MANAGING VIOLENT AND OTHER TROUBLING STUDENTS:

THE ROLE OF THREAT ASSESSMENT TEAMS ON CAMPUS

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INTRODUCTION

Violence on college and university campuses has been a serious concern of administrators and others for some time,[1] and particularly in light of recent events at Virginia Tech and Northern Illinois University, it is considered one of the leading issues currently facing institutions of higher education.[2] While incidents of campus violence, specifically homicides, occur infrequently,[3] the impact they have on campus communities when they do occur can be quite profound. During the past few decades, there have been a number of high-profile violent incidents in middle, secondary, and post-secondary schools.[4] In many ways, however, the recent Virginia Tech tragedy could be considered the "9/11" of higher education. Much like the tragic terrorist attacks on September 11, 2001, the April 2007 events at Virginia Tech opened the eyes of many and motivated higher education like no other event has in recent memory.[5] Since that dreadful day, campus administrators and others across the country have increasingly focused on safety issues generally and, more specifically, on the management of disruptive students who may also have serious mental health concerns.[6] Obviously, not all individuals with mental

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1. The American College Health Association (ACHA) made the issues of campus violence, bias, and violations of human rights a priority when it released a position statement regarding these issues in 1999. This position statement led to a thorough analysis by ACHA of campus violence trends, campus crime data, and prevention strategies. The results of this analysis were summarized in a white paper by the ACHA Campus Violence Committee. JOETTA CARR, AM. COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER (2005), *available at* http://www.acha.org/info_resources/06_Campus_Violence.pdf.

2. The *Healthy Campus 2010* initiative targets the leading health concerns for college and university students that institutions likely will have to face during the next decade. Injury and violence rank seventh on the top ten list of concerns, after concerns about the level of physical activity among students, weight and obesity, tobacco use, substance abuse, responsible sexual behavior, and mental health. Am. Coll. Health Ass'n, Healthy Campus 2010: Making It Happen, http://www.acha.org/info_resources/hc2010.cfm (last visited Apr. 17, 2008).

3. From 1995 to 2002, crimes involving students between the ages of eighteen and twenty-four as victims decreased by over fifty percent. KATRINA BAUM & PATSY KLAUS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: VIOLENT VICTIMIZATION OF COLLEGE STUDENTS*,* 1995–2002*,* at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf. Overall, college and university students are less likely to be victims of violent crime compared to non-students of comparable ages (41 per 1000 versus 102 per 1000, respectively). *Id.* Furthermore, research has revealed that college and university students are more likely to be victimized by strangers at an off-campus location than by other students on campus. *Id.*

4. According to *U.S. News & World Report*, there have been thirty-three high school and middle school shootings and fifteen college and university shootings resulting in mass casualties since 1990. Interestingly, only eight comparable school shootings were recorded from 1966–1989, suggesting that this type of violence is on the rise. *Timeline of School Shootings*, U.S. NEWS & WORLD REPORT, Feb. 15, 2008, http://www.usnews.com/articles/news/national/2008/02/15/timeline-of-school-shootings.html.

5. *See* Kathleen A. Rinehart, *Higher Education's 9/11: Crisis Management, Lessons From The Tragedy At Virginia Tech*, UNIV. BUS., Dec. 2007, http://www.universitybusiness.com/viewarticle.aspx?articleid=967.

6. Data indicate that the average age of onset for major mental illness is during the traditional college age years (eighteen to twenty-four years old). *See generally* Phillip W. Long, Internet Mental Health, http://www.mentalhealth.com (last visited Apr. 17, 2008) (providing general background on mental illnesses). Therefore, by virtue of age alone, college and

health issues cause disruption or are violent.[7] Most students with mental health concerns successfully complete their studies without experiencing any significant behavioral problems or requiring any emergency intervention. But some do, in fact, engage in behavior that causes concern on campus.

A number of widely reported findings from government agencies and others analyzing the issues surrounding violence on college and university campuses have recommended that institutions create some sort of threat assessment team to monitor and respond to students exhibiting disturbing behavior.[8] These teams are designed to implement the systems approach described in a model formulated by Ursula Delworth and advocated by other commentators.[9] The report commissioned by the Governor of Virginia ("GOVERNOR'S REPORT") provides the most exhaustive review of the tragic events at Virginia Tech, including the timeline of key events; the local, state, and federal law enforcement responses; and the background and mental health history of Seung Hui Cho, who committed the atrocities at Virginia Tech.[10] The GOVERNOR'S REPORT included numerous

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university students are at risk of developing mental illness while in school. A group of researchers at Kansas State University found some evidence that the severity of mental health issues has been increasing in that institution's student population over a thirteen-year period. Sherry A. Benton et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF'L PSYCHOL.: RES. AND PRAC. 66, 66–72 (2003). This finding appears to be a trend across campuses and warrants further research. *See also* RICHARD T. KADISON & THERESA F. DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT (2004); ARTHUR SANDEEN & MARGARET J. BARR, CRITICAL ISSUES FOR STUDENT AFFAIRS: CHALLENGES AND OPPORTUNITIES 158–160 (2006).

7. Researchers have observed that certain types of severe psychiatric disorders—schizophrenia, major depression, and bipolar illness—that are accompanied by active psychotic symptoms may be associated with a higher likelihood of violent behavior. Richard A. Friedman, *Violence and Mental Illness: How Strong is the Link?*, 355 NEW ENG. J. MED. 2064, 2064–66 (2006). However, the vast majority of people with mental health concerns are not violent whatsoever. *Id.* Furthermore, not all individuals with severe psychiatric disorders become violent and not all individuals who are violent have mental health issues. *Id.*

8. *See, e.g.*, ROBERT FEIN ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS (2002), *available at* http://www.secretservice.gov/ntac/ssi_guide.pdf; FLA. GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, REPORT ON FINDINGS AND RECOMMENDATIONS 6–7 (2007); STATE OF ILLINOIS CAMPUS SECURITY TASK FORCE REPORT TO THE GOVERNOR (2008), *available at* http://www.ibhe.org/CampusSafety/materials/CSTFReport.pdf; TASK FORCE ON SCH. AND CAMPUS SAFETY, NAT'L ASS'N OF ATT'YS GEN., REPORT AND RECOMMENDATIONS 3–4 (2007); UNIV. OF N. C. CAMPUS SAFETY TASK FORCE, REPORT OF THE CAMPUS SAFETY TASK FORCE PRESENTED TO ATTORNEY GENERAL ROY COOPER 7 (2008); VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007), *available at* http://www.vtreviewpanel.org/report/index.html [hereinafter GOVERNOR'S REPORT]; WIS. GOVERNOR'S TASK FORCE ON CAMPUS SAFETY, INTERIM REPORT 15 (2007); *see also* M. Jablonski et al., In Search of Safer Communities: Emerging Practices for Student Affairs in Addressing Campus Violence (Feb. 15, 2008) (unpublished NASPA paper), http://www.naspa.org/files/InSearchofSaferCommunities.pdf (proposing the use of a threat assessment team as one component of a Crisis Management Model).

9. *See infra* Part I.

10. GOVERNOR'S REPORT, *supra* note 8. The Panel was charged, in part, with the following:

> The Panel's mission is to provide an independent, thorough, and objective incident review of this tragic event, including a review of educational laws, policies and

recommendations to help institutions learn from the events at Virginia Tech, including that institutions should have an inter-disciplinary threat assessment team on their campuses charged with detecting and monitoring students of concern and managing the flow of information regarding such students.[11] Such teams provide a centralized method for student conduct officers, mental health professionals, law enforcement, and other administrators to work together to detect, track, and intervene with students of concern with the ultimate goal of reducing, if not completely avoiding, violence and tragedy on campus. These teams have been called several different names, including but not limited to threat assessment teams, campus assessment teams, students-of-concern teams, and campus crisis teams, but they all have the same overriding goals mentioned above. Because most commentators, reports, articles, and other sources refer to these teams as "threat assessment teams," the authors will use that term in this article.

Since the recommendation regarding threat assessment teams appeared in the GOVERNOR'S REPORT, many institutions have been considering how to: (a) develop, run, and coordinate such teams on their campuses; (b) define the roles and responsibilities of the various team members; and (c) address the ethical and legal parameters that govern threat assessment teams. The purpose of this article is to provide institutions of higher education with practical suggestions on how to create and maintain threat assessment teams consistent with best practices and in accordance with applicable ethical and legal parameters. Part I describes a framework for establishing and operating a threat assessment team, including recommendations regarding which administrators to include on the team, the roles and responsibilities of the various team members, and the development of policies and procedures to govern the team's operations. While detecting and monitoring potentially violent students is an important role of threat assessment teams, these teams can also be used to monitor other students who may be troubled or troubling in other ways (e.g., suicidal students, students with substance abuse problems, and

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> institutions, the public safety and health care procedures and responses, and the mental health delivery system. With respect to these areas of review, the Panel should focus on what went right, what went wrong, what practices should be considered best practices, and what practices are in need of improvement. This review should include examination of information contained in academic, health and court records and by information obtained through interviews with knowledgeable individuals. Once that factual narrative is in place and questions have been answered, the Panel should offer recommendations for improvements in light of those facts and circumstances.

Exec. Order 53, Office of the Governor, Commonwealth of Virginia (2007).

11. GOVERNOR'S REPORT, *supra* note 8, at 19. There are more than seventy recommendations detailed in the GOVERNOR'S REPORT. *Id. passim*. Recommendation II-3 states:

> Virginia Tech and other institutions of higher learning should have a threat assessment team that includes representatives from law enforcement, human resources, student and academic affairs, legal counsel, and mental health functions. The team should be empowered to take actions such as additional investigation, gathering background information, identification of additional dangerous warning signs, establishing a threat potential risk level (1 to 10) for a case, preparing a case for hearings (for instance, commitment hearings), and disseminating warning information.

Id. at 19.

students with eating disorders). Part II addresses the application of the disability laws to threat assessment teams with a particular focus on the practical issues that often arise in connection with voluntary and involuntary leave policies and disciplining students who are or may be disabled. Part III explores the applicability of various privacy and confidentiality laws to the information obtained and used by threat assessment teams, including a discussion of available strategies for maximizing the ability to share crucial information about troubled students.

I. DEVELOPING A THREAT ASSESSMENT TEAM: A PRACTICAL GUIDE

The concept of threat assessment is not new, as evidenced by this technique's use in primary, middle, and secondary schools where, in recent decades, administrators have had to respond to a number of violent incidents.[12] Traditionally, threat assessment teams in higher education were uncommon, although a few colleges and universities have had them for some time.[13] The pre-Virginia Tech literature described various frameworks and guidelines for developing and implementing assessment teams based largely upon law enforcement models[14] and models that were applied in elementary, middle, and secondary schools.[15] Recently, other models have emerged.[16] These models offer a great deal of useful guidance for institutions in determining how best to fashion a threat assessment team suiting their specific campus communities.

Almost twenty years ago, Ursula Delworth, a former professor of counseling psychology at the University of Iowa, developed a useful model that merits attention from institutions grappling with how best to address students of concern.[17] Section A of this Part briefly describes the Delworth model. Using this model as a starting point, Sections B–E outline the various stages involved in implementing a threat assessment team: (a) forming the team and defining the members' roles and responsibilities; (b) conducting assessments of student behavior; (c) evaluating various intervention strategies to determine the best

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12. *See* FEIN ET AL., *supra* note 8.

13. For example, Iowa State University initiated a Critical Incident Response Team in 1994 to provide an integrated response to critical incidents on campus. Iowa State Univ., Dep't of Pub. Safety, Critical Incidents http://www.dps.iastate.edu/wordpress/?page_id=101 (last visited Apr. 17, 2008).

14. *See* FEIN ET AL., *supra* note 8; MARY ELLEN O'TOOLE, FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000), *available at* http://www.fbi.gov/publications/school/school2.pdf.

15. *See, e.g.*, Univ. of Va., Guidelines for Responding to Student Threats of Violence, http://youthviolence.edschool.virginia.edu/guidelinesmanual80305.html (last visited Apr. 17, 2008).

16. The National Center for Higher Education Risk Management (NCHERM) has developed a model, specifically in response to the Virginia Tech tragedy, called the College and University Intervention Team (CUBIT). Nat'l Ctr. for Higher Educ. Risk Mgmt., The Cubit Model, http://www.ncherm.org/cubit.html (last visited Apr. 17, 2008).

17. DEALING WITH THE BEHAVIORAL AND PSYCHOLOGICAL PROBLEMS OF STUDENTS, NEW DIRECTIONS FOR STUDENT SERVICES 45 (Ursula Delworth ed., 1989) [hereinafter DELWORTH].

approach in a given situation; and (d) collecting relevant data and making appropriate modifications to the team's practices, policies, and procedures.

A. The Delworth Model: A Brief Overview

In her seminal monograph, Delworth explained the rationale for using a threat assessment team:

> All campuses have or should have some system in place for handling the discipline or judicial problems and the psychological problems of students. The issue often becomes one of insufficient coordination, inadequate information flow, and lack of a shared process . . . . The group responsible for such coordination is usually termed campus intervention team, but is equally effective by any other name . . . .[18]

Arguably, Delworth's monograph did not garner the attention it deserved at the time of its publication, but the framework she articulated, the Assessment-Intervention of Student Problems (AISP) Model, remains as relevant and useful as it did when it first appeared almost twenty years ago. There are three essential components to this model: (a) the formation of a campus assessment team; (b) a general assessment process for channeling students into the most appropriate on-campus and off-campus resources; and (c) intervention with the student of concern.[19] Delworth's model provides a practical approach that can be applied by campus administrators more easily than some of the other models mentioned above. Moreover, the Delworth model is unique among these other models for multiple reasons. First, it identifies the most appropriate members of an assessment team and articulates the roles and responsibilities of each team member. Second, it provides a heuristic and pragmatic diagnostic tool for members of a threat assessment team to quickly assess students of concern and differentiate between behavioral issues and mental health issues. Third, it guides team members in connecting students to the most appropriate resources to protect both the student's and the broader campus community's safety and well-being.[20] Another advantage of the Delworth model is its usefulness in addressing a wide range of student conduct issues beyond homicidal and suicidal behavior.[21]

Since the introduction of the Delworth model, the issues facing institutions have evolved and become increasingly complex. The remaining sections of this Part, therefore, will describe the Delworth model in greater detail and will expand upon it to address its application in a contemporary setting affected by the events at Virginia Tech and, more recently, at Northern Illinois University. As discussed in more detail below, the Delworth model provides a very helpful framework for developing and administering threat assessment teams in today's environment.

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18. *Id.* at 9.
19. *Id.* at 4.
20. *Id.* at 9.
21. *Id.* at 5. Delworth offers a variety of categories of student issues and problems that can be assessed and monitored.

B. Threat Assessment Team Formation

As indicated above, the first step under Delworth's model is to develop a threat assessment team.[22] This stage involves both identifying the appropriate team members and defining the members' roles and responsibilities.[23] The name of the team is not nearly as important as deciding which campus administrators should serve on the team and delineating the roles and responsibilities of each team member.[24] Diagram 1[25] provides a proposal regarding the various individuals who might serve on a threat assessment team based upon the roles and responsibilities of various campus representatives. Diagram 2[26] contains guidelines regarding the suggested roles and responsibilities of certain team members and a recommended process for managing the various matters that may come before the team.[27]

The goals of the threat assessment team are multifold. The team should: (a) engage in a collaborative process to develop the most appropriate policies and procedures governing the team's operations, including a provision regarding the frequency of team meetings;[28] (b) serve as consultants to various campus constituents who may have concerns about students based upon their interactions

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22. *Id.* at 9. Delworth actually referred to this type of team as a "campus assessment team."

23. *Id.* In terms of the team composition, Delworth recommends that:

> The team is minimally composed of key personnel from (1) campus mental health services, (2) campus security, (3) the student services administration, (4) the institution's legal counselors, and (5) the student services judicial or discipline office. Other relevant persons can be included on a permanent basis, or included as needed for a specific issue . . . .

Id.

24. *Id.* at 10. The authors understand and appreciate that some small institutions, and even some large institutions with budget constraints, may not have all of the resources available on their campuses to administer a threat assessment team. This potential lack of resources and the impact it can have on campuses that are trying to adopt threat assessment teams and provide services to students of concern has received a substantial amount of attention in the higher education community. Institutions with fewer or limited resources on campus may be able to engage with off-campus resources such as community mental health providers and local law enforcement to fulfill some of the threat assessment team's roles and responsibilities. *See* Elizabeth Farrell, *Public Colleges Lack Funds to Help Troubled Students*, CHRON. OF HIGHER EDUC., Feb. 21, 2008, http://chronicle.com/daily/2008/02/1750n.htm. Prior to the creation of a team, institutions should conduct a thorough evaluation of the resources available, both on and off campus, for developing the team and implementing the various policies and procedures that will govern the team's operations. Deficits in certain areas should be considered by the institution's senior administration to determine how best to ensure that a threat assessment team has access to the resources necessary to carry out the team's mission. John H. Dunkle et al., Pre-Conference Workshop at the Nat'l Ass'n of Student Personnel Adm'rs Nat'l Conf., Dealing with Disturbing and Disturbed Students: Best Practices and Applications, Mar. 29, 2004.

25. *See infra* Appendix I.

26. *See infra* Appendix II.

27. Diagrams 1 and 2 expand upon the original Delworth model by further explaining the roles and responsibilities of threat assessment team members. These diagrams were developed for a pre-conference program at the annual meeting of the National Association of Student Personnel Administrators (NASPA). *See* Dunkle et al., *supra* note 24.

28. DELWORTH, *supra* note 17, at 11. Institutions should hold frequent and regular threat assessment team meetings. Additional meetings can be held as needed, depending upon the number and severity of cases that may require the team's attention.

with these students;[29] (c) educate and train campus community members about the role and purpose of the team so that faculty, staff, and students know how and when to bring an issue to the team's attention;[30] (d) determine the most appropriate systems, both inside and outside the institution, for assessing students of concern;[31] (e) work together to determine how to best intervene with students when necessary;[32] and (f) review the results of its assessments to monitor any trends and evaluate the team's performance.[33] While the Delworth model articulated these goals, another important goal that has been raised more recently is the development of a system to monitor students who come to the attention of a threat assessment team, thereby facilitating efforts to gather information regarding these students and helping ensure that they do not fall through the cracks.[34]

As Diagram 1 indicates,[35] the college or university president or other top administrative official, while most likely not involved directly in the administration of the threat assessment team, should be knowledgeable about the team in case a major incident occurs on campus. In this way, the president, as the institution's chief executive officer and potential spokesperson, will be able to refer to the team in an informed manner. The president may also play a crucial role in making appropriate financial and other resources available to assist the team in achieving its mission of assessing and monitoring students of concern.

The role of the Vice President for Student Affairs or other chief student affairs officer (CSAO) is to ensure that the team is constituted, the roles and responsibilities of members are clearly articulated, and any team policies and procedures comport with applicable ethical, legal, and best-practice standards.[36] The CSAO should educate the president and other senior officers about the team and keep the senior administration informed about any high-profile situations that the team is handling.[37] The CSAO can also serve as an advocate for the team in

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29. *Id.* at 8. While some administrators struggle over what information can be shared in the threat assessment context, research has shown that collateral information gathered from a number of different sources is often crucial in assessing and intervening with students with mental health concerns. *See* John H. Dunkle et al., Nat'l Ass'n of Student Personnel Adm'rs Symp., Dealing With Distressed and Disruptive Students: What's an Administrator To Do?, Mar. 19, 2005.

30. *See* DELWORTH, *supra* note 17, at 10. The Virginia Tech Report specifically articulated the importance of training campus community members in Recommendations II-4:

"Students, faculty, and staff should be trained annually about responding to various emergencies and about the notification systems that will be used. An annual reminder provided as part of registration should be considered." GOVERNOR'S REPORT, *supra* note 8, at 19.

31. *See* DELWORTH, *supra* note 17, at 9.

32. *Id.* at 9.

33. *Id.* at 10.

34. *See* John H. Dunkle, Invited Program at the Nat'l Ass'n of Student Personnel Adm'rs Prof'l Dev. Series, Newport, R.I.: Building a Local Clinical Database: Let Your Local Data Be Your Guide in Developing Effective Mental Health Services, Jan. 7, 2005.

35. *See infra* Appendix I.

36. Resources such as the CAS Standards also can aid institutions in articulating roles and responsibilities and best practices. *See* COUNCIL FOR THE ADVANCEMENT OF STANDARDS IN HIGHER EDUC., CAS PROFESSIONAL STANDARDS FOR HIGHER EDUCATION (6th ed. 2006) [hereinafter CAS].

37. Arthur Sandeen, *A Chief Student Affairs Officer's Perspective on the AISP Model*, *in*

securing the necessary resources for the team to function effectively.[38] Consideration of local and national data trends can aid the team in carrying out its duties, as an institution's particular circumstances and more general trends in higher education may inform the best approach in a given situation. As such, the CSAO should ensure that the team tracks local data through annual reports and other methods and considers any relevant national benchmarking data. It is also important for the CSAO, in conjunction with other members of the threat assessment team, to monitor and periodically update team policies and procedures, as the law and best practices may change over time.

As Diagram 1 indicates,[39] the team leader should be a senior student affairs administrator who has high-level authority to manage student behavior and who has a solid understanding of the institution's administrative structure, the institution's policies and procedures concerning student conduct, and the complexity of managing difficult student issues.[40] The individual in this position may be the CSAO, a dean of students, or a judicial affairs officer. Such a senior-level student affairs administrator is often in the unique position of having a broader perspective regarding student issues as a result of receiving information from a wide variety of campus constituents outside the threat assessment team context. Furthermore, unlike mental health professionals, a senior student affairs administrator is not limited by medical confidentiality laws and, therefore, often has greater flexibility in sharing student information on a need-to-know basis.[41] In addition, student affairs administrators often have specific training and expertise in providing students with the requisite procedural protections that may be required by law or under the institution's policies. Perhaps most important, a team leader who understands student conduct codes and the student judicial process will ensure the process remains focused on student behavior. By focusing on student conduct, administrators can help reduce the likelihood of potential claims of discrimination based upon a mental health or other disability and can open the door to a number of intervention options based upon a student's behavior.[42]

As proposed in Diagram 2,[43] the threat assessment team leader can serve as a designated point of contact for staff, faculty, and others who may have concerns about a particular student.[44] The team leader can also be responsible for assembling the team to begin the assessment process. The team leader's principal role at the beginning of the assessment process is to consider what other institutional systems or external resources should be involved in a given situation. Furthermore, the team leader can help the team stay focused on a student's conduct

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DELWORTH, *supra* note 17, at 57.

38. *Id.*

39. *See infra* Appendix I.

40. *See* DELWORTH, *supra* note 17, at 4.

41. Privacy and confidentiality laws are discussed in more detail in Part III.

42. *See infra* Part II; *see also* Nancy Tribbensee, Distressed and Distressing Students: Legal Issues (2005), http://www.law.stetson.edu/excellence/HigherEd/archives/2005/Distressed DistressingStudents.pdf.

43. *See infra* Appendix II.

44. *See supra* note 24 and accompanying text.

rather than his or her actual or perceived mental health condition or disability. (Please note that the "student conduct process" section in Diagram 2 is shaded to signify the importance of focusing on student behavior.) Finally, if parental contact is necessary, the team leader may be in the best position to initiate that contact.[45]

Another key member of a threat assessment team is a mental health professional, either from an on-campus service or an off-campus mental health provider or agency. If a student of concern is known to be experiencing, or is suspected of experiencing, mental health problems, a mental health professional can play a very important role in helping assess the level of risk a student may pose to self and others. Because most state laws concerning confidentiality of mental health treatment records are quite restrictive, the mental health professional may not be able to share specific information about a student's treatment absent an appropriate signed release.[46] As discussed in Part III, however, medical confidentiality laws typically include exceptions that allow, or even require, clinicians to disclose patient information to protect the welfare of the patient or potential victims of violence. Even when a mental health professional cannot disclose identifiable patient information, he or she can still offer a great deal to the team by talking in hypothetical terms about similar situations or offering guidance regarding the best course of action given the details of the specific case at hand as reported by other team members.[47] For institutions with on-campus mental health services, it is recommended that, if possible, an identified administrator, typically the director or other representative of the campus mental health service who does not have a treatment relationship with the student, serve as the representative on the threat assessment team to eliminate or significantly reduce the possibility of a conflict of interest that could arise by having the treating clinician serve in a dual role as the provider and also as a team member.[48]

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45. Institutions should have clear policies and procedures regarding when and under what circumstances parental contact may be appropriate and who at the institution is responsible for handling these communications. Some administrators, faculty, and staff perceive federal privacy laws as barriers to sharing information about students of concern, even though such laws do not prohibit contacting parents in emergency situations. *See infra* Part III. In any event, the issue of parental notification about students who are suicidal or a concern in other ways has received considerable attention by lawmakers who are considering revising laws to allow for more notification to parents and clarifying the issue so that perceived legal barriers are reduced. Anita Kumar, *Lawmakers Weigh Parental Notification Changes*, WASH. POST, Feb. 10, 2008, at C1.

46. *See* Brent Paterson & Sandy Colbs, *Navigating Student Privacy Laws*, LEADERSHIP EXCHANGE, Winter 2008, at 30.

47. Mental health professionals serving on a threat assessment team should be aware of the following caveat:

> It is important, however, for a clear distinction to be made between the mental health professional in this administrative role and the mental health professional in the role of personal therapist in order to protect the student's right to privacy and not interfere with future treatment. Caution must be observed to ensure confidentiality when establishing the campus intervention team so that the value of the mental health system is not diminished and perceived by students as watchdog for the administration.

Brown & Decoster, *The Disturbed and Disturbing Student*, *in* DELWORTH, *supra* note 17, at 50.

48. Brown and Decoster further stated:

Diagrams 1 and 2 also propose that a threat assessment team include a disability specialist, a law enforcement representative, and legal counsel.[49] The main role of the disability specialist is to provide expertise about any applicable disability laws and to help the institution avoid discriminating against a student based upon a diagnosed or perceived disability. Law enforcement can provide very useful support in terms of safety planning as well as gathering any available background information regarding students who may be of concern. In this regard, it is recommended that institutions consider mutual aid agreements with off-campus law enforcement to coordinate law enforcement efforts when necessary. Finally, legal counsel can advise the team as to governing legal provisions and how they influence the various options that the team can consider. It is essential for the team to have open and easy access to legal counsel to avoid any delay in the assessment process or emergency notification due to any perceived legal barriers.[50]

Other campus representatives and resources may also be called upon to assist the threat assessment team, either as members of the team or on an *ad hoc* basis. For example, if the team is assessing and intervening with a student who has an eating disorder, it could be critical to have a physician or other health care provider involved because of the medical complications that often accompany eating disorders. Similarly, if a non-U.S. citizen is a student of concern, it would be important for the threat assessment team to include, or at least consult with, offices on campus that support international students. A representative from such offices might, for example, be able to provide useful information about the impact various intervention strategies may have on the student's visa status. Similarly, if a student involved in a study abroad program is the focus of concern, consultation with the institution's study abroad office or official would be essential in identifying resources and any complicating issues in the host country.

C. Conducting an Assessment

Once the threat assessment team has been formed and roles and responsibilities have been clearly articulated, the Delworth model raises several issues regarding the assessment of students of concern. Delworth offered a simple preliminary diagnostic tool for quickly assessing students and channeling them into the most appropriate systems for more complete assessment and subsequent intervention.[51]

> A decision to remove the student from the campus environment is an administrative function determined either by appropriate campus authorities or by local community authorities. For example, though the campus mental health professional may have established a relationship with the student and so be influential in facilitating a voluntary withdrawal from the college, this same professional should not be a member of an institutional decision-making body assembled to make withdrawal determinations unless specifically requested to participate by the client or otherwise allowed to do so through a signed consent form.

Id.

49. *See infra* Appendices I & II.

50. The Council for the Advancement of Standards in Higher Education recommends, as a best practice, timely access to legal counsel for all functional areas in higher education. *See* CAS, *supra* note 36.

51. *See* DELWORTH, *supra* note 17, at 4–9.

Specifically, Delworth proposed that students of concern could be categorized in the following ways: (a) students who are disturbing, (b) students who are disturbed, and (c) students who are both disturbing and disturbed (hereinafter, "the disturbing/disturbed student").[52] Disturbing students are those whose conduct violates an institution's code of conduct but who do not have any evident mental health concerns.[53] The behavior of disturbing students can often be addressed using the student disciplinary system. Disturbed students are those who may be experiencing mental health problems but whose conduct does not violate the college or university's code of conduct.[54] These students are often the most difficult to detect because they may not be in treatment at a campus health service and they may be achieving their educational goals without causing disruption on campus. The disturbing/disturbed student is both disruptive and suffering from mental health problems.[55] It is this category of students that can cause the most vexing and challenging problems for threat assessment teams and other members of the campus community.[56]

The Delworth model offers a framework that threat assessment teams can use to distinguish between student behavior that should be addressed through disciplinary channels and student mental health issues that may require intervention of a different kind.[57] Diagram 2 delineates two simultaneous and inextricably linked response tracks, with one track addressing the mental health issues and the other focusing on student conduct.[58] By clearly distinguishing between conduct on the one hand and potential mental health issues on the other, students can be funneled into the most appropriate systems for assessment and intervention. The team leader can also ensure that a student's conduct is handled through the appropriate disciplinary system and that the student has access to any available mental health services. Regardless of the presence of mental health concerns, it is often appropriate and desirable for institutions to hold students accountable for their behavior.[59]

A key question that the team leader should address, preferably in consultation with others on the threat assessment team, is whether the student poses an imminent danger to self or others.[60] If so, law enforcement and others need to intervene immediately to protect the safety of the student and others on campus.[61] The campus conduct officer can provide information to the team about the

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52. *Id.*

53. *Id.* at 4.

54. *Id.* at 7.

55. *Id.* at 8.

56. SANDEEN & BARR, *supra* note 6, at 160.

57. DELWORTH, *supra* note 17, at 4–9.

58. *See infra* Appendix II.

59. United Educators, *Administrative Leave and Other Options for Emotionally Distressed or Suicidal Students*, RISK RES. BULL. (Apr. 2006); *see infra* Part II.B.1.

60. *See* DELWORTH, *supra* note 17, at 12.

61. It is crucial that the threat assessment team be aware of any on-campus or off-campus crisis response systems and coordinate the team's responses with those systems when an imminent danger exists. For a more detailed discussion of the legal requirements associated with the assessment of students with mental health concerns, see *infra* Parts II and III.

student's past behavior based upon any prior disciplinary proceedings or other information in the conduct officer's possession.[62] Gathering such information is a crucial component of the assessment process, as past behavior may be an indicator of future behavior. Mental health professionals may be called upon to determine if a student needs hospitalization for psychiatric reasons. As such, the mental health professional should be familiar with both voluntary and involuntary hospitalization or commitment procedures, which are typically codified by statute.[63] In addition, the mental health professional, and perhaps other members of the threat assessment team, should consider developing collaborative working relationships with local hospitals to facilitate the provision of emergency care to students when necessary. It is crucial that the threat assessment team understand the process for accessing emergency care for students at local hospitals, including how to gain access to any information the hospital is willing to provide once the student is admitted and after the student is discharged. This type of collaboration can be extremely helpful in coordinating the efforts of the threat assessment team and off-campus medical providers.[64]

Another issue for the team to consider at the outset is the location of the disruptive behavior, including whether the conduct occurred on campus or at an off-campus location. Many institutions have moved toward the development and implementation of disciplinary policies and procedures that extend the applicability of the student code of conduct to certain off-campus behavior.[65] Depending upon the circumstances, the threat assessment team may wish to coordinate its efforts with local law enforcement or other off-campus resources in addition to considering whether a student's off-campus behavior should be addressed through the institution's disciplinary system.

Regardless of where a particular student's conduct occurs, mental health professionals are often called upon to help determine whether a student may pose a serious threat to self or others.[66] This process may involve a referral to campus mental health services or to off-campus resources for a mandated assessment.[67] It

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62. *See infra* Part III.A.2.a.

63. Under Illinois law, for example, the Mental Health and Developmental Disabilities Code sets forth the legal process for the voluntary and involuntary admission of individuals for psychiatric evaluation in emergency situations. *See* 405 ILL. COMP. STAT. 5/3-401 to -405, -600 to -611 (2007).

64. The GOVERNOR'S REPORT emphasized the coordination of care among on-campus and off-campus resources in dealing with students of concern. GOVERNOR'S REPORT, *supra* note 8, at 60–62. As discussed in Part III, medical privacy and confidentiality laws may limit what information local hospitals can share with an institution's threat assessment team. Releases of information signed by the student or the student's legal representative can allow access to information when an imminent danger does not exist. Mental health professionals on the threat assessment team should be trained regarding how to secure legally acceptable releases of information and also how to comply with institutional policies regarding such releases.

65. Elia Powers, *Extending the Arm of Campus Law*, INSIDE HIGHER ED, Nov. 20, 2007, http://www.insidehighered.com/news/2007/11/20/offcampus.

66. *See infra* Part II.B.2.

67. In the case of graduate and professional students engaged in clinical rotations, internships, and other activities during which they have contact with the patients or other members of the public, questions may arise regarding whether a student is fit for duty. Fitness for

is crucial that the mental health providers be skilled at conducting a safety assessment, including assessing threats to self and others.[68] Mental health professionals must also be able to perform culturally-sensitive assessments to differentiate between normal expressions of behavior and conduct that is indicative of potentially dangerous behavior. Furthermore, it is crucial that the mental health professional be versed in the nuances of assessment for severe psychiatric disorders, such as major depression and bipolar illness,[69] eating disorders,[70] and

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duty evaluations are highly specialized assessments that typically require referral to off-campus experts. *See, e.g.*, CARY D. ROSTOW & ROBERT D. DAVIS, A HANDBOOK FOR PSYCHOLOGICAL FITNESS-FOR-DUTY EVALUATIONS IN LAW ENFORCEMENT (2004).

68. There are tools available to aid team members in conducting a rapid and competent suicide risk assessment and violence-toward-others risk assessment. *See, e.g.*, *Quick Reference for Forensic and Ethical Issues in Psychiatry*, 1 FOCUS 345, 347–48 (2003). The National Center for Higher Education Risk Management (NCHERM) and Center for Aggression Management websites include some useful protocols and training materials for conducting threat assessments and detecting "red flags" that may be indicative of certain behaviors. *See* Welcome to NCHERM, http://www.ncherm.org/index.php (last visited Apr. 17, 2008); Center for Aggression Management, http://www.aggressionmanagement.com (last visited Apr. 17, 2008).

69. Effectively treating these conditions often involves a combination of psychotherapy and psychotropic medications. Most students who are diagnosed and compliant with treatment recommendations are able to perform satisfactorily in school. AM. PSYCHIATRIC ASS'N, AMERICAN PSYCHIATRIC ASSOCIATION PRACTICE GUIDELINES 145 (1996). If a student is left untreated or non-compliant, however, major depression and bipolar illness can be fatal. For example, it is estimated that suicide occurs in ten to fifteen percent of bipolar patients. *See* AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH BIPOLAR DISORDER 17 (2d ed., Am. Psychiatric Publ'g 2002) (1995), *available at* http://www.psychiatryonline.com/content.aspx?aid=50051 [hereinafter BIPOLAR DISORDER PRACTICE GUIDELINE]. For an excellent comprehensive review of mood disorders and understanding suicide, see also KAY R. JAMISON, NIGHT FALLS FAST: UNDERSTANDING SUICIDE (1999). Major depression is characterized by the presence of a subjective experience of sadness or depressed mood for at least a two-week period, markedly decreased interest in pleasurable activities, suicidal ideation, and several other possible symptoms. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 349 (2000) [hereinafter MANUAL OF MENTAL DISORDERS].

There are two versions of Bipolar Disorder: Bipolar 1 and Bipolar 2. Bipolar 1 Disorder, historically referred to as manic-depression, involves the cycling between periods of major depression and periods of mania (extremely elevated, expansive, and irritable mood), whereas Bipolar 2 involves the occurrence of at least one major depressive episode and one or more periods of hypomania (involves elevated mood but less severe than mania). *Id.* at 382–97. In the case of Bipolar 1 disorder, untreated mania can progress to impulsive, reckless, and potentially dangerous behavior. BIPOLAR DISORDER PRACTICE GUIDELINE, *supra*, at 7. Upon direct assessment and inquiry by a mental health professional, an individual who is manic will frequently deny any suicidal or violent ideation or intent. *Id.* Because irritability and impulsivity increase as the mania proceeds, however, the individual could begin to engage in dangerous behavior toward self or others (e.g., driving a car dangerously fast in the opposite direction of traffic). *See id.* Untreated mania can often involve the development of psychotic symptoms that could lead to potentially dangerous behavior toward others (e.g., experiencing command hallucinations and/or paranoia that lead to impulses to harm another person). *Id.* at 11. Individuals experiencing mania hopefully will be connected to treatment in a controlled setting, such as an inpatient unit, since they are often at greater risk for suicide at the time when medication is initiated and the mood begins to shift to depression. *Id.* The key point here is that these disorders may involve specific, elevated risks even though the affected individual denies any suicidal ideation or intent to harm self or others. *Id.* at 7. Further complicating this analysis,

substance abuse or dependence disorders[71] (including the abuse of prescription drugs, an increasingly common phenomenon).[72] In such circumstances, determining the existence of an imminent danger is not always easy given the subtleties of different conditions and their specific and varying risks. Another issue that mental health professionals and campus communities are increasingly seeing is self-mutilating behavior (e.g., self-induced cutting or burning).[73] Such

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individuals with bipolar illness are often in denial about their own illness and therefore are ambivalent about their treatment, often leading to problems with non-compliance as well as patients with co-morbid conditions such as substance abuse or dependence. *Id.* at 12.

It is crucial that mental health professionals be skilled at conducting differential diagnostic assessments of mood disorders to avoid misdiagnoses. For example, a mistaken diagnosis, such as diagnosing a patient as major depression when in fact there is bipolar illness, could lead to added safety concerns. *Id.* at 6. Furthermore, there are several other forms of mood disorders that require precision in diagnosis. *See* MANUAL OF MENTAL DISORDERS, *supra*, at 398–428. It is beyond the scope of this paper to go into greater detail about those conditions.

70. Anorexia nervosa and bulimia are the two most common eating disorders; they both involve a preoccupation with one's weight. *See* MANUAL OF MENTAL DISORDERS, *supra* note 69, at 583–95. Anorexia specifically involves the refusal to maintain a normal body weight and an intense fear about weight gain. *Id.* at 583. Individuals with bulimia engage in cycles of binging (ingesting an excessive amount of food at one sitting) and purging (ridding oneself of the ingested food through some compensatory behavior, such as vomiting, over-exercising, or using laxatives). *Id.* at 589. There are, however, several variations of these eating disorders that may present themselves. Women are more likely to be diagnosed with eating disorders, but more cases are emerging among men, especially gay men. *Id.* at 592. *See also* B. Timothy Walsh & David M. Garner, *Diagnostic Issues*, *in* HANDBOOK OF TREATMENT FOR EATING DISORDERS 25 (2d ed. 1997). Campus administrators are typically most concerned about the medical complications that are often associated with eating disorders. Students suffering from eating disorders often deny any intent to harm themselves or others, but the medical condition resulting from an eating disorder could be fatal. Determining whether an imminent danger exists in these situations can be extremely challenging and should involve consultation with a medical professional who has expertise in eating disorders. *Id.* at 38. The level of risk can be even more pronounced when a student is in denial about his or her disease or if a student also has a substance abuse problem and/or is suffering from major depression. *Id.*

71. Students often experience a great deal of peer pressure to use various substances, especially alcohol. *See* KADISON & DIGERONIMO, *supra* note 6, at 30. A small percentage of students will develop a full-blown substance abuse or dependence that will require an intensive evaluation and intervention program. *Id.* at 115. Even if a student does not meet the criteria for a substance abuse disorder, binge drinking (i.e., four or more drinks per episode for women and five or more drinks per episode for men) may lead to negative consequences, such as getting sick, missing classes, or engaging in dangerous behavior resulting in injury or death. *Id.* at 114–15. Use of alcohol almost always results in an increase in the level of risk associated with the underlying behavior. Although alcohol use, in and of itself, does not necessarily lead to imminent danger to self or others, it does have the potential to lead to unintended negative consequences that can result in serious harm to self or others. When They Drink: Practitioner Views and Lessons Learned on Preventing High-Risk Collegiate Drinking (Robert J. Chapman ed., 2008), (unpublished manuscript), *available at* http://www.rowan.edu/centers/cas/hec/documents/draftmanuscript_000.pdf.

72. For an excellent overview of data about college and university student abuse of prescription drugs and a description of a research study confirming that a substantial percentage of students are using prescription drugs recreationally, see Ethan A. Kolek, *Recreational Prescription Drug Use Among College Students*, 43 NASPA J. 19, 19–39 (2006).

73. KADISON & DIGERONIMO, *supra* note 6, at 142–46; *see also* Gregory T. Eells, *Mobilizing the Campuses Against Self-Mutilation*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Dec.

behaviors typically are not done with the intent of causing serious harm to oneself, but rather to experience relief from internal pain and suffering.[74] It is essential that threat assessment teams understand the phenomenon of self-mutilation and how to apply intervention strategies to students who engage in this behavior.[75]

The results of any mental health assessment can then be filtered back to the threat assessment team for consideration (as long as the student has signed an appropriate release authorizing the disclosure or when such sharing of information is otherwise permitted by law).[76] As discussed in Part II, any assessment must be individualized for each student and not be based upon generalizations, assumptions, misconceptions, or unfounded evidence. In this way, the threat assessment team may limit the institution's exposure to potential legal claims, particularly those premised upon an allegation of disability discrimination.

D. Evaluating and Applying Intervention Strategies

Based upon the information gathered by the threat assessment team, it can consider various methods of intervention, including those described below.

1. Voluntary Leave of Absence

It may be appropriate for the student to spend some time away from campus by agreeing to voluntary medical leave.[77] Such leaves can be accomplished by engaging the student, perhaps in conjunction with one or both of the student's parents, to help the student understand the potential benefits associated with temporarily taking time away from the pressures of classes and other school-related responsibilities.[78] Institutions should consider having a clearly articulated and well-publicized voluntary leave policy that includes the conditions a student must meet both to initiate a leave and to later resume his or her studies.

2. Interim Suspension/Involuntary Withdrawal

In rare cases, an institution may determine that a student must be removed from

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8, 2006, at B8.

74. KADISON & DIGERONIMO, *supra* note 6, at 142–46.

75. *See* Letter from Sheralyn Goldbecker, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Kent Chabotar, President, Guilford Coll., 2003 NDLR (LRP) LEXIS 627 (Mar. 6, 2003) [hereinafter OCR Letter to Guilford Coll.].

76. The student conduct officer or other student affairs team member is probably the best candidate to present any relevant information regarding a mental health assessment to the threat assessment team for purposes of determining the most appropriate course of action.

77. *See* United Educators, *supra* note 59.

78. Convincing a student, and perhaps the student's parents, to take a voluntary leave can take time and requires a great deal of patience from campus mental health professionals and other administrators. A technique known as "motivational interviewing" can be very useful in this process. Threat assessment team members should consider learning about this technique because it offers a collaborative and educational approach to helping students that is less likely to be perceived as confrontational or punitive. *See generally* WILLIAM R. MILLER & STEPHEN ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE (2d ed. 2002).

campus immediately because of imminent safety concerns.[79] Many institutions have some form of interim suspension policy in place for these situations. Any such policy should specify who at the institution has the authority to impose an interim suspension, under what circumstances the institution can impose an interim suspension, and how any such suspension may be lifted or modified. Many institutions have also developed involuntary withdrawal procedures that may be used to remove a dangerous student from campus if the student will not agree to a voluntary leave of absence. Prior to imposing an involuntary withdrawal, institutions typically should secure an opinion from a mental health provider that the student poses an imminent risk of serious harm to self or others.[80] There is some controversy regarding involuntary leave policies, and some commentators have argued that it is preferable to utilize interim suspension or other disciplinary procedures so that the focus remains on a student's conduct rather than his or her mental health condition.[81] Each institution should determine the best approach for its campus in conjunction with legal counsel.

3. On-Campus and Other Interventions

In many situations, a threat assessment team may decide that voluntary or involuntary leave is not necessary or advisable. In such situations, the team may decide that some other form of intervention may be best. For example, perhaps a referral to a mental health provider will suffice. Contacting a student's parents or other family members, either alone or in conjunction with a mental health referral, may also be an effective means of intervention. The assessment process may also reveal a mental health condition that had not been known to the student or others on campus. To the extent such a condition qualifies as a disability under disability law, the student and the institution may be able to work together to find reasonable accommodations that may rectify the situation.[82] Finally, regardless of the presence of a mental health condition, it is often appropriate for the institution to ensure that the student is somehow held accountable for his or her behavior. The threat assessment team can trigger the student disciplinary process and, later, ensure that any disciplinary sanctions are enforced. While the threat assessment team must be sensitive to the mental health of the student, an appropriately administered disciplinary system often can afford an excellent educational

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79. *See supra* notes 60–61 and accompanying text.

80. *See infra* Part II.B.4.

81. Gary Pavela, Director of Judicial Programs at the University of Maryland at College Park, cautions against the use of such involuntary withdrawal policies as "hair trigger removal policies." Eric Hoover, *Giving Them the Help They Need: The Author of a New Book on Student Suicide Says Colleges Need to Think About a Lot More than Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), May 19, 2006, at A39. Instead, Pavela proposes utilizing administrative and campus conduct policies to send the clear message to students that threatening and/or suicidal behavior is not acceptable and that removal from campus is a possibility if the behavior is not addressed. *Id.* Others have urged institutions to consider intermediate steps before invoking a campus judicial or disciplinary system or imposing an involuntary withdrawal to allow for a more collaborative, non-confrontational approach. *See, e.g.*, Marlynn H. Wei, *College and University Policy and Procedural Responses to Students at Risk of Suicide,* 34 J.C. & U. L. 285 (2008).

82. For a discussion of these and related disability law concepts, see *infra* Part II.A.

opportunity for the student.[83] In other situations, some other means of ensuring accountability outside the disciplinary process may be more appropriate. As with all potential intervention strategies, the best approach depends upon the precise circumstances of the particular situation.

E. Tracking and Monitoring Procedures

Although clearly articulated assessment and intervention procedures go a long way in dealing with students of concern, it is equally important to have procedures in place to track the actions of the threat assessment team and to monitor students who come to the team's attention. For example, threat assessment teams must determine the most appropriate manner to document and store information collected during the assessment process. The student conduct officer may be a good candidate to serve as the record custodian given his or her role in holding students accountable for their behavior. However, this decision should be made by each threat assessment team in light of the institution's culture, relevant policy considerations, and applicable law.[84] Regardless of how threat assessment team records are maintained, institutions should give careful consideration to the method of recording information to ensure that the assessment team has a clear record of the actions it has taken and its reasons for doing so.[85]

Threat assessment teams should also consider the development of a procedure to track each student and the various interventions the team considered and implemented for each student. A tracking system could be as simple as a periodic meeting with the student to assess his or her current status. The team may also wish to develop a system to verify that the student adheres to any behavioral conditions recommended or required by the institution. Another important aspect of tracking the team's work is developing a system to record any important trends with regard to the various cases the team manages. In this way, the institution will have access to longitudinal data that can help its threat assessment team identify significant trends and adjust the team's practices and procedures accordingly.[86] Such data can also help the threat assessment team ensure it is treating students consistently, which can be an important aspect of complying with various legal requirements under applicable disability laws, as well as other laws governing the privacy and confidentiality of student information.

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83. Some administrators and teams may be reluctant to pursue disciplinary action for fear of "pushing the student over the edge," but the educational benefits of a properly administered campus disciplinary system can be extremely useful. *See* John H. Dunkle & C. Presley, *Helping Students with Health and Wellness Issues*, *in* HANDBOOK OF STUDENT AFFAIRS ADMINISTRATION, (George S. McClellan and Jeremy Stringer eds., 3d ed. forthcoming 2009) (on file with authors).

84. *See infra* Part III.

85. *See infra* note 130.

86. The threat assessment team should consider developing a method for tracking various demographic and other data about matters addressed by the team. This can then be analyzed and reviewed each year and tracked over a long period of time to assess trends and make any necessary modifications to the team's policies and procedures. Dunkle, *supra* note 34.

II. THE DISABILITY LAWS AND THREAT ASSESSMENT TEAMS

Understanding how disability laws apply to threat assessment teams is essential to the effective and efficient operation of these teams. Section A of this Part will discuss the basic aspects of disability law relevant to the creation and implementation of threat assessment teams. Section B will discuss in greater depth critical questions of disability law as they relate to threat assessment teams. Section C will summarize some conclusions about how threat assessment teams can carry out their mission without running afoul of the disability laws.

A. Basic Aspects of Disability Law

There are numerous legal concerns to consider when implementing a threat assessment team. Most salient among these concerns are the legal requirements of complying with disability law and student confidentiality and privacy laws.[87] Institutions considering the implementation of threat assessment teams should consult with legal counsel to discuss not only these issues but also questions of potential liability under negligence theories, contract law, defamation law, and other areas of law that might relate to use of a threat assessment team.[88]

To create and operate a threat assessment team, it is essential for administrators to possess a basic understanding of disability law.[89] There are numerous state and federal laws designed to protect persons with disabilities, including students. Virtually every institution of higher education is subject to one or more of these laws.[90] Most notably, any institution that accepts federal funds, as most institutions in the country do, is subject to § 504 of the Rehabilitation Act of 1973.[91] Further, public institutions of higher learning are subject to Title II of the Americans with Disabilities Act (ADA)[92] and their private counterparts fall under

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87. See *infra* Part III for a detailed discussion of student confidentiality and privacy laws.

88. A full discussion of these other legal issues is beyond the scope of this article.

89. Because a number of recent commentators have explored the contours of disability law in some detail, this article summarizes key elements of the law in order to provide a basic understanding within the context of threat assessment teams. For a more detailed description of the framework of disability law, see Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 510–19 (2006); Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217 (2003). For a thorough overview of the disability laws applicable to institutions of higher education, see LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 3 (3d ed. 2006).

90. *See* Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., (Mar. 16, 2007), *available at* http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070316.html ("[N]early every institution of postsecondary education in the United States is subject to Section 504 or Title II.").

91. Section 504 of the Rehabilitation Act of 1973 applies to all colleges and universities that receive federal funding. *See* 29 U.S.C. § 794(b)(2)(A) (2000 & Supp. IV 2004); 34 C.F.R. §§ 104.3(h), 104.41–.47 (2007).

92. 42 U.S.C. §§ 12131–12134 (2000 & Supp. IV 2004). Title II of the ADA covers public services, including those provided by public colleges and universities. *See id.*

Title III of the ADA as institutions providing public accommodations.[93] Other laws that may apply to colleges and universities include the Fair Housing Act[94] and a host of state and local laws.[95]

Disability laws have a number of common elements critical to understanding how the law impacts threat assessment teams.[96] First, these laws prohibit discrimination on the basis of disability.[97] Second, they include mental health impairments in the class of disabilities that may be accorded protection.[98] And third, they may require an institution to provide reasonable accommodations to a student.[99]

Despite their broad reach, disability laws have important limits. Most notably, they do not require institutions to fundamentally alter their educational programs,[100] to lower institutional standards,[101] or to assume an undue burden in accommodating individuals with disabilities.[102]

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93. *Id.* §§ 12181–12189 (2000 & Supp. IV 2004). Title III of the ADA applies to places of public accommodation, which includes most private higher educational institutions. *See id.*

94. *Id.* §§ 3601–3631 (2000).

95. *See* JOHN W. PARRY, AM. BAR ASSOC., MONOGRAPH ON STATE DISABILITY DISCRIMINATION LAWS (2005) (providing a comprehensive overview of state disability discrimination laws).

96. In addition, courts generally review claims brought under either the Rehabilitation Act or the ADA using the same analytical framework. *See, e.g.*, Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.").

97. 29 U.S.C. § 794(a) (2000); 42 U.S.C. §§ 12132, 12182 (2000). The disability laws also prohibit harassment on the basis of a disability and retaliation against a student exercising his or her rights under the disability laws. *See, e.g.*, Office of Civil Rights, U.S. Dept. of Educ., Disability Discrimination: Overview of the Laws, http://www.ed.gov/about/offices/list/ocr/disabilityoverview.html (last visited April 28, 2008).

98. 42 U.S.C. § 12102(2)(A) (2000); 34 C.F.R. § 104.3(j)(1) (2007).

99. 29 U.S.C. § 701 (2000); 42 U.S.C. § 12112(b)(5)(A) (2000). Note that the student has the burden of seeking an accommodation in the higher education context. *See* Letter from Charles Smailer, Office of Civil Rights, U.S. Dep't of Educ., to Terry Queeno, Campus Dir., Brown Mackie Coll., 2004 NDLR (LRP) LEXIS 658, at *8 (Dec. 10, 2004) ("[I]t is the responsibility of the student to notify the educational institution of the existence of any claimed disability covered by Section 504, provide satisfactory documentation of the disability if requested to do so, and specify what aids, services or adjustments, if any, are being requested.").

100. *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979) (stating that colleges and universities need not fundamentally alter their program to accommodate disabled students under the Rehabilitation Act).

101. *Id.* at 413 n.12 ("[N]othing in the [Rehabilitation] Act requires an educational institution to lower its standards."); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998) (stating that requiring the medical school to advance a student with an anxiety disorder who had received insufficient grades in classes would be "a substantial, rather than a reasonable accommodation"); *see also* Letter from Mahoney, Office of Civil Rights, U.S. Dep't of Educ., to Stuart Sutin, President, Cmty. Coll. of Allegheny Cty., 2005 NDLR (LRP) LEXIS 589, at *12–13 (June 28, 2005) (upholding the college's determination that class participation and attendance could not be waived upon the request of a student claiming disability).

102. *See* Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (holding that the ADA does not require a provider of public accommodation to modify its program to accommodate the needs of a disabled student if the modification constitutes an undue burden); *see also* McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 860 (5th Cir. 1993) (denying additional

The fundamental concepts set forth in the preceding two paragraphs can be counterintuitive and challenging to grasp. In addition, the application of disability law often turns on a case-by-case basis.[103] Further complicating matters, situations facing a threat assessment team are often exigent, requiring quick decision-making. For these reasons, it may be necessary to consult with student disability professionals or legal counsel, especially for some of the more complex questions that may arise.[104] Nonetheless, a basic familiarity with the issues discussed in this article may facilitate discussion amongst threat assessment team members, sharpen questions for counsel, and enhance the collective judgment of threat assessment teams.

To be protected under the disability laws, a student must meet the definition of "disabled" and also be "qualified" to participate in the educational program at issue.[105] Someone who is "disabled" for purposes of the law has a physical or mental impairment that renders the individual substantially limited in a major life activity.[106] The law includes in the definition of "disabled" those individuals who are "regarded as" disabled by their academic institutions or who have a history of disability.[107] To be "qualified" to participate in the academic program, the student must meet the fundamental requirements of the program with or without reasonable accommodations.[108]

Different decision-makers reviewing disability claims brought by college and university students have interpreted the definitions of "disability" and "qualified" in very different ways. The Office for Civil Rights of the United States Department of Education (widely known as "OCR"), which enforces § 504 and Title II of the ADA, appears to take a relatively broad view as to whether a student is "qualified" to participate in a particular academic program.[109] Courts

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accommodations requested by a student because they "would constitute preferential treatment and go beyond the elimination of disadvantageous treatment mandated by § 504").

103. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198–99 (2002) (discussing 42 U.S.C. § 12102(2) and the intent of Congress that the existence of a disability be determined on a case-by-case basis).

104. Indeed, threat assessment teams should, ideally, include a student disability expert and legal counsel. *See supra* notes 48–50 and accompanying text.

105. 29 U.S.C. § 794(a) (2000); 42 U.S.C. § 12132 (2000). At least one court has questioned whether the "qualified" requirement applies to claims brought under Title III of the ADA. *See* Singh v. George Washington Univ. Sch. of Med. and Health Scis., 508 F.3d 1097, 1105–06 (D.C. Cir. 2007) (noting that Title III does not contain either the phrase "otherwise qualified" or "qualified individual" but also citing cases finding that Title III does, in fact, have a "qualified" requirement).

106. 42 U.S.C. § 12102(2) (2000); 28 C.F.R. § 35.104 (2007); 34 C.F.R. § 104.3(j)(1) (2007).

107. 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104 (2007); 34 C.F.R. § 104.3(j) (2007).

108. 29 U.S.C. § 794(b) (2000 & Supp. IV 2004); 42 U.S.C. §§ 12111(8), 12131(2); 34 C.F.R. § 104.3(l)(3).

109. *See, e.g.*, Letter from Rhonda Bowman, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Lee Snyder, President, Bluffton Univ., at 5 (Dec. 22, 2004), *available at* http://www.bazelon.org/pdf/OCRComplaintBluffton.pdf (finding that the student "qualified within the meaning of Section 504" because she had been "admitted to the University") [hereinafter OCR Letter to Bluffton Univ.]; Letter from Michael E. Gallagher, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Finuf, S. Ohio Coll., 2002 NDLR (LRP) LEXIS

interpreting the disability laws have tended to be more critical in determining whether a student is "qualified" and, therefore, protected under the disability laws.[110]

Likewise, in situations where an institution takes an adverse action against a student (such as involuntarily withdrawing her from studies), OCR has considered the student to be "regarded as" disabled on the basis of the involuntary action and, therefore, protected under disability law.[111] Courts, on the other hand, have tended to impose substantial and rigorous analysis in determining whether a student is "disabled" for purposes of the law.[112] One court-driven concept that has the potential to be particularly far-reaching in this regard is that of "mitigating measures." Under this doctrine, which stems from a series of U.S. Supreme Court decisions beginning with *Sutton v. United Air Lines, Inc.*,[113] courts generally find that a student who refuses to take measures that would mitigate his impairment is not "substantially limited" in a major life activity and therefore is not disabled.[114]

943, at *10–13 (Nov. 15, 2002) (finding that a student who was enrolled, attending classes, and maintaining a passing grade point average was considered by the college to be "qualified" under Section 504, even where the student had exhibited "inability" to comply with the college's conduct code)[hereinafter OCR Letter to S. Ohio Coll.].

110. *See, e.g.*, Millington v. Temple Univ. Sch. of Dentistry, No. 06-4796, 2008 WL 185792 (3d Cir. Jan. 23, 2008) (holding that a dental student who had been granted accommodations but who missed classes and failed exams was not "otherwise qualified" and therefore not disabled); Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999) (finding that a student who threatened a professor was not "otherwise qualified" even if the behavior was caused by a mental disability); Anderson v. Univ. of Wis., 841 F.2d 737, 740 (7th Cir. 1988) (holding that a law student who did not meet the standard for academic scores was not "otherwise qualified" under the Rehabilitation Act).

111. *See, e.g.*, OCR Letter to Guilford College, *supra* note 75, at *24 (finding that a college "either knew or should have known" that its student had a disability when it decided to involuntarily withdraw the student, despite insufficient evidence demonstrating that the student had identified herself as being disabled).

112. *See, e.g.*, Marlon v. Western New England Coll., 124 Fed. App'x 15, 16–17 (1st Cir. 2005) (rejecting a law student's argument that the college had regarded her as disabled where it had provided her with accommodations for carpal tunnel syndrome); Davis v. Univ. of N.C., 263 F.3d 95, 99–101 (4th Cir. 2001) (finding that, although the university may have perceived that a student in its teacher certification program who had multiple personality disorder was limited in the major life activity of teaching, the student was not disabled because there was insufficient evidence that the university perceived her to be "*substantially* limited") (citing Murphy v. United Parcel Serv., 527 U.S. 516, 521–22 (1999) (emphasis in original)).

113. 527 U.S. 471 (1999). *Sutton*, in conjunction with *Murphy*, 527 U.S. at 516 (holding that plaintiff taking medication for high blood pressure was not disabled under ADA) and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that plaintiff who mitigated vision impairment by subconsciously adjusting for it was not disabled), are frequently referred to as the "Sutton Trilogy." *See, e.g.*, LaPorta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001).

114. *Sutton,* 527 U.S. at 482 ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."); *see also* McGuinness v. Univ. of N.M. Sch. Of Med., 170 F.3d 974, 978–79 (10th Cir. 1998) (finding that a student who failed to mitigate impairment by retaking the first year of medical school was not disabled); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238 (D. Mass. 1999) (finding that a dental student,

B. Critical Concepts of Disability Law Relating to Threat Assessment Teams

There are a number of critical situations threat assessment teams will face that raise questions of disability law. These situations include: (a) violation of student conduct codes by students with mental health disabilities; (b) violence or potential violence committed by students with mental health disabilities against self or others; (c) assessment of students whose behavior presents a significant risk of harm to the health or safety of the student or others; and (d) mandatory assessment, involuntary withdrawal, and conditional readmission of students with mental health impairments. This section will discuss application of the disability laws to these situations in turn.

1. Discipline and Conduct Codes

Threat assessment team members may question whether they will run afoul of the anti-discrimination mandate of disability law if they discipline a student suspected of having or known to have a mental health impairment. But, in general, the law permits an institution to discipline a student for violations of its conduct code regardless of the student's disability status.[115] OCR has stated it "does not generally question a recipient's decision on whether or not to impose or continue a disciplinary action, provided that their [sic] decision is based on legitimate, nondiscriminatory reasons."[116] In addition, an institution typically may enforce its disciplinary policies even where the conduct in question is caused by a disability.[117] The institution must ensure, however, that it applies its conduct code in a similar fashion to other, non-disabled students.[118] Institutions should strive,

whose eye condition was largely corrected with contact lenses and occupational bifocals, was not substantially limited in a major life activity and, therefore, not disabled under the ADA or the Rehabilitation Act). The doctrine of "mitigating measures" has received substantial criticism. *See, e.g.*, Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 326 (2003) (criticizing the "*Sutton* trilogy"). As this article goes to press, Congress is considering measures that would require courts to determine whether an individual has a disability "without considering the impact of any mitigating measures." ADA Restoration Act, H.R. 3195, 110th Cong. (2007), at § 3; ADA Restoration Act, S. 1881, 110th Cong. (2007).

115. OCR Letter to S. Ohio Coll., *supra* note 109, at *11 ("Section 504 permits a recipient to establish reasonable rules to maintain a safe and orderly environment.").

116. Letter from Gary D. Jackson, Dir., Office of Civil Rights, U.S. Dep't of Educ., to Robert Spitzer, President, Gonzaga Univ., 2003 NDLR (LRP) LEXIS 1034, at *9 (Nov. 25, 2003).

117. OCR Letter to S. Ohio Coll., *supra* note 109, at *11 ("Section 504 allows a college to discipline a student for misconduct, even though that misconduct resulted from the student's disability, if the behavior violates an essential conduct code."); *see also* Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999) (affirming summary judgment for a university that expelled a student who threatened a professor "even if the behavior was precipitated by [plaintiff's] mental illness").

118. OCR has identified two limited instances in which a college may take into account a student's disability for purposes of applying discipline:

> For purposes of Section 504, a student's disability does not generally play a role in the disciplinary process except in two limited circumstances: first, where the student's

for instance, to apply the same discipline to a student who exhibits mental health concerns as they would to a non-disabled star athlete or the student government president.

Another legal consideration an institution must keep in mind when disciplining students with mental health concerns is whether there is a modification of its usual policies or practices that it could implement in order to accommodate a student who qualifies as disabled under the law. The law at present is not entirely clear on this point. Although OCR has acknowledged schools may have "legitimate concerns" about disruption caused by students suffering from mental health impairments, it has stated that administrators must attempt to address disruptive behavior by "modifying [the institution's] usual policies or practices in a nondiscriminatory manner acceptable under Section 504."[119] OCR also has advised that, in addition to providing a student who suffers from a mental health disability with adequate notice of the school's behavioral standards and the basis for the institution's belief that the student has failed to meet the standards, it must provide the student with "a reasonable opportunity to modify the behavior or engage in counseling so the student can comply with [the school's] reasonable standards of conduct."[120] This interpretation of § 504 as requiring the institution to consider reasonable accommodations for a student who has violated a conduct code—and who may not even have requested the accommodations—seems to run counter to the decisions of most courts holding that an institution need not lower institutional standards or assume an undue burden in order to comply with the disability laws.[121] Some courts have held that students who fail to comply with conduct codes or honor codes are simply not protected under the law because they are no longer "otherwise qualified" to participate in the institution's educational programs.[122]

> inability to comply with the conduct code resulted from the college's failure to provide a reasonable academic adjustment or accommodation; or second, where as part of its regular disciplinary process, a college takes into account mitigating situational factors, such as the loss of a parent. If such factors are taken into account, a student's disability should be considered as a mitigating factor.

OCR Letter to S. Ohio College, *supra* note 109, at *12.

119. Letter from Pearthree, Office of Civil Rights, U.S. Dep't of Educ., to Bernard O'Connor, President, DeSales Univ., 2005 NDLR (LRP) LEXIS 568, at *19–20 (Feb. 17, 2005) [hereinafter OCR Letter to DeSales Univ.]; *see also* Letter from Office of Civil Rights, U.S. Dep't of Educ., to Robert A. Hoover, President, Univ. of Idaho, 1998 NDLR (LRP) LEXIS 470, at *14 (Feb. 24, 1998) (upholding the university's dismissal of a student for violating disciplinary code where there was no evidence that the university had failed to consider the student's disability-related reasons for conduct violation).

120. Letter from James E. Heffernan, Team Leader, Office of Civil Rights, U.S. Dep't of Educ., to Byron E. Kee, President, N. Cent. Tech. Coll., 1997 NDLR (LRP) LEXIS 724, at *10 (June 3, 1997); *see also* OCR Letter to S. Ohio Coll., *supra* note 109, at *12.

121. *See supra* notes 99–102. Although courts have held that higher education institutions have "a real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that [they] conscientiously carried out this statutory obligation," *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25–26 (1st Cir. 1991), the application of the accommodation requirement to conduct that would be subject to discipline seems to extend the accommodation requirement beyond where most courts have taken it.

122. *See, e.g.*, Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9,

Institutions considering disciplining a student with a mental health disability may also need to consider the impact of the disciplinary process on the student and whether the student is fit to undergo that process. Whether the disciplinary process and any likely punishment would have an adverse impact on a student's mental health is an appropriate topic for a threat assessment team to consider. In particular, although the mental health expert on the team may be prohibited by confidentiality laws from discussing the specific diagnosis or treatment of the student in question, the expert might be able to opine on the impact of the disciplinary process on students exhibiting particular symptoms. Upon such consultation, the institution might decide to suspend disciplinary proceedings until the student in question is fit to undergo them.[123] Alternatively, it may consider the student's mental health condition to be a mitigating factor when imposing any sanction.[124] These approaches raise the possibility that a student could make a claim he was "regarded as" disabled and treated differently by the institution on that basis, but, as long as the institution does not subject the student to any additional *adverse* treatment on the basis of his disability (real or perceived), the institution should run little risk of liability if faced with a claim of discrimination.

Conduct violations are important to the threat assessment process because they often provide an opportunity for the student to interact with the school. When a student is suspected of having or is known to have mental health concerns, and the student commits a conduct violation, there may be an opportunity to suggest counseling services to the student (whether the institution's or those of an outside provider). Likewise, where the institution believes a student would benefit from time away from school, it may use the opportunity to give the student a choice of serving a disciplinary suspension or voluntarily withdrawing for a period of time. This use of conduct violations to leverage voluntary action by the student has been criticized in commentary and in the press.[125] But, assuming the student in question has violated an institution's conduct code and the institution applies it equally to disabled and non-disabled students, it appears to be a legally permissible strategy. As a practical matter, it is a strategy upon which many institutions rely.

When pursuing these courses of action, it is important to keep a number of concerns in mind. First, an institution should never manufacture conduct code violations in order to force a student to withdraw. This would raise serious ethical

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1999); Childress v. Clement, 5 F. Supp. 2d 384, 390–92 (E.D. Va. 1998) (finding that a student with a disability who was expelled from the university for plagiarizing and cheating was not "otherwise qualified"). *But see* Mershon v. St. Louis Univ., 442 F.3d 1069, 1077 (8th Cir. 2006) (finding that a student who the university accommodated until it perceived him as threat to a professor and barred him from campus could not show that he had requested "reasonable specific accommodations" that might have rendered him "otherwise qualified").

123. *See supra* note 83.

124. *See supra* note 109 (discussing OCR Letter to S. Ohio Coll.).

125. *E.g.*, Elizabeth Wolnick, Note, *Depression Discrimination: Are Suicidal College Students Protected By the Americans with Disabilities Act?*, 49 ARIZ. L. REV. 989 (2007); Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1; Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A1; Bonnie Miller and Megan Twohey, *Colleges Take Hard Line on Psychological Problems: Critics See Harm; Officials Cite Court Rulings, Virginia Tech*, CHI. TRIB., Dec. 27, 2007, at 1.

concerns and legal risks under the anti-discrimination mandate of disability law. In addition, to avoid discriminatory action, an institution must not treat its disabled students any more harshly under its conduct code than it treats non-disabled students. Finally, an institution may wish to consider reputational concerns in determining whether to force a student to withdraw on the basis of a conduct violation rooted in a mental health problem.[126]

2. Violence Against Self or Others

There has been deep and widespread concern on campuses in the wake of the tragic events at Virginia Tech, Northern Illinois University, and other schools about violence committed by students with mental disabilities.[127] Violent episodes that injure or threaten others almost certainly constitute conduct code violations and institutions may, accordingly, discipline students for violating the institution's conduct standards.

Whether and how a college or university intervenes with a student who it believes to be at risk of self-harm or suicide raises more difficult issues.[128] In addressing students whom a threat assessment team considers to be at risk of self-harm and/or suicide, it is important to note that, in most cases, the student at risk is willing to work with the school to obtain counseling and treatment and complete her educational program. It is the experience of the authors that, when approached with thoughtful concern,[129] most students who are at risk of self-harm will: agree to sign waivers that permit information sharing between caregivers and college or university administrators; voluntarily move to more appropriate housing; and even voluntarily withdraw from school on a temporary basis until they are able to obtain the treatment and care they need in order to diminish any risk of harm.[130] Where the student has agreed to permit threat assessment teams to share information that would otherwise be confidential, or where a student agrees to withdraw voluntarily from a program in order to seek treatment, the risk of a legal claim against the

126. Arenson, *supra* note 125, at A1. Note that there has also been coverage of threat assessment teams that is generally positive. *See, e.g.*, Elizabeth Bernstein, *Bucking Privacy Concerns, Cornell Acts as Watchdog*, WALL ST. J., Dec. 28, 2007, at A1; Anthony Morgano, *Team Prevents Violence at UW*, THE BADGER HERALD, Feb. 26, 2008, *available at* http://badgerherald.com/news/2008/02/26/team_prevents_violen.php.

127. *See, e.g.*, Alex Kingsbury, *Toward a Safer Campus: The Ivory Tower is More Secure Than Ever, But More Safeguards May Still Be Needed*, U.S. NEWS & WORLD REP., Apr. 30, 2007, at 48; Christine Lim, *Warning of Danger Via Text Message*, TIME, Aug. 09, 2007, http://www.time.com/time/specials/2007/article/0,28804,1651473_1651472_1651580,00.html; Gary Pavela, *Commentary: Fearing Our Students Won't Help Them*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Feb. 18, 2008, at A37.

128. For an excellent overview of the issues surrounding suicide and self-harm on campus, see Linda J. Schutjer, Suicide and Self Harm: Legal Trends and Risk Management (June 27, 2006) (unpublished manuscript, on file with the National Assoc. of Coll. and Univ. Attorneys).

129. *See supra* note 78.

130. *See also* Schutjer, *supra* note 128, at 6 ("The vast majority of students who are unable to continue their studies at a college or university due to a medical or mental illness or issue recognize that they need to take time off and will pursue a voluntary leave or withdrawal.").

institution is greatly reduced.[131] Thus, it is important for threat assessment teams to engage students of concern consensually throughout the threat assessment process to the extent possible.[132]

Where a student refuses to participate in the threat assessment process or where circumstances arise that are so exigent that the institution must act without obtaining the student's consent, the law permits colleges and universities to take adverse action against a student who is disabled (or "regarded as" such) if the school finds the student is a "direct threat" to herself or others and if the school applies the appropriate process.[133] The law permits actions adverse to the very people it was designed to protect because a student found to be a "direct threat" to the health and safety of others is not a "qualified individual" within the meaning of § 504 of the Rehabilitation Act of 1973.[134] OCR, which has expanded this concept to include a student who is a threat to self, has confirmed its policy permits action adverse to a disabled student if the student poses a "direct threat" to the health or safety of himself or others:

> OCR policy holds that nothing in Section 504 prevents educational institutions from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of self or others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity.[135]

The appropriate manner of determining whether a direct threat exists is discussed in detail immediately below.

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131. Although a valid release permitting the sharing of student information may waive a student's rights under various privacy or confidentiality laws, the risk of legal liability is not completely eradicated. Even students who voluntarily agree to measures designed to protect their well-being may later file claims against the institution. These claims are more easily defended when there is a well-documented record of the institution's decision-making process. For this reason, the authors recommend that one member of the threat assessment team keep thorough records of decisions with regard to students. It is important that the records include objective facts and observations rather than speculation or ill-considered, conclusory statements. A full discussion of threat assessment record-keeping is beyond the scope of this article.

132. *See supra* note 78.

133. *See* OCR Letter to Bluffton Univ., *supra* note 109, at 4; Letter from Michael E. Gallagher, Office for Civil Rights, Dep't of Educ., to Jean Scott, President, Marietta Coll., 2005 NDLR (LRP) LEXIS 371, at *6–7 (July 26, 2005); OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales Univ., *supra* note 119, at *15.

134. *See* OCR Letter to DeSales Univ., *supra* note 119, at *15; OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *26; *see also* 42 U.S.C. § 12113(b) (2000).

135. OCR Letter to Bluffton Univ., *supra* note 109, at 4; *see also* OCR Letter to DeSales Univ., *supra* note 119, at *15; OCR Letter to Guilford Coll., *supra* note 75, at *26.

3. Direct Threat Assessment of Students Exhibiting Mental Health Problems

a. Determining Whether a Direct Threat Exists

OCR has provided substantial guidance in opinion letters regarding assessment of students to determine whether a direct threat exists. "[T]he 'direct threat' standard applies to situations where a college proposes to take adverse action against a student whose conduct resulting from a disability poses a *significant risk to the health or safety of the student or others*."[136] A "significant risk" exists when there is a "high probability of substantial harm and not just a slightly increased, speculative, or remote risk."[137]

It is critical that the team investigating whether a student's circumstances rise to the level of a direct threat engage in an *individualized and objective assessment* of the student's ability to participate safely in the educational program at issue.[138] The institution must be careful not to base this assessment on stereotypes.[139] Rather, it must ground its assessment upon reasonable judgment based upon current medical knowledge or the best available objective evidence to ascertain the following:

(a) The nature, duration, and severity of the risk;

(b) The probability that potentially threatening injury actually will occur;[140] and

(c) Whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk.[141]

b. Complying with Due Process

In applying the direct threat standard, colleges and universities must comply with due process.[142] Due process is a constitutional concept requiring fair

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136. OCR Letter to DeSales Univ., *supra* note 119, at *14 (emphasis added).

137. OCR Letter to Guilford Coll., *supra* note 75, at *7; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to DeSales Univ., *supra* note 119, at *14.

138. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7; OCR Letter to Guilford Coll., *supra* note 75, at *24; OCR Letter to DeSales Univ., *supra* note 119, at *14.

139. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7; OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales Univ., *supra* note 119, at *14–15.

140. The "probability" prong of the direct threat analysis poses inherent difficulty, as several commentators have noted that future violent behavior is exceedingly difficult to predict. *See supra* note 7; FEIN ET AL., *supra* note 8, at 20 (rejecting use of "profiles" of students who might engage in violence); Gary Pavela, ASJA L. AND POL'Y REP. No. 277 (Feb. 21, 2008) (quoting Gene Deisnger, Ph.D.) ("Threat assessment and management are much more about preparing for future behavior than they are about predicting behavior *per se*.").

141. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *7–8; OCR Letter to Guilford Coll., *supra* note 75, at *24–25; OCR Letter to DeSales Univ., *supra* note 119, at *14.

142. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *26; OCR Letter to DeSales

procedures.[143] In the context of higher education, due process is typically binding upon public institutions but not private ones.[144] But, under the disability laws as applied by the OCR, due process requires any college or university subject to § 504, whether public or private, to "adhere to procedures that ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice, or stereotypes."[145]

With regard to the mechanics of due process, OCR distinguishes between "minimal due process" and "full due process." Threat assessment teams facing "exceptional circumstances . . . where safety is of immediate concern . . . may take interim steps pending a final decision regarding an adverse action against a student as long as [they provide] minimal due process."[146] OCR interprets this to mean that the institution must provide the student with (a) adequate notice of the adverse action and (b) an opportunity to address the evidence acquired by the institution.[147] Further, an institution taking action under the minimal due process standard must follow up with full due process as soon as practicable.[148]

Where a situation is no longer an emergency or where it is not otherwise exigent, the institution must apply full due process.[149] In addition to adequate notice and an opportunity to address the evidence supporting an adverse action, full due process in this context requires the institution to afford the student the right to a hearing and to an appeal.[150]

Due process is a critical concept for threat assessment teams to understand because of its profound prophylactic qualities. First, by its very nature, it tends to protect students from arbitrary action by avoiding prejudice, encouraging a thorough review of evidence, and providing for notice and an appeal. Due process also protects the institution applying it. Courts tend to defer to higher education

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Univ., *supra* note 119, at *15–16.

143. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125 (1990) (stating that the Due Process Clause "encompasses . . . a guarantee of fair procedure").

144. *See, e.g.*, Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000) ("Although the actions of public universities are subject to due process scrutiny, private universities are not bound to provide students with the full range of due process protection.").

145. OCR Letter to Marietta Coll., *supra* note 133, at *8; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *26.

146. OCR Letter to Marietta Coll., *supra* note 133, at *8; *see also* OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *15–16.

147. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

148. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

149. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

150. OCR Letter to Bluffton Univ., *supra* note 109, at 4; OCR Letter to Marietta Coll., *supra* note 133, at *8; OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

institutions making decisions involving their academic judgment, including questions of reasonable accommodation[151] and whether a student is "qualified" under the disability laws,[152] unless the institution in question has acted arbitrarily or capriciously.[153] Similarly, OCR has specifically stated that it "accords significant discretion to decisions of postsecondary institutions made through a fair due process proceeding."[154] Thus, a threat assessment team that employs due process, as described by OCR, is almost certainly taking great strides toward protecting its students and other constituents and also toward limiting institutional exposure to legal liability.[155]

4. Mandatory Assessment, Involuntary Withdrawal, and Conditional Readmission

It is critical for threat assessment team members to have a basic understanding of the direct threat standard because it permits an institution to take useful and consequential steps that otherwise might be deemed discriminatory. These steps include mandatory assessment, involuntary leave, and conditional readmission.

a. Mandatory Assessment

It appears that a college or university may use its need to determine whether a direct threat exists as the basis for a program of mandatory assessment. For example, some institutions have adopted policies requiring a mandatory assessment of students exhibiting suicidal behavior.[156] The legal foundation for

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151. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1047–48 (9th Cir. 1999) (holding that, once the educational institution has sought suitable means of reasonably accommodating the disabled student and submitted a factual record showing conscientious effort to accommodate, the court will defer to the institution's academic decision).

152. *See* Hash v. Univ of Ky., 138 S.W.3d 123, 128–29 (Ky. Ct. App. 2004) (deferring to the university's determination that a student suffering from depression who had withdrawn from law school was not qualified for readmission under state law).

153. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 91–92 (1978) (warning against "judicial intrusion into academic decisionmaking" where the defendant university had followed its rules and the plaintiff medical student had failed to show arbitrary or capricious action on part of the university); *see also* McGregor v. La. St. Univ. Bd. of Supervisors, 3 F.3d 850, 859 (5th Cir. 1993) (deferring to the law school's decision not to modify its full-time attendance and in-class examination requirements for a disabled student where the court found no evidence of malice, ill will, or efforts to impede the student's progress).

154. OCR Letter to Guilford Coll., *supra* note 75, at *27; OCR Letter to DeSales Univ., *supra* note 119, at *16.

155. *See, e.g.*, Esmail v. S.U.N.Y. Health Sci. Ctr. at Brooklyn, 633 N.Y.S.2d 117, 117 (N.Y. App. Div. 1995) (affirming the dismissal of a disability discrimination claim by the student where the court found "no procedural irregularities" in the defendant university's decision). Assuming that the institution's policies meet applicable legal standards, threat assessment teams should review any applicable policies, such as involuntary leave policies, to ensure compliance. Failure to comply with an institution's published policies can lead to numerous legal claims by affected students, including breach of contract, discrimination, retaliation, and other claims.

156. *See, e.g.*, Univ. of Ill. Urbana-Champaign, Counseling Ctr., Suicide Policy, http://ccserver4.ad.uiuc.edu/?page_id=53 (last visited Apr. 10, 2008) (outlining the University of Illinois's mandatory assessment policy following suicide threats and attempts); Univ. of Or.,

requiring students whom the institution regards as disabled (or at least as potentially disabled) to undergo a mandatory assessment is somewhat unclear. On the one hand, it may be that mandatory assessment, at least in the case of a suicide threat, is permissible as a disciplinary response to a threat of violence (i.e., to self).[157] On the other hand, it seems reasonably clear that an institution could justify a mandatory assessment policy on the basis of its need to determine whether a direct threat exists.[158] An institution must be able to determine whether a direct threat exists, and a mandatory assessment policy, if invoked upon a reasonable belief that the student in question might pose a direct threat to self or others,[159] is a reasonable way to achieve the individualized and objective analysis required by the direct threat standard.

b. *Involuntary Withdrawal*

Even more important, the direct threat standard provides the basis for involuntary withdrawal. As numerous OCR letters make clear, a college or university can remove a student from its programs and even terminate enrollment if it finds that the student constitutes a direct threat to the health or safety of self or others.[160] Absent the direct threat concept or some clear inability to comply with rules of conduct,[161] involuntary withdrawal of students with mental health problems would almost certainly be challenged as discriminatory.

c. *Conditional Readmission*

Another significant area in which the direct threat concept permits institutions to take actions that would otherwise appear discriminatory is with regard to readmission to the institution (or institutional program) from which the student has withdrawn. OCR has repeatedly instructed that, assuming an institution has a policy on emergency withdrawal and readmission, it may place conditions on a

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Student Medical Leave Policy, http://arcweb.sos.state.or.us/rules/OARS_500/OAR_571/571_023.html (last visited Apr. 10, 2008) (outlining the University of Oregon's policy regarding student medical leave, including provisions for mandatory professional assessment); Univ. of Puget Sound, Mandated Assessment for Risk of Suicidality and Self-Harm (2003), http://www.ups.edu/documents/MARSSH_Disclosure_Statement.pdf (last visited Apr. 10, 2008); *see also* Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081 (2007). In carrying out a mandatory assessment program, institutions should be mindful of due process considerations. *See* Wei, *supra* note 81, at 310.

157. *See* Gary Pavela, *Direct Threat Analysis and the Illinois Mandated Assessment Policy*, ASJA L. & POL'Y REP., Sept. 21, 2005 ("A suicide threat, for example, is first of all a *threat of violence*. Threats of violence may be sanctioned through the campus disciplinary system (or administrative equivalent), after appropriate due process.").

158. OCR Letter to Guilford Coll., *supra* note 75, at *26 ("A college may inquire into a student's medical condition where the college, on a nondiscriminatory basis, believes that a student represents a direct threat to self or others.").

159. *See id.*

160. *See supra* note 133.

161. OCR Letter to S. Ohio Coll., *supra* note 109, at *11.

student's return to campus after the student has been found to be a direct threat.[162] As with the determination of whether a direct threat exists, a college or university must determine the conditions a returning student must satisfy "on an individual basis."[163]

OCR has explicitly suggested that an institution may require a returning student to provide documentation of steps he has taken to reduce the previous threat, including that the student: (a) followed a treatment plan; (b) submitted periodic reports of his progress; and (c) granted permission for the institution to talk to his treating professional.[164] Further, several courts have deferred to decisions by institutions not to readmit students where the institution was acting within its academic discretion.[165]

The institution's right to place conditions on a student seeking readmission is not unlimited.[166] First, colleges and universities must apply their readmission policies equitably and may not discriminate against students with disabilities seeking readmission.[167] Thus, an institution would appear to run afoul of the anti-

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162. Bluffton Univ., *supra* note 109, at 6 (permitting conditions on a student's return); OCR Letter to Marietta Coll., *supra* note 133, at *14 (permitting an emergency withdrawal policy that included "conditions for a student's return to the College after an emergency withdrawal, consistent with Federal disability laws and with consideration of the individual circumstances of each student"); OCR Letter to Guilford Coll., *supra* note 75, at *33–34 (permitting an institution limited discretion in conditions for a student's return, including requiring documentation that the student acted to reduce the previous threat); OCR Letter to DeSales Univ., *supra* note 119, at *25 (permitting the university to condition receipt of the benefit of returning upon "showing that the student is no longer a threat" and to require periodic reports from the student's physician).

163. OCR Letter to Guilford Coll., *supra* note 75, at *34.

164. OCR Letter to Guilford Coll., *supra* note 75, at *34; OCR Letter to DeSales Univ., *supra* note 119, at *15.

165. *See, e.g.*, Hash v. Univ. of Ky., 138 S.W.3d 123 (Ky. Ct. App. 2004) (affirming summary judgment to the defendant university that rejected an application for readmission by a law student who withdrew due to depression). For a thorough review of recent case law and OCR decisions regarding readmission of students with disabilities, see Daggett, *supra* note 89, at 527–53.

166. *See, e.g.*, Carlin v. Trs. of Boston Univ., 907 F. Supp. 509 (D. Mass. 1995) (denying summary judgment to the university defendant where the university denied readmission to a Ph.D. student who took a one year leave of absence due to symptoms of depression); Dearmont v. Tex. A & M Univ., No. H-87-3665, 1991 NDLR (LRP) LEXIS 1013 (S. D. Tex. 1991) (awarding judgment and reinstatement to a student with a learning disability under the Rehabilitation Act where the court found that the university had failed to make reasonable accommodations and had engaged in harassment of the student); OCR Letter to Guilford Coll., *supra* note 75, at *33–34 ("While the institution has discretion in fashioning return conditions, its discretion is not unlimited."). *But see* Haight v. Haw. Pacific Univ., No. 95-16810, 1997 U.S. App. LEXIS 20024 (9th Cir. Jun. 16, 1997) (finding that a student who was offered conditional readmission and made no attempt to fulfill the conditions had not been "excluded" from the program and therefore could show no violation of the Rehabilitation Act or ADA). For a discussion of cases in which claims by students with disabilities who had sought readmission to defendant institutions survived summary judgment (and in the case of *Dearmont,* prevailed), see Daggett, *supra* note 89, at 536–46.

167. OCR Letter to Guilford Coll., *supra* note 75, at *33 ("[A]n educational institution must not discriminate on the basis of disability in establishing conditions under which a student can return after having been withdrawn from any of the institution's programs, whether academic, housing, both, or other.").

discrimination mandate of disability law if it denied readmission to a disabled student with a history of substance abuse while permitting readmission for a non-disabled student withdrawn due to his own history of substance abuse.

Second, an institution may not require as a condition for readmission that the student's "disability-related behavior no longer occurs, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications."[168] Nor may an institution require that, as a precondition of returning to his studies, a student completely cease all self-injurious behavior, as "[n]ot all self-injurious behavior may be sufficiently serious as to constitute a direct threat."[169] Thus, under OCR's view, it would appear impermissible to withhold readmission from a student whose severe eating disorder had previously led to a direct threat finding on the basis that the student still purges or refuses to eat *unless* the current behavior meets the standard for a direct threat.

Thus, as far as OCR is concerned, the permissibility of imposing conditions on a student's participation in educational programs is tied to the continued existence of a direct threat or the need to determine whether such a threat exists. If no direct threat exists, or if the threat has subsided, OCR's approach apparently forbids higher education institutions from withholding readmission from a disabled student.

C. Concluding Thoughts Regarding the Disability Laws

Disability laws, as applied to institutions of higher education, are designed to provide an "even playing field" for students with disabilities.[170] Application of these laws can be challenging for threat assessment teams for many reasons. For instance, challenges arise because each case turns on its own facts, the law continues to evolve, and circumstances may be exigent and require immediate decisions. In addition, the standard set forth by OCR for determining whether a direct threat exists is extremely high and the analysis required is rigorous. Nonetheless, certain practices will most likely result in OCR and courts granting significant discretion to institutions making decisions under disability law.

First and foremost, courts and the OCR care deeply about procedure.[171] Thus,

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168. *Id.* at *34; OCR Letter to DeSales Univ., *supra* note 119, at *15.

169. OCR Letter to Guilford Coll., *supra* note 75, at *35; *see also* OCR Letter to DeSales Univ., *supra* note 119, at *15; Schutjer, *supra* note 128, at 8 (discussing the OCR Letter to Guilford Coll.).

170. *See* 42 U.S.C. §§12101(a)(8)–(9) (2000); Felix v. N.Y. City Trans. Auth., 324 F.3d 102, 107 (2d Cir. 2003); 34 C.F.R. § 104.4(b)(2) (2007).

171. *Compare* Esmail v. S.U.N.Y. Health Sci. Ctr. at Brooklyn, 633 N.Y.S.2d 117 (N.Y. App. Div. 1995) (no procedural regularities), *with* Dearmont v. Tex. A & M Univ., No. H-87-3665, 1991 NDLR (LRP) LEXIS 1013 (S.D. Tex. May 28, 1991) (criticizing university's procedures). *See also* OCR Letter to Bluffton Univ., *supra* note 109, at 5 (criticizing failure to provide due process); OCR Letter to Marietta Coll., *supra* note 133, at *12–13; OCR Letter to Guilford Coll., *supra* note 75, at *29–37 (criticizing the college's failure to adhere to due process principles, failure to have formal procedures for involuntary withdrawal for medical reasons, and failure to offer grievance procedures); OCR Letter to DeSales Univ., *supra* note 119, at *16 (noting the university's failure to give a disabled student notice that it believed he had a serious mental impairment that might require long-term treatment); *id.* at *20 (noting the university's

institutions must be careful to have up-to-date, thoughtful policies to address situations implicating disability law. Further, assuming such procedures are in place, threat assessment teams must make every effort to comply with them. In so doing, the teams must focus on objective facts and current student conduct rather than stereotypes. They also should refrain from rushing to judgment based on their experience with a particular mental health condition and make an individualized inquiry into a student's current circumstances. Moreover, teams should appoint a member to document objectively and thoroughly their decisions and supporting evidence.[172] Finally, threat assessment teams and the institutions employing them should always provide adequate due process, following the guidance set forth by OCR and discussed above.

III. PRIVACY AND CONFIDENTIALITY LAWS: UNDERSTANDING THE WHO, WHAT, AND WHEN OF SHARING STUDENT INFORMATION

In addition to addressing the many issues that can arise under disability law, it is essential for threat assessment teams to understand how various privacy and confidentiality laws affect their operations. As reflected in the GOVERNOR'S REPORT, confusion often abounds on campuses regarding what information about troubled students legally can be shared within an institution and with individuals outside the institution.[173] In their report to President George W. Bush, the Secretaries of Health & Human Services and Education and the Attorney General echoed these concerns, noting that critical information sharing has been severely hampered because of the "confusion and differing interpretations about state and federal privacy laws."[174] Various officials at Virginia Tech "explained their failures to communicate with one another or with Cho's parents by noting their belief that such communications are prohibited by the federal laws governing the privacy of health and education records" despite the fact that "federal laws and their state counterparts afford ample leeway to share information in potentially dangerous situations."[175]

Given the various federal and state laws that potentially apply in this context and their interrelationship with one another, some level of confusion is understandable, but the events at Virginia Tech and Northern Illinois University have given institutions a strong incentive to gain a firm grasp on what disclosures are permitted under privacy and confidentiality laws that apply to the information that institutions maintain and collect regarding troubled students.[176] It is essential for the members of a threat assessment team to understand how the Family

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failure to provide the student with an opportunity to present evidence or be heard regarding expulsion from the university housing and failure to provide notice of what behavior it would consider in reaching a decision).

172. *See supra* Section I.E.

173. GOVERNOR'S REPORT, *supra* note 8, at 2, 52, 63–70.

174. DEP'T OF JUSTICE ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (2007), *available at* http://www.hhs.gov/vtreport.gov.

175. GOVERNOR'S REPORT, *supra* note 8, at 2.

176. *See* Mike Gangloff, *Legislating Privacy: How Open Should Information Be?,* ROANOKE TIMES, Dec. 30, 2007, at A1.

Educational Rights and Privacy Act (FERPA),[177] the Health Insurance Portability and Accountability Act (HIPAA),[178] and any applicable state laws affect the ability of team members to collect and share information with one another and to disclose information to a student's family members, local law enforcement officials, or others outside the institution. The Virginia Tech Review Panel correctly concluded that these laws allow disclosure of information when a student poses a serious threat to self or others.[179] Precisely what disclosures are permitted depends upon what law or laws apply and the particulars of the situation at hand.

The U.S. Department of Education's Family Policy Compliance Office (FPCO) has issued further guidance regarding FERPA in the wake of the tragic events at Virginia Tech.[180] The apparent confusion over FERPA has also been acknowledged in the proposed legislation reauthorizing the Higher Education Act (HEA) which would require the U.S. Department of Education to

> provide guidance that clarifies the role of institutions of higher education with respect to the disclosure of education records . . . in the event that [a] student demonstrates that the student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault . . . [and] clarify that an institution of higher education that, in good faith, discloses education records or other information in accordance with the requirements of this Act and [FERPA] shall not be liable to any person for that disclosure.[181]

Indeed, the Department of Education has now issued proposed amendments to the FERPA regulations, many of which are designed to memorialize the recent guidance from the FPCO.[182]

This Part will explain how threat assessment teams can determine what laws apply when dealing with students who may pose a serious threat to self or others and what information can be disclosed under these laws to help protect these

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177. 20 U.S.C. § 1232g (2000); 34 C.F.R. § 99 (2007).

178. 42 U.S.C. §§ 1320d to d-8 (2000); 45 C.F.R. pts. 160, 162, 164 (2007).

179. *See* Steven J. McDonald, *The Family Rights and Privacy Act: 7 Myths—and the Truth*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 18, 2008, at A53.

180. *See* U.S. Dep't of Educ., Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities, http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf (last visited Apr. 20, 2008) [hereinafter Balancing Student Privacy and School Safety]; U.S. Department of Educ., Disclosure of Information from Education Records to Parents of Postsecondary Students, http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html (last visited Apr. 20, 2008) [hereinafter Disclosure of Information from Education Records]; Ass'n for Student Judicial Affairs, FERPA Questions for Lee Rooker, Director of the Family Policy Compliance Office, U.S. Department of Education (2007) (unpublished manuscript), *available at* http://www.asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONSanswered.doc [hereinafter FERPA Questions for Lee Rooker].

181. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 865 (2007).

182. *See* Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). Among other things, the proposed amendments would clarify permissible disclosures to parents and permissible disclosures of directory information; specify conditions that apply to disclosures in health or safety emergencies; allow disclosures to third parties in connection with the outsourcing of services; and revise the definitions of various key terms. *Id.*

students, the campus community, and the general public. Section A of this Part will discuss the applicability of FERPA and its many exceptions. Section B will address federal and state laws that govern the privacy and confidentiality of student health information. Whether to share or disclose information in a given situation is, of course, a question separate from the issue of whether a particular disclosure is legally permissible. The discussion in this Part focuses on what disclosures are legally permissible. After determining the legality of a contemplated disclosure, institutions still must carefully consider the policy issues of when and under what circumstances to share or disclose information both within the institution and outside of it.

A. Understanding FERPA's Scope and Exceptions

FERPA, also known as the Buckley Amendment, is a federal statute that affords "eligible students" certain rights with respect to their "education records."[183] More specifically in this context, it provides students who are attending an institution of postsecondary education the right to inspect and review their "education records," request an amendment of any education records that are inaccurate or misleading, and exercise some level of control over the disclosure of their education records (and the personally identifiable information contained therein).[184] FERPA's reach is quite broad. It applies to all educational institutions that accept funding at any level under any program administered by the Department of Education and requires such institutions to notify students annually of their rights under FERPA.[185] FERPA generally covers all records, regardless of their format, containing personally identifiable student information that are maintained by an institution or an employee or other agent of the institution.[186] In addition to more traditional academic records, such as transcripts, "education records" also include "non-academic student information database systems, class schedules, financial aid records, financial account records, disability accommodation records, disciplinary records, and even 'unofficial' files, photographs, e-mail messages, hand-scrawled Post-it notes, and records that are publicly available elsewhere or that [a] student . . . has publicly disclosed."[187]

With regard to any records that are subject to FERPA, an institution can

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183. 20 U.S.C. § 1232g (2000 & Supp. V 2005); *see also* 34 C.F.R. § 99 (2007). For a very helpful summary of the events that led to the adoption of FERPA, FERPA's basic requirements, and the U.S. Supreme Court and other leading court decisions interpreting FERPA, see Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003). NAT'L ASSOC. OF COLL. & UNIV. ATT'YS, THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: A LEGAL COMPENDIUM (Steven J. McDonald ed., 2d ed. 2002) is another excellent resource. *See also* Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393 (2008).

184. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5; *see also* Steven J. McDonald & Nancy E. Tribbensee, *FERPA and Campus Safety*, NACUANOTES, Aug. 6, 2007, http://www.myacpa.org/pd/documents/ferpa1.pdf.

185. 20 U.S.C. § 1232g(a), (e), (f); 34 C.F.R. §§ 99.1, 99.7.

186. 34 C.F.R. § 99.3.

187. McDonald & Tribbensee, *supra* note 184.

disclose information from those records only if (a) it is "directory information;"[188] (b) the student has consented in writing to the disclosure;[189] or (c) one or more exceptions to FERPA's written consent requirement applies.[190]

Despite FERPA's broad reach and general prohibition against disclosures of student record information absent the student's express written permission, FERPA nonetheless provides institutions and their threat assessment teams with a fair amount of flexibility when it comes to disclosing student information in two important respects. First, FERPA expressly *excludes* from its coverage several categories of records and information regarding students. Second, even with regard to student record information covered by FERPA, the statute and implementing regulations include a number of important exceptions allowing institutions to share student record information both within the institution and with others outside the institution.

1. Records and Information Excluded from FERPA

As relevant in the threat assessment team context, FERPA does not cover the following information and records even if they contain personally identifiable information about a student: (a) personal observations or direct interactions not derived from an existing education record; (b) records created and maintained by a "law enforcement unit" for a law enforcement purpose; and (c) student medical treatment records.[191]

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188. FERPA defines "directory information" as follows:

> [I]nformation contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

34 C.F.R. § 99.3 (citing 20 U.S.C. § 1232g(a)(5)(A)).

An institution may disclose directory information about a current student without the student's express written permission if it describes in its annual FERPA notification: (a) the types of personally identifiable information that the institution has designated as directory information; (b) the student's right to request that the institution not designate any or all of his or her information as directory information; and (c) the period of time within which a student has to notify the institution in writing that he or she does not want any or all of his or her information designated as directory information. 20 U.S.C. § 1232g(a)(5)(A)–(B); 34 C.F.R. § 99.37.

189. Unless an exception applies, an institution must obtain the student's express written consent before disclosing personally identifiable information from the student's education records. 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.30(a). The written consent must: (a) be signed and dated by the student; (b) specify the records that may be disclosed; (c) state the purpose of the disclosure; and (d) identify the party or class of parties to whom the disclosure may be made. 20 U.S.C. § 1232g(b) (2000); 34 C.F.R. § 99.30(a)–(b) (2007). Under certain circumstances, an electronic signature may be acceptable evidence of a student's written consent, but an e-mail from a student will not suffice. 34 C.F.R. § 99.30(d).

190. 20 U.S.C. § 1232g(b); 34 C.F.R. §§ 99.30, 99.31; *see also* McDonald & Tribbensee, *supra* note 184.

191. Other categories of records are also excluded from the definition of "education records"

a. Personal Knowledge or Observations

FERPA only protects information derived from student education records; it does not apply to personal observations of, or direct interactions with, students.[192] If, at some point, a faculty or staff member describes his or her observations of a student in a document that is maintained by the institution or an employee of the institution, that document would be subject to FERPA, but the faculty or staff member would still be permitted to disclose his or her personal observations to a threat assessment team member or other appropriate school official without regard to FERPA.[193] The record itself, however, could be disclosed only in accordance with FERPA.[194] As a result, FERPA would not prohibit a school official from contacting a student's parents to advise them about any concerns based upon the individual's own personal observations of the student.[195] This is a very important exception given that a number of faculty or staff members may observe or interact with a student whose conduct may be of concern for one reason or another. Accordingly, it is essential for institutions to understand that information obtained based upon one's direct interactions with a student is not covered by FERPA.

b. Law Enforcement Unit Records

"Law enforcement unit" records are records that are: (a) created by a law enforcement unit; (b) created for a law enforcement purpose; and (c) maintained by a law enforcement unit.[196] Many colleges and universities have their own police or public safety department, but even institutions that do not have a separate unit dedicated to public safety and security can designate a particular office or employee as the unit or official responsible for referring alleged violations of law to local law enforcement authorities.[197] Significantly, a "law enforcement unit" does not lose its status as such under FERPA if it performs other, non-law enforcement functions for the institution, including the investigation of incidents or conduct that leads to disciplinary action against a student.[198] Institutions should identify in their FERPA policy and annual notification which office or official

and, therefore, are not covered by FERPA. They include: (a) student employment records; (b) alumni records; and (c) records that are kept in the sole possession of the maker of the records, used only as a personal memory aid, and are not accessible to or shared with any other person except a temporary substitute for the maker. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3(b)(1), (3), (5).

192. 20 U.S.C. § 1232g(a)(4).

193. *Id.* As discussed in more detail below, *infra* Part III.A.1.c, even if the information at issue is covered by FERPA, members of a threat assessment team can often access the information under the "legitimate educational interest" exception that allows school officials to access information contained in a student's "education records" as long as the team members have a legitimate need to know the information to perform their job function.

194. *See* McDonald & Tribbensee, *supra* note 184; Disclosure of Information from Education Records, *supra* note 180.

195. Disclosure of Information from Education Records, *supra* note 180.

196. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

197. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

198. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.

serves as the institution's "law enforcement unit."[199] Law enforcement unit officials employed by the institution should also be identified in the institution's annual notification as "school officials" with a "legitimate educational interest"[200] so they can gain access to a student's "education records" as a member of a threat assessment team or to otherwise carry out their job responsibilities.[201]

Investigative reports and other records created and maintained by law enforcement units are not "education records" covered by FERPA so long as the records are created, at least in part, for a law enforcement purpose.[202] Records created exclusively for a non-law enforcement purpose, such as pursuing disciplinary action against a student, would still be subject to FERPA.[203] In addition, law enforcement unit records that are shared with non-law enforcement personnel at an institution, such as members of a threat assessment team or student affairs personnel, become "education records" subject to FERPA in the hands of non-law enforcement personnel.[204] The copies of these same records maintained by a law enforcement unit remain exempt from FERPA, and information from those records can be freely disclosed by law enforcement personnel.[205] Similarly, "education records" shared with law enforcement unit officials remain subject to FERPA, even while in the possession of the law enforcement unit.[206] As a result, it is wise to maintain law enforcement unit records separately from education records to ensure that an institution can take full advantage of the ability to disclose information from law enforcement unit records.[207] In sum, FERPA does not prohibit institutions from disclosing law enforcement unit records (and the information contained therein) to anyone, even where they do not have a student's consent.[208] This exception can, of course, facilitate communications between an institution's law enforcement officials and local law enforcement, a student's parents and family members, and others outside the institution.

c. *Student Medical Records*

Certain student medical records are also excluded from FERPA if they are: (a) made or maintained by a physician, psychiatrist, psychologist, or other health care professional acting in his or her professional capacity; and (b) made, maintained, or used only in connection with treatment of the student.[209] Such records are

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199. *See* Balancing Student Privacy and School Safety, *supra* note 180.
200. *See* discussion *infra* Part III.A.2.a.
201. *Id.*
202. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
203. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
204. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
205. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
206. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8.
207. *See* Balancing Student Privacy and School Safety, *supra* note 180.
208. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8; LeRoy Rooker, Dir., Fam. Pol'y Compliance Off., Address at the University of Vermont Legal Issues in Higher Education Conference: Post Virginia Tech Communication: What, When, and To Whom? (Oct. 16, 2007); Balancing Student Privacy and School Safety, *supra* note 180.
209. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

referred to herein as "student treatment records." The exclusion for student treatment records is narrower than it first may seem because any such records that are used or disclosed for any purpose other than treatment (e.g., disclosures to an insurance company for billing purposes, disclosures to a disability services office on campus for purposes of evaluating a request for accommodations, etc.), become "education records" and, therefore, are protected by FERPA.[210]

However, unlike direct personal observations and law enforcement records, exclusion of this information from FERPA does not mean that the information contained in student treatment records can be freely disclosed. Student medical records, and the information contained therein, are typically subject to state medical records laws or state laws governing physician-patient confidentiality.[211] In addition, HIPAA may restrict disclosure of these records if the institution is a "covered entity" or its health service is a "covered component" of the institution within the meaning of HIPAA.[212]

2. Exceptions to FERPA's Written Consent Requirement

For records that are "education records" protected by FERPA, as noted above, a student's express written consent is required for disclosure of the information contained in these records unless it is limited to "directory information" or an exception applies.[213] The most significant exceptions to the written consent requirement for threat assessment purposes include disclosures: (a) to other school officials with a "legitimate educational interest;"[214] (b) to parents of a dependent student;[215] (c) in a health or safety emergency;[216] (d) in connection with certain disciplinary proceedings involving alcohol, drugs, crimes of violence, or non-forcible sex offenses;[217] (e) to comply with a subpoena or court order;[218] and (f) to other schools in which a student seeks or intends to enroll.[219] Significantly, all of these exceptions are independent of one another. Thus, institutions may find that more than one exception allows for disclosure in a particular situation. They are also permissive rather than mandatory. Although an institution is not required to disclose information if one or more of the following exceptions applies, in the context of a threat assessment team, an institution likely will be searching for ways to make disclosures if necessary to protect the welfare or safety of a student, the broader campus community, or the public at large.

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210. *See* FERPA Questions for Lee Rooker, *supra* note 180.
211. *See* discussion *infra* Part III.B.2.
212. *See* discussion *infra* Part III.B.1.
213. *See* 20 U.S.C. § 1232g(a)(5)(A), (b)(1), (b)(2)(A); 34 C.F.R. §§ 99.3, 99.30.
214. 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).
215. 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8).
216. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.31(a)(10).
217. 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(13)–(15).
218. 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.31(a)(9).
219. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.31(a)(2).

a. Institutional Officials with a Legitimate Educational Interest

FERPA permits the disclosure of information from a student's education records to other institutional officials (known under FERPA as "school officials") without the student's consent as long as the institution defines in its annual FERPA notification who qualifies as an institutional official and what constitutes a "legitimate educational interest."[220] Generally speaking, a legitimate educational interest exists when there is a need to know the information at issue in order to perform one's professional responsibilities for the institution.[221] To take full advantage of this exception, institutions should consider adopting an expansive definition of "institutional official" in their annual FERPA notification.

For example, the FPCO's *Model Notification of Rights Under FERPA* includes the following definition of a "school official":

> [A] person employed by the [institution] in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the [institution] has contracted as its agent to provide a service instead of using [institutional] employees or officials (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another [institutional] official in performing his or her tasks.[222]

Members of a threat assessment team could easily qualify as institutional officials, and their collection of information regarding students of concern and sharing of that information with one another would be essential to carrying out the team's mission. As a result, assuming they fall within the definition of a "school official" set forth in the institution's annual FERPA notification, members of a threat assessment team should be able to share student record information with one another, even absent express written permission. In addition, others at the institution should be free to share such information with the team for purposes of reporting any information that may be of interest to the team.

b. Parents of a Dependent Student

FERPA also permits disclosure of student information to the parents of a student who is a dependent for federal income tax purposes.[223] Neither the age of the student nor the parent's status as the custodial parent is relevant.[224] If a student is claimed as a dependent by one or both parents, either parent may be given access to the student's education records and the information contained in those

220. 20 U.S.C. § 1232g(e)–(f); 34 C.F.R. § 99.7(a)(3).

221. *See* Fam. Pol'y Compliance Off., U.S. Dep't of Educ., Model Notification of Rights Under FERPA for Postsecondary Institutions, http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html.

222. *Id.*

223. 20 U.S.C. § 1232g(b)(H); 34 CFR § 99.31(a)(8).

224. Rooker, *supra* note 208.

records.[225] To rely on this exception, however, the institution must have a copy of the most recent federal tax return (or relevant portion thereof) identifying the student as a dependent or a signed and dated acknowledgement from the student indicating that the student is a dependent of at least one parent for federal income tax purposes.[226] Assuming an institution has the appropriate documentation on file, it may freely share student record information with either or both of a student's parents. Whether to do so in a particular situation is a decision that should be made on a case-by-case basis.

c. Health or Safety Emergency

The FERPA exception that has probably received the most attention in the wake of the events at Virginia Tech is the "health or safety emergency" exception. FERPA allows for disclosure of student record information in connection with a health or safety emergency "if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[227] Safety concerns that may call for a disclosure of student record information could include "a student's suicidal [or homicidal] statements or ideations, unusually erratic and angry behaviors, or similar conduct that others would reasonably see as posing a risk of serious harm."[228]

In relying upon this exception, the institution has the responsibility to make an initial good-faith determination of whether disclosure is necessary to protect the health or safety of the student or others.[229] Institutions should document any disclosures under this exception, including a description of the emergency. The FPCO has indicated it will be very reluctant to second-guess an institution's use of this exception so long as there is documentation reflecting the basis for the institution's determination that a health or safety emergency existed.[230] Stated somewhat differently, the FPCO "will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."[231] As other commentators have noted:

225. *Id.*

226. *Id.*

227. 20 U.S.C. § 1232g(b)(1)(I); *see* 34 C.F.R. §§ 99.31(a)(10), 99.36(a). The proposed amendments to the health or safety emergency exception would remove the language requiring strict construction of this exception and add language making it clear that institutions can take into account the totality of the circumstances pertaining to a threat to health or safety. Family Education Rights and Privacy, 73 Fed. Reg., 15,573, 15,589 (proposed Mar. 24, 2008). In addition, if an institution determines that there is an articulable and significant threat to the health or safety of the student or others, the proposed amendments would allow the institution to disclose information from the student's education records as long as there is a rational basis for the institution's determination. *Id.* In such situations, the Department of Education would not substitute its judgment for that of the institution. *Id.*

228. *See* McDonald & Tribbensee, *supra* note 184.

229. *See* FERPA Questions for Lee Rooker, *supra* note 180.

230. Rooker, *supra* note 208.

231. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Melanie P. Baise, Assoc. Univ. Counsel, Univ. of N. M. (Nov. 29, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html [hereinafter New Mexico

> [A] limited disclosure to a limited number of people, made on the basis of a good-faith determination in light of the facts available at the time . . . is highly unlikely to be deemed a violation of FERPA, even if the perceived emergency later turns out, in hindsight, not to have been one.[232]

Under this exception, records and information can be released to appropriate parties such as law enforcement officials, public health officials, and trained medical personnel.[233] The FPCO also interprets FERPA as permitting institutions to disclose information from education records to parents if a health or safety emergency involves their son or daughter.[234]

Although institutions appear to have discretion in interpreting and applying the health or safety emergency exception, they should nonetheless be mindful of student privacy interests and also understand that the exception is designed to be narrowly construed. In particular, this exception is limited to the period of the emergency and, generally, does not allow for the blanket release of personally identifiable information from a student's education records.[235] In general, and when reasonably possible, the initial disclosure should be made to professionals trained to evaluate and handle such emergencies, such as campus mental health or law enforcement personnel, who can then determine whether further disclosures are appropriate.[236]

Determining whether the health or safety emergency exception applies depends largely on the situation at hand. As a result, it is typically wise for threat assessment team members or other appropriate college or university officials to work together in deciding whether this exception applies. In the threat assessment context, this exception should allow institutions to disclose student record information when there is reason to believe the student poses a serious threat to his or her own safety or to the safety of others.

d. Disciplinary Proceedings Involving Alcohol, Drugs, Violent Crimes, and Non-Forcible Sex Offenses

FERPA also allows institutions to disclose information related to certain types of disciplinary proceedings. For example, an institution may inform the parent of a student who is under the age of twenty-one if it has determined that the student has committed a violation of its drug or alcohol policies.[237] To rely upon this exception, the student must be under age twenty-one at the time of the disclosure,

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FPCO Letter].

232. *See* McDonald & Tribbensee, *supra* note 184.

233. *See* Balancing Student Privacy and School Safety, *supra* note 180.

234. *Id.*

235. *Id.*

236. *See* Letter from Fam. Pol'y Compliance Off., U.S. Dep't of Educ., to New Bremen Local Schs. (Sept. 22, 1994); New Mexico FPCO Letter, *supra* note 231; Letter from LeRoy S. Rooker, Dir., Fam. Pol'y Compliance Off., U.S. Dep't of Educ., to Martha Holloway, State Sch. Nurse Consultant, Ala. Dep't of Educ. (Feb. 25, 2004); McDonald & Tribbensee, *supra* note 184.

237. 20 U.S.C. § 1232g(i) (2000 & Supp. V 2005); 34 C.F.R. § 99.31(a)(15) (2007).

but need not be a dependent for federal income tax purposes.[238] An institution may also disclose to the alleged victim the final results of a disciplinary proceeding against a student accused of committing certain crimes of violence (i.e., arson, assault, burglary, homicide, manslaughter, destruction of property, kidnapping, robbery, forcible sex offenses) or a non-forcible sex offense (i.e., statutory rape, incest), regardless of the outcome of that proceeding.[239] The final results include the name of the alleged perpetrator, the outcome of the proceeding, and any sanctions imposed.[240] FERPA also permits disclosure to anyone—not just the victim—of the final results of a disciplinary hearing, if the institution determines an alleged perpetrator of a crime of violence or non-forcible sex offense committed a violation of the institution's code of conduct or other disciplinary policies.[241]

e. Compliance with Subpoenas and Court Orders

FERPA also permits institutions to disclose student records to the extent required to comply with lawfully issued subpoenas and court orders.[242] Prior to any disclosure, the institution must make a reasonable attempt to notify the student of the subpoena or court order and give the student a reasonable opportunity to seek court protection, unless the subpoena or court order specifically directs the institution not to disclose the existence or contents of the subpoena or court order.[243] Institutions are encouraged to consult with legal counsel to assess the validity of any subpoena or court order and ensure the applicable notice requirements have been satisfied before providing any education records or student information in response to a subpoena or court order.

238. 20 U.S.C. § 1232g(i); 34 C.F.R. § 99.31(a)(15).
239. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(13), 99.39.
240. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(13), 99.39.
241. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31(a)(14), 99.39.
242. 20 U.S.C. § 1232g(b)(2)(A)–(B); 34 C.F.R. § 99.31(a)(9).
243. 20 U.S.C. § 1232g(b)(1)(J)(i)–(ii); 34 C.F.R. § 99.31(a)(9).

f. Other Educational Institutions

Colleges and universities are also permitted to disclose student record information to other schools in which a student seeks or intends to enroll.[244] To rely upon this exception, an institution must make a reasonable attempt to notify the student that it intends to release student record information in a particular instance or include this practice in its annual FERPA notification.[245] The institution must also provide the student with a copy of the disclosed records upon request and give the student an opportunity to request a hearing to challenge the accuracy of the disclosed records.[246]

B. Medical Records Laws

As noted above, understanding FERPA is just one piece of the puzzle when it comes to determining if an institution may disclose information regarding its students in the threat assessment context. In addition to the rules governing disclosure of "education records" protected by FERPA, various medical records laws may also apply. Although student medical records used only for treatment purposes are not covered by FERPA, as noted above, such records may be subject to additional privacy or confidentiality protection under other laws such as HIPAA and state medical records laws.[247] These laws often govern when and under what circumstances medical record information maintained by an institution's health service can be disclosed. Threat assessment teams, mental health professionals, or other health care providers serving on these teams must be mindful of these restrictions in connection with their participation in the assessment process.

1. HIPAA

Among other things, HIPAA, through regulations collectively known as the Privacy Rule,[248] establishes standards and imposes requirements to protect the privacy of individually identifiable health information maintained by "covered entities" (or by "covered components" of entities that are not subject to HIPAA in their entirety).[249] Unless a use or disclosure of identifiable patient information

244. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34. The proposed amendments to the FERPA regulations would make it easier for institutions to share information from a student's education records with other educational institutions, even after the student has already enrolled or transferred, as long as the disclosure is for purposes related to the student's enrollment or transfer. Family Education Rights and Privacy, 73 Fed. Reg. 15,573, 15,581 (proposed Mar. 24, 2008).

245. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34.

246. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34.

247. *See* McDonald & Tribbensee, *supra* note 184; FERPA Questions for Lee Rooker, *supra* note 180.

248. 42 U.S.C. § 1320d to d-8 (2000); 45 C.F.R. pts. 160, 164 (2007).

249. In addition to the Privacy Rule, the HIPAA regulations also include the Security Rule and transaction and code sets standards. *See* 45 C.F.R. pts. 160, 162, 164 (2007). The Security Rule specifies a number of administrative, technical, and physical security procedures designed to safeguard the confidentiality of protected health information maintained in electronic form by

(commonly known in HIPAA parlance as "protected health information" or "PHI") is for treatment, payment, or health care operations, the entity maintaining the information generally must secure the patient's written authorization to use or disclose the information.[250] Like FERPA and state medical records laws, HIPAA includes a number of exceptions to the written authorization requirement, including an exception permitting disclosure of protected health information without the patient's consent if the health care provider determines "in good faith" that the disclosure "[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" and is made to "a person or persons reasonably able to prevent or lessen the threat, including the target of the threat."[251]

Despite the attention that HIPAA has received since it was passed, many institutions of higher education are not even subject to HIPAA, at least with respect to student medical records. Perhaps most important, HIPAA expressly excludes from its coverage any records that qualify as "education records" or student treatment records (used only for treatment purposes) under FERPA.[252] Because any student records maintained by an institution's health center almost certainly qualify as student treatment records or "education records" within the meaning of FERPA, these records should fall outside the scope of HIPAA. As a result, a campus health center that provides treatment only to students should not be subject to HIPAA with regard to the records and information it maintains.[253]

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covered entities. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Overview of Security Rule, http://www.cms.hhs.gov/SecurityStandard/ (last visited Apr. 17, 2008). The transaction and code sets standards require health care providers who engage in any of the specified transactions in electronic form to comply with the applicable standard for those transactions to ensure consistency with regard to the health care transactions, code sets, and identifiers used by health care providers that do business electronically. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Overview of Transaction and Code Sets Standards, http://www.cms.hhs.gov/TransactionCodeSetsStands/ (last visited Apr. 17, 2008).

250. 45 C.F.R. § 164.508.

251. 45 C.F.R. § 164.512.

252. 45 C.F.R. § 160.103; *see* Balancing Student Privacy and School Safety, *supra* note 180.

253. Prior to the adoption of the final Security Rule, which was published in the Federal Register on February 20, 2003, only the Privacy Rule, which incorporated the definition of "protected health information," expressly excluded education records and student treatment records from the definition of "protected health information" covered by HIPAA. 67 Fed. Reg. 53,182, 53,267 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164). As a result, it appeared that other portions of HIPAA outside the Privacy Rule might apply to student medical records. Judy Eisen, Coordination of HIPAA and FERPA, http://counselonline.cua.edu/archives/hot%20legal%20topics/HIPAA%20by%20Judy%20Eisen.doc (last visited Apr. 17, 2008). With the adoption of the final Security Rule, however, the definition of "protected health information" was moved from the Privacy Rule to the portion of the HIPAA regulations entitled "General Administrative Requirements." *See* 45 C.F.R. pt. 160. This definition applies generally to all HIPAA regulations, thus making it clear that the scope of information covered by both the Privacy and Security Rules is the same. 68 Fed. Reg. 8340, 8342 (Feb. 20, 2003) (codified at 45 C.F.R. §§ 160.102, 160.103). Given that the definition of "protected health information," which excludes both "education records" and student treatment records, now appears in the General Administrative Requirements that apply to the Privacy Rule, Security Rule, and the transaction and code set regulations, it appears that "education records" and student treatment records, as those terms are defined under FERPA, may be exempted from HIPAA as a whole. 45 C.F.R. §

A campus health center that also treats and creates health records for non-students (e.g., dependents of students, faculty, or staff), may, however, be subject to HIPAA, at least with regard to any non-student health records, if the health center engages in any "covered transactions" in electronic form.[254] These transactions are set forth in the HIPAA transaction and code sets regulations.[255] Examples include requests from a health care provider to obtain payment from a health plan,[256] an inquiry from a health care provider to a health plan to determine eligibility or coverage under a health plan,[257] and transmission of information regarding payment for services or an explanation of benefits from a health plan to a health care provider.[258]

If a campus health center qualifies as a "covered entity" under HIPAA as a result of providing treatment to non-students, the institution may elect to cease treating any non-students if it does not wish to be subject to HIPAA. If an institution with a "covered" health center wants to continue treating non-students, the institution will have to decide whether to treat all of its health records in accordance with HIPAA or whether to segregate any student health records from non-student health records, thereby undertaking an obligation to comply with HIPAA only with respect to those non-student health records actually subject to HIPAA. Given potential logistical complications associated with segregating records, an institution that treats non-students and engages in transactions covered by HIPAA may very well elect to treat both student and non-student health records as being subject to HIPAA.

Institutions should carefully consider whether to treat both student and non-student health records as subject to HIPAA given the choice. As an initial matter, compliance with HIPAA would not relieve an institution of its obligation to comply with FERPA with regard to any "education records."[259] Because HIPAA provides a federal floor of privacy protection and does not preempt state laws that provide greater privacy protection, institutions would also have to continue to comply with any state medical records laws that are not in direct conflict with HIPAA.[260] A potential drawback to treating "education records" or student treatment records as being subject to HIPAA (even though not technically required) is that HIPAA, unlike FERPA, does not allow an institution to share student health records with other institutional officials for legitimate educational purposes without the student's express written permission.[261] Given the potential

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160.103. The FPCO may be issuing further guidance regarding the interrelationship between HIPAA and FERPA. Given the many intricacies involved in this analysis, institutions are encouraged to seek legal advice in determining the extent to which HIPAA governs any medical or other health information they maintain.

254. 45 C.F.R. §§ 160.102(a), 160.103, 162.402.

255. *See* 45 C.F.R. §§ 162.1101–.1801.

256. 45 C.F.R. § 162.1101.

257. 45 C.F.R. § 162.1201.

258. 45 C.F.R. § 162.1601.

259. McDonald & Tribbensee, *supra* note 184.

260. *See* 45 C.F.R. §§ 160.201–.203.

261. Eisen, *supra* note 253.

limitation on sharing information in the threat assessment team context and the added complexity of having to comply with another set of regulations in addition to FERPA and state medical records laws (not to mention HIPAA's civil and criminal penalty provisions),[262] institutions should carefully assess the implications associated with HIPAA compliance before voluntarily electing to be HIPAA-compliant in connection with any student health records they maintain.[263]

However, even if HIPAA does apply to an institution's student medical records, it is important to note it also allows for disclosures of information in certain emergency situations.[264] As a result, HIPAA should not hinder the ability of threat assessment teams to obtain and share information in situations where a student poses a serious and imminent threat to self or others.

2. State Medical Records Laws

In addition to the FERPA and HIPAA considerations outlined above, any student or other health records that colleges and universities maintain are also likely subject to state laws protecting the doctor-patient privilege or otherwise governing the privacy or confidentiality of medical records. As noted above, institutions must generally comply with these laws, in addition to FERPA, and regardless of whether they are subject to HIPAA. These laws often place severe restrictions on the ability of health providers—especially mental health providers—to disclose information obtained in the course of treatment absent the student's express written permission.[265] Fortunately, however, these laws also typically include exceptions, sometimes referred to generally as "*Tarasoff* exceptions,"[266] that allow providers to make limited disclosures without a student's consent if the provider determines the disclosure is necessary to protect the student or another person against an imminent risk of serious injury or death.[267] As with HIPAA, these laws generally allow for some limited disclosure of information when a student poses a serious, imminent risk to his or her own safety or the safety of others. Because these laws vary from state to state, however, it is important for each institution to consult its state's laws and seek legal advice to ensure that its threat assessment team understands the circumstances under which mental health or other student medical information may be disclosed.

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262. 42 U.S.C. §§ 1320d-5 to -6 (2007); 45 C.F.R. §§ 160.400–.426.

263. Institutions whose health centers are subject to HIPAA only because they treat non-students may wish to consider whether to continue treating non-students. By treating only students, a health center may be able to avoid having to comply with HIPAA. *See* discussion *supra* Part III.B.1. Such a decision is a policy decision best resolved by an institution's senior administration.

264. 45 C.F.R. § 164.512 (2007).

265. *See, e.g.*, CAL. CIV. CODE §§ 56.10(c), 56.104 (West 2008); D.C. CODE § 7-1203.03 (2001); FLA. STAT. ANN. §§ 456.059, 491.0147 (West 2000); N.Y. MENTAL HYG. LAW § 33.13(c) (McKinney 2007).

266. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

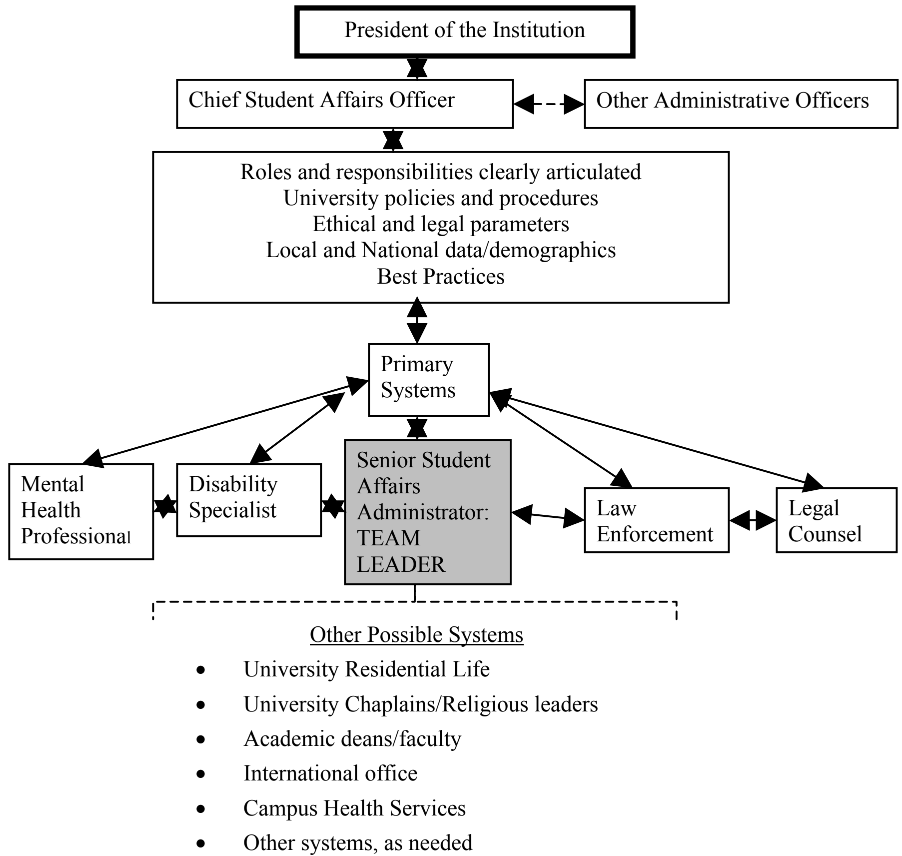
267. *See, e.g.*, CAL. CIV. CODE §§ 56.10(c), 56.104; D.C. CODE § 7-1203.03; FLA. STAT. ANN. §§ 456.059, 491.0147; N.Y. MENTAL HYG. LAW § 33.13(c).

CONCLUSION

The events at Virginia Tech and Northern Illinois University have created a sense of urgency at colleges and universities around the country with regard to the development and implementation of strategies for dealing with students who may be disturbing, disturbed, or a combination of both. The model that Delworth articulated almost twenty years ago demonstrates that these issues have been percolating for some time. Delworth's model provides a useful and straightforward approach for implementing a threat assessment team. With all of the attention these teams have received recently, institutions have access to a wealth of information regarding best practices in this area. Although the issues arising under disability law and laws governing the privacy and confidentiality of student information can be complex, institutions now have every incentive to develop threat assessment team policies and procedures that not only comport with applicable legal requirements but also serve to promote appropriate information sharing and foster a safe, productive campus community.

APPENDIX I

Diagram 1: A Proposed Threat Assessment Team Formation



APPENDIX II

Diagram 2: Threat Assessment Team: General Guidelines for Team Process