

## **Appendix 609**

### **Individualized Assessment of Possible Direct Threat**

#### **Purpose**

To provide additional information and guidance on the direct-threat assessment process currently outlined in PRH Chapter 1, Section 1.4, R3. This supersedes information in Program Instruction 07-16.

#### **Background**

Job Corps requires, as a qualification standard, that an applicant or a student not pose a direct threat to the health or safety of himself/herself or others, including students and staff. Like any qualification standard, this requirement must apply to all applicants and students, not just to those with disabilities. If, however, an individual poses a direct threat as a result of a disability, Job Corps must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level.

This document provides Job Corps health and wellness staff, including Trainee Employee and Assistance Program (TEAP) specialists, with guidance designed to help them properly and lawfully assess an individual applicant's or student's ability to safely participate in the Job Corps program.

If the assessor determines that the individual poses a direct threat and the threat results from a disability, the assessor must consider whether any accommodations or modifications would reduce the risk, and list any suggested accommodations or modifications. Please note that the assessor must not consider whether, in his/her view, a particular accommodation or modification is "reasonable;" that determination must be made by the Center Director or his/her designee, on the basis of a number of specific factors that are required by law.

#### **Instructions**

The attached form may be used to conduct an individualized assessment of an applicant's or student's possible direct threat to self or others.

Federal disability nondiscrimination laws define a "direct threat" as **a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation or modification.** A "significant risk" means a high, not a slight, probability; a speculative or remote risk is insufficient.

Determining whether an individual poses a significant risk of substantial harm to himself/herself or others must be made on a case-by-case basis. Job Corps should identify the specific risk posed by the disability. For individuals with psychiatric disabilities, Job Corps must identify the specific behavior of the individual that would pose the direct threat. Federal disability nondiscrimination laws make clear that an individual does not pose a direct threat simply because he or she has a history of psychiatric disability, or is currently receiving treatment for a psychiatric disability.

When evaluating whether an individual with a disability or medical condition poses a direct threat, please keep in mind that there are special rules governing when disability-related inquiries, i.e., questions which are likely to elicit information about a disability can be made.

- In the context of evaluating an applicant for Job Corps, a direct-threat assessment may be done whenever Job Corps believes that a known or apparent disability or medical condition poses a direct threat to the health or safety of the individual or others. This typically will occur: (1) *after* the applicant has received conditional assignment to a Job Corps center and has completed the questions on the 6-53 Health Questionnaire; *and* (2) after specific, objective, factual information about that particular conditionally enrolled applicant is gathered that is medically related to any “yes” responses given to the questions in sections 8 or 9 of the questionnaire; *if* (3) the initial review of this specific, objective, factual information supports a reasonable belief that the conditionally enrolled applicant may have a medical condition or disability that poses a significant risk of substantial harm to the health or safety of the individual or others, i.e., direct threat. If all of these criteria are satisfied, the health and wellness manager will forward the applicant’s information to the appropriate licensed health provider employed by the center for a detailed direct-threat assessment.
- In the case of a current student, a direct-threat assessment may be conducted if there is a reasonable belief, based on objective evidence, that the student may have a medical condition or disability that poses a “direct threat” as defined above.

### **Who May Conduct the Assessment?**

The clinical assessment of risk, and degree of potential harm that may be caused by the individual’s medical condition, mental health status, or the severity of the disability, fall under the Health and Wellness department on each center. As such, these clinical assessments are to be carried out by qualified, licensed/certified health providers only. Those providers employed by Job Corps include nurses, physicians, center mental health consultants, dentists, and TEAP specialists. This group, therefore, has a significant role to play in determining whether, in a given Job Corps setting, a particular individual’s medical condition or disability poses a significant risk of substantial harm to the health or safety of himself/herself or others. Medical health conditions that may pose a direct threat shall be assessed by nurses and/or physicians; mental health conditions shall be assessed by mental health consultants; oral health conditions should be assessed by dentists; and conditions related to substance use shall be assessed by TEAP specialists. In some cases, it may be necessary to consult an outside specialist with expertise in the particular medical condition or disability and its effects.

### **Basis for the Assessment**

The determination that an individual has a medical condition or disability that poses a “direct threat” must be based on an individualized assessment of the individual’s present ability to safely participate in the Job Corps program. This assessment must be made by a licensed health provider, based on a reasonable medical judgment that relies on the most current medical knowledge and the best available objective evidence. Before conducting a direct-threat assessment, the assessor may need to educate himself/herself about the current state of medical

knowledge, and about the specific facts of the particular individual's medical history and/or the circumstances in which he or she has been or will be placed in the Job Corps program.

As noted above, the assessment must focus on the current medical condition or disability of the specific individual named on the form. The determination cannot be based on generalizations about the medical condition or disability; the assessor must identify the specific risk that is posed by the medical condition or disability of the named individual in the applicable Job Corps context. Additionally, the harm must be serious and likely to occur, not remote and speculative. Subjective perceptions, irrational fears, patronizing attitudes, and stereotypes have no place in the assessment process.

### **Factors to be Considered**

In determining whether an individual has a medical condition or disability that poses a direct threat, the assessor must consider four specific factors: duration of the risk, nature and severity of the potential harm, likelihood that the potential harm will occur, and imminence of the potential harm.

If the assessor considers these four factors and determines that a direct threat is posed by the medical condition or disability, he/she must consider whether the risk can be eliminated or reduced to an acceptable level by reasonable accommodation or modification.

Relevant factors in making the direct threat assessment (including the consideration of whether the risk may be lessened or eliminated) may include:

- Input from the individual with the medical condition or disability.
- The medical history of the individual, including his or her experience in previous situations similar to those he or she would encounter in the program.
- Opinions of medical doctors, rehabilitation counselors, or therapists who have expertise in the condition involved and/or direct knowledge of the individual.

Under federal disability nondiscrimination laws, the burden is on Job Corps to prove that a particular individual has a medical condition or disability that poses a direct threat. This means that if the objective, factual evidence is equivocal, or is insufficient to prove that the participation of that specific individual would pose a direct threat, the assessor must assume that no direct threat exists.

The four factors for determining direct threat are described below.

1. **Nature and severity of the risk.** In the professional judgment of the assessor:
  - a. What *kind of harm* is potentially posed by this individual's medical condition or disability? List the specific information on which the judgment is based.

- b. What is the *seriousness of the potential harm* in this particular case (e.g., death, incapacitation, serious injury, minor injury/emotional distress)? List the specific information on which the judgment is based.
2. **Duration of the risk.** In the professional judgment of the assessor, how long will the risk last? List the specific information on which the judgment is based.
3. **Likelihood that the potential harm will occur.** In the professional judgment of the assessor, is the likelihood that potential harm will occur high, moderate, or low? List the specific information on which the judgment is based.
4. **Imminence of the potential harm.** In the professional judgment of the assessor, how soon is the harm likely to occur? List the specific information on which the judgment is based.

Taking all four of these factors into consideration, the assessor should determine whether the applicant's or student's condition poses a significant risk of substantial harm.

### **Accommodations or Modifications**

If the individual is a person with a disability, the center's Reasonable Accommodation Committee (RAC) must convene and consider accommodations and/or modifications that the individual may need. Once the accommodations and/or modifications have been identified, the qualified licensed professional who conducted the original assessment must review the previous findings to each of the factors giving consideration to the identified accommodations to determine whether or not the accommodations and/or modifications eliminate the threat or reduce it to below the level of threat.

If it is determined that the accommodations and/or modifications will remove the barriers to enrollment, then the RAC must forward the list of identified accommodations and/or modifications to the Center Director for a "reasonableness" and/or undue hardship determination (see below). If the accommodations and/or modifications identified would not eliminate the threat or sufficiently reduce it to below the level of threat, then the RAC (inclusive of the licensed professional) must indicate which accommodations and/or modifications would be insufficient and explain why.

### **Examples of Accommodation/Modification Consideration for Direct Threat**

- Schedule adjustments to allow the student to attend necessary off-center appointments.
- Shortened training day or later start to the training day to adjust for medication side-effects.

If the RAC (inclusive of the licensed professional) cannot identify any appropriate accommodations to eliminate or reduce the level of threat, then the RAC must document the process that was taken to identify the accommodations and/or modifications (i.e., called Job Accommodation Network, reviewed individual's previous IEPs, etc.). Every effort should be

made to identify appropriate accommodations and/or modifications, and RACs are encouraged to use identified resources (e.g., Job Accommodation Network) to assist them, as appropriate.

#### Example of Language

- “The Reasonable Accommodation Committee (RAC) contacted JAN and reviewed the individual’s previous IEPs and could not identify any accommodation or modifications that would eliminate the risk or reduce it to an acceptable level without treatment or intervention for improving applicant’s impulse control and reduction of harm behaviors first.”

#### **Center Director Reasonableness Determination**

If the individual is a person with a disability and accommodations or modifications that could either eliminate the risk or reduce it to an acceptable level have been listed by the center’s RAC, the Center Director is responsible for making a determination as to whether such accommodations or modifications would be “reasonable” or pose an undue hardship. The RAC may assist the Center Director as needed in gathering the necessary data to make this determination. Guidance on how to make this determination is available in the “Evaluating a Request” and “Denying a Request” sections of the Job Corps Reasonable Accommodation Guidelines available on the Job Corps Disability Website.

For more information on direct threat, see the Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (<http://www.eeoc.gov/policy/docs/psych.html>).

**FORM FOR INDIVIDUALIZED ASSESSMENT OF POSSIBLE DIRECT THREAT**

Applicant's or Student's Name: \_\_\_\_\_

Date of Review: \_\_\_\_\_

Interview conducted by: telephone \_\_\_\_\_ in person \_\_\_\_\_ videoconference \_\_\_\_\_

In determining whether, in your professional judgment, the individual named above has a medical condition or disability that poses a direct threat, consider the following and respond accordingly.

Factors to be considered in determining whether a “significant risk of substantial harm” exists include: (1) duration of the risk, (2) nature and severity of the potential harm, (3) likelihood that the potential harm will occur, and (4) imminence of the potential harm.

Under the law, the burden is on Job Corps to prove that a specific individual poses a direct threat. Therefore, if the objective, factual information about the specific individual named above is equivocal, or is insufficient to *prove* that a direct threat exists, you must assume that the individual's disability or medical condition does not pose a direct threat.

If you determine that a “significant risk of substantial harm” exists, consider whether any accommodations or modifications would reduce the risk, and list any suggested accommodations or modifications. Do not consider whether, in your view, a particular accommodation or modification is “reasonable.” That determination must be made by the Center Director or his/her designees.

1. What factors triggered review of the individual's file for possible direct threat?
2. What is the nature and severity of the potential harm?
  - a. What kind of harm is potentially posed by this individual's medical condition or disability?
  - b. What is the seriousness of the potential harm in this particular case (e.g., death, incapacitation, serious injury, minor injury/emotional distress)?
3. What is the duration of the risk (i.e., how long will the risk last)?
4. What is the likelihood that the potential harm will occur (i.e., high, moderate, or low)?

