The ADA Integration Mandate and Suicidal Students: Are Compulsory Leaves of Absence Discriminatory?

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Abstract

In 1990, the passage of the Americans with Disabilities Act (ADA) seemed to promise a new era for people with disabilities—one free from discriminatory exclusion and undue interference in personal autonomy. Thirty years later, universities—subject to the law's mandates under Title III—have found themselves grappling with an unprecedented rise in mental illness among young adults on campuses. One approach to dealing with this crisis has been to compel students who pose a risk of self-harm to take leaves of absence from their studies until their health improves.

In employing such a strategy, Stanford University ran headlong into the ADA. A group of students who were forced to leave campus because of mental health disorders recently sued Stanford, arguing the university excluded them because of their disabilities. The lawsuit ultimately settled, and no court has considered the merits of the challenge. Additionally, no prior literature has discussed the ADA's application in this context.

This Note analyzes whether the direct-threat or fundamental-alteration exceptions to the ADA's integration mandate can justify a university policy compelling leaves of absence for mentally ill students. It answers in the negative, arguing that such a policy violates the ADA except as applied to the most severe cases. It further finds that policy views about the proper role of universities in staving off campus suicide are polarized

between those wanting schools to be more paternalistic and those wanting students to have greater autonomy.

About the Author

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Introduction

In February of her freshman year at Stanford, Lark Trumbly tried to kill herself.[1] She mixed pills and alcohol and passed out on the bathroom floor of her dorm.

Ms. Trumbly woke up the next morning at Stanford Hospital. A social worker from Stanford greeted her and informed Ms. Trumbly that she was a danger to herself. "You're not going back to class," she told Ms. Trumbly. Because Stanford Hospital's psychiatric ward was at capacity, the University brought Ms. Trumbly to a hospital in San Francisco on an involuntary seventy-two-hour hold.[2]

The second day of Ms. Trumbly's detention, a Residence Dean visited her hospital room. The Dean said that Ms. Trumbly could not return to Stanford "for reasons of liability" because "students like [her] tend to not really succeed here."[3] He offered her a voluntary leave of absence agreement, but Ms. Trumbly refused. Later that day, the Dean informed Ms. Trumbly that she would nevertheless be compelled to leave under the Dean's Leave of Absence (DLOA) policy. She contested the leave,

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1. Interview with Lark Trumbly, Graduate of Stanford University, in Palo Alto, Cal. (May 25, 2019).

2. See Cal. Welf. & Inst. Code § 5150 (West 2019).

3. Interview with Lark Trumbly, supra note 1.

and less than twenty-four hours after she was released from the hospital, Ms. Trumbly appeared by herself at a hearing before a panel of three Stanford administrators to present her case as to why she should be allowed to stay. Stanford ordered a compulsory leave.

"Nobody at any point mentioned any sort of accommodations," Ms. Trumbly said. "It was just me arguing that I shouldn't leave and them arguing that I should. That was the binary." The University never broached the possibility of her attending classes while in off-campus housing or taking a reduced course load while receiving psychiatric treatment, she said. Nor did the University ever seek Ms. Trumbly's psychiatric records or an independent evaluation of her.

So, Ms. Trumbly returned home to Sacramento. Bored and isolated, she attempted suicide again, unknown to Stanford. When the leave of absence ended and she returned to campus the next year, Ms. Trumbly simply wanted to be better. But her misfortunes were not over. During her year back, she was sexually assaulted; she began cutting herself to cope. Again, the University proposed that she take a leave of absence. Administrators asked her if she really wanted to contest the leave, going through the DLOA process again only to inevitably reach the same outcome. Ms. Trumbly relented, signing a voluntary leave of absence agreement.

This time, she got better. She became involved in a local after-school science program and was motivated, she said, by proving Stanford wrong about her not belonging at the University. Ms. Trumbly ultimately returned, and she graduated in 2017 with a degree in psychology.

Ms. Trumbly's story parallels other students' accounts of their experiences in a lawsuit brought in May of 2018 against Stanford University over its compulsory leave-of-absence policy for students who pose a suicide risk.[4] The plaintiffs in that suit claimed Stanford's policy violated the Americans with Disabilities Act by failing to make individualized inquiries and by discriminatorily excluding students with mental disabilities.[5] This Note examines whether Stanford's policy could withstand that challenge. I conclude that the policy before revision under the settlement terms likely violated the Americans with Disabilities Act. Although the leave-of-absence policy has been reformed under the terms of a settlement agreement in 2019, this Note's findings implicate the leave-of-absence policies at other universities. Furthermore, in retaining the power to compel a student to take a leave of absence, Stanford's revised policy may still violate the law.

Part I provides background on mental health problems in post-secondary institutions, Stanford's previous compulsory leave-of-absence policy, the lawsuit against the University, and the terms of the settlement agreement. Part II addresses the legal question of whether a university can lawfully compel leaves of absence for students at risk of suicide. Specifically, I examine the viability of the direct-threat and fundamental-alteration defenses to a discrimination claim against universities.

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4. Complaint at 1–19, Mental Health & Wellness Coal. v. Bd. of Trs. of Stanford Univ., No. 5:18-cv-02895, 2018 WL 2267871 (N.D. Cal. filed May 17, 2018).

5. Id. at 21–24.

Part III considers whether forced leaves of absence should be desired as a matter of public policy and, more generally, what role universities should play in addressing an emerging mental health crisis on university campuses.

I. Suicide and Stanford's Leave-of-Absence Policy

A. The College Mental Health Crisis

Today, the American college campus is at the forefront of a mental health crisis. At any given moment in a college classroom, 11.3 percent of college students have seriously considered suicide within the last year, 29.5 percent have experienced overwhelming anxiety within the previous two weeks, and sixteen percent have felt "so depressed that it was difficult to function" at least once in the previous two weeks.[6] Unfortunately, suicidal thoughts translate to suicide attempts—behind accidental injury, suicide is the leading cause of death among young adults.[7]

Stanford is no stranger to these broader trends. In the first three months of 2019, two Stanford students killed themselves while on campus.[8] Stanford students who have survived suicide attempts have written

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6. Am. Coll. Health Ass'n, Fall 2018 Reference Group Report 31–32 (2018).

7. Ctrs. for Disease Control & Prevention, WISQARS Leading Causes of Death Reports, 1981–2018, https://webappa.cdc.gov/sasweb/ncipc/leadcause.html (last visited Mar. 25, 2020) (data from 1999 to 2018 (ICD-10), National and Regional).

8. Courtney Douglas et. al, Male Graduate Student Found Dead in Engineering Building, Stanford Daily (Feb. 11, 2019), https://www.

about their experiences in editorials.[9] Some have discussed their experiences with involuntary 72-hour psychiatric holds under California Welfare & Institutions Code section 5150.[10] Beyond anecdotal evidence, there is little publicly available data about the scope of the mental health crisis at Stanford. According to a former director of Stanford Hospital's high-security Inpatient Psychiatric Ward, between one and three undergraduate, graduate, or postgraduate students are admitted to the psychiatric ward each week following a finding that these students pose an "acute risk of being a danger" to themselves or others.[11] In a 2014 Stanford Daily survey, three of five residential assistants in freshman dorms reported that a resident had expressed suicidal thoughts to them.[12] About twen-

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stanforddaily.com/2019/02/11/male-graduate-student-found-dead-in-engineering-building; Holden Foreman, Grad Student, World-champion Cyclist Kelly Catlin Dies at Age 23, STAN. DAILY (Mar. 10, 2019), https://www.stanforddaily.com/2019/03/10/grad-student-world-champion-cyclist-kelly-catlin-dies-at-age-23.

9. Hope G. Yi, Opinion, A Letter to Stanford: Radical Vulnerability, STAN. DAILY (Jan. 25, 2017), https://www.stanforddaily.com/2017/01/25/a-letter-to-stanford-radical-vulnerability.

10. Gillian Brassil, Where Do Stanford Students Go If They've Attempted Suicide?, STAN. DAILY (Apr. 5, 2019), https://www.stanforddaily.com/2019/04/05/where-do-stanford-students-go-if-theyve-attempted-suicide.

11. Id.

12. Jana Persky, Trouble in Paradise: The State of Mental Health

ty-eight percent of all students surveyed reported having spoken to their dorm staff about mental health, and twenty-nine percent reported using Stanford's on-campus counseling center, Counseling and Psychological Services.[13]

The rise in mental health problems on campus escapes simple explanation. A former Dean of Freshmen and Undergraduate Advising at Stanford believes that we can trace the issue to students failing to develop coping strategies in the face of failure due to childhood coddling.[14] Others point to more frequent diagnoses of mental health disorders, economic anxiety about the high price of college relative to future returns, and changing demographics.[15] Universities across the country are funneling millions of dollars into pinpointing the roots of the crisis and figuring out the best ways to combat it.[16]

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at Stanford, Stan. Daily (Mar. 7, 2014), https://www.stanforddaily.com/2014/03/07/trouble-in-paradise-the-state-of-mental-health-at-stanford.

13. Id.

14. Julie Lythcott-Haims, How to Raise an Adult (2016).

15. Alina Tugend, Colleges Get Proactive in Addressing Depression on Campus, N.Y. Times (June 7, 2017), https://www.nytimes.com/2017/06/07/education/colleges-get-proactive-in-addressing-depression-on-campus.html.

16. Duke, Davidson, Johnson C. Smith University, and Furman University are part of a five-year $3.4 million project that follows the Class of 2018 from freshman through senior year. Id. The UCLA Anxiety and

B. Dean's Leave of Absence Policy

When a potentially suicidal student is hospitalized, Stanford—like other universities in the same position—has the difficult responsibility of determining what to do with a young adult suffering through his darkest days. One strategy—one Stanford has often used[17]—is effectuating a leave of absence.

Until January 4, 2020, the Dean's Leave of Absence (DLOA) Policy laid out the formal procedural framework for mental health-based leaves of absence at Stanford.[18] The DLOA policy is no longer in effect, as it has been replaced by a new policy pursuant to a settlement agreement reached in the fall of 2019.[19] But the previous leave policy that prompted a class action lawsuit still resembles Stanford's new leave policy in many respects, and it could be relevant to mental wellness policies still existing at other post-secondary institutions. Stanford's now-defunct DLOA policy thus bears discussing.

Depression Research Center is similarly monitoring 100,000 people to identify genetic and environmental causes of depression. See id.

17. Complaint, supra note 4, at 5 ("In practice, Stanford applies this policy on a blanket basis to exclude students with mental health disabilities who are hospitalized.").

18. Dean's Leave of Absence, STAN. U., https://web.archive.org/web/20190311032034/https://studentaffairs.stanford.edu/policies/deans-leave-absence (last visited May 29, 2019).

19. See Part I.D., infra.

In accordance with the policy, the Associate Vice Provost and Dean of Students could place a student on DLOA following "an individualized assessment" in which the University determined one or more of the following criteria were met:

- The student "presents a substantial risk of harm to self or others or has engaged in threatening or violent activities;"
- The student "significantly disrupts the educational or other activities of the University community;"
- The student "is unable or unwilling to carry out substantial self-care obligations or to participate meaningfully in educational activities;" and/or
- The student "requires a level of care from the University community that exceeds the resources and staffing that the University can reasonably be expected to provide for a student's well-being."[20]

Under the DLOA policy, students were accorded a few procedural protections. "Where appropriate and feasible," a student would receive notice that he was under consideration for DLOA.[21] A student also had the right to appeal decisions compelling a leave.[22] The individualized assessment, however, could take place ex parte while the student was

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20. Id.

21. Id.

22. Id.

still hospitalized.[23] And, the University was able to choose its own clinician to evaluate a student for the above criteria.[24]

As Ms. Trumbly's two interactions with the policy showed,[25] a DLOA could be either involuntary or voluntary. If a student met one or more of the above criteria, the University would request that they voluntarily take a leave. If the student refused, they gained additional procedural protections. The University could compel a DLOA, but it had to convene a three-person Advisory Committee chosen from the student's Residence Dean, Deans of Graduate Life, a representative from Vaden Health Center or Counseling and Psychological Services, faculty members, academic advisers, a representative from the Office of Accessible Education, a healthcare provider, or other members of the Stanford community.[26] The Advisory Committee would deliberate whether a compulsory DLOA was appropriate for the student. The student had an opportunity to respond to the committee's concerns at a hearing, which generally took place in a conference room in Old Union (Stanford's central hub for student government as well as university administrators overseeing student life).[27]

Ultimately, the decision to order a compulsory DLOA was solely at the discretion of the Dean of Students. Any ordered DLOA contained two

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23. Id.

24. Id.

25. Interview with Lark Trumbly, supra note 1.

26. Dean's Leave of Absence, supra note 18.

27. Id.; Interview with Lark Trumbly, supra note 1.

elements: (1) a timeframe for the leave and (2) conditions the student must satisfy to return to Stanford. The student was prohibited from being on campus before satisfying both elements. Even if the Dean decided not to compel a DLOA, the Dean could impose conditions on continued enrollment.

The DLOA process was described as an "administrative process . . . not a disciplinary process."[28] However, a DLOA imposed real burdens on students who had been hospitalized. A student's grades for the quarter in which a leave took place automatically became "W" for "Withdrew," potentially adversely affecting a student's academic standing.[29] The student's financial obligations for the quarter did not change because of a DLOA—a student had to shoulder fees ranging in the hundreds of dollars for cancelling housing and changing his academic schedule.[30] And, as noted, the student was to essentially cease contact with the University until they got better.

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28. Dean's Leave of Absence, supra note 18.

29. Id. ("When a student is placed on a Dean's Leave of Absence after the beginning of the term, courses in which the student was enrolled after the drop deadline appear on the student's transcript and show the symbol 'W' (withdrew). Students who receive all 'W's as the result of a DLOA may be subject to Academic Standing policies, although the Academic Standing Committee may take the leave into consideration.").

30. Id.; see also Complaint, supra note 4, at 6.

C. Mental Health & Wellness Coalition v. Stanford

The plaintiffs in Mental Health & Wellness Coalition v. Stanford argued that implementation of Stanford's DLOA Policy diverged from its text. On May 17, 2018, Disability Rights Advocates, representing six Stanford students who each underwent a DLOA, filed a complaint against the University that challenged the DLOA Policy as discriminatory against students with mental health disorders. Two months later, three additional students joined the lawsuit,[31] and the plaintiffs moved for class certification.[32] The lawsuit was one of several similar suits against universities across the United States.[33] Disability Rights Advocates said it chose

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31. Amended Complaint, Mental Health & Wellness Coal. v. Bd. of Trs. of Stanford Univ., No. 5:18-cv-02895-NC, 2018 WL 8620996 (N.D. Cal. filed July 16, 2018).

32. Mot. for Class Certification at 3–4, Mental Health & Wellness Coalition v. Bd. of Trs. of Stanford Univ., No. 5:18-cv-02895-NC, 2018 WL 8620906 (N.D. Cal. filed July 16, 2018).

33. Comparable lawsuits were brought against Bates College, Princeton, Yale, Hunter College, Western Michigan University, George Washington University, Marist College, and Quinnipiac University. See Anemona Hartocollis, Feeling Suicidal, Students Turned to Their College. They Were Told to Go Home., N.Y. Times (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/college-suicide-stanford-leaves.html; Jever Mariwala & Alice Park, Alumna Sues Yale for Forced Medical Leave, Yale Daily News (Nov. 16, 2018), https://yaledailynews.com/blog/2018/11/16/alumna-sues-yale-for-forced-medical-leave.

Stanford for the test case because the school's leave-of-absence policy was a "particularly egregious example."[34]

The nine plaintiffs have stories like Ms. Trumbly's.[35] Essentially, each of them was hospitalized after expressing suicidal ideation or otherwise having an acute mental health episode. They believed they could seek treatment for their mental health problems while remaining on campus, but each took a leave of absence because of either allegedly coercive tactics or the compulsory DLOA process. All felt worse off because of it.

Among several other state and federal claims, the plaintiffs argued that the DLOA Policy violated Title III of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Those statutes prohibit places of public accommodation from denying disabled persons equal access to benefits and services. According to the plaintiffs, "Stanford's practice of responding to students in crisis is to immediately bar them from the University community, prohibit them from being present on campus, and evict them from their housing."[36] They claimed the University did not conduct individualized assessments and instead applied DLOA on a "blanket basis." According to the plaintiffs, Stanford also

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34. Stanford University Systematically Violates the Rights of Students With Mental Health Disabilities, Disability Rights Advocates (May 17, 2018), https://dralegal.org/press/stanford-university-systematically-violates-the-rights-of-students-with-mental-health-disabilities.

35. See generally Amended Complaint, supra note 31.

36. Complaint, supra note 4, at 5.

coerced students into accepting purportedly voluntary leaves and discouraged appeals.[37]

D. The Settlement Agreement and Reform

Without admitting fault, Stanford agreed to settle the case in the fall of 2019.[38] As part of the agreement, Stanford replaced the DLOA policy with the Involuntary Leave of Absence and Return Policy.[39] The new policy left intact the University's general ability to compel leaves of absence while bolstering students' procedural protections.[40]

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37. See Amended Complaint, supra note 31, at 16 ("Giammalva also coerced Erik into signing a voluntary leave of absence form. He told Erik that he had not yet been released from the hospital because of his failure to cooperate and sign the form, and that it would be near impossible to return to Stanford without filling out the form."); id. at 19 ("Harrison did not want to take a leave of absence but signed the leave of absence form because Stanford presented it as the only option and he did not know that he had any choice or right to protest."); id. at 25 ("Sofia did not want to take a leave of absence, but signed the leave of absence form because she thought she had no other choice."); Hartocollis, supra note 32.

38. Settlement Agreement, Mental Health & Wellness Coal. v. Bd. of Trs. of Stanford Univ., No. 5:18-cv-02895 (N.D. Cal. filed Sept. 20, 2019).

39. Involuntary Leave of Absence and Return Policy, Stan. U., https://stanford.app.box.com/v/involuntary-leave-of-absence (last visited Feb. 14, 2020).

40. Id.

Most importantly, the assessment Stanford conducts before imposing a leave is now more individualized in at least three ways. First, Stanford now gives deference to the opinion of the student's medical provider on whether the student remaining at school is appropriate.[41] Second, the University now pays "particular attention" to the risk and severity of potential disruption should a student remain on campus, without reference to "mere speculation, stereotypes, or generalizations" about particular mental health disorders.[42] And, third, the Dean of Students is now required to consult with a mental health expert in the Office of Accessible Education and may compel a leave of absence only if that expert determines that a reasonable accommodation is not possible. As part of the settlement, Stanford also promised to ensure that the Office of Accessible Education is properly staffed and to train staffers directly involved in the leave-of-absence process at least once a year.[43]

The settlement agreement also improves the transparency of the compulsory process. The University will now notify any student being considered for a compulsory leave in writing—such notice was previously at the University's discretion. The full implications of a compelled leave of absence (in terms of access to campus, academic status, tuition options and the like) are now publicly available.[44] Otherwise, much

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41. Id. at 3 ("The Dean of Students will give significant weight to the opinion of the student's treatment provider(s) . . . ." (emphasis added)).

42. Id.

43. Settlement Agreement, supra note 38, at 5–6.

44. Involuntary Leave of Absence and Return Policy, supra note 39.

of the old policy's framework remains in the University's new leave-of-absence policy.

Given how recently Stanford adopted the revised policy, it remains to be seen how the new process will work for students. After all, the Mental Health & Wellness Coalition lawsuit detailed numerous ways in which the University deviated from the text of its previous DLOA policy. The district court will maintain jurisdiction for two years to ensure that Stanford complies with the terms of the settlement.[45]

II. Can a University Lawfully Compel Leaves of Absence?

Whether a university can compel a student exhibiting suicidal ideation to take a leave of absence without violating Title III of the ADA appears to be a question of first impression.[46]

For the purposes of this Part, I take the factual allegations in the Mental Health & Wellness Coalition complaint as true, and I apply the law to Stanford's previous DLOA policy (rather than the reformed policy enacted as part of the settlement agreement). I also treat

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45. Settlement Agreement, supra note 38, at 6.

46. Note that what I say about ADA claims throughout this Note could also be said about Section 504 of the Rehabilitation Act, as courts generally construe the two as coextensive in reach. See generally Katie Eyer, Rehabilitation Act Redux, 23 Yale L. & Pol'y Rev. 271 (2005); but see id. at 309–10 (suggesting that courts should treat Section 504 of the Rehabilitation Act as broader than the ADA with respect to federalism and sovereign-immunity limitations).

coercively obtained "voluntary" exercises of DLOA as equivalent to compelled leaves.[47]

A. The Americans with Disabilities Act

After myriad attempts to amend the Civil Rights Act of 1964 to include language protecting individuals with disabilities in the 1980s,[48] the Americans with Disabilities Act (ADA) was signed into law on July 26, 1990.[49] President George H.W. Bush described the ADA as a "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[50] The Act establishes a "national mandate for

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47. See, e.g., Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1195 (1997) (describing how undue influence abrogates assent to a contract); Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 130 (Ct. App. 1966) ("Undue influence . . . is a shorthand legal phrase used to describe persuasion . . . which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. In this sense, undue influence has been called overpersuasion.").

48. See, e.g., H.R. 370, 99th Cong. (1st Sess. 1985).

49. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990).

50. Robert L. Burgdorf, Jr., The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 413–14 (1991).

the elimination of discrimination against individuals with disabilities."[51] It identifies as the "[n]ation's proper goals . . . to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[52]

The ADA comprises five different titles for five different sources of discrimination. Relevant here is Title III, which controls requirements for public accommodations operated by private entities. The Title III anti-discrimination mandate states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations, of any place of public accommodation . . . ."[53]

To state a claim under Title III, students in the position of the plaintiffs in Mental Health & Wellness Coalition must show that they are disabled, (2) that they are academically qualified to attend Stanford; (3) that Stanford is a "place of public accommodation (for ADA purposes)"; and (4) that Stanford discriminated against him based on his disability.[54]

University students living with mental illness fall squarely within the protections of Title III of the ADA.[55] First, mental illnesses leading to sui-

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51. 42 U.S.C. § 12101 (2018).

52. Id.

53. 42 U.S.C. § 12182(a) (2018).

54. See Mershon v. St. Louis Univ., 442 F.3d 1069, 1076–77 (8th Cir. 2006).

55. See, e.g., Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999). See generally 42 U.S.C. §§ 12181–12189 (2018).

cidal ideation are disabilities under the ADA. Section 12102 defines a disability as "a physical or mental impairment that substantially limits one or more major life activities."[56] Episodic psychiatric disorders like depression and anxiety are specifically enumerated as cognizable disabilities in Title III.[57] Second, students attending a university are "qualified individuals" under the ADA by virtue of having been accepted to the school in the first place.[58] Third, activities inherent to attending college are "major life activities." The Department of Justice recognizes "caring for oneself, performing manual tasks . . . learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working" as major life activities.[59] And, fourth, private universities like Stanford are places

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56. 42 U.S.C. § 12102 (2018).

57. See 28 C.F.R. § 36.105(a)(2)(i) (2019) (requiring that the ADA disability definition be "construed broadly in favor of expansive coverage"); 28 C.F.R § 36.105(d)(1)(iv) (specifying that a covered disability includes episodic disorders like some forms of depression); Genna L. Sinel, Note, Working to Destigmatize Mental illness: A Critique of Federal Employment Law, 11 NYU J.L. & LIBERTY 1131, 1158 (2018).

58. Title III, unlike Title I and Title II of the ADA, does not explicitly contain the "qualified individual" language. Courts, however, have read this language into Title III, considering Congress' intent that the ADA use an analogous standard to that of the Rehabilitation Act. See, e.g., Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 154 (1st Cir. 1998); Redding v. Nova Se. Univ., Inc., 165 F. Supp. 3d 1274, 1289–90 (S.D. Fla. 2016).

59. 28 C.F.R. § 36.105(c)(1)(i) (2019).

of public accommodation and consequently fall under the ambit of Title III and the associated Department of Justice regulations.[60]

It is almost as clear that a compulsory leave of absence is an adverse action constituting discrimination under the ADA, absent any defenses by a university. Unjustified exclusion is an archetypal act of discrimination, and the ADA so contemplates: Discrimination includes "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals . . . unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the . . . service, facility, privilege, advantage, or accommodation being offered."[61] At the very least, a forced leave is comparable in severity to a suspension, which is generally considered an adverse action.[62]

B. A University's Potential Defenses

How could a university in Stanford's position respond? From Stanford's answer to the amended complaint, it is not clear what Stanford's main theory of the case was. The school raised twenty-five varied affirmative defenses.[63] Not all of them are equally strong, though certain

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60. 42 U.S.C. § 12181(7)(J) (2012) (including "nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education" within definition of public accommodations).

61. 42 U.S.C. § 12182(b)(2)(A)(iii) (2012).

62. See Alexiadis v. New York Coll. of Health Professions, 891 F. Supp. 2d 418, 430 (E.D.N.Y. 2012).

63. Stanford's Answer to Amended Complaint at 54–58, Mental Health &

defenses might be more successful if raised by schools without Stanford's resources.[64]

I focus on two defenses to the plaintiffs' ADA claims that seem most promising for universities whose leave-of-absence policies are challenged: the direct-threat and fundamental-alteration exceptions to the ADA's anti-discrimination mandate. This Part will examine each defense in turn.

1. The Direct-Threat Exception

A university could argue that the ADA's direct-threat exception excuses their disparate treatment of students experiencing suicidal

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Wellness Coal. v. Bd. of Trs. of Stan. Univ., No. 5:18-cv-02895 (N.D. Cal. filed May 17, 2018).

64. For instance, the defense that an accommodation would create an undue burden on an entity's financial and administrative resources has, in my view, limited sway when raised by Stanford. See id. at 55 (raising as an eighth affirmative defense "Undue Hardship"). Although Stanford subsidizes health insurance for certain financially needy students, Stanford touts a $27.7 billion endowment. See Stanford Releases Annual Financial Results for Investment Return, Endowment, STAN. NEWS (Oct. 2, 2019), https://news.stanford.edu/2019/10/02/stanford-releases-annual-financial-results-investment-return-endowment. The marginal cost of accommodating a sick student rather than compelling a leave likely pales in comparison. In any case, the University has compelled leaves of absence for students with health insurance plans that are not Stanford-subsidized. See Interview with Lark Trumbly, supra note 1.

ideation and other serious mental health issues. Before the settlement agreement, Stanford made exactly that argument—Stanford's answer in Mental Health & Wellness Coalition states as the University's twenty-fifth affirmative defense that "Plaintiff posed a significant risk to the health or safety of members of the Stanford community (including such Plaintiff)."[65]

The ADA permits a public accommodation to provide services inequitably where "an individual poses a direct threat to the health or safety of others."[66] 42 U.S.C. § 12182 defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

The primary difficulty with the direct-threat defense is that the statutory text plainly refers only to situations where an individual is a threat to others, not to the individual himself. A "significant risk to the health or safety of others" is simply not susceptible to interpretation as a "significant risk to the health or safety of oneself." In fact, "others" and "oneself" seem to nearly be antonyms in this context. There is thus a sound argument that the direct-threat exception's language unambiguously precludes its interpretation as "threat to others."

Supplementary regulations offer no assistance to the "threat-to-others" interpretation. 28 C.F.R. § 36.208(a) refers to the defense's permissibility only when involving a "direct threat to the health or safety of others." Subsection (b) uses the same language:

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65. Stanford's Answer to Amended Complaint, supra note 63, at 58.

66. 42 U.S.C. § 12182(b)(3) (2012).

> In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[67]

To compound the textual problem with the direct threat defense here, the legislative history of the ADA does not provide support for the lawful exclusion of individuals who pose a threat only to themselves. Senator Ted Kennedy said as much during Congressional debates on the Act:

> It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply "protecting the individual" from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.[68]

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67. 28 C.F.R. § 36.208(b) (2019) (emphasis added).

68. 136 Cong. Rec. S9684–03, S9697 (daily ed. July 13, 1990)

Senator Kennedy's comments are corroborated by the Congressional findings stated at the beginning of the ADA: that "individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies . . . ."[69] Permitting places of public accommodation to overrule the decisions of a person with a disability about their own safety would seem inconsistent with the ADA's own definition of discrimination.

It is worth noting that the ADA's direct-threat exception was intended to parallel the direct-threat exception under the Rehabilitation Act.[70] The Rehabilitation Act adopted the rule propounded in School Board of Nassau County v. Arline,[71] a case involving an elementary school teacher with a history of tuberculosis who was fired after several relapses. The teacher brought claims under Section 504 of the Rehabilitation Act,

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(statement of Sen. Kennedy) (emphasis added); see also 136 Cong. Rec. H4614–02, H4623 (daily ed. July 12, 1990) (statement of Sen. Kennedy). But see Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 n.5 (2002) (describing the legislative history as inconclusive and "decry[ing] paternalism in general terms" rather than precluding a threat-to-self exception).

69. 42 U.S.C. § 12101(a)(5) (2018).

70. See Adam B. Kaplan, Father Doesn't Always Know Best: Rejecting Paternalistic Expansion of the "Direct Threat" Defense to Claims Under the Americans with Disabilities Act, 106 Dick. L. Rev. 389, 411 (2001); H.R. Rep. No. 101–485, at 34, 45 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 445, 457, 468.

71. School Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987).

alleging unlawful discrimination based on her tuberculosis. The Supreme Court first recognized tuberculosis as a disability under the Act and then proceeded to explain the direct-threat exception in the context of contagious diseases. Notably, the Court analyzed the teacher's threat only with respect to the safety of others.[72]

Despite these barriers to its preferred interpretation, a university can nevertheless find limited support in caselaw for the proposition that the direct-threat exception contemplates threats to self. Although no court has addressed the question in the context of Title III, the Supreme Court discussed this issue in the context of Title I and the associated Equal Employment Opportunity Commission (EEOC) regulations.

In the 1990s, Mario Echazabal applied for and was twice rejected from a job at a Chevron oil refinery.[73] Though otherwise qualified, Echazabal suffered from liver damage caused by Hepatitis C, and Chevron's doctors believed continued exposure to toxins while working at the refinery would aggravate Echazabal's condition.[74] Citing his liver prob-

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72. See id. at 287 n.16 ("A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." (emphasis added)).

73. Echazabal, 536 U.S. at 76.

74. The district court found no issue of material fact with respect to whether working on Chevron's rig would further damage Mario Echazabal's liver. Id. at 77 ("Although two medical witnesses disputed Chevron's judgment that Echazabal's liver function was impaired and subject to

lem, Chevron refused to hire Echazabal.[75] Echazabal filed suit against Chevron, alleging among other claims discrimination under Title I of the ADA. Chevron's chief defense relied on an EEOC regulation that authorized a qualification standard to "include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace."[76] In reply, Echazabal argued that the regulation exceeded the scope of permissible rulemaking under the ADA. The relevant ADA provision was 42 U.S.C. § 12113(b), which states that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." According to Echazabal, in specifying a threat-to-others defense, Congress "intended a negative implication about those whose safety could be considered."[77]

In Chevron U.S.A. Inc. v. Echazabal, the Court unanimously rejected Echazabal's argument, holding that the ADA permitted a reading of the direct-threat exception to include threats to self. The Court first found that the canon of expressio unius est exclusio alterius—"expressing one item of [an] associated group or series excludes another left unmentioned"[78]—did not require reading 42 U.S.C. § 12113(b) to exclude threats

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further damage under the job conditions in the refinery, the District Court granted summary judgment for Chevron.").

75. Id.

76. 29 C.F.R. § 1630.15 (2011) (emphasis added).

77. Echazabal, 536 U.S. at 83.

78. United States v. Vonn, 535 U.S. 55, 65, 122 (2002).

to self. To the Court, the "spacious" language of "may include" suggested room for agency interpretation; the lack of a real "series" in the statutory language left the expressio unius est exclusio alterius canon inapt; and finding a negative implication in the statute would lead to absurd results.[79] The Court went on to apply Chevron deference to the EEOC's interpretation of direct threat as including a threat to self.[80] The EEOC interpretation was reasonable because, otherwise, employers would be forced to hire self-endangering workers and assume a substantial risk of violating the Occupational Safety and Health Act.[81] The Court rejected Echazabal's argument that the EEOC interpretation was unreasonable because it contravened what Echazabal viewed as the ADA's anti-paternalistic spirit.[82] It also declined to infer that, because Congress

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79. Echazabal, 536 U.S. at 83–84 ("When Congress specified threats to others in the workplace, for example, could it possibly have meant that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the workplace? If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?").

80. Id. at 84.

81. Id. at 85.

82. See, e.g., 42 U.S.C. § 12101(a)(5) (2012) (stating as a finding of Congress that "individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies"); D. Aaron Lacy, Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self, 44 Santa Clara L. Rev. 55, 90 (2003) ("[T]he central purpose of

was aware of earlier EEOC regulations reading the Rehabilitation Act to include threats to self, Congress rejected a threat-to-self defense by not expressly adopting it in the ADA.[83]

There is at least one obvious problem with analogizing to Echazabal in the context of forcing mentally ill students to take leaves of absence: The Department of Justice regulation interpreting the direct threat defense in Title III does not include the key language "direct threat to the health or safety of the individual or others" found in the EEOC regulation interpreting Title I.[84] In short, there is no agency interpretation of Title III's direct threat defense favorable to a defendant university for a court to defer to in the first place. Stanford would have had to argue that the language in 42 U.S.C. § 12182(b)(3) contemplates threats to self on its own terms. Most likely, a court would not credit such an interpretation without Chevron deference, and quite "reflexive deference" at that.[85]

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the ADA was to bring people with disabilities out of a subordinate state and onto the same level as all other individuals. This includes allowing people with disabilities to take risks that are more severe because of the person's disability. . . . The EEOC's rule seems to view people with disabilities as incapable of making decisions as to what is best for them.").

83. Echazabal, 536 U.S. at 83.

84. 29 C.F.R. § 1630.15 (2011) (emphasis added).

85. . Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing the "reflexive" deference courts sometimes apply when dealing with the Chevron doctrine).

The statute's text encompasses only threats to "others,"[86] making "threat to others" the best reading of the statute. Furthermore, some textual features of Title I's direct-threat exception that contributed to Echazabal's "threat to self" reading are absent from Title III, despite otherwise identical language between the titles.[87] For many courts today, this would be the end of the inquiry.[88] Interpreting the text to include threats to self would thus require some muscular statutory interpretation.

Even so, Stanford could have attempted to rely on Echazabal and the EEOC regulation through a somewhat strained argument rooted in administrative law. The ADA is an unusual statute in that Congress

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86. Again, 42 U.S.C. § 12182(b)(3) (2012) refers only to threats to others: Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

87. . Compare 42 U.S.C. § 12113(b) (2012) (Title I direct-threat exception prefaced by "may include"), with 42 U.S.C. § 12182 (2012) (Title III definition lacking similarly open language).

88. See generally William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant.").

delegated enforcement responsibility to multiple agencies. Employment regulation is the domain of the EEOC.[89] Provisions governing public services in Title II and Title III are administered by the Department of Justice.[90] The Department of Transportation has responsibility over all provisions concerning public transit.[91] The statutory language of the direct-threat defense, however, is essentially the same throughout the law. Thus, multiple agencies are interpreting what arguably amounts to identical language.

It is unsettled how Chevron deference applies to multi-agency statutes, though there have been four proposed methods. Under the first and most popular method, courts choose one agency from among the possible interpreters and defer entirely to that agency.[92] There is no agreed upon method of deciding which should be the interpreting agency, but one involves determining which agency is most suited to make the interpretation, with reference to the traditional rationales for Chevron deference.[93] The EEOC is arguably a good candidate to be this singu-

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89. 42 U.S.C. § 12116(a) (2012).

90. 42 U.S.C. §§ 12134(a) (2012), 12186(b) (2012).

91. 42 U.S.C. §§ 12134(a) (2012), 12186(a) (2012).

92. Daniel A. Farber & Anne Joseph O'Connell, Agencies as Adversaries, 105 CAL. L. REV. 1375, 1450–51 (2017).

93. See id. at 1451. Cf. Gonzales v. Oregon, 546 U.S. 243, 265, 267 (2006) (finding the Secretary of Health & Human Services the individual with interpretive authority of the Controlled Substances Act, rather than the Attorney General, because the former was better suited to

lar interpreting agency in the context of the direct-threat defense. The EEOC "has significant expertise and authority to interpret and promulgate regulations under the ADA."[94] Considering the volume of Title I cases compared to cases arising under Titles II and III of the ADA,[95] the EEOC's regulations are in some ways the most impactful, economically and socially. If a court were to accept this argument, Stanford could have relied on the EEOC threat-to-self regulation, in effect repealing the contrary Department of Justice threat-to-others regulation.

But it would be difficult to convince a court that the Department of Justice has less expertise than the EEOC. No one can credibly claim that the Department of Justice, whose Civil Rights Division administers a

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make medical judgments); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991) (finding the Secretary of Labor had interpretive authority over the Occupational Safety and Health Act rather than the Occupational Safety and Health Review Commission because the Secretary was the "administrative actor in the best position to develop [various] attributes.").

94. Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470 (5th Cir. 1998), cert. granted, judgment vacated, 527 U.S. 1032 (1999), and abrogated by Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

95. See, e.g., Michael Waterstone, The Untold Story of the Rest of the Americans With Disabilities Act, 58 VAND. L. REV. 1807, 1809 (2005) ("[Title I] . . . is the most written about and litigated of the ADA's three major Titles.").

broad swath of federal anti-discrimination statutes, is less suited to interpreting a civil rights statute.

The other proposed methods of dealing with multi-agency statutes are not helpful to universities like Stanford. The second method affords no deference to multi-agency statutes and calls for de novo review.[96] As discussed above, the threat-to-self interpretation is not exactly a natural reading of the statute, so this method cannot assist universities. Under a third method, a court will defer only if the multiple agencies agree on one interpretation, which of course is not the case for the direct-threat defense.[97] The fourth method defers to each agency's interpretations, even if contrary.[98] If applied, the fourth method would also result in a court relying on the unfavorable Department of Justice regulation, which establishes a threat-to-others interpretation.

2. The Fundamental-Alteration Exception

Stanford's twenty-fourth affirmative defense was that accommodating the mentally ill students who were forced to take a leave would have required a "fundamental alteration" to the University.[99]

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96. Farber & O'Connell, supra note 90, at 1452. See also New Life Evangelistic Ctr., Inc. v. Sebelius, 753 F. Supp. 2d 103, 122–23 (D.D.C. 2010); Chao v. Cmty. Tr. Co., 474 F.3d 75, 85 (3d Cir. 2007).

97. Catherine M. Sharkey, Agency Coordination in Consumer Protection, 2013 U. Chi. Legal F. 329, 330 (2013).

98. Bd. of Trade of Chicago v. SEC, 187 F.3d 713, 719 (7th Cir. 1999) (dicta).

99. Stanford's Answer to Amended Complaint, supra note 63, at 58.

The ADA, of course, has limits. Under Title III of the ADA, there are upper bounds on the modifications that public accommodations are required to make for individuals with disabilities. Discrimination includes:

> A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.][100]

Thus, a university in Stanford's position could plausibly argue that permitting a suicidal student to remain on campus is not a reasonable accommodation because such a policy would constitute a fundamental alteration to the University's services.

The Supreme Court provided basic guidance on the meaning of "fundamental alteration" in PGA Tour, Inc. v. Martin,[101] where a professional golfer with a malformed leg challenged as discriminatory a PGA Tour rule that prohibited the use of golf carts between one green and the next tee in certain tournaments. PGA Tour had refused to waive this "walking rule" for the plaintiff, as it believed such an exception would be a fundamental alteration to the game of golf; according to PGA Tour, the walking rule "inject[s] the element of fatigue into the skill of shot-making," and

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100. 42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

101. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

waiver for any competitor would give him an unfair advantage.[102] The Court held that refusing to grant Martin a waiver of the walking rule would not have effected a fundamental alteration to PGA Tour's services.[103] For the Court, the game's fundamental character was "shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible[.]"[104] Thus, the walking rule could not be described as an "indispensable feature" of tournament golf.[105] Furthermore, waiving the walking rule would not be outcome-affecting because Martin's particular disability fatigued him more than walking fatigued able-bodied competitors.[106] In failing to offer Martin a reasonable accommodation, PGA Tour violated the ADA.

Lower courts have expanded on PGA Tour in the school context. One pattern that has emerged is that courts will not order accommodations that essentially require schools to "move the goalposts," so to speak. For instance, courts have found that favorable accommodations in scoring rules, qualification standards, and medal standards for wheelchair racers in scholastic track would be fundamental alterations.[107]

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102. Id. at 687.

103. Id. at 690–91.

104. Id. at 683.

105. Id. at 685.

106. . Id. at 687.

107. See A.H. by Holzmueller v. Illinois High Sch. Ass'n, 263 F. Supp. 3d 705, 723 (N.D. Ill. 2017), aff'd, 881 F.3d 587 (7th Cir. 2018) (lowering a track race's qualification and medal standards for students with physical

Similarly, the ADA does not require a school to honor a plaintiff's request that class deadlines and graduation standards be relaxed on a wholesale basis to accommodate disabilities that may affect learning.[108]

Other fundamental-alteration cases focus more on a potential accommodation's disruptive effects on fellow students. Bercovitch v. Baldwin School, Inc. provides an instructive example.[109] There, the plaintiff student was indefinitely suspended for a long history of "extreme and incorrigible" behavioral problems.[110] Doctors later diagnosed the student with attention-deficit/hyperactivity disorder, oppositional defiant disorder,

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disabilities would be a fundamental alteration); K. L. v. Missouri State High Sch. Activities Ass'n, 178 F. Supp. 3d 792, 806 (E.D. Mo. 2016) (finding that requested accommodations that included a change to the track scoring system would effect a "material and fundamental alteration"); McFadden v. Grasmick, 485 F. Supp. 2d 642, 647 (D. Md. 2007) (holding that accommodation request to have wheelchair racer's points count toward able-bodied students' team score was fundamental alteration).

108. See Axelrod v. Phillips Acad., Andover, 46 F. Supp. 2d 72, 86 (D. Mass. 1999) ("There is no reasonable accommodation that Phillips Academy can make to accommodate a student's failure to perform the work or to turn it in on time."); Doe v. Haverford Sch., No. CIV.A. 03-3989, 2003 WL 22097782, at *9 (E.D. Pa. Aug. 5, 2003) (requiring school to essentially excuse unfinished work and lack of attendance, allegedly due to plaintiff's sleep apnea, would be fundamental alteration).

109. 133 F.3d 141 (1st Cir. 1998).

110. Id. at 144.

and childhood depression.[111] The court held that dramatically loosening the school's disciplinary policy for the student would be a fundamental alteration that the ADA did not require—permitting the student to return without disciplinary consequences would simply be too disruptive in the classroom.[112]

These lines of cases derive from Title II, which controls state and local governments, but the underlying reasoning is transferable to Title III: An accommodation is a fundamental alteration when it would actually confer an unfair advantage on a student with a disability (as in the "moving-the-goalposts" cases) or reduce other students' ability to succeed (as in Bercovitch).

Returning to Stanford, the question is whether allowing a mentally ill student to remain on campus while in recovery "fundamentally alter[s] the nature of" the goods, services, facilities, privileges, advantages, or accommodations Stanford provides.[113] Universities like Stanford primarily provide education and lodging services to students. According to Stanford's mission statement, the University's goals are threefold: research, education, and service.[114] Specifically, under the education prong,

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111. Id.

112. Id. at 152.

113. 42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

114. Stanford's Long Range Vision, https://ourvision.stanford.edu (last visited Apr. 11, 2020).

Stanford hopes to "[p]repare students to think broadly, deeply and critically, and to contribute to the world."[115]

It is difficult to see how providing accommodations for a mentally ill student on campus fundamentally detracts from this mission. In fact, if a student in good academic standing and his psychiatrist agree that remaining on campus would be the best option for the student's mental health, accommodating the student' seems entirely consistent with Stanford's educational mission. If we take the facts of the Mental Health & Wellness Coalition complaint as true, this is not a case of moving the goalposts, as the plaintiffs here are not requesting modifications to their academic duties. In fact, students may be forced to leave campus despite their good academic standing.[116] Nor is this a case of disrupting other students like Bercovitch was, if we believe the plaintiffs when they say that the level of community support they needed was unexceptional. Rather, there are substantial parallels between the Stanford case and PGA Tour. Permitting students to continue studying while obtaining medical treatment (and perhaps receiving marginally greater administrative support) is akin to the PGA Tour remedy of permitting disabled golfers to play while skipping some of the walking.

To establish a fundamental-alteration defense, Stanford could try to show that accommodating the mentally ill students would fundamentally

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115. About Stanford Town Center, https://ourvision.stanford.edu/microsites/stanford-town-center/about-stanford-town-center (last visited Apr. 11, 2020).

116. . See, e.g., Interview with Lark Trumbly, supra note 1.

change the school from an institution of learning into a psychiatric institution. Anecdotally, Stanford has previously implied this argument when interacting with students in the midst of the DLOA process. In one instance, a student ("Jacob") subjected to a compulsory leave received a letter from the Dean of Students stating that Jacob's "situation required a level of support from University staff and students that was unsustainable and for which they did not have the professional expertise to manage."[117]

But Stanford would overstate this argument. A college can offer mental health resources without transforming it into a psychiatric ward. Stanford already operates a counseling center on campus for students—recently expanding its staff—and invests significantly in other mental health resources.[118] Before assuming their roles, residential assistants in each dorm undergo extensive training in assisting those with mental illnesses, including role-playing scenarios with struggling students and

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117. Amended Complaint, supra note 31, at 10.

118. Holden Foreman, As Number of Mental Health Resources Increases, Students Point to Complexities of Issue, Stan. Daily (Apr. 18, 2019), https://www.stanforddaily.com/2019/04/18/as-number-of-mental-health-resources-increases-students-point-to-complexities-of-issue. See also Julia Ingram, A Closer Look at Stanford's Leave of Absence Policies, Stan. Daily (Aug. 28, 2018), https://www.stanforddaily.com/2018/08/28/a-closer-look-at-stanfords-leave-of-absence-policies (noting statement by Vice Provost for Student Affairs Susie Brubaker-Cole that Stanford is "continually learning how to provide mental health resources that best meet the wide range of student needs").

learning Question, Persuade, Refer (QPR) suicide prevention techniques.[119] It is not as if the University must erect a new mental health infrastructure from the ground up for each student eligible for a compulsory DLOA. No one is asking the University to hire a caretaker for each mentally ill student. Rather, excluded students wish only that they had been offered the option to attend classes on campus while receiving psychiatric treatment.

Furthermore, the intensity of treatment required by students compelled to take leaves of absence is not necessarily extraordinary. For instance, a typical treatment might be standard out-patient psychiatric treatment, already available on and around campus.[120] The DLOA policy itself did not specify what types of mental-health accommodations would be too much, but excluded students are not required to enter in-patient psychiatric treatment during their leaves of absence—instead, they face a general mandate from the University to "get better."[121] Unless a particular student is in such dire straits that he requires continuous professional supervision, it is hard to argue that providing marginally more mental

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119. Persky, supra note 12.

120. .See Clinical Services, STAN. U. https://vaden.stanford.edu/caps/clinical-services (last visited June 3, 2020) (describing clinical services available on campus as well as the process for referring students to off-campus providers).

121. Interview with Lark Trumbly, supra note 1; Hartocollis, supra note 30.

health resources to an individual effects a fundamental alteration of a university's educational service.[122]

In sum, refusing to accommodate a mentally ill student might be justified under the fundamental alteration theory in an extreme case, but Mental Health & Wellness Coalition does not present that case. In the same way that walking was not an "indispensable feature" of golf,[123] being free from any psychological ailments is not an indispensable feature of succeeding at a university. And like waiver of the walking rule in PGA Tour did not fundamentally alter the game of golf, provision of marginally more mental health resources or staff supervision to the mentally ill students probably would not fundamentally alter a university's educational mission.

C. Requirement of an Individualized Inquiry

Even if a university can lawfully remove a mentally ill student from campus, under either a direct-threat or fundamental-alteration theory, the validity of Stanford's DLOA policy also depends on a more straightforward issue: individualized evaluation of a student's circumstances.

The ADA requires an individualized inquiry before a public accommodation can exclude a student with a disability under one of the above justifications.[124] Here, this requirement means a university

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122. But see Part III.B, infra on community impacts.

123. PGA Tour, Inc. v. Martin, 532 U.S. 661, 685 (2001).

124. See, e.g., id. at 688; 28 C.F.R. § 36.208(b) (2019) ("[A] public accommodation must make an individualized assessment[.]"). Cf. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) ("[W]hether a person has a

cannot exclude students who have had suicidal thoughts as a blanket rule. Rather, the school must "determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."[125]

The settlement agreement in Mental Health & Wellness Coalition added enough procedural protections to Stanford's individualized student assessments to satisfy the plaintiffs.[126] Certain provisions of the new leave-of-absence policy like disavowing generalizations about mental health disorders seem to have been added specifically to remedy the old policy's lack of an individualized inquiry.

Stanford's previous DLOA policy still warrants analysis, however, as other universities may face claims of inadequately individualized inquiry.[127] Taking its factual allegations as true, the Mental Health & Wellness Coalition complaint casts doubt on whether Stanford truly conducted a searching individualized inquiry into the propriety of a compelled DLOA in each circumstance. First, the University's cited reasons for a DLOA

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disability under the ADA is an individualized inquiry").

125. PGA Tour, 532 U.S. at 688.

126. Elena Kadvany, In 'Historic' Settlement, Stanford Agrees to Revise Leave of Absence Policies for Students in Mental Health Crisis, Mountain View Voice (Oct. 8, 2019), https://www.mv-voice.com/news/2019/10/08/in-historic-settlement-stanford-agrees-to-revise-leave-of-absence-policies-for-students-in-mental-health-crisis.]

127. See Hartocollis, supra note 30.

often sounded vague and formulaic. Phrases like "burden on your friends" and "distraction" are the norm; yet, when excluded students tried to verify these community impacts, they found that the allegations of being a burden were exaggerated or fabricated.[128] Second, although the DLOA Policy contemplated the involvement of a clinician in determining whether a leave is appropriate,[129] Stanford did not always consult a psychiatrist in the DLOA process.[130] The result was that a leave of absence could be ordered without the University ever hearing a clinical professional's perspective. Third, Stanford did not always discuss reasonable accommodations for students' mental health problems ex ante; rather, Residence Deans tended to jump to discussing the DLOA option right

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128. See Part III.B, infra. See also Amended Complaint, supra note 31, at 9 ("Jacob reached out to Residence Dean Thiedeman by email to schedule a phone call to clarify the reasons for his housing hold. Over the phone, Thiedeman responded vaguely; admitting she had not spoken with Jacob's friends but claiming that unidentified other people had, and had determined there was an impact on his friends.").

129. Dean's Leave of Absence, supra note 18 ("Students are expected, if necessary, to sign a release of information to facilitate discussions between the University and the clinician conducting an evaluation.").

130. See Interview with Lark Trumbly, supra note 1 (describing how Ms. Trumbly's psychiatrist was never consulted in the DLOA process about her mental wellness or what the best course of action would be from a mental health standpoint).

away.[131] Fourth, Stanford's practice of strong-arming students into signing voluntary leave agreements deprived the University of a full picture of each student's unique situation. "Voluntary" leaves allowed the University to bypass the Advisory Committee procedure that was triggered when a student contested a DLOA.[132] This robbed the individual student of the opportunity to present their interests in the setting of a DLOA hearing; it also permitted the University to forego speaking to the faculty, advisors, healthcare providers, and other members of the community who would have provided more information about a given student and whether a leave would be appropriate.

Whatever the merits of the direct-threat or fundamental-alteration defenses, failing to make true individualized inquiries into each ill student's situation—and considering reasonable modifications—is a clear violation of the ADA's mandate under PGA Tour. As a first step, universities seeking to comply with the ADA's individualized inquiry requirement would be wise to follow Stanford's lead in its new leave-of-absence policy by deferring to students' medical providers and expressly rejecting reliance on "speculation, stereotypes, or generalizations" about particular mental health disorders.[133]

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131. See Amended Complaint, supra note 31, at 9, 14 17, 20, 28, 36 (describing lack of mention of reasonable accommodations before discussions of leaves of absence); Interview with Lark Trumbly, supra note 1.

132. Dean's Leave of Absence, supra note 18.

133. Involuntary Leave of Absence and Return Policy, supra note 39.

III. The Policy Question: How Should Universities Address Campus Suicide?

Independent of whether a university can exclude a suicidal student is the question of whether a university should exclude said student as a policy matter.

Answering this question requires the threshold determination of a metric. Stanford's on-campus counseling center, Counseling and Psychological Services, refused to comment for this Note. But based on comments to the New York Times, Stanford's concern in its DLOA policy appears to be two-pronged: Stanford told the Times that "in extraordinary circumstances, it may be in the best interest of the student and the community that he or she leave campus for a time."[134] I take these interests as a framework for discussing whether leave-of-absence policies are effective at addressing the university mental health crisis.

A. Is the Interest of Students Served?

The relationship between a compulsory leave of absence and an individual's wellbeing is complex. The Mental Health & Wellness Coalition complaint lists solely students who were worse off because of their leaves. One student was forced to leave even after she informed the Dean of Students her family was abusive.[135] Another was allegedly forced to return to a racist community the student described as "suffocating."[136] Even where a student's home community is not harmful, Dr.

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134. Hartocollis, supra note 30 (emphasis added).

135. Amended Complaint, supra note 31, at 25.

136. Hartocollis, supra note 30 ("Being home in Beaumont, Tex., has

Ahmed Khan, a psychiatrist and clinical professor who treats many Stanford students, says a patient's "micro-community" can be critical to the success of a patient's treatment—being in a supportive environment and keeping busy academically can both positively impact mental health for certain individuals.[137] Foregoing a positive environment by taking a leave could therefore leave worse off a student forced into a DLOA. Ms. Trumbly's first compelled leave, during which she again attempted suicide, is evidence for that point.

But it is also clear that a leave of absence can be helpful to certain struggling students. The key is individual circumstances. A Bates College student who took a voluntary leave of absence after initially resisting the college's efforts found that two years away from school, care from her family, and medication ultimately helped her overcome the depression that had led to a suicide attempt.[138] Ms. Trumbly, the former Stanford student, did not want to take her second leave and thinks she may have gotten better without it, but she acknowledged that her wellbeing

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been 'suffocating,' he said. He misses Palo Alto. In Beaumont, 'people look at me crazy and call me racial slurs if I'm going on runs,' he said.").

137. Telephone Interview with Ahmed Khan, Clinical Assistant Professor of Psychiatry and Behavioral Sciences, Stanford University (May 31, 2019).

138. Hartocollis, supra note 30 ("'It was terrifying and really, really difficult, but I really needed it,' she said of her leave. 'I think I'm leading a much happier life.'").

improved during that consecutive leave.[139] And, according to Dr. Khan, where a mental health problem has roots in a trauma that occurred on campus, distance can be helpful.[140]

Perhaps recognizing the possibility that effecting a leave of absence against a student's wishes could sometimes be beneficial, the plaintiffs in Mental Health & Wellness Coalition did not request injunctive relief that would overturn Stanford's entire compulsory leave process. Rather, they requested only that Stanford modify its policies to comply with the ADA.[141] Likewise, Ms. Trumbly recognizes that, in limited and extreme circumstances, a university should have the power to compel a leave of absence.[142]

A university's interest in having such a tool to protect a student is not difficult to understand. A college may be reluctant to take at face value a mentally ill student's word that he would be better off staying on campus. After all, the hallmark symptom of mental illnesses like major depressive disorder is irrational thinking.[143] However, if a student's desire to remain on campus after a psychiatric episode is shared by his psychiatrist, there seems to be less of a reason for the University to second guess the stu-

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139. Interview with Lark Trumbly, supra note 1.

140. Telephone Interview with Ahmed Khan, supra note 135.

141. Amended Complaint, supra note 31, at 49.

142. Interview with Lark Trumbly, supra note 1.

143. See, e.g., to 29 C.F.R. § 1630.2(j)(3) app. (2020)("Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others.").

dent's and psychiatrist's preferences—at least when the policy priority is the student's wellbeing. According to the Mental Health & Wellness Coalition complaint, Stanford nevertheless discounted and overruled psychiatrists' opinions. In an appeal to a forced leave under the DLOA policy, one student's psychiatrist submitted a corresponding letter of support outlining treatment progress, which stated, "It is my opinion that [the student] would benefit from returning to Stanford for spring quarter in 2018 with a reduced course load."[144] Stanford was not persuaded and imposed an involuntary leave anyway.[145]

Dr. Khan says that there may be circumstances where it may still be in the best interest of the student to compel a leave despite the student's and his psychiatrist's desire that he stay. Psychiatrists know only what their patients tell them, and they tend to accept patients' perceptions as true.[146] On the other hand, Stanford may have access to different information not available to the psychiatrist. If the University's information is more reliable, for whatever reason, a compelled leave may be in the best interest of the student.

Conversely, the psychiatrist's information might be more reliable than the University's. Ultimately, Dr. Khan says the only way to determine what is best for an individual student is a case-by-case analysis that accounts for each student's "subtleties."[147] Here, the policy analysis

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144. Amended Complaint, supra note 31, at 10.

145. Id.

146. Telephone Interview with Ahmed Khan, supra note 135.

147. Id.

mirrors the legal one: A searching individualized inquiry and an individually-tailored decision regarding reasonable accommodations rather than a blanket rule will best serve students' interests. Stanford surely recognized this when it revised its leave policy post-settlement to defer to a student's medical provider with "significant weight."[148]

B. Is the Interest of the Community Served?

For students opposing a DLOA who have the support of their psychiatrists, Stanford may be prioritizing the second policy prong: the interest of the community. This prong bleeds into the fundamental-alteration analysis in Part II.B.2, because if enough community members were asked to assume the burden of caring for a suicidal student, a university could state facts to establish the fundamental-alteration defense. Not surprisingly, under its previous leave-of-absence policy, Stanford frequently cites the excluded student being a "burden on the community" as a significant reason for compelling a DLOA.[149]

There are many ways that a student suffering from mental illness could burden a community. One sense of being a burden could entail unreasonably taxing Stanford's resources to accommodate on-campus study. But Stanford, like nearly all universities, offers on-campus mental health services. Thus, by "burden on the community" Stanford must refer

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148. Involuntary Leave of Absence and Return Policy, supra note 39.

149. See, e.g., Amended Complaint, supra note 31, at 25; id. at 8 ("Giammalva said that Jacob had been a disruption to the community and it was unfair for him to impose a burden on other students and staff."); Interview with Lark Trumbly, supra note 1.

to a burden beyond the counseling center—one extending to resident assistants, friends of the suffering student, and the university administration.[150] In both of her leaves of absence, Ms. Trumbly heard this very justification from her Residence Dean. The first time, the "burden" was said to be caused by her alcohol intake, and the second time, it was caused by her visible self-harm.[151] "She said [my self-harm] was distracting to my fellow classmates," Ms. Trumbly said. "I'm like, 'I'm sure it was, but it's also distracting to me.' I've actually never had a problem with anybody in my dorm."[152]

There are surely circumstances in which a university's concern for the burden on the community is legitimate. A student who is truly unable to take care of his basic needs cannot be foisted on dorm staffers who, despite training,[153] are not mental health professionals. For instance, a student whose condition worsens, and who is entirely dependent on others to stave off suicide, should presumably be removed from campus for the sake of the community, if not for their own sake.

According to students who have undergone compulsory leaves of absence, the burden on the community, if any, was rarely this extreme; yet, the University sometimes imposed a DLOA regardless. For example, a Residence Dean informed one plaintiff that he was under consideration for DLOA because his mental illness had caused "an impact on his

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150. See Amended Complaint, supra note 31, at 8.

151. Interview with Lark Trumbly, supra note 1.

152. Id.

153. Persky, supra note 12.

friends."[154] But when the plaintiff spoke with his friends later, they said they had not been in contact with anyone from the University.[155] Similarly, a Residence Dean "accused [plaintiff] Rose of distressing other students."[156] Anxious about being an encumbrance, Rose avoided her friends for a while but eventually ascertained that they also had not complained of her behavior to the University.[157] Nevertheless, Rose was compelled to leave after the Dean of Students found her "increasingly dependent" on other students to manage her mental health.[158]

Beyond the caretaking burden, the community's interest involves another, darker concern: the aftermath of any eventual suicide that is not prevented by on-campus treatment. Two students who killed themselves on Stanford's campus in 2019 were discovered by fellow students. A fifth-year materials science and engineering Ph.D. was found dead in his lab.[159] One month later, a first-year at Stanford Law School discovered her roommate's body in their shared apartment in the Munger Graduate

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154. Amended Complaint, supra note 31, at 9.

155. Id. at 10.

156. Id. at 23.

157. Id.

158. Id.

159. Erin Woo, 'A Toxic Culture of Overwork': Inside the Graduate Student Mental Health Crisis, Stan. Daily (Mar. 13, 2019), https://www.stanforddaily.com/2019/03/13/a-toxic-culture-of-overwork-inside-the-graduate-student-mental-health-crisis.

Residences.[160] Furthermore, after a student at Hamilton College killed himself in 2016, his roommate discovered his body dangling from a belt, several inches off the ground.[161] "Every day of my life I think about it," he told the New York Times. "I do feel guilt at not being there at 1:30 a.m., maybe keeping him alive for another day."[162]

Indeed, studies show that at least six people are "intimately traumatized" by any given suicide.[163] Considering the saturated nature of college housing, the number of students, faculty, and staff affected by one student's suicide is likely to be even higher. Termed "survivors of suicide loss," these individuals are prone to self-blame, depression, and post-traumatic stress disorder.[164] Thus, even if the ADA's direct-threat

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160. Kent Babb, Driven to the End, Wash. Post (July 29, 2019), https://www.washingtonpost.com/sports/2019/07/29/kelly-catlin-death-cyclist/?arc404=true.

161. Anemona Hartocollis, His College Knew of His Despair. His Parents Didn't, Until It Was Too Late, N.Y. Times (May 12, 2018), https://www.nytimes.com/2018/05/12/us/college-student-suicide-hamilton.html?module=inline.

162. Id.

163. Deborah Serani, Understanding Survivors of Suicide Loss, Psychology Today (Nov. 25, 2013), https://www.psychologytoday.com/us/blog/two-takes-depression/201311/understanding-survivors-suicide-loss; see also William Feigelman, Bernard S. Gorman, & John R. Jordan, Stigmatization and Suicide Bereavement, 33 Death Studies 591 (2009).

164. Serani, supra note 161.

exception does not contemplate exclusion for threats to self, in a sense a suicide's force is rarely limited to the deceased—it more likely has broad ramifications for the community as a whole.

C. The Role of a University in Mental Health Interventions

The ideal design of a leave-of-absence policy may ultimately depend on a value judgment over what role a university should play in students' wellbeing.

Unquestionably, universities like Stanford are in a precarious position. Some institutions like Hamilton College have drawn ire essentially for not being paternalistic enough. After a student's suicide, Hamilton faced criticism for an unwritten policy of not informing parents of struggling students' mental health issues. Likewise, when a University of Pennsylvania student killed herself in 2016, the university counseling center faced criticism for not informing the student's parents that the student was having problems until it was too late.[165] Justifying what some would categorize as a hands-off approach, Hamilton said "the college's overall philosophy is to treat students as adults and allow them to take ownership of any issues they are facing."[166] Under public pressure, however, Hamilton and other colleges began training faculty to recognize mental health disorders and implemented a process by which employees could report struggling students to the dean of students.

In contrast, Mental Health & Wellness Coalition takes the other side. Universities, according to the plaintiffs, are being too paternalistic

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165. Hartocollis, supra note 138.

166. Id.

to the point of interfering with student autonomy. By definition, a compulsory DLOA overrules an individual student's judgment that he is able to manage his mental health disorder while continuing to study. Critics of Echazabal would likely fall in this camp, as well, finding compulsory DLOA a "paternalistic infringement on the right of a person with a disability to decide what is in his best interest, because it allows" a university "to substitute [its] judgment for that of a person with a disability."[167]

Of course, the Court in Echazabal determined that sound policy reasons rooted in protecting an individual's health and safety overrode concerns of paternalism. Before they can design an ideal leave-of-absence policy, students, parents, faculty, and the rest of each university's community must choose between these competing visions of a university's proper role in managing students' mental health.

Conclusions and Recommendations

Compulsory leaves of absence present complicated legal and policy questions. Most straightforwardly on both fronts, universities should conduct an individualized inquiry into the propriety of such a leave. Universities should cease practices like coercing voluntary leave agreements and affirmatively inform students they have the option to contest a leave of absence. Universities should reform the information-gathering processes and notify students with specificity rather than generalities of the reasons for seeking to impose a particular leave of absence. Universities should give students sufficient time to respond and allow a parent or psychiatrist to accompany the student at any appellate hearings. And,

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167. Lacy, supra note 74, at 99.

universities should broach the possibility of reasonable accommodations and only look to compulsory leaves as a last resort.

As part of its settlement agreement, Stanford has apparently implemented reforms on many of these fronts. Stanford's revised policy appears to focus on implementing searching individualized inquiries—it disavows generalizations about mental illness and defers to students' medical providers. It better notifies students of all of the auxiliary consequences of a compulsory leave. And, Stanford now clearly offers a voluntary leave before initiating the compulsory leave process.

It is difficult to evaluate Stanford's revised policy because it is still in its nascence. On its face, the policy could do more to make students undergoing the compulsory leave process feel comfortable. For example, the new policy on its face did not enumerate a right to have a parent or psychiatrist in hearings, though the plaintiffs in Mental Health & Wellness Coalition may not have requested that relief. How Stanford's revised policy plays out in practice will be a subject for future research.

Additionally, the settlement agreement in Mental Health & Wellness Coalition foreclosed immediate judicial consideration of significant questions. Even if an individualized inquiry occurs, a university's legal authority to compel a leave of absence by a suicidal student is still debatable. Thus, Stanford's policy may still be in danger for compelling leaves of absence at all. Textually, the direct-threat exception in Title III of the ADA offers scant assistance to Stanford's position unless a court performs some acrobatics in Chevron deference. Universities like Stanford are thus left to argue that accommodations for mentally ill students on campus would fundamentally alter schools' educational

mission—perhaps an uphill battle outside of extreme cases in which students need assistance taking care of basic needs.

Yet, there are unmistakable policy reasons for a university to retain some ability to compel a leave of absence for certain mentally ill students, after an individualized inquiry. Sometimes, a student might be better off away from campus, even if he believes otherwise at the time a leave is imposed. Sometimes, caring for a student—or, worse, dealing with a student's death—can inflict a heavy burden on the campus community, with or without constituting a fundamental alteration.

Undoubtedly, universities are in a difficult position, stretched by sometimes competing needs of complying with the law, protecting students, ensuring community wellbeing, and respecting student autonomy. Universities across the country facing this conundrum should carefully evaluate whether Stanford struck the right balance in the Mental Health & Wellness Coalition case.