Students Who Are at Risk of Harming Themselves or Others: Legal Parameters and Some Practical Advice

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REHABILITATION ACT

• 29 U.S.C.A. section 794 – “No otherwise qualified individual with a disability 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 or by the United States Postal Service.”

The Rehabilitation Act bars entities which receive federal funding from excluding an individual from programs or educational opportunities solely because the individual suffers from a disability.
DIRECT THREAT

Direct Threat is defined as:

- a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

NEW GUIDANCE REGARDING HARM TO SELF

• Revisions to Title II regulations define “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of polices, practices or procedures or by the provision of auxiliary aids or services.” 25 CFR 35.104

• NOTE: absence of risk “to self.”

• Look to observable conduct that may violate codes of conduct or safety.
RUTGERS POLICY OF INVOLUNTARY WITHDRAWAL

Applicable Standards:

• Poses a significant risk to the health or safety of self or others;

• Substantially impedes the lawful activities of other members of the campus community, or the educational processes or proper activities or functions of the university or its personnel

If either of the above, the student may be withdrawn immediately with an appeal within 48 hours of the decision to withdraw, or involuntarily withdrawn after a process which involves, generally, an evaluation by a medical professional, and a more elaborate due process proceeding.
What Does the Office of Civil Rights Require Us to Consider When Taking Action Regarding a Student Who May Pose a Risk?

- is there a **high probability** of substantial harm (not just a slightly increased, speculative, or remote risk);
- have you made an **individualized and objective** assessment of the student’s ability to safely participate in the college’s program;
- have you obtained **reasonable medical judgment** relying on the most current medical knowledge or best available objective (non-medical) evidence; and
- have you determined, as best you can, the **nature, duration and severity of the risk**, the **probability that the potentially threatening injury will actually occur**, and whether **reasonable modifications of policies, practices, or procedures** will sufficiently mitigate the risk?
SPECIAL RELATIONSHIP

- A “special relationship” is a legal doctrine which basically provides that when one reasonably expects another to protect one from foreseeable harm, the failure to exercise reasonable care may be seen as negligence
• Kleinknecht v. Gettysburg College, 980 F.2d 1360 (3rd Cir. 1993) - Student athlete with no known medical history of heart problems was recruited by school to play lacrosse. During practice, he suffered a heart attack and died.

• Schieszler v. Ferrum College, 236 F. Supp. 2d 602 (W.D. Virginia 2002) – student hung himself in his dormitory. Resident assistant and dean of students knew about the student’s previous attempt at suicide and asked him to sign a contract barring self-harm. Court found that the school could potentially be found to have a special relationship with the student.
• **Shin v. Massachusetts Inst. Of Technology**, 19 Mass. 570 (Mass Super. 2005) – While previous law clearly stated that schools “do not owe others a duty to take action to rescue or protect them from conditions we have not created,” *Cremins v. Clancy*, 415 Mass. 289, 296 (1993), administrators had a special relationship with a student.

• **Bash v. Clark University**, 2006 WL 4114297 (Mass. Super. 2006) – student died of heroin overdoses. Academic probation advisor and Deans of students knew that student had once previously used heroin. Parents sued. Student’s fatal overdoses was not reasonable foreseeable.
The school required that students in dormitories must not pose an imminent or potential danger to self or others. Students who do pose such a risk were required to take a leave of absence. As student was hospitalized based on two treating physicians determination that she was at risk of committing suicide. Based on this hospitalization and student’s medical history, the school determined that the student was a substantial risk to herself. Rather than place her on a leave of absence, the school allowed her to continue in school as long as she lived in supervised housing. When the student asked to be allowed to move back into unsupervised housing, the school required that she, like all other students, provide medical information to the school. When the student refused to turn over medical information, the school denied her request to join unsupervised housing and the student filed a complaint with OCR.

OCR Determination:
The school did not violate the Rehabilitation Act by denying the student’s request to join unsupervised housing.
The administration heard rumors that student had attempted suicide 3 months before school started and that she had killed a cat. Students reported that student threatened to kill herself or others. In a student government meeting, student was disruptive and was reported to have said that "I could just kill myself or someone else" or "I will just kill someone if I don't find" answer to a funding question. It was also reported that she publicly declared herself "insane." Student was brought to Dean who told her to go home for a few days. Thereafter, the student was informed that her disruptive behavior violated the school’s conduct code, and that she would be suspended. After hearing, the student was suspended until she could present a psychological evaluation stating that she was not a threat to others.

OCR Determination:

Codes of conduct maybe used with respect to students with disabilities. The disability should not play a role in the disciplinary process except where a requested and reasonable accommodation was not granted or mitigating factors maybe taken into account in the ordinary course. The process of conducting a hearing on a conduct violation did not allow for an individualized assessment of the student’s threat to health and safety. This process violated the Rehabilitation Act.
Woodbury University 2001

Student self-injured arm over Thanksgiving break in dorm and reported the event to the university psychologist. She also gave a hand-written note to a university official stating that 6 months earlier she had to be physically stopped from killing herself.

Student was excluded from winter break housing. Spring housing was conditioned on: the student entering into a no-suicide, no-harm contract; the student’s agreement to sign a release for broad access to medical records; and, the student signing a release for university psychologist to speak to outside treatment provider. In addition, if the student was not in treatment, she would be required to submit to a Suicide Risk Assessment from an outside treatment provider. However, the school’s demand was revised. The school asked that the student provide a letter one week after the start of spring semester from a health professional stating whether treatment was recommended. The student submitted the letter as requested and was readmitted to housing.

OCR Determination:

The school’s initial request was too broad and not individualized. The student disclosed that she cut herself during the break because she was alone; therefore, it was reasonable to think that she was a direct threat to herself during breaks, but not during the semester. The revised request - the student submit a letter from a health professional noting whether treatment was recommended - was reasonable and limited.
Guilford College 2003

Student disclosed on admissions form that she suffered from depression, anxiety and had been in in-patient and out-patient treatment.

Student also notified school that she was independent from her parents.

Student cut herself and was brought to the hospital by another student. Student cut herself again, but was not hospitalized. The school medically withdrew the student and called grandparent/legal guardian. The night that she was withdrawn, she cut herself again and required stitches. She was hospitalized involuntarily for 2 days. The University filled out a voluntary withdrawal form to withdraw the student but never showed it to her. The school did not provide the student the opportunity to appeal.

OCR Determination:

The school's actions were in violation of the Rehabilitation Act in that procedures were inadequate. Disabilities accommodation forms did not invite requests for accommodations based on emotional or psychological disabilities. School did not consider accommodations. No involuntary withdrawal process.
Regent University 2003

MBA student disclosed bipolar disorder on application but requested no accommodations and did not submit documentation. Over 6 years, student registered four times but never completed a semester. The student was aggressive and threatening to staff. She threatened physical harm, demonstrated disproportionate responses, tried to circumvent ordinary school processes, said that he was in a “spiritual war with the university,” said he was a “warrior for god” and was “at liberty to take heads and stick them on poles.” He was verbally abusive and belligerent with staff. When student attempted to enroll again, 7 years after initial enrollment, the school required that the student provide a letter from a doctor saying that the student could satisfy the requirements of the graduate program and could opine as to whether there were credit limits that would be appropriate.

OCR Determination:

The university’s request for documentation and request for input from treatment provider were reasonable based on direct threat towards health and safety of others. The university demonstrated that it was attempting to negotiate accommodations.
Gonzaga University 2003

Law student withdrew because of mental health concerns. Returned to school the next semester. The following semester, the student made harassing and threatening phone calls to university faculty and students. The University suspended the student on an interim basis because of this behavior. The student made threatening phone calls to staff and family during hospitalization and after. Student requested re-enrollment.

University denied student’s request to return based on conduct/direct threat but allowed that the student's request could be reconsidered at a later date. However, she would first have to consider demonstrate that she can satisfy university standards.

OCR Determination:

The school’s actions were based on the student’s threatening behavior and not in discrimination based on her disability.
Bluffton University 2004

First year student cut herself and overdosed on pills in spring semester. She was hospitalized for one week with bipolar disorder. Hospital clinician recommended that student return to school following hospitalization

Three days after attempt, the school involuntarily withdrew student. The school said that she could return after being evaluated. Student submitted a letter from her counselor saying that the student was stable and able to return to school. The school did not rescind decision.

OCR Determination:

Student was not provided due process - no notice, no hearing, no grievance procedure.

School had removed student because of an unsubstantiated fear based on stereotype that the student would attempt suicide again

School did not consider accommodations
Marietta College 2005

At parent’s request, dean spoke with freshman student’s psychologist who explained that student was suicidal but would give no notice of attempt. Psychologist noted that student needed weekly therapy sessions.

Student became non-compliant with medication and non-compliant with recommended treatment plan

Prior to coming to school, student had attempted suicide 3 times

School involuntarily withdrew student when parents rejected a voluntary withdrawal. School refunded all monies paid

OCR Determination:

Violation of Rehabilitation Act Section 504 because school did not engage in individual assessment - did not determine: nature, duration and severity of risk, probability that risk will actually occur or whether or not medications could mitigate the risk. Also, student was offered no right of appeal.
DeSales University 2005

Student noted depression on enrollment form, sought counseling a few times, visited Health Center several times for minor ailments and sought counseling a few times. Student posted suicide notes on dorm room door and a sign that said "Once Alive & Depressed Have A Voice." Staff observed that the student had cut himself. Staff complained that the student was over-using university resources.

Student was removed from housing for a portion of fall semester pending evaluation by doctor. Doctor recommended but did not require student to engage in counseling. Student was allowed to return to dorm after engaging in three therapy sessions. After return, the student drew on blackboard during final exam and requested a tranquilizer dart from Health Center to use against ER staff.

Student was denied housing during the spring semester.

OCR Determination:

While the fall withdrawal was appropriate, the withdrawal of the spring semester was not in compliance with 504 because the school did not engage in an individualized assessment of the student's mental health - the school did not talk with doctors after the fall event, did not invoke discipline, did not have a written involuntary withdrawal policy, did not limit his use of university resources.
PRACTICAL ADVICE

• Provide due process
  • For immediate threats the process can be abbreviated but must be followed by broader notice and opportunity to be heard
  • The process should provide for a reasonably speedy appeal
  • The student should receive recitation of facts supporting decision to take action
• Get an evaluation from a medical professional who can advise you about the nature, severity and duration of the threat
• Consider in a conscious way what accommodations, if any, the institution could offer
• Consult with others - faculty members, academic deans, residence life administrators, police and, as appropriate, students and family
• Consider return to school (when the student can demonstrate abatement of threat)
• Try to assemble a team rather than having a single decision maker
• 34 C.F.R. section 104.44 regarding academic adjustments:

• A school “shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”
HYPOTHETICAL ONE

September - student calls police claiming that he had an altercation with another student and was cut on his face. The police think the cut was self-inflicted. The student is evaluated and denies self-harm. He sees a psychologist at the school who notes that the student is hypertensive, has kidney disease, gout, has ADHD, is taking Lexipro and has some paranoid thinking. The student's room assignment is changed three times in one semester.

November - Campus police report to the Dean of Students that they received a report regarding a student who was driving a car at a very high speed. He side-swiped a number of cars, shredded the tires on the car and ultimately crashed and totaled his car. The student was found to have a prescription for Xanax in the car with him. The prescription was filled two days before the accident but the bottle had 15 pills missing. He doesn't remember anything. He admitted taking 3 times the normal amount of Xanax. Parents were notified but reluctant to come to school. They wanted him to be evaluated. The police did not see him as homicidal or suicidal.

The psychologist says that he is chronically at risk rather than at risk of imminent harm. The physician thinks behavior might be related to renal insufficiency (drug related).

He was arrested for the car accident
April 2010- Psychologist says that transfer student was in an intensive outpatient program in the Fall for suicidal ideation and eating disorder. Estranged from mother who is psychologically sick. Student was physically, psychologically and emotionally abused by mother. Mother stops financial support of student. Hospitalized again during spring semester because she took overdose of sleeping pills. She is socially isolated at school and cuts herself.

May 2010 – Very motivated to stay in school. Hospital will not take her back unless she has support from family, which mom will not give. Student refused treatment. School involuntarily withdrew student who then agreed to treatment so as to stay in school. Psychologist sees her as very high risk. She has attempted suicide several times. She performs exceptionally well academically.

June 2010 - Student has entered a treatment program and is doing well.

July 2010 - Student attended program and wants to reenter residence hall. She researches suicide on Internet. Cuts herself.

August– Student is doing well but her eating disorder is blossoming.

November 2010 - Hospital wants her back but she has no transportation. No cutting, no suicidal ideation, depressed but not as severe. She missed a lot of classes but she catches up.

December 2010 - Eating disorder, needs more treatment. Concern about how she will eat during winter break
A student in a Nursing program has complained to a Dean that someone has taken her Internet identity and is sending odd and inappropriate messages to others under the student’s identity. At the same time, the student is receiving harassing emails. For example, she receives emails from an unidentifiable sender that suggests she is cold and heartless because she will not talk with the sender or enter into a relationship with him. Others who are receiving messages from what appears to be this same sender also complain to the Dean that they are concerned because the sender is saying things that suggest the sender might be suicidal and homicidal. One student who believes he knows who the sender is starts doing some research. He finds clues that the sender is another student in the Nursing program. The researcher also shows the Dean an email in which the sender says that he will commit suicide by taking insulin. The Dean knows that many students in the Nursing program have access to medication.
Dining services at your school calls the Dean of Students to complain that a student is stealing food from the dining hall. Dining says that she has been caught a number of times. She is very, very thin and very much of a loner. Upon inquiry, the Dean finds out that the student has been barred from sports by the track team coach because she is so thin and apparently unhealthy and because she has very bad relationships with other team members. She is argumentative and surly. The coach has also noted that the student has cut her arms numerous times.