Revisiting Student-at-Risk Response Teams: Threat Assessment, Case Management, or Both?

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THE CENTER FOR EXCELLENCE IN
HIGHER EDUCATION LAW & POLICY
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Agenda

- Risk Management Basics

- Liability

- Student-at-Risk Response Teams

- Time permitting: Involuntary Leaves/Discipline Systems
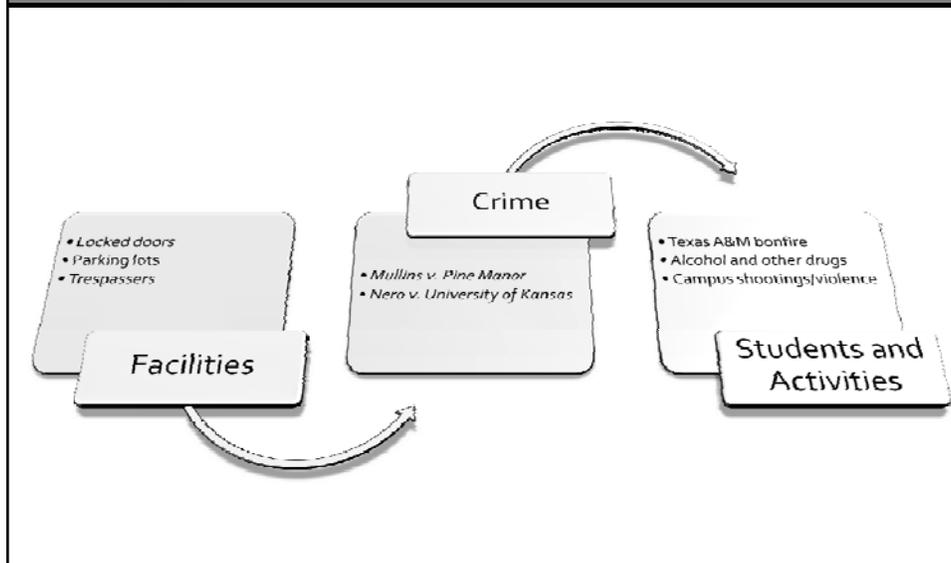
What Is Risk Management?	

Process of analyzing potential and perceived risks and taking steps to avoid or minimize those risks.	
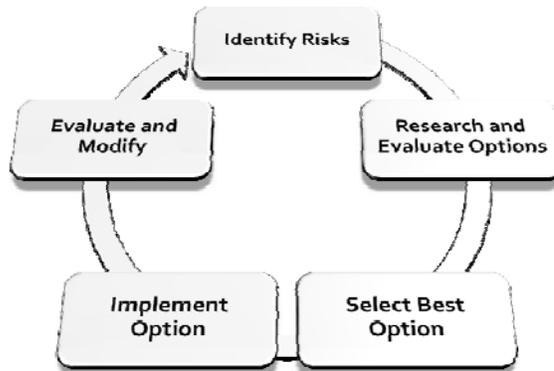
Managing Risks

History of Risk Management on Campus

Key Risk Management Concepts

- It's everyone's job; but, points of responsibility

- Collaborative/team approach

- Freedom to identify risks and solutions

- Appropriately resourced

- Training

- Timely communication and action

Risk v. Liability

- **Risk**
  - Possibility of loss or injury

- **Liability**
  - Legal responsibility

- Risk does not equal liability; the absence of liability does not eliminate risk

- But, some overlap

Negligence Law

- **Duty:** Obligation, recognized by law, requiring a person to conform to a certain standard of care to protect others against unreasonable risks

- **Breach:** A failure to conform to the standard required

- **Causation:** Link between action and damage

- **Damage:** Actual loss or injury required

- How would a reasonably prudent person act under the same or similar circumstances?
  - Contextual

- Negligence requires that the risk be both foreseeable and unreasonable.
  - Must protect against what usually happens or is likely to happen under the circumstances.
  - The law does not require us to be insurers of safety.

Vicarious Liability

- Employees (and volunteers) can be agents of the university
  - "Scope of duty"
  - Control
  - Note: Direct action against institution for negligent hiring, supervision, retention.

- Students typically are not agents of the university
  - Exception: student employees
  - But, students may be sued individually
  - Student organizations (control)

Imputed Knowledge

- Legally, all campus personnel represent the university.

- Each employee's knowledge is generally imputed to the institution.

- Once a university has knowledge or notice that a student's behavior is concerning, the university has a legal duty to respond reasonably.
  - Even if an employee has not shared knowledge about the student with others
  - Thus, it behooves universities to have a coordinated effort, to promote communication, and to train all levels of employees.

Liability Overview: Suicide

- No trend toward courts holding colleges or individual administrators liable for college student suicide.

- But a rise in the number of suicides is likely to lead to more claims and lawsuits.

- And, some historical barriers to liability have eroded.
  - Immunities/causation

- Best interest of the student/professional discretion.

Liability for Student-on-Student (or Employee) Violence

- Analogy to negligent hiring (e.g., negligent admissions) [N.C. cases]
  - Negligent retention
  - Residence halls

- Duty to warn or protect [*Tarasoff + Mullins v. Pine Manor + Nero v. Kansas State*]
  - But, not an insurer and student must also take reasonable steps to protect himself [*Rhaney v. University Md. Eastern Shore*]

Liability for "Adverse Action"

- Constitutional claims (public institution)

- Breach of contract (private institution)

- Invasion of privacy, defamation, negligence

- Discrimination

- FERPA (but no private right of action)

Individual Liability

- Two ways your name might appear in the caption

- Can be sued individually
  - But, plaintiff often wants the institution (as the deep pocket) on the hook
  - But, sometimes the institution cannot be sued successfully (e.g., sovereign immunity)
  - In terrorem effect

- Indemnification

- Insurance

- Note about university counsel

Insurance Claims

Between the years 2000 and 2004, UE received 69 claims — more than one a month — from college, university, and independent school members arising out of a student's mental disorder, psychological condition, or an attempted or completed suicide. Broadly categorized, 64 percent charged the institution with unlawful discrimination, wrongful dismissal, or other adverse actions based on the student's mental condition or disability. The remaining claims asserted institutional or employee negligence or breach of contract in failing to prevent or respond appropriately to students' attempted or completed suicide, or a failure to provide adequate counseling, emergency, or other support services to mentally troubled students. Not a single claim challenged the release of mental health information to parents or family members. These claims also show that cases involving suicide and other severe harm to students can be costly to resolve. Ten percent of the claims resulted in approximately $6 million in economic loss to UE and its member institutions, though many were resolved without litigation. One conclusion is clear: The failure to notify family members about a student's precarious situation increases the likelihood of a lawsuit.

Source: United Educators, *Students With Mental Health Problems: When Should Parents Be Notified?* (Student Affairs Risk Research Bulletin, Apr. 2005).

What We've Learned – And Gleaned

- Training and awareness (Virginia legislation)
  - Policies and protocols
- Safety trumps privacy
  - Suicide-homicide continuum (shooters/moped in *Jain*)
  - But, individualized assessment of threat (*Nott* + Virginia)
- Student at-risk response teams
  - Becoming an industry standard?
  - Collaboration and prompt follow up (*Shin*)
- Students who lie/conceal (*Clark*)
  - We are not insurers of student safety
- Parental notification – discretionary (*Jain* + FERPA)
- Caring . . . not liability shifting (*Mahoney*)

Mahoney v. Allegheny College

- "We believe the 'University' has a responsibility to adopt prevention programs and protocols regarding students['] self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective."

  - *Mahoney v. Allegheny College*, Memorandum and Order (Court of Common Pleas of Crawford Co, Pa., Civil Division, Dec. 22, 2005), *available at* http://www.asjaonline.org/attachments/articles/35/Allegheny%20college%20SJ%20decision.pdf

And . . .

- Universities have limited resources and must make tough choices
  - Foreseeability
    - Not always the same from campus-to-campus
    - But must be aware of national happenings and trends

- There's not a universal template

Collaborative Teams on Campus

- Some schools have teams that date back decades
- Many schools initiated teams after 9/11
- Even more initiated teams after the Virginia Tech and Northern Illinois shootings
- Late 2007 survey in Massachusetts: 65 IHEs/50%
- Less frequent on two-year campuses

- Are collaborative teams that deal with at-risk students becoming an industry standard for purposes of negligence analysis?
  - December 2008 United Educators presentation: "Pretty much a necessity in today's world."
 - Jed Foundation "good practice."

But What Kind of Team?

- Student-at-Risk Response Team?

- Threat Assessment Team?

- Both?

- It depends:

- State law

- System requirements

- Size
  - Just the same people?

- Resources
  - Expertise
  - Different training

- Culture

- Notes: (1) Area still evolving. (2) Conflated.

Possible Models

- One team
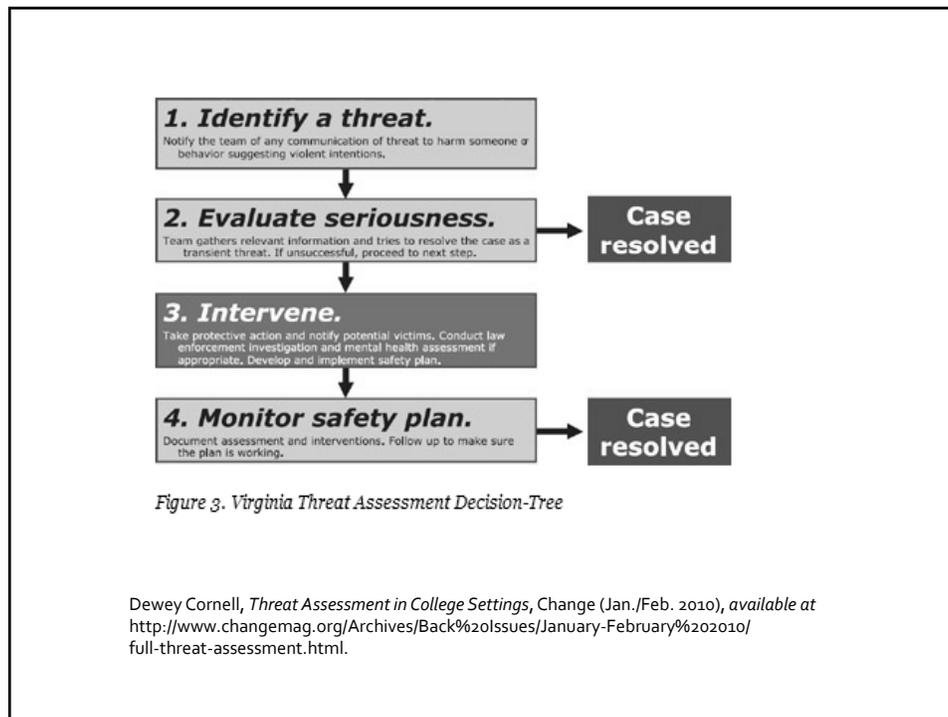
- Two separate teams, with some membership overlap

- Student-at-Risk Response Team, with Threat Assessment (Violence) sub-team

- Broad risk-management coordinating team, with multiple sub-teams (campus violence, alcohol and drugs, relational violence, etc.)
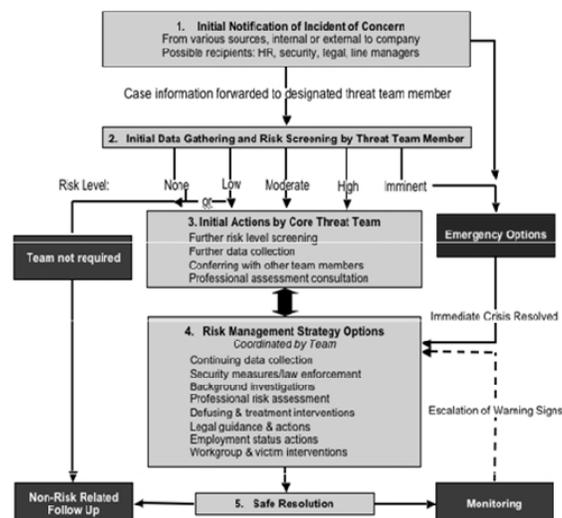

Source: Stephen G. White, *Workplace and Campus Violence: The Challenge to "Connect the Dots"* (NACUA CLE Conference, Mar. 2009).

Figure 3. Virginia Threat Assessment Decision-Tree

1. Identify a threat.
Notify the team of any communication of threat to harm someone or behavior suggesting violent intentions.

2. Evaluate seriousness.
Team gathers relevant information and tries to resolve the case as a transient threat. If unsuccessful, proceed to next step.

→ **Case resolved**

3. Intervene.
Take protective action and notify potential victims. Conduct law enforcement investigation and mental health assessment if appropriate. Develop and implement safety plan.

4. Monitor safety plan.
Document assessment and interventions. Follow up to make sure the plan is working.

→ **Case resolved**

Figure 3. Virginia Threat Assessment Decision-Tree

Dewey Cornell, *Threat Assessment in College Settings*, Change (Jan./Feb. 2010), *available at* http://www.changemag.org/Archives/Back%20Issues/January-February%202010/ full-threat-assessment.html.

Team Mission or Objectives

- Repository of information
  - Students, employees, other — **Connect-the-dots**
  - Types/level of concern (trade-offs)
- Facilitate timely communication
- Investigate
- Assess
- Recommend strategies
- Evaluate strategies post-implementation
- Educate campus community (or others – local businesses, parents)
- Develop policy recommendations
- Coordinate with other campus of off-campus groups (e.g., admissions, strategic planning, local business association)
- **Impose discipline <?>**
- **Re-evaluate purpose and mission (mission-creep)**
- **Note: When you create a new team, check/update all relevant policies.**

Virginia Tech Pre-shooting CARE Team	
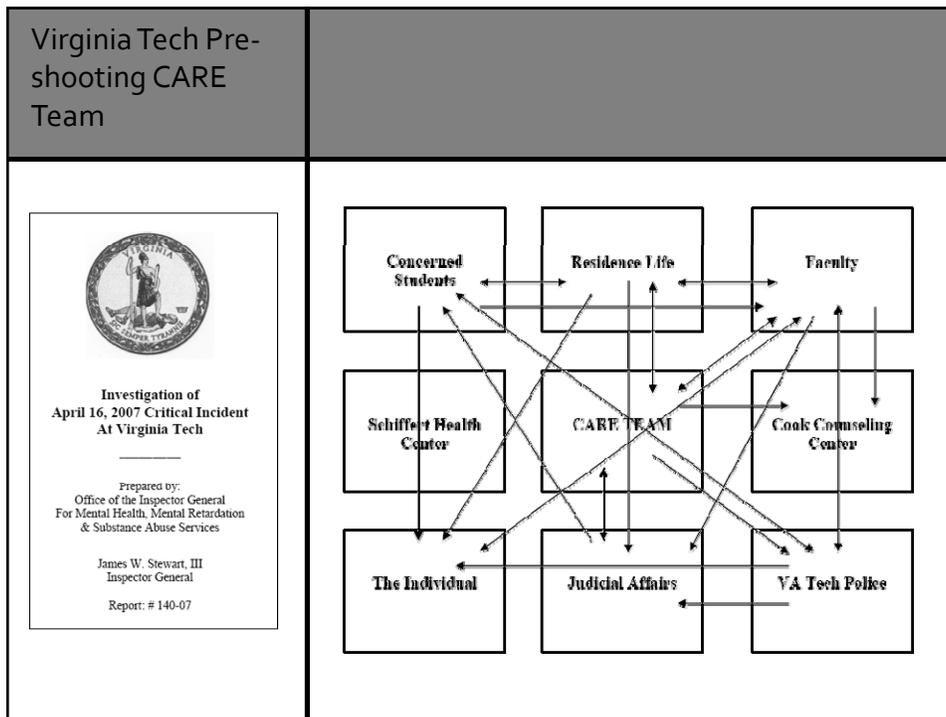
Evolving Educational Landscape

- Study-abroad programs
  - Students from other schools

- Distance -learning programs (with students at a distance)

- Collaborative programs with another school or university where student is enrolled in two schools at once
  - Articulation agreement

Team Name

- Avoid stigma
- Avoid chilling effect on reporting
- Accuracy (people know what the team does)

- Student Coordination Committee (SCC)
- Behavioral Intervention and Assessment Team (BAIT)
- Student Review Team (SRT)
- Alert Team
- Student Assistance, Facilitation, and Evaluation Team (SAFE)
- Behavioral Evaluation and Threat Assessment (BETA)
- Student Assistance Response Team (StART)
- Student Support and Emergency Team (SSET)
- Student Care Team
- Campus Awareness Response and Evaluation Team (CARE)

Team Visibility

- Multiple media (especially web)

- Emphasize role/clarify misperceptions

- Link to academic success and campus safety

- Ensure people can reach the team/team members (web, etc.)
  - Inside and outside reporting options
  - Related education

Education and Reporting Methods Audit					
(1) **Potential reporter**	(2) **Education methods**	(3) **Frequency of education**	(4) **Reporting methods**	(5) **Problem(s) identified during annual review of reports**	(6) **Improvements to education and reporting methods**
Parents	Presentation given at first-year orientation. Parents provided a list of potential warning signs.	Annually.	Team members' email and phone number and an anonymous reporting phone number.	Very few reports submitted by parents; the few reports received came from first-year student parent group; reports made by telephone.	Expand scope beyond parents of first-year students by giving a presentation at Parents Weekend in the fall.
	Website. Simple description of troubling behaviors listed.	Continuously available through the web.	Anonymous email address and phone number.		Parents want to report to an actual person. Team will provide contact information for one member as the parent liaison.
	Informational pamphlet sent to parents of first-year students. Description of behaviors from website used.	Annually.	Contact information for all team members.		Will mail this pamphlet to all parents and not just parents of first-year students.

Source: Alyssa Keehan, *Threat Assessment Teams for Troubled Students: Putting the Pieces Together* 15 (United Educators 2009).

Team Composition

- Multidisciplinary and centralized
  - What about "branch campuses"?

- Size (UE says 5-20)

- Composition
  - Student affairs
  - Campus safety/police
  - Housing
  - Athletics
  - Legal
  - Academic Affairs
  - Academic Support/Student Retention
  - Residence Life
  - Judicial Affairs
  - Disability Services
  - International Student Services
  - Counseling Center
  - Health Center
  - Risk Management
  - Communications/Public Affairs
  - Registrar
  - Human Resources
  - Chaplain
  - Ombudsman
  - Who else?

- Mixing in the disciplinary function:

  - Chilling effect on reporting?

  - In effect setting up two discipline systems? Potential for inconsistent results?

  - Supplanting expertise?

  - Inconsistent with disciplinary code in any respect? (e.g., access to information, discussion of speculation?)

Team Leader

- Team needs support of senior leadership

- But should "top leader" participate (or even lead this team)? If so, how?

- Characteristics:
  - Understands and supports team's purpose
  - Has time to chair; will make team a priority
  - Respected
  - Outstanding communication skills, judgment, and discretion
  - Willing to listen, and willing to continue learning

Training

- May differ depending on team purpose
  - Specific threat assessment training
  - Other topics: mental health topics, legal (disability law, documentation practices, privacy, negligence law, etc.)

- Once is not enough
  - Staff turnover

- Table tops, visiting experts, webinars, seminars, reference guides, representative of your insurance company

Meeting Protocol

- Frequency and length
  - Cannot replace interim communications (*Shin*)

- Assignments and follow up
  - Specific dates – pro's and con's
  - How long do students stay in the minutes?

- Access to experts/consultants and counsel

- Administrative support

- Semester and annual recaps

- Review at some interval by an expert or oversight team?

- Individual notes

- Minutes
  - Timely
  - Accurate; non-inflammatory
  - Level of detail
  - Offense and defense
  - Who takes minutes? [suggest one person, not rotating] Does anyone review the minutes before distribution?
  - Cannot convert to attorney-client protected document
    - Minutes are usually covered by FERPA
    - Threat-assessment minutes, if kept and maintained by campus security, may be exempt from FERPA.
    - State guidelines (Virginia on threat-assessment minutes)
  - How minutes are distributed and maintained
  - Do not become part of the student's academic record
  - Public institutions – other challenges?

UE's Recommended Documentation Practice

- Student's name
- Date of report
- Nature of report or incident
- Source of report, or departments involved
- Conclusions based on team's analysis (e.g., does student pose risk of harm to self or others?)
- Recommended strategy/intervention
- Results of recommended strategy/intervention
- **I would add, as part of the strategy:**
  - Team member assigned to follow up
  - Deadline to follow up

Communication within the Team

- Interim communications
  - Email – or not?

- Communicating with licensed mental-health and medical professionals
  - Do not conflate privacy under FERPA with the ethics and privacy rules by which mental-health and medical professionals are bound.

- Other limits or issues?

Communication Outside the Team

- Reluctance to report to the team
  - Getting someone "in trouble"
  - Misplaced duties (e.g., confidentiality)

- Anonymous reports – how should these be handled (if at all)?

- Campus outreach/liaison with departments not represented?

- Inadvertent disclosures

- Inappropriate disclosures (breach by member)

- Follow up with referral source

- Speaking with faculty and others who deal with the student

- Speaking with outside mental-health professional treating student (consent form)

- Parental notification

- Campus/others in time of crisis (new FERPA exception)

- Licensing boards/internships, etc.

Team Member Well-Being

- Direct threats

- Grievance

- Lawsuit

- Secondary trauma

- Workload/burnout

Keys to Success

- Multidisciplinary teamwork
  - Training
  - Strong communication
  - Follow up

- University support

- Campus-wide visibility and education

OCR: Involuntary Leave Policies

- Involuntary leave policies are permissible.
- *In re Bluffton, In re Guilford,* and *In re Marrietta* (Office of Civil Rights): Federal law does not prevent an IHE from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of self or others, even if the individual is a person with a disability, as that person may no longer be qualified for a particular educational program.
  - What makes a person qualified for a particular educational program?

What OCR Says IHEs Should Do

- Define "direct threat": high probability of substantial harm and not just a slightly increased, speculative, or remote risk

- Conduct individualized and objective assessment
  - grounded "in sound evidence" and not "on unfounded fears, prejudice, or stereotypes regarding individuals with psychiatric disabilities"
  - based on a reasonable medical judgment relying on the most current medical knowledge
  - based on observation of a student's conduct, actions, and statements, not merely knowledge or beliefs that a student is an individual with a disability

- Consider alternatives short of withdrawal.

- Afford student notice and an opportunity to be heard.
  - But, interim measures permitted.

OCR: Return to Campus

- IHE may establish conditions for a student's return to classes/housing, etc.
- Must establish conditions on an individual basis.
  - Show adherence to treatment plan; submit periodic progress reports; grant permission for campus officials to speak with treating professional
- Not permissible to set condition that student's disability-related behavior not reoccur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications.

Other Discipline System Issues

- Waiting until a rule violation has occurred
  - Educational conferences

- Mandatory assessment v. mandatory counseling

- Removal from campus housing

- Victim protection

A Few Thoughts

- Create a culture in which every person understands that he or she has a role in campus health and safety.

- Reasonableness is a key.

- Encourage educators to act based on their professional judgment, training, and discretion, without fear that they may be acting outside the strict letter of the rules.

- Avoiding or minimizing legal liability is rarely the primary concern

- Do not let the memory of Virginia Tech, Northern Illinois, and other campus tragedies fade.

Virginia Legislation

§ 23-9.2:8. Policies addressing suicidal students.
- The governing boards of each public institution of higher education shall develop and implement policies that advise students, faculty, and staff, including residence hall staff, of the proper procedures for identifying and addressing the needs of students exhibiting suicidal tendencies or behavior. The policies shall ensure that no student is penalized or expelled solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behaviors. Nothing in this section shall preclude any public institution of higher education from establishing policies and procedures for appropriately dealing with students who are a danger to themselves, or to others, and whose behavior is disruptive to the academic community. (2007, c. 705.)