned pregnancy, etc.

Struggles commonly faced by college students 2

- 13% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students);
- 9.7% of females and 2.5% of males experience rape or sexual assault through physical force, violence, or incapacitation among graduate and professional students. See, Campus Sexual Violence: Statistics, RAINN, Rape, Abuse & Incest National Network - [https://www.rainn.org › statistics › campus-sexual-violence](https://www.rainn.org/statistics/campus-sexual-violence).
- Adverse or dismissive outcomes of campus student grievance investigations also affect the mental and emotional state of aggrieved students.

Demand for Mental Health Care on Campus Continues to Surge

- Prior to the pandemic schools were already facing a surge in the demand for mental health care far outpacing capacity;
- The traditional counseling center model is ill-equipped to address the extraordinary increase in demand;
- Counseling staffs have in many instances tripled in size while still not being able to cope with care demand;
- Many institutions do not have mental health counseling services at all.

Unlawful Disciplinary Actions Based on Mental Health Crisis are Common

- Bazelon Center for Mental Health Law reports that it receives “several” calls a week from students who were suspended, expelled, or forced to withdraw from their schools due to their mental illnesses.
- National Council on Disability reports that 10 percent of students surveyed said that institutional bias could be creating roadblocks to accessing mental health services.
- These misperceptions may have more to do with awareness and familiarity than bias, according to William Meek, Ph.D., Director of Counseling and Psychological Services at Brown University and licensed psychologist.

Student Charged in Violent Threats to Professor

- The Georgia Bureau of Investigation announced the arrest of a man for making threats of gun violence via email and letters against a faculty member at the University of North Georgia. The bureau said that the man threatened violence not only against the faculty member, but against others at the university, unless the faculty member resigned. University officials confirmed to The Gainesville Times that the man arrested was a student at the university (August 2018).

Informal Agenda

- Q: if the student is not arrested and/or imprisoned, but determined to have a mental illness, should he be allowed to return to campus with any necessary accommodations and on-going or required therapy?
- Q: Can a college prescreen applicants for preexisting mental health disorders?
- Q: What does ADA/504 require in an exigent or crisis situation?

“Clear and Present Danger” Reporting

- Some States require post-secondary institutions to report to State and Federal authorities students who pose a “clear and present danger.”
- “Clear and present danger” is currently defined as: A person who demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior, as determined by a physician, clinical psychologist, qualified examiner, school administrator, or law enforcement official; OR,
 - A person who communicates a serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner.

Campus Law Enforcement Records Are Not Education Records

- Campus law enforcement records are not “education records” subject to FERPA privacy protections;
- Police may refuse to allow parents or students to inspect law enforcement records in regard to a specific individual;
- Police unit may disclose law enforcement records to third parties without parent or student’s prior written consent;
- BUT education records, or personally identifiable information from education records, shared with campus police, do not lose their protected status as education records just because they are shared with campus police; i.e., ER will not be shared with other outside parties.

Harmful Student Conduct May Be Disclosed

- Yes, FERPA allows a school to share PII AND STUDENT COUNSELING records unconsensually from education records with school officials determined to have legitimate educational interests in the behavior of a student who has been disciplined for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. See § 99.36(b)(2) and Q&A 9 and § 99.36(b)(1) and (2).
- The school may also unconsensually disclose PII from education records about a student disciplined for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community, to school officials at another school determined to have legitimate educational interests in the behavior of the student--if deemed necessary.

OCR FERPA Disclosure Example

- If a school official knows that a student, disciplined for bringing a gun or knife to school or threatened to hurt students and/or teachers, is planning to attend a school-sponsored activity at another... school, FERPA allows that school official to notify school officials at the other school that has legitimate educational interests in the behavior of the student. See § 99.36(b)(3).
- ADA Direct Threat would likely bar an accommodation request to exempt the student from the FERPA non-consensual disclosure as a proactive safety precaution for the school community; e.g., a student alleging that her past misconduct was caused by her disability.

Serious Questions Remain for Campus Licensed Mental Health Counselors

- Is a State licensed counselor legally obligated to disclose therapy and/or counseling records and notes to campus police department and/or school officials notwithstanding FERPA safety-based exceptions?
- What is the effect of a student undergoing therapy who insists his mental health records be kept confidential; e.g., not disclosed to campus administrators, police, or parents?
- Does the FERPA campus safety exception create a chilling effect on students who need occasional or on-going counseling?
- Is the FERPA safety exception ever clearly explained to any student seeking counseling or therapy prior to engaging in mental health treatment?

Sample University Policy on Student Threatening Behavior

- DEFINITIONS
- “Threatening behavior” means any statement, communication, conduct, or gesture, including those in written form, directed toward any member of the University community that causes a reasonable apprehension of physical harm to a person or property. A student can be guilty of threatening behavior even if the person who is the object of the threat does not observe or receive it, so long as a reasonable person would interpret the maker’s statement, communication, conduct, or gesture as a serious expression of intent to physically harm.
- University of Arizona – Threatening Behavior by Students Policy:
- URL:
- <https://policy.arizona.edu/education-and-student-affairs/threatening-behavior-students>

ADA/504 Applies to Mental Health Crisis

- ADA, Section 504, and FHA prohibit discrimination based on disability;
- Schools must facilitate reasonable accommodations and/or modifications upon student request--including use of campus mental health services for qualified” students with disabilities to equalize participation in academic life; e.g., courses, sports, housing, all other activities.

Mental Crisis May Confer Disability Protection Status

- Students have no legal obligation to disclose any disability during the application and admissions stages;
- An incident of threatening behavior causing an impermissible disruption or risk to students and faculty may establish an existing mental health or other behavioral disability during disciplinary review;
- Student or his representative must at the time of disciplinary review make an accommodation request to remain or return to campus to attend classes with academic accommodations/modifications based on licensed professional diagnosis.
- Referral for accommodations may be made by an examining mental health licensed professional.

Direct Threat and Otherwise Qualified Removal

- Removal is permissible during Exigent or Emergency Situations caused by mental crisis;
- Officials may invoke ADA defense of “direct threat” to others for removal;
- Officials may also determine student as “otherwise not qualified” to remain in dorm or campus due to psychiatric or cognitive manifestations; e.g., threatening self-harm, extreme panic attacks, difficulty relating to other students.

But Wait! Not so Fast!

- A student being in mental health crisis does not exempt the institution from ADA/504 compliance.
- A “due process” Procedure is Triggered when disciplinary action (suspension or expulsion) is recommended;
- ADA/504 may require on-going reasonable accommodation and/or academic adjustments regardless of student mental health—status--so long as the student makes the ADA request and a scientific finding supports allowing class attendance.

OCR Warning on Suspensions and Expulsions

- Any suspension/expulsion disciplinary action taken against a student based on disability is scrutinized to review for fairness, consistent and transparent due process, and stigma-based decisions;
- Disciplinary actions against students in mental crisis must be free of stigma or misinformation about an incident; e.g., basing decisions on hearsay social media postings, e-mails, voice mails, and alleged unsubstantiated or “anonymous” third-party reports;
- Inflexible “zero tolerance” policies will likely be found inconsistent with ADA/504 non-discrimination obligations—unless Direct Threat is scientifically shown without undue bias or a crime has been committed and the student duly arrested.

All Resources Must be Counted

- All school resources must be counted before declining necessary academic modifications;
- Departmental budgetary constraint argument is typically rejected by OCR and courts;
- A finding of “fundamental alteration” and/or “undue burden” must be made in writing explaining the rationale for declining accommodations.
- If defenses are invoked the university must take any other action that would not impose fundamental alteration or undue burden but ensures equal student participation—including required counseling for treating the mental crisis.

Direct Threat to Others 1

- Direct Threat is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by modification of policies, practices, or procedures, or by provision of auxiliary aids or services;
- Determination of Direct Threat may not be based on generalizations or stereotypes about the effects of a particular disability; e.g., unseemly physical movements or facial expressions.

Direct Threat to Others 2

Determinations must be based on an individualized assessment that rely on current medical evidence, or on the best available objective evidence, to assess:

- 1) The nature, duration, and severity of the risk;
- 2) The probability that the potential injury will actually occur; and,
- 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk to an acceptable level.

Illustration A: Pre-ADAAA Self-Harm as Direct Threat

- *Woodbury University* did not violate Section 504 by removing a student from her dorm during the Christmas/New Year intersession after she harmed herself during Thanksgiving vacation;
- OCR found that there were reasonable conduct-based grounds for the University to believe that the student would pose a Threat” to her own health and safety if she remained in her dorm during the intersession. *OCR Letter to Woodbury University (June 29, 2001)*

Self-Harm Issues: The Otherwise Qualified Standard

- Self-Harm must be evaluated under the “otherwise qualified standard” before a student may be barred from participation;
- Is the student qualified to participate; e.g., meets program requisites with or without accommodation or modification?
- Courts addressing student risk or safety issues under Section 504 indicate that schools can take decisive action regarding students whose participation in any given program or activity would cause them harm.

Illustration B:

Failure to Examine Evidence

- A student with bipolar disorder was involuntarily withdrawn after she attempted suicide.
- The official making the determination failed to contact the student's healthcare providers before sending a letter stating that it was in the student's best interest to leave school and receive professional help. He also failed to review any of the student's medical or counseling records prior to making the decision.
- A week after the withdrawal letter, the student's mental health counselor stated that the student was no longer suicidal and encouraged the student to return to her studies.



Case Review



- OCR found that the university violated Section 504 by failure to consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, and failure to consider mitigating the risk of injury to the student or other students.
- Officials also failed to provide the student with advance notice of a hearing and an opportunity to be heard (OCR Letter to Bluffton University, 2001).

Illustration C: Student not Otherwise Qualified to Participate

- A student was barred from competition in NCAA basketball due to a heart defect. A school physician declared the student ineligible to play based on a number of factors: medical records in which several treating physicians recommended that the student not play competitive basketball, the report of the team physician after examining the student, published guidelines and recommendations regarding the eligibility of athletes with heart problems, and recommendations of consulting physicians.
- **Held:** Northwestern did not discriminate based on disability because student was not “otherwise qualified” to play intercollegiate basketball. A “significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated.” Knapp v. Northwestern University (1996)

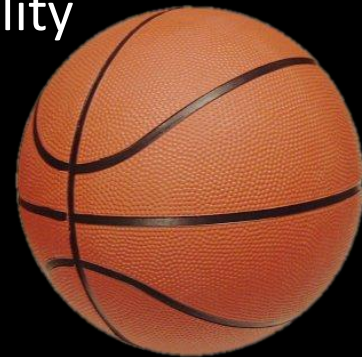




Illustration D: Failure to Involve Mental Health Providers



- Student was involuntarily withdrawn after several cutting episodes;
- OCR found the college violated Section 504 because the college did not involve all relevant healthcare providers, did not assess the student's particular stressor, and did not consider an alternative less severe than withdrawal as an accommodation for the student. OCR letter to Guilford College (March 6, 2003)
- TakeAway: Schools may no longer discipline or sanction students with compulsory withdrawals and sanction as a default solution.

Illustration E: Compulsory Removal of Student will be Suspect

- In 2011 OCR determined that Spring Arbor University violated the rights of a student with a mental health disability who withdrew “voluntarily.”
- OCR took issue with rigid conditions imposed on the student’s return to campus—blaming the university for failing to determine whether the student posed a "direct threat to others.
- TakeAWay: Schools may no longer send students home indefinitely and require them to seek psychiatric treatment as a condition to return after suffering a mental crisis.



Case Review



- Spring Arbor likely avoided applying the *direct threat to others* standard because the strict factors to meet the test might have weakened its case to remove a student;
- OCR decided this case consistent with Justice Department interpretation indicating the threat has to be against others -- not to the student.
- Omission of a *direct threat to self* defense in Title II means that schools can no longer force compulsory removal or withdrawal of students under a self-harm "direct threat analysis.

The Regarded As Prong and Disciplinary Rules

- Disciplinary rules must be neutral and must be applied in a non-discriminatory manner;
- Example: a college must not discipline a student for having hallucinations. It may not punish more severely a student who disturbs others by conversing loudly with an imaginary person than a student who disturbs others by playing loud music in her headphones;
- School might unlawfully “regard” or perceive student as dangerous without supporting evidence.

Supporting Students in Mental Health Crisis



- Acknowledge but not stigmatize mental health problems;
- Make suicide prevention a priority;
- Encourage students to seek help or treatment that they may need;
- Ensure that personal information is kept confidential;
- Allow students to continue their education as normally as possible with reasonable accommodations; and,
- Refrain from discrimination against students with mental illnesses--including
- punitive actions toward those in crisis.

Remove Barriers to Remaining in School



- Make it easy and non-punitive to take voluntary leaves of absence; e.g., waiving deadlines by which students must withdraw to receive tuition refunds, and policies that discourage students to complete courses at a later time.
- Encourage students to remain on campus with possible accommodations or return to school after a medically-necessary leave of absence without imposing unfair conditions.

The Federal Clery Act 1

- Requires colleges and universities to disseminate an Annual Security Report to employees and students every October 1--including statistics of campus crime for the preceding three calendar years and details about efforts taken to improve campus safety;
- Imposes requirements for real-time public availability of campus crime information via a daily crime log and requires issuance of timely warnings and/or emergency notifications of real time dangerous circumstances.



The Federal Clery Act 2



- Clery also requires schools to provide victims of covered crimes with written explanation of rights; i.e., the option for a relocation/change of housing, transportation, academic course assignment, access to counseling services, legal services, and ***law enforcement notification***;
- Requires disciplinary proceedings to be conducted by trained parties at the institution—must be prompt, fair, and impartial, and must confer procedural rights to both the accuser and the accused.

Recommended Guidance Publications

- Campus Mental Health: Know Your Rights - A guide for students who want to seek help for mental illness or emotional distress;
- Campus Mental Health – Frequently Asked Questions;
- Bazelon Center – Practice Guidelines;
- In the Driver Seat – Self-Directed Mental Health;
- All located at:
- <http://www.bazelon.org/resource-library/publications/>

THE ADA CENTER

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