

National Association
for Behavioral Intervention
and Threat Assessment

Legal Issues and Other Hot Topics

University of Wisconsin

Your Faculty





Daniel Swinton
Partner, TNG

Makenzie Schiemann
President, NABITA

Agenda



1. Intersection of CARE, TITLE IX, and Conduct
   - Role of each office/department
   - Overlaps across CARE, Title IX, and Conduct
   - Responding to behavior impacted by disability
2. Returning to Campus After a Hospitalization
   - Disability considerations
   - Case law examples
   - Appropriate practices
3. Returning to Campus After LOA
   - Voluntary leave of absence
   - Involuntary leave of absence

National Association for Behavioral Intervention and Threat Assessment

Intersection on CARE, Title IX, and Conduct

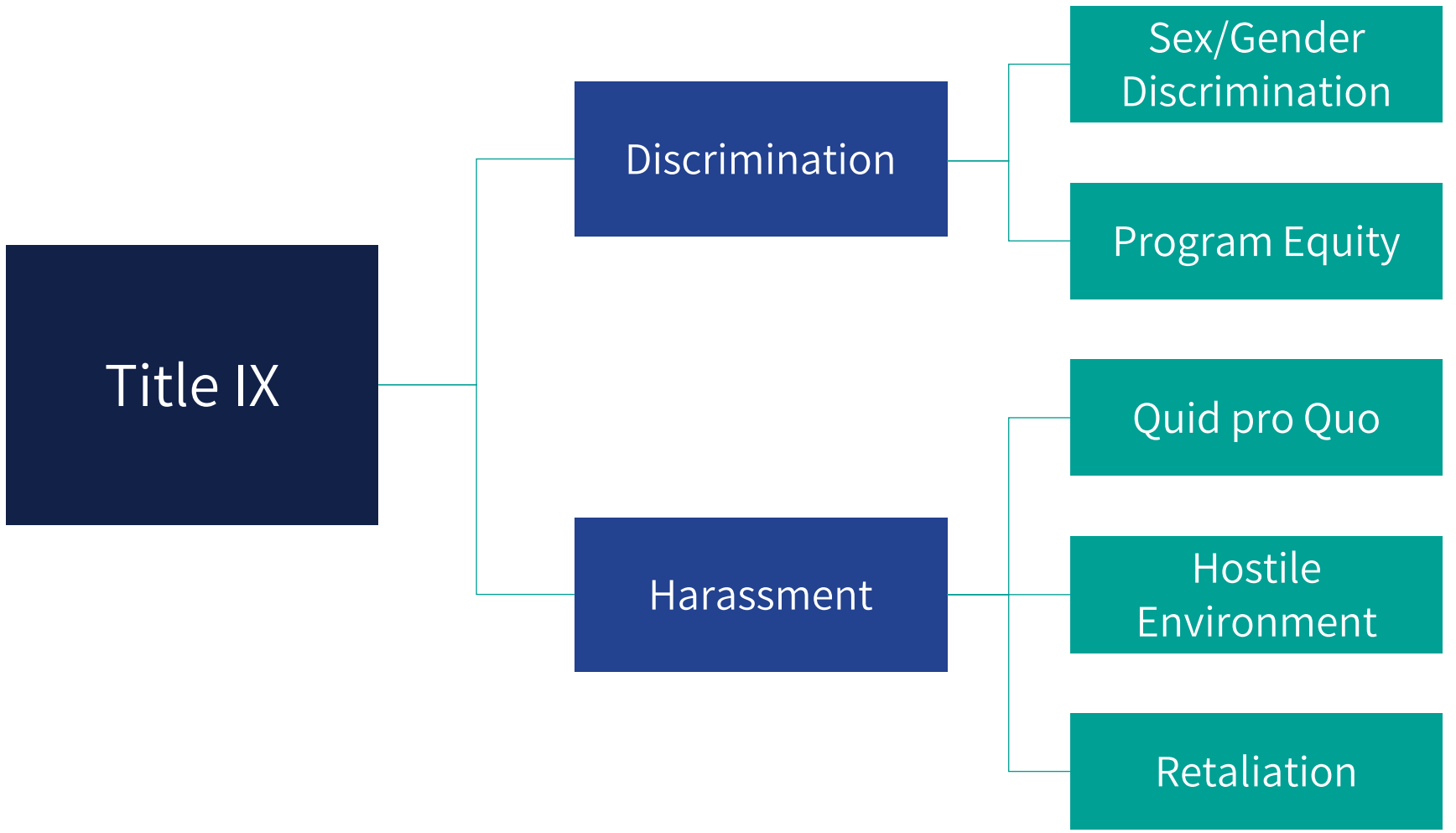
Defining Terms: Title IX

Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 & 34 C.F.R. Part 106

TITLE IX


Title IX
Discrimination
Sex/Gender Discrimination
Program Equity
Harassment
Quid pro Quo
Hostile Environment
Retaliation



Title IX office is responsible for addressing *discrimination based on sex, providing education and development, and following a fundamentally fair process.*



Investigate
the incident



Stop
the discrimination



Prevent
its recurrence



Remedy
the effects

NABITA

Defining Terms: Conduct

Conduct

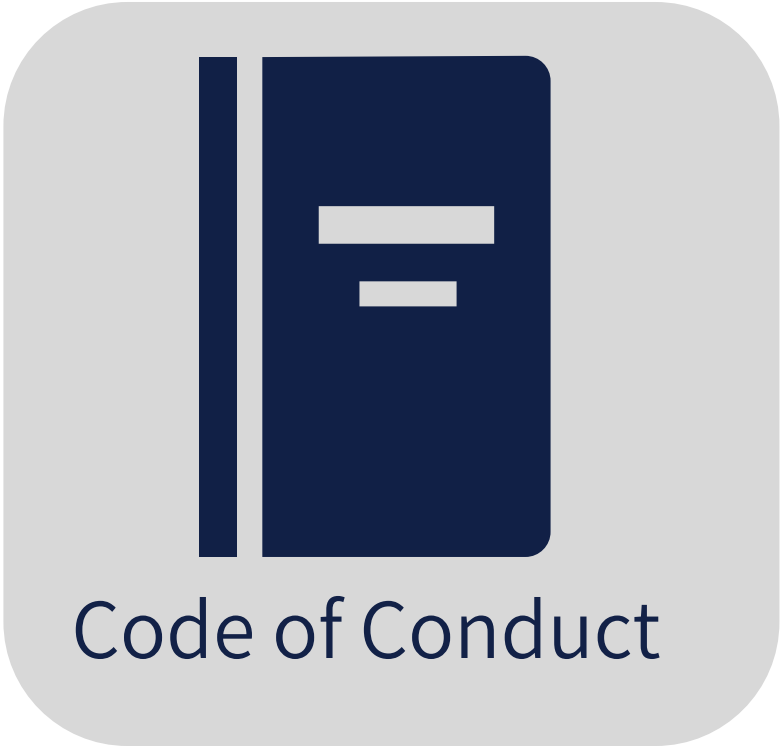
"Student conduct is focused on the growth of the student, preservation of the educational environment, and the safety of the student and of the community."

- Schiemann & Molnar, 2018

EDUCATION

and

ACCOUNTABILITY





The **student conduct office** has a ***responsibility*** to carry out the ***student code of conduct*** and to ***ensure the institution's procedures are followed consistently and fairly***.

The **student** has the ***responsibility*** to ***follow the student code of conduct*** and the ***right*** to ***due process*** before any adverse act is imposed.

NABITA

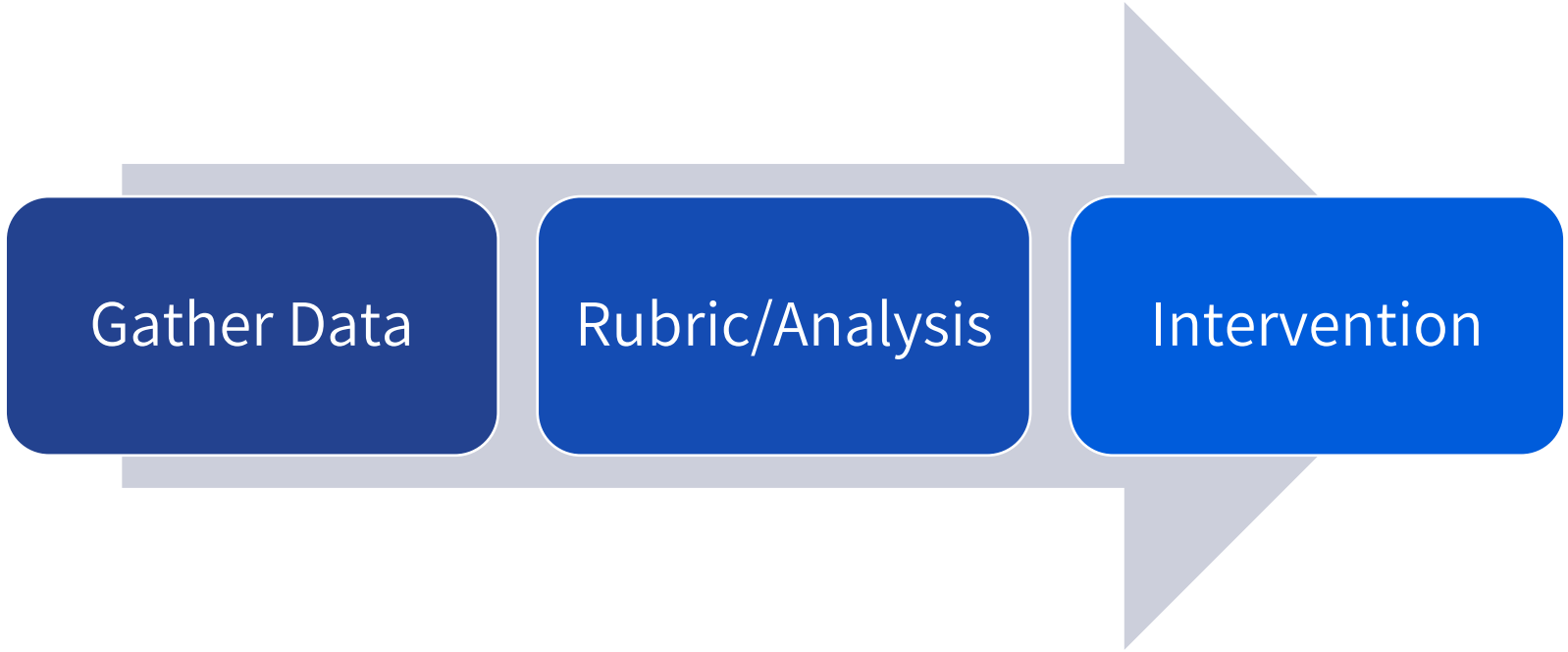
Defining TERMS: BIT

BIT

"Behavioral Intervention Teams are small groups of school officials who meet regularly to collect and review concerning information about at-risk community members and develop intervention plans to assist them."

- NaBITA Advisory Board, 2018

Defining Terms:
Behavioral Intervention Teams



Defining Terms: BITs



BITs have defined, cross-departmental membership.



BITs meet at least biweekly to discuss cases.



BITs actively receive referrals for a wide range of concerns.



BITs use an objective rubric to assess risk.



BITs deploy interventions to provide support, reduce risk & increase safety.



BITs increase communication & collaboration

NABITA

Conduct and BIT



Substance Use

- Acute Intoxication
- High-risk substance use



Behavioral Issues

- Disruption
- Poor boundaries
- Hate crime/bias incident



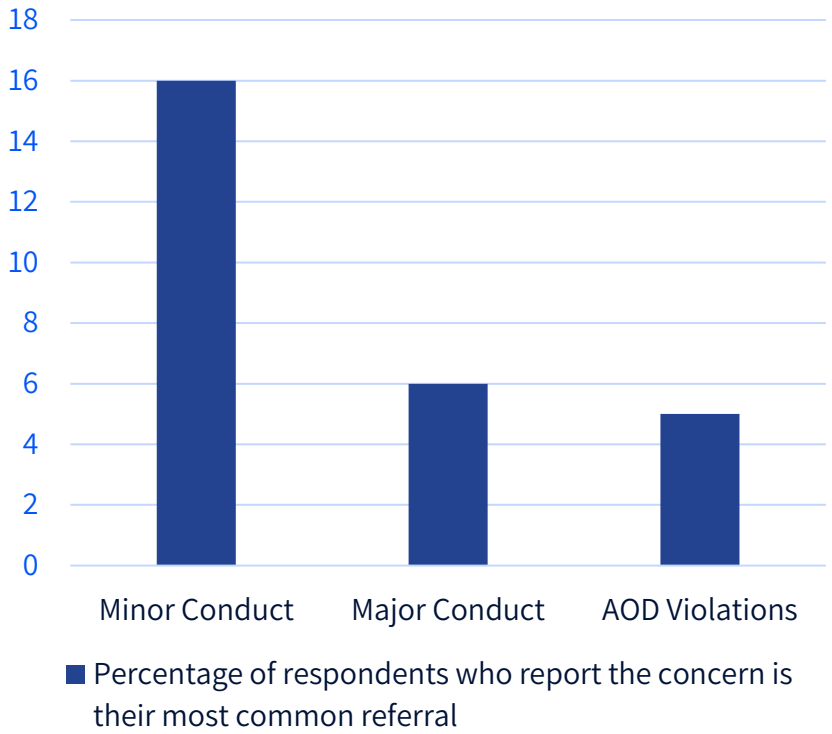
Interpersonal Conflict

- Roommate issues
- Anger management
- Relationship problems

Conduct and BIT

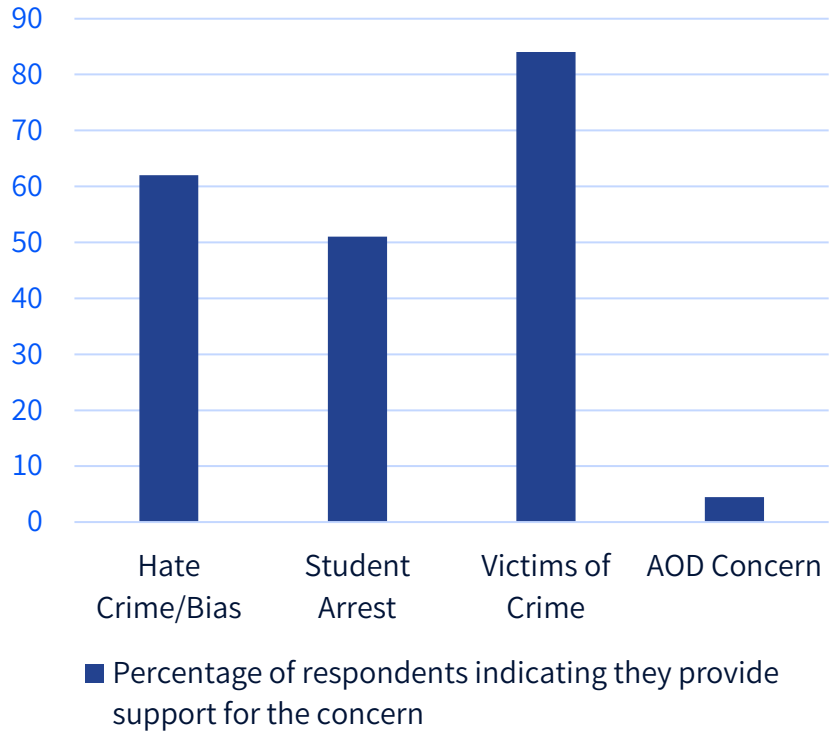
Most common referral to the BIT…

NaBITA Survey, 2018



CMs provide support for situations involving…

HECMA Survey, 2017



Title IX and BIT

Title IX Cases

Cases involving incidents of aggression, threats of violence, violence, harm to self, stalking, hazing, vandalism, substance abuse.

For example:

Complainant experiences hallucinations that cause them to believe they are being stalked.

Respondent has history of suicidal ideation.

Employee's ex-partner repeatedly calls the workplace and makes threats to employee and coworkers.



BIT Cases

Referrals to the BIT that have components of sex-based violence necessitating Title IX-based response.

For example:

Multiple women report that a male student is "making them uncomfortable" and behaving strangely.

Employee notifies campus police that they recently obtained an order of protection from their estranged spouse.

Student employee has been frequently late to work, is overheard arguing with their partner on the phone, and has visible bruising on multiple occasions.

NABITA

Defining FERPA



FERPA is a federal law FERPA is a federal law that protects the privacy of student education records, and the personally identifiable information contained within the records

- **Education Records are defined as records that are:**
  - **Directly related to a student**
  - **Maintained by an educational agency or by a party acting for the agency or institution**
- **Includes anything that is considered personally identifiable information (i.e. anything that could easily lead to the identification of a student)**
- **Rights belong to the parent until the students turns 18 OR attends college**

Internal Information Sharing

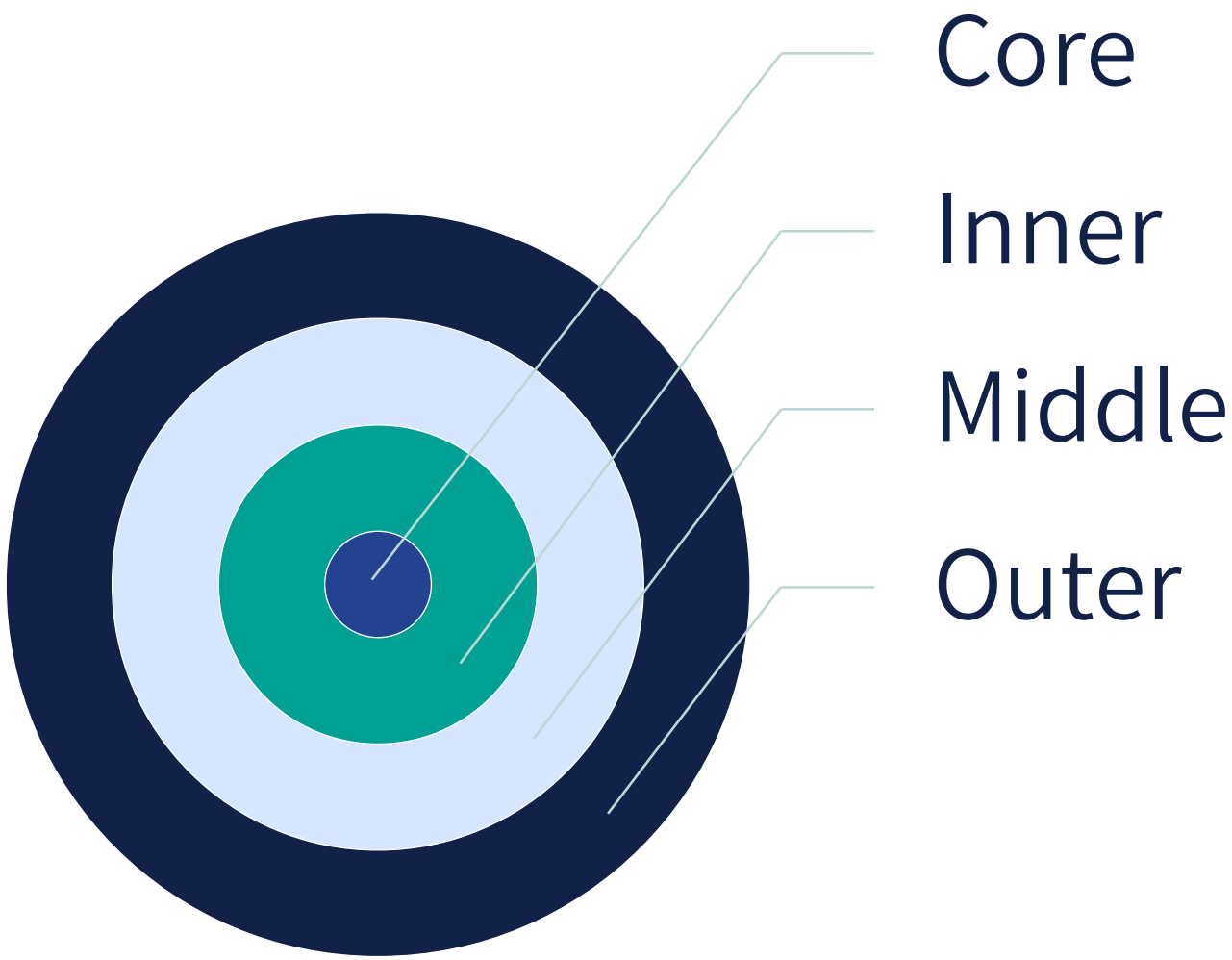


School Official

Legitimate Educational Interest

No consent required

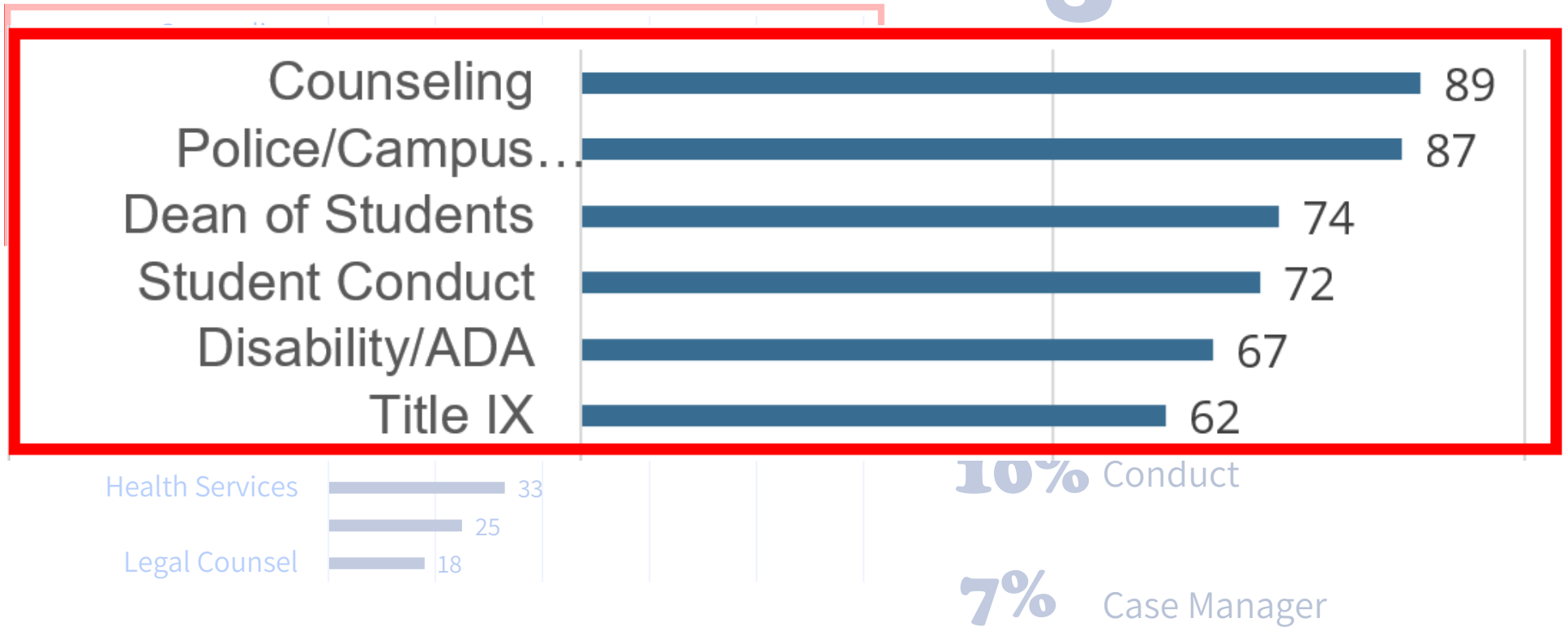
Participation on the BIT



Participation on the BIT

BIT Membership

*percentage of institutions reporting that the department is on their team



Average BIT Size

8 persons

10% Conduct

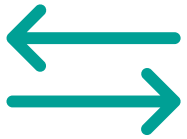
7% Case Manager

Participation on the BIT

Conduct  Core, Possibly Chair

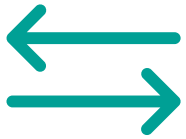
Title IX  Middle, Possibly Inner

Information Sharing

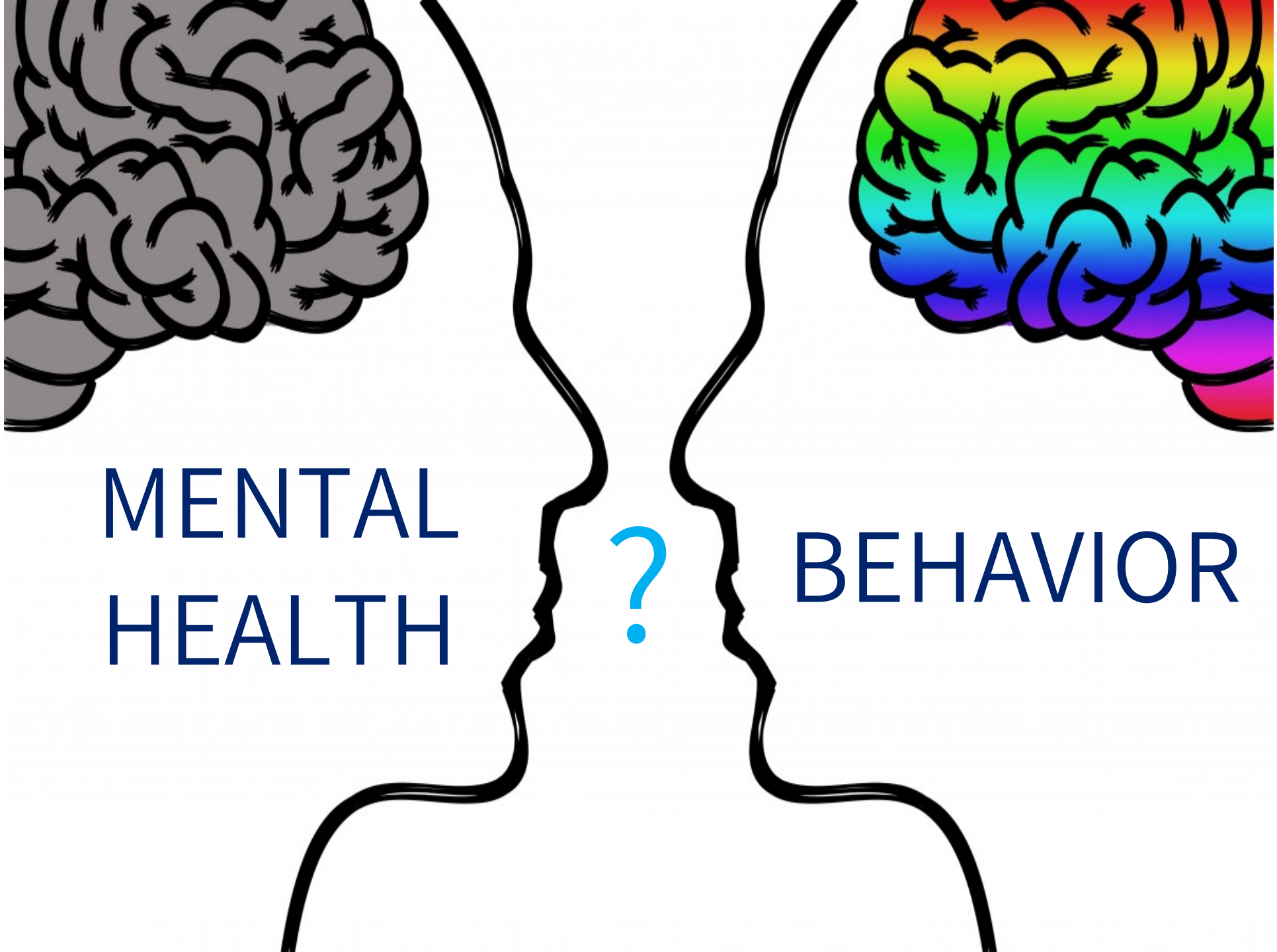
Conduct  BIT

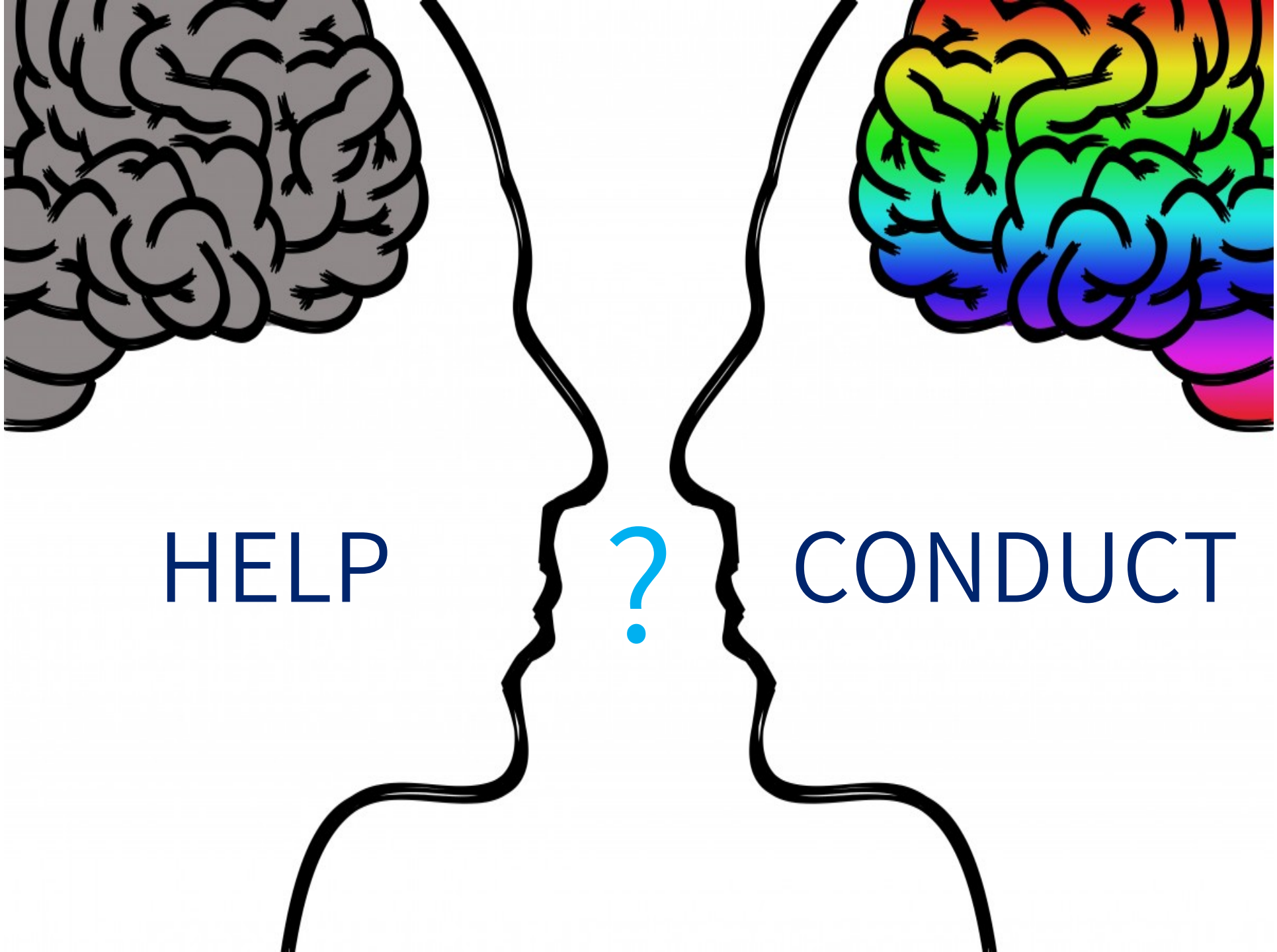
- Conduct history of students referred to BIT
- Referrals to BIT for students interacting with conduct office who have engaged in or threatened violence, pose a risk to self/others, are experiencing distress, or are in need of additional support.
- Updates from conduct on shared cases regarding pending hearings, outcomes, sanctions, etc.
- Updates from BIT on shared cases regarding changes in risk rating, interventions, additional referrals, etc.
- Referrals to conduct when BIT referrals indicate egregious conduct violations, disruption to others, etc. and/or when the student does not comply with mandated assessment.

Information Sharing

Title IX  BIT

- Violence Risk Assessment for emergency removal
- General Title IX information for individuals referred to BIT
- Referrals to BIT from Title IX for incidents of aggression, threats of violence, actual violence, harm to self, stalking, hazing, vandalism, substance abuse, etc.
- Updates from Title IX regarding emergency removals, interim measures, outcomes, sanctions, remedies, etc.
- Updates from BIT regarding risk rating, interventions, and summary of results from additional violence risk assessments
- Referrals to Title IX when BIT referrals indicate potential Title IX related concerns.


MENTAL
HEALTH
?
BEHAVIOR


HELP
?
CONDUCT

Both

And



Code of Conduct



Due Process/Fundamentally Fair Process

APPLIES TO ALL STUDENTS

Mental Health and Behavior



Behavioral Agreements



Progressive Sanctions

Behavioral Agreements

- Behavioral agreements should not precede or supplant conduct. When they do, select students are held to different standards.
- Behavioral agreements should not circumvent due process or the sanctioning process.
- Instead, use an advocacy-based approach, including a focus on helping the student understand the sanctions and access resources.
- Sanctions are what the student is required to do – anything else is a recommendation or a referral.
- The work with the case manager or the BIT can support or reinforce the sanctioning and take the form of collaborative brainstorming on how to have appropriate interactions/behaviors.
- This becomes a roadmap for how the student can behave differently to avoid violating the code of conduct again.

Progressive Sanctioning



Progressive Sanctions

- Meet with a case manager
- Meet with a counselor to discuss incident and learn strategies for changing behavior
- Attend an assessment
- Restorative justice/ADR
- Opportunities for positive engagement

Case Study

- Andrew and Kate have been dating for nearly two years and share an apartment together. Recently, Kate ended the relationship, but they continue living together due to the shared lease.

- Last night, Kate returned to the apartment and found Andrew intoxicated and agitated.

- As Andrew shouted and cried, begging Kate to “take him back” he grabbed a knife and cut his wrists in front of her. Additionally, he stabbed the counter with the knife.

Case Study

- When Kate tried to intervene, he allegedly grabbed her by the arm, leaving bruises.
- Kate called Andrew's mom and together they drove him to the local hospital where he received stitches and returned home with his mother.
- Since the incident, Kate has asked that Andrew no longer contact her, and he has texted her repeatedly throughout the day.

Case Study

- Andrew is a veteran student with a prior aggravated assault charge for drawing a firearm during a “road rage” incident.

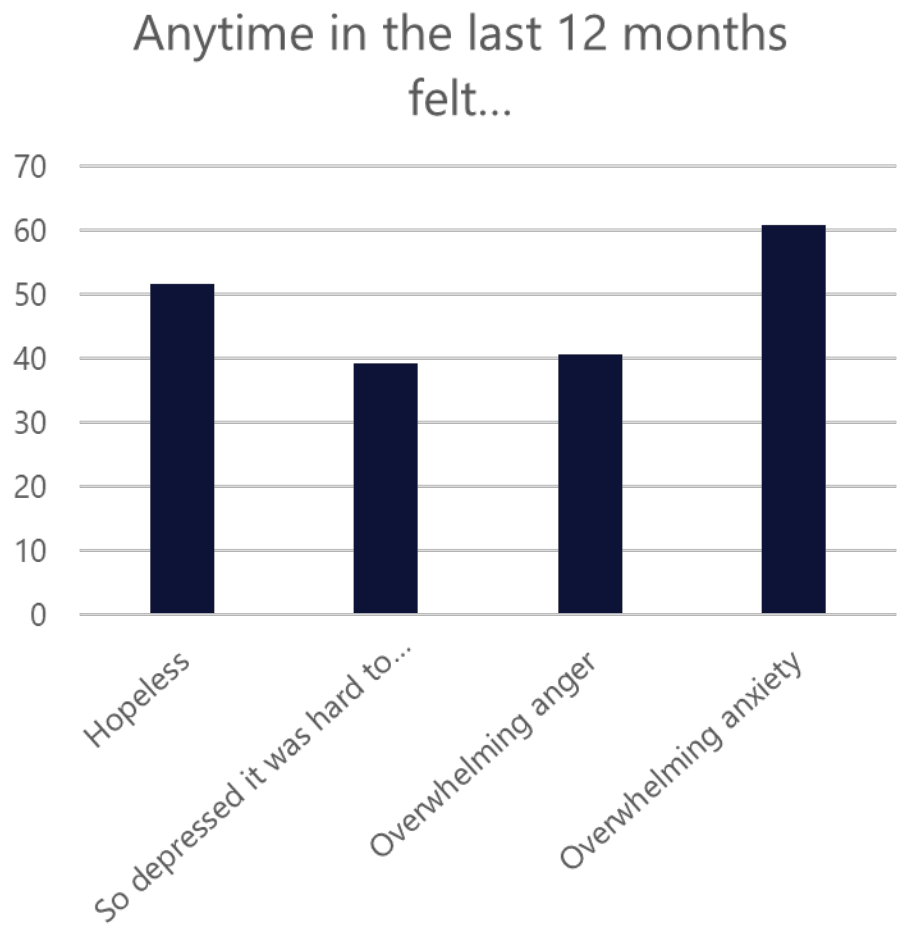
- Kate also has prior history with the BIT for self-harm and causing disruption among her friend group.

Returning from a Behavioral Health Hospitalization or LOA

Mental Health in the College Population

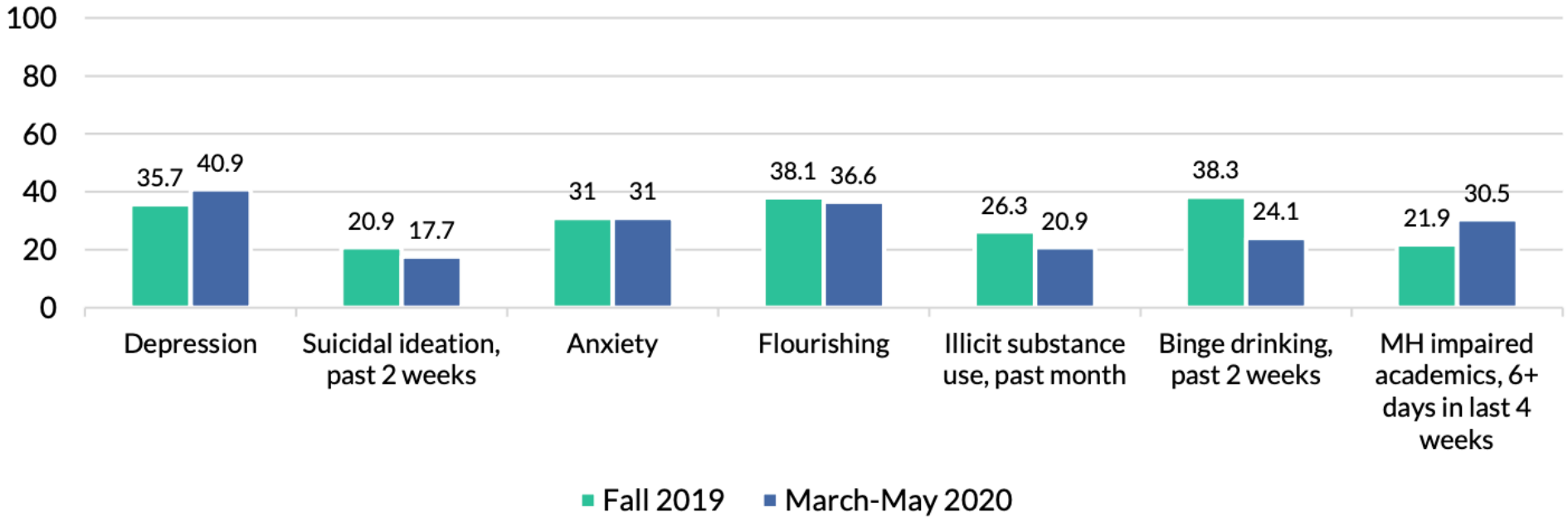
NCHA Data 2017

In the last 12mos, diagnosed or treated for….	Percentage of students reporting
Eating Disorder	2.7
Anxiety	21.6
Bipolar Disorder	1.8
Depression	17.8
Obsessive Compulsive Disorder	3.2
Panic attacks	10.7
Substance abuse or addiction	1.9
Schizophrenia	.4



Mental Health in the College Population

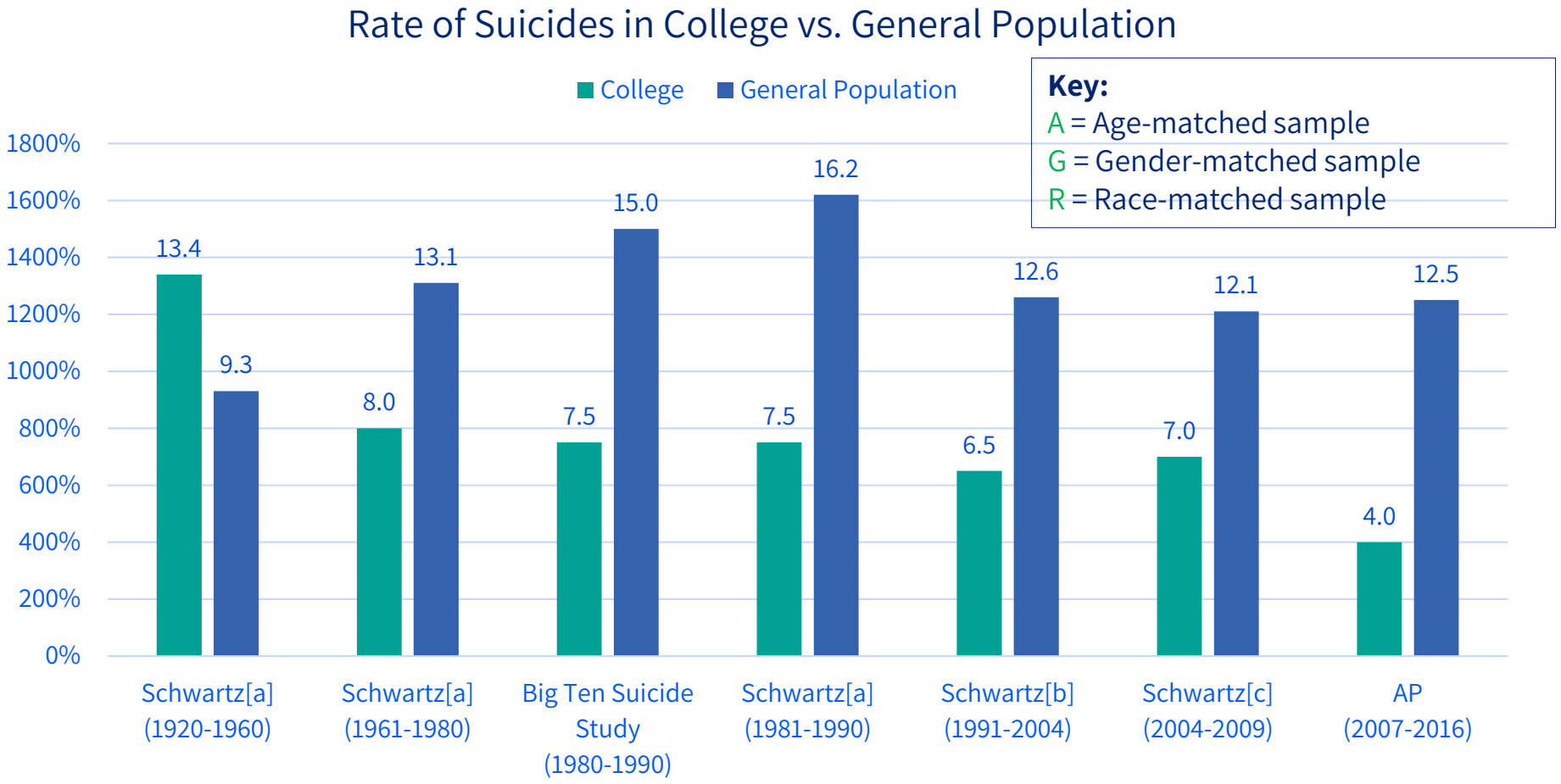
Figure 11a. Mental Health and Substance Use Fall 2019 vs. Spring 2020 (*Healthy Minds Study*)



Source: https://healthymindsnetwork.org/wp-content/uploads/2020/07/Healthy_Minds_NCHA_COVID_Survey_Report_FINAL.pdf

NABITA

College as a Protective Factor



Source: http://www.sprc.org/sites/default/files/migrate/library/SuicideAmongCollegeStudentsInUS.pdf https://afsp.org/about-suicide/suicide-statistics/ https://apnews.com/45f78abcfcec43e49f4c0fbe06b66a8b

Suicidality and Mental Health Emergencies in the College Population



On average, counseling center directors report that 15 students were sent to the hospital by counseling center staff for psychological reasons.



In 2017, 1% of college aged students received psychiatric services from the emergency room - up from .3% in 2007.

Understanding Suicidality

- Suicidal Ideation: Having thoughts about wanting to die, or planning suicide. Passive suicidal ideation refers to a person who is thinking about death but has no specific plan for suicide.

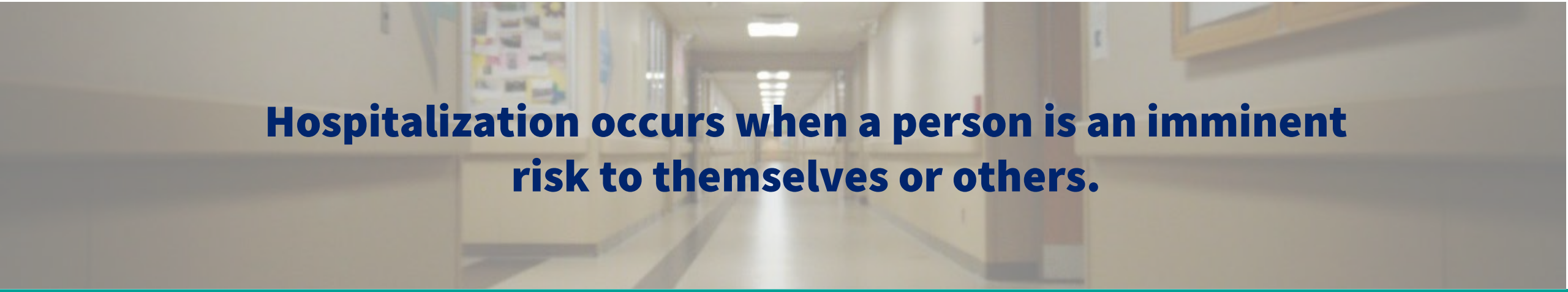
- Suicide attempt: A self-injurious behavior, associated with some evidence of intent to die.

- Non-suicidal self injury (NSSI): Self injurious behavior (cutting, burning, scratching) not associated with intent to die.

Understanding Suicidality Level of Care

- Online support/paraprofessional (RA)/friend
- Consulting evaluation (stop by)
- Outpatient treatment:
  - Weekly or bi-weekly
  - Psychological Testing
  - Medication Referrals
- Intensive Outpatient/Partial Hospitalization
- Inpatient Unit

Understanding Suicidality Level of Care



Hospitalization occurs when a person is an imminent risk to themselves or others.

Voluntary Hospitalizations

- The individual agrees to be admitted to the hospital.
- Can request to be discharged. If providers agree, they are released.
- If treatment providers do not agree they are safe, can turn to involuntary.

Involuntary Hospitalizations

- The individualized is found to be a danger to self or others or are unable to care for themselves and there is a danger of “essential harm” due to a mental illness.
- Varies by state but typically initiated by licensed mental health provider, doctor, or law enforcement.
- Initially 72 hours but can be extended.

The Challenge…

- A student was feeling suicidal and expressed to his roommates that he was feeling scared that he was going to do “something stupid”. The roommates told the RA what was happening and then drove him to the hospital where he waited for hours and eventually returned to the residence hall without being seen.

- A student has been engaging in non-suicidal self-injury for several weeks and has been telling her friends lately she has been thinking of killing herself. The friends are feeling worried that they can’t keep taking care of her and reach out to the counseling center for assistance. The student meets with a counselor and discloses that she has been stockpiling her medication by not taking it for months and she has been thinking of overdosing. The counselor involuntarily hospitalizes the student. After staying at the hospital for the required 72 hours, the student is released.

- A father of an off-campus student reaches out to your office as his son has attempted suicide and has been admitted to the hospital. The student has been in the hospital for several days and the student and his family is hoping someone can communicate with his professors about the medical emergency. The student’s doctors have told the parents that he will likely be released at the end of the week and would like to continue in his classes as he has been doing well.

Commonly Asked Questions…

- How do we know the student is safe to return to campus?
- We believe they need to take some time off school. Can we require they take a leave of absence?
- What documentation do we need to be able to let them in classes?
- How can we make sure they get the support they need to stay safe?

Protections for Students with Disabilities

- Section 504 of the Rehabilitation Act – this act effectively states that a student cannot be denied or excluded from an opportunity on the basis of their disability.
- Americans with Disabilities Act – this is the act that requires schools and employers level the playing field for those with disabilities using reasonable accommodations.
- Thus, these regulations may effect how a public or private college may act to suspend, place on leave, or withdraw a student on the basis of a condition of disability.
  - Protection under the law applies to those who have disclosed a documented disability and those who are regarded as having a disability

Psychiatric Disabilities

- **Defined as a mental impairment that substantially limits one or more major life activities.**
- **Suicidality is not in itself a protected disability, but suicidality is often accompanied by a mental illness.**
- **Examples of psychiatric disabilities:**
  - Major Depressive Disorder
  - Bipolar Disorder
  - Schizophrenia
  - Generalized Anxiety Disorder
  - Autism Spectrum Disorder
  - Other diagnoses as defined in the DSM-V

Change in Disability Law

- As a result of 2011 changes to federal disability law regulations, it is now unlawful to involuntarily separate a student on the basis of self-harm or suicidal behaviors.

- The narrowing of this language has forced colleges and universities to reconsider what are appropriate and lawful practices when faced with students whose actions indicate self-harm and/or the risk of suicide.

Student Code of Conduct and Due Process

- All students, including those with disabilities may be held accountable for behaviors that violate policy through the student code of conduct.
- All students are entitled to due process before any adverse action is taken.
- Typically, that is defined as notice and an opportunity to be heard; almost all institutions have an appeal opportunity as well.
- Schools are entitled to take interim actions in certain extenuating circumstances, but are limited in these circumstances.

Responding to a Student Post-Discharge



Discharge from the hospital indicates student is no longer an imminent risk



Must be permitted to return to classes and housing

UNLESS…

Applying the Code of Conduct

- **If there is a violation of the code of conduct, can initiate the conduct process**
  - Does the behavior/violation warrant an interim suspension?
  - If not, student can return and go through the conduct process as usual

- **Common Violations:**
  - Disruption to campus
  - Threat of harm to others
  - Violation of housing contract

- **Avoid Behavioral Agreements/Contracts**

Balancing Support while Managing Risk

- **Use of Mandated Assessment**
  - Requirement to attend an assessment of risk issued by BIT or Conduct
  - Psychological Assessment vs. Risk Assessment
  - Student permitted to return to campus and classes while the assessment is being issued
  - Risk assessment provides an understanding of the risk and protective factors

- **Case Management and BIT as Collaborative Support**
  - Engagement with the student at time of hospitalization
  - Serves to help support the student during and after hospitalization
  - Can assist with accessing resources, navigating academics, etc.
  - Involve other support networks such as parents

National Association for Behavioral Intervention and Threat Assessment

Returning from a Leave of Absence

Types of Leave of Absence

Voluntary

- Student initiates the leave of absence.
- Temporarily allows the student to remain an admitted student while not actively enrolled in classes.
- Typically LOA is due to:
  - Medical issue
  - Time away to work/focus on family
  - Study Abroad

Involuntary

- University initiates the leave of absence.
- Removes the student for a set period of time from active enrollment while allowing them to remain an admitted student.
- Involuntary LOA must be a result of a applying the direct threat test or because the student poses a legitimate safety risk.

Initiating a Voluntary LOA

- Process should be outlined in the Academic Handbook and/or the Student Code of Conduct.
- Process is the same for all students regardless of the reason for the leave.
- If LOA is occurring mid-semester, or after drop/withdraw deadline, supporting documentation may be required but it is the same for all students.
- The voluntary LOA should be truly LOA and not a result of pressure, coercion, or feeling as though the school left them with no other option.

Returning from a Voluntary LOA

- All students returning from a voluntary LOA are able to resume classes without additional steps.
- Students returning from voluntary LOAs cannot be made to reapply, or petition to return, regardless of the reason for the leave.
- They do not have demonstrate readiness to return or cessation of any behaviors.

Initiating an Involuntary LOA

- **Process for determining the presence of a direct threat or legitimate safety risk must be rooted in due process or fundamentally fair process and likely includes at a minimum:**
  - Letter of notice
  - Objective evidence obtained via an individualized assessment related to the level of risk posed
  - Opportunity for a hearing
  - Opportunity for an appeal

Returning from an Involuntary LOA

- Student is entitled to return when they can demonstrate that they are no longer a direct threat or no longer post a legitimate safety risk.
- The risk must be reduced/averted, but not the disability or condition that may have contributed to the risk.
- Conditions to return can be outlined at the time of separation if these conditions relate to the risk and not to the cessation of the underlying disability.

Case Law Examples



NORTHERN MICHIGAN UNIVERSITY

Northern Michigan University Case Facts

- Katerina Klawes was a student at Northern Michigan University when she shared with a friend that she had Major Depressive Disorder and her doctor was concerned about her being suicidal.
- When her friend reported it, the Dean of Students attempted to contact her unsuccessfully, and then had campus and local police locate her. Local police determined she was not a threat to herself.
- NMU required her to sign a behavioral agreement, requiring her to not speak to others about her suicidal thoughts and to attend a psychological assessment, with the threat of disenrollment.

Decision

- **Klawes filed a complaint with DOJ for violation of Title II of the ADA.**
  - Four other students who were required to sign behavioral agreements joined the complaint.
- **DOJ required NMU to update its "Policy relating to student self-destructive behavior, its ADA and reasonable accommodations policies, and its withdrawal policies, practices, and procedures.**
- **DOJ required NMU to create a process for individualized assessments and train faculty, counseling, DOS and staff.**
- **NMU settled for $173,500.**



Takeaways

- NMU overreacted to the risk presented and acted based on speculation and assumption.
- Threatening a student with separation or conduct code action for suicidal thoughts is problematic.
- Retire the use of gag orders.
- Teams should take a position of genuine interest in identifying a success plan rather than threatening them with disenrollment.
- If institutions use behavioral agreements, they should be designed to reinforce Codes of Conduct - not add additional standards and sanctions.





ST. JOSEPH'S COLLEGE

St. Joseph's College Case Facts

- In the fall semester, a female student grabbed and tried to kiss a male student, would not let go of him, insisted she was in love with him and that they were married. She had to be forcibly removed by a security guard. She voluntarily went to the hospital and was released the same day.

- A week later, she was permitted to return to campus after receiving a letter from her psychiatrist giving her clearance; however, another week later, the student repeated the first incident. This time she was transported to the hospital via ambulance.

- The college's BAC (their BIT) met and placed the student on emergency suspension without notice to her or an opportunity to meet with any member of the BAC.

St. Joseph's College Case Facts

- The student wrote to the Dean of Students in the following Spring semester, seeking to return.

- It was determined by the BAC on the basis of the evidence it used to suspend her the previous semester, that she was not fit to return.

Decision

- OCR determined that the College regarded the student as an individual with a disability, based on its knowledge of her psychiatric conditions at the time of her delusions.

- Further, SJC had subjected the student to differential treatment on the basis of that disability by diverting from the traditional conduct process that would have been used for similar behaviors by students who were not disabled, and that it had failed to provide the due process and additional procedural protections that the traditional process would have afforded.



Takeaways

- Do not use BIT processes as a diversion from the conduct process. While the two collaborate and communicate, BIT should not take over or replace the conduct process.
- BIT processes and policies should be written and published.
- The St. Joseph's College decision appears to reinforce the notion that BIT should remain preventive and caring, and leave the conduct actions to the Student Conduct Office.





UCLA

UCLA Case Facts

- Damon Thompson transferred to UCLA in the Fall of 2008 and began experiencing difficulties with other students in the residence hall and classroom.
- During the fall semester, Damon made several complaints about residents making comments about him, disrupting his sleep and eavesdropping on him during class and in his residence halls.
- In late January of the next spring semester, Thompson again complained to three professors and a TA that student were trying to distract him. The TA observed Thompson acted oddly and often talked to himself. The TA referred him to the counseling center. Another professor forwarded the complaints to the “Consultation and Response Team” who referred him to the counseling center.

UCLA Case Facts

- The situation worsened in February for Thompson when he told the RD that “voices were coming through the walls calling him an idiot”. He heard a clicking noise above his bed that he believed was a gun from other residents trying to shoot him. Thompson told the RD that he called his father who advised him to “hurt the other residents”. Thompson admitted to thinking about hurting them but ultimately said he decided against it.
- Campus police searched his room and found no weapon. They did transport him to the ER where he receive a psychiatric evaluation. During the exam he denied suicidal or homicidal evaluation and agreed to medication and outpatient treatment. The Consultation and Response Team was advised an discussed Thompson during their meeting.

UCLA Case Facts

- Thompson continued to experience difficulty throughout the spring semester and his engagement in support resources was inconsistent.
- Thompson began counseling in March but reported throwing away his medication. He reported continued hallucinations and paranoid thoughts.
- The RD notified CAPS of continued difficulty in the residence hall. The Consultation and Response team moved Thompson to a single room.
- Later in March, Thomspon disclosed to his therapist that he was experiencing thoughts of wanting to harm others but had no identified victim or plan beyond wanting to hurt the people insulting him – but he did not know who they were. CAPS determined he did not meet criteria for an involuntary hospitalization. He continued to attend therapy and report ongoing hallucinations until April when he discontinued treatment.

UCLA Case Facts

- Thompson continued to experience difficulty throughout the spring semester and his engagement in support resources was inconsistent.
- Thompson began counseling in March but reported throwing away his medication. He reported continued hallucinations and paranoid thoughts.
- The RD notified CAPS of continued difficulty in the residence hall. The Consultation and Response team moved Thompson to a single room.
- Later in March, Thompson disclosed to his therapist that he was experiencing thoughts of wanting to harm others but had no identified victim or plan beyond wanting to hurt the people insulting him – but he did not know who they were. CAPS determined he did not meet criteria for an involuntary hospitalization. He continued to attend therapy and report ongoing hallucinations until April when he discontinued treatment.

UCLA Case Facts

- In June, campus police responded to the residence hall after Thompson shoved a resident twice saying he was making too much noise and this was his “last warning”. Thompson was removed from housing and required to attend counseling when fall semester started.
- Once in his off-campus apartment he called the police twice to complain that neighbors were yelling at him through the floor.

UCLA Case Facts

- Once Fall semester began, he reengaged in counseling services and continued reporting insults and harassment and that he was hearing “voices of other students having malice toward him and making critical and racist comments”. He denied an intent to harm anyone.

UCLA Case Facts

- On October 6th, the TA emailed the professor detailing “another incident” with Thompson. Thompson accused another student of calling him stupid and insisted that he learn the name. The TA gave him the student’s name and “calmed down”. The TA noted that he was worried that this behavior was his weekly routine and that Thompson frequently identified Katherine Rosen as one of the students calling him stupid.
- On October 7th, another TA emailed the professor saying that Thompson came into his lab from a different section and accused the students of verbally harassing him. Thompson identified another student other than Rosen as one of the harassers. The professor forwarded this email the Dean of Students who contacted the Consultation and Response Team.
- The CAPS directed recommended “urgent outreach” to Thompson and members of the team tried to schedule a meeting to discuss Thompson.
- Thompson did not show up for his therapy appointment that afternoon.

UCLA Case Facts

- The next morning, the dean of students and leader of the Consultation and Response team met to discuss Thompson and decided to see if he was having difficulties in other classes.
- Around noon that day, Thompson was working in the chemistry lab and suddenly stabbed Rosen in the chest and neck.

UCLA Case Facts

- Rosen sued Thompson, the Regents of UCLS, several UCLA employees including the professor, the Dean of Students and the CAPS psychologist.
- The complaint alleged a single cause of action against UCLE for negligence claiming that UCLA had a special relationship with her as an enrolled student, which entailed a duty “to take reasonable protective measures to ensure her safety against violent attacks and otherwise protect her from foreseeable criminal conduct, to warn her as to such reasonable foreseeable criminal conduct on its campus and in its buildings, and/or to control the reasonably foreseeable wrongful acts of third parties/other students.”
- She alleged UCLA failed this duty to protect her as they were aware of Thompson’s behavior and threats, as well as naming her specifically, and they failed to warn or protect her or to control Thompson’s foreseeable violent behavior.

Decision

- In a landmark ruling, the Supreme Court of California applied Section 40 of the Third Restatement of Torts to determine for the first time that colleges and universities have a “special relationship” with their students.
- This decision removes the fact question of duty from litigation. Schools in CA now have a duty to use reasonable care to protect them from foreseeable acts of violence in the classroom or during curricular activities.



Takeaways

- The appropriate standard is the level of care that a reasonable person of ordinarily prudent behavior could be expected to exercise under the circumstances.
- Institutions should assume they have a duty of care to students who may be at foreseeable risk as the result of another student's mental health challenges.
- Institutions should use BITS and case management to assess and manage risk associated with students – this requires more than a "one and done" approach and involves more than meeting to discuss the student.
- Interventions should match the level of risk present, should be ongoing, and should involve implementation of safety measures and active engagement in safety planning.



THANK YOU

makenzie.schiemann@tngconsulting.com
daniel.swinton@tngconsulting.com