

Spring 2017

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Recommended Citation

Dana Martin, *Higher Education Institutions' Treatment of Students Deemed a "Direct Threat" to Themselves and the ADA*, 12 Nw. J. L. & Soc. Pol'y. 111 (2017).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol12/iss3/4>

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Higher Education Institutions' Treatment of Students Deemed a "Direct Threat" to Themselves and the ADA

Dana Martin

I. INTRODUCTION

Mental illness among college students has risen sharply in recent years.¹ Studies have suggested that up to one-third of students meet the criteria for depressive illness during their college tenures.² In 2007, five times as many college students surpassed clinical cutoffs in one or more major mental health categories than in the 1930s.³ This study suggests that mental illness among college students is not a new problem, but a growing one.⁴ Each successive generation of high school- and college-aged students exhibits more mental health issues than the previous.⁵ An unfortunate consequence of this reality is the resulting rise in suicide among young adults, which has become the second most common cause of death in that demographic.⁶

Colleges' and universities' response to this mental health crisis among young people has been alarming. For purposes of this Note, self-harming behavior refers to suicide and suicide attempts, as well as cutting, burning or other topical self-inflicted injuries, and starving or bingeing and purging in connection with an eating disorder. When a student exhibits these types of self-harming behavior, schools often respond with disciplinary action, citing a violation of a student code of conduct that prohibits harming a student (the student him- or herself being the victim) and punishing the student, sometimes with suspension or expulsion.⁷ Because disciplinary actions necessarily involve some internal procedure, schools will argue this grants students appropriate due process, despite the fact that it is essentially creating a disciplinary cause of action for a mental illness.⁸ Other schools employ involuntary leaves of absence with complicated and unclear readmission procedures. For example, in 2010, Spring Arbor University attempted to place a student on involuntary medical leave with readmission pursuant to a behavioral contract that, among other items, required the student to "avoid stressful social situations" and provide written

¹ Gregg Henriques, *The College Student Mental Health Crisis*, PSYCHOL. TODAY (Feb. 15, 2014), <https://www.psychologytoday.com/blog/theory-knowledge/201402/the-college-student-mental-health-crisis>.

² *Id.*

³ Jean M. Twenge et al., *Birth Cohort Increases in Psychopathology Among Young Americans, 1938–2007: A Cross-Temporal Meta-Analysis of the MMPI*, 30 CLINICAL PSYCHOL. REV. 145, 150-51 (2010).

⁴ *Id.* at 152.

⁵ *Id.*

⁶ Henriques, *supra* note 1.

⁷ Katie J.M. Baker, *How Colleges Flunk Mental Health*, NEWSWEEK (Feb. 11, 2014, 11:13 AM), <http://www.newsweek.com/2014/02/14/how-colleges-flunk-mental-health-245492.html>.

⁸ *Id.*

documentation that he was receiving appropriate medical treatment.⁹ Although there are circumstances where removing students from a potentially dangerous situation so that they may seek professional help in a treatment facility or at home with a familiar doctor may be in their best interest, the lack of consideration for individual circumstances and confusion in readmission creates a vehicle for discrimination.¹⁰ This lack of clarity can also discourage students from seeking much-needed help.¹¹

These policies will be analyzed in the context of Title II of the Americans with Disabilities Act (Title II) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Title II applies to state and local governments, and thus to public colleges and universities. Section 504 applies to any program receiving federal government funding, including most private institutions.¹² These two provisions are worded similarly and often interpreted as being functionally identical.¹³ Under these policies—enforcement of which was delegated to the U.S. Department of Education Office of Civil Rights (OCR) by the U.S. Department of Justice—colleges and universities may not discriminate against any student who falls into the category of “disabled.”¹⁴ This is problematic for schools that want to remove students exhibiting self-harmful behavior, as neither Title II nor Section 504 recognize an exemption from protection for students who are a direct threat to themselves.¹⁵

This Note will discuss the legal framework of these laws and how they apply to higher education institutions’ dismissal policies for students who demonstrate self-harming behavior, but who have given no indication of being a threat to others. This includes a discussion of how amendments to the Americans with Disabilities Act (ADA) may affect the legality of those policies. Next, it will thoroughly examine the way Title II and Section 504 apply to students exhibiting dangerous behavior. It will do so by determining whether these students fit into the category of “disabled,” ultimately concluding that they do and are thus entitled to protection under the scope of the acts. Then, it will look at the way colleges and universities have shaped their policies, including both formal disciplinary action as well as mandatory leaves of absence. It will consider how the OCR has enforced the acts under those policies, concluding that in many cases they violate Title II or Section 504. Finally, this Note will look at the policy implications of the practices of dismissing students demonstrating harmful behavior, concluding that these policies usually do more harm than good to student safety.

⁹ In this case, the student refused to sign the behavioral contract and voluntarily withdrew. When applying for readmission, the school required that he meet the conditions of the behavioral contract. The Office for Civil Rights determined that this was not allowed because the school did not generally require documented proof of medical treatment for readmission and thus was imposing disparate treatment on students with medical disabilities. Paul G. Lannon, Jr., *Direct Threat and Caring for Students: Where We Stand Now*, NACUANotes (Sept. 3, 2014), <http://www.higheredcompliance.org/resources/SelfHarm.pdf>.

¹⁰ Andrew Giambrone, *When Mentally Ill Students Feel Alone*, ATLANTIC (Mar. 2, 2015), <http://www.theatlantic.com/education/archive/2015/03/when-mentally-ill-students-feel-alone/386504/>.

¹¹ *Id.*

¹² Paul Lannon & Elizabeth Sanghavi, *New Title II Regulations Regarding Direct Threat: Do They Change how Colleges and Universities Should Treat Students who are Threats to Themselves?*, NACUANOTES (Nov. 1, 2011), <https://www.pdx.edu/ogc/sites/www.pdx.edu.ogc/files/Students%20%26%20Law%20-%20NACUA%20Nov%201,%202011.pdf>.

¹³ See 42 U.S.C. § 12133 (2012) (“The remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures, and rights [that Title II] provides”); see also *Badgett v. Ala. High Sch. Athletic Ass’n*, No. 2:07–CV–00572–KOB, 2007 WL 2461928 (N.D. Ala. May 3, 2007).

¹⁴ Lannon & Sanghavi, *supra* note 12.

¹⁵ *Id.*

Students' medical and disciplinary records are generally unavailable to the public, leading to an absence of hard statistics. This lack of data presents a serious problem for researchers and policy makers. Although anecdotal reports claim that dozens of current and former students have been dismissed from their schools for seeking help with their self-harming behaviors, it is difficult to ascertain how many of these students are unfairly discriminated against.¹⁶ Further, it is possible that concerns about costs and public stigma discourage many victims of discrimination from filing lawsuits.¹⁷ Accordingly, much of this analysis relies on anecdotes from the few students who have gone public with their experiences.

The existing literature on this topic seems to fall into one of three categories. The first is existing law review and journal articles. Unfortunately, many are outdated and do not take into account the recent 2011 Amendments to the ADA.¹⁸ Other more recent articles approach the matter from a broader policy standpoint, rather than analyzing school practices specifically under the acts.¹⁹ Pieces in the next category, investigatory articles, shed light on the issue, but do not provide sufficient legal commentary.²⁰ While an important source of information, they do not deeply analyze the acts and how they have been applied in the small amount of case law that exists.²¹ The final category consists of memoranda that explain the OCR's current practices so that schools can shape their policies accordingly.²² These memoranda give insight into the way schools and the OCR interact, but they do not take a stance on whether these policies are in the true spirit of the acts or whether they are in the best interest of the students.²³ This Note aims to fill a gap by synthesizing these three categories and offering policy suggestions for moving forward.

II. GENERAL LEGAL FRAMEWORK FOR DISABILITY LAW IN HIGHER EDUCATION

Anti-discrimination statutes for the disabled community, particularly for those with mental and cognitive illnesses, are a relatively new development in American law.²⁴ Their application in colleges and universities has inspired discussion, highlighted most prominently by students who are considered a "threat to themselves," but not necessarily a threat to others. These students are typically not punished merely for having a disability, but rather for a specific act, such as a suicide attempt or other self-harming behavior. This raises the following question: Are these students, who often suffer from a mental disability, protected from adverse action taken by their schools in the form of disciplinary proceedings or involuntary medical leave with opaque readmission instructions? It seems the OCR is taking action against schools with disparate standards for readmission for students on

¹⁶ Baker, *supra* note 7.

¹⁷ *Id.*

¹⁸ See, e.g., Zachary B. Silverstein et al., *College and University Policy and Procedural Responses to Students at Risk of Suicide*, 34 J. COLL. & UNIV. L. 585 (2008); Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279 (2001).

¹⁹ See, e.g., Yvette Walker, Note, *Expelled for Crazy: Suggestions Towards an Ideal Policy for the Removal and Reintegration of Student Mental Health Consumers*, 24 S. CAL. REV. L. & SOC. JUST. 393 (2015).

²⁰ See, e.g., Baker, *supra* note 7; Giambrone, *supra* note 10.

²¹ *Id.*

²² See, e.g., Lannon & Sanghavi, *supra* note 12.

²³ *Id.*

²⁴ Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. & EDUC. DEF. FUND (1992), <http://dredf.org/news/publications/the-history-of-the-ada/>.

medical leave for their physical health and students on leave for mental health. However, schools that take disciplinary action or enforce involuntary medical leave without special consideration to the individual circumstances of each students' case are still violating the ADA.

A. *Brief History of Disability Law in the United States*

Section 504 of the Rehabilitation Act of 1973 marked the first legislative attempt at reducing discrimination against the disabled community in programs and activities receiving federal public funding.²⁵ Previously, employment disadvantages and challenges associated with public accommodations were viewed as unfortunate, but inevitable consequences of living with a disability rather than the result of systemic discrimination.²⁶ Prior to the Rehabilitation Act (the Act), each type of disability categorized disabled people into legally separate groups.²⁷ Breaking with prior practice, the Act defined the disabled as a larger class of persons deserving of protections from discrimination rather than smaller, distinct groups.²⁸ Section 504 defines a disabled person as one "with a physical or mental impairment which substantially limits one or more major life activities," including "caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning."²⁹ This definition cast a wide net, expanding coverage to a wide variety of people, including both the physically and mentally disabled.

After the Act was passed in 1973, the Department of Health, Education, and Welfare (HEW) was charged with creating regulations for its enforcement.³⁰ Affected institutions, including universities, opposed the new regulations in the early years after the passage of the Act.³¹ The Department enacted regulations following organized sit-ins across the country at HEW buildings.³² The new regulations set guidelines for reducing discrimination on the basis of inaccessibility and discriminatory practices in higher education.³³

Section 504 and the regulations passed by HEW formed the basis for the ADA. Passed in 1990, the ADA expanded the scope of protection beyond activities and programs receiving public funding to privately owned businesses and public institutions, including state and local governments.³⁴ Title I applies in employment contexts, Title II applies to public institutions, and Title III applies to public accommodations.³⁵ As of 2008, in response to two Supreme Court decisions that narrowly interpreted the ADA's definition

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 34 C.F.R. § 104.3(j)(2)(ii) (2011).

³⁰ Kitty Cone, *Short History of the 504 Sit In*, DISABILITY RTS. & EDUC. DEF. FUND, <http://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/>.

³¹ *Id.*

³² *Id.*

³³ Lannon & Sanghavi, *supra* note 12.

³⁴ Mayerson, *supra* note 24.

³⁵ Lannon & Sanghavi, *supra* note 12.

of “disabled,” new amendments to the ADA expanded the scope of the term to re-include certain groups of disabled persons.³⁶

The first narrow Supreme Court decision was *Sutton v. United Airlines, Inc.*³⁷ Here, the Court reasoned that petitioners, who were able to mitigate the disabling effects of their poor eyesight with corrective lenses, were not considered disabled and thus not discriminated against when denied employment based on their visual impairment.³⁸ Later, in *Toyota Manufacturing, Kentucky, Inc. v. Williams*,³⁹ the Court held that carpal tunnel syndrome, which limited petitioner’s ability to do housework and manual labor, did not “substantially impair major life activities,” and thus, the ADA was not violated when petitioner was denied an accommodation at her assembly line job.⁴⁰

In response to these decisions, the 2008 Amendments expanded the scope of the ADA by removing language referring to the disabled community as a “discrete and insular minority,” which had been used by the Court to narrowly interpret “disabled.”⁴¹ Additionally, the Amendments included an illustrative list of major life activities, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”⁴² The Amendments further specified that people cannot be excluded from protection under the Act simply because some of their major life activities are unimpaired, or simply because they can mitigate the effects of their impairments through medication or other means.⁴³ Finally, the Amendments note that the definition of disability is to be construed broadly in future interpretations.⁴⁴

B. *Application of Disability Law in Institutions of Higher Education*

The U.S. Department of Justice delegated to the OCR the ability to enforce Section 504 and Title II, including the 2008 Amendments to educational institutions intended to protect students with disabilities from discriminatory practices and reduced access to facilities.⁴⁵ Section 504 applies to any institution that receives public funding, including private colleges and universities which typically receive some form of contribution from the federal government.⁴⁶ Title II is applicable to public institutions that are funded primarily by the state.⁴⁷ Section 504 is often interpreted as being consistent with rulings

³⁶ *Questions and Answers about the Department of Justice’s Notice of Proposed Rulemaking to Implement the Americans with Disabilities Act Amendments Act of 2008*, DEP’T OF JUST., http://www.ada.gov/nprm_adaaa/adaaa-nprm-qa.htm (last visited Apr. 7, 2017).

³⁷ 527 U.S. 471 (1999).

³⁸ *Id.* at 494.

³⁹ 534 U.S. 184 (2009).

⁴⁰ *Id.* at 193.

⁴¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a)(1), 122 Stat. 3553 (2008).

⁴² *Id.* §4(a)(2).

⁴³ *Id.* § 4(a)(4)(E)(i).

⁴⁴ *Id.* § 4(a)(4)(A).

⁴⁵ Lannon & Sanghavi, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ *Id.*

under Title II.⁴⁸ Despite these regulations, colleges and universities have responded to students with mental health disabilities through disciplinary action and even dismissal.⁴⁹

One example of these practices in action is a 2004 incident at George Washington University. In 2004, Jordan Nott, a sophomore student at George Washington, checked himself into the hospital after having suicidal thoughts.⁵⁰ In the following days, the university informed him that he was being charged with “endangering behavior,” which violated the rules of the student body.⁵¹ Because of this, he faced suspension or expulsion.⁵² Mr. Nott withdrew from the school and filed suit, a case which eventually settled.⁵³ This case demonstrates one example of a higher education institution responding to a student’s mental condition with disciplinary action. Here, Mr. Nott sought protection under Title II and Section 504, such that disciplining him on the basis of his “disability” constitutes discrimination before the case eventually settled.

Universities traditionally avoided liability under disability laws by determining that students considered a threat to themselves were exempt from the protection of the ADA under Title II based on interpretations of the OCR’s resolution letters and agreements.⁵⁴ For example, a 2001 letter to Woodbury University involving a student who inflicted an injury to her arm acknowledged that the Ninth Circuit found adverse action taken against employees who engage in self-harmful behavior violates Title I, which does not contain “threat to self” language either. Without further explanation, the letter continued to define “direct threat” as “significant risk of causing substantial harm to the health or safety of the student or others.”⁵⁵

Based on these regulations, colleges and universities determined that they were permitted to take disciplinary action against students deemed threatening to their own personal safety without violating the ADA.⁵⁶ However, in 2011, the U.S. Department of Justice added an amendment to Title II, creating an affirmative defense that protects colleges and universities from liability for disciplinary action taken against students who pose “a significant risk to the health or safety of *others* that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services” (emphasis added).⁵⁷ The new regulation parallels language used by the OCR in previous interpretations, such as the Woodbury Letter mentioned above, but still makes no mention of a risk to the health or safety of the individual herself.⁵⁸

Alternatively, Title I, which applies in employment contexts, contains the “individual” language and permits action to be taken against an employee who is considered a “direct threat to the health or safety of *the individual* or others in the

⁴⁸ See 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures, and rights [that Title II] provides . . .”); see also *Badgett*, 2007 WL 2461928.

⁴⁹ Lannon & Sanghavi, *supra* note 12.

⁵⁰ *Depressed? Get Out!*, WASH. POST (Mar. 13, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200804.html>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Student and University Settle Lawsuit on Mental Health Issues*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., <http://www.bazelon.org/LinkClick.aspx?fileticket=NiaQCGwAkOQ%3D&tabid=251>.

⁵⁴ Lannon & Sanghavi, *supra* note 12.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 28 C.F.R. § 35.104 (2011).

⁵⁸ *Id.* § 35.139.

workplace” (emphasis added) without violating the ADA.⁵⁹ Conversely, Title III, which applies to public accommodations, allows for action to be taken against a person deemed a “direct threat to the health and safety of others,” but contains no provision for a person deemed threatening to the individual herself, mirroring the language in Title II.⁶⁰ The existence of the “individual” language in Title I, but not II or III, suggests that the legislature contemplated a defense for institutions in taking adverse action against an individual who is a threat to him- or herself in employment contexts, but intentionally chose not to make that defense applicable to public accommodations, including colleges and universities. Further, in order to find a “direct threat to others” under Title III, the Supreme Court has held that “significant risk” is to be determined by “objective, scientific evidence.”⁶¹ A mere good-faith belief that the threat existed would not be sufficient to maintain the defense under the disqualification from accommodation under Title III of the ADA.⁶²

The U.S. Department of Justice did not discuss its reasoning for modeling the language in the new Title II regulations (Final Rule) after Title III rather than Title I, which contains a direct “threat to self” defense. Nor did it include guidance on how the Final Rule should be interpreted. It did, however, contain in its commentary the idea that the Title II regulations were intended to parallel those in Title III, and that the Title III provisions concerning safety in a direct threat defense were applicable in Title II.⁶³ It is possible that the U.S. Department of Justice did not choose its language carefully, and simply forgot to add “threat to self” language as in Title I, even though it intended to include it as a defense. Interestingly, the OCR has not adjudicated this language discrepancy consistently in the few Title II cases that have come to trial, often finding a direct threat to oneself as a legitimate disqualification from ADA protections.⁶⁴

1. Application of the “Threat to Self” Defense by Colleges and Universities Prior to the “Final Rule” Regulations

Prior to the Final Rule, letters from the OCR provided guidance on how to address students who were considered threatening to their own personal safety to institutions of higher education.⁶⁵ In a 2004 complaint filed by a student and his parents from Marietta College in Ohio, the OCR advised the school that “Section 504 does not prevent a postsecondary education institution from taking action to address an imminent risk of danger posed by an individual with a disability who represents a direct threat to the health and safety of himself/herself or others.”⁶⁶ In this case, the student was involuntarily

⁵⁹ 29 C.F.R. § 1630.15(b)(2) (2011).

⁶⁰ 42 U.S.C. § 12111(3) (2012); *id.* § 12113(b); *id.* § 12182(b)(3).

⁶¹ *Bragdon v. Abbott*, 524 U.S. 624, 648-50 (1998) (finding that a dentist violated the ADA by refusing to examine a patient with HIV outside of a hospital setting without demonstrating objective evidence that he was at risk).

⁶² *Id.* at 649.

⁶³ *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. 56164, 56206 (Sept. 15, 2010).

⁶⁴ Lannon & Sanghavi, *supra* note 12.

⁶⁵ *Id.*

⁶⁶ Letter from Michael E. Gallagher, Team Leader: Cleveland Office, Midwestern Div., U.S. Dep’t of Educ. Office for Civil Rights, to Dr. Jean Scott, President, Marietta Coll. (Mar. 18, 2005) (available at

dismissed from Marietta College after two meetings with his counselor, who felt that the student was at risk of a suicide attempt.⁶⁷ The OCR ultimately overruled the dismissal based on the college's failure to sufficiently demonstrate that the risk to his own safety was direct and imminent, but concluded that a dismissal, founded on "reasonable, objective medical evidence" that the student was a threat to himself, would not violate the ADA.⁶⁸ This letter suggests that even while following the 2011 amendments, the OCR still continued to recognize "threat to self" as a valid defense when charged with violating the ADA or Section 504, so long as there was sufficient evidence to show there was an actual threat.⁶⁹

This instance and similar letters from the OCR suggested that a threat to oneself with no contention that a student was threatening to others was sufficient to maintain a disciplinary action or involuntary medical dismissal of a student despite his or her mental disability.⁷⁰ University policies and complaints themselves, however, evidence the fact that postsecondary education institutions embraced the notion that they could "take action" against a student who demonstrated suicidal or self-harming behavior.⁷¹ For example, in 2005, Western Carolina University enacted a policy outlined in the student handbook that allowed the university to put students with eating disorders who refused to seek help on mandatory leave of absence.⁷²

2. Application of the "Threat to Self" Defense by Colleges and Universities Following the 2011 "Final Rule" Regulations

Western Carolina University's website describes an "Eating Disorder Treatment Team" (EDTT), which is put in place to assess the best ways to treat students affected by anorexia and other eating disorders.⁷³ This team individually assesses each student's situation and creates a plan for treatment.⁷⁴ The EDTT was implemented in 1991, but there is no indication as to whether or not the EDTT is authorized to remove students from campus if it sees fit.⁷⁵ The school's student policies for the current 2015-2016 academic year, however, explain that certain student conduct warrants some form of disciplinary action, including "harm to person" defined as "causing, or threatening to cause, emotional or physical harm or injury to another person and/or self. Taking or threatening any actions

<http://www.bazelon.org/LinkClick.aspx?fileticket=26yfG15xOM8%3D&tabid=313> (invoking Section 504 because the college is a private institution).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See, e.g., id.*; Letter from Team Leader: Phila. Office, U.S. Dep't of Educ. Office for Civil Rights, to Father Bernard O'Connor, President, DeSales Univ. (Feb. 17, 2005) (available at <http://www.southwestada.org/html/topical/FAPSI/OCR/desales.html>).

⁷¹ Eric Hoover, *Dismissed for Depression*, CHRON. OF HIGHER EDUC. (Mar. 24, 2006), <http://chronicle.com/article/Dismissed-for-Depression/8008>.

⁷² *Id.*

⁷³ W. CAROLINA WELLNESS PROGRAM, HOW HEALTHY IS OUR CAMPUS?: STUDENT DATA REPORT 9 (2010), [http://www.wcu.edu/WebFiles/PDFs/healthy_campus_book\(1\).pdf](http://www.wcu.edu/WebFiles/PDFs/healthy_campus_book(1).pdf).

⁷⁴ *Id.*

⁷⁵ *WCU's Eating Disorder Treatment Team Shares Approach in Popular Manual*, W. CAROLINA UNIV. OFFICE OF PUB. RELATIONS (Oct. 23, 2006), <http://www.wcu.edu/pubinfo/news/2006/eatingdisordermanual.htm>.

that create a danger to any person’s health, safety, or personal well-being (including self).”⁷⁶

This is one example of how colleges and universities have internalized the “threat to self” defense and used it to shape their policies without giving any weight to the 2011 Amendment’s language that technically only created an affirmative defense to students that were a threat to others. Another involves a 2013 case where a Princeton University student was placed on an involuntary leave of absence following a suicide attempt, despite seeking help at the University Health Center within moments of the attempt.⁷⁷ The student filed a complaint with the university on the basis of Section 504, since Princeton is a private school, although the OCR views Section 504 and Title II as virtually interchangeable.⁷⁸ There was no evidence that the student was a threat to anyone other than himself.⁷⁹

OCR determined that the student’s forced leave from Princeton was not discriminatory.⁸⁰ The policy of removing students who attempted suicide was applied broadly to all students, not just those who suffered from mental disabilities.⁸¹ OCR reasoned that the interest in protecting the well-being and safety of students was legitimate, and so long as there was objective evidence of the existence of the potential for the student to harm himself, and the policy was focused on the action rather than the disability, it was legitimate.⁸² The letter to Princeton did not use the “direct threat to self” language, but clearly created an exception for policies that remove students who only pose a threat to themselves.⁸³ The student has since filed a federal discrimination suit against Princeton, and at this stage of the litigation, the court has granted the student leave to file a second amended complaint.⁸⁴

OCR’s stance in this case was problematic. It essentially, under the guise of evenhanded application, granted institutions of higher education a defense to take adverse action against students with mental disabilities through the “direct threat to self” defense, despite the defense’s non-existence in Title II.⁸⁵ By allowing self-harm to be a legitimate reason for student removal, a university can avoid charges of discrimination by asserting that all students would be treated similarly under the policy.⁸⁶ They can insist that a student who is clinically depressed and attempts suicide can be removed from campus because a student who is not clinically depressed would face the same consequences if he or she attempted suicide as well.⁸⁷ This ignores the elephant in the room. Self-harming behaviors disproportionately affect students with mental illnesses, and these policies serve as a proxy for schools to discriminate against those students who are most vulnerable. The illusion that these policies are applied broadly and are facially neutral should be irrelevant to the

⁷⁶ W. CAROLINA UNIV., CODE OF STUDENT CONDUCT: 2015-2016 12 (Aug. 14, 2015), http://www.wcu.edu/WebFiles/PDFs/Catamount_Code_Final_Document.pdf.

⁷⁷ Complaint at 1–2, 7, *W.P. v. Princeton Univ.*, No. 14-1893, 2016 WL 7493965 (D.N.J. Dec. 30, 2016) (No. 3:14-cv-01893-JAP-TJB).

⁷⁸ *Id.* at 2.

⁷⁹ *See id.* at 7.

⁸⁰ Lannon, *supra* note 9.

⁸¹ *Id.* (citing OCR Letter to Princeton University, Complaint No. 02-12-2155, 2 (Jan. 18, 2013)).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *W.P. v. Princeton Univ.*, 2016 WL 7493965 at *3 (D.N.J. Dec. 30, 2016); *supra* note 77.

⁸⁵ Lannon, *supra* note 9.

⁸⁶ *Id.*

⁸⁷ *Id.*

ADA and Section 504. This concept will be explored more comprehensively in Section III(c)(1).

III. DISCUSSION

The OCR's failure to adequately protect students deemed a direct threat to themselves raises several questions. The lack of case law on the subject further complicates the issue. Unfortunately, very few students affected by these discriminatory policies bring a complaint against their college or university.⁸⁸ Of the few complaints that are filed, many settle before a definitive precedent can be set by a court ruling. The lack of active challenges before an impartial judiciary provides little motivation for institutions to change their policies.

Section III of this Note discusses the rationale for institutions of higher education to adopt "threat to self" defenses for dismissing students with mental impairments. These rationales break down into two categories: first, stigmatization and unfounded fears linking students with mental illnesses with violent behavior towards others, and second, liability for secondary education institutions when a student commits suicide on campus. Next, Section III factually analyzes whether students with mental health issues, even absent a direct threat defense, are actually protected under the ADA. This is particularly relevant when students have not been formally diagnosed. Third, if students are covered under the scope of the ADA, Section III analyzes whether the use of "direct threat to self" as an excluding factor from protection does actually violate the ADA. This section looks particularly at how this applies to couching the adverse action against students as involuntary medical leave as opposed to subjecting them to formal discipline. Finally, Section III will take a closer look at the reasons that allowing colleges and universities the "direct threat to self" defense is contrary to good public policy.

A. *Why do Colleges and Universities Dismiss Students Determined to be a Direct Threat to Themselves?*

To better understand the implications of institutions' application of the direct threat defense, it is important to understand their motivation for doing so. One theory is that colleges and universities are increasingly fearful of being the site of another tragedy, and tend to stigmatize students with mental impairments as being more likely to commit acts of violence toward others. The second is a fear of liability for the death of a student who commits suicide, stemming from a lack of uniformity and clarity in case law regarding the school's responsibility when a student is a victim of suicide on campus.

1. Are Mentally Ill Students Substantially More Likely to Commit a Mass Shooting?

According to a study by Harvard University, the rate of mass shootings tripled between 2011 and 2014, with many instances taking place in college and university settings.⁸⁹ Theoretically, the "threat to others" defense for colleges and universities taking

⁸⁸ Baker, *supra* note 7.

⁸⁹ Amy P. Cohen, Deborah Azrael & Matthew Miller, *Rate of Mass Shootings has Tripled Since 2011, Harvard Research Shows*, MOTHER JONES (Oct. 15, 2014) <http://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research>.

action against students should be sufficient for schools to take adverse action against students they reasonably fear may pose a threat to the campus community. However, administrators may feel this defense does not provide them sufficient discretion. The use of a “threat to self” defense may be an attempt by institutions to remove students with mental illnesses who they fear, unfoundedly, may escalate into a threat to the campus community without having to demonstrate “reasonable, objective medical evidence” that the student poses a direct threat to the safety of other students.⁹⁰

While proactively protecting the safety of other students, faculty, and staff at a university is laudable, dismissing students with mental illnesses may not be a sufficient or even practical means of doing so. A 1990 study, found that in analyzing tens of thousands of both healthy and mentally ill individuals over the course of a year, “serious mental illness alone was a risk factor for violence—from minor incidents, like shoving, to armed assault—in only four percent of cases.”⁹¹ Rather, other factors such as socioeconomic position, gender, and substance abuse, regardless of mental health status, proved much more dispositive on an individual’s likelihood of exhibiting violent behavior.⁹² Likewise, a subsequent study, shows that people with mental illnesses are only more likely to exhibit violent behavior if they are also abusing drugs or alcohol.⁹³ Otherwise, they have the same rate of violent tendencies as the rest of the population.⁹⁴

These studies suggest that college and university policies dismissing students who likely suffer from mental illnesses for self-harmful behavior as a pre-emptive way to prevent violence on campus is at best unproductive, and at worst a misdirected use of resources. These studies give reason to believe that colleges and universities would be better off directing their attention to reducing the rate of substance abuse among all students, rather than dismissing students who suffer from mental illnesses for demonstrating parasuicidal behavior.

2. Are Colleges and Universities Liable for the Death of a Student Who Commits Suicide?

Another theory focuses on liability for the institution when a student commits suicide. Suicide is now the third leading cause of death among college-aged students.⁹⁵ The rate of suicide contemplation is even higher.⁹⁶ Up to ten percent of students have reportedly made a plan for suicide even if they do not carry it out.⁹⁷ While universities are generally not legally responsible when students commit suicide, there are exceptions.⁹⁸ In *Shieszler*

⁹⁰ See Letter from Michael E. Gallagher to Dr. Jean Scott, *supra* note 66.

⁹¹ Maria Konnikova, *Is There a Link Between Mental Health and Gun Violence?*, NEW YORKER (Nov. 19, 2014), <http://www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence>; Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from Epistemological Catchment Area Surveys*, 14 HOSP. & CMTY. PSYCHIATRY 761 (1990).

⁹² Konnikova, *supra* note 91; Swanson et al., *supra* note 91.

⁹³ Steadman et al., *Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 399–400 (1998).

⁹⁴ *Id.* at 400.

⁹⁵ *Suicide Statistics*, EMORY UNIV.: EMORY CARES 4 U, <http://www.emorycaresforyou.emory.edu/resources/suicidestatistics.html> (last visited Feb. 23, 2017).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ R. YOUNG ET AL., UNIV. OF S. MISS., SUICIDE: A NEGLIGENCE ISSUE IN HIGHER EDUCATION, <http://aquila.usm.edu/cgi/viewcontent.cgi?article=1003&context=smela>.

v. Ferrum College, the Western District of Virginia found Ferrum College liable for the wrongful death of a student who committed suicide in his dorm room at the institution.⁹⁹ The court found that the college owed a duty of care due to its special relationship with the student.¹⁰⁰ Ferrum College knew that the student had made threats to kill himself and took no affirmative steps to prevent him from doing so, even though in the past they had required him to undergo counseling.¹⁰¹ The court held that the college's inaction constituted a breach of their duty of care to the student, and thus could be held liable for his wrongful and foreseeable death.¹⁰²

Unfortunately, the law is not settled in several jurisdictions, leaving many institutions unclear where they would stand should the personal representative of a student suicide victim bring a liability suit. This fear of liability for a self-inflicted death is likely responsible for secondary education institutions' continuing dismissal of students, either through expulsion or involuntary leave of absence, when they pose a threat to their own personal safety.

B. Does the Americans with Disabilities Act and Section 504 of the Rehabilitation Act Apply to Students Who are at Risk of Suicide?

At this stage, this Note has established that there is a clear exception from protection under the ADA and Section 504 for college students who are a direct threat to others, and a less clear, but often-invoked, exception when they are a direct threat to themselves. It is important, however, to ensure that students most at risk of a suicide attempt actually fall within the scope of the acts without the use of an exception defense. As mentioned above, the ADA and Section 504 apply to an individual "with a physical or mental impairment which substantially limits one or more major life activities," including "caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning."¹⁰³ Mental illnesses can vary in severity over the course of an individual's life, and unfortunately often go undiagnosed.¹⁰⁴ This Section discusses how the law treats these types of patients and whether or not they are protected by the acts.

A person is protected under the ADA when three criteria are met.¹⁰⁵ First, that person must be a "qualified" individual with a disability.¹⁰⁶ Next, that individual must have been "excluded from participation in, or was denied the benefits of services, programs, or activities of a public entity."¹⁰⁷ And finally, the discrimination was the result of the

⁹⁹ 236 F.Supp.2d 602, 613 (W.D. Va. 2002).

¹⁰⁰ *Id.* at 609.

¹⁰¹ *Id.*

¹⁰² *Id.* at 613

¹⁰³ *Fact Sheet: Your Rights Under Section 504 of the Rehabilitation Act*, U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE FOR CIVIL RIGHTS, <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf> (last visited Feb. 26, 2017).

¹⁰⁴ *Key Facts About Mental Illness*, INT'L CTR. FOR CLUBHOUSE DEV. D/B/A CLUBHOUSE INT'L, <http://www.iccd.org/keyfacts.html> (last visited Feb. 26, 2017).

¹⁰⁵ Ann K. Wooster, Annotation, *When Does a Public Entity Discriminate Against Disabled Individuals in Provision of Services, Programs, or Activities Under the Americans With Disabilities Act*, 42 U.S.C.A. §12132, 163 A.L.R. Fed. 339 § 2(a) (2000).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* This Note assumes that barring the student from campus either through discipline or forced medical leave constitutes an exclusion from participation and denial of the benefits of the school, satisfying the

individual's disability.¹⁰⁸ Assuming that the second and third prongs are met, this section considers whether students exhibiting self-harming behavior should be considered "qualified individuals." Section III(c) of this Note takes a closer look at the OCR's policy that evenhanded application of dismissal proceedings for students exhibiting suicidal behavior, regardless of mental health status, is nondiscriminatory.

Widely recognized mental impairments, such as depression, bipolar disorder, and anxiety, are traditionally protected by the acts.¹⁰⁹ A doctor's note is usually sufficient to determine that a student is affected by the disability and thus qualifies for protection.¹¹⁰ Absent that, testimony from family members or colleagues will be accepted so long as the personality traits described match those traits commonly associated with the student's claimed disability.¹¹¹ This flexibility is particularly helpful to college students, where undiagnosed (and thus untreated) mental illness can be especially problematic.

Under this theory of qualification for mental health patients, it is clear that the majority of college students who suffer from mental impairments, diagnosed or not, should be afforded protection from discrimination under the ADA and Section 504. Absent any disqualification defense, any action that limits the students' access to services and university facilities based on an aspect of their status as disabled should violate the acts. After establishing that these individuals are qualified under the ADA, the next concern is whether the "threat to self" defense is a valid one.

C. How is the Office of Civil Rights' Use of the "Threat to Self" Defense in Violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act?

Since students at risk of a suicide attempt and suffering from mental illness, whether diagnosed or not, are protected by the ADA and Section 504, it is important to take a closer look at the stance taken by the OCR and the position endorsed by many colleges and universities. This Section will do this in two steps. First, it will analyze the OCR's assertion that an "evenhanded" application of policies permitting the dismissal of students who demonstrate self-harming behavior, regardless of mental health status, is compliant with the ADA. Thus far, this Note has taken the position that punishing suicidal behavior constitutes discrimination on the basis of a disability. This Section will take a closer look at the ways in which these policies are discriminatory, even when evenhandedly applied as advocated by the OCR. Second, it will analyze the use of "involuntary medical leave" practices by colleges and universities as opposed to formal disciplinary proceedings to determine if these practices are discriminatory within the scope of the ADA. This will be accomplished by looking at the involuntary medical leave policies and the way they affect students with mental health disabilities as opposed to other types of disabilities, as well as

second criterion. Further, it will assume for the time being that basing the adverse action against students' self-harmful behavior is on the basis of their mental impairment. This is not necessarily a settled concept.

¹⁰⁸ *Id.*

¹⁰⁹ See Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders Under the Americans With Disabilities Act*, 42 VILL. L. REV. 723, 724–26 (1997) (noting that diagnosis of severe psychiatric conditions, such as depression and bipolar disorder, often by definition qualify as protected disabilities under the ADA).

¹¹⁰ *Id.* at 728.

¹¹¹ *Id.*

the readmission procedures for those students put on involuntary medical leaves of absence.

1. The Office of Civil Rights Endorsed Dismissal Policies for Students Demonstrating Self-Harmful Behavior so Long as They are Applied Evenhandedly to All Students

The National Association of College and University Attorneys issued a memorandum outlining current positions taken by the OCR and provided a synthesis of guiding principles institutions of higher education should follow to prevent a violation under the ADA and Section 504.¹¹² Among its several recommendations, including avoiding “direct threat” language even when applying the defense, is to “[e]nforce conduct codes or other policies applicable to all students.”¹¹³ It encourages schools to avoid discrimination claims by “rely[ing] on policies prohibiting students from harming members of the school community or creating a substantial health or safety risk” when intervening, justifying removal actions, or imposing conditions on readmission for students who are at risk of self-harm.¹¹⁴ Schools are encouraged to “compare with similarly-situated, non-disabled students to avoid disparate treatment” by comparing the processes followed and the outcomes when dealing with disabled and non-disabled students.¹¹⁵

The essence of this statement is that so long as the policy is shaped as a general prohibition of causing harm to students, colleges and universities can avoid liability when taking adverse action against students who attempted suicide. They equate other potentially reckless or dangerous behavior that puts the campus community at risk with self-harming behavior. Thus, so long as the procedural mechanisms are the same for both situations, institutions of higher education are not discriminating against students with mental impairments.

This is problematic when considering the third requirement for qualification for protection under the ADA: that the denial of access to services or facilities was based on the individual’s status as disabled. Not all policies are disparate on their face, such as a policy banning all disabled people from accessing a museum. Disparate impact policies, on the other hand, are those that are facially neutral, but discriminatory when applied. Title II contains language prohibiting regulations that “have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”¹¹⁶

Similarly, in *Alexander v. Choate*, the Supreme Court held that policies that are discriminatory in effect can be in violation of Section 504.¹¹⁷ In this case, Medicaid recipients challenged a policy that reduced the number of inpatient hospital visits covered by the program per year by arguing the effect was discriminatory to disabled patients who necessarily are in the hospital more regularly.¹¹⁸ The Court reasoned that when a policy is discriminatory in effect, it must balance the interests of both parties before determining whether it was unacceptable under Section 504.¹¹⁹ The defining characteristic of an

¹¹² Lannon & Sanghavi, *supra* note 12.

¹¹³ Lannon, *supra* note 9.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 28 C.F.R. § 35.130(b)(3)(i) (1999).

¹¹⁷ 469 U.S. 287, 289 (1985).

¹¹⁸ *Id.* at 289–90.

¹¹⁹ *Id.* at 300.

actionable disparate impact claim is whether the policy denies the disabled “meaningful access to the benefit that the grantee offers.”¹²⁰ The Court reasoned that the reduction of inpatient hospital visits covered by Medicaid, an evenhandedly applied provision, does not deny meaningful access to disabled persons.¹²¹ Although the policy may disproportionately affect the disabled, they are still afforded coverage under Medicaid and may take advantage of numerous services provided by the program.¹²²

Like the Medicaid provision, policies prohibiting any kind of harm to a student (including harm to one’s self) is a facially neutral rule. Unlike the Medicaid provision, however, it can deny “meaningful access to the benefit that the grantee offers.”¹²³ When a student is dismissed from the school for self-harmful behavior, he or she is fundamentally denied all access to school facilities and services, unlike the Medicaid provision, which only reduced benefits in one small area. The provision disproportionately affects students with mental impairments. It is difficult to quantify the percentage of students who engage in self-harm that suffer from one or more mental illnesses. Self-harm is often considered an unhealthy coping mechanism for mental illnesses, such as borderline personality disorder, depression, eating disorders, anxiety, or post-traumatic distress disorder.¹²⁴ Thus, a provision that permits the dismissal of a student engaging in self-harmful behavior, even if written broadly and inclusively, is in violation of Section 504 of the Act and Title II of the ADA for its disparate impact on students with mental disabilities.

2. College and University Practice of Subjecting a Student to an Involuntary Medical Leave Rather than Formal Disciplinary Proceedings is Nonetheless Discriminatory as Applied

Another question that arises is whether institutions of higher education face the same issues under the ADA and Section 504 when they submit a student who has demonstrated self-harmful behavior to “involuntary medical leave,” rather than expelling or suspending the student or taking some other disciplinary measure. Addressing the action in this way seems to portray the school’s action as an intervention step to protect the student rather than a discriminatory action barring a student from the benefits and services of campus. This distinction may have been legitimate if not for the approach taken, as well as readmission procedures employed by many institutions. While it is understandable that a college may want to take affirmative steps to help a student who is coping with a disability by developing a personalized plan, possibly including a temporary leave of absence from the school, the one-size-fits-all approach to removal and readmission make the effect of the policies discriminatory.

Part of the problem with this approach is the use of staff psychologists to assess the student’s fitness to remain at the school. Ideally, counselors at colleges and universities have students’ best interests in mind. However, they are employees of an institution with clear motivation for wanting to remove a student at risk of endangering his- or herself to avoid potential liability for the school. While medical leave may be appropriate in some

¹²⁰ *Id.* at 301.

¹²¹ *Id.* at 303–04.

¹²² *Id.* at 304–05.

¹²³ *Id.* at 301.

¹²⁴ *Self-Harm*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions/Related-Conditions/Self-harm> (last visited Jan. 25, 2017).

cases, the ADA mandates that any dismissal proceedings be based on “objective, scientific evidence” for direct threat to *others* cases.¹²⁵ The same standard should be given to a student who is threatening to harm him- or herself.

Fortunately, the OCR has embraced the notion that involuntary medical leave and dismissals are functionally the same with regards to disability law.¹²⁶ OCR has largely taken the stance since 2011 that involuntary medical leave for mental health issues may be permissible, so long as it is treated the same way as medical leave for physical impairments.¹²⁷ This policy would pass the “evenhanded” test from *Alexander v. Choate* because medical leave is inherently temporary.¹²⁸ Thus, the student is at least theoretically not totally denied access to the benefits and services of the school by reason of his or her disability.¹²⁹ In situations where leaving campus to seek more qualified professional help or spending time at home is beneficial to the student’s health, that interest may outweigh any temporary deprivation of benefit the student faces.¹³⁰

The important condition to ensuring these policies are non-discriminatory is allowing the student the ability to return to campus. This may be conditioned on a doctor’s note clearing the student for fitness to return to school, but may not be made more restrictive or burdensome than it would be for a student on leave for a physical impairment.¹³¹ OCR embraced this notion in 2011 in a complaint against Georgetown University, where it asserted that failing to inform a student about what documentation he or she needs to return to campus following a medical leave for mental health reasons is in violation of Section 504.¹³² Additionally, OCR informed the school that if a student provides a certification from a medical professional that he or she is fit to return to school, the institution may not require that the student submit to additional evaluations except in “extreme circumstances” for which the school must be able to provide sufficient reasoning.¹³³ A university may not require medical records for a student returning to campus after a mental health leave where it does not impose the same requirement to students returning from leave for other reasons.¹³⁴

Thus, removing a student from a dangerous situation may be beneficial to the student’s overall health and safety. However, schools may not use this ability to forcibly remove the student indefinitely with a readmission procedure that is unclear and unfair. Fortunately, OCR has embraced this position recently and has begun enforcing it when students who faced discrimination file a complaint against their college or university. Part

¹²⁵ *Bragdon*, 524 U.S. at 650.

¹²⁶ See Letter from Olabisi L. Okubadejo, Team Leader: D.C. Office, U.S. Dep’t of Educ. Office for Civil Rights, to Dr. John J. DeGioia, Office of the President, Georgetown Univ. (Oct. 13, 2011) (available at <http://www.bazelon.org/LinkClick.aspx?fileticket=ttN4vzvSIkc%3D&tabid=313>).

¹²⁷ *Id.*

¹²⁸ 469 U.S. at 303–04.

¹²⁹ *Id.* at 300.

¹³⁰ *Id.*

¹³¹ Letter from Olabisi L. Okubadejo to Dr. John J. DeGioia, *supra* note 126.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Letter from Catherine D. Criswell, Director, U.S. Dep’t of Educ. Office of Civil Rights, to Diane Y. Bower, Esq., Law Offices of Marcoux Allen (Dec. 16, 2010) (available at <http://www.bazelon.org/LinkClick.aspx?fileticket=WGmoOxFqnto%3d&tabid=313>) (holding that Spring Arbor University violated Section 504 when it conditioned a bipolar student’s readmission after medical leave on submission of medical records but did not also do so for students on leave for physical ailments).

of the solution may involve properly aligning the interests of staff psychiatrists with those of the students by moving away from a culture where institutions are highly motivated to remove a student who may be a liability concern.

D. Policy

Institutions argue that more flexibility in creating their own dismissal and readmission policies is beneficial to the safety of students at risk of self-harm, as well as the wider campus community. Schools may argue that they are ill-equipped to treat the student and that removing him or her from campus is in the student's best interest, as well as the interests of other students. While there are certainly situations where the student is better off away from school, particularly if school is a major source of stress, this is not always the case. It is important for higher education institutions to recognize the rights of students with disabilities to access the services and facilities the college or university has to offer.

Protecting the rights of students with mental impairments is good public policy for two reasons. First, sending a student home from campus without properly weighing the options can often do more harm than good for that particular student. Second, harsh removal policies discourage students from seeking the help that they may need.

1. The Need for an Individualized Approach to Assessing a Student Demonstrating Self-Harmful Behavior

It is important to disregard a one-size-fits-all approach to dealing with students with mental illnesses on college campuses. In 2013, a Yale student engaged in acts of self-harm, although not a suicide attempt.¹³⁵ When she contacted her counselor and was referred to a psychiatrist for evaluation, she explained what happened, and was told she may not be able to return to the university.¹³⁶ When she probed as to why, asserting that she did not feel safer at home, the psychiatrist reportedly explained that “we don't necessarily think you'll be safer at home. But we just can't have you here.”¹³⁷ While this is anecdotal evidence of the culture of school psychiatrists and their approach to students demonstrating self-harming behavior, it is unfortunately one of the few reports available of the interactions between students and these counselors.

The Bazelon Center, an organization that advocates for disability rights, has proposed a comprehensive plan for implementing involuntary leave for students demonstrating self-harming behavior.¹³⁸ It proposes delegating the decision to a committee rather than one individual, using involuntary leave as a last resort, conducting an individualized assessment of the student before making a decision, and giving the student a chance to appear before the committee to discuss relevant information.¹³⁹ The individualized assessment would ideally consider the severity of the potential harm,

¹³⁵ Rachel Williams, “*We Just Can't Have You Here*,” YALE DAILY NEWS (Jan. 24, 2014), <http://yaledailynews.com/blog/2014/01/24/we-just-cant-have-you-here/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See generally JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES 2 (2007), <http://www.bazelon.org/portals/0/education/SupportingStudentsCampusMHPolicy.pdf>.

¹³⁹ *Id.* at 7.

likelihood that it will occur, and any accommodations that may mitigate the risk of further harm.¹⁴⁰ This individualized approach will prevent students from being dismissed when it is not in their best interest.¹⁴¹

2. The Discouraging Effect of Current Policies

Beyond the discriminatory effect current policies have of removing students unnecessarily from campus, these policies have the broader and potentially more problematic effect of discouraging students who need help from reaching out for fear that they may be removed from school. In 2015, another Yale student's mental health struggles were brought to public attention when a student committed suicide, leaving behind a Facebook status explaining her fears about taking even a voluntary leave of absence from the university and not being allowed to return.¹⁴² This raised further questions of whether institutions' responses to students with mental illness are doing more harm than good by discouraging students from taking steps necessary for their own mental health out of fear of being removed from the school.

Unfortunately, it is very difficult to calculate the number of students who felt discouraged from seeking help for a mental illness at their college or university out of fear of retribution from the school. One student at the University of California at Santa Barbara was given a disciplinary letter for an alleged "housing policy violation" after she intentionally cut herself.¹⁴³ In the following weeks, she reported lying to her school-appointed therapist about continuing to cut herself out of fear of further disciplinary action by the school.¹⁴⁴ Clearly, actions taken by institutions in the name of student safety can endanger students who need the most help.

IV. CONCLUSION

Ultimately, it seems the OCR may be making a shift towards recognizing mentally disabled students' rights regarding re-admittance after voluntary or involuntary medical leave.¹⁴⁵ However, there still is a problem with disciplinary action and one-size-fits-all involuntary leave for students demonstrating self-harming behavior, which can have the effect of disproportionately discriminating against students with mental disabilities.¹⁴⁶ Although facially neutral, these policies' discriminatory effect can still put them in violation of Title II of the ADA and Section 504 of the Rehabilitation Act.¹⁴⁷ Barring a direct threat to others, students who are merely a direct threat to themselves are not

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Rachel Siegel & Vivian Wang, *Student Death Raises Questions on Withdrawal Policies*, YALE DAILY NEWS (Jan. 29, 2015), <http://yaledailynews.com/blog/2015/01/29/student-death-raises-questions-on-withdrawal-policies/>.

¹⁴³ Baker, *supra* note 7.

¹⁴⁴ *Id.*

¹⁴⁵ See Letter from Olabisi L. Okubadejo to Dr. John J. DeGioia, *supra* note 126 (holding that failing to notify student under involuntary medical withdrawal for mental health reasons of readmissions procedures violates Section 504).

¹⁴⁶ Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL'Y 1, 101 (2001).

¹⁴⁷ *Alexander*, 469 U.S. at 300.

excluded from protection under the acts, and thus the policies of many higher education institutions are in violation of the acts.¹⁴⁸

The best chance for colleges and universities to embrace students with mental illnesses and be more willing to work with such students would be to clarify the question of liability. If it were possible to set clear limits on school liability for the suicide of a student, schools may have less incentive to remove the student from campus as quickly as possible.¹⁴⁹ While it may seem that absolving schools of liability for a student suicide would be against the interests of the student and his or her family, this would allow schools and students to work together to develop creative and comprehensive plans of action without facing fear of liability.

¹⁴⁸ *Student and University Settle Lawsuit on Mental Health Issues*, *supra* note 53.

¹⁴⁹ Giambrone, *supra* note 10.