Education/Constitutional Law

Designated Duty: A University's Obligation to Students with Mental Health Issues

College is the start of an exciting new chapter—one of self-discovery, independence and growth. However, for many college students, this transition is accompanied by considerable stress, anxiety, depression and other mental health challenges.

A fall 2018 survey from the American College Health Association found that over 60 percent of college students "felt overwhelming anxiety" and over 40 percent of students "felt so depressed that it was difficult to function" at least once in the last 12 months. Further, 45 percent of students reported experiencing a "more than average" level of stress within the last 12 months.[1]

With today's college students experiencing mental health concerns at an alarming rate, colleges and universities are challenged with responding in a manner that balances student needs, autonomy, privacy, campus safety and compliance with disability laws.

The *University of California* Case

Recent case law makes clear that, when faced with circumstances involving students exhibiting mental distress, institutions can and should take action, including dismissal, to protect students and the campus community. For example, in *Regents of University of California v. Superior Court of Los Angeles County*,[2] a student was experiencing auditory hallucinations. Specifically, the student believed other students in the classroom and dormitory were criticizing him and calling him names.

School administrators learned of the student's delusions and attempted to provide mental health treatment over the course of many months, but the student ultimately refused to work with the school's counseling center, refused to take his medication, and refused voluntary hospitalization. Without warning or provocation, during a chemistry lab one morning, the student stabbed Katherine Rosen, a fellow student, in the chest and neck with a kitchen knife. She was taken to the hospital with life-threatening injuries, but ultimately survived. The student pled not guilty by reason of insanity to the criminal charges.

Rosen sued UCLA and several of its employees, alleging they failed to protect her from the student's foreseeable violent acts. The lower court held that UCLA had no duty to protect Rosen and the case was ultimately appealed.

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The Supreme Court of California, in overruling the Court of Appeals, held that universities owe a duty to protect or warn its students from foreseeable acts of violence by other students in the classroom or during curricular activities. It recognized, however, that the law generally does not place a duty to protect others from the conduct of third parties unless there is a special relationship between the parties. The court found that "[t]he college-student relationship thus fits within the paradigm of a special relationship."[3]

The *MIT* Case

In *Nguyen v Massachusetts Institute of Technology*,[4] Han Duy Nguyen, a graduate student at MIT, suffered from mental health issues and was receiving treatment from psychiatrists outside of the university. Nguyen informed a psychiatrist that he had previously attempted suicide twice, numerous years prior to joining MIT, but did not feel immediately suicidal. Despite poor academic performance and meetings with the Ph.D. program coordinator and MIT's mental health and counseling service, Nguyen continually refused accommodations.

On June 2, 2009, Nguyen jumped off the roof of a MIT building to his death. Nguyen did so after a phone call with his professor who had "read him the riot act" about an email message he sent regarding a summer research assistant position.[5] Nguyen's father sued MIT for the wrongful death of his son, alleging MIT and the individual defendants were negligent in not preventing his son's suicide.

The Superior Court of Massachusetts found that MIT had no duty to prevent Nguyen's suicide and dismissed the case. The Supreme Court of Massachusetts, on appeal, affirmed the ruling. In its decision, however, the court found that colleges and universities have an obligation, under certain circumstances, to prevent suicides.

The court noted that, in certain circumstances, there is a special relationship, such as one between a university and its student, that may result in a corresponding duty to take reasonable action to prevent suicide. Accordingly, when an institution has "actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation" or "a student's stated plans or intentions to commit suicide," the institution has a duty to take reasonable measures under the circumstances to protect the student.

Reasonable measures include initiating a suicide prevention protocol if the university has developed such a protocol.[6] In the absence of such a protocol, reasonable measures requires the institution (including

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non-clinicians) to contact the appropriate officials at the university empowered to assist the student in obtaining medical care or, if the student refuses such care, to notify the student's emergency contact.[7]

Importantly, "[t]he duty is not triggered merely by a university's knowledge of ideations without any stated plans or intentions to act on thoughts. The duty hinges of foreseeability."[8]

Ferris State Case

In *Mbawe v Ferris State University*,[9] a student in FSU's pharmacy program began to experience various paranoias, including that people were spying on him, following him and injecting him with foreign substances while he slept. When FSU learned about these issues, it began to extensively interact with the student, recommended various counselors, and it also recommended that he withdraw from the program while he sought help. The student rejected the recommendations of the institution, even as his delusions increased, and he continued to struggle academically.

Eventually, the student was involuntarily committed to a psychiatric hospital. Subsequently, FSU involuntarily withdrew the student from the pharmacy program. The student sued, alleging that FSU unlawfully discriminated against him in violation of Title II of the Americans with Disabilities Act (the ADA) and § 504 of the Rehabilitation Act of 1973 (§ 504) and deprived him of adequate 14th Amendment procedural due process.

In granting FSU's motion for summary judgment, the court held that the student's ADA and § 504 claims failed because he was not "otherwise qualified" to continue his studies in the pharmacy program, with or without a reasonable accommodation. Moreover, because Mbawe's dismissal was academic rather than disciplinary, FSU did not deprive Mbawe of adequate procedural due process by failing to afford him a formal hearing prior to withdrawing him from the program."[10] Additionally, the court found that the FSU officials were careful and deliberate in their decision making, and Mbawe was given "particularized professional attention by faculty members at all levels in effort to protect patients while helping [Mbawe] improve his chances of success."[11]

ADA and § 504

As indicated in *Mbawe*, while colleges and universities may have a duty to act to protect students exhibiting mental distress or the campus community, they must carefully consider how to proceed in a manner that does not run afoul of antidiscrimination laws. Two federal laws, the ADA and § 504, prohibit discrimination on the basis of disability, and provide a framework for decision making in complex cases.

Title II of the ADA (Title II) applies to public colleges and universities and provides, "…no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[12] Title III of the ADA (Title III) extends such protections to those attending private colleges and universities.[13]

Section 504 prohibits discrimination on the basis of disability by any institution that receives federal funding: "No otherwise qualified individual . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency."[14]

Under both the ADA and § 504, "disability" means, inter alia, a "physical or mental impairment that substantially limits one or more major life activities of such individual."[15]

Office of Civil Rights Guidance

For many years, it appeared well settled, based on guidance from the U.S. Department of Education's Office for Civil Rights (OCR), one federal agency charged with enforcing Title II and § 504 on college campuses, that, despite these prohibitions, institutions could involuntarily withdraw a disabled student who posed a "direct threat" to him or herself or to others without violating the ADA or § 504.

During this time, neither Title II nor Section 504, or their corresponding regulations, expressly addressed situations involving a "direct threat." Title III addressed circumstances in which an individual posed a "direct threat to the health or safety of others."[16]

Still, based on OCR guidance, institutions believed that "direct threat" included threats both to others and to self, and that, when faced with situations involving students who threatened their own health or safety, institutions could take action, including dismissing the student from the institution, to protect the student and campus community without violating antidiscrimination laws.[17]

In 2011, the U.S. Department of Justice enacted a new Title II regulation that called this practice into question. The regulation, effective March 15, 2011, provides that public institutions are not required to permit an individual to participate "when that individual poses a *direct threat to the health or safety of others*." (emphasis added).[18]

The regulation does not address situations wherein individuals pose a direct threat to themselves. The omission of language relating to a threat of self-harm left higher education administrators and attorneys questioning institutional policies for involuntary withdrawal as they relate to students reasonably believed to pose a risk to their own health or safety.

OCR Parameters Since 2011

Since 2011, OCR has declined to issue formal guidance on circumstances involving a direct threat to self. However, a review of OCR resolution letters and agreements issued since 2011 provides the parameters within which institutions should consider such circumstances.

In assessing complaints of discrimination in this context, OCR employs a "different treatment" analysis—that is, whether "similarly-situated, non-disabled students were treated differently."[19] OCR will determine whether the institution acted pursuant to a neutral policy that applied universally to all students and did not provide different policies for students with different disabilities. OCR is careful to avoid the phrase "threat to self," given the absence of such language from Title II.[20]

In its review of a complaint filed in 2018 against Rutgers University that alleged discrimination based on a student's involuntary withdrawal because of mental health issues,[21] OCR evaluated Rutgers' safety intervention policy and found that this policy was neutral on its face in application to all students, and the acts performed by the administrators were individualized to the complainant.

In a January 2013 resolution agreement with Princeton University,[22] OCR noted that the institution followed its policy in handling a student suffering from mental issues that the University determined may result in self harm. Specifically, Princeton made an individualized determination regarding the student, and its written policy included meetings, individual review, consultation with medical experts, and provided a right to the student to appeal the decision.

Thus, despite the absence of "threat to self" language from the regulations, OCR has, on several occasions, affirmed institutions' ability to monitor and, if necessary, act in such circumstances to protect students, provided certain guidelines and best practices are met.

In a 2018 briefing hosted by the National Association of College and University Attorneys, then-acting Assistant Secretary for Civil Rights Candice Jackson confirmed this process when she advised institutions to abandon the "'direct threat to self' terminology and framework," and recommended that institutions "focus on generally applicable health and safety requirements and conduct individualized assessment of a student's risk of self-harm."[23]

Real life situations involving student safety are complex and factually driven. If, after conducting an individualized assessment, an institution reasonably believes that a student poses a risk of harm to self or to others, the institution should take appropriate action to protect the student and the campus community. In doing so, the institution will minimize exposure and ensure that students receive the support they need to successfully complete their college journeys.

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1. *Fall 2018 Reference Group Executive Summary*, American College Health Association, (2018), available at https://bit.ly/2IJHVmd.
2. 413 P.3d 656 (Cal. 2018).
3. *Id.* at 668.
4. 96 N.E.3d 128 (2018).
5. *Id.* at 138.
6. *Id.* at 145.
7. *Id.*
8. *Id.* at 144.
9. 751 F. App'x 832, 840 (6th Cir 2018).
10. *Id.*
11. *Id.* at 842.
12. 42 USC § 12132. A "public entity" is defined as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; …." 42 USC 12131.
13. 42 USC § 12182(a); 28 CFR § 36.301(a). Undergraduate or postgraduate private schools or other places of education are considered "a place of public accommodation." 42 USC § 12181(7)(J).
14. 29 USC § 794(a). Subsection (b) provides that the term "program or activity" "means all of the operations of – a college, university, or other postsecondary institution, or a public system of higher education." 29 USC § 794(b)(2)(A). *See also* 34 CFR § 104.4(a).
15. 42 USC § 12102(1)(A). A "major life activity" includes, but is not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 USC § 12102(2)(A).
16. 42 USC § 12182.
17. OCR Letter to Woodbury University, Complaint Number 09-00-2079 (June 29, 2001); OCR Letter to Spring Arbor University, Complaint No. 15-10-2098, 15 (Dec. 16, 2010).
18. 28 CFR § 35.139(a); *see also* 28 CFR § 36.208(a).
19. OCR Letter to Spring Arbor University, Complaint No. 15-10-2098, 15 (Dec. 16, 2010).
20. NACUA Briefing with Candice Jackson, available at https://bit.ly/2XRzcoi.
21. OCR Letter to Rutgers University, Complaint No. 02-18-2006 (Apr. 27, 2018).
22. OCR Letter to Princeton University, Complaint No. 02-12-2155 (Jan. 18, 2013).
23. NACUA Briefing with Candice Jackson, available at https://bit.ly/2XRzcoi.