Distressed and Distressing Students: Legal Issues

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In addition to the many rewards of working in higher education, many faculty, staff and students have had the challenging experience of working with troubled or disruptive students. These are the students who tie up a disproportionate number of resources, who demand services from multiple offices, or create safety concerns on campus. Some of these students excel academically, while others flounder. Many of these students present challenges for academics and administrators.

On occasion, a student may become violent. Highly publicized school shootings, such as the tragedies at Columbine High School and the Appalachian School of Law, have heightened awareness and suspicion. Student suicides at New York University, Ferrum College and MIT have also been the topic of significant concern, media coverage, and litigation. Violence at colleges and universities have many on campus wondering how to identify which students might be at greatest risk to themselves or others.

Another type of student, perhaps less dramatic, is the student having personal problems or academic issues, who becomes overly dependant on a faculty or staff member. Having risen to their post in part for being so willing to

[1] An earlier draft of this paper was presented at University of Vermont in October 2004.

assist students, some employees find themselves overwhelmed with the desire to help these students.

At the same time, college and university attorneys and disability specialists are warning the campus community not to stigmatize or make assumptions about students who may have mental illness. Not only are generalizations not supported by research, they are unfair to students. Such actions also may create legal liability for the institution.

This article will use the phrase "distressed and distressing students" [2] throughout to refer to students who are potentially disruptive or violent, as well as to students who are withdrawn, despondent, or manipulative. This description has multiple advantages in an academic environment. It avoids any stigmatizing, pejorative or inappropriate mental health implications. It is readily understood by faculty and staff without any clinical training and does not tempt clinical faculty to engage in diagnosis of student behavior. It avoids the issues raised by terms such as "suicidal" and "dangerous" which require a diagnostic or predictive conclusion about future behavior. It also facilitates appropriate early assessment and intervention; harm does not need to be imminent for the phrase "distressed or distressing" to have meaning.

One of the additional benefits of this terminology is that it can be useful to shift the focus from attempting to describe the student to describing the employee or other person who finds the students conduct to be distressing. This facilitates an examination of the issues and variables that are within institutional or personal

[2] The author acknowledges having learned this descriptive phrase from Dr. Martha Christiansen, Director of Counseling and Consultation at Arizona State University.

power to change. For example, the school may not be able to "fix" the student, but it can modify its policies and practices, and individual employees who respond to the student can control and coordinate their individual responses and reactions.

Distressed and distressing students present many social and emotional challenges in an open campus environment. They also can present multiple legal issues, including questions of negligence, privacy, and disability discrimination. Here are some examples of questions many institutions have faced:

- Does a college or university have a duty to protect the campus community from a dangerous or disruptive student?
- Can a campus representative contact the parent or guardian of a distressed or despondent student without violating student privacy rights?
- Can an academic program refuse to permit a student into a clinical program after the student discloses that he or she suffers from a mental disorder for which the student refuses to take prescribed medication?

The following discussion will review (very briefly) current law in these areas as it relates specifically to distressed and distressing students. The discussion will then shift to practical strategies for working with these students effectively.

Negligence.

Questions of duty (as in a "duty to protect" or a "duty to warn") are questions that arise under the law of negligence. Before an institution can be held liable for negligence, the complaining party must prove four separate elements. A claim may begin with an allegation that a serious harm has occurred, such as: "I was assaulted on campus," or "my child committed suicide in his residence hall,"

but unless the complaining party goes on to establish all of the other required elements of a negligence claim, the institution will not be liable under negligence law.

The four elements required for negligence liability are: duty, breach, damage and causation. To establish duty, the complaining party must prove that the institution had a legally recognized duty. Next it must show that the institution breached that duty. The complaining party also must prove that it suffered some harm or damage. Finally, it must show that it was the institution's breach of its legal duty that caused the harm or damage.

The third and fourth elements, *i.e.*, damages and causation, are very fact specific and will not be discussed here. These elements will need to be analyzed on a case-by-case basis when harm is alleged to have occurred. The question of the existence and breach of a legal duty will be examined because it has particular relevance for campus policy makers reviewing security policies and for individual administrators evaluating a specific student scenario.[3]

The duty of care owed to the campus community will depend on the circumstances. A college or university may have a general duty to conduct its operations with reasonable care. Colleges and universities do not generally have a duty to protect people on campus from unforeseeable criminal acts. Additional duties can arise, however, if the institution has knowledge of the risk that is not

[3] For an excellent discussion of the relationship between the concept of legal duty and the role of the university in facilitating a safe educational environment, see Robert D. Bickel and Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* Carolina Academic Press (1999).

generally known, the institution's acts contribute to the harm, or the institution undertakes an obligation that it fails to discharge with reasonable care.

For example, an institution might be found negligent for failing to suspend or expel a dangerous or disruptive student if the student's continued presence on campus resulted in harm and the person injured could show that the university had a duty to protect or warn that victim. At a minimum, this would require that either the specific victim was foreseeable or was a member of a class of foreseeable potential victims.

Suspension or expulsion of a potentially dangerous student may not be the entire answer. Removing a student from campus may not eliminate the threat to others (or self). Once a student has been separated from campus obligations and resources, the student's behavior may worsen and feelings of hopelessness or frustration may increase. Before a decision is made in these cases, campus judicial officers should consult with counselors or psychologists, law enforcement or others trained in threat assessment to evaluate options.

Failure to act reasonably with regard to a distressed or distressing student can, in some cases, result in harm to members of the community and negligence liability for the institution. The best approach to address these concerns is to establish effective and open lines of communication among departments and between administrative areas. Whether establishing policy or determining how to act in a specific case, the welfare of the community should be paramount.

Student Privacy. Campuses are constantly balancing competing interests. No one would deny the importance of providing a safe learning environment, but

administrators also recognize that federal and state laws protect student privacy. These interests may conflict when it appears that the most sensible course of action would require disclosing otherwise protected information about a student to protect the campus or a specific individual. Another issue that arises when a student appears to be seriously distressed or even suicidal is whether federal privacy law permits the campus to contact the student's parent or legal guardian to discuss concerns.

The federal law that protects the privacy of student educational records is the Family Educational Rights and Privacy Act of 1974 (FERPA).[4] FERPA gives students access to their records and, with limited exceptions, allows students to decide who else will get access to their records. After a student is enrolled in a post-secondary institution,[5] then the student (not the parent) has control of these access rights. Unless a statutory exception applies,[6] the only way that a college or university is permitted to authorize a parent to access the student's educational record is with the student's consent. One important exception provided by FERPA is the health and safety exception,[7] under which a campus may (but is not required to) disclose information about a student if it is reasonably necessary to protect health or safety. This exception permits campus administrators to communicate with a parent, legal guardian or even law enforcement, as appropriate, when a

[4] 20 U.S.C. 1232g.
[5] All post-secondary students hold FERPA rights, regardless of the student's age.
[6] This includes a provision of FERPA that permits (but does not require) institutions to disclose information to a parent if that parent has declared the student as a tax dependant.
[7] 20 U.S.C. §1232g (b)(1)(I).

student is threatening harm to self or others, if the communication is intended to lessen the threatened harm.

Concerns about negligence and privacy merge in when administrators want to disclose otherwise private information in the interest of campus safety. Campus mental health providers, nurses and physicians cannot disclose information they learn in the context of providing professional care to students, unless they meet a much higher standard than the FERPA standard. Ethical rules and related laws may not permit disclosure unless the client or patient is deemed to be an imminent threat to self or others. This higher standard may mean that it will be easier for non-psychological or medical staff to contact the parent or guardian under a FERPA exception. In any event, if the campus reasonably believe that contacting the parent or guardian is necessary or desirable to manage a serious situation, it may be appropriate to make an "executive" decision to risk a possible privacy suit rather than create a chance for a wrongful death suit.

A recent California case has raised concern among professional psychologists and therapists, including many who provide services on campuses across the country. The case involves the psychologist's duty to warn a foreseeable victim when a patient threatens harm to a third party.

The case law regarding a psychologist's duty to warn begins in 1976 with the well-known case of *Tarasoff v. Regents of the University of California.*[8] In *Tarasoff,* a man told his psychologist at a university hospital that he planned to kill his girlfriend. The psychologist reported this to the campus police, who

[8] 17 Cal. 3d 425; 551 P.2d 334.

detained and then released him. No one contacted his girlfriend to advise her of the threat. Two months later, the man killed her. In a wrongful death action, the court held that the psychologist had a duty to warn the foreseeable victim of serious harm. Many states[9] have enacted statutes in response to *Tarasoff,* providing immunity for therapists who warn law enforcement or the intended victim of the threatened harm. College and university counseling centers are very familiar with these laws and their obligations under them. Furthermore, professional obligations of confidentiality do not extend to protect patient communications to a therapist if the communication includes a threat by the patient to harm self or others.

The 2004 decision in *Ewing v. Northridge Hospital Medical Center*[10] presents a slightly different fact scenario from *Tarasoff*. In *Tarasoff,* the patient communicated the intended harm to his therapist. In *Ewing,* the patient communicated the threat to his father, who later relayed the threat to the therapist. After the patient killed the intended victim and himself, the parents of the victim sued the medical center for not warning their son of the serious threat to his welfare.

The medical center moved to dismiss on the grounds that the therapist did not have a duty to warn because the threat was not communicated directly to the therapist. The trial court agreed and granted the motion. The Court of Appeals reversed this decision, saying that the patient's communication to his father could

[9] Including California (California Civil Code § 43.92) and Arizona (Arizona Revised Statutes § 36-517.02.
[10] 120 Cal. App. 4th 1289 (2004).

give rise to a duty to warn. It held that whether the circumstances created a duty in this case was a triable issue of fact for the jury. This case is an important one for campus counseling centers to watch. Although it is a decision by a California court and not technically binding in other states, it may influence future decisions unless it is overturned. Regardless of the decision in this case, genuine concerns for safety and avoidance of imminent serious harm will often require or permit limited disclosure.

Academic Implications. Distressed and distressing students provide challenges for academic programs in addition to conduct and risk assessments. In certain professional fields, such as medicine, nursing, psychology and social work, the faculty who are making the admission and retention decisions may be familiar with clinical diagnostic categories and speculate that a student's behavior meets the conditions for a diagnostic category. In other programs, the faculty may just feel that the student is odd or unpredictable and be wary of committing departmental resources or funding for a student who may be perceived as "crazy."

Federal laws, such as § 504 of the Rehabilitation Act[11] and the Americans with Disabilities Act of 1990[12] prohibit discrimination against an otherwise qualified student on the basis of an actual or perceived disability. Faculty should consult campus disability specialists or counsel before making any decision that could be construed as discriminatory. Programs should not use psychological language (such as "impaired," "crazy," "depressed," "bipolar," or "disturbed") to describe or characterize a student. The student's conduct should be described in

[11] 29 U.S.C. § 794.
[12] 42 U.S.C. § 12131.

behavioral terms. For example, rather than saying that a student is depressed, the faculty can document that the student is failing to complete assignments, falls asleep in class, and is tearful when confronted. The student can be made aware of available services on campus, including counseling services, but should not be required to attend.

Programs can take additional steps to protect the integrity of their professions and to discourage students who may be a bad fit. Programs in which interpersonal skills are essential for success should describe those skills in all documents (including websites) that set forth program requirements. For example, one skill that is essential in clinical programs is the ability to accept supervision and the willingness and ability to integrate the supervisor's feedback into practice. This should be articulated in documents that prospective students review when applying to the program. This skill should also be articulated and assessed early and throughout the program (even if actual patient/client or student contact does not occur until later in the training). Articulating necessary interpersonal skills forces faculty to come to an agreement on what is required, allows students to choose not to apply for a program if the requirement is unattractive, and for admitted students gives the program an objective basis against which to measure student performance.

Many campuses have found successful ways to coordinate services for distressed and distressing students, as well as to provide resources for faculty and staff. For example, Arizona State University has established a Student Assistance Coordinating Committee to coordinate campus response for students who are

having difficulties or who are engaging multiple campus offices inappropriately. The system assumes that each participating office will retain primary responsibility for the services it provides, but helps to avoid duplication and "forum shopping." The Committee includes representatives from Counseling and Consultation, Student Health, Disability Resources, Student Life, Residential Life, the Graduate College, General Counsel, and Public Safety. Representatives from other areas (e.g., Greek Life or a particular academic program) may be invited to address a specific student issue. This group uses a case management model to evaluate the student's needs and the appropriate institutional response. They meet monthly, but any member can call a special meeting to address an emergent situation. Services like this help students maintain academic progress, help programs set appropriate boundaries, and guard against an undue drain on limited resources.

Conclusion. Although distressed and distressing students may present challenges, with appropriate resources and boundaries many can succeed in their academic programs without undue strain on the rest of the campus. In every case, it is important for faculty and staff to be aware of and consult with appropriate campus resources, including legal counsel. All affected constituencies should be in regular communication regarding policy development and risk management to reduce liability and protect student rights.