

NOTES

FINDING THE PROPER BALANCE: PROTECTING SUICIDAL STUDENTS WITHOUT HARMING UNIVERSITIES

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INTRODUCTION

ON April 16, 2007, Seung-Hui Cho, a senior at the Virginia Polytechnic Institute and State University (“Virginia Tech”), took the lives of thirty-two students and faculty and wounded many others before taking his own life. Three days later, Timothy Kaine, the Governor of Virginia, formed the Virginia Tech Review Panel to evaluate the tragic events that had occurred. The panel’s results indicated that there were clear warning signs of Cho’s mental instability and that individuals and departments within the university knew about these signs but did not “connect[] all the dots” and intervene effectively.¹ Among the warning signs listed were Cho’s previously expressed suicidal thoughts, a prior hospitalization, and a finding that he was an imminent danger to himself.²

The panel found that there was widespread confusion among university officials throughout Virginia about the Family Educational Rights and Privacy Act (“FERPA”),³ the federal laws that govern the privacy of health and education records.⁴ Importantly, Virginia Tech’s administrators were uncertain about what information could be disclosed to each other and to Cho’s parents, who later stated that, had they known about his condition, they would have taken Cho out of school and provided him psychiatric help.⁵

This widespread confusion is understandable, as the obligations and duties of university officials toward suicidal students have become increasingly ambiguous. Courts and legislators have backed university officials into a tight corner when it comes to addressing

¹ Va. Tech Review Panel, *Mass Shootings at Virginia Tech*, Report of the Review Panel 2 (2007), available at <http://www.vtreviewpanel.org/index.html>.

² *Id.* at 47–48. Other warning signs included complaints of stalking female classmates, bizarre and threatening behavior documented by his suitemates and submitted to their resident advisor, and submitting violent writings to various English professors, including one paper concerning a young man who planned to kill his fellow students. *Id.* at 40–53.

³ 20 U.S.C. § 1232g (2000 & Supp. IV 2004).

⁴ Va. Tech Review Panel, *supra* note 1, at 63. For example, the panel noted that Virginia Tech and the University of Virginia disagreed on whether university administrators could share disciplinary records with campus police. *Id.* at 68.

⁵ *Id.* at 63. When Cho’s parents were asked what would they would have done if they had been notified by the college about the various complaints about Cho’s behavior, they responded, “We would have taken him home and made him miss a semester to get this looked at . . . but we just did not know . . . about anything being wrong.” *Id.* at 49.

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the needs of mentally troubled students, particularly those with suicidal tendencies such as Cho. While university officials are *permitted* under FERPA to inform “appropriate parties” of a dependent student’s health status or of a student’s health emergency,⁶ these exceptions to the underlying presumption of privacy remain largely unexplained and unclear. Courts have refused to acknowledge a duty on the part of college officials to notify a student’s parents following a suicide attempt or threat, which has led university officials to err on the side of nondisclosure.

In the absence of a duty to notify, parents of students who have committed suicide have sought to establish university liability through wrongful-death suits, alleging that universities have a duty to protect their children from harm. Although courts have traditionally refused to recognize third-party liability in suicide wrongful-death suits, courts have moved away from such a stance in recent cases involving student suicide. Instead, courts have grown increasingly willing to hold university administrators liable if a student’s suicide is particularly foreseeable, reasoning that a special relationship exists between university administrators and students. This trend, which seems to penalize university officials who are more actively involved with monitoring and treating potentially suicidal students, has led some universities and colleges to force suicidal students out of the university setting after the students have sought help at counseling centers or hospitals. But university policies that send suicidal students home may serve to deter students with mental health problems from seeking the treatment they need in the first place. In addition, the university policies may run afoul of the Americans with Disabilities Act of 1990⁷ and Section 504 of the Rehabilitation Act,⁸ both of which protect people with mental health problems from discrimination on the basis of their disabilities.

In March, only a month prior to the tragedy, Governor Kaine signed into law a bill prohibiting state universities from penalizing or expelling students who have attempted or threatened suicide. The bill, the first of its kind, was an important move away from the

⁶ 20 U.S.C. § 1232g(b)(1)(I).

⁷ 42 U.S.C. § 12181 (2000).

⁸ 29 U.S.C. § 794 (2000 & Supp. IV 2004).

discriminatory policy of forced withdrawal. The violence at Virginia Tech, however, gave birth to a heightened awareness that people with mental health problems, on rare occasions, take the lives of others as well as their own. This awareness may bring with it an impulse to move back toward the forced-withdrawal policies of the past in an attempt to limit liability, not just for wrongful-death suits, but also for suits involving third-party harm caused by suicidal students.

This Note will address the difficulties that university officials have faced in recent years when addressing suicidal students and the mixed signals that have been sent by courts and legislatures regarding a university's duties toward suicidal students—signals that influence the development of university suicide policies, and ultimately push many colleges toward a conservative, hands-off course of action. This Note will suggest an alternative model for delineating the legal duties of universities with respect to suicidal students—a model that attempts to balance the privacy and civil rights of the suicidal student, the need for suicidal students to receive proper treatment, and the liability concerns of universities. The model emphasizes the importance of using campus suicide policies to push students toward getting the help and treatment they need to cope with their mental health problems. At the same time, the suggested model would allow university officials to maintain control over determining whether a student is permitted to remain on campus.

Part I of this Note will discuss mental health trends faced by universities today. Part II will explain the Family Educational Rights and Privacy Act. Part III will contrast courts' traditional approach of limiting third-party liability in wrongful-death suits involving suicide with courts' recent willingness to carve out an exception allowing suits to be brought against university officials when a suicide is particularly foreseeable. Part IV will discuss the response of university officials—implementing mandatory-withdrawal policies in order to limit suicide-based liability—and the allegations that such withdrawal policies violate the Americans with Disabilities Act and Rehabilitation Act. Part V will conclude with possible alternatives to mandatory-withdrawal policies and solutions to the confusion that has developed concerning a university's obligation toward suicidal students.

I. CURRENT MENTAL HEALTH TRENDS AT UNIVERSITIES AND COLLEGES

Traditionally, the mission of university counseling centers has been to “assist students to define and accomplish personal, academic, and career goals by providing developmental, preventive, and remedial counseling.”⁹ During the last decade, however, university counseling centers have reported both an increase in the number of students using campus mental health facilities and a shift in the services provided, from offering information and treating benign developmental disorders to treating more severe psychological disorders.¹⁰ One study found that “[s]ixty percent of senior student affairs officers surveyed reported that a record number of students are using campus counseling services for longer periods of time than ever before.”¹¹

In particular, counseling centers report being consistently presented with more severe concerns including “suicidality, substance use, history of psychiatric treatment or hospitalization, depression, anxiety, and very high subjective ratings of distress.”¹² According to the 2003 National Survey of Counseling Center Directors at 274 institutions, 85% of directors reported an increase in “severe” psychological problems over the previous five years, with 51% reporting an increase in self-injury incidents.¹³ Eighty-nine percent of centers reported that they have had to hospitalize a student for psychological reasons, and 10% reported a student suicide.¹⁴ Although suicide rates among university students are reported to be half of the national suicide rate for an age-matched population, suicide still remains the second leading cause of death among univer-

⁹ Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 *NASPA J.* 167, 167 (2003).

¹⁰ *Id.* at 168; see also Deanna S. Pledge et al., *Stability and Severity of Presenting Problems at a University Counseling Center: A 6-Year Analysis*, 29 *Prof. Psychol.: Res. & Prac.* 386, 386 (1998).

¹¹ Kitzrow, *supra* note 9, at 170 (citation omitted).

¹² Pledge et al., *supra* note 10, at 387; see also Kitzrow, *supra* note 9, at 168. It should be noted, however, that the perceived increase in suicidal ideation among students has not led to an increase in completed suicides. While the youth suicide rate tripled between 1950 and 1994, national data shows a decline in suicide rates beginning in the early 1990s. Gary Pavela, *Questions and Answers on College Student Suicide: A Law and Policy Perspective* 89 (2007).

¹³ Kitzrow, *supra* note 9, at 168–69.

¹⁴ *Id.* at 169.

sity students.¹⁵ According to the 2006 American College Health Association's Assessment Report, 1.3% of students reported attempting suicide at least one time over the course of the past year, and 9.3% of students reported seriously considering suicide at least once during that same time frame.¹⁶ Russ Federman, director of counseling and psychological services at the University of Virginia, stated that one in eleven university students sought counseling or psychological help in the last year, and a similar ratio had contemplated suicide.¹⁷ Of the approximately 18 million students enrolled in higher education nationwide in 2006, 234,000 attempted suicide.¹⁸ The Jed Foundation has estimated that 1100 of those students end up committing suicide, an average of around three each day.¹⁹

The increase in severity of mental health problems faced by college students is thought to stem from a variety of factors. Some studies point to the increased prevalence of divorce, family dysfunction and instability, low frustration tolerance, and early experimentation with drugs, alcohol, and sex.²⁰ Others look to the development and increased effectiveness of medications that have made it possible for students with serious psychological disabilities to attend college who would have been unable to do so in the past.²¹ Still others suggest that there has been a change in people's attitudes toward mental health treatment. Students may be more willing to visit counseling centers and receive treatment for their

¹⁵ Morton M. Silverman et al., *The Big Ten Student Suicide Study: A 10-Year Study of Suicides on Midwestern University Campuses*, 27 *Suicide & Life-Threatening Behav.* 285, 285 (1997) (finding that the overall student suicide rate at the "Big Ten" schools was 7.5 per 100,000 enrolled students, while the national suicide rate for an age-matched sample was 15 per 100,000 individuals); Am. Ass'n of Suicidology, *Youth Suicide Fact Sheet* (Mar. 19, 2004), <http://www.jedfoundation.org/documents/YouthSuicide.pdf> (noting that suicide is the second leading cause of death for university students) (last visited Dec. 1, 2007).

¹⁶ Am. Coll. Health Ass'n, *National College Health Assessment Spring 2006 Reference Group Data Report*, 55 *J. Am. Coll. Health* 195, 204 (2006).

¹⁷ Adam Schreck, *Senate Hearing Focuses on Campus Safety: Educators and Experts Suggest Ways to Reduce Risks at Schools*, *L.A. Times*, Apr. 24, 2007, at A16.

¹⁸ *Id.*

¹⁹ Shari Roan, *Crisis on Campus: As Mental Illness Among Collegians Rises, Students' Privacy Rights and Treatment Clash with Families' Need to Know*, *L.A. Times*, Sept. 3, 2007, at F1.

²⁰ Kitzrow, *supra* note 9, at 170–71.

²¹ *Id.* at 171.

mental health problems than in the past, when such problems often carried heavy stigmatization.²²

With this increase in severity of students' psychological disorders has come an increased level of concern about liability risks among university officials. Gary Pavela, a University of Maryland law professor, says roughly a third of university presidents he works with are now buying private coverage to protect themselves from wrongful-death suits.²³ Eighty-eight percent of counseling center directors reported an increased concern about liability risks regarding student suicide.²⁴ As some commentators have suggested, and as this Note will develop, this increased concern for liability has adversely shaped university policies addressing suicidal students.²⁵

II. FERPA AND THE DUTY TO NOTIFY

In addition to changes in mental health trends, federal law also has influenced the development of university policies addressing suicidal students. The Family Educational Rights and Privacy Act was enacted in 1974 to protect the privacy of parents and students regarding outside access to student educational records. FERPA states that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents to any individual, agency, or organization.”²⁶ Once a student reaches the age of eighteen, the rights accorded to the student's parents, including permission requirements for access to records, are trans-

²² *Id.*

²³ Chuck Plunkett, *Colleges' Policies Matter of Life, Death: The Legal and Moral Paths Are Anything But Clear When Balancing Concerns of Safety, Privacy and Mental Health*, *Denver Post*, Apr. 22, 2007, at 1A.

²⁴ *Id.*; see also Robert P. Gallagher, *National Survey of Counseling Center Directors 6* (2006), available at <http://www.iacsinc.org/National%20Survey%20for%20Counseling%20Center%20Directors%20Results%20-%20Final.pdf>.

²⁵ See, e.g., Rob Capriccioso, *Counseling Crisis*, *Inside Higher Ed*, Mar. 13, 2006, <http://www.insidehighered.com/news/2006/03/13/counseling> [hereinafter *Capriccioso, Counseling Crisis*]; Rob Capriccioso, *Settlement in MIT Suicide Suit*, *Inside Higher Ed*, Apr. 4, 2006, <http://www.insidehighered.com/news/2006/04/04/shin> [hereinafter *Capriccioso, Settlement in MIT Suicide Suit*]; Julie Rawe & Kathleen Kingsbury, *When Colleges Go on Suicide Watch*, *Time*, May 22, 2006, at 62–63.

²⁶ 20 U.S.C. § 1232g(b)(1) (2000 & Supp. IV 2004).

ferred to the student only.²⁷ FERPA does not apply to student records that are made or maintained by an independent physician, psychiatrist, or psychologist acting in his or her professional capacity that are made, maintained, or used only in connection with treatment of the student and disclosed only to individuals providing the treatment.²⁸ The Act applies to nonmedical staff members and campus health officials employed by educational institutions that receive federal funds, including both private and public universities, and places restrictions on school officials' abilities to disclose student information to outside parties absent a FERPA-recognized exception.

One such exception to the Act is that a university is authorized to allow parents of dependent students to examine their child's academic records without the student's consent.²⁹ This exception is important because approximately fifty percent of undergraduate students in the United States are classified as dependents.³⁰ While some school policies place all students under the age of twenty-four in the dependent category unless proof of independent status is shown, other universities require parents to send a copy of their tax returns each semester to verify dependency. A parent desiring to view records relating to their child's mental health may have to take the initiative to review the school's privacy policies and fill out the correct forms. Further, the ability to examine an educational record is not the same as the right to be kept informed of updates in a student's record—colleges have no duty under this exception to notify the parents of any changes. Parents must proactively request to review their child's records periodically.

A second exception allows university officials to notify parents regarding their child's mental health after a health emergency involving their child. This exception applies to independents and dependents alike. More specifically, unless otherwise prohibited by

²⁷ 20 U.S.C. § 1232g(d).

²⁸ 34 C.F.R. § 99.3 (2006). The conduct of independent physicians, psychiatrists, and psychologists is governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and is beyond the scope of this Note. For more information on HIPAA, see 45 C.F.R. §§ 160, 164 (2006).

²⁹ 20 U.S.C. § 1232g(a)(1)(A). For a definition of dependent, see I.R.C. § 152 (West 2007).

³⁰ Nat'l Ctr. for Educ. Statistics, *Student Financing of Undergraduate Education: 2003–04*, at 179 (2006), <http://nces.ed.gov/pubs2006/2006186.pdf>.

state law, following an emergency, university staff members are permitted, but never required, to inform “appropriate parties” of confidential mental health information where “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”³¹ This exception is strictly construed.³² While FERPA does not grant an individual the right to sue, multiple violations can lead to fines and the withdrawal of federal funding for the university.

Because the Department of Education has held that universities are merely permitted to inform appropriate parties following a health emergency but are not required to do so, universities often err on the side of nondisclosure even though the incidents may qualify under the emergency exception.³³ Such a tendency is compounded by the fact that courts have yet to more narrowly define health emergency or to determine whether or not self-injury would fall under the exception.

Further support for this conservative stance comes from court holdings that have found university administrators to have no duty to notify a student’s parents of a student’s self-destructive behavior prior to suicide. At least two state courts have ruled that a university does not breach any legally cognizable duty of care by failing to notify a student’s parents of an earlier suicide attempt, despite informal policies or promises to the contrary.³⁴ In *Mahoney v. Allegheny College*, the court warned against imposing a “duty [on] nonprofessionally trained persons to notify” of “impending danger,” noting that such a policy implicates “issues of foreseeability for nonprofessional lay persons as well as issues involving the disruption of a professional confidential clinical relationship and

³¹ 34 C.F.R. § 99.36(a).

³² *Id.* § 99.36(c).

³³ See, e.g., Alana Semuels, A Healthy Relationship: Parents Should Talk to Their Child About Having Colleges Share Medical Info, *Pittsburgh Post-Gazette*, Feb. 16, 2005, at ED-14.

³⁴ See *Jain v. State*, 617 N.W.2d 293, 299 (Iowa 2000); *Shin v. MIT*, 19 Mass. L. Rptr. 570, 574, 2005 WL 1869101, at *8 (Super. Ct. June 27, 2005) (finding that statements made by the Housemaster promising to inform the parents of subsequent problems did not rise to the level of a “specific promise” that the plaintiffs relied upon).

lesser issues of a student's right to privacy and expressed wishes involving notification."³⁵

While a duty to notify has not been recognized by courts, a recent trend in litigation has been to deny summary judgment for wrongful-death suits brought against university officials when a student has committed suicide and the university official knew or should have known that the student was contemplating suicide.³⁶ Because it is far more problematic to predict and prevent suicide than it is to notify a student's parents that their child has attempted or threatened to commit suicide, it may be in the university's best interest to use the FERPA exceptions to their full potential.

First, FERPA applies only to information in student records—personal observations and conversations with students fall outside of FERPA's scope. FERPA also does not apply to records created and maintained by campus law enforcement for law-enforcement purposes.³⁷ Thus, schools should be aware that there are many situations in which information can be freely shared with parents without the risk of fines or a withdrawal of funding.

Second, there is no reason for a university to deny a dependent's parents access to their child's records. The dependent exception is clearer than the health-emergency exception and thus does not carry with it the same risk of fines. Universities could go further, however, by establishing policies that allow for the notification, rather than mere access, of a dependent's parents following a severe suicide threat.

Third, universities could also attempt to define FERPA's "health emergency" with greater particularity, thus allowing notification when that threshold has been crossed. While current law remains unclear and courts have not ruled on the issue, guidelines have been issued that indicate that a suicide attempt should be construed as a health emergency. For example, the Department of Education's Family Compliance Policy Officer ("FCPO") has advised that a student's suicidal statements, coupled with unsafe con-

³⁵ *Mahoney v. Allegheny Coll.*, No. AD 892-2003, at 23 (Pa. Ct. C.P. Dec. 22, 2005), available at <http://www.asjaonline.org/attachments/articles/35/Allegheny%20college%20SJ%20decision.pdf>.

³⁶ See *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002); *Shin*, 19 Mass. L. Rptr. 570, 2005 WL 1869101, at *1.

³⁷ 20 U.S.C. § 1232g(a)(4) (2000).

duct and threats against another student, constituted a “health or safety emergency” under FERPA.³⁸ Although the university would risk fines and the possible withdrawal of funds if the definition of an emergency were not narrowly construed in the university’s guidelines, even a very strict construction, such as notification following a suicide attempt requiring hospitalization, would allow parents to remain better informed than under many current university policies and may help to identify the cases most likely to lead to an actual suicide.³⁹

In cases of attempted suicide, students could first be asked if there is any specific reason why the parents should not be informed, such as history of abuse or lack of support, which could compound the student’s problems rather than help solve them. If no such reason is given, the practice of informing parents of serious suicide attempts will allow parents both to provide support for their child and to furnish any relevant medical information that the student has not disclosed to the university. Further, if the parents are invited to discuss, help form, and approve a treatment plan for their child after a suicide attempt, it may help the university avoid future liability if the student ultimately commits suicide and a wrongful-death action is brought. If courts follow the recent trend of finding a duty on the part of university officials to prevent a student’s suicide, parental involvement and approval of a treatment plan may permit a court to find that the officials’ duty was not breached.

³⁸ Va. Tech Review Panel, *supra* note 1, at G-9.

³⁹ See Liam Goldrick, *Youth Suicide Prevention: Strengthening State Policies and School-Based Strategies 2* (Apr. 18, 2005), available at <http://www.nga.org/Files/pdf/0504suicideprevention.pdf> (stating that one of the risk factors for suicide includes previous suicide attempts); Paul Joffe, *An Empirically Supported Program to Prevent Suicide Among a College Population 4, 10* (Feb. 16, 2003), available at <http://www.jedfoundation.org/articles/joffeuniversityofillinoisprogram.pdf> (stating that “between 40 and 65 percent of individuals who committed suicide gave unmistakable evidence of prior intent based on the occurrence of a serious prior suicide attempt” and that “a student who threatened or attempted suicide was 543 times more likely to commit suicide in the following year than his or her roommates or classmates who had not threatened or attempted”).

III. WRONGFUL-DEATH CLAIMS AND DUTY OF CARE

Traditionally, courts have been hesitant to recognize suicide-related wrongful-death claims, finding that “the act of suicide is considered a deliberate, intentional and intervening act that precludes another’s responsibility for the harm.”⁴⁰ Moreover, there ordinarily is no affirmative duty to act to assist or protect another, and a cause of action for negligence will not lie unless there is a duty recognized by law.⁴¹ Accordingly, courts have been hesitant to recognize an affirmative duty to protect another in the case of suicide and have limited this duty to individuals with training and special knowledge in the area, recognizing that the act of suicide is extremely hard to predict and properly address.⁴² Thus, many courts find that no duty exists between university officials and a student when officials fail to protect a student and prevent his or her suicide.⁴³

In the leading case, *Jain v. State*,⁴⁴ the Supreme Court of Iowa affirmed a lower-court ruling of summary judgment concluding that no special relationship existed between the university and the student, and the university therefore had no affirmative duty to prevent the suicide.⁴⁵ Jain, a student at the University of Iowa, committed suicide in his dorm room after one failed attempt. Resident assistants were alerted to the first attempt, and they and other university officials aware of the situation encouraged Jain to seek counseling. Less than two weeks after the first attempt, Jain was pronounced dead of self-inflicted carbon monoxide poisoning when he left his moped running in his dormitory room.⁴⁶

⁴⁰ *Jain v. State*, 617 N.W.2d 293, 300 (Iowa 2000); see also *Cutler v. Klass*, 473 N.W.2d 178, 182 (Iowa 1991); *Falkenstein v. City of Bismarck*, 268 N.W.2d 787, 790 (N.D. 1978); *McLaughlin v. Sullivan*, 461 A.2d 123, 124 (N.H. 1983).

⁴¹ *Cremins v. Clancy*, 612 N.E.2d 1183, 1187 (Mass. 1993).

⁴² Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 *Stetson L. Rev.* 125, 146 (2002).

⁴³ See *Jain*, 617 N.W.2d at 294–95, 300; *Mahoney v. Allegheny Coll.*, No. AD 892-2003, at 23 (Pa. Ct. C.P. Dec. 22, 2005), available at <http://www.asjaonline.org/attachments/articles/35/Allegheny%20college%20SJ%20decision.pdf>.

⁴⁴ 617 N.W.2d at 293.

⁴⁵ *Id.* at 296–97, 300.

⁴⁶ *Id.* at 295–96.

The court looked to the *Restatement (Second) of Torts*, Section 323, which states:

One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.⁴⁷

The court explained that the required increase in the risk of harm is not simply that which occurs when a person fails to do something that he or she reasonably should have done. Liability under Section 323(a) applies only when the defendant's actions increase the risk of harm to the plaintiff relative to the risk that would have existed had the defendant never provided the services initially.⁴⁸ Thus, the defendant must put the plaintiff in a worse situation than if the defendant had never begun performance. Looking to Section 323(b), the court explained that the plaintiff must show "actual or affirmative reliance, i.e., reliance based on specific actions or representations which cause a person to forego other alternatives of protecting themselves."⁴⁹ The court found that no affirmative action by university employees had increased the risk of self-harm, and noted to the contrary that the resident advisors had intervened appropriately, offered Jain support and encouragement, referred him to counseling, and sought permission to contact his parents.⁵⁰ There was also no proof that Jain had relied on the services offered by the administrators to his detriment, and, in fact, evidence showed that he never took advantage of any of the counseling services offered to him.⁵¹ The court thus concluded that a nontherapist college official had no general duty of care to prevent student suicide, despite knowledge of a prior suicide attempt.

Courts have generally followed the holding in *Jain*, finding that there is no general duty of care on the part of nonmedical univer-

⁴⁷ Restatement (Second) of Torts § 323 (1965).

⁴⁸ *Jain*, 617 N.W.2d at 299.

⁴⁹ *Id.* (citations and internal quotations omitted).

⁵⁰ *Id.*

⁵¹ *Id.* at 299–300.

sity staff to prevent a student's suicide.⁵² Courts have, however, become more willing to carve out exceptions to this general rule based on Section 314A of the *Restatement (Second) of Torts*. This Section lists "special relationships" that can cause a duty of care to be imposed on a third party due to the foreseeability of the plaintiff's injury by that third party, thus giving rise to a duty to act or protect the individual where no such duty would otherwise exist. Although specific special relationships are listed, the commentary notes that the specified relations are not exhaustive and are not the only ones in which the court may recognize an affirmative duty of care. The commentary further notes a trend toward an acknowledgement of an affirmative "duty to aid or protect in any relation of dependence."⁵³

The Massachusetts Supreme Judicial Court gave further guidance in *Irwin v. Town of Ware*,⁵⁴ explaining the basis for imposing a duty when a special relationship exists and the importance of foreseeability of injury to the plaintiff by the defendant:

Foremost among [the considerations giving rise to special relationships] is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so. It has been said that such foreseeability can be based on reasonable reliance by the plaintiff, impeding other persons who might seek to render aid, statutory duties, property ownership or some other basis. As the harm which safely may be considered foreseeable to the defendant changes with the evol-

⁵² Such a holding fits within the usual tort rule that nontherapist counselors are not required to prevent suicide unless they cause the risk of suicide. See, e.g., *Nally v. Grace Cmty. Church*, 763 P.2d 948, 957–58 (Cal. 1988) (finding no duty owed by clergy to prevent suicide); *Adams v. City of Fremont*, 68 Cal. App. 4th 243, 278–79 (1998) (finding that law-enforcement officers responding to a crisis involving a person threatening suicide had no legal duty that would have exposed them to liability if their conduct failed to prevent the suicide from happening); *Bogust v. Iverson*, 102 N.W.2d 228, 230–33 (Wis. 1960) (holding that there was no legal duty on the part of the director, who was neither a medical doctor nor a specialist in mental disorders, that could sustain the parents' wrongful-death action).

⁵³ *Restatement (Second) of Torts* § 314A (1965); *Shin v. MIT*, 19 Mass. L. Rptr. 570, 576, 2005 WL 1869101, at *12 (Super. Ct. June 27, 2005).

⁵⁴ 467 N.E.2d 1292 (Mass. 1984) (finding a special relationship between a police officer who negligently failed to remove an intoxicated motorist from the highway and a citizen who suffered injury as a result of his negligence).

ing expectations of a maturing society, so change the “special relationships” upon which the common law will base tort liability for the failure to take affirmative action with reasonable care.⁵⁵

Such a “special relationship” has been extended to characterize the relationship between universities and students in various situations. For example, in *Mullins v. Pine Manor College*,⁵⁶ the court found that a duty was owed to a female college student who was attacked by an intruder on campus, recognizing that the concentration of young people, especially young women, on a college campus creates a favorable opportunity for criminal behavior. Since many students were away from home for the first time and were not fully aware of the dangers present in a city, the threat of criminal behavior should have been foreseeable to university officials.⁵⁷ Courts have used this line of reasoning in subsequent cases regarding campus safety.⁵⁸

Recently, courts have seemed willing to extend this reasoning to wrongful-death suits based on student suicides, finding that a special relationship exists between university officials and the student where the suicide was particularly foreseeable. In *Schieszler v. Ferrum College*, a U.S. District Court in Virginia denied a motion to dismiss, finding that a duty was owed on the part of university administrators to a student who committed suicide.⁵⁹ The court held that a trier of fact could conclude that there was an “imminent probability” that the student would try to hurt himself and that defendants “had notice” of this specific harm.⁶⁰

In *Schieszler*, the student, Michael Frentzel, sent a note to his girlfriend indicating his intent to kill himself.⁶¹ The resident assistant and campus police saw the note, visited Frentzel, and found him with self-inflicted wounds. The police notified the dean, who

⁵⁵ Id. at 1300–01.

⁵⁶ 449 N.E.2d 331 (Mass. 1983).

⁵⁷ Id. at 335.

⁵⁸ See, e.g., *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1050 (Me. 2001) (refusing to grant summary judgment on a negligence claim, finding that the fact that a “sexual assault could occur in a dormitory room on a college campus is foreseeable” and that because of this, “the University owed a duty to reasonably warn and advise students of steps they could have taken to improve their personal safety”).

⁵⁹ 236 F. Supp. 2d 602 (W.D. Va. 2002).

⁶⁰ Id. at 609.

⁶¹ For a more detailed account of the facts summarized below, see id. at 605–06.

responded by requiring Frentzel to sign a statement that he would not hurt himself. A few days later, Frentzel wrote to a friend asking him to tell his girlfriend that he loved her. His girlfriend told the defendants, but they took no action. Frentzel wrote another note stating that “only God can help me now,” which his girlfriend again passed on to the defendants. When officials visited Frentzel’s room, they found that he had hanged himself.

The court agreed with the general holding in *Jain* and acknowledged that the university had no affirmative duty to act to assist or protect Frentzel absent unusual circumstances.⁶² But the court then looked to Section 314A, noting that “an affirmative duty to aid or protect will arise when a special relationship exists between the parties” and that “a special relationship may exist . . . because of the particular factual circumstances in a given case.”⁶³ The court found especially relevant the fact that the defendants required Frentzel to sign a statement that he would not hurt himself, indicating that the defendants believed he was likely to do so.⁶⁴ The court followed the rule in *Mullins*, citing the idea that “[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.”⁶⁵ Although the parties settled for an undisclosed amount, the case marked a break from courts’ past hesitancy to allow third-party liability in suicide wrongful-death suits. The case thus left universities uncertain of their legal duties toward students with suicidal tendencies.

The reasoning in *Schieszler* was followed by the Massachusetts Superior Court in *Shin v. MIT*,⁶⁶ where the court denied the university administrators’ motion for summary judgment, rejecting the defendants’ argument that they had no duty to prevent Shin’s suicide. The defendants pointed to Massachusetts law, which states that “persons who are not treating clinicians have a duty to prevent suicide only if 1) they caused the decedent’s uncontrollable suicidal condition, or 2) they had the decedent in their physical custody,

⁶² Id. at 606.

⁶³ Id. at 606–07.

⁶⁴ Id. at 609.

⁶⁵ Id. at 610 (quoting *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983)).

⁶⁶ 19 Mass. L. Rptr. 570, 2005 WL 1869101, at *1 (Super. Ct. June 27, 2005).

such as a mental hospital or prison, and had knowledge of the decedent's risk of suicide."⁶⁷ While the court acknowledged that neither situation was present in the instant case, it then followed *Schieszler* and looked to Section 314A to determine whether the facts suggested that a special relationship existed between the decedent and the administrators.⁶⁸

Looking to the specific facts of the case, the court found that the university administrators were well aware of Shin's mental health troubles and that the plaintiffs had provided sufficient evidence that the defendants could have reasonably foreseen Shin's suicide.⁶⁹ Shin had a history of psychiatric trouble and was undergoing therapy and receiving medication for her condition by campus medical staff. The deans had received reports from students and professors about Shin's self-destructive behavior and had met with Shin on numerous occasions to discuss her mental health. Furthermore, university administrators referred Shin to MIT's mental health center for an assessment after observing self-inflicted injuries, and they also received notification of Shin's suicidal intentions on the day of her suicide. The notification led to a meeting to discuss Shin's deteriorating condition with all those who had been involved in her therapy. The treatment team made an appointment for Shin at a local medical center for the following day and left a message on her answering machine, but Shin killed herself later that night.

Based on these facts, the court found a special relationship between the MIT administrators and Shin, and thereby imposed a duty to exercise reasonable care to protect Shin.⁷⁰ The court further found that the administrators had failed to secure Shin's short-term safety in response to her suicide plan, holding that "[b]y not formulating and enacting an immediate plan to respond to Shin's escalating threats to commit suicide, the Plaintiffs have put forth sufficient evidence of a genuine issue of material fact as to whether the MIT Administrators were grossly negligent in their treatment of Eliza-

⁶⁷ Id. at 576, 2005 WL 1869101, at *11 (citing *Nelson v. Mass. Port Auth.*, 771 N.E.2d 209, 211–12 (Mass. App. Ct. 2002)).

⁶⁸ Id. at 570, 576–77, 2005 WL 1869101, at *12–13.

⁶⁹ For a more detailed account of the facts summarized below, see id. at 570–73, 2005 WL 1869101, at *5–8.

⁷⁰ Id. at 577, 2005 WL 1869101, at *13.

beth.”⁷¹ Similar reasoning was used to deny the defendants’ motions for summary judgment with regards to the negligence and wrongful-death claims.⁷²

Not all courts agree with *Schieszler* and *Shin* that a particularly foreseeable suicide will give rise to a special relationship between an administrator and student. For example, in *Mahoney v. Allegheny College*, the court relied on the line of reasoning demonstrated in *Jain* and distinguished the facts of the case from *Schieszler* and *Shin*.⁷³ In *Mahoney*, Charles Mahoney was first diagnosed with major depression at Allegheny’s Counseling Center, where he received medication and participated in regular therapy.⁷⁴ He admitted to suicidal ideations and was hospitalized at one point for these feelings. Despite continued suicidal thoughts, he refused to be readmitted to the hospital or take a leave of absence from school. On the day of the suicide, Mahoney met with his psychiatrist, stated that he did not have any sleeping pills, and made an appointment for the following morning. He later hanged himself.

His parents sued, alleging that the defendants breached a duty of care to prevent their son’s suicide. The court summarily dismissed the parents’ claims against two college deans, finding that there was no special relationship or reasonable foreseeability that would justify creating a duty to prevent Mahoney’s suicide.⁷⁵ The court distinguished the case from *Shin* and *Schieszler* by noting that the deans’ relationship with Mahoney existed for a period of only three to four days and was limited to a disciplinary proceeding. Furthermore, the court found that unlike *Shin* and *Frentzel*, Mahoney had not engaged in any specific acts of self-harm, that the deans had relied on Mahoney’s professional mental health counselor who had

⁷¹ Id. at 578, 2005 WL 1869101, at *14.

⁷² Id. The case eventually settled. Plunkett, *supra* note 23.

⁷³ No. AD 892-2003, at 21–23 (Pa. Ct. C.P. Dec. 22, 2005), available at <http://www.asjaonline.org/attachments/articles/35/Allegheny%20college%20SJ%20decision.pdf>.

⁷⁴ For a more detailed account of the facts summarized below, see *id.* at 3–11.

⁷⁵ Id. at 22. The court did not grant summary judgment to the school, the counselor, or Mahoney’s treating psychiatrist. At trial, the plaintiffs’ attorney argued that the defendants should have put Mahoney on an indefinite leave of absence or hospitalized him, but in an eleven to one vote, the jury found for the defendants on the basis that the suicide was not foreseeable. Matthew Heller, Pa. Jury Finds Student’s Suicide Unforeseeable, On Point Legal News, Oct. 5, 2006, <http://www.onpointnews.com/061005.asp>.

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ongoing contact with him, and that the deans took no actions that would have precluded Mahoney from seeking professional treatment or notifying his parents.⁷⁶

Although the court did not explicitly reject the rationale of *Shin* and *Schieszler*, it cautioned that a finding of a special relationship outside a custodial or controlled environment was “subjective in nature” and could lend itself to “reactive rather than reflective results steeped in ‘hindsight’ as compared to a careful and precise legal analysis required in a duty of due care.”⁷⁷ The court then engaged in the aforementioned “careful and precise” legal analysis, considering not only whether the act of suicide was foreseeable by the defendants but also the relationship between the parties. The court also attempted to strike a balance between the social utility of the defendant’s conduct, the nature of the risk imposed, the foreseeability of the harm, the consequences of imposing a duty on the defendant, and the overall public interest in a proposed solution.⁷⁸ The court seemed to fear that imposing such a duty on college administrators could lead to universities prioritizing their liability concerns over the health of the student:

[T]he “University” has a responsibility to adopt prevention programs and protocols regarding students self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective. In our view, the likelihood of a liability determination (even where a duty is established) is remote, when the issue of proximate causation (to be liable the university’s act/omissions would have to be shown to be substantial) is considered

⁷⁶ *Mahoney*, No. AD 892-2003, at 22.

⁷⁷ *Id.* at 23. The court noted that such a determination would be, in effect, an “attenuated and unarticulated form of ‘in loco parentis.’” *Id.* Under the *in loco parentis* doctrine, universities retained a significant amount of discretion over the management of their students, acting in place of the parents in a setting largely devoid of governmental or judicial interference. Courts shifted away from this doctrine in the 1960s and 1970s and moved toward treating students as independent persons with protected rights. During this time, universities were treated as bystanders, fiduciaries, or parties with a contractual relationship to the student. The *in loco parentis* doctrine has resurfaced with the implementation of a nationwide minimum drinking age of twenty-one and the expanded definition of university liability in the context of student deaths related to both suicide and alcohol consumption. See Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, *N.Y. Times*, Apr. 28, 2002, at E57.

⁷⁸ *Mahoney*, No. AD 892-2003, at 14–15.

Rather than create an ill-defined duty of due care the University and mental health community have a more realistic duty to make strides towards prevention.⁷⁹

The Pennsylvania court's concern that colleges may take a risk-avoidant view when faced with a potentially suicidal student seems justified. With different courts sending different messages to educational institutions, universities are faced with conflicting signals regarding the roles and obligations of university officials when it comes to suicide prevention. The *Shin* ruling, in particular, sends a disturbing message to college officials. *Shin* comes close to punishing officials who are actively involved with a student's treatment, as the more administrators are involved in the treatment and the more attuned they are to the student's problems, the more likely the suicide will be deemed as foreseeable and a special relationship will be found. The Pennsylvania court highlights this problem when it distinguishes the deans' involvement in *Mahoney* from the deans' involvement in *Shin*. While the deans in *Mahoney* met with Mahoney only a few times for disciplinary proceedings, the deans in *Shin* were actively involved in monitoring Shin's mental health condition: they referred her to counseling, admitted her to hospitals, met with her to discuss her condition, and evaluated her mental health and progress on a continuing basis. The deans who took a more hands-on approach to the student's health and well-being were thus subject to liability because the injury was now foreseeable while the deans who restricted their involvement in such affairs were not. Such rulings send a signal to universities that helping students with mental health problems may lead to future liability, while taking a more hands-off approach will not.

After the *Shin* settlement, many colleges said that they felt a need to "err on the side of getting students home, rather than helping them on campus."⁸⁰ The conflicting messages sent by courts resulted in a rising trend of implementing blanket mandatory-withdrawal policies, which force a student to withdraw from the university or its housing when a student engages in or is likely to engage in behavior that results in self-harm. These policies have led to a new wave of lawsuits based on allegations that such poli-

⁷⁹ Id. at 25.

⁸⁰ Capriccioso, Settlement in MIT Suicide Suit, supra note 25.

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cies violate the Americans with Disabilities Act and Rehabilitation Act by discriminating against those with mental health disabilities.⁸¹

IV. THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT

After the *Shin v. MIT* and *Schieszler v. Ferrum College* rulings, many universities instituted policies designed to distance the university from students who threaten or attempt to commit suicide. While some universities have responded to increasing concerns over mental health by improving their mental health facilities and programs,⁸² other universities have implemented forced-withdrawal policies that force students out of the university setting after they engage in suicidal behavior, alleging that such behavior violates the university's code of conduct. Some universities have also revoked housing privileges from students after a suicide attempt, claiming that such behavior violates the university's housing contract, and thus forced students to move off campus or back home with their parents.

Cornell University's policy, for example, states that "[s]eparation of a student from the university and its facilities may be necessary if there is sufficient evidence that the student is engaging in or is likely to engage in behavior that either poses a danger of harm to self or others, or disrupts the learning environment of others."⁸³ The policy is "meant to be invoked only in extraordinary circumstances, when a student is . . . unwilling to request a voluntary leave of absence, and such a leave may be necessary to protect the safety of that student . . . or others, or the integrity of the university's learning environment."⁸⁴ Pertinent examples of situations in which the policy may be invoked include "unresolved,

⁸¹ Such complaints also allege violations of the Fair Housing Act, but this is outside the scope of this Note. For information on the Fair Housing Act, see generally 42 U.S.C. § 3601 (2000).

⁸² MIT responded to *Shin* by creating a mental health task force, increasing staff numbers, extending hours at its mental health center, and promoting campus-wide awareness of mental health issues. Sontag, *supra* note 77.

⁸³ Cornell Univ. Policy Library, Involuntary Student Leave for Reasons of Personal or Community Safety 1 (Mar. 1999), http://www.policy.cornell.edu/CM_Images/Uploads/POL/vol7_2.pdf.

⁸⁴ *Id.* at 3.

ongoing, and serious suicidal threats.”⁸⁵ Thus, any student who makes a serious threat of suicide or who attempts suicide faces the inevitability of withdrawing from school, either voluntarily or after being compelled to do so by the university.

Forcing suicidal students to withdraw from school implicates the protections of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973, both of which protect students with disabilities from discrimination in the university setting. The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁸⁶ A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”⁸⁷

Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁸ An “individual with a disability” is defined as any person who has a physical or mental impairment that substantially limits one or more of such person’s major life activities, has a record of such an impairment, or is regarded as having such an impairment.⁸⁹ A disability must substantially limit one or more major life activities such as self-care, performance of manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.⁹⁰ Although phrased differently, the

⁸⁵ *Id.*

⁸⁶ 42 U.S.C. § 12132 (2000).

⁸⁷ *Id.* § 12131.

⁸⁸ 29 U.S.C. § 794(a) (2000). The term “program or activity” includes all of the operations of “a college, university, or other post-secondary institution, or a public system of higher education.” *Id.* § 794(b)(2)(A).

⁸⁹ *Id.* § 705(20)(B).

⁹⁰ *Id.* § 705(9)(B); see also *Goodman v. Potter*, 412 F. Supp. 2d 11, 14–16 (D.D.C. 2005).

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standards of the ADA and Section 504 are essentially the same, and the two statutes are ordinarily interpreted together.⁹¹

A. Judicial Interpretation of the Applicability of the ADA and Section 504 of the Rehabilitation Act to Exclusion of Suicidal Students from School Programs

In *Doe v. Hunter College*, the complaint alleged that the defendants had violated the ADA and Section 504 of the Rehabilitation Act by discriminating “against Plaintiff Doe by excluding her from participation in and denying her the opportunity to participate in or benefit from their programs, services[,] and activities” and alleged that the defendants “treated [her] unequally to students [who were] not disabled, [did] not have a history of or [were] not regarded as disabled.”⁹² Plaintiff also alleged that the policies had a disparate impact on people with depression.⁹³ The court found that Doe had adequately stated a claim for disability discrimination and refused to dismiss the case on summary judgment.⁹⁴

Doe involved a college student suffering from major depressive disorder.⁹⁵ She admitted to self-injurious behavior but was visiting both a psychiatrist and a licensed social worker and had been prescribed medication for her condition.⁹⁶ In June 2004, having forgotten to take her medication for several weeks, Doe took an overdose of Tylenol PM and dialed 911.⁹⁷ She was taken to the hospital and voluntarily admitted. The hospital determined she was not a threat to herself or others and released her four days later.⁹⁸ When Doe returned to her dormitory, however, she found that the locks

⁹¹ See, e.g., *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004).

⁹² Second Amended Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages at 20, *Doe v. Hunter Coll.*, No. 04 Civ. 6470 (S.D.N.Y. Sept. 23, 2005), available at <http://www.bazelon.org/pdf/Doe-v-Hunter-Second-Amended-Complaint.pdf>.

⁹³ Plaintiff's Memorandum of Law in Opposition to a Motion to Dismiss at 3, *Doe v. Hunter Coll.*, No. 04 Civ. 6470 (S.D.N.Y. Nov. 15, 2004), available at <http://www.bazelon.org/pdf/HunterOpp-Dismiss.pdf>.

⁹⁴ Order Denying Motion to Dismiss at 3, *Doe v. Hunter Coll.*, No. 04 Civ. 6470 (S.D.N.Y. Aug. 25, 2005), available at <http://www.bazelon.org/pdf/Doe-v-hunter-Order-denying-motion-to-dismiss.pdf>.

⁹⁵ Second Amended Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages, *supra* note 92, at 5.

⁹⁶ *Id.*

⁹⁷ *Id.* at 7.

⁹⁸ *Id.*

had been changed pursuant to the school's housing contract, which stated:

A student who attempts suicide or in anyway [sic] attempts to harm him or herself will be asked to take a leave of absence for at least one semester from the residence Hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the residence Hall. Additionally, students with psychological issues may be mandated by the Office of Residence Life to receive counseling.⁹⁹

The court held that “a discrimination claim need not establish a prima facie case in order to survive a motion to dismiss”; instead, all that is needed is “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁰⁰ Expanding further, the court stated that plaintiff's allegations did not “foreclose the possibility that even with reasonable accommodation she would be unable to meet the requirements for residence in [the dormitory].”¹⁰¹ Thus, the court found that, even if the defendants were to successfully argue that their policy did not constitute disparate treatment or intentional discrimination, Doe could still have a viable claim for defendants' failure to make reasonable accommodation. The case later settled for \$65,000 in damages and \$100,000 in attorney's fees.¹⁰² Accompanying the settlement was a letter from the New York Attorney General's office adding that the college's suicide policy was under review and would be superseded.¹⁰³

If other courts adopt reasoning similar to the *Doe* case, plaintiffs should be able to relatively easily establish claims that can survive summary judgment—something not yet achieved in the duty to notify suits and only occasionally achieved in wrongful-death suits.¹⁰⁴

⁹⁹ Id. at 9.

¹⁰⁰ Order Denying Motion to Dismiss, *supra* note 94, at 20–21.

¹⁰¹ Id. at 22.

¹⁰² Chaz Firestone, Policies on Suicide and Depression Land Two Schools in Court, *Brown Daily Herald*, Nov. 1, 2006, at 3, available at <http://media.www.browndailyherald.com/media/storage/paper472/news/2006/11/01/CampusWatch/Policies.On.Suicide.And.Depression.Land.Two.Schools.In.Court-2414439.shtml>.

¹⁰³ Press Release, Bazelon Ctr. for Mental Health Law, Hunter College Settles Lawsuit by Student Barred from Dorm After Treatment for Depression (Apr. 23, 2006), <http://www.bazelon.org/newsroom/2006/8-23-06-hunter-settlement.html>.

¹⁰⁴ See *supra* Part III for a discussion of wrongful-death and duty to notify suits.

This will lead to more lawsuits against universities and more expensive settlements.

Indeed, in the wake of *Doe*, a student named Jordan Nott filed suit against George Washington University, alleging that the university's mandatory-withdrawal policies were discriminatory and in violation of the ADA and Section 504.¹⁰⁵ In Nott's case, the university did not simply withdraw his housing privileges but threatened him with disciplinary charges, expulsion, suspension, and criminal charges if he did not withdraw from the university after he sought help for his depression.¹⁰⁶ Nott had recently been prescribed antidepressant medication after becoming depressed following a friend's suicide.¹⁰⁷ The depression continued and after reading about the adverse reactions some people have to the medication, Nott voluntarily checked himself into the George Washington University Hospital. He alleges that he was never actively suicidal at any time and did not make a suicide threat, gesture, or attempt at any point.

That same day, like *Doe*, the university informed him that consistent with the residence hall's policy on "Psychological Distress," as a "student who was subject to emergency psychological intervention or hospitalization, he was not permitted to return to his dorm room."¹⁰⁸ The next day, he was delivered a notice that he was suspended from the university and charged with a disciplinary violation for violating the School Code of Conduct by engaging in "Endangering Behavior."¹⁰⁹ The guidelines provided that "[b]ehavior of any kind that imperils or jeopardizes the health or safety of any person or persons is prohibited. This includes any actions that are endangering to self or to others."¹¹⁰ In response to proactively getting himself help, Nott was evicted from his dorm room, put on interim suspension by the university, and prohibited from attending classes, all before he even left the hospital. He was further barred from entry on university-owned or leased property

¹⁰⁵ First Amended Complaint at 4–5, *Nott v. George Washington Univ.*, No. 05-8503 (D.C. Super. Ct. Dec. 22, 2005), available at <http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf>.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ For a more detailed account of the facts summarized below, see *id.* at 4–14.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ *Id.* at 12.

and from attending university events. The university made it clear that if Nott were to come onto campus for any reason, he would be trespassing and could be arrested. Nott was offered the option to officially withdraw from the university. If he chose to do so, the charges would be deferred if he successfully completed the medical treatment prescribed to him, provided documentation that he had been symptom free for six months, and had been assessed by a professional as having the ability to live independently and perform successfully in a university environment; all other provisions of the suspension, including the bar from property, would remain in effect. The case was settled for an undisclosed amount.¹¹¹

B. Office of Civil Rights's Interpretation of Permissible University Suicide Policies Under Section 504 of the Rehabilitation Act

Nott and Doe are not alone.¹¹² Several students have filed complaints with the Office of Civil Rights ("OCR") within the Department of Education, the body charged with enforcing Section 504, alleging that they have faced similar situations. The OCR has sided with students suffering from mental illness in four recent cases, finding that such blanket mandatory-withdrawal policies violate Section 504 and constitute discrimination against students with mental health disabilities.¹¹³ Specifically, OCR regulations pertinent to postsecondary education state:

No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services¹¹⁴

¹¹¹ Roan, *supra* note 19.

¹¹² See, e.g., Capriccioso, *Counseling Crisis*, *supra* note 25 (documenting a student's account of being forced to take a mandated leave from New York University after she admitted to suicidal thoughts and signed into a hospital where she was treated for depression).

¹¹³ *Id.*

¹¹⁴ 34 C.F.R. § 104.43(a) (2007).

A recipient of federal funding “may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.”¹¹⁵

The OCR has issued general guidelines interpreting these provisions in relation to permissible university policies regarding suicide attempts. The guidelines state that Section 504 does not prohibit a postsecondary education institution from taking action to address an imminent risk of danger posed by an individual with a disability who represents a direct threat to the health or safety of himself or others, supporting in large measure existing university policies that attempt to distance suicidal students from the university.¹¹⁶ Such action must be grounded in sound evidence, however, and cannot be based on unfounded fears, prejudice, or stereotypes regarding students with psychiatric disabilities.¹¹⁷ In a direct threat situation, there must be a “high probability of substantial harm and not just a slightly increased, speculative, or remote risk.”¹¹⁸ Importantly, the institution must make an “individualized and objective assessment of the student’s ability to safely participate in the institution’s programs based on a reasonable medical judgment relying on the most current medical knowledge.”¹¹⁹ The assessment should look at the “nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk.”¹²⁰

The OCR has clarified that students cannot be removed simply out of fear that they will attempt suicide again after a prior attempt; instead, a claim that students pose a direct threat to themselves or others must be backed by direct evidence.¹²¹ Although an

¹¹⁵ Id. § 104.43(c).

¹¹⁶ Letter from Michael Gallagher, Team Leader, Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Jean Scott, President, Marietta Coll. 3 (Mar. 18, 2005), available at http://www.bsk.com/pdfinfomemos/Marietta_College.pdf [hereinafter Letter to Marietta] (sustaining a complaint alleging that the university had excluded a student from participation in its academic program on the basis of a disability when university officials were made aware of the student’s depression and history of suicide attempts).

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Letter from Rhonda Bowman, Team Leader, Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Lee Snyder, President, Bluffton Univ. (Dec. 22, 2004), available at

institution “may require as a precondition to a student’s return that the student provide documentation that the student has taken steps to reduce the previous threat,” the institution “cannot require that a student’s disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications.”¹²² In this way, the OCR prohibits blanket policies that do not take into account the student’s particular situation, requiring that each case be assessed on an individual basis.

Once an assessment has been completed, the university must give the student notice of its decision, and the student must be given an opportunity to provide evidence on his or her own behalf. The OCR requires that proper grievance procedures be put in place and publicized, and that those procedures incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504.¹²³ The OCR further requires that universities rectify any specific violations that were identified during the Section 504 investigation.¹²⁴ The students in question were reimbursed by their schools for any expenses that they incurred due to the universities’ discriminatory behavior, and if applicable, were allowed to return

http://www.bsk.com/pdfinfomemos/Bluffton_University.pdf [hereinafter Letter to Bluffton] (sustaining a complaint alleging that the university excluded a student from participation in its academic program on the basis of a disability after the university demanded the student either withdraw immediately or be indefinitely suspended following an attempted suicide).

¹²² Letter from Team Leader, Office for Civil Rights, U.S. Dep’t. of Educ., to Father Bernard O’Connor, President, DeSales Univ. 4, available at http://www.bsk.com/pdfinfomemos/DeSales_University.pdf [hereinafter Letter to DeSales] (sustaining a complaint alleging that the university discriminated against a student by forcing him to leave campus and denying him the opportunity to live in campus housing due to suspected mental and psychological disorders). Examples of steps that a university may take before readmission include requiring a student to follow a treatment plan, submit periodic reports, or grant permission for the institution to talk to any treating professionals. *Id.*

¹²³ Such due process standards provide that, where safety is of immediate concern, a college may take interim steps pending a final decision regarding adverse action against a student, as long as minimal due process, such as notice and an opportunity to address the evidence, is provided in the interim. Full due process, including a hearing and the right to appeal, must be offered later. *Id.* at 4.

¹²⁴ See, e.g., *id.*

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as students to their home institutions.¹²⁵ The complaints were then closed, but the OCR made clear that cases would be reopened if any schools fail to fully implement their compliance agreements with the OCR.¹²⁶

Both the courts and the OCR have sent strong signals to universities that mandatory-withdrawal policies from campus housing and academic programs will not be tolerated. The OCR will undoubtedly continue to find blanket withdrawal policies discriminatory in violation of Section 504. If a court receives an opportunity, there is a chance that it too will find that such policies discriminate against those with mental disorders. Because ninety percent of adolescent suicide victims have at least one diagnosable, active psychiatric illness at the time of their death, evidence suggests that these policies do have a disparate impact on individuals with mental disabilities.¹²⁷ At the very least, blanket policies that do not allow for individual assessment will be struck down for failure to make reasonable accommodations for particular students. Either way, universities will face consequences for their discriminatory behaviors once a complaint is filed, whether in the form of large settlements and court fees or smaller reimbursement fees and policy reforms.

Whether or not colleges and universities will proactively reform their policies to comply with OCR regulations is another question, however, especially when the end consequence of the OCR complaint system is simply forced compliance with Section 504 and payment of small reimbursement fees to the student bringing the complaint. If universities perceive the risk and costs of discrimination suits or OCR complaints to be less than the risk and costs associated with wrongful-death suits, there may be little incentive for universities to reform their discriminatory policies before a complaint has been lodged against them.

¹²⁵ See Letter to Bluffton, *supra* note 121, at 6 (noting that, pursuant to its agreement with the OCR, the university would reimburse the student for any room fees and books for the spring semester); Letter to Marietta, *supra* note 116, at 5 (explaining that the college, pursuant to its agreement with the OCR, would send an offer of readmission to the student alleging wrongful discrimination).

¹²⁶ See, e.g., Letter to Marietta, *supra* note 116, at 5.

¹²⁷ Pavela, *supra* note 12, at 92.

C. The Ongoing Debate over Forced-Withdrawal Policies

Many universities continue to defend their policies despite possible discriminatory effects, viewing them not simply as precautionary measures to avoid liability but rather as the best option for the health and well-being of the student and the university as a whole. Some advocates for existing policies note that schools have a right and obligation not to let one person's disturbing behavior disrupt another's educational experience. Professor Peter Lake of Stetson University stresses that "[a] lot of suicidal people don't just kill themselves They also can hurt others, even if it's unintentionally."¹²⁸ Administrators argue that they cannot only look at the individual but must take into account the other students in the dormitory and at the school. Policy reform would not only increase the risk of liability for wrongful-death suits, they reason, but would also increase the risk of liability for universities if the suicidal student decides to harm others as well. In the wake of the tragedy at Virginia Tech, there is no doubt that these concerns will have a particularly powerful influence on any university's decision to reform its discriminatory policies prior to a student lodging a complaint, for fear of keeping students on campus who may pose a direct threat to themselves or their peers.

Others have suggested that mandatory-withdrawal policies can force emotionally distressed students to get the best help possible. Tracy Schario, a spokeswoman for George Washington University, defended the position taken with Nott, stating: "Time away provides relief from the stress of campus and academic life in order for students to recover and learn to manage their symptoms and psychological concerns. We hope and expect that these students will recover, return to campus and function fully as successful students."¹²⁹ While there is no doubt that many university officials have the best intentions when dismissing a student, these statements may mask university officials' underlying desire to wash their hands of potentially suicidal students and avoid future liability.

Cornell University, for example, pushes as many as one hundred of its students each year to take voluntary medical leave, citing the

¹²⁸ Rawe & Kingsbury, *supra* note 25, at 63.

¹²⁹ Capriccioso, *Counseling Crisis*, *supra* note 25.

importance of getting help and having time to de-stress.¹³⁰ One student who voluntarily withdrew from the university after admitting to suicidal thoughts expressed disappointment that Cornell had not made any follow-up calls to see if she was making progress in the months following her dismissal. Cornell's deputy counsel explained the lack of follow up: "Once the student is gone or goes home, the individual becomes the responsibility of parents. Our obligation ends."¹³¹ At the University of California, one student who voluntarily withdrew from the university and arranged for outpatient psychiatric care for her bipolar disorder and suicidal ideation found that once she had recovered and sought to return to her studies, the university did not want her back. The student was subsequently readmitted after she wrote the university a letter accusing them of discrimination.¹³² Policies refusing readmittance to students suffering from mental illnesses suggest a desire on the part of university officials to take a hands-off approach distancing the university from problem students, rather than a commitment to having students get the help that they need so that they can return at a later date and successfully complete their education.

While some psychiatrists and student advocates view time away from school as beneficial to the student's well-being, others are adamant that such treatment not only violates antidiscrimination laws but also is detrimental to the student's health.¹³³ In essence, mandatory-withdrawal policies "punish" students who come forward and proactively seek treatment for their suicidal thoughts and behaviors, making it less likely that a student will come forward independently or notify a friend or confidant about his or her suicidal thoughts. Students forced to withdraw have echoed this concern. Nott stated that while he would seek help from a professional outside the university setting, he would never seek help at a campus counseling center again.¹³⁴ Anne Giedinghagen, a student dismissed from Cornell after admitting to thoughts of suicide while struggling

¹³⁰ Rawe & Kingsbury, *supra* note 25, at 63.

¹³¹ *Id.*

¹³² Roan, *supra* note 19, at F6.

¹³³ Rawe & Kingsbury, *supra* note 25, at 62 (noting that "a tragic result [of mandatory leave policies], say psychiatrists and student advocates, is that emotionally distressed students may be less willing to come forward and get the professional help they need").

¹³⁴ Capriccioso, *Counseling Crisis*, *supra* note 25.

with anorexia, admits that she feigned improvement after she was told she would have to get better or leave the university. Summing up her experience, she explained, “I felt like I had to hide how I was doing from my doctor, my counselor, [and] my nutritionist, so that I could stay.”¹³⁵ Mandatory-withdrawal policies may also make the friends of suicidal students more reluctant to report early warning signs of suicidal tendencies to deans or resident advisors out of fear that their friend will face serious repercussions.¹³⁶ Thus, by encouraging students to hide signs of their mental illness in order to avoid forced withdrawal from school, mandatory-withdrawal policies may be counterproductive to the goal of ensuring that students who need medication and psychological services receive treatment.

Karen Bower, senior attorney and spokesperson for the Bazelon Center for Mental Health Law, highlights another problem: “When [students are] at their most vulnerable and [are] seeking attention for severe depression, imposing disciplinary action on them—[for example,] sending them from the campus [or] evicting them from the dorm, does not help them It may worsen their depression, and it certainly isolates them from their support system.”¹³⁷ One Yale student, forced to withdraw by the university for mental health reasons, described being “shocked” and “disoriented” when she found herself no longer enrolled at the university: “I was angry and upset when I was made to withdraw,” she stated. “[I thought], ‘You’re pushing me out into the cold. I’ve lost my occupation, lost my social base.’ It was a little like I didn’t know where to go.”¹³⁸ Such social isolation may be felt particularly strongly in a case such as Nott’s, where he was not only asked to leave the university but also was barred from even setting foot on campus to visit with friends and attend university functions. There is evidence, in fact,

¹³⁵ Rawe & Kingsbury, *supra* note 25, at 62.

¹³⁶ In *Jain* and *Schieszler*, reports from friends and significant others to resident advisors and campus officials played an important role in making university officials aware of the student’s suicidal intentions, and in *Schieszler*, they played a role in getting the student into counseling. See *Jain*, 617 N.W.2d at 295; *Schieszler*, 236 F. Supp. 2d at 605, 609; see also *Shin*, 19 Mass. L. Rptr. at 571–72, 2005 WL 1869101, at *2–5. Policies that deter others from reporting these actions may thus decrease the likelihood that university officials will become aware of the suicidal student’s condition and help to get the student counseling and treatment.

¹³⁷ Firestone, *supra* note 102, at 6 (quotation omitted).

¹³⁸ Jessica Feinstein, *Withdrawn Students Face Negative Stigma*, Yale Daily News, Feb. 11, 2004, available at <http://www.yaledailynews.com/articles/view/10006#>.

that the college support system may decrease the probability that a student will successfully commit suicide. For example, at the Big Ten universities, from the period of 1980 to 1990, the overall student suicide rate was 7.5 students for every 100,000 enrolled students.¹³⁹ This is approximately half of the computed national suicide rate of fifteen suicides for every 100,000 individuals for a matched sample by age, gender, and race.¹⁴⁰ Although the actual cause for such differences is unknown, this example suggests the possibility of a positive correlation between college enrollment and a decrease in suicide rates. Forced withdrawals pose financial as well as social and educational costs. For the Yale student who was forced to withdraw for mental health reasons, withdrawal from the university caused her to lose both her university-based health insurance and access to trusted campus psychiatrists.¹⁴¹ The loss of medical insurance may force students to stop attending counseling sessions or to switch to less effective forms of medication, or it may make medication unaffordable altogether. Switching psychiatrists can have similar results as students may not want to start therapy from the beginning again with someone whom they do not trust.

D. Alternatives to Mandated-Leave Policies

Even if university officials cannot implement blanket mandatory-withdrawal policies, their hands are not completely tied when it comes to addressing potentially suicidal students. The University of Illinois implemented a successful and affordable suicide-prevention program in the fall of 1984, requiring any student who threatens or attempts suicide to attend four sessions with a professional for a mandatory assessment of the student's mental health.¹⁴² If students choose not to comply with the program, they may then be forced to withdraw from the university. Previously, the school had implemented a policy that had only encouraged students who had attempted suicide to visit with campus therapists. University

¹³⁹ Silverman et al., *supra* note 15, at 285, 293.

¹⁴⁰ *Id.* at 285, 292–95.

¹⁴¹ Feinstein, *supra* note 138.

¹⁴² “It is estimated that the annual costs of the program are \$10,000.00 a year for training and administration and \$40,000.00 a year for treatment. Distributed among 37,000 students, this averages out to an expense of \$1.35 per student.” Joffe, *supra* note 39, at 9, 23–24.

officials found that very few students chose to meet with the psychologists. Instead, after a suicide attempt, a significant number of students reported having fully recovered from their previous suicidal ideations, thus denying any need to meet with a therapist.¹⁴³ Others would agree to meet with a therapist but never actually schedule an appointment or would schedule an appointment and not keep it.¹⁴⁴ In the end, it was estimated that less than five percent of students met with a social worker or psychologist at least four times after a suicide attempt or threat.¹⁴⁵ This was particularly disturbing in light of evidence estimating that students who threaten or attempt suicide are 543 times more likely to commit suicide in the following year than their classmates who have not made previous threats or attempts.¹⁴⁶ Thus, in 1984, in an attempt to increase the number of students who received some form of therapy, the university made such sessions mandatory.¹⁴⁷

The university now requires all University of Illinois Student Affairs personnel to submit a Suicide Incident Report Form (“SIRF”) to the university’s counseling center when they have convincing evidence or information that a student has “threatened or attempted suicide, engaged in efforts to prepare to commit suicide or expressed a preoccupation with suicide.”¹⁴⁸ The SIRFs are not evaluations of a student’s mental health or suicidal risk, but merely demonstrate that a particular student has “crossed the line from passing thoughts of suicide to concrete and observable actions.”¹⁴⁹ Once a report has been made, a mental health professional meets with the student and assesses his or her past and current suicidal ideations.¹⁵⁰ The therapist then explains to the student the university’s standard of self-welfare and the consequences that may arise

¹⁴³ *Id.* at 9.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.* at 9; University of Illinois Counseling Center, Mandated Assessment Following Suicide Threats and Attempts (Aug. 6, 2004), <http://www.couns.uiuc.edu/SuicidePolicy.html>.

¹⁴⁸ University of Illinois Counseling Center, *supra* note 147.

¹⁴⁹ Joffe, *supra* note 39, at 11.

¹⁵⁰ University of Illinois Counseling Center, *supra* note 147.

if the student fails to maintain that standard of self-welfare in the future.¹⁵¹

The University of Illinois model also safeguards students' due process rights. Students have the right to appeal the accuracy of the events outlined in the SIRF to the Suicide Prevention Team ("the Team"). On appeal, the members of the Team will contact and interview witnesses to the incident to assess the facts surrounding the suicide attempt or threat. A majority of the Team must believe a report to be unfounded in order to drop and deactivate the suicide incident report. However, once the accuracy of the facts in the suicide incident report are verified, the requirement of four mandatory counseling sessions is not subject to appeal. If a student disagrees on elements other than the accuracy of the report, "such as whether the events in question cross the threshold of what constitutes a suicide threat or attempt or whether the professional he or she has retained meets the requirements of the program," the student may then appeal the Team's decision to the Dean of Students.¹⁵² The Dean's decision is final.¹⁵³

Overall, the program appears to have been successful. The percentage of students meeting the standard of four sessions went from an estimated five percent to an estimated 90 to 95% after the program's implementation.¹⁵⁴ From 1984 to 2002, 1531 suicide incidents were reported to the Team. The Team found that the rate of suicide at the university decreased from a rate of 6.91 per 100,000 enrolled students during the eight years prior to the program's implementation to a rate of 3.08 per 100,000 during the eighteen years following its implementation.¹⁵⁵ This represents a reduction of 55.4%, whereas the national suicide rate increased by 2.6% from 1976 to 2002.¹⁵⁶ A study comparing student suicides at the University of Illinois with other schools in the Big Ten found that the rate

¹⁵¹ See *id.* ("The University of Illinois expects and encourages students to maintain a reasonable concern for their own self-welfare. One of the times the University formally requires that such a concern be maintained is in the area of suicide."); see also Joffe, *supra* note 39, at 11–12.

¹⁵² University of Illinois Counseling Center, *supra* note 147.

¹⁵³ Joffe, *supra* note 39, at 13; University of Illinois Counseling Center, *supra* note 147.

¹⁵⁴ Joffe, *supra* note 39, at 15.

¹⁵⁵ *Id.* at 15–16.

¹⁵⁶ *Id.* at 16–17.

of student suicide at the University of Illinois decreased by 74.7% during the six years immediately following the program's implementation, while the suicide rate at other Big Ten schools increased by 9.1%.¹⁵⁷ Of those students who did commit suicide during the eighteen years following the program's implementation, none had been the subject of a Suicide Incident Report Form, and there has been no subsequent information to suggest that any of the students subject to SIRFs committed suicide in the years following graduation, indicating that the program may have lasting effects on participating students.¹⁵⁸ Further, no student has ever chosen to withdraw from the school to avoid participation in the assessments. In the eighteen years following the program's implementation, only one student was withdrawn by recommendation of the Team.¹⁵⁹

Not only does the University of Illinois program appear to be successful in reducing the rate of student suicide and increasing the number of at-risk students who receive some form of counseling, it also appears to be in accordance with the ADA and Section 504 and, thus, the OCR's established guidelines with respect to university suicide policies. By focusing solely on the student's past and current suicidal tendencies, applying the policy of four sessions of professional assessment uniformly to all students who attempt or threaten suicide, and by making no assumptions about the underlying mental health of the student, while at the same time making individualized assessments and adhering to due process standards, the program is able to function in accordance with the ADA.¹⁶⁰

The University of Illinois model also benefits administrators. By filling out a Suicide Incident Report Form for even the smallest of grievances, administrators not only know who to monitor more closely but also become aware of more serious situations that may trigger the health-emergency exception under FERPA. The university's policies specifically highlight for students that after a "par-

¹⁵⁷ *Id.* at 16–18. In comparison to the rate of 3.08 suicides at University of Illinois in the eighteen years following implementation of the program, the overall student suicide rate at the Big Ten schools was 7.5 per 100,000 enrolled students, while the national suicide rate was 15 per 100,000 individuals for the period of 1980 to 1990. Silverman, *supra* note 15, at 285, 292–95.

¹⁵⁸ Joffe, *supra* note 39, at 17.

¹⁵⁹ *Id.* at 19.

¹⁶⁰ *Id.* at 14.

ticularly *potentially* lethal suicide attempt” or repeated suicide attempts, a student’s parents may be informed, indicating that the university has accepted its own definition of the FERPA health-emergency exception that allows for parental notification.¹⁶¹ Administrators can use the reports to inform a student’s parents as to an attempted suicide in the most extreme cases and get them involved in the student’s treatment process. Such a practice would not only be beneficial to the student but may help to limit a university’s future liability in a wrongful-death suit if treatment fails to secure the student’s safety.

The University of Illinois system as a whole may also be viewed as more fair by students since students are not asked to withdraw from the university for voluntarily seeking help for a mental health problem and are not punished for simply suffering from a mental disorder. Although the program is based around the threat of withdrawal, the program strongly encourages continued enrollment even after a particularly serious suicide attempt.¹⁶² By having a professional explain the university’s standard of self-welfare, the breach of which may lead to consequences such as forced withdrawal, students also know exactly what to expect if they continue to engage in self-endangering behavior. If the student is ultimately required to withdraw, the shock is far less jarring. Instead of coming home from a hospital to find the dorm room locked or receiving notice of expulsion within hours after a suicide attempt, the student will have already gone through an extensive professional review process.

The policy option illustrated by the University of Illinois suicide-prevention program is a reasonable compromise between a student’s right to attend college free from discrimination and the university’s desire to both limit its own liability as well as protect the health and well-being of students and those around them. While policies based on those at the University of Illinois might provide

¹⁶¹ University of Illinois Counseling Center, *supra* note 147.

¹⁶² Joffe, *supra* note 39, at 19. From 1976 to 2002, only one student was asked to withdraw from the university. The student in question was subject to four SIRFs in a span of two weeks, two of which resulted in hospitalization. Although the original recommendation was that the student not be allowed to re-enroll for ten months, the student continued to meet weekly with her therapist and successfully petitioned to return to school only three months after her withdrawal. *Id.*

similar benefits for both university students and administrators in Virginia, new state legislation may limit the ability of universities in Virginia to implement such a policy successfully. On March 21, 2007, Governor Tim Kaine signed into law a bill that prohibits state universities from penalizing or expelling students solely for attempting or threatening suicide.¹⁶³ Bill sponsor Albert Eisenberg said he introduced the bill in response to the situations faced by Nott and Doe. "It just haunted me that these young people were faced with these crises and we were not fully, adequately able to put our arms around them and help them in some way The bottom line is that I expect and hope that we will save some lives."¹⁶⁴ While the law was passed with obvious good intentions, the language is vague enough to potentially confuse an already muddled area of the law. The statute reads:

The governing boards of each public institution of higher education shall develop and implement policies that advise students, faculty, and staff, including residence hall staff, of the proper procedures for identifying and addressing the needs of students exhibiting suicidal tendencies or behavior. The policies shall ensure that no student is penalized or expelled solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behaviors. Nothing in this section shall preclude any public institution of higher education from establishing policies and procedures for appropriately dealing with students who are a danger to themselves, or to others, and whose behavior is disruptive to the academic community.¹⁶⁵

The first part of the bill requires a university to adopt specific suicide policies and procedures for addressing suicidal students but does not allow a university to automatically subject students to expulsion or penalization for suicide attempts. A portion of the bill is then designed to reserve the rights of universities to cope with students who are disruptive or a danger to themselves or others, thus giving universities some leeway when addressing potentially dangerous students.

¹⁶³ Va. Code Ann. § 23-9.2:8 (Supp. 2007).

¹⁶⁴ Zinie Chen Sampson, *Bill Would Ban School Penalty for Suicide Try*, Daily Press (Newport News, Va.), Feb. 24, 2007, at C6.

¹⁶⁵ Va. Code Ann. § 23-9.2:8.

Although the University of Illinois program is not necessarily inconsistent with the Virginia law, it is unclear what policies and procedures a university can adopt that would not count as “penalizing” a student who has attempted or threatened suicide. Before the Virginia statute was signed into law, Greg Naylor, President of the Virginia Association of College and University Housing Officers (“VACUHO”), criticized the language of the bill, arguing that it could lead to an increase in lawsuits because any treatment a university requires for a student could be construed as punishment and could be prohibited because it penalizes the student for his or her suicide attempt or threat.¹⁶⁶ The same could be said to apply to any mandatory assessments required by the university, thus making it harder to implement the model procedures of the University of Illinois. VACUHO and the Virginia Association of Student Personnel Administrators (“VASPA”) urged the governor to veto the legislation and replace the final language with the following new language:

No part of this bill is intended to prevent colleges and universities in Virginia from: (1) requiring a student to seek appropriate mental health help; (2) removing said student from the institution if he/she refuses to seek appropriate mental health help; (3) removing a student from the institution who has become disruptive to the campus community and is impairing the educational pursuits of other students; and (4) requiring a student to take a ‘medical leave of absence’ from the institution if the institution can not guarantee the safety of the student or the safety of other students, until such time appropriate mental health professional [sic] deem the student ready to return to the institution as a fully functioning independent student.¹⁶⁷

¹⁶⁶ Greg Esposito, Kaine Likely to Sign Suicide Bill, Roanoke Times, Mar. 17, 2007, at Virginia 3.

¹⁶⁷ Id. Provision (4) of the proposed language, which requires the student to reach the status of a “fully functioning independent student,” may not meet the OCR’s guidelines for compliance with the Rehabilitation Act. A university may not condition the provision of a benefit on a showing by the student that he has eliminated behaviors that are a manifestation of his disability and the college must provide reasonable accommodations and modifications for the student if necessary. A university can, however, deny a benefit to a student if he or she poses a “direct threat” to the student

Adoption of statutory language like that proposed by VASPA in clauses (1) and (2) would provide universities with clearer guidelines in formulating policies aimed at suicide prevention. Currently the bill specifies only that expulsions for students who attempt or threaten suicide are prohibited. Similarly, the proposed language in clause (4) would give state universities the flexibility necessary to address suicidal students who may pose a danger to other students. Clause (4) thus also helps to calm any fears that may exist in the wake of the Virginia Tech tragedy about allowing suicidal students to remain on campus. Safeguards should be put in place, however, to ensure that clauses (3) and (4) do not become catchalls for sending home any student who makes a suicide threat or attempt. Instead, these provisions should be restricted to those students who have displayed a series of warning signs and pose a particularly extreme threat to themselves, others, or the campus setting. If other states choose to follow Virginia and propose similar statutes, they should attempt to be as clear and specific as possible so that the legislation serves the particular purpose of clarifying for the university what is and is not allowed with regard to college suicide policies.

V. SUGGESTIONS FOR REFORM

This Note argues that universities should strive to implement policies that strike a balance between a suicidal student's rights and treatment needs, and universities' abilities to cope with students who pose a danger to themselves or others. Implemented policies should protect students' rights by conforming with the privacy laws outlined by FERPA and the antidiscrimination laws set forth by the ADA and Section 504, while addressing the liability concerns of university administrators. In order to achieve this balance, this Note recommends the implementation of state legislation to protect suicidal students from discrimination, the clarification of privacy guidelines, and a move away from the current foreseeability test and toward a new foreseeability test. The new test would allow a good-faith exception for university administrators who are deemed to be "on notice" of a student's impending suicide specifi-

or to others, or if reasonable accommodations cannot be made. 29 U.S.C. § 794 (2000); 34 C.F.R. § 104(b) (2007); Letter to DeSales, *supra* note 122.

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cally because of their active involvement in that student's treatment. This change would give universities the freedom to establish suicide policies that mirror those of the University of Illinois, offering university officials flexibility when dealing with suicidal students while simultaneously protecting the suicidal student's rights.¹⁶⁸

A. University Policies

In the aftermath of the Virginia Tech tragedy, many universities and colleges are faced with increased pressure to re-evaluate the balance between the privacy and civil rights of students with mental health disabilities on one hand and the safety of other students (as well as exposure to wrongful-death liability) on the other hand. In light of the tragic events at Virginia Tech, university officials across the country may be likely to tip this balance in favor of providing increased campus security, potentially at the expense of the rights of mentally troubled students.

Days after the shooting, Stephen Trachtenberg, president of George Washington University, addressed the various concerns that face university administrators when deciding whether or not to allow a student to remain on campus, using the tragedy and the difficulties of striking a balance between university security and the rights of the suicidal student as an attempt to justify the university's treatment of suicidal students.¹⁶⁹ Referencing Jordan Nott's forced withdrawal,¹⁷⁰ Trachtenberg explained:

Ultimately, the university decided that an interim involuntary leave was the best course of action to protect a life. We were

¹⁶⁸ While it may be suggested that legislation should be enacted requiring state universities to adopt the specific suicide policies of the University of Illinois, I believe that universities should retain flexibility in their ability to construct effective suicide policies. I merely suggest that universities try to mirror the policies of the successful Illinois model. Mental health trends have changed significantly during the past decade, and they will continue to change. What has proven to be effective and successful for universities today may be found to be ineffective in the near future. As changes in legislation are often cumbersome and slow, universities themselves are in a better position to quickly judge whether a particular model is right for that particular institution, or if changes to the model are necessary.

¹⁶⁹ Stephen Joel Trachtenberg, *Our Worst Nightmare*, Wash. Post, Apr. 19, 2007, at A27.

¹⁷⁰ See *supra* notes 105–11 and accompanying text.

sued by the former student, and the media and others were quick to fault the university Had the student stayed at GW and hurt himself or others, it's likely the criticism would have been that the university should have done even more. We probably still would have faced a lawsuit. In this case, we stand by the result that a life may have been saved.¹⁷¹

An e-mail sent out by Patricia M. Lampkin, vice president and chief student affairs officer of the University of Virginia, in response to parents concerned after the Virginia Tech shooting, offered another administrator's perspective on how the tragedy should affect the university's suicide intervention policies. Lampkin suggested the policies chosen should encourage students to get the psychological counseling and medication that they need for proper treatment of their disabilities so that the chance that a student will cause harm to himself or to others will be reduced.¹⁷² The e-mail also highlights examples of some of the rash and overly cautious policies that have been suggested by concerned parents and community members following a rare but tragic event:

[M]any of you have raised the possibility of removing from the University students struggling with significant mental disorders Many of you also have raised questions regarding our ability to notify you in the event we learn that your son or daughter develops serious mental health concerns while here Some of you have asked whether the University plans to seek legislative change in this area. Others have suggested that we require students to sign mandatory consent forms for parental notification as part of our enrollment process.¹⁷³

Rather than suggesting a policy shift toward a mandatory-withdrawal policy, however, Lampkin properly used the e-mail to inform parents of the current university procedures in place and the laws that they must comply with when addressing a student with a mental disorder. Looking to the bigger picture, she noted that the university was "committed to ensuring that [its] policies

¹⁷¹ Trachtenberg, *supra* note 169.

¹⁷² E-mail from Patricia M. Lampkin, Vice President and Chief Student Affairs Officer, University of Virginia, to Parents of University Students (Apr. 23, 2007) (on file with the Virginia Law Review Association).

¹⁷³ *Id.*

continue to support . . . students in seeking the help they need” and cautioned parents about some of their responses, noting that “[n]one of us would want broader notification to lead to a student’s decision not to access our mental health professionals for fear of possible consequences.”¹⁷⁴

Most universities have moved away from the trend of discriminatory policies espoused by Trachtenberg and instead have implemented policies similar to those of the University of Illinois, which place emphasis on counseling and treatment instead of expulsion. It is important that other universities do not follow George Washington University’s lead and attempt to justify a move back to more discriminatory policies based on safety concerns. Instead, universities should reassess their current policies, using the policies of the University of Illinois as a model, to ensure that their procedures comply with the ADA, the Rehabilitation Act, and FERPA, while simultaneously giving the university the flexibility to keep both the suicidal student and his or her peers safe.

University administrators should be careful when creating policy out of tragedy, as such reforms may be charged with emotion and too extreme. Hundreds of thousands of students seek counseling at university health centers every year, many of whom have serious mental disorders, but the vast majority of those students will never hurt anyone at all, let alone others. Mandatory-withdrawal policies indiscriminately curtail the rights of all individuals seeking mental health treatment rather than properly identify only those students who are a danger to themselves or others. University officials should instead focus on the goal of adopting policies that not only protect students’ rights but also encourage students to get the necessary treatment that they need.

B. State Legislation

In order to avoid the curtailment of rights and facilitate the treatment of suicidal students, state legislation should build upon the model in place in Virginia, which requires universities to implement student suicide policies and prohibits the blanket expulsion or penalization of a student based solely on a suicide attempt or threat. Although far from perfect, the Virginia legislation con-

¹⁷⁴ Id.

tains many basic concepts that help to ensure the implementation of nondiscriminatory university suicide policies. The Virginia model, though, should provide only a starting point for other states to expand upon.

In following the Virginia model, future legislation should require each university to develop, implement, and advertise policies that advise students, faculty, and staff of the appropriate procedures for identifying and addressing the needs of suicidal students. New state legislation should also make clear that no student should be expelled solely for attempting suicide or seeking treatment for their suicidal thoughts, thus putting a definitive end to forced mandatory-withdrawal policies. States should depart from the Virginia model, however, by clearly enumerating the rights and duties of universities and delineating what administrators may or may not do in the wake of a suicide threat or attempt.

I suggest that, instead of a vague prohibition against a student being “penalized or expelled solely for attempting to commit suicide,” future statutory language include a more inclusive list of actions that a university administrator may or may not take in response to suicidal behavior. While expulsions are specifically prohibited under the Virginia legislation, the act lumps all other possible penalties together, making no distinction between more severe penalties, such as suspension, withdrawal, academic encumbrances, disciplinary charges, and criminal charges, and less severe penalties, such as mandatory counseling or treatment, behavioral contracts, and the notification of a suicidal student’s parents.

Future statutory language instead should specifically list and prohibit the more severe penalties, with a general catchall provision for like penalties not contemplated by the state legislature, and should specifically grant university administrators permission to apply other less severe penalties, with a similar catchall provision for like penalties not contemplated. In particular, the statute should make clear that the university may require a student to seek appropriate mental health treatment or counseling before returning to the university setting. Such language would thus clarify for university administrators which suicide policies would be prohibited under the statute and which would be allowed, and would explicitly ensure that a policy like that of the University of Illinois would not violate the statute.

Future legislation should also contain provisions similar to the language suggested by VASPA, allowing universities to remove a student from the university setting if he or she has become disruptive to the campus community. VASPA also allows universities to require a student to take a “medical leave of absence” from the university if the university cannot guarantee the safety of the student or the safety of the student’s peers, until the student is deemed ready to return to the university by a mental health professional. Safeguards should be put in place, however, to ensure that such provisions do not become a catchall for sending home any student who makes a suicide threat or attempt, thus providing universities with a backdoor way to discriminate against students with mental health disabilities. Instead, these provisions should apply only in extreme cases where there is a significant amount of concrete evidence that a student has engaged in potentially dangerous or suicidal behavior. Legislation that permits universities to intervene when faced with a potentially suicidal student would turn muddled laws into clear guidelines that would allow for the implementation of university suicide policies that conform to the requirements of the ADA and the Rehabilitation Act.

C. Federal Legislation

Another way in which universities can avoid a major curtailment of students’ rights while simultaneously encouraging students to get the best help possible is through FERPA and, in particular, the FERPA exceptions that allow for parental notification. The Virginia Tech Review Panel highlighted the many shortcomings of the current federal privacy laws, stating that the vagueness of the laws and inconsistent use of discretion on the part of university officials were among the major problems that allowed the Virginia Tech tragedy to occur. The panel made several recommendations to alleviate the lack of clarity in the laws. First, the panel suggested that accurate guidance from the state attorney general’s office be given to universities to improve understanding of the laws and clarify what information can be shared by organizations and individuals concerning students with mental health problems.¹⁷⁵ In addition, the panel recommended that FERPA shield persons and organiza-

¹⁷⁵ Va. Tech Review Panel, *supra* note 1, at 68.

tions from “liability (or loss of funding) for making a disclosure with a good-faith belief that the disclosure was necessary to protect the health, safety, or welfare of the person involved or members of the general public.”¹⁷⁶ The panel also recommended amendments to FERPA, among them that FERPA should allow more flexibility in its “emergency” exception in an effort to avoid the perception that nondisclosure is always a safer choice.¹⁷⁷

Legislation similar to the panel’s recommendations has already been introduced by Representative Tim Murphy (R-Pa.). The proposed bill, the Mental Health Security for America’s Families in Education Act, would amend FERPA to allow institutions of higher education to disclose to a parent of a dependent student “information related to any conduct of, or expression by, [that] student that demonstrates that the student poses a significant risk of harm to himself or herself, or to others, including a significant risk of suicide, homicide, or assault.”¹⁷⁸ Before a university may disclose this information to the student’s parents, the bill requires that (1) the student must first have consulted with an approved mental health professional, and (2) the university must receive written certification from that professional that the student poses a significant risk of harm to himself or herself or to others and that possession of such information by the parent is necessary to protect the health and safety of the student or others.¹⁷⁹ The bill also safeguards the university by proposing a section that states that an educational agency or institution that, in good faith, discloses educational records for the above purposes would not be liable to any person for that disclosure.¹⁸⁰

While the amendment clarifies the fact that parents of dependent students may be notified in situations involving self-harm or threats to others, the amendment combines the two exceptions into one rather than fleshing out each exception and making it separate and clear. Parental access to dependent students’ educational records is already allowed under the general exception, Section

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 69.

¹⁷⁸ Mental Health Security for America’s Families in Education Act of 2007, H.R. 2220, 110th Cong. § 3 (2007).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

1232g(b)(h), and emergencies are also considered to be an exception to the privacy laws of FERPA under Section 1232g(b)(i). The amendment thus combines the two exceptions together but fails to clarify the meaning of the health-emergency exception under Section 1232g(b)(h) with regard to independent students.

An alternative that would apply to both independent and dependent students alike would be an alteration of the general health-emergency exception, under Section 1232g(b)(i). Such an amendment could clarify the fact that any conduct of, or expression by, the student that demonstrates that a student poses a significant risk of harm to himself or to others, including a significant risk of suicide or homicide, qualifies as a health emergency that could be disclosed to parents. Requirements relating to medical consultation could remain in place but the change would ensure that the emergency exception becomes broader rather than even narrower than before, clearly applying to all students at the university regardless of dependent status.

D. Proactive Notification

Legislative clarification of the FERPA exceptions would be a step in the right direction; nonetheless, parents and universities should also act proactively themselves. Parents can inform officials ahead of time if they know that their child has a past history of mental health problems, which both places the university on notice and encourages the school to look out for any warning signs that the student's mental health may be deteriorating. Further, parents must take it upon themselves to make sure the proper paperwork is filed to establish their child as a dependent and to enable access to their child's records. Universities have little reason to deny parents access to their dependent child's records, as the laws are far less ambiguous in this area than under the health-emergency exception. Universities also could set up a notification system to notify a dependent child's parents following a particularly serious suicide attempt despite the absence of a duty to do so. This would allow university officials to alert parents after a suicide attempt while avoiding resort to the vaguely worded health-emergency exception. For the majority of students, notification should mean a larger support system, and for universities, it should lead to better insight into the medical history of the student and, thus, more effective

treatment. Increased monitoring of the student may also make changes in behavior and attitudes more noticeable since more people may be better attuned to warning signs.

E. Treatment of Suicide Wrongful-Death Cases by the Courts

Finally, I suggest that courts return to limiting third-party liability by abandoning the current foreseeability test used by some courts for university officials involved in suicide wrongful-death cases. Instead, courts should impose a good-faith exception to the foreseeability test, granting summary judgment for university officials who are on notice that a student is suicidal specifically because they have become active participants in the student's treatment and care.

Under the current foreseeability test, active involvement and close attention on the part of university administrators to a suicidal student's condition and treatment will increase university liability. The test may therefore thwart attempts to enact more hands-on university policies such as those employed at the University of Illinois, which encourage active involvement on the part of the university. The current test may instead encourage the implementation of conservative and discriminatory policies such as mandatory withdrawal.

Further, the current foreseeability test employed by some courts may present a slippery slope, applying beyond university deans and administrators to reach professors, housemasters, and other university employees who were particularly close to the decedent and attempted to help, thus similarly discouraging individuals from responding to a student's cry for help.

As the Virginia Tech tragedy demonstrates, it is important to have as many individuals involved in the monitoring of troubled students as possible. While faculty members failed to connect the dots between the warning signs, they did not close a blind eye to these signs as each was documented and reported. Court decisions that encourage a hands-off approach to suicidal students by penalizing officials who get actively involved in helping and treating a potentially suicidal student may lead to a failure among university officials and faculty members to report warning signs. Rather than condemn university officials for paying close attention to and tightly monitoring suicidal individuals, court decisions should en-

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courage university involvement in the hopes that a university's awareness of troubled students allows them to catch the warning signs before a tragedy can occur.

Courts instead should allow for a good-faith exception to the test, granting summary judgment when a student's suicide is foreseeable to a university administrator specifically because, in good faith, the administrator monitored the student's condition and took steps to ensure that the student received treatment and counseling for his or her condition. This approach would give university administrators the leeway to employ more hands-on suicide-prevention policies and become actively involved in a student's treatment without fear of liability, while simultaneously allowing summary judgment to be denied when a university administrator is aware of a suicidal student's condition but fails to take proper action in getting the student treatment. A good-faith exception would thus allow courts to distinguish between cases such as *Schieszler*, where university officials required the suicidal student to sign a behavioral contract with no suggestion of treatment or counseling, with cases such as *Shin*, where university officials monitored the student's behavior, met with the student to discuss her condition, referred the student for treatment, and continually followed up on her progress.

In the past, courts have acknowledged that the act of suicide is extremely hard to predict and properly address, and that an affirmative duty should be imposed only on those with training and special knowledge in the area.¹⁸¹ A good-faith exception to the foreseeability test would acknowledge the existence of a special relationship between university administrators and a student sufficient to give rise to liability, but liability would only apply where universities cannot show that a good-faith effort was made to treat the suicidal student.¹⁸² The exception also would continue to acknowledge the unpredictability of suicide and take into account that even an official with insight into a student's condition may not be able to prevent a suicide despite taking proper steps.

¹⁸¹ See supra note 42 and accompanying text.

¹⁸² The burden should fall on universities because they have better access to information regarding treatment and surrounding circumstances.

CONCLUSION

Universities should seek to implement policies that strike a balance between students' rights and the rights of the university to cope with students who are a danger to themselves or others. In order to achieve this goal, universities must be free to enact policies that maximize the chances that potentially suicidal students will get the needed psychological counseling or medication, which will reduce the probability that they will harm themselves or others. This Note suggests that state legislatures and Congress can aid universities in this process by resisting the urge to curtail the rights of the mentally disabled in the aftermath of the Virginia Tech tragedy, and instead, enact clearer FERPA guidelines as well as clearer prohibitions against the expulsion and penalization of suicidal students. Courts can also help universities by abandoning the current foreseeability test and using a good-faith exception to limit the liability of college officials, freeing universities to focus their policies on the well-being of students and the safety of those around them, rather than on limiting their own liability. These changes would allow universities to move away from blanket mandatory-withdrawal policies that punish students for proactively seeking treatment and instead would allow the implementation of an alternative suicide-prevention model, similar to the one adopted by the University of Illinois, that requires the mandatory assessment of a student rather than mandatory expulsion. Such alternative prevention models are not likely to violate FERPA, the ADA, or the Rehabilitation Act and thus are able to achieve a balance between the protection of students' rights, the need to get suicidal students the treatment necessary for recovery, and the safety of those who must coexist with them in the university setting.