

University Policy and Procedural Responses to Students at Risk of Suicide

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Abstract

Colleges and universities have recently faced several lawsuits brought by parents of students who have committed suicide or made suicide attempts. The lawsuits are based on varying claims, including negligence, breach of contract, and discrimination. In crafting policies to respond to these lawsuits, universities should not simply seek limiting institutional liability but should balance the private interest of their students, the relationship of the school to parents of the students, requirements of due process, and their commitment to antidiscrimination principles. This paper focuses on the procedural protections in university policies. I argue that suicidal ideation or attempt should not be treated as if the student has committed a disciplinary infraction, but should be treated as a mental health issue that should not trigger a disciplinary proceeding unless reached as a final resort. Institutions should preserve disciplinary proceedings as a form of last resort and afford students protections of minimal due process. I propose an intermediate mediation step.

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Introduction

In October 2004, Jordan Nott, a sophomore at George Washington University (GWU), voluntarily admitted himself to the GWU Hospital, reporting suicidal ideation.¹ The day after his admission, the assistant director of Student Judicial Services delivered a letter to Nott informing him that he was placed on interim suspension from the university and charged with a disciplinary violation for exhibiting “endangering behavior.”¹ Under the student code, according to the university letter cited by Nott’s complaint, “[b]ehavior of any kind that imperils or jeopardizes the health or safety of any person or persons is prohibited. This includes any actions that are endangering to self or to others.”¹ Jordan was barred from GWU property, including his dorm room, and all events at the university, even after release from the hospital. He was informed that if he entered the campus “for any reason, [he would] be trespassing and may be arrested.”¹ In response, Nott voluntarily withdrew and sued the university. In *Nott v. George Washington University*,¹ Nott alleged discrimination, breach of confidentiality, intentional infliction of emotional distress, and violation of federal laws, including the American with Disabilities Act of 1990² and the Fair Housing Amendments Act.³

In *Doe v. Hunter College*,⁴ a student filed action against Hunter College after she was barred from her dormitory residence following hospitalization for a suicide attempt. The Hunter College Housing Contract at the time stated that “a student who attempts suicide or in any way attempts to harm him or herself will be asked to take a leave of absence for at least one semester from the Residence Hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the Residence Hall. Additionally, students with psychological issues may be mandated by the Office of Residence Life to receive counseling.”⁵ This housing contract applied to all students who have attempted suicide, without an inquiry into the reason

behind this attempt. The plaintiff brought a disability discrimination action against the college pursuant to the American with Disabilities Act of 1990,² Section 504 of the Rehabilitation Act,⁶ and the Fair Housing Amendments Act.³

Both *Nott* and *Hunter* fueled public criticism of university policies regarding students at risk for suicide^{7,8}—an area already characterized by serious discussions within the community of university administrators, legal counsel, and mental health professionals. *Nott* was settled in October 2006, and the terms of settlement were not disclosed.⁹ University officials at GWU stated that they are reviewing and revising their policies on involuntary mental health withdrawal.⁹ *Hunter* was settled in August 2006 in favor of the plaintiff for \$65,000,¹⁰ and the New York Attorney General announced a review of CUNY's suicide policy.¹¹ A spokesperson at Hunter College stated that the automatic eviction policy for students who attempt suicide had been withdrawn.¹²

The university response in both *Nott* and *Hunter* leads to several questions: What is a well-informed, fair policy toward students who have made suicide attempts or engage in behaviors of self-harm? How do universities strike the right balance between the civil liberties and rights of students with mental illness against both institutional rights of the university and community rights of university members? How can colleges ensure adequate due process and fairness in its decisions, and yet not subject students to adversarial proceedings normally used for disciplinary infractions? This article focuses on the procedural aspect of university policies and advocates the interim step of mediation before resorting to disciplinary or involuntary medical withdrawals as a way of negotiating these difficult questions.

The main purposes of this paper are: 1) to conduct a review of the case law and current state of policies of university procedural responses to students risk of suicide and self-harm or

those that have made significant suicidal attempts; 2) to identify major challenges and pressures surrounding the formation of such procedural responses; 3) to assess disciplinary and non-disciplinary responses and identify problems and shortcomings in these approaches to the implementation of university policies; 4) to propose an interim step of mediation prior to resorting to formal disciplinary hearings; and 5) to assess future needs and goals for more effective and just procedural responses to students.

The article focuses on the challenge of dealing with students who do not voluntarily agree to withdraw or seek treatment. In particular, the paper points out the limitations of the doctrine in higher education law, namely, the dichotomy of academic and disciplinary dismissals. This paper shows how neither model is appropriately well-suited to handling students dealing primarily with mental health issues and illustrates how minimal due process should be afforded to students being withdrawn from schools when it is based on their mental health issues. I consider a third non-disciplinary, non-academic procedural method, which some institutions have used to withdraw students: involuntary psychiatric and medical withdrawals. For situations where the student refuses to withdraw voluntarily or seek treatment, this paper proposes the adoption of an intermediary step of mediation before resorting to disciplinary hearings or non-disciplinary involuntary withdrawal. The proposal for mediation seeks to accommodate goals articulated by courts and universities, including: 1) preservation of the student-institution relationship; 2) support the student in working toward educational and developmental achievement; and 3) protection of minimal due process rights of students.

The policy and legal research are supplemented by extensive, detailed informal phone interviews conducted by the author with 34 college counseling center directors. A request for an interview was sent via email to 363 directors who participated in the 2005 National Survey of

Counseling Center Directors, and interviews were conducted by telephone by the author.¹³ The aim of these interviews was not merely to survey the colleges, but to inquire more deeply into the informal decision-making procedures.

I. Mental Health Trends at Universities

Nott occurs amidst a context of heightened concern among college counselors and counseling center directors about the increased pressures on mental health centers on college campuses. Annual surveys of directors of university counseling centers indicate that many directors are worried about an increase in self-injury reports, a growing demand for services without increase in resources, and a higher demand for crisis counseling.^{14,15}

Although surveys of students between 1920 and the present suggest that the psychiatric disturbance among college students has remained relatively constant, between 6% to 16% of the student population,¹⁶ more students are seeking treatment at these college counseling centers, which are seeing as high as a 42% increase in numbers of students seen.^{17,18} Such increased numbers of students seeking treatment may be due to improved awareness, increased acceptance of mental health service, or increasing psychiatric needs. But these numbers are far from clear: most studies of college mental health use incidence of clinic usage by students, which should not be confused with illness rates. A small proportion of students are seen professionally, and some of those seen professionally do not necessarily have an illness. Other students seek services privately and would not be recorded in university statistics. Notably, however, the number of students who are seen, referred for, and prescribed medication has indisputably increased at a dramatic rate.²¹

Furthermore, counselors and administrators report that students are coming in with more serious and severe mental health problems.¹⁴ Whether students actually have more severe

problems than in previous years is unclear and much debated.¹⁹ Staff and directors at counseling centers have long reported that students are more distressed or disturbed than previous years.²⁰ But studies based on systematic assessment of students have found no evidence of an increase in client acuity at student counseling centers from the mid-1980s through the early 2000s.²¹ Schwartz suggests that the perception that student clients are more seriously troubled over the past few decades may actually be due to “changes in the perceiver rather than in the persons perceived.”²¹

The popular media has also emphasized this growing problem of mental illness at higher education institutions.²² Although the media has portrayed a growing “crisis” in suicide among college students,^{23,24} little evidence supports a dramatic increase in suicide rates in college students.²⁵ Suicide rates in college are reported to be half of the age-matched population that is not in college.²⁶ The overall student suicide rate was 7.5 / 100,000 in the “Big Ten” schools, compared to the national suicide rate of 15 / 100,000 in a matched sample.²⁶ Suicide remains, however, the second leading cause of death among college students. Suicide attempt rates in colleges have been estimated at 4 to 8 per 10,000 students, based on retrospective reports,²⁷ notwithstanding a bias toward underreporting.²⁸ Suicidal ideation has been reported to anywhere between 20% to 65% of college students.^{29,30} In response to concerns about student suicide, researchers have conducted several studies of student suicide on multiple campuses.²⁶ Several campuses have convened mental health task forces to improve their services.³¹

Universities have responded by introducing and implementing different programs aimed at suicide prevention and awareness.³² Paul Joffe identifies four approaches to the different programs³³ with aims: 1) to cultivate a community of caring; 2) to identify and refer at-risk students; 3) to reduce academic stress; and 4) to work with survivors of completed suicide.³³ The

Jed Foundation has articulated four goals of its own programs: 1) to increase research on suicide in student populations; 2) to strengthen campus services; 3) to raise awareness and decrease stigma of mental illness; and 4) to promote health seeking.³⁴ Of note, universities and colleges have not agreed upon best practices, policies, or programs. In response to this “lack of consensus among colleges and universities about what constitutes a comprehensive, campus-wide approach to managing the acutely distressed or suicidal student,” the Jed Foundation in 2005 held a roundtable discussion which included senior college administrators, college counselors, mental health practitioners and attorneys.³⁵ Based on this meeting, the Jed Foundation released a framework for university policies that listed issues to consider when drafting or revising protocols relating to the management of the student in acute distress or at risk for suicide. Significantly, the framework provides a series of questions to highlight problem areas but does not articulate a standard of practice.

This paper focuses in particular on the procedural responses of universities in situations where the university must determine and may suggest that the student should pursue a leave of absence or withdrawal. The Jed Foundation states that the goal of leave protocols should be “to both normalize leave-taking, so that students feel that this is a viable option, and to make the process itself less intimidating.”³⁵ The framework also proposes that institutions make information about the leave and re-entry process easily accessible in handbooks and on websites.

II. Challenges and Pressures Facing University Procedural Responses

Policymakers at universities and colleges, including administrators, legal counsel, and mental health professionals, face a difficult dilemma. The university must balance the rights of the individual and that of the campus community, minimize liability while weighing what is in the best interest of the student, and act with flexibility and consideration while ultimately

maintaining control over whether a student is allowed to remain on campus. The best interest of the student is not always clear either. At the center of the dilemma is a difficult balance between civil rights concerns (i.e., patient autonomy, privacy, confidentiality, and right to due process) and a paternalistic drive to protect the student against himself or herself (e.g., not exposing the student to pressures of remaining in school). Administrators of educational institutions have claimed “no matter what a school official chooses to do, someone will be unhappy.”³⁶

Several sources generate different pressures on university administrators, mental health professionals, and attorneys when considering how to structure university procedural responses to the suicidal student. Although liability is often cited as a reason behind these decisions, this section addresses both liability and additional influences on decision-making and policy in this area.

A. Liability for Student Suicides and Suicide Attempts

One factor influencing university policies is the specter of liability. Universities and colleges have traditionally retained much discretion over the management of their students in a setting of “governmental and judicial abstention.”^{37,38} Courts have held that “[g]reat deference is extended to university decision-making in academic and disciplinary matters.”³⁸ The early doctrine of *in loco parentis* gave universities and colleges the power to determine the educational environment.³⁹ Under *in loco parentis*, colleges had significant discretion over their students and were insulated from the judgment of courts, with one court explaining that “[c]ollege authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.”⁴⁰ One scholar characterized American higher education as a “Victorian gentleman’s club whose sacred

precincts were not to be profaned” by traditional governmental intrusion and that higher education institutions “tended to think of itself as removed from and perhaps above the world of law and lawyers,” with an idea of self-regulation, operating “autonomously . . . thriv[ing] on the privacy which autonomy afforded.”⁴¹

Courts shifted away from this doctrine in the 1960s and 1970s,⁴² and administrations yielded more independence to students.³⁷ During this time, courts treated universities as bystanders,³⁹ fiduciaries, or parties to a contractual relationship with students.^{43,44} Courts also began to recognize the constitutional rights of students on campus of public institutions and began to see an increase in litigation brought by students and their families.

Currently, 88.3% of counseling center directors reported an increased level of concern on campus about liability risks regarding student suicides.¹⁴ However, lawsuits against mental health centers are reported at low rates: six reported lawsuits (one involved suicide) in a national survey of 366 colleges and university counseling centers conducted in 2005,¹³ and four lawsuits (two involved suicide) in the same survey of 367 centers in 2006.¹⁴ Despite low numbers of lawsuits in this area against universities, universities seem concerned about the high-profile nature and negative publicity of such cases.

Commentators suggest that the heightened concern for liability has adversely shaped university policies, causing universities to push out students at a risk for suicide and depression with policies that withdraw or dismiss these students.⁴⁵ *Nott* and *Hunter* are part of a growing number of legal actions brought against universities involving a student who attempted or completed suicide.²⁴ Universities have faced lawsuits for inadequate inaction (under negligence or breach of contract theories),^{46,47} or action that may have been harmful or discriminatory.^{1,48}

Institutions can be liable for exercising “too little [or] too much restraint . . . the former for malpractice, the latter for abridgement of civil rights.”⁴⁹

These questions are complicated by the specter of university liability for student suicides.^{50,51} A series of cases caused some universities to perceive an increased threat of liability, especially *Schieszler v. Ferrum College*,⁵² and *Shin v. Massachusetts Institute of Technology*.⁴⁶ In these two cases, the parents filed charges against university administrators for negligence in preventing the suicide of a student. In *Schieszler*, the court held that “[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.”⁵² Whether these cases (and the courts’ denial of the motion to dismiss several claims in these cases) represent a real trend of increased liability for universities is unclear. *Shin* was settled for an undisclosed amount, making it more difficult for universities to calculate their risks if they were considering liability. Such a trend would indicate a significant departure from a tradition in which universities have not been found to be liable for students who have committed suicide unless there is a “special relationship” and several cases which have limited the scope of liability of universities.^{47,53,54,55,56} The holdings in these cases may be very fact-specific, and their precedential value is untested.

Regardless of the true impact of these cases, universities concerned with this potential liability, when deciding whether to keep a student where there may be doubt about the student’s capacity to remain safe, will systematically err on the side of caution. This occurs not simply from considerations of liability and publicity, but also from the standpoint of ensuring the safety of the student. Such a systematic preference for false positives (i.e., where the student is withdrawn from school when they might have done well in school had they been allowed to stay)

rather than false negatives (where the student was allowed to stay and either attempts suicide again or, worst case scenario, completes suicide) is a product of the more general process of decision-making in this area. As the University of Illinois dean of students explained, “I’d rather get sued for saving a kid’s life than for ignoring a kid’s life.”⁵⁷ This discussion points to a deeper, more fundamental challenge in this area: the unpredictability and individualistic nature of suicide and suicide attempt.

B. Unpredictability and Individualistic Nature of Suicide and Suicide Attempt

One major challenge contributing to underlying anxiety surrounding policy development in this area is the inherent uncertainty of clinical decision-making for patients with suicidal ideation and/or attempts.⁵⁸ Developing accurate clinical instruments to identify individuals at risk for suicide has been an extremely difficult task due to the low incidence of suicide.⁵⁹ Suicide continues to defy accurate prediction, despite the development of dozens of assessment tools and models.^{60,61,62} Some have proposed that prediction of imminent suicide should borrow from models and methods for evaluation or prediction of violence.⁶³ This suggestion, however, is unhelpful, given that predictions of violence are equally as unreliable.⁶⁴ Clinicians therefore stress that it is “axiomatic” that psychiatrists and clinicians are unable to predict dangerousness or suicide of individual patients.^{62,65} No psychological test, clinical technique, or biological marker can make a short-term prediction of suicide in an individual with sufficient specificity or sensitivity.

Psychiatrists have responded to this challenge by moving away from the search for keys to suicide prediction and turned instead to risk assessment.⁶² Clinicians can, however, place individuals along a suicide risk continuum and can make an intervention appropriate for the level

of risk.⁶² The appropriate level of intervention is determined by clinical judgment, and decisions may vary from clinician to clinician.

Furthermore, students who have suicidal ideation, have attempted suicide, or have completed suicide are “not a homogenous group” and suicidal thoughts and actions have “intense individual meanings and purposes which can be understood only in the context of an individual’s life.”⁶⁶ This individual nature of suicide attempt and self-harm suggests that the appropriate response to these students also requires a very individual-centered inquiry.

C. Biopsychosocial Vulnerability of Adolescents or Young Adults

Suicide management in the adolescent and young adult population that lives on-campus or without immediate family support requires particular considerations. First, this age population is particularly susceptible to risk-taking behavior and often values short-term over long-term gains.⁶⁷ The underlying neurobiological factors related to this increased risk-taking behavior of adolescents is an area of recent research. The biological vulnerability of the adolescent population may be supported by evidence of a tenfold increase in the rates of both attempts and completion compared to the child population.⁶⁶ Second, in terms of developmental factors, this age population is facing primary tasks of adolescence, including separation and identity formation, both of which may be contributory to suicide attempts or completions.⁶⁶ Third, students living at colleges and universities are usually living away from home for the first time and are without the familiar sources of social support or family members who can ensure that the student will remain safe or follow the treatment plan. This change in social environment may be another reason for these students’ particular vulnerability.

This biopsychosocial vulnerability of adolescents in colleges and universities leads to the question of how much responsibility the institution should take on in the absence of parental

authority. Many assert that the institution should provide as many educational and support resources in order to fulfill its role as educator. Gary Pavela states that the aim “is to keep students in school, not to dismiss them.”⁶⁸ While most schools would probably agree with the importance of educating and supporting the student, the more problematic question is how far the school should go in order to satisfy a good faith effort to help the student stay and be successful? Institutions have limited resources and other duties to their students more broadly. Moreover, the university setting in certain cases simply cannot provide an appropriate substitute for the kind of social support that some students require to remain safe and stay in treatment.⁶⁹

D. Difficulty of Categorizing Behavior

The definition and terminology for suicide and suicidal attempt or behavior have been a long-standing challenge to the field of public health, research, and clinical practice.⁷⁰ The World Health Organization (WHO) Working group defined “parasuicide” as

[a]n act with a non-fatal outcome in which an individual deliberately initiates a non-habitual behaviour that, without intervention from others, will cause self-harm, or deliberately ingest a substance in excess of the prescribed or generally recognized therapeutic dosage, and which is aimed at realizing changes which the subject desired, via the actual or expected physical consequences.⁷⁰

Other terms have been used, such as deliberate self-harm, self-injury, or self-poisoning, but these terms can cover other behavior patterns that have nothing to do with suicidal behavior. The WHO group later shifted to using the terms “fatal” and “non-fatal” suicidal behavior, indicating that the intention to die is not always present.⁷⁰

Self destructive behavior is difficult to assess at a clinical level. Furthermore, administrators face the difficulty of deciding what kinds of behaviors are unacceptable for a university student. Adolescents who have suicidal ideation, have attempted suicide, or have completed suicide are all individualized cases.⁶⁶ The level of lethality and intent (and thus the

severity of the behavior) vary widely.⁷¹ Categorizing behavior as a suicide attempt is further complicated by the fact that suicidal ideation may exist transiently, and that the patient may later deny or even forget the original intent of self-harm.⁶⁶ Another major challenge is differentiating between behavior with suicidal intent and self-destructive behavior that is nonsuicidal, which may be self-soothing to the person.⁷² Does suicidal behavior have to include conscious intent to kill oneself? How consistent, long-standing, and in what contexts does suicidal ideation indicate a need for intervention? For example, consider a student who, in an intoxicated state, mentions to his roommates that he has thought about killing himself, but the next day, the same student is confronted by this fact and denies any suicidal ideation. Therefore, the university faces difficult questions both at a descriptive level, when assessing the level of risk of the student, but also at a normative level, when deciding what sorts of behavior are unacceptable at the institution and what is the appropriate sanction or response.

E. Weighing Impact on the Community

The suicidal student is often not the only student involved. Roommates, dorm residents, residence hall assistants, professors, and others can be deeply affected by a suicidal student. Therefore, whether a student is able to or should remain as a resident on-campus (or more broadly a student of the institutional community) is not a question that should be considered in isolation, or a narrow focus of the student's psychological state alone. An institution has to consider the impact on the educational community as a whole, including other students residing in the dorm, classmates, and professors. Institutions have a duty to protect their other students and to maintain a safe, healthy learning environment for all their community members.

This consideration may sometimes lead to a tension between decisions based on the interests of the student alone versus those based on community interests. For example, consider a

student who is publicly cutting in the residence halls in front of the other students in the shared bathrooms. The other students are distressed by this public behavior. This student may not have any more or less ability to remain safe than a student who cuts privately in his or her room, but the one exhibiting behavior in public may be subject to more regulation and removed from the dorm on the grounds that his or her behavior is affecting the other students. The institution often defends such policies on the grounds that the university cannot consider the student in isolation, but must consider the negative impact on the other students and may therefore decide to remove the student from the campus, and, perhaps, even, from the university.

Are universities justified in weighing the fact that other students are very distressed by such public behavior? While universities have a duty to protect all its students and preserve the well-being of the community, one important question to consider is whether the university would justify its position in the same way if it were instead a student with epilepsy who has a seizure in public and causes distress to other students. Most universities would not treat such a purely medical situation in the same way as cutting or suicidal behavior that does not affect other students and would not attempt to remove the student on the grounds that such behavior disturbs other students. Should behavior like cutting be treated differently than physical illnesses? Is it possible that university's policies reflect an underlying prejudice against mental illness or a misconception that such behavior is voluntary and thus should trigger more accountability compared to a purely medical problem?

While the university has a duty to all of its students, the university should weigh the interests of other students in a way that does not conceal underlying biases and discrimination against mental illness. One strategy would be for the university to consider the level of involvement of and detrimental impact on other students. For example, the university could

consider whether the injury to fellow students is that of mere witnessing or something more involved and concerning, such as other students feeling a responsibility to monitor a suicidal student. While students may not question whether or not they could have done something to have prevented the epileptic seizure, after a suicide or suicidal attempt, students involved with a suicidal student may bear the burden of guilt or questioning what they could have done differently to prevent the suicidal attempt, or worse, suicide.

Another important community concern is the copycat suicide phenomenon.⁷³ Youth are particularly susceptible to the influence of reports and portrayals of suicide in the news media. Research has suggested suicide clusters as a phenomenon of “behavioral contagion” in which “the same behavior spreads quickly and spontaneously through a group.”⁷³ Unlike the consideration of a treating physician when deciding the management of a student in a physician-patient relationship, the institutional actor must afford significant weight to the impact on the other students and has a duty to provide a safe and healthy environment to all those in the community and not just the one student alone.

F. Maintaining Student-Institutional Relationship

Both institutions and courts agree on the importance of maintaining positive student-institutional relationships. Courts have emphasized that “[t]he educational process is not by nature adversarial; instead it centers around a continuing relationship between faculty and students.”⁷⁴ Courts seek to protect the faculty-student relationship and refrain from “bring[ing] an adversary flavor to the normal student-teacher relationship.”⁷⁴ Institutions, including mental health professionals, agree with the importance of building and keeping a good relationship with the student and the student’s family.⁷⁵ The maintenance of this on-going relationship is particularly important since the student may wish to return to school. Ideally, when the

institution has decided that the student cannot remain on-campus or in school, mental health professionals and administrators state that the preferable method is for the student to leave or withdraw voluntarily. However, when the institution must initiate adverse proceedings in order to withdraw the student, the institution should still seek to maintain the relationship and implement a procedure that is least detrimental to the relationship with the student or the student's family. Thus, when institutions develop decision-making policies, one consideration is whether the policy will foster and maintain positive relationships with the student, and the student's family as well.

In terms of the relationship with the student's family, another consideration is the question of parental notification. The university must comply with the Family Educational Rights and Privacy Act, which permits but does not require parental notification where the student is a dependent for tax purposes or in emergencies.⁷⁶ This policy consideration is flagged here, but is outside the scope of this article.⁶⁸

G. Antidiscrimination Principles: Compliance with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act

Institutions are also faced with the challenge of avoiding discrimination against students with a disability. Universities must be compliant with Section 504 of the Rehabilitation Act of 1973⁶ and the Americans with Disabilities Act (ADA).² Pursuant to Section 504 of the Rehabilitation Act of 1973, a "handicapped" individual is defined as any person who:

- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (ii) has a record of such impairment, or
- (iii) is regarded as having such an impairment.⁷⁷

Major life activities is defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Physical or

mental impairment have been defined to cover “any mental or psychological disorder,” including an “emotional or mental illness.”⁷⁸

Section 504 is enforced by the U.S. Department of Education, Office for Civil Rights (OCR). The OCR has issued rulings regarding how institutions should properly address students at risk of suicide or engaging in self-injuring behavior. In a 2001 enforcement letter to Woodbury University in California, the OCR addressed a case where a student engaged in self-injuring behavior in the residence halls.⁷⁹ The OCR stated that:

[n]othing in Section 504 of the Rehabilitation Act prevents educational institutions from addressing dangers posed by an individual who represents a “direct threat” to the health and safety of others, or individuals whose dangerous conduct violates an essential code of conduct provision, even if such an individual is a person with a disability. A “direct threat” is a significant risk of causing substantial harm to the health or safety of the student or others that cannot be eliminated or reduced to an acceptable level through the provision of reasonable accommodations...⁷⁹

As stated in the OCR letter to Bluffton University, a university that involuntarily withdrew a student after a suicide attempt cannot simply rely on the defense that the withdrawal was based on a fear of a repeat suicide attempt.⁸⁰ The institution must conduct an analysis of direct threat. A “direct threat” analysis has been described as “painstaking, highly individualized, and contextual, including analysis of ‘various settings in which the student may be situated,’ and the requirement to consider ‘reasonable accommodation.’”⁵⁰ The university is required: 1) to determine the nature, duration, and severity of the risk; 2) to assess the probability that the potentially threatening injury will actually occur; and 3) to determine whether reasonable modification of policies, practices, or procedures will sufficiently mitigate the risk.⁸¹ In Bluffton University’s case, the OCR found that the evidence did not support that the university based its decision on a “direct threat” since

[t]he University did not 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 Student or other students. The University made the decision without providing the Student notice of a hearing or an opportunity to be heard.⁸⁰

The university had instead made a decision to withdraw the student within 48 hours of the student's suicide attempt.

In addition to conducting a "direct threat" analysis, the university must develop grievance procedures. The OCR ruled that a university must, in accordance with Section 504, 34 C.F.R. § 104.7(b), develop "grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of Section 504 complaints and equitable resolution of complaints" alleging discrimination based upon disability.⁸¹ Furthermore, the OCR "requires postsecondary institutions to make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability."⁸¹

The OCR does allow for emergency responses, however, where safety is of "immediate concern."⁸¹ The institution can take interim steps, like suspension, pending a final decision regarding an adverse action against a student as long as it includes minimal due process in the meantime and full due process later.⁸¹

Of note, courts have allowed schools to refrain from accepting students who present a substantial risk to themselves or others, specifically in the context of mental health, even when challenged under Section 504 of the Rehabilitation Act. In *Doe v. New York University*, the student plaintiff was denied readmission to New York University's medical school after exhibiting "numerous self-destructive acts and attacks upon others" along with a long-standing history of "serious psychiatric and mental disorders."⁴⁸

The court held that the institution had not violated Section 504, specifying that the level of risk did not have to be greater than 50%:

In our view [plaintiff] would not be qualified for readmission if there is a significant risk of such recurrence [of behavior harmful to herself and others]. It would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others, even if the chances of harm were less than 50%. Indeed, even if she presents any appreciable risk of such harm, this factor could properly be taken into account in deciding whether, among qualified applicants, it rendered her less qualified than others for the limited number of places available.⁴⁸

The OCR emphasizes that postsecondary education institutions need to provide due process for students at risk of suicide in cases where the institution dismisses the student as part of preventing discrimination against disability. This due process requirement is explored in more detail in the following section.

H. Procedural Due Process

The requirement for due process is closely intertwined with the aim toward antidiscrimination. Due process requires the institution to “adhere to procedures that ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice, and stereotypes.”⁸¹ The OCR ruled that institutions should afford some sort of due process when removing students with psychological disabilities exhibiting self-injuring behavior. The OCR has ruled that:

[w]ith regard to allegations of self-destructive conduct by an individual with a disability, OCR will accord significant discretion to decisions of post-secondary institutions made through a due process.⁷⁹

In cases where the institution is taking adverse action against the student, the OCR has ruled that minimal due process (e.g., notice and an opportunity to address the evidence) is required in the interim, and full due process (e.g., a hearing and the right to appeal) is required later.⁸¹

The need for due process also has a constitutional basis. Even though courts are generally deferential to educational institutions, public institutions and private institutions with requisite interaction with the state to amount to “state action,” are required to provide procedural due process under the Fourteenth Amendment of the United States Constitution.^{82,83,84} In *Mathews v. Eldridge*, the Court held that the amount of due process protections depends on the private interest, the risk of an erroneous deprivation of such interest, and the value of additional or other procedural safeguards weighed against the fiscal and administrative burdens of any additional or substitute procedural requirement.⁸⁵

In a landmark decision *Dixon v. Alabama Board of Education* in 1961, a federal appellate court held that public institutions of higher learning must follow minimal procedural due process prior to disciplinary action.⁸⁶ *Dixon* represents a break from the doctrine of *in loco parentis* as a guide to the student-institutional relationship to one based on the Constitution.⁴⁴ One court described minimal due process when an institution initiates adverse proceedings in order to withdraw the student:

When a sanction is imposed for disciplinary reasons, the fundamental requirements of due process are notice and an opportunity for a hearing appropriate to the nature of the case. In order to be fair in the due process sense, the hearing must afford the person adversely affected the opportunity to respond, explain, and defend. For school expulsion, due process requires an informal give-and-take between the student and the disciplinarian, where the student is given an opportunity to explain his version of the facts. Due process further requires that a university base an expulsion on substantial evidence.⁸⁷

Courts generally do not second-guess academic and disciplinary decisions made by private educational institutions, a deference that “derives from a commendable respect for the independence of private educational institutions and well-justified laissez-faire attitude toward the internal affairs of such institutions.”⁸⁸ Courts have found that it is not their role to prescribe how private institutions should handle punishment, holding that it is “not the court’s function to

decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards.”⁸⁹ But many private institutions still provide some procedural rights, and commentators have advised private institutions to follow general requirements of minimal procedural due process, in order to appear more fair and reasonable to courts, students, and the public.⁸⁴

Other courts have been more specific about requirements for due process in public higher education institutions. In *Esteban v. Central Missouri State College*, the court required: 1) written notification of the specific charges 10 days before the hearing; 2) a hearing before the agent or agents with the power to expel; 3) an opportunity to inspect documents or evidence the institution will present at the hearing; 4) the opportunity to have counsel present at the hearing; 5) the opportunity for the accused student to present her statement or witnesses on her behalf; 6) a determination of outcome based solely on the evidence presented at the hearing; 7) a written statement of hearing agent's findings; and 8) the right of the student, at her expense, to record the hearing.⁸²

However, most courts have not prescribed specific due process requirements and give administrative flexibility to institutions.⁹⁰ Courts continue to show great deference to institutions of higher education in the area of discipline and reluctance to interfere with institutional decisions:

[s]chool discipline is not an area in which courts law claim to any expertise. Consequently, courts will not generally interfere in the operations of colleges and universities. Courts must enter the realm of school discipline with caution and allow schools flexibility in establishing and enforcing disciplinary procedures.⁹¹

In *Goss v. Lopez*, courts held that due process requires some form of oral or written notice, an explanation of the evidence, and a hearing or opportunity to present the student's side of the story in connection with the suspension of a student from a public school for disciplinary

reasons.⁹² However, the Supreme Court did not require formal hearings, a holding later reemphasized in *University of Missouri v. Horowitz*.⁷⁴ The Court held that “[a]ll that *Goss* required was an informal give-and-take between the student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context.”⁷⁴

III. Disciplinary Procedural Responses

Given strong judicial deference to higher education institutions, universities are in a position to choose among a variety of procedural responses to a student at risk for suicide or self-harm. The Supreme Court has recognized the need for flexibility in how one provides due process. The Court has held that “we have frequently emphasized that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁷⁴ In addition, the OCR has admitted:

[A]lthough there is no inherent reason that issues particular to students with disabilities cannot be heard in the pertinent traditional due process forums, both the institution and the student may be better served by referring such issues to forums staffed by college personnel with more expertise in and familiarity with such issues. However, such non-traditional forums cannot deny the student with a disability the same opportunity as any other student to challenge the truth and accuracy of the accusations concerning his/her conduct and its perceived dangerousness.⁷⁹

One such method is to use disciplinary proceedings. Such proceedings are both a method of last resort when a student is adamant about staying against the university’s recommendations and also may serve as leverage to persuade a student to voluntarily withdraw or seek help. Under such a method, the university can choose to treat self-harm or suicide attempt as a violation of the student conduct code, and start adverse proceedings against the student for a disciplinary dismissal. This method has been used in cases where the student has poor insight into his or her

medical or mental health problem and refuses to withdraw from the institution voluntarily.¹ In these proceedings, courts require that universities of higher education have an obligation to give a student timely notice of his or her suspension.⁹² Courts have determined that “rudimentary precautions” of disciplinary dismissals include timely notice of the charges, an opportunity to present a defense, and a speedy hearing.⁹² Thus notice of disciplinary action and status, such as suspension or expulsion from the university, is commonly delivered to the student very soon after the triggering event.⁹³

A. Disciplinary versus Academic Dismissals

Courts have required minimal due process specifically in cases of disciplinary dismissals. *Goss* illustrates how courts distinguish between disciplinary and academic proceedings.⁹² While academic dismissals are well-insulated from court intervention, requiring very minimal procedural safeguards,^{94,95,96} disciplinary dismissals require minimal due process. For example, hearings are not required for academic dismissals.^{74,97} Academic dismissals are treated differently because

[m]isconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a very different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.⁷⁴

The limited dichotomy between academic and disciplinary proceedings leaves open the question: How should universities handle students with mental health issues? The decision about a student who is suicidal may not fall clearly under either the academic or disciplinary model.

B. Advantages of Disciplinary Responses

One important advantage of a disciplinary response is that the university focuses on the conduct alone and does not necessarily make any judgment about the student’s disability, unless

¹ Interviews with 34 university and college counseling center directors, Dec. 2006 (conducted by and on file with author).

the student wants to raise it as a defense. Such a response therefore does not require a psychological inquiry and can be based merely on the behavior of the student. The OCR stated that the institution should engage in an analysis in a nondiscriminatory way, where a determination is “based on a student’s observed conduct, actions, and statements, not merely knowledge that the student is an individual with a disability.”⁷⁹

A second advantage to using the disciplinary system is that it ensures that more minimal due process will be afforded to the student than if it were seen as a non-disciplinary decision. The lack of minimal due process in mandatory medical withdrawals and informal withdrawals is a serious problem.⁹⁸ Requiring minimal due process would make sense for a number of reasons. Fact-finding is crucial to determine the disposition of a student with mental health issues, as it is in disciplinary decisions. The U.S. Department of Education Office of Civil Rights issued a ruling that emphasizes the importance of fact-finding when educational institutions assess the dangers posed by an individual who represents a direct threat to the health and safety of self or others:

[a]n educational institution] must make an individualized and objective assessment of the student’s ability to safely participate in the college’s program, based on reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence.⁷⁴

Under the balancing factors articulated by the Court in *Mathews*, the private interests at stake are significant: the disruption or end to an academic career and the imposition of the stigma of mental illness. In *Addington v. Texas*, the court recognized the stigma of being involuntarily committed to a mental hospital and thus required a “clear and convincing” standard of proof.⁹⁹ Although the stigma in *Addington* can be distinguished as the stigma of involuntary commitment, the holding in *Addington* suggests that the Court recognizes that the label of mental illness and holding people against their will can trigger the need for procedural protections under the Due

Process Clause.¹⁰⁰ The Court has held that the interest of “not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful.”¹⁰⁰

The seriousness of being labeled as mentally ill is reiterated in *Lombard v. Board of Education of the City of New York*, where the court found that a teacher had the right to a full hearing before being dismissed based on a report of having a mental disorder and held that “[a] charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding.”¹⁰⁰ Therefore, medical leave and dismissals involve significant stakes for the student—interests that should not to be left entirely to the unchecked discretion of the university. Some lower courts have held that procedural protections are required before dismissing a student based on mental health.⁹⁸ In *Evans v. West Virginia Board of Regents*, the court held that a former student, who was dismissed based on “mental anguish,” had sufficient property interest in the continuation and completion of his medical education to “warrant imposition of minimal procedural due process protections.”¹⁰¹ The court reinstated the student and held the school was required to provide “due process protections” in the form of a hearing, opportunity to retain counsel, and formal written notice of the reasons for dismissal.¹⁰¹

Third, the university should ultimately have a tool with which to withdraw students who suffer from a lack of insight or denial of their mental illness or ability to stay safe. The problem of an automatic policy of withdrawal after suicidal behavior should be distinguished from the case where the university has already tried several other strategies of working with the student and has not been able to come to a compromise or workable treatment plan where the student can remain in the institution. In such cases where the student continues to refuse to withdraw, the

university needs a mechanism to either pressure the student to voluntarily withdraw or ultimately to initiate proceedings to involuntarily withdraw the student.

C. Disadvantages of Disciplinary Responses

Educational administrators admit that traditional disciplinary policies were not drafted with psychiatric problems in mind.¹⁰² In the context of suicidal students, it is much less desirable to have an adversarial hearing. The student's condition may be jeopardized or destabilized by an adversarial process. The process would potentially exacerbate the student's relationship with the university and its teachers and administrators. An adversarial hearing which pits the student against the institution also defeats educational goals. Even if the kind of due process provided is minimal it may not be worth the emotional, or more public (even if confidential) costs of going through this procedure. One question is whether the student should have the power to weigh such costs and benefits and to decide which route to take.

Furthermore, a process traditionally associated with disciplinary action would stigmatize and moralize a mental health issue. Such stigmatization is a problem both in a utilitarian and non-utilitarian way. Students may be deterred from seeking help or voicing suicidal ideation. Students will internalize this moralization and interpret symptoms of depression or other disorders as a sign of being a bad person rather than a medical issue to be treated. In fact, many mental health professionals find it inappropriate to consider suicidal thoughts or underlying mental health issue like depression as a disciplinary issue: Only 4.4% of college counseling center directors favor sending such students to judicial boards for disposition.¹⁴ Only 1 out of 34 of the counseling center directors interviewed reported that the university handled suicidal ideation or attempt by itself (i.e., when it did not involve disruptive behavior to other students) as a disciplinary issue.⁷⁵

Moralizing a mental health issue and “equating acts of self-harm with acts of violence and suicide with self-murder,”¹⁰³ are both inappropriate and archaic. Suicide has a long history of being treated as a violent crime and a crime of moral turpitude. Suicide carries a long history of being equated with a violent crime. Suicide was considered a felony under English common law, described by Blackstone as a “felonious homicide” or “self-murder.”¹⁰⁴ In fact, the act of suicide was referred to as “self-murder,” “self-destruction,” “self-killer,” “self-homicide,” and “self-slaughter,” and the word “suicide” did not appear until 1642 and was not in popular use until 1755.¹⁰⁵ Suicide was punishable by a burial on the highway, with a stake driven through the body at a crossroads for public execution, and resulted in forfeiture of the suicide’s goods and chattels to the king.^{106,107,108,109,110,111}

Most states in the United States no longer consider suicide a crime.^{112 113,114} But some jurisdictions continue to consider suicide a criminal act.^{115,116,117,118,119} Some jurisdictions criminalize the attempt to commit suicide, but not suicide itself.¹²⁰ Other state legislatures have rescinded punishment for suicide by statute, but have not decriminalized the act.¹²¹ Clinicians suggest that if suicide is defined as a crime or seen as immoral, then it impedes unbiased discussion and research in this area.¹²²

Nonetheless, even apart from implementing a disciplinary procedural response, some universities operate with an underlying disciplinary philosophy in responding to suicidal behavior. Most notably, the University of Illinois suicide-prevention program requires any student who threatened or attempted suicide to attend four sessions of professional assessment, and failure to comply with the program can result in forced withdrawal from the university.¹²³

Joffe, the creator of UI’s program states:

Traditionally, suicidal behavior has been seen as a mental health issue. Clinicians who meet with such students are expected to provide support and assist them in finding

reasons to continue living. I would argue that the mental health culture is not nearly as effective at deterring inappropriate in-chargeness as the conduct and discipline culture. In this respect, the Suicide Prevention Program has far more in common with an office of conduct and discipline than with a counseling center.¹⁰³

Joffe explains that contemplating suicide is an issue of being “fundamentally in-charge of their continued existence” and points out the criminal justice system or, on campus, the conduct and discipline system is “an institution that specializes in entering into contests with citizens who inappropriately take charge of other people’s property and decisions.”¹⁰³ Joffe asserts that the program is a way to “persuad[e] these students to stand down from their current state of in-chargeness” and asserts that “[e]xperience has shown that the best way . . . is not necessarily through being more warm, more caring or concerned.”¹⁰³

Joffe describes the message that the Suicide Prevention Team of UI’s program sends to the student is this:

It is clear from your recent suicide attempt that you currently deem yourself to be in-charge of your continued existence. We are contacting you to inform you that we deem suicidal behavior to be an act of self-directed violence. Given the campus’s zero tolerance of violence, your recent behavior is unacceptable. As you may or may not already be aware, the university is in-charge of your continued enrollment as a student. If you persist in being in-charge of your continued existence, I will petition the Dean to exercise his in-chargeness over your continued enrollment and ask him to withdraw you.”¹⁰³

Mandatory sessions are actually very controversial among mental health professionals, and a survey in 2006 found that 40% of directors are in favor of mandating a certain number of counseling sessions for students who mention suicidal thoughts to anyone on campus.¹⁴

The approach is detrimental insofar as students may be deterred from seeking help or sharing their suicidal ideation to others since they know it could trigger this disciplinary, mandatory process. Even more troubling, UI’s program mandates sessions but does not provide minimal due process: the student can appeal the accuracy of the report to the team and the Dean

of Students, but the requirement of the four sessions is not subject to appeal, and no hearing is available.¹²⁴ This philosophy thus heightens the problematic nature of disciplinary responses while neglecting to provide the advantages of a disciplinary response.

The UI program also addresses only a certain segment of those who have suicidal ideation. Since suicide ideation can be traced to “intense individual meanings and purposes that can be understood only in the context of an individual’s life,”⁶⁶ the idea that the program assumes that the students with suicidal ideation and behavior are seeking control over their own lives is too narrow and over-simplified. It does not address many other reasons why students may think about or attempt suicide. Although suicide may be, for some, a way to regain control, it can also be retaliatory, a result of psychological pain.⁶⁶

Institutions that choose to implement the disciplinary response should use it as a method of last resort, and furthermore should seek to provide the advantages of such a system while seeking to minimize the disadvantages.

IV. Non-disciplinary Procedural Responses: Psychiatric or Medical Withdrawal, Medical Leave of Absence, and Other Approaches

Several institutions do not approach suicidal ideation, attempt, and self-harm as disciplinary issues. Students are encouraged to get treatment and are managed informally on a case-by-case basis under an unwritten policy without hearings or disciplinary action. Some institutions that use the disciplinary system reserve them for situations where the student has been behaviorally disruptive to the community and affected roommates or other students. The majority of directors interviewed expressed that the disciplinary system would be triggered if the student were causing disruption to the community. For example, if a student is repeatedly public with his or her self-cutting and causes distress to fellow roommates, he or she may face

disciplinary action. Several directors cited this example during interviews and said that it would be potentially sent through disciplinary systems or the student's housing rights would be terminated.⁷⁵ Even then, there is much reluctance to apply disciplinary proceedings to students in these situations. Other institutions do not use the disciplinary system at all if it involves a suicidal student. One institution uses a behavioral contract to manage the student in the residence halls. Suicidal students returning to on-campus residential halls would agree to follow a behavioral contract with clear terms that if the student were to repeat the behavior, he or she would no longer be able to stay in the dormitory.¹²⁵

Committees and working groups also play important roles in reviewing cases and decision-making regarding suicidal students at some universities. One university used a working group that included the associate dean of students, housing or residential life director, disability resource center counselor, campus police, and mental health counseling center director.⁷⁵ Several directors of counseling centers described their role on such committees as offering advice or recommendations to the dean of students, who would make the final decision.

Forced withdrawals under these unwritten, informal policies are not well-studied or reported. Directors of university counseling centers have cited low numbers of forced withdrawals on their campuses, but such numbers largely remain confidential^{23,126} or unreported.⁹⁸ Some have estimated about two-thirds of higher education public institutions provide for mandatory psychiatric withdrawals.⁹⁸ It is not known how many of these policies have an appeals process or other provisions for minimal due process.

A. Psychiatric and Medical Withdrawals

Some institutions have developed written provisions for mandatory medical or psychiatric withdrawal of students and have applied them to suicidal students.^{75,102} For example,

Iowa State University has a policy of involuntary medical withdrawal, which states:

the [u]niversity may order involuntary withdrawal of a student if it is determined that the student is suffering from a mental disorder as defined by the current American Psychiatric Association Diagnostic Manual such that the disorder causes, or threatens to cause, the student to engage in behavior which poses a significant danger of causing imminent harm to the student, to others or to substantial property rights, or renders the student unable to engage in basic required activities necessary to obtain an education.¹²⁷

Under this policy, the student has a hearing before the Dean of Students, the Director of Student Health and a member of the Student Counseling staff and has at least 48 hours to review the psychological or psychiatric evaluation prior to the hearing. A written decision is rendered by a committee, which states the reasons for its determination. The decision may be appealed to the Vice President for Student Affairs.

Some universities do not offer a hearing or appeals process. Cornell has a policy of involuntary student leave of absence for reasons personal or community safety, which is invoked under “extraordinary circumstances.”¹²⁸ The policy states:

[s]eparation of a student from the university and its facilities may be necessary if there is sufficient evidence that the student is engaging in or is likely to engage in behavior that either poses a danger of harm to self or others, or disrupts the learning environment of others.

Cornell’s involuntary policy does not articulate an appeals process or hearing, perhaps because it is used only in very extreme circumstances. But one commentator observed that an appeals process is often unavailable in this medical leave or mental health approach and criticized that “there often is no genuinely neutral fact finder or decisionmaker in internal institutional proceedings.”⁹⁸

B. Medical Leave of Absence: Voluntary and Involuntary

Some medical leave of absence policies allow the student to take a certain period of time off from school and are initiated voluntarily. But some schools also have involuntary medical

leave of absence policies. For example, the University of Pennsylvania has an involuntary medical leave of absence regulation.¹²⁹ The policy states:

The University may place a student on an involuntary leave of absence or require conditions for continued attendance under the following circumstances when the student exhibits behavior resulting from a psychological, psychiatric, or other medical condition that:

- harms or threatens to harm the health or safety of the student or others;
- causes or threatens to cause significant property damage; or
- significantly disrupts the educational and other activities of the University community.

Under this policy, the provost, in consultation with the school dean may place the student on an involuntary leave of absence. The student will, “when reasonably possible . . . be given the opportunity to confer with the Provost and to provide additional information for consideration.”¹²⁹ The decision may not be appealed.

C. Advantages of Non-disciplinary Responses

These non-disciplinary responses are individualized, informal meetings that treat the issue as a mental health problem. The student’s problem is addressed as one that deserves treatment, not sanctions. Other advantages over the disciplinary response are that it lacks the moralization and stigmatization that the disciplinary system imposes on the student. Mental health professionals are often consulted by the decisionmaker or administrator and may therefore provide a more objective and independent analysis of the situation than how the adversarial process works with both sides bringing in their own experts. These informal meetings also can protect the student-institutional relationship and provide grounds for the student to return to school when he or she is ready.

D. Disadvantages of Non-disciplinary Responses

One major problem with these non-disciplinary approaches is that minimal due process is not often provided, compared to disciplinary procedures. Students are unable to challenge the institution's allegations in adversarial context and may have limited opportunity to present their versions of the story. These approaches also require inquiry into psychological issues, and do not focus on conduct alone, which risks discrimination against those with mental health issues. Furthermore, students who are forced to withdraw can face the stigma of failure,¹³⁰ but this kind of stigma may not be any more or less than the stigma that comes with a disciplinary dismissal.

For the medical or psychiatric withdrawal, another challenge is that readmission can often be difficult process for students to navigate.¹³¹ Where readmission can vary based on a distinction between medical and personal withdrawals, students have alleged that withdrawals based on mental health reasons are particularly disadvantageous.

The next section provides an alternative solution that balances the advantages and disadvantages of both types of responses and seeks to treat suicidal students in a nonjudgmental, neutral, fair manner disassociated from the moralization of disciplinary action, while also protecting due process rights and the student-institutional relationship.

V. Proposal for an Intermediate Mediation Step

In order to provide minimal due process and fact-finding, while also respecting suicidal ideation or attempts as mental health issues, I propose the use of mediation before resorting to a disciplinary hearing or mandatory psychiatric or medical withdrawal.

Five different criteria apply to the effectiveness and appropriateness of campus judiciaries and can be used here to help universities craft their procedural responses: competence, impartiality, acceptability, suitability for the job given to it, and consistency with the traditions of

the institution where it is established.¹³² The structure and process of mediation—or whatever response the institution chooses—should keep these goals in mind.

Mediation has several advantages over adversarial systems.¹³³ Cases that involve determining the disposition of a student at risk for suicide or self-harm are particularly suited to mediation. First of all, in contrast to an oppositional or confrontational nature of disciplinary proceedings, mediation aligns parties and operates with shared goals, protecting the relationship among parties such as the student-teacher relationship or the psychiatrist-patient relationship. As one commentator explained, While the adversarial process produces winners and losers, mediation allows the parties to creatively fashion a noncoercive resolution of their dispute in which both parties benefit.”¹³³ An agreement through mediation would provide a better foundation to a continued relationship between the student and university.

Secondly, this non-adversarial environment with an impartial mediator would be less intimidating for students, particularly since they do not have right to counsel in disciplinary proceedings.^{134,135} Students would be encouraged to participate and work through the problems rather than have to assess risk, endure the stress of an adversarial proceeding, or voluntarily withdraw without having been heard. The informality of mediation can be more reassuring to the student and administrators, and allow both sides to feel less defensive and work together. Some policies for medical leave and withdrawal indicate language consistent with a goal to create a non-adversarial, non-coercive environment and share similar goals to protect these relationships. For example, University of Illinois at Urbana Champaign in its student policy states that the student should have the opportunity to examine the psychiatric or other evaluations in an informal proceeding and can be assisted by a member of the faculty, a mental health professional, or by other counsel.¹³⁶ Other universities state that they will provide for an

informal hearing that is “conversational and non-adversarial” for involuntary administrative withdrawals.^{137,138}

But one problem has been that “there often is no genuinely neutral fact finder or decisionmaker in internal institutional proceedings.”⁹⁸ Mediation can correct this by including a neutral decisionmaker who is not associated with the university.¹³⁹

Third, mediation does not have the same element of blame and does not assign “winners” or “losers.”¹³³ The lack of blame is particularly appropriate in situations regarding mental illness.

Fourth, mediation is a forum in which the participant will have an opportunity to be heard. The student would be able to relate his or her perspective and not be limited by the specific questions in a formal disciplinary proceeding or the adversarial procedures. The ability for the student to articulate his or her own version to a neutral third-party may prove therapeutic.

Fifth, mediation can be an educational process for the student, just as it is for clients in legal matters compared to the trial system.¹³³ Given that these procedures are within the context of an educational relationship, mediation is a way that the student can see and learn about his or her own case more objectively.

Mediation allows for greater flexibility and narrowly tailored solutions. Rather than being restricted to the rules of disciplinary proceedings and a limited set of results like suspension or leaves of absences, the terms of a medical leave or withdrawal, treatment, or expectations for readmission can be discussed based on the individual case. Finally, mediation proceedings could potentially result in time and expense savings, but more research in this area needs to be done. Administrative costs and efficiency should be researched and compared to current policies like disciplinary action or mandatory withdrawals.

One of the main challenges of mediation will be confronting problems of confidentiality.¹³⁹ Mediation, like hearings, should be kept confidential, in order to allow both parties to feel more free to speak, and the university should consider a signed agreement between the parties which would state the statements made in mediation would be confidential. The parties could also agree to make statements in mediation unavailable to later proceedings. This may prove to be a drawback to either party, but can be negotiated. Second, an imbalance of power may still be present in mediation. This problem can be partially remedied by allowing the student to have a representative with university ties during the proceedings. One commentator has suggested including a tenured faculty member as a student representative.⁹⁸ Another risk involved in mediation is that the student may reveal undesirable attributes during proceedings. The student may reveal too much information, which would normally be kept confidential under other adversarial circumstances. This risk should be weighed against the costs of other available options, and the university should offer the student the options of a disciplinary hearing in order to give, at least, in this difficult situation the student some autonomy in deciding which route to take. The university must decide whether to make mediation results binding or if they can be appealed. Furthermore, if mediation does not arrive at a solution, then the university must decide whether parties could resort to hearings or the other procedures already in place at the university. Mediation would at least be a non-adversarial step that provides due process before resorting to formal disciplinary proceedings or withdrawals that do not offer as much due process protections.

One major limitation is the lack of empirical data on how many students are dismissed and under what informal procedures. Although experts in this area have expressed the need for “[e]stablishing a centralized registry for suicides and suicidal behavior among college and

university students in order to provide sound and consistent information about the magnitude and trends of the problem,”¹⁴⁰ such a registry of that information or information about the disposition and withdrawal outcome of the student may face resistance from university administrators and counseling centers who will consider such data confidential or may not want such numbers public. Major barriers to collecting these data include the confidential nature of medical and administrative records and the strong preference of universities not to release such information to the public.

VI. Conclusion

Universities and colleges should preserve the minimal due process protections of disciplinary systems along with a mental health approach by using principles of mediation. This paper has delineated the difficult questions that universities must face with students at risk of suicide or self-harm, specifically regarding procedural protections. I have set forth the framework for a proposal that will require a more detailed development in later work, including studies of administrative and efficiency cost comparisons. This is a policy-making area that may be reactionary to lawsuits. More studies are needed to assess changes in current written or unwritten policies at universities and colleges and, in particular, the number of students affected. In particular, as more colleges and universities may implement forced withdrawals, mandatory sessions, and the medical model, the need to ensure adequate procedural protections becomes ever more pressing.

Acknowledgments

I am deeply grateful to Professors Howard Zonana, M.D., of Yale School of Medicine and Robert A. Burt, J.D. of Yale Law School for their invaluable mentorship and comments. I am indebted to Chad W. Flanders, Ph.D. for his generous support and insightful comments. I owe a special thanks to Richard Belitsky, M.D. for showing me that compassion and kindness in psychiatry can and should persevere in the most challenging clinical situations. I would also like to thank Professor Paul Appelbaum, M.D. of Columbia University for his generous help and thoughts. Finally, I owe much gratitude to the college counseling center directors who generously and thoughtfully shared their experiences, insight, and, most of all, demonstrated a compassionate attitude toward their students.

Appendix A. Characteristics of Colleges and Universities Interviewed

Table 1. Characteristics of Counseling Center Directors Interviewed

Characteristic	% (N=34)
Male	68 (23)
Female	32 (11)
Current Director	92 (31)
Former Director	8 (3)

Table 2. Characteristics of Schools Interviewed

Undergraduate School Size	Under 2,500 18% (N=6)	2,500 – 7,500 % (N=12)	7,500 – 15,000 % (N=6)	Over 15,000 % (N=10)	Total % (N=34)
School Status					
Private	100 (6)	58 (7)	50 (3)	20 (2)	53 (18)
Public or State-related	0 (0)	42 (5)	50 (3)	80 (8)	47 (16)

Table 3. List of Colleges and Universities Interviewed
(2 colleges and universities are not listed at their request)

Brigham Young University
Central Michigan University
Colorado State University- Pueblo
Cornell University
Dickinson College
Keene State College
Loras College
McMurry University
National Louis University
Northern Arizona University
Rollins College
Sacred Heart
Sarah Lawrence
St. John Fisher College
Truman State University
University of California, Davis
University of California, Irvine
University of Massachusetts Dartmouth
University of Florida
University of Iowa
University of Pittsburgh
University of Puget Sound
University of Rhode Island
University of Southern California
University of Tulsa
University of Wisconsin
University of Denver
University of Hartford
University of Miami
University of Alaska-Fairbanks
Virginia Commonwealth University
Yale University

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- ¹ Nott v. George Washington University (D.C. 2006) (complaint), available at www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf
- ² 42 U.S.C. § 12181 et. seq
- ³ 42 U.S.C. § 3604(f)
- ⁴ Doe v. Hunter College, 04-Civ-6470 (S.D.N.Y. 2004), Court Documents. Available at <http://www.bazelon.org/issues/education/incourt/Hunter/courtdocs.html>
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