

# DEALING WITH STUDENTS WITH PSYCHIATRIC DISORDERS ON CAMPUS: LEGAL COMPLIANCE AND PREVENTION STRATEGIES

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## INTRODUCTION

According to data collected by the United States government, approximately 27 percent of individuals between the ages of eighteen and twenty-four have a diagnosable mental illness.<sup>1</sup> Although suicide is the eighth leading cause of death for Americans of all ages, it is the second leading cause of death for young adults between the ages of eighteen and twenty-four.<sup>2</sup> A 2012 survey by the American College Health Association found that 21 percent of college and university students had sought treatment for mental health issues that year.<sup>3</sup> Yet, despite the prevalence of mental illness among college and university students, many do not seek either ac-

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1. *Mental Health: What a Difference Student Awareness Makes*, SAMHSA.GOV, <http://www.promoteacceptance.samhsa.gov/publications/collegelife.aspx> (last visited Sept. 20, 2014).

2. *NAMI on Campus*, NAT'L ALLIANCE ON MENTAL ILLNESS, [http://www.nami.org/Template.cfm?Section=NAMI\\_on\\_Campus&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=19&ContentID=12235](http://www.nami.org/Template.cfm?Section=NAMI_on_Campus&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=19&ContentID=12235) (last visited Sept. 20, 2014).

3. AMERICAN COLLEGE HEALTH ASSOCIATION, AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT II: REFERENCE GROUP EXECUTIVE SUMMARY SPRING 2012 15 (2012), *available at* [http://www.acha-ncha.org/docs/ACHA-NCHA-II\\_ReferenceGroup\\_ExecutiveSummary\\_Spring 2012.pdf](http://www.acha-ncha.org/docs/ACHA-NCHA-II_ReferenceGroup_ExecutiveSummary_Spring 2012.pdf).

commodations or treatment. In a survey conducted by the National Alliance on Mental Illness in 2011, of the college and university student respondents who stated that they had a psychiatric disorder, only half of those respondents had disclosed the disorder to their college or university.<sup>4</sup>

Although several campuses have experienced shootings in the past decade, beginning with the massacre at Virginia Tech,<sup>5</sup> data from the Bureau of Justice Statistics shows that college and university students are less likely to experience violence than nonstudents between the ages of eighteen and twenty-four.<sup>6</sup> According to a Bureau of Justice Statistics study, most crimes against college and university students occur off campus, and the number of violent incidents involving college and university students actually decreased during the time period of the study.<sup>7</sup>

Nevertheless, college and university students, their families, and faculty and staff have been alarmed at the violence that has occurred on campuses that otherwise seem safe and welcoming. The prevalence of mental illness on college and university campuses, and particularly that of untreated mental illness, has resulted in strategies to address the problematic behavior, the underlying mental illness, or both—and has also, in some cases, created legal liability for colleges and universities and the staff who were trying to protect both the students with mental illness and the campus community at large.

This article will examine the legal protections for students with psychiatric disorders, the limits placed on faculty and administrators who wish to protect these students and those that they may do harm to, and the strategies that some institutions have adopted in order to identify at-risk students and intervene before they harm themselves or others.

### I. MENTAL ILLNESS AND VIOLENCE

Scholars differ over the propensity of individuals with mental illness for violence. While some data show that individuals with psychiatric disorders are no more likely to be violent than individuals without these disorders,<sup>8</sup> a

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4. NATIONAL ALLIANCE ON MENTAL ILLNESS, COLLEGE STUDENTS SPEAK (2011), available at [http://www.nami.org/Content/NavigationMenu/Find\\_Support/NAMI\\_on\\_Campus1/collegereport.pdf](http://www.nami.org/Content/NavigationMenu/Find_Support/NAMI_on_Campus1/collegereport.pdf), at 9.

5. For example, students were killed at Northern Illinois University (2008), San Jose State University (2011), and Santa Monica College (2013), among several other incidents.

6. KATRINA BAUM & PATSY KLAUS, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995-2002 1 (2005), available at <http://www.bjs.gov/content/pub/pdf/vvcs02.pdf>.

7. *Id.*

8. For a brief summary of research findings on violence and mental illness, see *Violence and Mental Illness: The Facts*, SAMSA.GOV, <http://promoteacceptance.samhsa.gov/publications/facts.aspx?printid=1>.

study of individuals with “serious” mental illnesses, such as schizophrenia, major depression, or bipolar disorder, found that such individuals were two to three times more likely to be “assaultive” than individuals who did not have these disorders.<sup>9</sup> The data also showed that the lifetime prevalence of violence for individuals with serious mental illnesses was 16 percent, compared to 7 percent for individuals who did not have a serious mental illness.<sup>10</sup> On the other hand, the author noted that individuals who do not have a serious mental illness but who engage in substance abuse are seven times more likely to engage in violence than those who are not substance abusers.<sup>11</sup> So, despite the increased potential for a student with a psychiatric disorder to engage in violence, the vast majority of individuals with these disorders are not violent to others, although they may be a risk to themselves.<sup>12</sup>

In addition to being concerned about the risk of violence against others, college and university faculty and administrators are also worried about students who engage in forms of self-harm, such as self-mutilation and suicide. While college and university students are less likely to attempt or commit suicide than non-students,<sup>13</sup> campuses across the country are struggling to monitor student behavior and to prevent students from harming themselves. In some instances, students who are suicidal use violence against others in order to cause their own deaths.<sup>14</sup> As such, suicide prevention is another important strategy to reduce campus violence.<sup>15</sup>

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9. Richard A. Friedman, *Violence and Mental Illness: How Strong is the Link?* 355 N. ENGL. J. MED. 2064 (2006) (defining “assaultive” as physically attacking another with a weapon, such as a knife or a gun). *Id.*

10. *Id.*

11. *Id.* See also Melissa Grunloh et al., *Mental Illness and Violent Behavior in School: A Primer for College Administrators*, 7 CAMPUS SAFETY & STUD. DEVEL. 6 (2007) (summarizing research on other factors related to violent behavior).

12. See, e.g., Susan P. Stuart, “*Hope and Despondence*”: *Emerging Adulthood and Higher Education’s Relationship with its Nonviolent Mentally Ill Students*, 38 J.C. & U.L. 319 (2012) (arguing that colleges and universities should not force mentally ill students who are disruptive but not violent off campus as a strategy to prevent campus violence).

13. The suicide rate for college students is approximately one-half the suicide rate for individuals in the same age group who are not college students. M.M. Silverman et al., *The Big Ten Suicide Study: A 10-Year Study of Suicides on Midwestern Campuses*, 27 SUICIDE LIFE THREAT BEHAVIOR 285 (1997).

14. For example, the student who killed students and faculty members at Virginia Tech subsequently turned his weapon on himself. The shooter in the Sandy Hook Elementary School tragedy took his own life immediately after killing twenty-six individuals. Michael Martinez, *Newtown a Year Later: Nation Reflects on Legacy of its 2nd-Deadliest Mass Shooting*, CNN.COM, Dec. 14, 2013, [http://www.cnn.com/2013/12/14/us/newtown-sandy-hook-shooting-anniversary/index.html?iid=article\\_sidebar](http://www.cnn.com/2013/12/14/us/newtown-sandy-hook-shooting-anniversary/index.html?iid=article_sidebar).

15. A discussion of student suicide prevention is beyond the scope of this paper. A useful resource is THE JED FOUNDATION, FRAMEWORK FOR DEVELOPING INSTITU-

## II. LEGAL PROTECTIONS FOR STUDENTS WITH PSYCHIATRIC DISORDERS

Colleges and universities face legal liability if students are injured or killed while on campus or while attending campus functions.<sup>16</sup> They may also face legal liability if they mishandle efforts to respond to problematic behavior by students with psychiatric disorders, either by requiring the students to engage in certain prophylactic behaviors (such as taking prescribed medication) or placing them on involuntary medical leave.<sup>17</sup> Colleges and universities have been found liable for student suicides<sup>18</sup> and have also faced legal liability for insisting that students who are disruptive or who engage in risky behavior withdraw from classes and leave campus until their conditions have stabilized.<sup>19</sup>

The major sources of protection for students with psychiatric disorders are Section 504 of the Rehabilitation Act of 1973<sup>20</sup> and Titles II and III of the Americans with Disabilities Act.<sup>21</sup> Both laws protect individuals who have a physical or mental disorder, who have a record of such a disorder, or

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TIONAL PROTOCOLS FOR THE ACUTELY DISTRESSED OR SUICIDAL COLLEGE STUDENT (2006), [https://www.jedfoundation.org/assets/Programs/Program\\_downloads/Framework\\_color.pdf](https://www.jedfoundation.org/assets/Programs/Program_downloads/Framework_color.pdf).

16. Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008). For example, a college may face claims for negligence, wrongful death, misrepresentation, and breach of contract, among others. *See, e.g.*, *Butler v. Maharishi Univ. of Mgmt.*, 589 F. Supp. 2d 1150, 1169–70 (S.D. Iowa 2008) (denying the university’s motion for summary judgment in a case where a parent of student murdered by fellow student sued the university for premises liability, fraudulent misrepresentation, and negligence).

17. *See infra* Part III.

18. *See, e.g.*, *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL1869101 (Mass. Super. Aug. 29, 2005) (ruling that the claims of parents of a student who was an apparent suicide must be litigated). In *Shin*, the parties reached a settlement so there was no finding on liability. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, April 4, 2006, <http://www.insidehighered.com/news/2006/04/04/shin>. *See also* *Schiesler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

19. For example, OCR determined that Bluffton University had impermissibly required a student who attempted suicide to take an involuntary medical leave. Letter to Bluffton Univ., OCR Docket No. 15-04-2042 (Dec. 22, 2004), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=LWFnT1VirFU%3D&tabid=313> [hereinafter *Bluffton Letter*]. In addition to potential legal liability, there may be ethical issues involved. Students often need to remain enrolled at their college or university in order to be covered by student health insurance and to receive mental health treatment from the college’s or university’s mental health service providers.

20. 29 U.S.C. § 794 (2012). The Rehabilitation Act is a “Spending Clause” measure that applies to entities that receive federal funds.

21. 42 U.S.C. § 12131–65 and 12181–89 (2012). Public colleges and universities are covered by Title II, and private universities are covered by Title III. For a thorough discussion of the elements of a Section 504 or ADA claim and the 2008 amendments to the ADA, see Laura Rothstein, *Disability Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2005). *See also* LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* §§1:12 – 1:21 (4th ed. 2013).

who are regarded as disabled.<sup>22</sup> The disorder must “substantially interfere” with one or more “major life activities,” such as sleeping, caring for oneself, concentrating, and learning.<sup>23</sup>

The requirements of both laws with respect to students with disabilities are virtually identical. The student must provide documentation of a recognized disability,<sup>24</sup> and he or she must request accommodations to enable him or her to function in classes and in campus life. Students are expected to follow the college’s or university’s rules and codes of conduct; failure to do so may result in a determination by the U.S. Department of Education’s Office for Civil Rights (“OCR”) or a court ruling that the student is not “qualified” because complying with a campus conduct or honor code is an essential function of being a student.<sup>25</sup> Section 504 of the ADA does not protect students who are not “qualified” individuals with a disability.<sup>26</sup>

OCR enforces both laws as they apply to students with disabilities.<sup>27</sup> The U.S. Department of Justice enforces Title II in public entities that are not colleges and universities;<sup>28</sup> therefore, its regulations affect enforcement of the ADA with respect to public colleges and universities.

Colleges and universities are not required to provide accommodations to students who have not disclosed a disability, either physical or mental. Once the student provides documentation of a disability, the college is required to consider whether and what reasonable accommodations may be appropriate.<sup>29</sup> As noted earlier, many students with psychiatric disorders do not disclose their disorders and thus are not eligible for accommodations. If they engage in disruptive conduct and the college or university requires the student to receive counseling or other forms of treatment, the student may assert that the college or university “regards” the student as disabled—a potential violation of the ADA.<sup>30</sup> On the other hand, if the col-

22. *Davis v. Univ. of N.C.*, 263 F.3d 95, 99 (4th Cir. 2001). Disability discrimination claims brought under Section 504 and under the ADA are analyzed in the same way. *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 n. 5 (8th Cir. 1999).

23. 42 U.S.C. § 12102(2) (2012).

24. Students with psychiatric disorders must provide a diagnosis of a disorder recognized in the fifth edition of the *Diagnostic and Statistical Manual* published by the American Psychological Association (known as the *DSM-V*). But simply having a diagnosis is not enough for protection under either law. The disorder must “substantially limit” one or more major life activity.

25. *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998). *See also* *El Kouni v. Trustees of Boston Univ.*, 169 F. Supp. 2d 1 (D. Mass. 2001).

26. *Id.*

27. *See About OCR*, U.S. DEP’T OF EDUC., [www2.ed.gov/about/offices/list/ocr/aboutocr.html](http://www2.ed.gov/about/offices/list/ocr/aboutocr.html) (last visited Sept. 22, 2014).

28. *See Disability Rights Section*, U.S. DEP’T OF JUSTICE, [www.justice.gov/crt/about/drs/](http://www.justice.gov/crt/about/drs/) (last visited Sept. 22, 2014).

29. 34 C.F.R. § 104.12; 42 U.S.C. § 12182(b)(2)(A).

30. *See* 34 C.F.R. § 104.3(j)(2)(iv).

lege or university does not respond to disruptive conduct, the student's misconduct may escalate into self-harm or harm to others. Whether or not the student has a documented psychiatric disability, the college or university may charge students engaging in misconduct with a violation of the college or university's code of student conduct and impose discipline.<sup>31</sup>

Both laws require colleges and universities to provide "reasonable accommodations" or adjustments to academic requirements, student policies, and other requirements to "qualified students"<sup>32</sup> unless the student poses a "direct threat." If a direct threat is established, then the college or university is not required to accommodate the student unless the accommodation would remove the threat.<sup>33</sup> Colleges and universities in the past have responded to students who threatened self-harm by determining that the student was a "direct threat."<sup>34</sup> In some cases, colleges and universities place the student on an involuntary medical leave.<sup>35</sup>

Until 2010, OCR had interpreted the term "direct threat" to encompass threats of self-harm or threats to others.<sup>36</sup> In 2010, the U.S. Department of Justice issued new final rules implementing Title II of the ADA which narrowed the definition of "direct threat" to apply only to an individual who is a threat to others, but not to himself or herself.<sup>37</sup> OCR adopted this new definition of direct threat, limiting the ability of colleges and universities to remove a student from campus who was a danger to himself or herself (such as a suicidal student), but who was not a danger to others.<sup>38</sup>

OCR guidelines require that the college engage in an "interactive process" with the student to determine whether accommodations or adjustments would mitigate the effect of the student's disability.<sup>39</sup> This is partic-

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31. See generally GARY PAVELA, *THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS* (1985).

32. A "qualified" student is one who can meet the academic and technical standards of the institution or academic program. 34 C.F.R. § 104.3(l)(3) (2012).

33. See, e.g., 28 C.F.R. § 35.139(a).

34. See, e.g., Letter to Woodbury Univ., OCR Docket No. 09-00-2079 (June 29, 2001), available at [http://webcache.googleusercontent.com/search?q=cache:pGs1Cvkkf50J:www.nacua.org/lrs/nacua\\_resources\\_page/studentsuicide/p\\_woodbury.doc+&cd=1&hl=en&ct=clnk&gl=us&client=safari](http://webcache.googleusercontent.com/search?q=cache:pGs1Cvkkf50J:www.nacua.org/lrs/nacua_resources_page/studentsuicide/p_woodbury.doc+&cd=1&hl=en&ct=clnk&gl=us&client=safari) [hereinafter Woodbury Letter].

35. See, e.g., Bluffton Letter, *supra* note 19. See also Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Analysis*, 34 J.C. & U.L. 349 (2008) (discussing "mandatory withdrawals" and the ADA and Section 504 standards applicable to such leaves).

36. See Paul Lennon & Elizabeth Sanghavi, *New Title II Regulations Regarding Direct Threat: Do They Change How Colleges and Universities Should Treat Students Who are Threats to Themselves?* 10 NACUA Notes no.1 (Nov. 1, 2011).

37. 75 Fed. Reg. 56180 (Sept. 15, 2010).

38. See Lennon & Sanghavi, *supra* note 36 (providing a discussion of the revised "direct threat" regulations and guidelines for revising involuntary withdrawal policies).

39. See, e.g., Woodbury Letter, *supra* note 34. The institution must establish a process for "an individualized consideration of the student's disability particularly with

ularly important in cases involving students with psychiatric disorders who have engaged in, or threatened to engage in, self-harm. Any college or university that fails to use the interactive process may be deemed by OCR to have violated disability discrimination laws.<sup>40</sup>

### III. THE “INTERACTIVE PROCESS” AND “DIRECT THREAT”

When students engage in risky or disruptive behavior, several issues arise that have both legal and policy implications. Is the student’s behavior a risk to the student, or to other students or the campus community? Can the student function, or is some intervention needed? Can the college or university require a student to obtain counseling or other mental health services as a condition of remaining enrolled? Can the college or university force a student to leave campus until the student can provide documentation that he or she can return and function in a manner that is not disruptive or potentially dangerous to the student or others?

College and university administrators dealing with students whose behavior is disruptive or risky have, in some cases, placed the student on an involuntary medical leave without providing due process.<sup>41</sup> In other cases, administrators have placed students on involuntary medical leave without going through the “interactive process” required by Section 504 and the ADA.

A college or university must engage in a two-step process in order to comply with OCR’s requirements with respect to dealing with disruptive or at-risk students. First, the college or university must determine whether the student poses a direct threat to others. According to the ADA Title II regulations (which OCR also follows with respect to enforcing Section 504),

In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.<sup>42</sup>

Next, the college or university must engage in an interactive process

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regard to sanctions, penalties, and adverse restrictions.” *Id.* at 3.

40. See, e.g., Letter to Guilford Univ., OCR Docket No.11-02-2003 (Mar. 6, 2003) [hereinafter Guilford Letter]; Bluffton Letter, *supra* note 19.

41. See, e.g., Guilford Letter, *supra* note 40.

42. 28 C.F.R. § 35.139(b) (2014). The definition of “direct threat” in the ADA Title III regulations is virtually identical. 28 C.F.R. § 36.208(b) (2014).

with the student.<sup>43</sup> This is a form of due process that allows the student to respond to the details of the direct threat analysis, to provide additional information (including medical information), and to correct any incorrect information. At this point, a range of options is typically discussed, including treatment interventions or modifications, academic or living adjustments, and voluntary or involuntary leaves of absence.

Since the release of the revised ADA Title II in 2010, there have been several OCR letter rulings on the issue of direct threat and involuntary leaves of absence. In a case brought under Section 504 against Spring Arbor University, a student claimed that the university had discriminated against him on the basis of a psychiatric disability by imposing a number of conditions prior to allowing him to return from a voluntary leave of absence.<sup>44</sup> After transferring from another college, the student told an admissions representative about his bipolar disorder and requested the need for certain academic accommodations.<sup>45</sup> The admissions representative did not refer the student to the disability services office nor inform anyone at the university that the student had requested accommodations.<sup>46</sup> The student did not seek accommodations when he arrived on campus and engaged in behavior that fellow students found disruptive and troubling.<sup>47</sup> In October of his first semester at the university, he was told to meet with the vice president for student development.<sup>48</sup> The vice president attempted to persuade the student to sign a behavioral contract.<sup>49</sup> The student became upset and requested a voluntary withdrawal on medical grounds.<sup>50</sup> At the time of his withdrawal, his academic performance was satisfactory and he had not been charged with any violations of the university's code of conduct.<sup>51</sup>

In May the student requested permission to be readmitted and requested off-campus housing as an accommodation.<sup>52</sup> The university required the student to submit a "Section 504 plan" and letter from his therapist as a condition of his return.<sup>53</sup> In addition to the plan and letter, the university required the student to obtain permission from several departments (such as

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43. Woodbury Letter, *supra* note 34.

44. Letter to Spring Arbor University, OCR Docket No. 15-10-2098 (Dec. 16, 2010), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=WgmoOxFqnto%3D&tabid=313> [hereinafter Spring Arbor Letter].

45. *Id.* at 2.

46. *Id.*

47. *Id.* at 4.

48. *Id.* at 2.

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 3.

52. *Id.*

53. *Id.*



the registrar, financial aid, and the business office) to re-enroll.<sup>54</sup>

OCR found that the university had discriminated against the student by requiring the “504 plan” as a condition of readmission.<sup>55</sup> The actions taken prior to his withdrawal, including the attempt to have him sign a “behavioral contract,” were evidence that the university regarded the student as disabled.<sup>56</sup> Furthermore, there was no evidence that the university had a routine practice of requiring evidence from other students who had withdrawn, whether for medical or other reasons, that they were able to function at the time they applied for readmission.<sup>57</sup> Because the student was in good academic and disciplinary standing at the time of his withdrawal, OCR determined that he was a “qualified person with a disability” and thus protected by Section 504.<sup>58</sup>

OCR also found that the university had not taken the steps to determine whether or not the student was a direct threat to others.<sup>59</sup> At the time the student withdrew, he was seen as disruptive, but not as dangerous to others.<sup>60</sup> At the time of his application for readmission, no one at the University had had sufficient interaction with the student to determine whether he posed a direct threat at that time.<sup>61</sup> OCR stated:

Under OCR policy, 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 others . . . . Following a proper determination that a student poses a direct threat, an educational institution may require as a precondition to a student’s return that the student provide documentation that the student has taken steps to reduce the previous threat (e.g., followed a treatment plan, submitted periodic reports, or granted permission for the institution to talk to the treating professional). However, educational institutions cannot require that a student’s disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications.<sup>62</sup>

The next OCR opinion following revision of the Title II regulations involved Purchase College, a member of the State University of New York

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54. *Id.*

55. *Id.* at 11.

56. *Id.* at 10.

57. *Id.* at 11.

58. *Id.*

59. *Id.* at 11.

60. *Id.* at 12.

61. *Id.*

62. *Id.* at 9.

System.<sup>63</sup> The student complainant, who filed a claim under Section 504, asserted that the college had forced him to take an involuntary medical leave after he experienced a “psychiatric crisis” (a suicide attempt) and was hospitalized.<sup>64</sup> The student, who had been diagnosed with bipolar disorder, claimed that the College did not engage in a direct threat analysis, did not permit him to submit documentation from a therapist unaffiliated with the College, and did not provide him with a method to submit a formal grievance concerning the imposition of involuntary leave.<sup>65</sup>

At the time of the complaint, Purchase’s policy for students who wish to return to classes after undergoing emergency medical treatment required any such student to be assessed by either the counseling center (for psychiatric emergencies) or the student health center (for physical trauma or illness), so that any need for accommodations or academic adjustments could be assessed.<sup>66</sup> OCR found that policy to be non-discriminatory, since it treated all health emergencies equally and did not apply only to students with disabilities.<sup>67</sup>

According to OCR’s findings, when a counselor evaluated the student, the student provided information from his private therapist and submitted to a lengthy assessment interview with the counselor.<sup>68</sup> After reviewing the documentation from the counselor and the student’s own therapist, the associate dean concluded that the stressors that had prompted his suicide attempt (marijuana use and a difficult relationship with a girlfriend) had gone unabated, and determined that the student was not ready to return to his classes.<sup>69</sup> The associate dean also agreed with the counselor that the student required additional intensive therapy and outpatient treatment.<sup>70</sup> The associate dean notified the student that he could choose a voluntary leave or she would place him on an involuntary leave; she also informed him of his right to appeal that determination.<sup>71</sup> The student chose the voluntary leave, and did not appeal the determination that the leave was necessary.<sup>72</sup>

Because the college considered information from the student’s own therapist—although it chose to rely on its own therapist’s differing judgment—OCR determined that the college engaged in the required interactive process and followed its policy consistently with respect to disabled and non-

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63. Letter to Purchase College, OCR Docket No. 02-10-2181, available at [http://ncherp.org/documents/OCRLetter\\_PurchaseCollege.pdf](http://ncherp.org/documents/OCRLetter_PurchaseCollege.pdf).

64. *Id.* at 2.

65. *Id.*

66. *Id.* at 2–3 (discussing “Policy 3”).

67. *Id.* at 3.

68. *Id.* at 3.

69. *Id.* at 4.

70. *Id.* at 4 n.7.

71. *Id.*

72. *Id.*

disabled students.<sup>73</sup> OCR did, however, require the college to revise its Section 504 policy to provide contact information for its Section 504 compliance officer.<sup>74</sup>

A third OCR decision following the revision of the Title II regulations involved Saint Joseph's College in Brooklyn, New York.<sup>75</sup> In this case, a female student—who had not disclosed a disability nor requested accommodations—grabbed a male student, insisted they were married, and would not release him.<sup>76</sup> The student was suspended from campus, but was allowed to return several days later when her therapist provided medical clearance for her to return.<sup>77</sup> A second similar incident occurred a week later, and the student was hospitalized.<sup>78</sup> The following day, the college's Behavioral Assessment Committee ("BAC") convened without the student present and recommended that the student be suspended on an emergency basis.<sup>79</sup> The college suspended the student without providing the student with an opportunity to meet with the BAC or the associate dean who made the suspension decision.<sup>80</sup> Although the college had a procedure for providing due process in emergency suspension situations, this process was not used because of the BAC recommendation.<sup>81</sup> OCR determined that the college had used the BAC process rather than its emergency suspension process in two earlier incidents, both of which involved student misconduct that administrators suspected were related to mental health issues.<sup>82</sup>

The student claimed that the college regarded her as disabled, and OCR agreed.<sup>83</sup> There was no written policy explaining the BAC process, nor was there an opportunity for the student to meet with the BAC to appeal its recommendation or the decision of the associate dean.<sup>84</sup> When the student asked to return to the college at the beginning of the following semester, the BAC met again, and again determined that she should not return.<sup>85</sup> According to OCR, the student was again not permitted to meet with the BAC

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73. *Id.* at 5.

74. *Id.*

75. Letter to St. Joseph's College, OCR Docket No. 02-10-2171 (January 24, 2011), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=IV5EzSZQtDo%3D&tabid=313> [hereinafter St. Joseph's Letter].

76. *Id.* at 2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 3.

81. *Id.*

82. *Id.*

83. *Id.* at 5 ("Based on statements made by College staff during interviews and in documentation, OCR concluded that the College regarded the Student as a person with a disability.").

84. *Id.* at 3.

85. *Id.* at 4.

nor given the opportunity to present information or witnesses on her own behalf; rather, the BAC merely informed the student that she had violated the code of student conduct.<sup>86</sup> The BAC did not advise the student of any right to appeal the recommendation or her right to have a hearing before the student judicial committee, which included student members.<sup>87</sup> Two months later, the student's father contacted the college and requested the college to readmit his daughter.<sup>88</sup> The father also informed school officials that the student was taking her medication and was stable.<sup>89</sup> However, the BAC recommended against her return because it had no "new evidence" concerning her mental health.<sup>90</sup> In a letter to the student, the BAC advised her of its decision but did not include any information concerning her right to appeal the decision or submit additional information on her mental health status.<sup>91</sup>

OCR faulted the college for not advising the student of her due process rights under its emergency suspension policy and for using the BAC only for students with suspected mental disorders.<sup>92</sup> OCR stated that both the emergency suspension policy and the BAC process must be available to disabled and nondisabled students alike in order for the college to be in compliance with Section 504.<sup>93</sup> It also required that the BAC option provide due process protections equal to those of the emergency suspension policy.<sup>94</sup>

In a fourth case, OCR found that Fordham University had engaged in discriminatory behavior in violation of Section 504.<sup>95</sup> There, the university required a student returning from a medical withdrawal to provide documentation from a psychiatrist and a psychologist that he was fit to return, as well as meet with the university's psychologist and agree to a "statement of expectations."<sup>96</sup> OCR noted that Fordham students returning from a medical withdrawal related to psychiatric disorders were required to provide this documentation regardless of the nature and severity of their disorders.<sup>97</sup> In contrast, for students seeking readmission after a medical withdrawal for

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 4–5.

91. *Id.* at 5.

92. *Id.*

93. *Id.*

94. *Id.*

95. Letter to Fordham University, OCR Docket No. 02-10-2013 (Nov. 17, 2011), available at [http://www.nacua.org/documents/FordhamU\\_OCRLetter\\_November2011.pdf](http://www.nacua.org/documents/FordhamU_OCRLetter_November2011.pdf).

96. *Id.* at 2.

97. *Id.*

reasons unrelated to a psychiatric disorder, the University made a case-by-case determination of what type of documentation was required. In this case, OCR found that the university regarded the student as disabled but did not make an individualized determination as to what type of documentation was necessary.<sup>98</sup> Such behavior had the effect of subjecting the student to discrimination on the basis of disability.<sup>99</sup>

A fifth matter involving a recent OCR investigation—but one that did not result in a formal finding—involved Western Michigan University.<sup>100</sup> There, a student had attempted suicide and was placed on an involuntary medical leave.<sup>101</sup> He filed a complaint with OCR for disability discrimination, and, before OCR had completed an investigation, the University voluntarily resolved the complaint.<sup>102</sup> One provision of the resolution agreement allowed the student to return to campus.<sup>103</sup> Another item in the resolution agreement committed Western Michigan to revise its code of student conduct and other policy documents to provide that the same procedures will be used to deal with misconduct by students with psychiatric disorders as those that are used for all students unless the student at issue poses a direct threat to others.<sup>104</sup> Less than a month after his victory from OCR, the student committed suicide.<sup>105</sup>

In a sixth instance, OCR investigated a complaint against Princeton University, and ultimately concluded that the university's decision to require a student who had attempted suicide four times to take an involuntary leave and to be evaluated by its campus disability services office before being granted permission to re-enroll, did not violate Section 504.<sup>106</sup> According to the student's complaint, the university required the student to withdraw from his classes on a voluntary basis and restricted his access to the campus after the student was hospitalized for a fourth suicide attempt.<sup>107</sup> In response, the student requested a part-time academic schedule, off-campus

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98. *Id.* at 4.

99. *Id.*

100. Christina Cantero, *Western Michigan University Revises Policy Related to Students Showing Suicidal Tendencies*, MLIVE.COM, Dec. 29, 2013, [www.mlive.com/news/kalamazoo/index.ssf/2013/12/western\\_michigan\\_university\\_re\\_15.html](http://www.mlive.com/news/kalamazoo/index.ssf/2013/12/western_michigan_university_re_15.html).

101. *Id.*

102. *Id.*

103. Allie Grasgreen, *Who Protects the Suicidal?* INSIDE HIGHER ED, January 2, 2014, <http://www.insidehighered.com/news/2014/01/02/suicide-ocr-again-tells-colleges-not-remove-self-threatening-students>.

104. *Id.*

105. *Id.*

106. OCR Letter to President Shirley Tilghman, OCR Docket No. 02-12-2155 (Jan. 18, 2013), <http://www.nacua.org/securedocuments/resourcepagedocs/distressedSuicidalSs/PrincetonOcrletter.pdf/> (on file with author).

107. *Id.* at 2.

housing, and a one-semester leave of absence.<sup>108</sup>

The student acknowledged that he had not registered with the Office of Disability Services because he needed no accommodations for his bipolar disorder and depression, nor had he requested the accommodations he claimed to have requested. Following his release from the hospital, two members of the university's counseling and psychological services office evaluated the student.<sup>109</sup> The counselors determined that the student posed a very high suicide risk because he refused to engage in recommended in-patient treatment, continued to engage in drug and alcohol abuse, and did not appear to understand the seriousness of his disorder.<sup>110</sup> OCR determined that the university's policy with respect to students whose health or well-being is affected was applied to both disabled and nondisabled students alike, and thus found no discrimination against the student with respect to the leave of absence or the refusal to reinstate him on the basis of his current unstable condition.<sup>111</sup>

Following Princeton's refusal to allow the student to re-enroll, the vice president informed the student of his right to appeal the determination. The vice president met with the student and reviewed all documentation regarding his suicide attempt and the evaluations performed by the campus counseling department and the student's own therapist.<sup>112</sup> OCR determined that this individualized assessment complied with its regulations.<sup>113</sup>

The final issue involved the university's requirement that the student provide documentation that he could manage his behavior and the stress of being re-enrolled before being given permission to return. The form that the student was required to fill out and the required review by the disability services office was used for any student who withdrew from the University "in all situations similar to the complainant's circumstances."<sup>114</sup> Having found in the Princeton's favor on all of the student's allegations, OCR dismissed the complaint.<sup>115</sup>

These cases provide examples of the approach taken by the OCR to student claims of disability discrimination when the students have engaged in disruptive or risky behavior. Although this small number of cases is not sufficient to support sweeping pronouncements about institutional compliance with Section 504, the outcomes of these cases suggest strategies that colleges and universities can use to respond appropriately to students who

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108. *Id.* at 5.

109. Discrimination Complaint, Princeton Univ., U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (July 6, 2012).

110. *Id.* See also OCR Letter to President Shirley Tilghman, *supra* note 106.

111. OCR Letter to President Shirley Tilghman, *supra* note 106.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

engage in such behavior and avoid potential findings of disability discrimination. The next section discusses some of these strategies.

#### IV. OBSERVATIONS AND SUGGESTIONS FOR PRACTICE

OCR rulings and the mental health literature suggest several strategies for dealing with students whose behavior is disruptive or risky. It is important to understand that each student must be assessed individually, taking into consideration not only possible mental health issues, but substance abuse issues as well.<sup>116</sup> It is also important to recognize that, in some situations, a quick response is necessary to protect the student or others from harm, and college and university officials may have to provide due process and other protections after removing the student from campus (for a hospitalization, for example). Nevertheless, the following suggestions may be helpful for colleges and universities to consider.

1. Misconduct has many causes. Students who engage in disruptive or risky behavior may or may not have a psychiatric disorder. Staff should, at least initially, deal with the behavior, not its cause. Students who have not disclosed a disability and who violate an institution's code of student conduct should be held responsible for their actions, and may be suspended or expelled for serious misconduct.<sup>117</sup> However, if the student discloses a disability and the behavior is linked to that disability, the student may be entitled to adjustments of the school's disciplinary process (but not its conduct rules).
2. Colleges and universities should review their policies for dealing with students whose behavior suggests that they may have a psychiatric disorder. One source of advice is the *Model Policy for Colleges and Universities* developed by the Jed Foundation, which focuses on depressed and suicidal students.<sup>118</sup>
3. Emergency withdrawal or leave policies should be applied equally to all students, whether or not they have a disability. If a student, or the institution, determines that the student cannot currently function in the campus setting, the process should be the same, regardless of whether or not the student's conduct is relat-

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116. See *supra* Part I, which notes that abusers of drugs and alcohol are far more likely to engage in violent or disruptive behavior than are individuals with a psychiatric disorder.

117. See generally PAVELA, *supra* note 31.

118. THE JED FOUNDATION, SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES (2007), available at <http://www.bazelon.org/pdf/SupportingStudents.pdf> [hereinafter SUPPORTING STUDENTS].

ed to a disability.<sup>119</sup> An individualized determination should be made for every student<sup>120</sup> and every student should be given the opportunity to meet with and provide information to a behavioral assessment team, if one is in place, or whoever decides whether or not the student may remain on campus.<sup>121</sup>

4. Re-enrollment or readmission policies should apply uniformly to all students on campus who are separated from school because of misconduct or health emergencies.<sup>122</sup>

5. If a behavioral assessment team is used to make determinations as to whether a student with a disability has violated the code of conduct, the student should have the same due process rights as are provided for students who use the campus judicial process.<sup>123</sup>

6. Colleges and universities should make individualized determinations as to whether a particular student is a direct threat to others. If a student is not a direct threat to others but is engaging in conduct that is either potentially harmful to himself or herself or disruptive, college or university officials should determine whether the student is “qualified” under the institution’s academic and technical standards.<sup>124</sup> This includes the student’s ability to abide by the code of conduct. Included in this individualized assessment should be a discussion of potential reasonable accommodations or adjustments that could enable the student to remain on campus. For example, if the trigger for problems seems to be the residence hall form of housing, an accommodation could include off-campus housing.<sup>125</sup>

7. In conducting an individualized assessment, school officials

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119. See OCR Letter to President Shirley Tilghman, *supra*, note 106.

120. The Jed Foundation’s *Framework for Developing Institutional Protocols*, *supra* note 15, has helpful suggestions for creating an individualized approach to emergency medical leaves.

121. *Supporting Students*, *supra*, note 118.

122. OCR Letter to President Shirley Tilghman, *supra* note 106.

123. St. Joseph’s Letter, *supra* note 75.

124. *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996). Specific examples of academic and technical standards include: 1) intellectual, conceptual, and integrative skills, such as the ability to read, conduct research, and synthesize information; 2) communication skills, such as the ability to communicate orally and in writing with others; 3) behavioral and social attributes, including the ability to interact civilly with others; 4) attendance and participation, including the ability to regularly and punctually attend class; and 5) time management, including the ability to meet deadlines. DARBY DICKERSON, NASPA LEADERSHIP EXCHANGE, MANDATORY WITHDRAWAL AND LEAVE OF ABSENCE REVISITED 28-29 (2007) (cited by THE JED FOUNDATION, STUDENT MENTAL HEALTH AND THE LAW: A RESOURCE FOR INSTITUTIONS OF HIGHER EDUCATION (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156124)).

125. Lennon & Sanghavi, *supra* note 36.



should allow the assessed student to provide documentation from his or her therapist or other health care provider, as well as consider that documentation when determining the course of action.<sup>126</sup> This should be done both before the student takes a leave of absence and while school officials evaluate whether the student may return to campus.

8. Train staff members who meet with transfer students or admitted students who disclose a disability to refer any such students to the college or university's disability services office. Staff should also be trained to contact that office to ensure that the student has followed through.<sup>127</sup>

9. Train faculty and staff on how to respond to disruptive or threatening students in a classroom, office, or student activities setting.<sup>128</sup>

10. If a college or university has no threat assessment committee (behavioral assessment team, etc.), it should create one and train its members.<sup>129</sup>

The above suggestions are simply a beginning, and may not address all of the issues posed by students who engage in disruptive or risky behavior. However, these suggestions should help colleges and universities respond lawfully and productively to emergency situations, and they will help colleges and universities avoid legal liability while striving to meet the needs of these students.

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126. Letter to Georgetown Univ., OCR Docket No. 11-11-2044 (Oct. 13, 2011), available at [http://www.nacua.org/documents/GeorgetownU\\_OCRLetter\\_October2011.pdf](http://www.nacua.org/documents/GeorgetownU_OCRLetter_October2011.pdf).

127. Spring Arbor Letter, *supra* note 44.

128. Stuart, *supra*, note 12. See, e.g., CORNELL UNIV., RECOGNIZING AND RESPONDING TO STUDENTS IN DISTRESS: A FACULTY HANDBOOK (2011), available at [http://dos.cornell.edu/dos/cms/upload/244734\\_StuHndBk\\_allPgs\\_LoRes.pdf](http://dos.cornell.edu/dos/cms/upload/244734_StuHndBk_allPgs_LoRes.pdf).

129. For a good source of training materials for threat assessment teams, see U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, CAMPUS THREAT ASSESSMENT CASE STUDIES (2012), available at [http://www.nacua.org/sec\\_uredocuments/resourcepagedocs/DistressedSuicidalSs/CampusThreatAssessmentCaseStudies.pdf](http://www.nacua.org/sec_uredocuments/resourcepagedocs/DistressedSuicidalSs/CampusThreatAssessmentCaseStudies.pdf).

