

# BALANCING ACCESS AND SAFETY FOR GRADUATE STUDENTS WITH MENTAL HEALTH ISSUES

A COMMISSIONED PAPER FOR THE CGS-JED GRADUATE  
STUDENT MENTAL HEALTH AND WELLBEING REPORT

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## II. Introduction

Higher education has seen a marked increase in students experiencing serious mental health challenges over the last two decades. The increase was first documented at the undergraduate level, by the American College Health Association and others,<sup>1</sup> and naturally that increase next became apparent in graduate and professional programs across the country.<sup>2</sup> Understanding the legal framework of non-discrimination for addressing behavioral concerns, providing accommodations, as well as being familiar with legal requirements to respect student privacy, is critical to designing policies and practices to best support all of our students at higher education institutions. This paper will primarily focus on the institutional obligation not to discriminate against individuals with disabilities, as administrators and faculty work with students who have mental health issues, while providing some suggestions for additional resources for other legal issues.

Universities must operate within a set of legal standards and requirements that are themselves shifting and evolving as colleges, students and their families re-define and re-establish their respective roles. In general, the relationship between students<sup>3</sup> and universities is viewed as a “contract,” whereby a university provides education in exchange for tuition payments. Courts generally try to understand what each party promised to provide and what they reasonably expected to get in return by looking at the documents provided around enrollment and matriculation.<sup>4</sup> But contract law is not the only legal context at the university; universities also owe duties – to act non-negligently – to students in certain situations (to prevent them from a known harm, for example). And, of course, universities are prohibited from discriminating against students on the basis of any protected characteristic, such as race, sex, or disability. Disability discrimination is likely to be the most applicable legal analysis in many situations where there are concerns about mental health, therefore this paper is chiefly concerned with analysis and interpretation of the

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1 The Freshman Survey (TFS) run by the Cooperative Institutional Research Program (CIRP) has found a steady decline in first-year students’ mental health through its annual survey administered since 1985. Saltzenberg, Ellen Bara, “The Mental and Physical Well-Being of Incoming Freshmen: Three Decades of Research,” *Higher Ed Today*, Sept. 6, 2018, (<https://www.higheredtoday.org/2018/09/06/mental-physical-well-incoming-freshmen-three-decades-research/> last retrieved June 5, 2020)

2 Teresa M Evans, Lindsay Bira, Jazmin Beltran Gastelum, L. Todd Weiss & Nathan L Vanderford, “Evidence for a Mental Health Crisis in Graduate Education,” *NATURE BIOTECHNOLOGY*, MAR. 2018 ([HTTPS://WWW.NATURE.COM/ARTICLES/NBT.4089.EPDE](https://www.nature.com/articles/NBT.4089.EPDE), LAST RETRIEVED JUNE 5, 2020)

3 While many graduate students may serve in some employment or similar role during their course of study, as teaching assistant, research assistant, and other roles, their education is the primary relationship. Issues related to employment are beyond the scope of this paper, which focuses on non-discrimination based on disability.

4 Under contract law, students may bring claims based on statements made in institutional application or admissions materials, as well as statements made in handbooks or codes of conduct. In general, one significant protection is that contractual obligations must only be “substantially” performed. Perfect performance is not usually required, giving both sides some leeway and room to argue that their actions were “substantial performance.” Contract claims by students are therefore somewhat less common (although the rash of tuition refund lawsuits in response to COVID-19 is the exception).

federal obligations to ensure non-discrimination on the basis of disability.<sup>5</sup>

## II. Non-Discrimination Obligations

### a. The Rehabilitation Act and the Americans with Disabilities Act

Higher education institutions were first federally regulated with respect to disabilities in 1973, through the requirements of Section 504 of the Rehabilitation Act, which prohibited discrimination on the basis of disability at institutions who received federal financial assistance.<sup>6</sup> In general, the early legal cases focused on whether an individual was qualified and what accommodations would be appropriate in a particular case.<sup>7</sup>

The Americans with Disabilities Act (ADA), passed in 1990, broadened protections for individuals with disabilities, with its three major sections prohibiting discrimination against qualified individuals with a disability by employers, public entities, including states and local governmental entities, and places of public accommodation, such as transportation providers, hotels, restaurants, etc. Public higher education institutions (with respect to their students) are regulated by Title II of the ADA, while private institutions are regulated as places of public accommodation.<sup>8</sup> Moreover, the significant overhaul of federal legislation now known as the Individuals with Disabilities in Education Act (IDEA Act) in 1990 guaranteed “a free appropriate public education” to children with disabilities throughout the nation and ensured special education and related services to those children,<sup>9</sup> increasing the numbers of college-bound students with disabilities.

### b. The Legal Standard: Non-Discrimination Against Qualified Individuals with Disabilities

The Rehabilitation Act and the ADA have been interpreted by courts to provide the same legal protections, despite minor differences in wording. The core prohibition of both statutes is that regulated organizations, including higher education institutions, may not discriminate against qualified individuals with a disability.<sup>10</sup> Each of these terms has been subject to litigation and deserves some explanation.

- To be “qualified” an individual must be otherwise qualified – able to meet the

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5        Some states have unique civil rights legislation, not based on federal statutes, as is true for New Jersey’s landmark Law Against Discrimination, passed in 1945, which was expanded to prohibit discrimination on the basis of “handicap” in the 1970s. N.J.S.A. 10:5-1 et seq. It is important to understand whether the applicable state protections are distinct from the federal framework, for example recognizing a wider range of conditions as “qualified disabilities,” but it is beyond the scope of this paper to cover all fifty states’ laws, therefore this discussion will focus on federal laws applicable to all U.S. institutions of higher education.

6        29 U.S.C. § 794

7        See *Laura Rothstein*, HIGHER EDUCATION AND DISABILITY DISCRIMINATION: A FIFTY YEAR RETROSPECTIVE, 36 J.C. & U.L. 843 (2010) FOR AN OVERVIEW OF THESE DEVELOPMENTS.

8        All higher education institutions are regulated by Title I of the ADA with regard to their employees.

9        20 U.S.C. § 1400 et. seq.

10       Protection also extends to individuals who have a history of having a disability or are regarded as having a disability by the decision-maker.

institution’s requirements for education, training or technical competencies, and able to carry out the essential functions of the program with or without reasonable accommodation—aside from the disability.<sup>11</sup>

- Having a “disability” means an individual must be substantially limited<sup>12</sup> in one or more major life activities, such as breathing, walking, seeing, thinking, and a major life activity also includes the operation of a major bodily function.<sup>13</sup>

Unlike most other anti-discrimination statutes which simply prohibit discrimination, these statutes also require that qualified individuals with a disability must be provided with “reasonable accommodations” to enable them to perform the essential elements of their role and to participate in the program or activity.

- Individuals must first self-identify, and must do so in a timely manner, as having a disability, which may include documenting the disability, and express that they need a modification or accommodation, although there are no required words to do so.
- A reasonable accommodation must be necessary to allow the individual to perform or participate, and may not be an undue burden on the institution or require the institution to fundamentally alter its educational program or lower its academic standards.<sup>14</sup>
- Institutions are not required to provide personal aids or services, such as help in bathing, dressing, individually prescribed devices or aids.<sup>15</sup>

Finally, individuals with a disability may be required to meet generally applicable safety standards for an activity<sup>16</sup> and may not pose a “direct threat.”

- Under both Titles II and III of the ADA, direct threat is defined as 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 . . . .”<sup>17</sup>

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11 29 U.S.C. § 794 (2014); 42 U.S.C. § 12102(2) (2012)

12 The test for substantial limitation compares an individual with a disability against the general adult population, rather than against other students in the program. This can be significant where a student may have a relative weakness, which may be personally perceived as very substantial when compared to classmates in a highly selective, rigorous graduate program, but where testing or other measures does not demonstrate that the person is objectively substantially limited when compared to the overall U.S. population. See, *Singh v. George Washington University*, 667 F.3d 1 (D.C. Cir. 2011), affirming 597 F. Supp. 2d 89 (D.D.C. 2009).

13 Id. and see also 34 C.F.R. § 104.3(l) (2000); 42 U.S.C. § 12131(2) (2001); 42 U.S.C. § 12182(b)(2)(A) (2009). In the 1990s and 2000s, there was significant litigation over which conditions qualified as a “disability” and Congress enacted the Americans with Disabilities Amendments Act in 2008 to clarify that individuals were disabled even if they used devices or medication that removed symptoms or permitted them to perform major life activities, such as a prosthetic limb. However, individuals merely needing corrective glasses/lenses are not disabled individuals by virtue of their eyesight. 42 U.S.C. § 12102(4)(E).

14 This issue is of course of central importance to educational institutions, and was so crucial to clarity that it was repeated in the ADA Amendments Act. It has been a fixture of the case law regarding higher education institutions since the 1979 case of *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

15 22 CFR § 217.44 (d)(2).

16 Institutions are permitted to impose legitimate safety requirements necessary for the safe operation of their services, programs and activities, per 28 C.F.R. § 35.130(h). This regulation applies to both public entities under Title II and public accommodations under Title III.

17 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III).

In this way, from its origin, the ADA has recognized that a safety threat created by an individual's disability may be a legitimate consideration and may influence the fundamental access that the ADA is designed to facilitate. However, the original statutory language was focused on threats to other people, as distinct from a threat to one's own self. Initially, all of the regulations under the ADA were equally silent on this issue, as will be discussed in greater detail below in sub-section E.

### c. Reasonable Accommodations

Institutions usually are required under both state and federal law to reasonably accommodate disabled students, and to consider reasonable accommodation before utilizing mandatory forms of separation, such as suspension, required leaves of absence, etc. The challenge, of course, is how to determine what accommodations are reasonable. Universities (and employers) must engage in an "interactive" process to try to find reasonable accommodations.<sup>18</sup> The requirement of an "interactive process" aiming toward reasonable accommodations is a mutual obligation for the school and the student.

A student must initiate the process by making it clear to the university that they are experiencing difficulties and seek assistance to address a disability. Once the university is aware that the student has a disability or handicap and is seeking assistance, the institution must engage in an "informal interactive process" to search for the appropriate reasonable accommodation.<sup>19</sup> Institutions are required to act in good faith and to be proactive about identifying alternatives and evaluating them.<sup>20</sup> The student is also required to participate, rather than to make demands and passively await an outcome. Both parties "bear responsibility for communicating with one another to 'identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.'"<sup>21</sup> A university need not simply accept the accommodations proposed by the student, but can explore and discuss a variety of options. Additionally, a student who has been offered modifications must seek to utilize them and give them a fair chance, rather than simply requesting more extensive modifications. The focus of the interactive process should be to identify the particular nature of this student's disability and explore individualized, appropriate modifications that might accommodate the student's limitations.

Universities need only offer a student those accommodations that are "reasonable." The duty to accommodate is intended to ensure a student with a disability has the chance to perform the essential functions of being a student. Institutions do not have a duty to

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18 *Jones v. Aluminum Shapes, Inc.*, 772 A.2d 34 (N.J. Super. App. Div. 2001) (discussing need for reasonable accommodations through an interactive process under both the New Jersey Law Against Discrimination (LAD) and ADA).

19 This is most often litigated in the employment context, where courts have routinely observed "the interactive process is mandatory, and both parties have a duty to participate in good faith." *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868–69 (6th Cir. 2007).; see also *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009).

20 *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999).

21 *Jones*, at 40 (quoting *Smith v. Midland Brake*, 180 F.3d 1154, 1171 (10th Cir. 1999)).

accommodate every desire or preference of the student as long as they make it possible for the student to accomplish the course or degree requirements. For example, although an institution may need to provide extended testing time, it is not required to change the substantive content of the test, which assesses the learning the student has accomplished.<sup>22</sup> What is reasonable should be evaluated based on a variety of practical factors such as: the size of the college's programs, the type of operations of the college, the nature and cost of the accommodation(s) needed, and the extent to which accommodation would involve waiver of an essential requirement of a program. If the accommodation in question is an "undue burden" on the university, then it is not reasonable. For example, if a particular modification is extremely costly, has no other application for other students or programs, and would impose a significant burden upon numerous professors and administrators, then the accommodation would likely be an undue hardship. Similarly, if the accommodation would require an institution to waive an essential requirement of its educational program – such as a request to eliminate a clinical requirement for a healthcare program – then the institution need not provide that accommodation. Universities need not fundamentally alter educational programs to accommodate disabled individuals.

In some cases, the most difficult question is likely to be whether the "accommodations" or modifications being considered would so fundamentally alter the nature of an educational programs that the accommodation is not reasonable. Another way this is often stated is that an institution need not lower its academic standards for individual students.<sup>23</sup> However, the university must be ready to prove that the modification or accommodation rejected would genuinely have altered the educational services offered<sup>24</sup> and that it has not been provided to other students in the past (whether for a disability or otherwise). Examples of the kind of fundamental alterations that are not required by anti-discrimination law are:

- Medical schools have not been required to eliminate multiple-choice tests for students whose disabilities may impede their performance on such tests.<sup>25</sup>
- An optometry school was not required to waive degree requirements that students demonstrate mechanical proficiency with certain instruments to evaluate the human eye.<sup>26</sup>
- A college may refuse to waive its foreign language or mathematics requirements for learning disabled students because the academic judgment that a liberal arts education should include some proficiency in a foreign language or mathematics is a professional,

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22 U.S. Department of Education, Office for Civil Rights, "Students with Disabilities Preparing for Postsecondary education," Sept. 2011, available at <https://www2.ed.gov/about/offices/list/ocr/transition.html> (last downloaded August 9, 2020); see also 22 CFR § 217.44 (c) noting the importance of measuring a student's "achievement" rather than a limitation.

23 *Hamilton v. City College of City Univ.*, 173 F.Supp.2d 181 (S.D.N.Y. 2001) (noting that the objective of accommodations is not to "water down scholastic requirements").

24 In addition, institutions should consider whether the requested accommodation or modification has been offered to other students in situations other than a disability accommodation, which would indicate it is reasonable and does not fundamentally alter the education.

25 *Singh v. George Washington University*, 667 F.3d 1 (D.C. Cir. 2011), affirming 597 F. Supp. 2d 89 (D.D.C. 2009), relying on *Wong v. Regents of the University of California*, 410 F.3d 1052 (9th Cir.2005).

26 *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988).



educational judgment entitled to deference.<sup>27</sup>

Institutions should be able to demonstrate the factual basis for their decisions about which accommodations are reasonable by showing that “the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternative would result either in lowering academic standards or requiring substantial program alteration.”<sup>28</sup>

When seeking to raise the fundamental alteration defense, “there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.”<sup>29</sup> In more personal terms, keep in mind that a truly interactive reasonable accommodations process should be open-ended and creative, especially with graduate students. Graduate students have made career choices and dedicated significant time and treasure to the pursuit of their degree. They also make their year-round home with the institution where they are pursuing a degree (and for many it may be their only home). Therefore, institutions should (and usually do) work very hard to find the mix of accommodations that will enable a graduate student to complete their degree.

A Note on Documentation: Carefully documenting communications and proposals for reasonable accommodations will serve an institution well in the long run. The university should make sure to receive information, whether from the student or the student’s health care provider, that clearly identifies the limitations created by the condition, and evaluate all suggested modifications or accommodations, as well suggesting accommodations of its own. It is important to understand the nexus between the limitation caused by the disability, and the requested accommodation. Sometimes individuals request accommodations that they think will benefit them although there may be little or no connection with their disability. The institution’s focus should be on developing a range of possible accommodations that directly address the limitations and support the student to engage fully in the academic program – to fulfill the essential elements of being a student in that program. Policies should reflect the obligation to keep careful and complete records, through the period of the student’s enrollment and for several years after.

#### d. Direct Threat

A “direct threat” means that the student presents a “significant risk” to the health or safety of someone and the risk cannot be eliminated by modifications of policies, procedures or use of auxiliary aids. When evaluating whether an individual with a mental health issue poses a direct threat to others, courts are instructed not to accept a “[g]eneralized assumption,”

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<sup>27</sup> *Guckenberger v. Boston Univ.*, 974 F.Supp. 106 (D. Mass 1997) (*Guckenberger II*); *Guckenberger v. Boston Univ.*, 8 F.Supp. 2d 82 (D. Mass. 1998) (*Guckenberger III*).

<sup>28</sup> *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991).

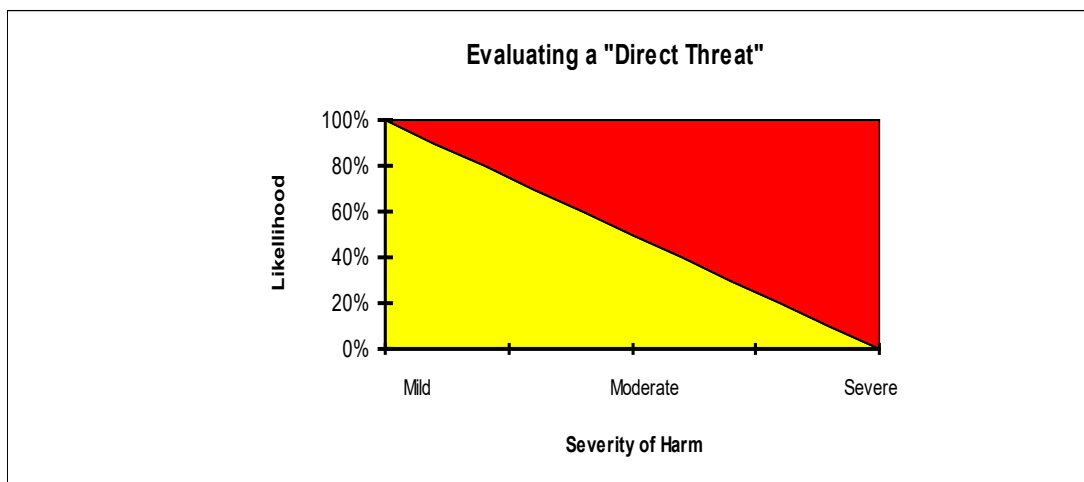
<sup>29</sup> *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991).

“subjective fears,” or “speculation” as conclusive evidence of dangerous behavior.<sup>30</sup> “Significant risk” does not mean that the risk of injury must be more likely to occur than not (i.e., a greater than 50% chance). It must be “significant” based on reasonable judgment that relies on current medical information or evidence and taking into account the nature and severity of the risk as well as the probability that the injury will occur.

In practical terms, procedures for assessing risk need to involve:

- An individualized assessment (not a rule applicable to all students with x diagnosis);<sup>31</sup>
- Consideration of the best and most current medical information and/or objective evidence about the individual’s condition or issue;<sup>32</sup>
- Evaluation of possible modifications to the institution’s policies, practices, or procedures that could mitigate or minimize the risk; and
- Consideration of the nature, duration and severity of the risk as well as the probability that injury will occur.

One way to conceptualize these factors is to think of the risk analysis as capable of being plotted on vertical and horizontal axes, reflecting the degree of the potential harm on one axis and the likelihood of that harm occurring on the second axis.



This kind of analysis permits us to use a sort of “sliding scale” to evaluate the

30 H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 29, reprinted in 1988 U.S. CODE CONG. ADMIN. NEWS 2173.

31 The risk must be justified on the basis of particularized inquiry. 29 CFR § 1630.2(r). See also Equal Employment Opportunity Commission, v. Beverage Distributors Company, LLC, 780 F.3d 1018 (10th Cir. 2014) (holding that proof of an actual direct threat is not necessary; rather, an employer need only show that it “reasonably determined” that a direct threat was posed); Krocka v. Bransfield, 969 F. Supp. 1073 (N.D. Ill. 1997) (holding that placing an officer in a personnel monitoring group because he was taking Prozac was an adverse employment action not justified by the health and safety exception).

32 Consideration of these issues may increase the risk that the individual is being “regarded as” having a disability, and the ADA also prohibits discrimination against individuals for being regarded as disabled. 42 U.S.C. § 12102(2)(C). Although the “regarded as” protection does not require institutions to provide reasonable accommodations, it is advisable nonetheless to evaluate reasonable accommodations for an individual when a mental health condition is suspected, as described further below in the OCR Principles announced in January 2018.



conditions we might impose. In the case of mental health concerns, the case will be strongest if the institution can point to objective evidence from the student’s prior behavior that the student has committed overt acts that caused harm or that directly threatened harm.<sup>33</sup> For example, where a student with a mental health condition has repeatedly gotten into fistfights, the degree of harm may be medium but the likelihood of future harm may be high, justifying an effort to monitor and enforce proper behavior by the student going forward. In contrast, if a student with a mental health issue has threatened another person with a deadly weapon, the degree of threatened harm is higher and may justify more serious sanctions such as mandated withdrawal or expulsion.

Separate and distinct from the ADA framework for direct threat, but relatedly, a university may have a tort law obligation to protect a student from a known risk or harm in certain situations; such situations ordinarily lead to negligence cases. The leading case in this area is *Tarasoff v. Regents of the University of California*. There, the court held that a psychotherapist who counseled an individual had knowledge that the patient was a real threat to a specific third person and the psychotherapist failed to take reasonable steps to warn the third person or prevent harm to that person.<sup>34</sup> It is worth noting that with information about an immediate and specific threat, therapists and others may need to take action to protect third parties.

The current case known as *Regents of the University of California v. Rosen* has received a significant amount of attention for articulating that a university – rather than a clinician, as in *Tarasoff* – has a limited duty to protect students from another student who may be a threat. Damon Thompson was a student at UCLA who had struggled with mental health issues including hallucinations. UCLA had a series of interactions strongly advising him to engage in treatment, had removed him from housing, and was providing counseling services. In October 2009, he stabbed a classmate, Kathleen Rosen, in a UCLA lab. The California Supreme Court found that limited duty to protect individuals from a foreseeable threat from a student may exist, but such duty only “extends to activities that are tied to the school’s curriculum but not to student behavior over which the university has no significant degree of control.”<sup>35</sup> Litigation is continuing in this case, which may provide further guidance on whether UCLA’s actions satisfied this duty.

These cases illustrate the importance of ensuring institutional policies, practices and training support identification of students who may be a serious threat to others, and provide a structure to the reasonable measure to prevent violence from occurring. Such policies may rely upon the legal authority, under the Rehabilitation Act and the ADA, of institutions to take affirmative actions to intervene – including by imposing

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33 Cf. *In re Commitment of J.M.*, 288 N.J. Super. 197, 205 (N.J. App. Div. 1996).

34 *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425 (Cal. 1976).

35 *Regents of the University of California v. Rosen*, 4 Cal. 5<sup>th</sup> 607 (2018).

a mandatory separation from enrollment<sup>36</sup> – when mental health issues cause or contribute to a serious threat to others.

#### e. Threats to Self

Up to 2010, colleges and universities understood – based upon long-standing government guidance – that they could conditions on or even dismiss students with a disability who were “direct threats” to themselves, without running afoul of federal anti-discrimination laws.<sup>37</sup> Schools relied on the interpretation of the phrase by the U.S. Department of Education, Office of Civil Rights (“OCR”), with primary enforcement authority for non-discrimination statutes for educational institutions, that direct threat includes both a threat to “others” and a threat to “self.”

In 2011, the U.S. Department of Justice’s (“DOJ”) amended of the Americans with Disabilities Act (ADA) Title II regulations. The amendment mirrored existing Title III regulations with respect to the concept of “direct threat,” explicitly permitting institutions to address students who were a “direct threat” to others, while remaining silent on how to analyze a student who was a threat to themselves. Despite confusion among the regulated community and requests for clarification from the government agencies,<sup>38</sup> that is where the statutes and regulations remain at this time. However, the actions of the enforcement agencies over the last ten years have largely resolved the uncertainty.

In particular, the Office for Civil Rights has articulated principles for colleges and universities that align with their enforcement work. On January 26, 2018, then-Acting Assistant Secretary for the U.S. Department of Education for the Office for Civil Rights, Candice Jackson, conducted a briefing with the National Association of College & University Attorneys (NACUA). Assistant Secretary Jackson underscored OCR’s commitment to working with postsecondary institutions in a manner that respects the rights of students but acknowledges the challenges that maintaining a student’s enrollment may present for the student, other students and the campus community. Assistant Secretary Jackson clarified that OCR would not second-guess institutional decision-making in this area if in fact the campus followed certain guidelines, drawn from OCR’s existing resolutions and agreements.

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36 There are additional legal considerations if the student is present in the U.S. on a visa, as well as when the student is employed in addition to their coursework. These are beyond the scope of this paper but some starting points are provided in the Resources.

37 Paul Lannon & Elizabeth Sanghvi, NACUANote Vol. 10, No. 1, “New Title II Regulations Regarding Direct Threat: Do They Change How Colleges and Universities Should Treat Students Who Are Threats to Themselves?” (2011).

38 Paul Lannon, NACUANote Vol 12, No.8, “Direct Threat and Caring for Students at Risk of Self-Harm: Where We Stand Now,” (2014).

Some of the principles Ms. Jackson highlighted include the following:<sup>39</sup>

- Postsecondary institutions are always permitted to offer students mental health services
- Campuses should consider what reasonable accommodations, if any, exist that would enable the student to remain enrolled and/or on campus<sup>40</sup>
- Colleges and universities should be cautious in addressing self-harming students through the student discipline system without regard to other forms of reasonable accommodation that might exist
- Involuntary leaves of absence are permissible, but should only be considered as a last resort
- Decisions to impose an involuntary leave of absence and any conditions for return must be determined on an individualized basis
- Qualified personnel should be involved in reviewing clinical and medical information
- A campus may consider how the student's behavior has impacted the campus community
- Campuses should invite and consider information provided by the student, including from the student's care provider(s)
- Institutions should narrowly tailor requests for information from a student's health care provider(s)
- Students should be accorded a mechanism for challenging the imposition of the leave and/or conditions for return
- Institutional policies should be non-discriminatory on their face and applied equally to students with and without disabilities
- Institutions may require that a student seeking to return submit an evaluation from the student's providers(s) and may require the student to comply with a medically prescribed treatment plan
- Institutions may impose behavioral contracts upon a student's return and enforce their provisions

Notably, Assistant Secretary Jackson suggested that it would be prudent for colleges and universities to avoid the use of the "direct threat to self" terminology and framework. Instead, a campus should focus on generally applicable health and safety requirements.

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39 A more thorough presentation of the guidelines is available at: [https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/selfharmbriefing.pdf?sfvrsn=31406bbe\\_4](https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/selfharmbriefing.pdf?sfvrsn=31406bbe_4), and the principles were published by Higher Ed Today

<https://www.higheredtoday.org/2019/09/04/helping-students-risk-self-harm-considerations-new-academic-year/>. These principles reflect best practices for working with any student with a disability, whether their behavior poses a threat to others or to self, with the distinction that a threat to others must utilize the "direct threat" standard in making the individualized assessment.

40 The consideration of reasonable accommodation prior to imposing an involuntary leave of absence on a student is a consistent theme of the agreements and the Stanford University Settlement Agreement and Policy.

## i. Agency Enforcement

Both the Office for Civil Rights of the U.S. Department of Education and the Department of Justice, each of which have concurrent authority to enforce the ADA, have consistently resolved complaints made against institutions of higher education over the last decade

Despite the guidance to avoid use of “direct threat” language, review of OCR resolutions indicates that OCR has often applied a fairly similar legal analysis as would be required under the ADA regulations. Institutions are expected to make a reasonable judgment based upon current medical or other specialized knowledge or the best available evidence in order to assess the nature, duration and severity of the risk; and the probability of injury or harm. OCR has also articulated procedural expectations, as it has repeatedly looked for institutions to make individualized determinations regarding a student’s health and safety, under policies that are generally applicable to all students, while giving serious consideration to the input of the student’s preferred provider, and providing both notice and an opportunity for appeal. Institutions may require that students provide medical information to facilitate the individualized assessment,<sup>41</sup> and if necessary may mandate an evaluation, including a medical or psychological evaluation, by a health professional of its choosing.<sup>42</sup> The record of enforcement actions demonstrates that multiple institutions have processes that satisfy OCR’s substantive and procedures expectations, allowing other institutions to model policies or practices on those good examples.

Resolution agreements that may be useful to review include: SUNY-Purchase,<sup>43</sup> Princeton University,<sup>44</sup> Georgetown University,<sup>45</sup> and Rutgers University.<sup>46</sup>

Despite the silence in the regulatory language regarding a threat to self, the DOJ has consistently upheld the right of postsecondary institutions to impose an involuntary leave of absence on a student even if they do not pose a direct threat to others. In rare

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41 Princeton’s policies required such information, and both OCR and DOJ concluded this did not discriminate against individuals with disabilities. OCR Letter to Princeton University, Complaint No. 02-12-2155, 2 (Jan. 18, 2013), and Agreement between the United States of America and Princeton University under the Americans with Disabilities Act, December 19, 2016, available at [https://www.ada.gov/princeton\\_sa.html](https://www.ada.gov/princeton_sa.html) (last downloaded August 6, 2020).

42 Rutgers’ Safety Intervention Policy includes specific provisions about requiring evaluations, as well as requiring release of an evaluation to the decision-makers under the Policy. OCR concluded this was not discriminatory. Case No. 02-18.2006; *Rutgers University – New Brunswick*, (April 27, 2018) available at [https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/4-27-18\\_letterfromocr.pdf?sfvrsn=a9f16abe\\_6](https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/4-27-18_letterfromocr.pdf?sfvrsn=a9f16abe_6)

43 OCR Letter to Purchase College, State University of New York, Complaint No. 02-10-2181, 2 (Jan. 14, 2011).

44 OCR Letter to Princeton University, Complaint No. 02-12-2155, 2 (Jan. 18, 2013).

45 OCR Letter to Georgetown University, Complaint No. 11-11-2044, 1 (Oct. 13, 2011) and OCR Voluntary Resolution Agreement, Georgetown University, Complaint No. 11-11-2044 (Oct. 13, 2011).

46 Case No. 02-18.2006; *Rutgers University – New Brunswick*, (April 27, 2018) available at [https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/4-27-18\\_letterfromocr.pdf?sfvrsn=a9f16abe\\_6](https://www.nacua.org/docs/default-source/new-cases-and-developments/2018/4-27-18_letterfromocr.pdf?sfvrsn=a9f16abe_6)

circumstances, this is the strongest message that can be given that the student needs to focus on their health and safety. In addition, institutions may impose conditions on continued enrollment, or individualized conditions for return after a leave or withdrawal. Aspects of the DOJ settlement agreements also closely reflect the principles articulated by Assistant Secretary Jackson, and the agreements sometimes use language very similar to OCR resolution letters. The DOJ has resolved cases with Quinnipiac University,<sup>47</sup> University of Tennessee Health Science Center,<sup>48</sup> Princeton University<sup>49</sup> and Northern Michigan University<sup>50</sup> in the last five years.

## ii. Litigation

Litigation regarding withdrawals, leaves of absence or reduced course load accommodations are not very common, given that the timeline to resolve a lawsuit may far exceed the length of the leave or need for accommodations. They appear to be even less common in the context of graduate students than undergraduates, perhaps reflecting the challenges unique to graduate education that are addressed in the excellent papers by other consultants to CGS. However, litigation remains a real risk for institutions and understanding the legal framework is equally important.

The 2018 ruling in *Nguyen v. Massachusetts Institute of Technology*, by Massachusetts highest court, and the ongoing litigation in *Tang v. Harvard University* will – over time—provide more clarity about the limited duties an institution may have to respond to a student it knows to suicidal. (Similarly, the ultimate resolution of the case of *Rosen v. University of California at Los Angeles*, referenced above, will articulate the scope of a limited duty to address situations where a student is a threat to other students.)

Han Nguyen was a 25-year-old doctoral student at MIT in 2009, when he jumped off a building on MIT's campus and died. His father sued MIT, alleging that employees of MIT should have prevented Nguyen's suicide. The Supreme Judicial Court of Massachusetts, in a closely watched case, announced a limited exception to the rule

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47 Settlement Agreement between the United States of America and Quinnipiac University under the Americans with Disabilities Act, December 14, 2014, available at [https://www.ada.gov/quinnipiac\\_sa.htm](https://www.ada.gov/quinnipiac_sa.htm) (last downloaded on August 6, 2020).

48 Settlement Agreement between the United States of America and the University of Tennessee Health Sciences Center under the Americans with Disabilities Act, July 22, 2016, at ¶3, available at <https://www.justice.gov/crt/case-document/university-tennessee-health-science-center-settlement-agreement> (last downloaded on August 6, 2020).

49 Agreement between the United States of America and Princeton University under the Americans with Disabilities Act, December 19, 2016, available at [https://www.ada.gov/princeton\\_sa.html](https://www.ada.gov/princeton_sa.html) (last downloaded August 6, 2020).

50 Agreement between the United States of America and Northern Michigan University under the Americans with Disabilities Act, October 17, 2018, available at [https://www.ada.gov/nmu\\_sa.html](https://www.ada.gov/nmu_sa.html) (last downloaded August 7, 2020).

that “[g]enerally, there is no duty to prevent another from committing suicide.”<sup>51</sup> The Court considered the modern relationships between students and schools, noting that there are enormous differences across the range of educational institutions, elementary schools to graduate programs, but that there is a form of special relationship between a university and its students, ranging from athletics, to university housing and community engagement. The court acknowledged there are limits to the relationship, as “universities are not responsible for monitoring and controlling all aspects of their students’ lives”<sup>52</sup> but concluded that an institution has a limited duty “to take reasonable measures” to protect a student when the institution “has actual knowledge of the student’s suicide attempt while enrolled or recently before matriculation” or “of a student’s stated plans or intentions to commit suicide.”<sup>53</sup> Applying this standard, the Supreme Judicial Court of Massachusetts held that MIT had no duty to Nguyen, who had not expressed a plan to commit suicide to an MIT employee and, any prior suicide attempt had occurred more than year before he matriculated at MIT.<sup>54</sup>

In analyzing the evidence, the Court applied the standard for “actual knowledge,” which requires that the specific individual employees who had contact with Nguyen have specific, personal knowledge of either: suicide attempts or a plan to commit suicide and found that none of the faculty or staff had such knowledge.

The *Nguyen* case has been held to be controlling in another Massachusetts case that is not yet resolved, *Tang v. Harvard University*. The *Tang* case asserts that Harvard failed to satisfy the Nguyen duty after undergraduate Luke Tang made a suicide attempt in spring 2015. Harvard provided counseling, required him to enter a behavioral contract including continued counseling, and Tang then left for the summer. Shortly after returning to Harvard in the fall, Tang died by suicide in his residential hall. It remains to be determined whether Harvard’s actions were “reasonable measures” to prevent Tang’s death by suicide.

These cases are a reminder that our communities expect us to work hard to keep students safe and institutional policies, as well as training for faculty and employees who support students, should clearly articulate the importance of alerting the appropriate office about concerns about a student’s suicide attempts or plans. Often the appropriate office is the dean of students or dean of the graduate school,

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51 *Nguyen v. Massachusetts Institute of Technology*, slip op. at 21 (Mass. S.J.C. 2018).

52 *Id.* at 25

53 *Id.* at 29.

54 Another issue in the case was whether Nguyen was a student or an employee on the date of his death, June 2, 2009, as he was engaged in paid summer research outside of his ordinary graduate school activity and has contact with a professor that may have been related to his academics, but the court concluded that the evidence was unclear and inadequate to determine whether he was an employee or a student, *id.* at 43-33. *MIT had sought a ruling that*<http://www.middlebury.edu/about/handbook/policies-for-all/non-discrim-policies/b.1.b-1-title-ix-investigation-resolutions-policy>*was serving as an employee doing the paid summer research because claims of personal injury while working are governed by workers’ compensation statutes in each states, and such compensation is the exclusive remedy for workplace injuries, including death.*



which can then ensure that an individualized assessment is carried out, reasonable accommodations are considered, and reasonable measures are pursued to prevent a student's death by suicide.

### III. Privacy Considerations

Title I of the Americans with Disabilities Act, proscribing discrimination in employment, imposes limitations on sharing of information related to an employee's disability, but Titles II and III (for public institutions and private institutions) do not contain parallel confidentiality provisions. Courts have also rejected confidentiality claims brought under the Section 504 (the Rehabilitation Act).<sup>55</sup> Of course, the overarching federal statute governing all personally identifiable student information is Family Education Rights & Privacy Act of 1974 (sometimes known as the Buckley amendment, or FERPA). FERPA governs access to student records from kindergarten through doctoral programs. States may have a similar (or more expansive) law, but FERPA is common to all American postsecondary programs.

FERPA has two major purposes: (1) to ensure access for students to inspect their "education records" and (2) to limit release of "education records" through consent or a specific regulatory exception. "Education records" is a broad category, encompassing all documents or records that (1) contain information directly related to the student (meaning containing personally identifiable information in most cases) and (2) maintained by the institution.<sup>56</sup> Practically, this definition includes student records from application through graduation, ranging from financial aid documents, housing records, immigration information, to disciplinary records, records relating to disability accommodations, and, obviously, academic records. Keep in mind that students have a right to inspect their records, and records should therefore be carefully maintained, with appropriate discretion and professional tone. Other employees of the institution are always permitted to access education records when needed in order to perform their job duties.<sup>57</sup>

In the context of concerns about graduate students' mental health, there are several permissive exceptions to FERPA, allowing the institution to determine to share information (institutions are not obligated to do so) when necessary:

- In a health or safety emergency;
- With consent of the student, such as where the student consents to have a health care provider (at the institution or outside) share some information about progress in treatment with a dean or other student life official;
- With the parents of a student who is a tax dependent under IRS rules;<sup>58</sup> OR

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55 See, e.g., *Stokes v. Barnhart*, 257 F.Supp.2d 288 (D. Me. 2003) (holding §504 does not include confidentiality violations where there is no employment relationship).

56 20 U.S. Code § 1232g (a)(4)

57 20 U.S. Code § 1232g (b)(1)

58 34 C.F.R. Part B §99.31 (A) (10), §99.30, and §99.31(A)(8), respectively.

- Personal observations are not an “education record” as defined by FERPA and therefore may be shared orally (if written, they become an education record).

A health and safety emergency exists when there is an “articulable and significant threat” to a person, and disclosure is necessary to reduce that risk.<sup>59</sup> In such circumstances, disclosure by an administrator<sup>60</sup> is permitted to any person who can reduce the risk to personal safety, including public safety staff, law enforcement, family members, friends, etc.

Faculty and staff who work with graduate students should ensure that they understand their institution’s (or their school’s) expectations of when they should share a concern about a student with campus healthcare providers, a dean of a program/school, or other office. There is no national statute or regulation that states a standard for when university employees should share a safety concern about a student, and so each institution needs to articulate its internal process for handling concerns. For example, institutions in Massachusetts may consider revising their practices to express an expectation that faculty and staff will report concerns about students expressing suicidal thoughts, in order to ensure that the institution can utilize its suicide intervention protocols.

Although graduate students are certainly legally adults, and often live quite independently of their families, it may also be helpful in situations where there is a serious concern about a student’s well-being to engage with a spouse, parents or other family members.

### **A Note on Other Issues**

Other legal issues may certainly be relevant in a situation with a particular graduate student who may come from another country, be performing employee services, and/or be a member of a union. These and other issues underscore the need for the types of determinations discussed throughout – about a student’s enrollment status or whether an accommodations is reasonable –to be always an individualized process, rather than a one-size-fits-all rule. Some additional information on immigration, employment and unionization is provided in Appendix A: Resources.

## **IV. Conclusion**

I have found it beneficial, through years of practicing law at colleges and universities and working on issues of students with disabilities and students in crisis, to use the

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<sup>59</sup> 34 C.F.R. Part B §99.36

<sup>60</sup> Note that health care providers have mandatory and/or voluntary codes of ethics that often restrict their ability to disclose information more stringently than FERPA; this discussion is primarily intended for non-healthcare administrators.

following series of questions to clarify which legal issues are in play. When a student presents health or safety concerns I recommend working through the following questions:

- 1) Is the student “otherwise-qualified” academically to perform at the institution? (If no, the student’s status should be addressed under the applicable academic policies.)
- 2) Is the student “otherwise-qualified” by their conduct to remain at the institution? (If no, the student’s behavior should be addressed under the appropriate conduct policy.)
- 3) Does the student pose a “direct threat” to the health or safety of others at the university?
- 4a) Is the student meeting the institution’s legitimate safety requirements, such as being able to safely and effectively participate in your educational program(s)?
- 4b) Does the student’s condition require a level of treatment that is incompatible with being a student in the educational program?
- 4c) Is there a nexus between the threat to the student’s health/safety and the academic environment? (Alternatively, is there a reasonable relationship between our environment and our requirement that the student withdraw?)
- 5) If the student is otherwise qualified and not a direct threat to anyone, then we must ask whether we can reasonably accommodate the student with a disability. This begins the interactive process.

These questions operationalize the guidance summarized in this paper. To frame them in a different way, decades of experience working within the ADA and the Rehabilitation Act have demonstrated that institutions of higher education are empowered, consistent with the federal laws protecting individuals with disabilities, to act in the following ways:

- (1) Where a student’s health is negatively affecting their academic performance, institutions are entitled to impose conditions that are reasonably related to the academic performance problems;
- (2) Where a student is violating the university’s general rules of conduct, even if the violations are caused by an illness or condition, the university may require that the student meet its rules of conduct as a condition of continued enrollment;
- (3) Where a student’s illness or issue has only impacted academic performance in that the student has withdrawn or requested a leave, an institution may impose conditions on re-admission that are reasonably connected to the reason for withdrawal;
- (4) Where a student’s illness or condition poses a direct threat to other people in the community, a school may require the student to take steps that reduce the threat to others;
- (5) Where an institution has a well-documented and objective basis for concern

about a significant risk to a student's own health or safety, it can try to get the student to agree to reasonable, individualized treatment steps, including by discussing a requirement to withdraw (or take a leave of absence); and

(6) Universities are on the strongest ground in requiring a student to leave if: the student's health necessitates a level of treatment that is incompatible with being a full-time student or the student's health issue is intensified or otherwise made more problematic by being in the academic environment.

(7) Finally, if a student is academically and by conduct qualified to remain at an institution and does not pose a direct threat to others or themselves, but nevertheless suffers a diagnosable mental or psychological condition, then the institution must engage in an interactive process to determine if it can reasonably accommodate the student so that they can perform the essential functions of study in the educational program.

Working within the civil rights laws that protect individuals with disabilities is essential to our mission as higher education institutions – to welcome the best and brightest students from every background to participate in creating, preserving and transmitting knowledge here in the United States. Finding the right policies, practices and preparation to balance the rights of individual students with disabilities to access and participate in our programs with the institution's need to support the safety and well-being of students in our communities will serve our country and our world well, as we strive to solve the most challenging problems of our time.

## About the Study

A growing body of evidence indicates that mental health challenges are common among graduate students. Unfortunately, many barriers exist to effective support and care. A collaboration between the Council of Graduate Schools (CGS) and The Jed Foundation (JED), *Supporting Mental Health and Well-being of Graduate Students* was designed to address this gap by creating a foundation for evidence-based policies and programs to support graduate student mental health and well-being. The project was generously supported by the Andrew W. Mellon Foundation and the Alfred P. Sloan Foundation.

## About the Council of Graduate Schools (CGS)

CGS is an association of 500 graduate institutions that is dedicated to the advancement of graduate education and research. Working closely with our members, we advocate for graduate education, develop innovative research, and establish best practices. Our projects generate information and data that help graduate deans and their institutions better support graduate students and programs.

## About The Jed Foundation (JED)

JED is a nonprofit that protects emotional health and prevents suicide for our nation's teens and young adults. We're partnering with high schools and colleges to strengthen their mental health, substance misuse, and suicide prevention programs and systems. We're equipping teens and young adults with the skills and knowledge to help themselves and each other. We're encouraging community awareness, understanding and action for young adult mental health.



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