

# BOND

## HIGHER EDUCATION INFORMATION MEMO

JANUARY 10, 2022

### **Dealing with the Student Mental Health Crisis on Campus: Are Involuntary Withdrawal Policies or Mandatory Medical Leaves the Answer?**

There is little debate that the student mental health crisis at colleges and universities is at an all-time high. Just last month, news headlines shared the story of a university's response to receiving an anonymous letter describing a potential suicide that was to take place on campus before the holiday break. The university immediately published a Community Notice encouraging the student at risk to seek help and advising the campus community to be vigilant in reporting and responding to mental health issues amongst their peers. While this student mental health crisis was not caused by COVID-19, it has been intensified by the pandemic and all of the changes it has caused to 'normal' college life. According to a survey of college presidents conducted by the American Council on Education (ACE) in September 2021, student mental health was identified as one of their most pressing concerns.

Unfortunately, most administrators have faced or will likely face the crisis that occurs when students threaten, attempt or succeed in harming other students or themselves. These are sensitive and highly stressful situations that often call for quick action. The dilemma heightens when, despite a student's suicidal ideations and/or self-harm behaviors, the student insists there is no problem and refuses treatment. These situations can also have a significant impact on other students who are struggling to handle another student's mental health crisis. Faced with the need to protect the campus community, many colleges and universities seek to remove the student from campus and turn to Involuntary Withdrawal policies or mandatory medical leave policies to do so. Involuntary medical withdrawals can range from forced withdrawals from classes to complete removal from campus.

Despite good intentions, the automatic response of removing a student from the education environment under an involuntary withdrawal policy may run afoul of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), relevant regulations and decisions of enforcement agencies, such as the U.S. Department of Justice (DOJ) or the U.S. Department of Education's Office for Civil Rights (OCR). DOJ and OCR share enforcement of Title II of the ADA which governs public institutions' provision of educational services. DOJ enforces Title III of the ADA which governs private institutions' offering of educational services, and OCR enforces Sec. 504, which applies to public and private institutions that receive federal financial assistance.

As highlighted in Bond attorney Sandra Casey's article "[New Guidance Relating to Mental Health Disabilities Amid COVID-19 Health Crisis](#)" students who suffer from mental health issues may be suffering from a disability that is protected under federal and state law. Under that guidance, colleges and universities are reminded that they cannot make assumptions about a person's mental health and take a course of action that could be viewed as a reaction based upon fear or a stereotype about mental illness. Rather, institutions have an obligation to determine whether reasonable accommodations would allow a student with a disability to continue to participate in the institution's programs and activities.

The law that addresses an institution's ability to respond to students experiencing a mental health crisis while on campus has been complicated and plagued with uncertainty. The regulations of Title II of the ADA were historically interpreted by OCR as allowing for campus officials to send home, against their wishes if necessary, students who posed a "direct threat" to themselves or others. In 2011, the regulation was amended and did not specifically address the situation of when a student poses a threat to oneself and defines direct threat only 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." The change in the regulation placed OCR's enforcement of Title II of the ADA and Sec. 504 into a gray area.

Although there has been great pressure to clarify, through statutory or regulatory amendments, whether and to what extent postsecondary institutions can act to respond to an individual who poses a direct threat to oneself, the law has remained unchanged. In the absence of any clarification in the law and/or formal guidance from regulatory agencies in this area, institutions have been left to gather what they can from various OCR resolution agreements and DOJ settlement agreements. In addition, in 2018, a U.S. Department of Education senior official summarized for the National Association of College and University Attorneys (NACUA) some of the general principles generated from OCR's resolution agreements in this area and assured colleges and universities that OCR would not second guess their response so long as decisions are based on individualized assessments, removal from the educational environment is considered a last resort and due consideration has been given to potential reasonable accommodations prior to an institution implementing an involuntary medical leave.

Below are just a few best practices and guiding principles when considering the enforcement of an involuntary withdrawal policy upon a student who expresses suicidal thoughts or engages in self-harming behaviors:

- **Do not assume that involuntary withdrawal is the only and/or appropriate course of action.**

Review applicable policies, such as those governing medical leaves, counseling services and privacy issues. Consider whether more counseling services can be offered to all students, regardless of whether they are classified as having a disability. Identify mental health resources available on and off campus and advise students and their families of these resources. Implement an authorization form that provides school counselors with flexibility to share information with other school administrators and the student's parents on a need-to-know basis. Where possible, institutions should explore whether a student with mental health issues may remain on campus and/or enrolled in its educational programs while seeking treatment for, or recovering from, any health conditions. To the extent that removal from campus is the most suitable course of action, institutions should allow for and encourage a voluntary medical withdrawal.

- **Ensure that the involuntary withdrawal process includes an individualized assessment and consideration of modifications and/or accommodations.**

What provisions should be included in any policy used to place students with a mental health disability on a mandatory medical leave of absence? First, involuntary withdrawal policies should be neutral and apply equally to all students, with or without disabilities. Any policy should treat mental health issues similar to other medical conditions. For students with disabilities, requiring an individualized assessment means that an institution cannot automatically put a student who has attempted suicide or is observed as having suicidal thoughts on a forced medical leave. By

providing individualized, personal assessments for suicidal or self-harming students, the institution is able to determine whether that particular student poses a legitimate danger to themselves or the campus community. The institution must then engage in an interactive process with the student to determine whether and what reasonable accommodations can be made, which may or may not be a leave of absence. An institution should require a student with mental health issues to take a medical leave only if the student's continued participation would require modifications that would unreasonably or fundamentally alter the nature of the educational programs. Accommodations that allow students to continue their education might include things such as providing a student with a single room, requiring a student to live off-campus, or attending classes through remote or virtual means. It is critical that campus officials carefully cull any such accommodations in order to determine whether they are feasible and they meet academic requirements of a particular program prior to them being offered. If accommodations are proffered to the student, they should be communicated at the outset (or at least confirmed) in writing. If the student rebuffs proffered accommodations, the university may consider alternative responses, which ultimately may be an involuntary withdrawal.

- **Create a team of trained administrators and staff to evaluate a student's potential risk of harm.**

The assessment of a particular student's mental health necessitates the collaboration of various campus staff and officials, including, but not limited to, the institution's mental health counselors, staff responsible for student accommodations, academic deans and other administrators. Training these 'teams' better prepares individuals to work together and to have the confidence to deal with situations that are often stressful, scary and time sensitive, and can be helpful in the event of litigation. Training a wide net of the campus community on student mental health issues and the law surrounding accommodations will enhance the safety of the student population, encourage greater communication amongst the campus community and enhance the institution's ability to promptly identify the need for and provision of services and resources for students with disabilities, including mental health conditions.

- **Clearly describe the information to be considered in evaluating a student's risk of harm, which should include medical evidence.**

Institutions should, when feasible, base risk assessments on the opinions of healthcare professionals. College administrators are often reluctant and/or uncertain as to whether and to what extent they can seek medical advice when evaluating whether a student poses a risk of harm and/or what, if any, accommodations may be appropriate. Institutions can, and should, consult with mental health experts and carefully review any medical opinions produced by the student's healthcare professionals. Confidentiality must play a part in this process. While seeking the student's full medical history is not appropriate, reasonable and narrowly tailored requests necessary to complete the individualized assessment are proper and useful. A "treatment provider form," which was sanctioned by the DOJ, to seek medical information in connection with the risk analysis and/or to support decision-making in the accommodation process, can be found in a [2018 DOJ settlement agreement with Northern Michigan University](#).

College administrators are typically not mental healthcare professionals and should not "play doctor." If college administrators ignore or refuse to accept information from healthcare providers, the institution is, unknowingly, likely assuming greater liability to ensure the safety of the student facing mental health issues, as well as the safety of other students on campus.

OCR's resolution agreements uniformly emphasize the need to give careful consideration to the opinions and recommendations of the student's healthcare provider, as well as the opinions and recommendations of any healthcare professional consulted by the college or university. Memories fade and experts have been known to change their minds. Therefore, ideally, all such medical advice should be reflected in written medical documentation and the university should document each stage of its process, who was involved and the information/conclusions reached.

- **Ensure that the involuntary withdrawal process is equal and fair, including the possibility of an appeal stage for a student who is involuntarily withdrawn.**

OCR has emphasized the need for providing students with an appeal process to challenge an involuntary withdrawal decision. An institution that provides such a mechanism to challenge an involuntary withdrawal also benefits by having a second set of eyes on the determination within the institution, which often reduces the risk of the student resorting to redress outside the institution before enforcement agencies or a court.

- **Provide a clear process for a student's return.**

If a student takes a medical leave, whether it is ultimately a voluntary leave or an involuntary withdrawal, institutions must be cognizant of not treating students with mental health issues differently than other students who seek readmission to the institution, while also being open to modifications in order to accommodate students with disabilities. If the student presents credible medical documentation that they can resume their studies at the college, the interactive process should begin. Policies such as requiring students to wait for a specific time before being allowed to return, or even some that prohibit a return to campus after a mental health incident, have run afoul of OCR and DOJ requirements.

Colleges and universities often turn to involuntary withdrawal policies when they feel that the student poses a safety risk to themselves or other students, or when the administration feels that they don't have sufficient resources to support a student. The guideposts outlined above allow institutions to carefully consider whether other resources or alternatives might exist to support a student facing a mental health crisis and also create checkpoints to ensure that the risk assumption is not an impulsive decision, but one based on an individualized assessment and up-to-date medical documentation. We encourage institutions to ensure they act before a crisis to ensure their policies, processes, resources and staff training are up to date. This continues to be an area where greater clarification in the law and/or more guidance from OCR or DOJ would be useful and where the risk of possible legal action remains high, despite the best intentions of institutions to address conduct that poses serious health and safety risks. Accordingly, colleges and universities are encouraged to consult legal counsel when navigating this challenging area.

If you have any questions or need Bond's assistance, please contact [Christa Richer Cook](#), any attorney in Bond's [Higher Education practice](#) or the attorney at the firm with whom you are regularly in contact.

