

GENERAL COUNSEL'S CORNER

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Welcome to our new space featuring Bond's legal team of former general counsels and academic administrators of higher education institutions. In this corner, an attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.

Our first post is brought to you by [Sandra M. Casey](#) in our Albany, New York office. Sandra served in senior leadership roles as Deputy and acting General Counsel for the State University of New York (SUNY) system and College Counsel to Siena College, bringing extensive and varied experience in higher education and compliance to her clients.

New Guidance Relating to Mental Health Disabilities Amid COVID-19 Health Crisis

In recognition of World Mental Health Day on Oct. 13, 2021, the U.S. Department of Justice (DOJ) together with the U.S. Department of Education's Office for Civil Rights (OCR) issued a fact sheet to guide students with mental disabilities, their families and their schools and postsecondary institutions during the COVID-19 pandemic and beyond (DOJ/OCR Guidance). The two federal agencies specifically highlighted the rights of those who may be at risk of self-harm, and even captioned their guidance as "[Supporting and Protecting the Rights of Students at Risk of Self-Harm in the Era of COVID-19](#)." This is an acute issue for institutions of higher education (IHEs) because of the age of the population they serve and is heightened for residential institutions of higher education.

The DOJ/OCR Guidance reminds us that students with mental disabilities are protected by federal civil rights laws, including [Section 504 of the Rehabilitation Act of 1973](#) (Section 504) and the [Americans with Disabilities Act of 1990](#) (ADA). Such laws offer students an "equal opportunity to learn, free from discrimination, including during public health crises." IHEs are therefore in a constant balancing act of protecting individual rights of afflicted students while maintaining a productive learning, living and working environment for their communities.

Scenarios are set forth in the DOJ/OCR Guidance which can trigger OCR and the DOJ's Civil Rights Division (CRT) investigations. The takeaway from these scenarios in the postsecondary setting is that colleges and universities 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.

It cannot be stressed enough that IHEs *must* undertake an individualized assessment which takes into account each student's circumstances when dealing with a student who is at risk of self-harm or suicide or who has made a request for an accommodation based upon a mental health malady that is triggered or exacerbated by the COVID-19 crisis. This individualized assessment requires that administrators consult with mental health experts who can provide factual information to address myths and fears about mental illnesses.

Requiring an individualized assessment means that an IHE cannot automatically put a student who has attempted suicide or is observed as having suicidal thoughts (also known as suicidal ideation) on medical leave. The IHE must engage in an interactive process with the student and the student's support team (family, friend, emergency contact and health care providers) to arrive at a reasonable accommodation, which may or may not be a leave of absence.

Responding to students encountering mental health crises is often a patchwork of improvised responses and is stressful for staff. Sadly, this is not a one-off emergency, but a situation that IHEs should plan for and develop overall protocols to assist with the individualized decision making that is necessary. The DOJ/OCR Guidance provides specific steps to help in this regard:

- Develop trauma-informed crisis management procedures that include an individualized assessment of the student's circumstances.
- Provide and facilitate access to mental health evaluations and services, including making efforts to reduce or remove barriers and negative consequences, including stigma, associated with receiving mental health services.
- Reasonably modify policies, such as attendance policies, for individual students as appropriate.
- Train staff to recognize and respond appropriately to signs of distress and suicidal ideation in students.
- Review and share the resources set forth in the [DOJ/OCR Guidance](#)

Because of ongoing challenges mental health crises present on campuses, it is also imperative for IHEs to bring together the key staff who will respond and ensure they know the protocols and their roles in the process of addressing a student mental health crisis. Engaging in table-top exercises where key staff participate in different scenarios is a very helpful tool to achieve this goal.

General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Sarah Luke](#) (Governors State University); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.

