UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, California 94102

JUN 29 2001

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Dr. Kenneth R. Nielsen
President
Woodbury University
7500 Glenoaks Boulevard
Burbank, California 91510-7846

(In reply, please refer to Docket Number 09-00-2079.)

Dear President Nielsen:

On April 20, 2000, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against Woodbury University (University) on behalf of a student (hereinafter the Student), who was living in a University dormitory over the 1999 Thanksgiving vacation when she inflicted an injury on her arm.[1] The Student informed the University Psychologist of this conduct. Thereafter the Student was excluded from the dorms during the Christmas/New Year intersession and was conditionally excluded from returning to the dorm in the spring semester.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. The University receives Department funds and is subject to Section 504 and the regulation.[2]

Counsel alleged that the University discriminated against the Student, based upon her psychological disability by excluding her from the dorm[3] and by conditioning readmission to the dorm on her signing (1) a "no suicide and no self harm" contract; and (2) a medical release giving the University broad access to her medical records and granting the University's psychologist the right to talk directly to her mental

[1] This self-inflicted injury has been described as a "scratch" by the Student and "self-mutilating cuts" by the University.
[2] The University is also subject to Title III of the Americans with Disabilities Act, as well as State and Federal Fair Housing laws. Title III does recognize such a defense. *Bragdon v. Abbott*, 480 U.S. 273, 107 S. Ct. 1123 (1998). However, OCR does not enforce these laws.
[3] It appears that because she was excluded from the dorm during the intersession period, the Student lost a holiday employment opportunity.

health professional. If she was not currently undergoing treatment, she was also required by the University to have an outside mental health professional complete a Suicide Risk Assessment on her. There is no allegation that she was excluded from the academic program of the University.

On December 16, 1999, the Student's attorney wrote a letter to the University asking that the Student be allowed to return to the dormitory without disclosing any medical information or otherwise further complying with the conditions established by the University. Thereafter, by letter dated December 23, 1999, mailed to the Student's home out of state, a Dean revised the University's prerequisites to the Student returning to the dormitory. The Dean asked that the Student provide the University with a letter from a licensed mental health professional stating whether or not the professional had recommended treatment, and whether the Student had accepted or rejected any such recommended treatment.

Neither the Student nor her attorney received the Dean's December 23rd correspondence. Apparently, they first became aware of the Dean's revisions during a conversation between her attorney and the Dean on January 7, 2000. On January 13th, the Student's doctor provided the requested letter to the University, and upon receipt of this correspondence, approximately one week after the start of the spring semester, the Student was allowed to return to the dormitory. During the week preceding her re-admittance to the dormitory, the student was able to attend class but had considerable difficulty arranging for alternate shelter and accessing her possessions which were left in the dorm.

OCR has concluded that the University did not violate Section 504 when the University concluded that the Student was not qualified to participate in its housing program for the holiday intersession. However, the scope of conditions initially set by the University, as a prerequisite for the Student to return to the regular spring housing sessions, were over-broad and as such inconsistent with Section 504. Nevertheless, prior to Counsel filing a complainant with OCR, these defects in the University's procedures were promptly cured following the communications between Counsel and the University. No further action by OCR has been necessary to resolve this OCR complaint.[4] However, through this letter OCR will be providing technical assistance.

[4] Counsel has stated that the University's actions with regard to the Student violate Fair Housing and other civil rights laws. OCR limited its analysis and conclusions to the laws it enforces.

Analysis

Introduction

OCR has long made clear that nothing in Section 504 of the Rehabilitation Act prevents educational institutions from addressing the 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 disability. A "direct threat" is a significant risk of causing substantial harm to the health or safety of the student[5] or others that cannot be eliminated or reduced to an acceptable level through the provision of reasonable accommodations.[6] Educational institutions must however, take steps to ensure that disciplinary and other adverse actions against such persons are not a pretext for discrimination. Lawful actions require proceedings with due process.[7] In certain circumstances, described more fully below, these proceedings need to include an individualized consideration of the student's disability particularly with regard to sanctions, penalties, and adverse restrictions.

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[5] The history of persons with disabilities contains many examples of patronizing attitudes and legal policies that have represented a barrier to equal opportunity. This history includes expressions of concern that persons with disabilities must be "protected" from injuring themselves. In some instances these concerns have merely been a pretext for discrimination. In *Echazabal v. Chevron,* 213 F.3d 1098 (9th Cir. 2000), the Ninth Circuit issued an opinion, based substantially on this concern. The court concluded that Title I of the Americans with Disabilities Act (ADA) does not allow an employer to remove an individual with a disability from an employment position solely because a requirement of the position represents a direct threat to the person's own health and safety. (The Title III regulations, applicable to the recipient in this case, do identify such a defense. However, OCR does not enforce Title III.)

[6] Determination of whether the student's behavior constitutes a direct threat should take into account the nature, duration, and severity of the risk, the likelihood or imminence that the harmful behavior will occur or reoccur, and whether the threat to the student can be reduced sufficiently by reasonable accommodation. *School Bd. of Nassau Cty. v .Arline,* 480 U.S. 273, 288, 107 S. Ct. 1123, 1131 (1987); *Chalk v. Orange Cty. Superintendent of Schools*, 840 F.2d 701, 707-708 (9th Cir. 1988). A significant risk constitutes a high probability of substantial harm and not just a slightly increased, speculative or remote risk. *Bragdon v. Abbott*, 480 U.S. 273, 288, 107 S. Ct. 1123, 1131 (1998) [Title III]. Actions that the student will reliably take on his/her own, such as regularly attending therapy sessions, may also be pertinent to consideration of "direct threat."

[7] In exceptional circumstances, a student who represents an immediate direct threat to him/herself may have to have his/her conduct addressed through State procedures for emergency commitment or through criminal law enforcement procedures. As long as such actions are not a pretext for discrimination, nothing in the ADA or Section 504 prevents resort to such external resources and procedures. Conduct that is criminal or "egregious" may not have to be treated in the same manner as the kind of conduct addressed in this letter. *Humphrey v. Memorial Hospital,* 239 F.3d 1128 (9th Cir. 2001). *See* footnote 13. Serious misconduct or direct threat behavior may also create exigent circumstances where initial minimal due process is provided before short-term sanctions are imposed, followed by more complete due process at a subsequent point in time.

OCR recognizes that, when an educational institution responds to a student's actions that are believed to present a "direct threat" to health and safety or to actions that appear to breach an essential code of conduct provision, post-secondary institutions are generally entitled to a significant degree of deference. *Regents of the University Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507 (1985). The degree of deference owed by OCR should be greatest when colleges and universities establish and implement due process procedures well-calculated to conscientiously consider all pertinent and appropriate information. *Wong v. Regents of University of California*, 192 F.3d 807,817, 819 823 (9th Cir. 1999); *Wynne v. Tufts University School of Medicine I*, 932 F.2d 19, 25 (1st Cir. 1991). However, this deference is not unlimited. *P.G.A. v. Martin*, __ U.S. __, 121 S. Ct. 1879 (2001).

Compared to the issue of persons seen as a threat to others, the issue of persons who are a threat to self has seldom been addressed under the Rehabilitation Act. Prior OCR letters addressing this type of threat have supported intervention by colleges and universities when they have tailored the scope of the intervention to the particular circumstances of the case.[8]

Due Process Principles

With 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 proceeding that incorporates the following basic principles.

An institution may make inquiry into the student's medical history and records to the extent necessary to determine the conditions and circumstances under which the student may constitute a direct threat to him/herself (or others), the probabilities for those conditions and circumstances occurring if the student is allowed to participate in the program under consideration, and any accommodations or mitigating measures that would enable the student to meet the institution's essential academic and technical standards for participation in that program.

A college does not have a right to unlimited access to all of the student's medical/psychological records. Specifically, permission for a student to participate in

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[8] In a letter to Vassar College, (OCR # 02-95-2121) OCR supported the college insisting on *some* medical documentation before readmitting to its regular housing program a student hospitalized for risk of suicide. But in a letter to Western Washington University concerning termination of a residence hall advisor who was hospitalized for depression and suicidal ideation, OCR found noncompliance when the University insisted on more medical documentation than could be provided by the complainant's own treating physician. And, in a letter to Snow College OCR obtained a remedial plan under which the College agreed to cease from imposing a "wellness contract" on a previously hospitalized student who had engaged in suicidal thoughts.

a program may not be conditioned upon the student providing a general medical release giving the institution complete and full access to all medical history and records. This determination must include consideration of any information the student wishes to provide from his or her own medical care/psychological services providers.

An institution may not dismiss or sanction a student with a disability for behavior that it does not sanction when undertaken by students who are not disabled. 34 C.F.R. § 104.43.[9] Nor may an institution charge a student with a code of conduct breach merely to force the student to reveal his/her medical condition. However, inquiry into a student's medical condition may take place because the student has put his/her disability into issue in a code of conduct hearing or other procedure to ascertain direct threat to his/her own health and safety or because the University, on a nondiscriminatory basis, believes that the student represents a direct threat to him/herself. A nondiscriminatory belief will be based on a student's observed conduct, actions, and statements, not merely knowledge that the student is an individual with a disability. In such instances, a reasonable first step may be to extend an informal opportunity for the student to explain the conduct that has been observed that gives the college or university a reason to believe the student represents a direct threat to his/her health and safety.

A threat of or an act of self-destructive behavior by an individual with a disability may raise a genuine question, but in most situations is not dispositive of, whether an individual is "qualified." With respect to the institution's right to ascertain whether the student is qualified for the program in which s/he seeks to participate, a post-secondary institution may not exclude from a program a student with disability who meets the "essential" academic and technical requirements of the program. Conversely, a college need not allow participation by an individual who is not qualified. 34 C.F.R. § 104.3(k)(3) and 34 C.F.R. § 104.43. An institution is not required to fundamentally alter the nature of its program, meaning that the institution need not compromise "essential" academic and technical requirements of the program for any student. *Southeastern Community College v. Davis,* 442 U.S. 397, 413, 99 S. Ct. 2361, 2370-71 (1979). Technical requirements include those essential provisions found in a College's code of conduct as well as the ability to not represent a "direct threat"[10] to self or others.

The determination of whether an individual is qualified to remain in a program because he/she may represent a direct threat to him/herself should take into account

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[9] Just as non-disabled students are not always subjected to the full force of a disciplinary process, so too students with disabilities may be more appropriately encouraged to seek reasonable accommodation rather than being subjected to scrutiny under the code of conduct.

[10] See footnotes 6.

the differences in the various settings in which the student may be situated. For example, a student may constitute a threat to him or herself when in the dormitory, but not when in the classroom. Thus, in certain circumstances, a student with a disability may be qualified to remain in the classroom, but not qualified to live in the dormitory. A post-secondary institution's "setting specific" inquiry may accord weight to aspects of a particular situation that have a known propensity to trigger the student's self-destructive behavior (e.g., effect of student spending extended time alone). When there are situation specific factors that increase the likelihood of the student engaging in self-destructive behavior, a determination of whether the student represents a "direct threat" to self should take into account any reasonable accommodations that could be provided to the student or mitigating measures the student has been utilizing.

Students with disabilities may be held accountable for compliance with all essential code of conduct provisions even when the misconduct does not rise to the level of a direct threat.[11] However, disability is pertinent to whether there are grounds to mitigate the penalty for violation of the code of conduct or engaging in an act that represents a direct threat to him/herself. In determining the sanction to impose for misconduct, a student with a disability is entitled to have his/her disability considered as an "extenuating circumstance" to the same degree as a college or university takes other similar factors into account for non-disabled students. With regard to the mitigation of sanctions, a disabled student may also introduce evidence (including individualized medical evidence) that, his/her misconduct is causally related to his/her disability and that the misconduct was occasioned by the absence of an accommodation that was reasonable and requested in a timely manner but denied or unimplemented by the college or university.[12] [13]

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[11] But see, *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001), Title I of the ADA protects employees from adverse employment action based on conduct related to a disability (other than alcoholism or drug addiction) so long as the individual does not pose a direct threat to health and safety.

[12] An example of such a situation is provided by a hypothetical student with a psychological disability who is up for discipline because he has been rude repeatedly in class to his teacher. The class in question commences at 7:45 in the morning. Prior to commencing the semester, the student provided reliable documentation demonstrating that he is an individual with a psychological disability and that with medication he is qualified to attend class. However, his document also shows that his medication is not effective before 9 A.M. Accordingly the student asked that he not be assigned to any classes before this time. In this example, an institution's refusal to accommodate the student would be pertinent to whether the penalty routinely imposed on non-disabled students should be waived or mitigated as well as the degree and nature of the sanction to be imposed. *See Humphrey v. Memorial Hospital*, 239 F.3d 1128 (9th Cir. 2001); when an employer improperly denies a lawful accommodation to an employee, Title I of the ADA protects employee from adverse employment action based on conduct related to a disability (other than alcoholism or drug addiction) so long as the individual did not engage in "egregious" or "criminal conduct."

[13] There is recent case law also suggesting that, with regard to mitigation of sanctions, in such proceedings, the student should be permitted to ask the college or university to consider that the

Answering the question of whether a student with a disability constitutes a direct threat may include medical/psychological information that a college or university's traditional due process venues are unaccustomed to considering. Thus, although 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 nontraditional 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.[14]

A student whom the university or college through proper due process procedures has excluded from the program based on "threat to self " may be required, as a pre-condition to returning to the program, to provide documentation demonstrating that s/he no longer poses such a threat. *See Doe v. New York University,* 666 F.2d 761 (2nd Cir. 1981). *Compare Carlin v. Trustees of Boston University,* 907 F. Supp. 509 (D. Mass. 1995). One type of documentation that may serve to show this, is documentation from a medical/psychological expert stating either that, a) the student is taking certain "mitigating" steps such as a course of treatment/medication, and/or b) there are available reasonable accommodations (such as reduction of course load, provision of a private dormitory room, etc.) that would eliminate or sufficiently reduce manifestations of the student's disability that previously pose a threat to self. In such a case, the university/college may pre-condition return to the program on the student's commitment to continuing such steps or to avail themselves of such accommodations.

Application of Principles to this Case

Based upon the totality of the circumstances, OCR finds that the University was not in violation of Section 504 when it prohibited the Student from staying in her dormitory over intersession. OCR finds that there were conduct-based reasonable grounds for the University to believe that the Student was a direct threat to her own health and safety during the unique circumstances of the intersession residence life program. The Student indicated that she engaged in self-injuring behavior over Thanksgiving vacation in substantial part because she was alone during that time. The circumstances of the Christmas intersession represented the same setting that triggered her earlier self-injurious behavior.

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impermissible conduct will not arise again or will be sufficiently ameliorated if properly accommodated in the future. See *Wong v. Regents of University of California*, 192 F.3d 807,817, 819 823 (9th Cir. 1999) and *Humphrey v. Memorial Hospital*, 239 F.3d 1128 (9th Cir. 2001).

[14] *See* San Diego Community College District (OCR # 09-98-2145).

At the time a decision had to be made, the University did not have evidence indicating circumstances had changed that would reduce the level of threat which the Student represented to her own health and safety. In addition, the University provided OCR with a handwritten note from the Student to a University employee in which the Student states that she had to be physically stopped from killing herself in the spring of 1999. [OCR could not ascertain when the University took possession of this note.]

OCR has no evidence that the Student requested that the University modify its intersession housing program to meet her disability-related needs or otherwise consider accommodations that would reduce the level of threat to her own safety. (She may have not considered such modification necessary.) However, given what the University knew at the time, it was not discriminatory for it to decide, on an interim basis, that to enable the Student to participate in the intersession program in a manner that would ensure her safety would have constituted "a fundamental alteration in the nature of the program" and thus, not be required under Section 504. Over intersession, the residence life program in the dormitory would have neither the student participation nor supervisory staffing present to ensure that the Student could be monitored or provided attention and support if, under stress, she were to desire to re-engage in any self-destructive behavior.

Having excluded the Student from staying in the dormitory over the holidays, the University then went on to place multiple conditions on her returning as a dormitory resident during the regular spring semester. First, the December 6, 1999 letter to the Student effectively constituted a request that the Student provide a blanket disclosure of all psychiatric/medical information, rather than specific information targeted to address only the particular issues of legitimate concern for the University. Moreover, while authorized direct communications between a university and a student's medical care provider may make good sense in a range of circumstances, in nearly all circumstances a student should be able to establish some limits on the nature and scope of those communications.

Second, while there was ample justification for not allowing the Student to participate in the intersession residence life program, there was not as high a degree of justification for keeping her out of the University's regular residence life program. The University has not suggested to OCR that the Student, in the environment that normally existed in the dormitory, was a direct threat to herself. Nor has it been suggested that she was a direct threat to anyone other than herself or in violation of the University code of conduct. However, following correspondence from Counsel, the University revised its original prerequisites to the Student returning to the dormitory during the spring semester. These greatly reduced conditions were not onerous, were quickly met, and would have been even less burdensome were it not for missed communications associated with the holiday season. Though action by

Counsel was necessary to secure the narrowed request, it is also the case that the student's own doctor contributed to the post-intersession expenditure of time. Had these problems not been cured, the student would have been entitled to a due process proceeding consistent with the technical assistance in this letter.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

If the University has any questions about this letter, please call me at 415-556-4275.

Sincerely,

Dianne Word

for Robert E. Scott
Team Leader
Office for Civil Rights

cc: Paul Coady, Esq.
Akin, Gump, Strauss, Hauer and Feld