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TOPIC:

New Title II Regulations Regarding Direct Threat: Do They Change How Colleges and Universities Should Treat Students Who Are Threats to Themselves?

INTRODUCTION:

Federal laws prohibit discrimination on the basis of disability, including mental illness. But for years, colleges and universities have understood – based upon government guidance – that they could nonetheless dismiss or discipline disabled students who are "direct threats" to themselves, without running afoul of federal anti-discrimination laws. Now, institutions are reexamining this position in light of new federal regulations which expressly recognize an institution's ability to discipline or dismiss students that pose direct threats to *others*, but omit any reference to direct threats to *self*. This NACUANOTE reviews the Department of Justice's ("DOJ") new direct threat regulation under Title II of the Americans with Disabilities Act, the U.S. Department of Education's past threat-to-self cases and relevant case law, and suggests some approaches for developing involuntary withdrawal policies and removal protocols to comply with Title II.

DISCUSSION:

Federal Disability Law Generally

The DOJ has delegated to the U.S. Department of Education, Office for Civil Rights ("OCR") the power to enforce two disability laws [1]: Section 504 of the Rehabilitation Act of 1973 ("Section 504"), applicable to public and private institutions [2], and Title II of the Americans with Disabilities Act ("Title II"), relevant only to public institutions. Neither of these laws nor their implementing regulations expressly addressed the issue of direct threat to self or others prior to the DOJ's new Title II regulation.

By contrast, other sections of the Americans with Disabilities Act ("ADA") clearly address the issue of direct threat. Both Title I (which applies in the employment context) and Title III (which applies to public accommodations) statutorily define a direct threat as a threat to others [3]. The Title I implementing regulation expands this definition to include threat to self [4], while the Title III implementing regulation specifically addresses only threat to others [5].

Lacking the definitions of "direct threat" found in Titles I and III of the ADA, institutions subject to Title II and Section 504 have had to rely on OCR's resolution letters and agreements when developing involuntary medical withdrawal, emergency removal protocols and disciplinary procedures for their students. Based on that OCR guidance, colleges and universities have long believed that federal discrimination laws permit them to remove, dismiss or otherwise discipline students who directly threaten their own health or safety, even if those students have disabilities [6]. But now

institutions are questioning whether this remains the case, in light of the new Title II regulation issued by the DOJ.

The DOJ's New Title II Regulatory Provision

As a preliminary matter, it is important to note that while Title II applies only to public entities, private colleges and universities subject to Section 504 should take note of the new regulations, because OCR generally interprets Title II and Section 504 similarly [7].

Effective March 15, 2011, the DOJ's new Title II regulation expressly recognizes a defense to adverse actions taken against students who pose a direct threat to the health or safety of others, but there is no mention of a defense for actions taken against students who pose a direct threat to themselves. Unfortunately, neither the DOJ nor OCR, both of which share Title II enforcement authority, has provided official guidance on the application of this new provision, particularly as to whether schools may still incorporate a "direct threat to self" analysis when responding to students who exhibit a substantial risk of self-harm.

The new Title II regulation defines "direct threat" and permits public institutions to take adverse actions against students who pose a direct threat [8]. The DOJ's commentary accompanying the rule change states that the Title II regulation was amended to parallel the Title III definition and requirements regarding direct threat [9]. Title III defines direct threat with respect to others but not to self, and now the Title II regulation does the same, defining direct threat 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 [10].

The DOJ's new direct threat provision specifically states that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of the public entity when that individual poses a direct threat to the health or safety of others." [11]

Why recognize direct threat to others but not to self? Why did the DOJ opt to follow the Title III regulations, which do not refer to threat to self, rather than the Title I ADA employment regulations which do? One possibility is that the DOJ considers the evaluation of a direct threat to *others* to be substantively different from the evaluation of threat to *self*. However, there has been no coherent argument presented as to why an institution should evaluate a direct threat to others differently from a direct threat to self. To the contrary, the underlying misconduct is the same: violence or serious harm to a person. Institutions should have the authority and discretion to take appropriate measures to prevent and eliminate such misconduct regardless of whether a student is disabled. Similarly, emergency removal or involuntary withdrawal protocols have the same goal regardless of whether there is a threat to self or others: preventing violence or other serious harm to a person on campus. Thus, from an institutional perspective, there appears to be no cogent rationale for treating a direct threat to others differently from a direct threat to self.

The commentary in the 1991 preamble to the Title II final rule emphasizes that a chief goal of the ADA is "protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." [12] To that end, it continues: "The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment . . . ." [13] From this language, one could infer that the government is most concerned with avoiding stereotypical responses to students at risk for self-harm and wants colleges and universities to focus on providing care and accommodations to those students.

Another possibility is that the new regulation merely codifies the DOJ's longstanding interpretation of

direct threat under Title II. Although the direct threat regulation is new, the 1991 preamble to the Title II final rule also addressed direct threat, stating that "[w]here questions of safety are involved, the principles established in [Title III's implementing regulation] will be applicable. [Title III] provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others." [14] In this light, the new regulation reflects the same interpretation that the DOJ originally held. What may be changing is OCR's view.

At least two OCR regional offices have stated in unofficial correspondence that due to the DOJ's new regulation, institutions may no longer incorporate a threat to self analysis in their policies for emergency removal or involuntary medical withdrawal, and other OCR officials have reiterated that position in public presentations. However, there has been no official written guidance from OCR or the DOJ to confirm this. The regulation itself neither specifically allows public schools to exclude students who are threats to themselves, nor does it specifically prohibit this.

Regardless of the reasons for the amendment, the new regulations do not explain how to respond to students who pose a threat of harm to themselves without violating the ADA. The question then for public colleges and universities subject to Title II (and, likely, private institutions subject to Section 504) is whether they can incorporate a direct threat to self analysis in their student removal or withdrawal policies without violating federal law.

At one extreme, the regulatory amendments might suggest that institutions cannot take actions against disabled students who are direct threats to themselves without violating the ADA. OCR has rejected this interpretation in the past and repeatedly reaffirmed the right of educational institutions, subject to certain safeguards, to remove students involuntarily when they harm or attempt to harm themselves. However, it is unclear how OCR, the DOJ or the courts will view this issue in light of the DOJ's new regulation. To better understand possible interpretations of the new regulation, we briefly review past OCR and court determinations regarding threat to self cases.

OCR's Previous Interpretation of Direct Threat to Self

Prior to the DOJ's 2010 Title II final rule, OCR resolution letters consistently stated that colleges and universities could remove, discipline or take other corrective actions against a student, regardless of disability, if the student was a "direct threat." [15] OCR made clear that it interpreted direct threat to include both threats to others and threats to self. In multiple cases, OCR has advised that federal disability law "does not prohibit a postsecondary education institution from taking action to address an imminent risk of danger posed by an individual with a disability who represents a direct threat to the health and safety of himself/herself or others," provided that certain safeguards and due process standards are met [16] and that any adverse actions taken are not a pretext or excuse for discrimination. [17]

For example, in a case involving Woodbury University, OCR determined that the university did not violate Section 504 when it barred a student from staying in her dorm during the Christmas/New Year intersession after she had harmed herself during Thanksgiving vacation. OCR found that there were reasonable conduct-based grounds for the University to believe that the student would be a direct threat to her own health and safety if she were in her dorm during the intersession. [18]

Note, however, that OCR has indicated that a school taking action against a student believed to be a threat to self would violate Section 504 if it did not base such a determination on an individualized and objective assessment of the student's ability to participate safely in the school's programs. This assessment must be based on a "reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence." [19] The assessment must determine: 1) the nature, duration and severity of the risk; 2) the probability that the injury will occur; and 3) whether reasonable modifications of policies, practices or procedures can mitigate the risk. [20] OCR has

stated that to be a direct threat, there must be a high probability of substantial harm, not just a slightly increased, speculative, or remote risk. Such an individualized assessment is essential to ensure that any adverse actions against persons posing a direct threat are not a "pretext or excuse for discrimination." [21]

In a case involving Bluffton University, a student with bipolar disorder was involuntarily withdrawn after she attempted suicide. The university official who made this determination did not contact the student's healthcare providers before he sent a letter stating that it was in the student's best interest to leave school and receive professional help. He also did not review any of the student's medical or counseling records prior to making the decision. One week after the withdrawal letter, the student's mental health counselor stated that the student was no longer suicidal and that the counselor had encouraged the student to return to her studies. OCR found that the university had violated Section 504 for a number of reasons, including the university's failure to "consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, or consider mitigating the risk of injury to the [s]tudent or other students." The university also failed to provide the student with advance notice of a hearing and an opportunity to be heard. [22]

Similarly, in a case involving Guilford College, a student was involuntarily withdrawn after several cutting episodes. OCR found that the college violated Section 504 in part because the college did not involve all relevant healthcare providers, did not assess the student's particular stressor, and did not consider an alternative less severe than withdrawal as an accommodation for the student. [23]

Institutions have relied on OCR determinations such as these to develop policies and protocols whereby students, including those with disabilities, could be individually assessed, and, if found to pose a high probability of substantial harm to self, withdrawn, removed involuntarily or otherwise sanctioned.

Relevant Court Cases Interpreting Threat to Self Determinations

The school-based court cases that address student safety issues have been decided under Section 504 and indicate that schools can take adverse actions against students whose participation in certain activities or programs would cause them harm. [24] These cases have not specifically referenced the "direct threat" defense, but rather refer generally to whether a student is not "otherwise qualified" as a result of a threat of injury or a life-threatening illness. In *Knapp v. Northwestern University*, a student was barred from competition in NCAA basketball due to a heart defect. [25] A Northwestern physician declared the student ineligible to participate on the men's basketball team based on a number of factors, including the student's medical records in which several treating physicians recommended that the student not play competitive basketball, the report of the team physician after examining the student, published guidelines and recommendations regarding the eligibility of athletes with heart problems, and the recommendations of consulting physicians. [26] The student claimed that such exclusion was discrimination under Section 504.

The court found that Northwestern had not discriminated against the student based on disability, in part because he was not "otherwise qualified" to play intercollegiate basketball. It stated that a "significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated." [27] The court held that Northwestern had not violated Section 504, as it had reasonably considered and relied on sufficient evidence specific to the student and the potential injury in determining that the student was not otherwise medically qualified to play basketball. [28] Similar to OCR's letters, the court stated that the court's role was to "ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence," not "unfounded fears or stereotypes." [29]

The direct threat case law in the employment setting appears to have influenced OCR's threat to self resolution letters issued prior to the 2010 Title II final rule. Although the Title I statutory language

does not expressly recognize threat to self, the Equal Employment Opportunity Commission ("EEOC") implementing regulation does. [30] In the Supreme Court case, *Chevron v. Echazabal*, an applicant for employment claimed that he was discriminated against based on his disability because Chevron refused to hire him due to a liver ailment that could be exacerbated by the conditions of the job. [31] Echazabal argued that the EEOC's regulations conflicted with Title I because the statutory definition of direct threat does not reference threat to self. The Court disagreed, finding that the EEOC's interpretation of the statute was permissible because the omission was not an "unequivocal implication of congressional intent." [32] The Court noted that employers would not be able to use a threat to self defense as a pretext for discrimination as the regulation requires an individualized assessment "of the individual's present ability to safely perform the essential functions of the job" [33] which must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Similar to requirements outlined by OCR in determining whether an individual would pose a direct threat, the factors to be considered include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. [34]

The effect of *Chevron* on Title II cases is unclear. Unlike Title II, the Title I implementing regulation specifically allows threat to self as a defense against adverse actions. A court could find that because the Title II regulations do not expressly include threat to self, *Chevron* does not apply. [35] Conversely, a court could find that the omission of "threat to self" in Title II does not preclude an interpretation that includes threat to self, especially where the regulations do not expressly reject such in interpretation.

DOJ's New Regulation is Influencing OCR's Analysis

Has the DOJ's new Title II regulation changed how colleges and universities should address disabled students who pose a threat to themselves? It appears that it has. The omission of a direct threat to self defense in the Title II regulation suggests that public institutions, and perhaps private institutions under Section 504 of the Rehabilitation Act, can no longer involuntarily remove or withdraw students under a "direct threat to self" analysis.

Recent unofficial correspondence from OCR supports this conclusion; OCR will no longer use the direct threat analysis when evaluating complaints involving students removed, dismissed or otherwise disciplined due to concerns regarding self-harm. Recent OCR decision letters indicate the same thing. In one such letter involving actions taken against a student at Spring Arbor University, OCR sets forth the "applicable legal standards" it uses when analyzing cases under Section 504:

> Under Section 504, the "direct threat" standard applies to situations where a university proposes to take adverse action against a student whose disability poses a significant risk to the health or safety of others. . . . Under OCR policy, nothing in Section 504 prevents educational institutions from addressing the dangers posed by an individual who represents a direct threat to the health and safety of others . . . . [36]

Noticeably absent is any provision permitting institutions to address students who pose a direct threat to themselves, in contrast to OCR's previous letters, as discussed above.

OCR's rejection of the direct threat to self analysis does not mean that colleges and universities are necessarily prohibited from taking action against students who are at risk of self-harm. What it means is that the analysis will be different. What will be the elements of the new analysis? There is no clear answer at this point. OCR has not published a Dear Colleague Letter or other guidance on this issue, and conversations with OCR indicate that no such guidance is forthcoming in the near future. Until such guidance is published, or courts address this issue squarely, these questions will remain unresolved.

What Can Colleges and Universities Do?

In the meantime, there are steps that colleges and universities can take. Recent experiences with OCR in Region One (covering New England), combined with the individualized assessment principles described above, suggest some practical guidelines for amending student removal, withdrawal and discipline policies. Such guidelines include:

Policies should focus on conduct, not disability: Removal, withdrawal or discipline policies should refer to safety concerns and code of conduct issues, and should apply to all students, not just those with disabilities. The student must not be penalized just for being disabled. It is possible that OCR may use a different treatment analysis in determining whether a student with a disability was discriminated against when adverse action was taken. OCR may compare whether a disabled complainant was treated in the same way as non-disabled, similarly situated students. [37] Under a different treatment analysis, OCR typically does not object if a disabled student is treated the same under a school's code of conduct as are non-disabled students. It appears OCR would frown on a student conduct code that explicitly incorporated or was interpreted to enable threats to self to be the sole basis of adverse action.

Policies must ensure that an individualized assessment is made: A major concern expressed by OCR and courts is that threat to self determinations should not be based on stereotypes or unfounded fears. Rather, protocols should incorporate an individualized assessment of the student that includes observations of actions that indicate safety or code of conduct issues. The assessment must also include consultations with qualified healthcare professionals who can assist the school in judging the risk of substantial harm. Schools should determine, based on such assessments, whether a student is "otherwise qualified" to take classes or remain in the dorms. It is possible that OCR will decide that students posing safety risks to themselves or who are unable to follow school policies are no longer "otherwise qualified" and, therefore, can be excluded from certain programs. However, it also is possible that OCR will determine that finding a student to be not otherwise qualified due to safety concerns to self is too close to a direct threat analysis and, therefore, not permitted under Title II.

Policies must ensure consideration of reasonable accommodations: Colleges and universities must determine whether there is a reasonable way to accommodate the student to decrease the safety risk and/or to ensure compliance with school policies such as the code of conduct. For example, if a student only is a safety concern when living in dorms, then a reasonable accommodation might be removal from campus housing. The school likely would violate Section 504 or the ADA if it decided to withdraw the student involuntarily.

Policies must ensure due process to the student: Many of the OCR letters and court cases on direct threat emphasize that a student must have a reasonable opportunity to be heard and respond before a final decision can be made. In exigent circumstances, an institution may take immediate measures to dismiss or withdraw a student, but this must be followed closely by an opportunity for the student to be heard and to present her position and any information the student would like to be considered.

OCR has no model policy or protocol for direct threat assessment, involuntary withdrawals or emergency removal protocols. However, the following is a student emergency removal protocol that was approved in 2010 by OCR with respect to a private college subject to Section 504 of the Rehabilitation Act:

> The university agrees to review its Student Emergency Removal Protocol and amend it, as appropriate. Nothing herein shall be construed to preclude the university from taking interim steps under the Protocol to address an immediate safety concern. The amendments will:
>
> i. include a statement of intent to apply the Protocol in a nondiscriminatory manner and guide decision makers acting under the Protocol to make

determinations based on observation of a student's conduct, actions, and statements, and not merely on knowledge or belief that a student is an individual with a disability.

ii. include the concept that determinations to remove a student will be made in consultation with a professional qualified to interpret the evidence, and: (a) will be based on a student's observed conduct, actions and statements; and (b) will not be based on a slightly increased, speculative, or remote risk of substantial harm.

Guidance in this area is still evolving, and institutions should have considerable flexibility in formulating their policies, provided that the policies can be implemented in a non-discriminatory manner and incorporate an individualized assessment, generally applicable rules of conduct, and professional medical advice.

CONCLUSION:

It appears as though the new amendments to Title II's implementing regulation will impact OCR's assessment of cases involving students at risk of self-harm. Indeed, in correspondence and at least one recent decision letter, OCR has explicitly abandoned the direct threat analysis in such cases. The lack of clear, official guidance at this point may indicate disagreement between the DOJ and OCR regarding what analysis should be used to determine if colleges and universities can take action against disabled students presenting a risk of self-harm. Until OCR or the DOJ issues guidance regarding the removal from campus or dorms of students who pose a direct threat to themselves, or their exclusion from other programs, colleges and universities with emergency removal and involuntary leave policies should ensure that their policies follow the core non-discrimination principles outlined previously by OCR and the courts, even if a direct threat analysis is no longer used explicitly.

FOOTNOTES

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ADDITIONAL RESOURCES:

- NACUA Distressed and Suicidal Students Resource Page
- DOJ Title II Regulations Regarding Direct Threat (as amended by September 15, 2010 final rule)

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