

Suicidal Students, BITs and the Direct Threat Standard

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THE TWELFTH NCHERM WHITEPAPER

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- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course*.
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 21st Century College*.
- Our 2005 topic was *The Typology of Campus Sexual Misconduct Complaints*.
- In 2006, the Whitepaper was entitled *Our Duty OF Care is a Duty TO Care*.
- The 2007 Whitepaper was entitled, *Some Kind of Hearing*.
- In 2008, NCHERM published *Risk Mitigation Through the NCHERM Behavioral Intervention and Threat Assessment (CUBIT) Model*.
- For 2009, NCHERM published *The NCHERM/NaBITA Threat Assessment Tool*.
- In 2010, our 10th Anniversary Whitepaper was entitled *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*.
- In 2011, NCHERM published *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence*.

For 2012, the topic of the NCHERM Whitepaper is *Suicidal Students, BITs and the Direct Threat Standard*.

SUICIDAL STUDENTS, BITs AND THE DIRECT THREAT STANDARD

INTRODUCTION

NCHERM Whitepapers rarely take on topics that are as complex and arcane as this one, but this topic was our unanimous choice this year for its significance and potential to fundamentally reshape campus policies and practices with respect to students who engage in self-harm and suicidal behaviors. Federal disability law governs how a public or private college may act to suspend, place on leave or withdraw a student on the basis of a condition of disability, and that law is in flux.

Protection under disability law comes either from the traditional process of disclosure and qualification as an individual with a disability or when campus officials *perceive* an individual to be a person with a disability and respond to them as such, as when they might act to separate from the institution a suicidal student who may be a danger to themselves or to the campus community. But, why would an institution want to do so?

Campus administrators tend to take one of two approaches to the question of what is in the best interest of a suicidal student. Some believe that supporting that student within the campus allows for the greatest stability for that student by providing access to resources and serving as a safety net, especially when the student's family or home life is unstable. The other viewpoint campus administrators may take is to acknowledge that campuses make poor mental health facilities. They know that a suicidal student can be an unfair burden to their friends and classmates who often feel an obligation to support. They feel that a suicidal student may be better served by hospitalization, a dedicated facility and/or family involvement. And, they worry that a student's suicidal act on campus may result in collateral harm to others, suicide clusters and even liability to the institution. As a result, "Do they stay or should they go" is a frequent topic of debate for campus behavioral intervention and threat assessment teams.

While there are legitimate questions of philosophy, we must explore the legal parameters bounding those philosophical choices. Legally, it is well-settled that while being suicidal is not a protected disability, the attendant conditions that make a person suicidal, such as depression, addiction or a mental illness are almost always seen as qualifying disabilities and therefore are protected by the courts. Various self-harmful actions less severe than suicide may be protected as well if they result from a condition that meets the disability standard of impairing major life activities. As a result of changes in 2011 to federal disability law regulations, it is now unlawful to involuntarily separate a student on the basis of self-harmful or suicidal behaviors.

THE LAW

While the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 are separate statutes, they are subject to a joint set of regulations. Direct threat issues arise under Section 504, as they result from questions of discrimination against individuals with disabilities rather than issues of reasonable accommodation, which more typically fall under the ADA. At issue are Titles II and III of the ADA regulations, and a little history will be helpful here. Title II proffers regulations applicable to public institutions, and Title III applies to private institutions. Until March of 2011, Titles II and III used different language to address direct

threats, with Title II using the broader “harm to self or others” terminology, while Title III has always applied the direct threat standard only to “harm to others.”

The Title II regulations were revised in September of 2010, with the revisions taking effect on March 15th, 2011. Direct threat in Title II is now defined such that "Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139." The change omits the word "self" that in the prior regulations said "self or others."¹ Today, then, it is discriminatory to apply the direct threat test to a situation that involves only harm to self. For many of us, this does not comport with our understanding of the law prior to these changes, and that must be explained.

Our understanding of how colleges and universities could legally separate a suicidal student derives from decisions by the U.S. Department of Education’s Office for Civil Rights (OCR), which enforces Section 504. At the AHEAD² conferences and in other fora, OCR shared with us its decisions involving Bluffton University, Guilford College, Marietta College and DeSales University, all of which stated or implied that a private college **could** apply the direct threat standard to self-harmful behaviors, and explained how. This is where our reality becomes twisted, because we essentially saw OCR applying language from Title II to harm-to-self cases under Section 504, where there was no harm-to-self language. OCR was implying that since Title II had harm-to-self language, it was fair to read Section 504 similarly. It should be noted that the Department of Justice had long sought to conform Title II’s language to Title III out of fear that campuses would abuse the broader language as a tool to kick suicidal students out pretextually, prematurely or presumptively. These four campus decision letters seemed to lay out the legal parameters, but ED’s OCR was in fact interpreting Section 504 in a way that DOJ ultimately has not supported.

Thus, we had a lack of coordination as to enforcement by the two OCRs, but ultimately control over the ADA regulations resides with the Department of Justice. When DOJ acted to revise Title II last year, it put the Department of Education’s OCR in the position of having to repudiate its long-standing interpretation of Section 504 as applying to self-harm. Both Titles II and III contain the same language now, but the narrowing this represents has provoked colleges and universities to reconsider what are appropriate and lawful practices when we are faced with students whose actions indicate self-harm and/or the risk of suicide. These changes are recent, and as such, we have little to guide us from ED’s OCR in terms of new interpretations and enforcement. This problem is exacerbated by a lack of communication between the two OCRs on this subject. Three OCR decisions give us what little guidance there is on the path forward, at least from the perspective of ED’s OCR, and we will discuss each of them with you now. Each of these OCR decisions is also posted in full on our website for your review, as we believe that only one of the three, the Spring Arbor decision, has been publicly disseminated, and they are all worth your time to read and digest.³

¹ http://www.ada.gov/regs2010/titleII_2010/titleII_2010_withbold.htm showing the revisions and http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf

² Association on Higher Education and Disability (www.ahead.org)

³ www.ncherm.org/legal_resources.html

THE SPRING ARBOR UNIVERSITY DECISION (December, 2010)

As noted above, the U.S. Department of Education's Office of Civil Rights (OCR) is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, which includes responding to complaints of discrimination based on disability under this law. Although the resolution of complaints against colleges and universities through the OCR does not create law or precedent as a court decision would, the analysis of facts, application of the relevant law and decisions of the OCR in resolving complaints is very instructive and provides insights and lessons for other institutions. A recent OCR decision involving Spring Arbor University contains important messages for us about "creating" protected disability status based on our actions, applying the direct threat test and placing requirements on the re-admission of a student.

The facts of this complaint involve a student enrolled at the university. At the time of his initial enrollment at the university he told an admissions representative that he had a disability (anxiety and depression). The student later reported that the admissions representative did not refer him to the school's Disability Services Office. The student did not independently seek accommodation from Disability Services, nor identify himself to Disability Services as an individual with a disability. The summer following the student's first term of enrollment, he experienced increased emotional symptoms and was diagnosed as bi-polar. At school, the student engaged in cutting behaviors, uncontrolled crying and persistently discussed his problems with other students. During this period of time, however, the student remained in good academic standing.

In the fall term following his diagnosis, as a result of his behavior on campus, the vice president and other university officials requested a meeting with the student. The student was told the purpose of the meeting was to discuss his success as a student. He was assured he was not in trouble and the meeting was not for disciplinary purposes. When he arrived at the meeting he was told that the university had received multiple complaints about him and therefore the university was requiring him to sign a behavior contract as a condition of remaining in school. The contract required him to engage in counseling, take all prescribed medications and to report to certain individuals if he was having a crisis. The student became very upset and stated his intent to withdraw from school immediately based on medical necessity.

The following spring, the student applied for re-admission to the university. He was informed that before he could return he was required to provide medical documentation, a release of medical treatment records, a student agreement form and other standard elements for re-admission. The university did not require 504 Plans or medical treatment documentation of other students seeking re-admission. In fact, the six-part readmission requirement presented to the student was not published by the university and even the university counsel was unaware of where the re-admission policy could be found, according to the OCR investigation. The student was denied re-admission and subsequently filed a complaint with the Office of Civil Rights based on disability discrimination under Section 504 of the Rehabilitation Act.

The OCR initially determined that although the student voluntarily withdrew from school, the institution's actions in presenting him with a behavior contract that had many elements related to mental health treatment actually resulted in the student being "regarded" as having a disability, and thus he was entitled to the protections afforded to an individual with a disability

under the law.⁴ Although the student never identified himself as having a disability with the university's Disability Services Office, the university demonstrated that they perceived the student to have a mental impairment as reflected in the elements in the behavior contract. Thus, the university, through its actions, established the disability status of the student.

The OCR further determined that the university then discriminated against the student, based on his disability, by imposing requirements on the student's re-admission that were not required of other students seeking re-admission to the university. The university argued that they were trying to ensure that the student could be successful upon re-admission. However, the student had never demonstrated that he couldn't be successful academically and, at the time of his voluntary withdrawal, he was in good academic standing and had never been disciplined. Thus, OCR determined that the university's reason was not a legitimate non-discriminatory one and was instead a pretext for disability discrimination.

The OCR stated that a university may remove a student with a disability or deny admission to that student if the university applied a "direct threat test"⁵ as set forth by the OCR. This test may be applied only when an individual poses a significant risk to the health and safety of others (*emphasis added*). The significant risk must represent a high probability of substantial harm and not just a slightly increased, speculative or remote risk. In this matter, the university stated that the school believed the student was a threat to himself, but not to others.

The OCR found the university to have violated the student's rights under Section 504 because the university, through its actions, established the student as a qualified individual with a disability by regarding him as such. Further, the university discriminated against him on the basis of his disability by requiring a substantial amount of documentation regarding his medical treatment and medical records as a condition of re-admission, which was not otherwise required of other students.

As a result, this is the first and only decision we are aware of in which OCR *acknowledged* a narrower direct threat standard than it had in its previous decisions. OCR only mentioned and did not *apply* that standard in this decision letter. It appears from the facts that it would have been inapplicable given that none of the student's documented behaviors indicated a potential for harm to others.

⁴ To determine whether an individual seeking admission has been subjected to disability based discrimination, the OCR will generally consider whether the individual is a qualified person with a disability and whether the individual was subjected to an adverse admission action based on the individual's disability.

⁵ The direct threat test involves making an individualized assessment that a preponderance of evidence indicates that an individual represents a high probability of substantial harm, based on a reasonable judgment that relies on current medical knowledge or objective non-medical evidence (if medical evidence is unavailable) to ascertain:

1. The nature, duration and severity of the risk;
2. The probability that the injury will actually occur; and
3. Whether reasonable modifications of policies, practices or procedures will sufficiently mitigate the risk.

THE MT. HOLYOKE COLLEGE DECISION (December, 2008)

The next decision by OCR that we will examine in this Whitepaper predates the others and the changes to the ADA regulations. This decision is included because it helps us to advance our understanding of the direct threat and alternative paths to address self-harm behaviors. In this OCR action, the complainant was the father of a female student who was required by Mt. Holyoke College (MHC) to take a medical leave for the Spring 2008 term. He averred that she was discriminated against on the basis of her disability. The OCR found that Mt. Holyoke had **not** discriminated against the female student.

The student had identified herself to MHC upon enrollment in 2006 as an individual with learning disabilities and unspecified psychiatric disabilities. Prior to college, she had engaged in cutting and suicidal ideation. She requested no accommodations on that basis. Later in 2006, she requested extended time for testing and to drop a course for medical reasons. She requested no additional accommodations in 2007. After the break up of a relationship in September of 2007, MHC became aware of self-harm ideation and threats of cutting by the student. MHC decided to have the student meet with the on-call counselor, to monitor the situation going forward and to recommend counseling (which the student declined). A cluster of notifications ensued (from residential life staff, faculty, the student's mother and fellow students) about her threats of cutting, her suicidal ideation and her general instability. At that time, the student informed college staff that she was cutting at least twice a day.

The Director of Residence Life and the Dean of Students spoke to the student's mother, and then to the student, with the goal of implementing a behavior contract. The contract was designed to modify the student's behavior with the clear implication that if she could or would not modify her behavior it would impact on her status at the college. Their goal was not to punish the student for her suicidal thoughts, but instead to mitigate the impact of her disruption on her hallmates and others who were becoming enmeshed in her difficulties. They sought to encourage her to turn instead to campus mental health and counseling resources when she needed support.

By November of 2007, the student's continued cutting and suicidal ideation came to light through a friend of the student, and it was clear the student was not complying with the behavior contract. She was given the choice of being immediately withdrawn for the remainder of the semester, or being able to complete the semester if she moved off campus, was living with and under the direct supervision of her parents and that she agreed to a voluntary withdrawal for the Spring of 2008. She chose the latter, but engaged in a series of appeals that resulted in no change to the institutional requirements, which culminated with her complaint to the OCR.

The OCR first examined whether the student was an individual with a disability, and found that she was. It next inquired as to whether she was subject to "differential treatment" on the basis of her disability, meaning that she was treated less favorably than similarly situated persons outside of the protected class of individuals with disabilities. If less favorable treatment is evidenced, the OCR will inquire as to whether there were legitimate (non-pretexual), non-discriminatory reasons for the less favorable treatment. Here, OCR found that the student was subject to less favorable treatment, because she was excluded from MHC's educational program. MHC protested that she had accepted their conditions and had agreed to voluntary

withdrawal. OCR's position was that she had no choice, and was forced to accept that outcome. Having to choose the lesser of two undesirable outcomes does not a voluntary choice make in the OCR's view.

Despite this evidence of less favorable treatment, the OCR concluded that the student was not excluded on the basis of her disability. It had evidence to show that she was subject to similar treatment and proceedings as were other students who engaged in disruptive behaviors, and that it was legitimate to conclude that she was disciplined not for cutting or suicidal gestures, but for ***the documented disruption those behaviors caused to the college community***. While OCR noted that the procedures applied to the student were not those described by college policies, she was subject to the same procedures applied to similarly situated students in the past. MHC was enforcing its behavior agreement with terms that were explicit within that agreement.

It would seem, then, that this decision points away from making a direct threat determination in self-harm cases and suggests a lawful path to disciplining a student's self-harmful conduct, as long as institutional action is not based on the disability-based behaviors themselves, or suggests a pretext for doing so. We elaborate further in the discussion section, below.

THE ST. JOSEPH'S COLLEGE (NY) DECISION (January, 2011)

This OCR decision was made in January of 2011, subsequent to the revisions of the ADA/504 regulations, but prior to them taking effect in March. A female student who was enrolled at St. Joseph's College (SJC) in Brooklyn, NY was suspended in November of 2009 until she was medically cleared after she grabbed and tried to kiss a male student, would not let go of him, insisted she was in love with him and that they were married and had to be forcibly removed by a security guard. She returned a week later with a letter from her psychiatrist. She repeated the first incident a week later, and was transported to the hospital by ambulance. During both instances, she appeared delusional⁶ and incoherent to witnesses and admitted she was not taking her medications.

The college's due process guidelines set forth a process for emergency suspensions that included significant procedural protections for the student. However, the college's BAC (their version of a BIT) met and placed the student on emergency suspension without notice to her or an opportunity to meet with any member of the BAC. The student wrote to the Dean of Students in January of 2010, seeking to return. It was determined by the BAC on the basis of the evidence it used to suspend her in December of 2009, that she was not fit to return. She was also informed at that time that the BAC had determined that she had violated the student code of conduct. No information about the procedures or appeals of that decision was included in the letter. Her father informed the college that she was taking her medication and was fit to return to school. The BAC denied the request, citing no new evidence to support the father's claim.

The OCR investigation found that SJC regarded the student as an individual with a disability, based on its knowledge of her psychiatric conditions at the time of her delusions, its decision to subject her to an unpublished BAC process rather than the traditional conduct process and its

⁶ This is not meant in any way to suggest a lack of desirability on the part of the object of her affections.

insistence on psychiatric clearance to return after the first incident. The OCR found further that SJC had subjected the student to differential treatment on the basis of that disability by diverting from the traditional conduct process that would have been used for similar behaviors by students who were not disabled, and that it had failed to provide the due process and additional procedural protections that the traditional process would have afforded.

The OCR and SJC then entered into a voluntary resolution agreement and continued monitoring plan to resolve the complaint. SJC agreed to:

- Offer the student a hearing with all due process rights afforded under its code of conduct;
- Not use its BAC as an alternate process for students with disabilities;
- Furnish a written BAC policy to OCR and publish it, offering due process commensurate with the conduct process and assuring OCR it will be used equally for students with disability as for those without;
- Submit documentation to OCR for all students subject to the BAC process for the period of one year going forward;
- Update policies and procedures and provide training to relevant administrators.

While there are no explicit direct threat implications to this decision, the absence of that discussion is informative. Did she pose a high probability of substantial harm to others? If not, was she in violation of the code of conduct? Perhaps, but how will SJC's actions not be seen as pretext now that it has repeatedly barred her from campus on the basis of her disability? While BITs can and should be useful tools in the management of students in crisis, their misuse as a tool to circumvent appropriate campus disciplinary procedures and/or to separate students indefinitely has the potential to cast BITs as heavy-handed, secretive and abusive of student rights. We'll address how to keep this from happening to other BITs in the section on BIT best practices, below.

IMPLICATIONS OF THE FOREGOING DISCUSSION FOR STUDENT CONDUCT PRACTICE

The implications of the *Spring Arbor* decision as it relates to student conduct are limited. This is primarily because a formal conduct proceeding was not initiated and there was never a disciplinary hearing held. It appears that all of the meetings with the student both during his enrollment and his attempts to reenroll were administrative meetings and/or follow-ups to those meetings that dealt with the conditions of return from a voluntary withdrawal. The implications to practices for behavioral intervention teams will be discussed in the next section of this Whitepaper.

The student conduct lesson from the *Mt. Holyoke* decision is a familiar one: "follow your procedures." Here, in contrast to *Spring Arbor*, the "behavioral contract" was, in fact, used as a sanctioning tool. Fortunately or unfortunately -- depending on your perspective -- *Mt. Holyoke* ratifies the use of the disciplinary system to sanction students on the basis of their behavior, even when that behavior is indicative of crisis. Many campuses backed away from that path years ago when OCR found our disciplinary actions to be pretextual, but it seems that a narrow, well-documented, progressive use of the discipline process to sanction a student for the disruptive effects of self-harm based behaviors may still be viable. That is true regardless of the disability status of the student and extends from minor disciplinary consequences to separating

that student from the campus community for an appropriate period of time. Heed, though, the lesson of *Spring Arbor* here as well. If we do separate a student for disruption, conditions of the sanction and conditions for return will be subject to the same differential treatment analysis by OCR. Thus, unless we impose similar conditions on all students who are placed on involuntary leave⁷, and perhaps on all students who request a voluntary leave, we will face difficulty in showing OCR that our conditions for return are not discriminatory.⁸

One additional concern raised by *Mt. Holyoke* would be whether student conduct administrators and/or student affairs administrators should continue to use “behavioral contracts” at all. Perhaps this is simply a semantic argument, but a “behavioral contract” is and should remain the purview of the mental health professional, if used at all. In *Mt. Holyoke*, the “behavioral contract” is really a “sanction in behavioral contract clothing.” Why it is not called a sanction is, in all likelihood, the result of wanting to be more caring in dealing with the student who is managing a mental health and/or stress issue. While one can certainly appreciate the delicate nature of dealing with students in crisis, the transparency of expectations via sanctions in the student conduct process is preferred to the quasi-treatment sounding option of the behavioral contract and the effort to effect voluntary compliance from what is in fact coerced action. We wind up not being so sensitive at all to the mental health/stress issue by forcing a choice that is no choice at all.

Again, recall that OCR assessed MHC’s actions by comparing them to MHC’s own history of actions in similar situations. Since MHC consistently sanctioned disruptive students, regardless of disability, it could overcome the differential treatment inquiry. But, circumventing the normal conduct channels to implement behavior contracts for self-harm cases meant that MHC and any other college applying this strategy would be running the risk of not subjecting individuals with disabilities to the same process as other disruptive students whose disruption did not arise from disability. And, in fact, MHC did not follow its prescribed channels, as noted by OCR. The student did not have a hearing on her violation of the behavior contract. She was not charged with failure to comply. While OCR cleared MHC, its decision letter also created a roadmap for suing a private college for breach of contract.

The *St. Joseph’s* decision brings to light an argument that even learned colleagues can disagree upon: the Behavioral Intervention Team’s use of emergency and interim suspensions. On one hand, BITs could be empowered to utilize emergency suspension when the student’s behavior rises to the level -- objectively measured -- of severe or extreme risk. This would certainly be the purview of the threat assessment team and/or a crisis response team. On the other hand, those who believe BITs should remain out of the student conduct business would leave the interim suspension to the student conduct officer. Certainly the Mount Holyoke decision lends itself to the latter opinion. The *St. Joseph’s* decision seems to indicate that the OCR has no stance on this other than to hold that if an institution is going to allow its BIT to engage in student conduct actions such as emergency or interim suspension, it must include that authority in its policies and procedures with protections for a student with a disability (or one regarded as having a

⁷ And that speaks to the need to clarify that they are not actually withdrawn, but on leave. We have to be careful about imposing readmission v. permitting reinstatement, given the fact that many campuses do not subject similarly situated students who are not disabled to the same conditions.

⁸ See also OCR Letter to SUNY-- Purchase College, January 2011, posted at http://www.ncherm.org/legal_resources.html

disability) similar to those that are afforded to students who are not disabled. Failure to do so will not only indicate a clear contractual violation, but could be (apparently) viewed as a pretext for discrimination.

While the OCR does not directly address the terms of the behavioral contract as “sanctions,” it warrants mentioning them – at least in part – as impacting the student conduct field. In the “behavioral contracts”⁹ that members of the BAC gave the SJC student, there are several sections that have been used at times by other student conduct officers on other campuses with the intention of being helpful. No matter how well intentioned they may be, they are still inappropriate. For example, it is never wise to require a student to “abide by all recommendations of the counselor” as part of the sanctioning process. This creates for the conduct officer the dilemma of attempting to interpret the relationship between the client and the counselor or the subsequent course of treatment without being qualified to do so. Even when the conduct officer has training or licensure in the counseling area, he/she is not serving the institution in that role in this case. In *Spring Arbor*, it also appears that the “sanctions” in this case required the student to sign a sort of “blanket waiver” allowing for continued conversation between his therapist and the student affairs professionals at the institution. This is never acceptable for a conduct officer to include in any sanction.

Additionally, sanctions should never include statements such as “taking all prescribed medications and behavior modifications.” This is an unenforceable sanction unless the student conduct officer intends to check daily -- or at worse multiple times daily -- on the student to ensure he/she is taking the medication. Provisions like this just beg for a jury to determine whether the college is liable when the student fails to take the medications and the college fails to enforce its requirement. All that is really needed is a statement that, “further behaviors that disrupt the institution or interfere with the mission of the institution may result in additional disciplinary action up to and including suspension or expulsion.” If this language sounds remarkably like the language institutions typically use for probation or deferred suspension, it is no accident.

Perhaps the most important lesson for conduct officers from the *Spring Arbor* letter lies in the repeated references in the letter to the fact that the student had never been through any disciplinary process for any reason. As such, the conduct process should never be stayed in its entirety when disruptive behavior has occurred, even if the BIT is “doing its thing.” It is certainly acceptable for one process to help *inform* the other, but not for one to prevent the other from proceeding at all, though the timing can and should often be staggered.

BEST PRACTICES FOR BEHAVIORAL INTERVENTION -- SO WHERE ARE WE NOW?

⁹ We hesitate to call these contracts “signed,” as it seems some measure of duress or least the appearance of duress existed at the time of the signing – the OCR notes this duress directly in *Mt. Holyoke*.

We will attempt to bring these three decisions and the 2011 regulatory changes together in this section by discussing what seem to be the BIT best practices on this subject at present, and the implications for behavioral intervention teams and the “counseling” of students and their families in these difficult situations.

In the *Spring Arbor* decision, it appears that the campus BAC (their BIT) “blindsided” the student by calling him into a meeting with the Vice President, the Assistant Vice President and the Resident Director to “discuss his success as a student.” Behavioral Intervention Teams across the country have developed a variety of ways to reach out to students who are in crisis or in the early stages of crisis. Some of these teams utilize case managers, some utilize their chair, some utilize team members and some utilize members of the community with whom the student has a connection. *Spring Arbor* reminds us that it would never be a good practice to summon a student and then begin that meeting by informing the student of “complaints” made against him. That seems more typical of a conduct hearing than a caring intervention, and even in conduct hearings we provide advanced notice. We suggest, instead, that the team member or designee should talk to the student initially about the concern that the institution has for his/her success, about how worried they are about how the student is doing and give the student objective feedback on how his or her behaviors have been impacting the community. To begin the meeting with the discussion about “complaints,” to have the meeting with multiple parties present and/or to have this meeting in an office across a conference table would certainly convey an adversarial tone and give the reasonable student a belief that they are in a hearing of some sort.

In the course of this meeting, if the student asks about the possibility of taking a leave and the consequences of such a leave, we should take pains to couch the conversation with the student (and with the family) in terms of options for voluntary leave without even the threat of an involuntary withdrawal or allusions that could cast a voluntary decision as appearing to be under duress. We need to frame it as a conversation between the student affairs professional and a student discussing their actual success, bearing in mind that the “voluntariness” of the withdrawal is even more questionable when the idea is initiated (especially if done so immediately) by those who called the meeting.

Further, in *Spring Arbor*, it appears that in the initial meeting the student was never given any criteria that he would have to meet for reenrollment. We need to be sure that our policies and procedures describe a clear process for reinstatement (or readmission, though we do not recommend that path as the default), that any conditions are imposed on all students who take or are placed on leave or that we do not place conditions on return when a leave is a voluntary decision.

It may also be clear to many of you in reading about these decisions that the OCR itself is issuing apparently contradictory decisions from different offices, a frequent gripe about the OCR and any attempt to try to divine meaning for other campuses from decision letters pertaining to only one campus. The most potent example is the disparity between the Boston Office’s decision in *Mt. Holyoke* and the New York Office’s decision in *St. Joseph’s*. In both complaints, an alternate, unpublished process was invented to deal with at-risk student behaviors. In the *St. Joseph’s* decision, SJC violated Section 504 by its failure to follow its established policies and by subjecting an individual with a disability to differential treatment on the basis of disability. In the *Mt. Holyoke* decision, a similarly unpublished process was used that differed from the

process outlined in the handbook, but because it was applied to other students as well, and because there were no similar cases at MHC for OCR to compare to, the OCR did not make a conclusion of differential treatment with respect to MHC.

CONCLUSION

Harm to Others. Procedures for involuntary or emergency suspension or leave can still be applied to a determination that a student is a direct threat of harm *to others*, whether those procedures exist within a BIT or reside in another mechanism outside the conduct process. There are still good reasons to keep that determination outside of a code of conduct, when it is based on behaviors directly related to disability, to avoid the pretextual discrimination argument that may come from charging an individual with a disability with threatening behavior under our code of conduct.¹⁰

Harm to Self. This issue is the bigger challenge to administrators because of the significant implications of these decisions and the changes to the regulations. Does the government intend that students who have attempted suicide and/or are engaging in suicidal ideation at a very high level are to be automatically retained despite the fact that the institution lacks the capacity for treatment? Does the government intend that students who disrupt the environment by the very nature of their suicidal acts “get a pass” and are not subject to the conduct system? Does this mean that student affairs professionals cannot have a conversation with a student who is struggling and “counsel them out” when it’s appropriate?

There is no one bright line answer to these questions. But there are answers. Unfortunately, these new regulations may return us to a day prior to the creation of formalized Behavioral Intervention Teams when the code of conduct policies (e.g., “harm to self”) were the sole source for dealing with and/or managing students who attempted suicide and thus are, by definition, struggling at the highest level. That is to say, after *Spring Arbor* and *Mt. Holyoke*, students who are suicidal and attempt suicide, who (almost always) disrupt the community in the course of that attempt, may still be held accountable for their disruptive behavior under the code of conduct. We have other tools as well. We still have the latitude to subject a student to assessment by a mental health professional, based on serious, legitimate concerns of harm to self or harm to others and to enforce that mandate with failure to comply charges under our code of conduct. When the assessment is on the basis of self-harm, an interim suspension or requirement of medical clearance to be reinstated is now a questionable action, raising again the specter of differential treatment discussed in the decisions above. This also illuminates the fact that we cannot use the assessment to determine whether the student is a direct threat, because the direct threat test cannot be applied to self-harm situations.

One must assume that the DOJ does not wish for institutions of higher education to become the harbor for students who are suicidal or who are ideating at the highest levels, all in the name of ensuring that the few campuses which might abuse the direct threat authority as applied to harm to self won’t go overboard. DOJ may not have considered that by foreclosing viable

¹⁰ Not to mention the fact that few colleges have direct threat test-based standards incorporated into student codes of conduct. Nor should we, lest we again wander into differential treatment territory by having two threat standards in our codes, one of which is disproportionately applied to individuals with disabilities.

options for campus action in the face of intractable mental health issues, it may have provoked exactly the kind of abuse it was seeking to avoid. Colleges and universities are neither designed for nor prepared to be mental health treatment facilities. If this does become the end result of the new regulations, colleges and universities will find themselves damned if they do and damned if they don't: potentially liable for the foreseeability of harm to students on one hand and in violation of Section 504 on the other. Very few campuses were abusing the direct threat authority under the old paradigm, but if presented now with the no-win choice of violating disability law or risking the safety of students, many administrators will act in the name of safety and let the lawyers untangle the details.

BITs and Differential Treatment. BITs on campuses all over the country have developed alternative procedures to the student conduct process. There is value in doing so. Those alternative processes need to be well-elaborated, defining when they will apply, when they will not, when they supersede the conduct process and when they operate concurrently with it. There should not be significant disparity between the procedural protections under the code of conduct and those offered by BITs. Furthermore, campuses will need to be able to document that those procedures developed for the BIT are applied equally to students with disabilities as well as to those who are not disabled, which should not be as difficult as it sounds if the process is truly about **behavioral** intervention.

Best practices will also include the training of Behavioral Intervention Team members, especially the chair and/or the case manager, to a) avoid any appearance of duress and/or a pseudo-conduct hearing, b) avoid any lack of transparency in expectations for all students who may choose to voluntarily withdraw and c) be extremely knowledgeable about how to run the BIT and student conduct process simultaneously to the advantage of the student and protection of the institution and its mission. At the very least, the *Mt. Holyoke* letter reminds BITs to allow conduct systems to proceed as necessary to ensure campus safety and minimum disruption.

Another consideration lies in the policies that might be developed. There does not appear to be any question that the involuntary withdrawal policy still has viability for those who present a clear danger to others. It is only in the instances where the involuntary withdrawal policy (or the "voluntary" withdrawal policy that does not appear to be very "voluntary") is utilized in cases where the student is a danger of harm to self that discrimination comes into question. Perhaps we need a shift in the current medical withdrawal policies that most institutions already have to outline a clear set of criteria that includes documentation from physical and mental health professionals in all cases (everything from an illness to a car wreck to the passing of relative to a suicide attempt) so that it might pass muster under the guidance offered in these decisions. There are a few highly selective, elite institutions that have an open leave policy where a student can leave for any reason at any time, but when doing so, they are all subject to appropriate documentation prior to readmission. For obvious reasons, this type of policy would be untenable for the vast majority of institutions, especially community colleges, but re-entry requirements for all would remove the differential treatment concern.

We would be remiss to leave out a very important philosophical quandary that student and academic affairs professionals encounter in many of these cases. This quandary involves the lack of an "academic do-over" for students who are not performing optimally as the result of stress that is beyond the "normal" stress experienced by their peers and which manifests in severe self injurious behaviors. In other words, when a student is allowed to persist despite the fact that

they are not at their best, they are stuck with the grades they get. These grades will have a definitive impact on them as they attempt to get jobs, transfer, get into professional school, or graduate school. Too often, we neglect to have this “optimal performance” conversation with the student, and instead focus strictly on their behavior. We have the authority to make it easy for them to take a truly voluntary leave, get the help they need and get it back together. We can address issues related to grades, exams, finances, leases and other ramifications of a mid-semester leave. We are certainly not advocating for the “undoing” of transcripts and/or grades once they are assigned, but instead suggest the need for the candid, transparent conversation to occur prior to persistence or withdrawal.

A Behavioral Intervention Team representative should meet with the student who is exhibiting behaviors which have been objectively assessed and openly discuss not only the risks (and not just the disciplinary risks), but the academic and financial consequences of electing to remain in school. Thus, the student who is assessed at a “low risk” will have the same conversation -- albeit possibly with a different person -- as the student who is at a “high risk.” But this conversation is not a simple one, nor should it be left to the untrained. There is a nuance to this, an art, a skill, which can and must be learned. Perhaps, if we master this, we can keep the OCR and the lawsuits at bay.

NEED MORE INFORMATION? HAVE QUESTIONS?

NCHERM AND NaBITA will be offering a co-sponsored webinar with the authors of this Whitepaper. “Changes to the ADA/Section 504 Direct Threat Standard” will be presented on Monday, February 13th, 2012 from noon to 1:30pm, ET. Can’t attend on the 13th? Buy the archive and watch it as a streaming download whenever and how often you want.

Register for this webinar at: <http://www.nabita.org/events.html>

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