

7 *A proactive risk management approach focuses on both academic and cocurricular needs to ensure disability services will maintain the best interests of students with disabilities, the broader campus community, and the institution.*

## Responding to and Supporting Students with Disabilities: Risk Management Considerations

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A wide variety of risk management issues are present every day on campuses across this country, many of which can arise from unexpected sources and situations. However, a 2004 survey showed that, at that time, few of the major colleges and universities responding to the survey had a comprehensive risk or crisis management plan in place (Mitroff, Diamond, and Alpasian 2006). Awareness has increased somewhat since then, in large part because of the attention and reactions prompted by several devastating human tragedies and natural disasters at a number of colleges and universities. But the impact of that change appears somewhat mixed. The National Association of College and University Business Officers' (NACUBO) National Campus Safety and Security Project survey reported that 85 percent of campuses have emergency preparedness plans that cover a wide array of possible emergencies (NACUBO 2009). However, that same year a survey by the Association of Governing Boards of Universities and Colleges (AGB) and United Educators noted that 60 percent of respondents said their institutions do not use comprehensive, strategic risk-assessment to identify major risks to mission success (AGB 2009). According to Whitfield (2003), "while commitment to risk management is strong, actual execution continues to evolve and remains weak" (17).

Recognition that this issue is of particular importance to the effective operation of disability services has just recently begun to receive the attention it demands. In view of factors affecting the environment in which higher education finds itself today, administrators should make it a high priority to understand how potentially complex risk and liability issues can significantly challenge and impact decisions within the context of disability services.

## Legal Considerations in Higher Education

Historically, colleges and universities have been viewed as ivory towers surrounded by reality. The world of higher education was largely a self-created, self-perpetuating, insular, isolated, and self-regulating environment. In this organizational culture, institutions were generally governed under the traditional, independent “silos of power and silence” management model, with the right hand in one administrative area or unit often unaware of the left hand’s mission, objectives, programs, practices, and contributions in another unit.

For a significant period of time in our nation’s history, the outside world intruded upon colleges and universities by invitation only and higher education faced few legal requirements. For many years, courts and legislatures generally deferred to decisions made by the academy. One such example was the 1928 *Anthony v. Syracuse* court decision that upheld the dismissal of a Syracuse student based simply on the rationale that she was not a “typical Syracuse girl” (*Anthony v. Syracuse* 1928).

The 1960s brought significant societal changes and saw the federal government begin to enact specific legislation affecting colleges and universities. The proliferation of federal laws, coupled with the rise of aggressive consumerism toward the end of the 1990s, led to an increased risk of private legal claims against institutions of higher education—and their administrators—by individuals or groups of students. Higher education has lost its special status and is now treated like any other business by judges, juries, and creative plaintiffs’ attorneys. In the summer of 2008, for example, the University of Nevada at Reno was defending more than 30 pending lawsuits and had spent \$1.7 million on outside counsel for just four of these cases (Schmidt 2009).

Furthermore, the trend in claims against institutions of higher education is for courts to determine that a “special relationship” exists between the institution and the harmed party (in most cases a student or students), and then to review and evaluate the institution’s decisions and actions against this standard. This has led courts from finding that colleges and universities owed “no duty” to those harmed in a higher education setting, to instead reviewing and evaluating the “reasonableness” of campus decisions and actions based on the “foreseeability” of the consequences as the threshold question in evaluating legal claims and allegations. Courts are interpreting this “special relationship” between institutions of higher education and students as imposing a legally mandated duty on colleges and universities to take necessary and appropriate steps to protect students in their care. Lake (2007) opined that, in the future, colleges and universities will be legally called to account for their actions more frequently. Specifically, he states that, while institutions of higher education may not be held liable more frequently, they will now “have to go to court, the legislatures, and Congress and explain why [they] did what [they] did—or did not do—more consistently and more probingly than ever before” (Lake 2007, 43).

In today's landscape, claims can be brought against colleges and universities for any number of things including (but not limited to): tort litigation (negligence, gross negligence, personal injury, property damage, premises liability); breach of contract; negligent supervision; and failure to provide constitutional and/or contractual due process. While it may be impossible to anticipate, react, and defend against all such claims, there are proactive and responsible steps that colleges and universities can take to reduce their risk of litigation and possible liability, while simultaneously providing appropriate support services and programs to all students, especially those students with disabilities and, in particular, those with significant psychological issues.

### **Risk Management: The Context for Disability Services**

Risk for an institution of higher education can come in many forms: physical or emotional harm to students, faculty, or staff; financial losses; or damage to facilities or reputation. There are a variety of possible responses to particular types of risk: avoid or ignore it; attempt to transfer it to a third party; make attempts to reduce, mitigate, or control the negative effects; or, in some instances, decide to accept some or all of the consequences of the risk. Obviously, we do not have the option of ignoring the risks potentially posed by having students on our campuses who have disabilities, including significant psychiatric disabilities. Moreover, the focus of risk management in the higher education setting should not be simply to avoid lawsuits and legal liability. The intent and focus should be to protect students, faculty, staff, and visitors from reasonably foreseeable harm by reducing unnecessary risk. As Achampong (2010) summarized, "In the final analysis, the ultimate goal of efforts to maximize an institution's value (through risk management) . . . is the achievement of the institution's expressed vision" (23).

Within this context, "risk management" is clearly a disability services issue. There may be certain threats inherent in the presence of particular students on campus—who may be known or unknown to the disability services office. The risk can relate to the specific nature of a student's disability and the behaviors associated with the disability that, under certain circumstances, may pose a threat to the student or to others. In every instance, the best interests and legal rights of a particular student involved must be considered and addressed, as well as those of other students, the campus community generally and the institution itself. As Novak and Paterson (2009) noted: "Key court decisions . . . imply that the responsibility of the university is to not only enforce standards of conduct and safety protocols but also to engage in proactively addressing known behaviors or environments that may result in harm or injury to students" (6).

Certainly, not all students with disabilities pose a threat of harm to themselves or others, and not all students who may pose a potential threat have diagnosed or documented disabilities. But, especially as more students

with significant mental health issues enter higher education, disability services providers (as well as student affairs professionals, support staff, advisors, and faculty members) are spending more time dealing with and responding to the behavioral issues that can arise. As responsible administrators, it is important to be well-versed not only in the best practices for providing accommodations to students with psychological disabilities, but also in the processes, procedures, and best practices that provide legal protection for the institution and result in a healthy educational, co-curricular, and residential living environment for all students and a safe and secure environment for everyone who is a member of the campus community.

### Lessons Learned

In recent years, courts have intervened to second-guess or weigh in on the appropriateness of an institution's decisions and actions when faced with the complex challenge of responding to students who presented a risk to themselves or others. In 2002, the parents of Elizabeth Shin sued MIT for \$27 million for the suicide death of their daughter and later settled for an undisclosed sum (Richards 2007). A federal trial court in Virginia found that Ferrum College had owed a "duty of care" to a student who hanged himself. The court determined that there was a "duty to protect" based on the institution's "special relationship" with its students (*Schieszler v. Ferrum college* 2002). In view of this, many institutions have chosen to respond more aggressively, not only by providing an increased range of psychologically related support services and programs, but also by developing and implementing specific policies to address issues regarding possible self-harm or endangerment. These efforts can protect not only the troubled student, but others at the institution.

In some instances, however, these policies have not withstood legal challenge. For example, in 2006, Hunter College removed a student from the residence halls after the student sought treatment following a suicide attempt. Their school policy stated: "Any 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" (*Doe v. Hunter College* 2004). The student claimed that the policy violated the Fair Housing Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. The school settled the case for \$165,000 (Capriccioso 2006).

In a similar situation, a student at George Washington University was forced to withdraw and was banned from campus after checking himself into a university hospital for depression. The University sent him a letter stating that he had violated the student conduct code by engaging in "endangering behavior" (Kinzie 2006). While these institutions and others may have had the best interests of students in mind in enacting these policies,

the overreaction scenarios they created had a detrimental effect on the individual students involved, as well as proving to be potentially discriminatory against students with apparent mental health issues.

Of course, colleges and universities can also be held responsible in the court of public opinion for not taking action when warning signs appear obvious. Such has been true regarding Virginia Tech following the release of the Virginia Tech Review Panel's report which listed ten separate documented episodes of threatening behavior by Seung-Hui Cho prior to the April 16, 2007, shootings that resulted in the deaths of 32 innocent victims. Moreover, several key administrators and staff members had specific knowledge about Cho's threatening behaviors, but were under the impression, supported by their legal counsel, that they could not share such information with one another, intervene, and take action ("Mass Shootings at Virginia Tech" 2007). It is likely that much more damaging information will come to light regarding the failure of Virginia Tech administrators to take appropriate steps to respond to a known threat. On April 16, 2009, the families of two students who were killed, and had not entered into a previous settlement agreement, filed lawsuits against the Commonwealth of Virginia, Virginia Tech, and individual administrators and counselors. Each seeks \$10 million in damages.

On three occasions, most recently November 22, 2010, the Virginia trial court judge ruled that claims of gross negligence will be allowed to proceed against the university, its president, a former executive vice president, and three employees of the university's counseling center ("Virginia Tech Officials Can be Sued Over '07 Shooting Deaths" 2010).

### **Responding Effectively Means Planning Proactively**

As the previous examples indicate, the current legal landscape can make appropriate decision making by college and university administrators complex and difficult. Administrators and staff can be confused by the law and often face the dilemma of under- versus overresponse. At the same time, students may face the choice of seeking support and assistance for their disabilities or mental illnesses, or potentially jeopardizing their educational opportunities merely by seeking help and making their particular situation known. Under these circumstances, it is especially important that disability services providers be part of institution-wide risk management planning, assessment, and preparation.

It is also important to recognize that institutional risks and crisis management scenarios often require decision makers to balance competing needs and demands, both internal and external. A behavioral issue involving a student who poses a threat to self or others may involve the varying agendas of students, parents, faculty, staff, alumni, as well as lawyers, insurance brokers, community members, the press and media, and governmental investigative and enforcement agencies. Developing effective review,

assessment, and decision-making strategies, as well as determining the roles and responsibilities of key decision makers, is critical to minimizing risk and controlling the outcome of such scenarios.

Over the past several years, numerous institutions have faced situations where the risk incurred and the resulting consequences were almost unimaginable and, certainly, in some cases, unforeseeable. However, in response to expected or unexpected crises, whether resulting from the uncontrollable force of nature or from an unfortunate student-generated human tragedy, there are some common themes for those institutions that fared well and responded effectively and appropriately versus those that did not. Below are listed characteristics of an effective response.

- Procedures and protocols had been developed and implemented in advance of the crisis scenario and their application, use, and effectiveness had been tested under controlled circumstances.
- The senior leadership team was responsive, creative, and decisive and exhibited flexibility as unforeseen situations and circumstances developed or became known.
- Administrators made decisions in keeping with their existing protocols and procedures and did not respond idiosyncratically to “the crisis.”
- Decisions and action steps were reevaluated as new information became available.

The following characteristics were associated with an inadequate response:

- Institutional policies, protocols, and procedures were either lacking or shown to be insufficient and ineffective.
- Institutional policies and administrative decisions were apparently based on subjective stereotypes and not an objective analysis of a particular situation.
- Senior administrators were aware of relevant, important information in advance of the incident, but failed to act or intervene.
- Key administrators did not communicate effectively with each other and/or covered up unflattering information regarding their areas of responsibility.
- The press and media came early and often and the institution seemed unprepared to respond and unable to control its message.
- Administrative decisions, intentional or otherwise, of what “not to do” were often more important to the outcomes than decisions regarding what “to do.”

### **Practical Considerations: Risk Management Protocols**

All experienced disability service providers are well aware of the legal mandates imposed by Section 504 of the Rehabilitation Act of 1973, the Americans

with Disabilities Act, and their related amendments (the Americans with Disabilities Act Amendments Act). They know that a “disability” is a physical or mental impairment that substantially limits one or more major life activity and that an “otherwise qualified” person must be provided “reasonable” accommodations. But the devil is often in the details, especially when it comes to dealing with students who may pose a risk of harm to themselves or others.

Sometimes, there can be more questions than answers. For example:

- Does a particular student have a disability—or not?
- Is the institution “on notice” that a student has a disability?
- For students who pose a risk of harm to self or others, and may have a disclosed psychological disability, what are the legal hurdles to assist them and/or remove them from campus?
- If there is a threat of harmful behavior, what are the institution’s legal duties and responsibilities?
- Is the assessment of risk based solely on an objective analysis or has subjectivity entered into the process?

The obligation and duty to respond to a student who poses a threat to self or others is fairly clear under federal law.<sup>1</sup> However, as the facts and circumstances surrounding the recent tragedy in Tucson have pointed-out, an institution’s related obligations and duties under the laws of a particular state may be open to interpretation.

The Office for Civil Rights (OCR) has ruled that federal law does not prevent an institution from addressing the dangers posed by an individual who represents a “direct threat” even if she or he is a person with a disability, as that person may no longer be qualified for a particular educational program. In their letter to Bluffton University, the OCR noted: “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 self or others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity” (*OCR Letter: Bluffton 2004*). The OCR cautioned, however, that institutions of higher education must take steps to ensure that any disciplinary actions against a person posing a threat “are not a pretext or excuse for discrimination.” The OCR further noted in its letter to Marietta College that it is incumbent upon colleges and universities to adhere to fair due process procedures including giving the student notice and an opportunity to address the information and evidence to the extent practicable (*OCR Letter: Marietta 2005*).

The updates to the Family Educational Rights and Privacy Act (FERPA) in January 2009 make it clear that an “educational agency or institution may disclose information to an eligible student’s parents in a health or safety emergency.” The new regulations, in fact, encourage institutions to release

information to avoid outbreaks of violence and they allow the institution to take into consideration the “totality of the circumstances” regarding the “significant and particular threat.” As stated in the regulations, the Department of Education will not “substitute its judgment for that of the educational agency or institution in evaluating the circumstances making its determination” (FERPA 2009).

While institutions of higher education may intervene and remove students from campus if they pose a direct threat to self or others, it is important to consider each case individually and to have the appropriate administrators and decision-makers involved in each instance make the best decision for the particular student as well as for the institution as a whole. At their core, these policies have a primary desire to protect a student from self-harm or to protect the community from the negative effects of self-injurious behavior, but what is legally permissible and what is “the best decision” for the student and institution may not always coincide (Bombardieri 2006). But Pavela (as cited in Capriccioso 2006), warns against establishing “hair trigger” removal policies for students who threaten suicide or harm to others. Pavela also notes: “Our primary job is to educate students, not devise creative ways to dismiss them”.

So how does an institution effectively go about making these difficult decisions? Following guidance from the OCR, recent court cases and best practices in student development for responding to students with disabilities, the following protocols should be in place:

1. *Establish a Threat Assessment Team.* Campus threat assessment teams are critical in today’s legal and risk management landscape. They are not only necessary in terms of preparation and planning for major campus incidents (such as weather-related disasters, active shooting situations, or hazardous materials spills), but also in terms of dealing with and responding to the day-to-day incidents that, when dealt with proactively and properly, can prevent future harm or tragedy. Disability service providers should be integral members of such teams and should be included in decision making not only about individual student issues, but also about overarching institutional planning efforts. Lake (2007) notes the importance of such teams:

Dangerous people rarely show all of their symptoms to just one department or group on campus. A professor may see a problem in an essay, the campus police may endure belligerent statements, a resident assistant may notice the student is a loner, the counseling center may notice that the student fails to appear for a follow-up visit. Acting independently, no department is likely to solve the problem. In short, college must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions. (43)

2. *Utilize Individualized, Direct Threat Assessment in Decision Making.* OCR has provided comprehensive guidance to colleges and universities regarding the appropriate response to students who exhibit dangerous or threatening behavior. The OCR makes it clear that decisions made in the best interest of the individual student involved, as well as the institution as a whole, should be made based on observed behaviors and specific conduct, not beliefs or suppositions about the cause of the behaviors (or the alleged or documented diagnosis). Decision makers should obtain credible medical evidence, diagnoses, and opinions from qualified medical professionals and use that information for assessment and decision making. To the extent practicable, the institution should provide notice to the student about impending decisions regarding his or her enrollment, afford the student an opportunity to be heard, and provide relevant, supporting information. It is also important to assess the actual risk of imminent harm using the direct threat analysis. Key decision makers should review the nature, frequency, and duration of the behavior and attempt to assess the likelihood, imminence, and nature of the harmful conduct in the future.
3. *Consider Alternatives to Suspension or Withdrawal.* Even if the ultimate decision in a particular student's situation is for that individual to be removed from the college or university's campus, it is important, as a part of the interactive discussion, review, and decision-making process, to consider other alternatives. This will ensure that the student can provide proposed solutions that administrators may not yet have considered and may allow for the student to continue his or her education in a modified fashion. Such alternatives can include releasing a student from campus housing, proposing a medical leave of absence for a semester or more, allowing a reduced class load, or developing a process by which a student can complete his or her coursework online or from a distance.
4. *Establish and Communicate Conditions and Requirements for Return.* If the decision has been made for the student to leave the institution (either voluntarily or involuntarily), it is important to establish clear parameters and conditions for the student's return. More stringent requirements for readmission can be established and put in place than in the original admissions process and all requirements should be clearly outlined in writing to the student, with copies to all administrators at the institution who have a legitimate educational interest. Readmission agreements should state the terms of exit and the reason, indicate what medical information is required to consider readmission, state that the institution desires to assist and support the student, but has certain expectations with which the student must comply, including asking various health care providers to confirm counseling or other relevant medical treatment.
5. *Establish Clear Parameters for Information Sharing with Key Administrators.* FERPA establishes guidelines for the sharing of information

about a student. It is permissive in terms of how that information can be shared, so each institution should establish more clearly its own internal rules and policies and state the ways in which information can be shared, and with whom. The legislation makes it clear that those with a “legitimate educational interest” include those who perform an administrative task as outlined in the person’s official job duties or who perform a supervisory or instructional task directly related to the student’s education. It may also include those who perform a service or benefit for the student such as health care, job placement, financial aid, or other related areas (§99.36 (b) (1) and (2)). It is up to each institution to establish a clear policy and protocol for determining which persons have a “need to know” in relationship to particular student issues.

## Conclusion

Making the “right” risk management decisions involving students with significant psychological disabilities requires, of course, a clear and comprehensive understanding of the legal obligations and duties at issue. It also requires taking into consideration the best interests of these individual students. At the same time, decision makers must focus on the best interests of students generally, other potentially affected members of the campus community, as well as the best interests, mission, values, reputation, and security of the institution.

## Note

1. This article was written prior to the shooting tragedy in Tucson. While the relevant issues remain clear under federal law, the facts and circumstances surrounding this incident have pointed out that an institution’s related obligations and duties under the laws of a particular state may be open to interpretation.

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