

## COMMENTS

### KICKING THE ROCK AND THE HARD PLACE TO THE CURB: AN ALTERNATIVE AND INTEGRATED APPROACH TO SUICIDAL STUDENTS IN HIGHER EDUCATION

In the early morning hours of October 27, 2004, Jordan Nott found himself unable to sleep.<sup>1</sup> He was wrapped up in thoughts about a close friend who recently committed suicide by jumping out of his dormitory window.<sup>2</sup> Having taken a prescription drug that he knew could cause suicidal thoughts, Nott asked his college roommate to accompany him to the university hospital.<sup>3</sup> Twelve hours after his hospital visit, he received a letter informing him that the university had evicted him from his dormitory room;<sup>4</sup> thirty-six hours later, the university mandated that he withdraw from the school or face suspension, expulsion, or criminal charges for violating the code of student conduct.<sup>5</sup> Additionally, the university warned him to stay away from campus and threatened to arrest him as a trespasser if he attempted to return.<sup>6</sup>

Nott said the university's actions felt "like a stab in the back"<sup>7</sup> and "a huge slap in the face."<sup>8</sup> To him, it felt as though the school wanted to "wipe [its] hands clean" of him.<sup>9</sup> Nott's experience led him to sue the university.<sup>10</sup> In

---

<sup>1</sup> First Amended Complaint at 5, *Nott v. George Washington Univ.*, No. 05-8503 (D.C. Super. Ct. Oct. 25, 2005).

<sup>2</sup> *Id.* at 3–4.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A01 (reporting that Nott received a letter informing him that he had violated the code of student conduct).

<sup>6</sup> First Amended Complaint, *supra* note 1, at 6. A *Washington Post* editorial questioned the propriety of the university's actions:

To be sure, campus suicides can raise serious liability concerns for universities. And it may be reasonable to ask a suicidal student—to the extent that ensuring his or her safety is beyond the school's ability—to take a leave of absence. But disciplinary proceedings? Charges? No school would use such language about a student with cancer or some other life-threatening physical illness.

Editorial, *Depressed? Get Out!*, WASH. POST, Mar. 13, 2006, at A14.

<sup>7</sup> Kinzie, *supra* note 5, at A01.

<sup>8</sup> Julie Rawe & Kathleen Kingsbury, *When Colleges Go on Suicide Watch*, TIME, May 22, 2006, at 62.

<sup>9</sup> Kinzie, *supra* note 5, at A01.

November 2006, two years after the incident, the university settled the lawsuit,<sup>11</sup> with the provost stating, “While we recognize that some steps in the process may not have been perfect, we stand by the result.”<sup>12</sup>

Across the country, an increasing number of colleges and universities are implementing policies similar to The George Washington University’s policy described above<sup>13</sup> and, in turn, are facing formal complaints and litigation from affected students.<sup>14</sup> Suicide is a leading cause of death for college students, second only to automobile accidents.<sup>15</sup> Student suicides are not a new phenomenon,<sup>16</sup> but university responses such as eviction and policies that mandate the student’s withdrawal from school are certainly a recent and growing trend.<sup>17</sup> While university officials claim that they have implemented the policies with students’ best interests in mind,<sup>18</sup> critics believe that the true motivation stems from two recent court cases.<sup>19</sup>

In the closely watched *Shin v. Massachusetts Institute of Technology*<sup>20</sup> and *Schieszler v. Ferrum College*,<sup>21</sup> courts considered whether universities and

<sup>10</sup> First Amended Complaint, *supra* note 1, at 1. Nott sued the university for violations of the Americans with Disabilities Act, the Rehabilitation Act, and the right to privacy. *See id.* at 22–29.

<sup>11</sup> Press Release, George Washington Univ. & Bazelon Ctr. for Mental Health Law, Joint Statement From George Washington Univ. and Bazelon Ctr. for Mental Health Law Regarding the Lawsuit by Former Student Jordan Nott (Oct. 31, 2006), [http://www.gwu.edu/~newsctr/pressrelease.cfm?ann\\_id=24111](http://www.gwu.edu/~newsctr/pressrelease.cfm?ann_id=24111).

<sup>12</sup> *Id.*

<sup>13</sup> *See* Reni Gertner, *Law, Mental Health Meet: Suicide Lawsuits Put Colleges in Tight Spot*, VA. LAW. WKLY., June 5, 2006, at 18 (“We’re seeing more involuntary withdrawal policies . . . . Almost every university has one now . . .”).

<sup>14</sup> Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED, Mar. 13, 2006, <http://insidehighered.com/layout/set/print/news/2006/03/13/counseling> [hereinafter Capriccioso, *Counseling Crisis*] (stating that many other students have filed complaints with the Department of Education’s Office of Civil Rights, while others pursue relief through the courts).

<sup>15</sup> Rawe & Kingsbury, *supra* note 8, at 62; *see also* Karen W. Arenson, *Worried Colleges Step up Efforts over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1 (estimating that 1,100 college students commit suicide per year); Rawe & Kingsbury, *supra* note 8, at 62 (same).

<sup>16</sup> GARY PAVELA, *THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS: LEGAL ISSUES, POLICY CONSIDERATIONS, AND ALTERNATIVE RESPONSES*, at vii (Donald D. Gehrig & D. Parker Young eds., 1985).

<sup>17</sup> *See* Rawe & Kingsbury, *supra* note 8, at 62 (“[M]any universities have hastily adopted mandatory-leave policies in an effort to reduce the risk of self-inflicted, on-campus deaths.”); Gertner, *supra* note 13 (“The current trend among universities is to adopt policies aimed at removing students who ‘check themselves into hospitals for treatment for mental illness . . .”).

<sup>18</sup> *See* Associated Press, *Eviction of Depressed Students a Tricky Issue for U.S. Colleges*, INT’L HERALD TRIB., Sept. 1, 2006, available at [http://www.ihf.com/articles/ap/2006/09/01/america/NA\\_GEN\\_US\\_College\\_Suicides.php](http://www.ihf.com/articles/ap/2006/09/01/america/NA_GEN_US_College_Suicides.php) [hereinafter Associated Press, *Eviction of Depressed Students*] (quoting a George Washington University spokeswoman as saying that “[t]he intention was to protect a life”).

<sup>19</sup> *See* Gertner, *supra* note 13.

<sup>20</sup> 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005).

<sup>21</sup> 236 F. Supp. 2d 602 (W.D. Va. 2002).

their administrators could be held liable for the suicides of two enrolled students who lived in campus housing.<sup>22</sup> While the parties in both cases eventually settled,<sup>23</sup> in pre-settlement rulings, both judges rejected the universities' assertions that they owed no duty to the deceased student<sup>24</sup> and stated that the universities' liability turned on the issue of foreseeability.<sup>25</sup>

Unfortunately for school officials who awaited a final decision in the cases,<sup>26</sup> the fact that these cases settled left unanswered the question of whether universities and their administrators owe a duty to their students.<sup>27</sup> Fearing liability, negative publicity, and multi-million-dollar lawsuits,<sup>28</sup> many universities have developed mandatory-leave policies similar to the one in place at The George Washington University.<sup>29</sup>

This Comment discusses the seemingly difficult position in which university administrators find themselves: on the one hand, if universities respect students' privacy and treat them as adults, they open themselves up to lawsuits based on wrongful death and negligence; on the other hand, if they implement mandatory withdrawal policies or force students to vacate campus housing, they risk violating federal statutes and the Constitution.<sup>30</sup> As an alternative to these options, this Comment proposes a collaborative approach that avoids liability for universities, but not at the cost of students' health and safety. This integrated approach necessitates that courts, legislatures, and universities take unified and complementary actions in combating the student suicide epidemic.

Part I discusses the split in the case law regarding special relationships, the duty that universities owe to their students, and universities' risk of tort

---

<sup>22</sup> *Shin*, 19 Mass. L. Rptr. at 572–78; *Schieszler*, 236 F. Supp. 2d at 605.

<sup>23</sup> Gertner, *supra* note 13.

<sup>24</sup> *See Shin*, 19 Mass. L. Rptr. at 575–77; *Schieszler*, 236 F. Supp. 2d at 609–10.

<sup>25</sup> *See Shin*, 19 Mass. L. Rptr. at 577–78; *Schieszler*, 236 F. Supp. 2d at 611–12. The jury typically determines which actor was the proximate cause of the injury. RESTATEMENT (THIRD) OF TORTS § 29(q) (Proposed Final Draft No. 1, 2005).

<sup>26</sup> *See* Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES, Apr. 28, 2002, at E56 (noting that school officials awaited guidance from the courts).

<sup>27</sup> *See supra* note 23 and accompanying text.

<sup>28</sup> *See* Capriccioso, *Counseling Crisis*, *supra* note 14 (reporting that the Shin family sued the Massachusetts Institute of Technology for \$27,650,000).

<sup>29</sup> *Id.*; *see supra* notes 4–6 and accompanying text. Universities that have or had similar policies include the Massachusetts Institute of Technology, Cornell University, Columbia University, New York University, and Hunter College. Karen Bower, *Lawsuits Change Campus Responses to Suicidal Students*, WOMEN IN HIGHER EDUC., Oct. 1, 2006, at 7.

<sup>30</sup> *See infra* Part II.A.1.

liability. Additionally, it explains the economic reasons behind why administrators often prefer mandatory withdrawal and eviction as a response to suicidal students. Part II examines the [suicide-response?] policies currently in place at colleges across the United States and the legal liabilities associated with each. Part III puts forth the solutions already offered by academics and then explains why a collaborative approach addresses the problem more effectively than a solution that focuses solely on courts, legislatures, or universities. Part IV discusses the various avenues through which legislatures and courts can effect changes—legislatures by implementing new laws and courts by establishing appropriate standards of liability for universities and administrators. Finally, Part V proposes an approach that all universities should adopt to achieve socially desirable policies toward suicidal students while simultaneously avoiding legal liability.

## I. THE DEPARTURE FROM PRECEDENT: *SHIN*, *SCHIESZLER*, AND *JAIN*

### A. *Legal Principles and “Special Relationships”*

In the development of American tort law, common law rules did not recognize an affirmative duty of care between universities and their adult students absent a showing of a special relationship.<sup>31</sup> Additionally, the traditional rule was that suicide constituted a “deliberate, intentional and intervening act that preclude[d] another’s responsibility for the harm.”<sup>32</sup>

However, the law has slowly developed two exceptions to the traditional rule. The first exception is where the individual or entity actually caused the suicide.<sup>33</sup> The second exception applies when the individual or entity had a

---

<sup>31</sup> 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, 147 (2002). Although this Comment only discusses suicide-based liability at universities, similar situations arise in hospitals, jails, and reform schools. *See id.* at 133.

<sup>32</sup> *McLaughlin v. Sullivan*, 461 A.2d 123, 124 (N.H. 1983); *see* PROSSER AND KEETON ON THE LAW OF TORTS 311 (W. Page Keeton ed., 5th ed. 1984) (“[I]t is agreed in negligence cases that the voluntary choice of suicide is an abnormal thing, which supersedes the defendant’s liability.”). For instance, in *McLaughlin*, an attorney’s client committed suicide after being sentenced to serve two to four years in jail. *McLaughlin*, 461 A.2d at 124. The court dismissed the action against the attorney because of the general principle that suicide cuts off liability for negligence, and because the court did not find that the attorney caused the suicide or that he had a duty to prevent it. *See id.* at 125–28.

<sup>33</sup> Lake & Tribbensee, *supra* note 31, at 130. Because courts apply the causation exception strictly, it applies in very limited circumstances. *Id.* Defendants can also fall under this exception if a court finds that they inappropriately provided drugs or alcohol to a student who later committed suicide. *Id.*

duty to prevent the suicide.<sup>34</sup> Cases in the educational context continue to promote the principle that suicide constitutes an intentional and intervening act<sup>35</sup> because “[s]tudents are expected to shoulder the stresses and burdens of the transition into the college environment, even if those burdens are very high.”<sup>36</sup> In *Jain v. State*, for example, a first-year student at the University of Iowa asphyxiated himself by leaving his moped running in his locked room.<sup>37</sup> The trial court granted the university’s motion for summary judgment,<sup>38</sup> and the Iowa Supreme Court affirmed the ruling because it found that the university neither increased the likelihood that the student would commit suicide nor led him to stop looking for help elsewhere.<sup>39</sup> The *Jain* court also affirmed the general principle that suicide is a superseding, intervening act that cuts off any possible third-party liability.<sup>40</sup> Because the court determined that no special relationship existed between the university and the student, it did not allow for an exception to that principle.<sup>41</sup>

Unfortunately for administrators of educational institutions, the pre-settlement rulings in *Shin*<sup>42</sup> and *Schieszler*<sup>43</sup> have muddled the liability landscape. In *Schieszler*, a student hung himself in his dormitory room after writing letters to friends indicating that he was depressed and thinking of committing suicide.<sup>44</sup> The district court found that the plaintiff offered enough evidence to establish the existence of a special relationship because the university, the Dean of Student Affairs, and the Dormitory Resident Advisor knew of the student’s problems.<sup>45</sup> Additionally, the court held that the university and the dean breached this duty.<sup>46</sup> Hence, liability would have

---

<sup>34</sup> *Id.*

<sup>35</sup> *See, e.g., Jain v. State*, 617 N.W.2d 293, 300 (Iowa 2000) (“[T]he act of suicide is considered a deliberate, intentional, and intervening act that precludes another’s responsibility for the harm.”).

<sup>36</sup> Lake & Tribbensee, *supra* note 31, at 135.

<sup>37</sup> 617 N.W.2d at 296.

<sup>38</sup> *Id.* at 294.

<sup>39</sup> *Id.* at 300. Absent one of those two factors, the university does not have a duty of care. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Shin v. Mass. Inst. of Tech.*, 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005).

<sup>43</sup> *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

<sup>44</sup> *Id.* at 605. On one occasion, campus police arrived at the student’s dormitory room to find him with “bruises [that] were self-inflicted.” *Id.*

<sup>45</sup> *Id.* at 609. The evidence of a special relationship included the defendants’ knowledge of his emotional problems and knowledge of a letter he sent to a friend stating his intention to commit suicide. *Id.*

<sup>46</sup> *Id.* at 610.

turned on proximate cause and foreseeability.<sup>47</sup> The parties came to a settlement agreement in 2003, before the trial was to commence.<sup>48</sup>

College administrators subsequently kept a close eye on *Shin*.<sup>49</sup> Elizabeth Shin first experienced psychiatric health problems during the spring semester of her first year at the Massachusetts Institute of Technology (MIT).<sup>50</sup> Over the next twelve months, several MIT psychiatrists and physicians, Deans of Counseling and Support Services, MIT professors, and a dormitory housemaster observed Shin's suicidal tendencies and worrisome behavior.<sup>51</sup> On April 10, 2000, MIT Campus Police found Shin in her dormitory room with her "clothing engulfed in flames."<sup>52</sup> Her parents terminated her life support four days later.<sup>53</sup> When her parents sued MIT and its administrators for wrongful death and negligence, the defendants moved for summary judgment.<sup>54</sup> While the court granted summary judgment for MIT, it denied summary judgment for the administrators<sup>55</sup> because it found the existence of a special relationship between the administrators and Shin.<sup>56</sup> The court found Shin's suicide reasonably foreseeable.<sup>57</sup> Therefore, the court concluded that the administrators had a duty to protect Shin from harm.<sup>58</sup> Shin's family agreed to settle the case before a jury could return a verdict.<sup>59</sup>

---

<sup>47</sup> See *id.* at 612.

<sup>48</sup> Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 12, 2005, at A1.

<sup>49</sup> *Shin v. Mass. Inst. of Tech.*, 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005); see also Rawe & Kingsbury, *supra* note 8, at 62.

<sup>50</sup> *Shin*, 19 Mass. L. Rptr. at 571.

<sup>51</sup> See *id.* at 570–74. Just before Shin's death the administrators had conducted a "deans and psychs" meeting where they discussed Shin's situation and set up an appointment for her to visit a psychiatric treatment facility in Cambridge, Massachusetts. *Id.* at 575.

<sup>52</sup> *Id.* at 572–73.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 573–78. Shin's family filed suit against MIT, MIT administrators, MIT medical professionals, and MIT campus police. *Id.* at 570.

<sup>55</sup> *Id.* at 577–78 (denying summary judgment on the counts of gross negligence, negligence and wrongful death, and conscious pain and suffering).

<sup>56</sup> *Shin*, 19 Mass. L. Rptr. at 577 (relying on, among other cases, the denial of summary judgment in *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002)). The court found that the administrators knew of Shin's problems for over a year, referred her to school psychiatrists, and regularly communicated with psychiatrists regarding Shin's condition. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Rob Capriccioso, *Settlement in MIT Student Suicide Suit*, INSIDE HIGHER ED, Apr. 4, 2006, <http://insidehighered.com/news/2006/04/04/shin>.

The trend toward holding administrators personally liable recently turned back in favor of the traditional common law with a lawsuit filed against Allegheny College.<sup>60</sup> On February 11, 2002, a student hung himself in his fraternity house after having expressing suicidal thoughts to a university counselor,<sup>61</sup> who in turn relayed the information to administrative deans.<sup>62</sup> In a pretrial order, the court ruled that the deans owed no duty of care to Mahoney.<sup>63</sup> The jury found that the university counselor was not liable for Mahoney's death.<sup>64</sup>

### *B. The Effect of Deviation from Traditional Tort Principles*

Recent case law leaves university administrators uncertain about the current state of the law and unable to predict where it will go in the future. The oldest case, *Jain*, and the most recent case, *Mahoney*, comport with common law principles; whether *Schieszler* and *Shin* are blips on a continuum or the beginning of a new direction in tort law is still unclear.

While *Jain* and *Mahoney* should serve as reassuring precedent for higher education administrators, both do little to allay the fears that *Schieszler* and *Shin* created.<sup>65</sup> When family members sue administrators in their individual capacities, the administrators have an added incentive to remove the "problematic" student before he creates an issue of potential liability.<sup>66</sup> As an analyst for the insurance company United Educators stated:

Universities can be between a rock and a hard place when it comes to protecting emotionally-disturbed students . . . . If a student stays on campus and administrators ignore clear warning signs that the student is suicidal, they could face a wrongful death suit. But if they put the student through an involuntary leave procedure, they could be faced with an ADA suit.<sup>67</sup>

---

<sup>60</sup> See *Mahoney v. Allegheny College*, No. AD 892-2003, slip op. at 8 (Pa. Ct. Com. Pl., Dec. 22, 2005); see also Rob Capriccioso, 2 *Suicide Suits Conclude*, INSIDE HIGHER ED, Sept. 5, 2006, <http://insidehighered.com/news/2006/09/05/suicide> [hereinafter Capriccioso, *Suicide Suits*].

<sup>61</sup> *Mahoney*, No. AD 892-2003, slip op. at 8 (Pa. Ct. Com. Pl. Dec. 22, 2005).

<sup>62</sup> *Id.* at 11-13.

<sup>63</sup> *Id.* at 22. The relationship between the student and the deans existed for only three to four days. *Id.*

<sup>64</sup> Capriccioso, *Suicide Suits*, *supra* note 60.

<sup>65</sup> See Gertner, *supra* note 13; *Eviction of Depressed Students a Tricky Issue for U.S. Colleges*, *supra* note 18.

<sup>66</sup> See Gertner, *supra* note 13; Capriccioso, *Counseling Crisis*, *supra* note 14.

<sup>67</sup> Gertner, *supra* note 13. United Educators is an insurance group created in 1986 that covers liabilities incurred specifically by educational institutions. See AICUP & United Educators, *College Liability Insurance Program*, Sept. 10, 2004, [http://www.aicup.org/resources/United\\_Educators.pdf](http://www.aicup.org/resources/United_Educators.pdf).

Administrators have to confront this controversial issue at an increasing rate: Ninety-five percent of counselors believe that the number of entering college students already on psychiatric medication is rising.<sup>68</sup> Scholars suggest that increased parental activism regarding safety and security on college campuses has caused societal attitudes about responsibility for student suicides to shift.<sup>69</sup> If that is the case, administrators are facing a challenge that likely will not wane in the near future.

Economics suggests that as long as universities face a high risk of institutional liability and administrators are subject to personal liability, they will continue to find ways of limiting their own accountability,<sup>70</sup> and they will prioritize their own interests over those of the troubled student.<sup>71</sup> For example, a recent graduate of Harvard University stated that even before she had the chance to receive a thorough medical assessment, her dean attempted to convince her to take leave and return home.<sup>72</sup> Even after she obtained antidepressants from the school's health services, the dean continued, "What if it doesn't work? What if you get a C on your transcript? You won't get into law school."<sup>73</sup> These are not the kinds of statements administrators should make to already-depressed students.

The imposition of liability upon universities and officials has caused the pendulum to swing in the wrong direction. In the past, universities may have taken too much of a "hands off" approach in allowing students to make their own mental health decisions.<sup>74</sup> Today, schools and officials are removing the potential liability itself—the student—rather than instituting the proper measures to alleviate the *threat* of liability.<sup>75</sup> Therefore, as Part III details, the legislature and the judiciary must take steps to decrease the risk of litigation and, in turn, minimize the incentives for universities and officials to act out of

---

<sup>68</sup> Rawe & Kingsbury, *supra* note 8, at 62.

<sup>69</sup> See, e.g., GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE app. at 94 (2006).

<sup>70</sup> See DENNIS J. FARRINGTON & DAVID PALFREYMAN, THE LAW OF HIGHER EDUCATION 535 (2006) (describing the process of identifying, measuring, and reducing risk in order to avoid potential liability).

<sup>71</sup> See *id.* (indicating that one of the four suggested mechanisms for reducing risk is "[p]assing the risk on to another party").

<sup>72</sup> See Katherine A. Kaplan, *Troubled Students Feel College Nudges Them off Campus*, HARV. CRIMSON, Jan. 23, 2004, <http://www.thecrimson.com/article.aspx?ref=357115>.

<sup>73</sup> *Id.*

<sup>74</sup> See Bower, *supra* note 29, at 7.

<sup>75</sup> Jordan Nott stated, "When you are looking out for your own liability, you're not really looking out for the interests of the student, you're looking out for yourself . . . . I suppose every person has to look out for themselves, but this goes way beyond a certain line." Capriccioso, *Counseling Crisis*, *supra* note 14.

self-interest. Without such unified action, universities might continue developing policies that violate constitutional rights and federal laws.

## II. CURRENT SUICIDE “PREVENTION” PLANS

Universities have developed programs that aim to prevent student suicide from occurring on campus and, thus, reduce the risk of tort liability.<sup>76</sup> University officials have been forced to take drastic measures, such as withdrawal and eviction, because they can no longer rely on the courts to conclude that suicide is an act that cuts off third party tort liability. *Shin*'s and *Schieszler*'s pretrial rulings suggested that universities and administrators could be liable under a theory of negligence.<sup>77</sup> In order to shield themselves from tort liability, officials formulated policies to remove depressed students from campuses before they commit suicide.

### A. *Postsecondary Responses to Schieszler and Shin*

#### 1. *Mandatory Withdrawal and Expulsion*

The most severe policies are those that threaten to withdraw students who voice depressive or suicidal thoughts. In 2005, Anne Giedinghagen, a student at Cornell University, confided to her therapist that she wanted to kill herself.<sup>78</sup> In response, the university told her that if she did not improve, she would have to leave the school.<sup>79</sup> Giedinghagen neither wanted to leave nor was able to improve on command; as a result, she pretended to feel better.<sup>80</sup> The university allowed her to stay only because she lied about her mental health to her physicians and counselor.<sup>81</sup>

This policy is not only unwise because it leads students to lie about their mental health, but it also rests on a faulty premise that academic stress will aggravate suicidal tendencies. A student can become suicidal for many reasons, but his suicidal tendencies do not automatically indicate that he cannot

---

<sup>76</sup> See *infra* Part II.A.

<sup>77</sup> See *Shin v. Mass. Inst. of Tech.*, 19 Mass. L. Rptr. 570, 576–77 (Mass. Super. Ct. 2005); *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 608–12 (W.D. Va. 2002).

<sup>78</sup> Rawe & Kingsbury, *supra* note 8, at 62.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

cope with the stresses of academic life.<sup>82</sup> As such, from a social and emotional viewpoint, mandatory withdrawal is not the best response to a suicidal student. From a legal perspective, mandatory withdrawal programs violate many constitutional rights and disability laws, including the Due Process Clause,<sup>83</sup> the Family Educational Rights and Privacy Act,<sup>84</sup> the Rehabilitation Act,<sup>85</sup> and the Americans with Disabilities Act.<sup>86</sup>

## 2. *Eviction from Campus Housing Facilities*

Another policy that colleges enforce is the eviction of students from campus housing without allowing the students to withdraw from their classes.<sup>87</sup> For example, a student attending Hunter College swallowed twenty pain-relievers and subsequently called 911.<sup>88</sup> An ambulance transported her to a hospital, where she stayed for four days.<sup>89</sup> Upon her return to her dormitory, she discovered that the college had changed the lock on her door during her absence.<sup>90</sup> The Dean of Students said that her actions violated the housing contract.<sup>91</sup> Despite her eviction, the student completed her classes that semester and was allowed to enroll in the classes for the following semester.<sup>92</sup>

As evidenced by the Hunter College student's experience, universities often try to shield themselves from liability through eviction provisions written into housing contracts. Withdrawal policies mask colleges' goal of limited tort liability better than eviction policies because a student's housing situation is

---

<sup>82</sup> See PAVELA, *supra* note 16, at 56.

<sup>83</sup> See *infra* notes 124–50 and accompanying text.

<sup>84</sup> See *infra* notes 164–73 and accompanying text.

<sup>85</sup> See *infra* notes 200–12 and accompanying text.

<sup>86</sup> See *infra* notes 200–12 and accompanying text.

<sup>87</sup> See generally Second Amended Complaint, *Doe v. Hunter Coll.*, 04 CV 6740 (SHS) (S.D.N.Y. Sept. 23, 2005), available at <http://www.bazelon.org/pdf/Doe-v-Hunter-Second-Amended-Complaint.pdf>; Associated Press, *Eviction of Depressed Students*, *supra* note 18.

<sup>88</sup> Second Amended Complaint, *supra* note 87, at 7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 7–8.

<sup>91</sup> *Id.* at 8–9. The housing contract read:

A student who attempts suicide or in anyway 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.

*Id.* at 9.

<sup>92</sup> See *id.* at 7, 9 (stating that the student received four A's and one incomplete the semester of her hospitalization and attended classes at the university the following July and August).

seemingly less related to depression and suicide than a student's academic situation.<sup>93</sup> While universities and administrators may succeed in avoiding tort liability, they fail in protecting themselves from liability under the Due Process Clause,<sup>94</sup> the Rehabilitation Act,<sup>95</sup> and the Americans with Disabilities Act.<sup>96</sup>

*B. Dissecting Withdrawal and Eviction Policies for Violations of Constitutional Rights and Disability Law*

Universities and their officials are defending themselves against claims that they acted negligently when they failed to prevent a student suicide. Because a few courts have imposed a duty of care upon universities and administrators, they are more often taking steps to keep suicidal students off their campuses. Typically, these policies are poorly constructed and violate statutory and constitutional rights.

*1. The Procedural Due Process Clause*

The Fifth and Fourteenth Amendments ensure that the government<sup>97</sup> will not deprive individuals of their liberty and property interests without due process of the law. Courts have broadly construed the terms "liberty" and "property" so that a "liberty" interest includes a person's good name and reputation,<sup>98</sup> and a "property" interest involves certain state benefits, including a public education.<sup>99</sup> Further, other courts have stated that the Due Process Clause protects the *pursuit* of an education as liberty and property interests.<sup>100</sup>

---

<sup>93</sup> The Hunter College student was still allowed to attend classes. *Id.* at 11.

<sup>94</sup> See *infra* notes 124–53 and accompanying text.

<sup>95</sup> See *infra* notes 207–17 and accompanying text.

<sup>96</sup> See *infra* notes 207–17 and accompanying text.

<sup>97</sup> The Fifth Amendment Due Process Clause applies to the federal government, see U.S. CONST. amend. V, and the Fourteenth Amendment Due Process Clause applies to the states, see U.S. CONST. amend. XIV, § 1.

<sup>98</sup> See *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975) (holding that a school violated students' due process rights when it suspended them without an opportunity to be heard because the deprivation could affect the students' future educational opportunities); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

<sup>99</sup> See *Goss*, 419 U.S. at 573–74 (noting that state benefits also include welfare benefits and a prisoner's good time credits).

<sup>100</sup> See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("[A] student's interest in pursuing an education is included within the [F]ourteenth [A]mendment's protection of liberty and property.").

The right to due process mandates that a student must have notice and the opportunity to be heard before he loses his liberty or property interests.<sup>101</sup>

In *Mathews v. Eldridge*<sup>102</sup> and *Connecticut v. Doehr*,<sup>103</sup> the Supreme Court set forth and applied a framework to assess whether a given action included an adequate opportunity to be heard.<sup>104</sup> Three factors make up the original *Mathews* test,<sup>105</sup> although the *Doehr* Court added two additional considerations to the second and third *Mathews* factors.<sup>106</sup> First, the court should examine the effect on the petitioner's private interest if he is not given an opportunity to be heard.<sup>107</sup> Second, a court must analyze the "risk of erroneous deprivation," which is the risk that the petitioner will be wrongly dispossessed of this private interest because he has not had the opportunity to be heard.<sup>108</sup> In this second prong, the court should also examine whether implementing "additional or alternative safeguards" is beneficial.<sup>109</sup> Third, the court should weigh the interest of the party who opposes the opportunity to be heard.<sup>110</sup> In addition, the third prong mandates that the court look at the government's ancillary interest in providing or forgoing additional or alternative safeguards.<sup>111</sup> The opportunity to be heard does not require a court to grant an individual a proper trial; in some situations, less formal procedures will suffice.<sup>112</sup>

Courts have extended these constitutional safeguards to cases involving student dismissals from institutions of higher education.<sup>113</sup> In *Greenhill v. Bailey*,<sup>114</sup> the Eighth Circuit Court of Appeals held that a medical school deprived a medical student of his due process rights because the school

---

<sup>101</sup> See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 311–14 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard.") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

<sup>102</sup> 424 U.S. 319 (1976) (determining how much due process an individual should be afforded by the government).

<sup>103</sup> 501 U.S. 1 (1991) (applying and adapting the *Mathews* test to "disputes between private parties").

<sup>104</sup> *Mathews*, 424 U.S. at 334–35; *Doehr*, 501 U.S. at 11.

<sup>105</sup> *Mathews*, 424 U.S. at 334–35.

<sup>106</sup> *Doehr*, 501 U.S. at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *Goss v. Lopez*, 419 U.S. 565, 582 (1975) ("In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.").

<sup>113</sup> See, e.g., *Greenhill v. Bailey*, 519 F.2d 5, 6 (8th Cir. 1975) (reviewing the dismissal of a student from medical school); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961) (reviewing dismissal of students from a state university).

<sup>114</sup> 519 F.2d 5.

suspended him for “[l]ack of intellectual ability,”<sup>115</sup> without first affording him the chance to speak before the decisionmaking committee.<sup>116</sup> Still, the court cautioned that universities should be afforded great deference when making *academic* judgments.<sup>117</sup>

In the disciplinary context, where universities do not receive as much deference,<sup>118</sup> some substantial form of an opportunity to be heard is required, although courts generally allow universities the flexibility to create informal hearing procedures.<sup>119</sup> For example, at least one court has concluded that the Constitution does not require legal counsel to have the ability to cross-examine a witness in university disciplinary proceedings.<sup>120</sup> Courts should categorize preemptive expulsion or eviction as disciplinary actions because such dismissals involve resolution of factual disputes and not subjective and qualitative academic judgment.<sup>121</sup> Depending upon what procedures a prewithdrawal or pre-eviction hearing encompasses, presuming one exists, a university may find itself in violation of the Fifth or Fourteenth Amendments.

Although the Due Process Clauses apply only to governmental entities, the clauses extend to public universities because they are effectively extensions of the state, whereas private universities are not.<sup>122</sup> Yet, it is possible for any private college receiving federal financial aid from the U.S. Department of Education to qualify as an institution in which the “[s]tate somehow involved

---

<sup>115</sup> *Id.* at 7 (quoting the reason cited for dismissal on the Change of Status Form).

<sup>116</sup> *Id.* at 8. The court said the university violated his liberty interest because it “‘imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other opportunities.’” *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

<sup>117</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978)). Academic decisions include who should be admitted to the university and who should be suspended for poor academic performance. *See generally id.* Academic decisions only have to be “careful and deliberate.” *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978).

<sup>118</sup> *See Horowitz*, 435 U.S. at 87 (“Misconduct is a very different matter from failure to attain a standard of excellence in studies.”) (quoting *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095, 1097 (Mass. 1913)).

<sup>119</sup> *See Goss v. Lopez*, 419 U.S. 565, 583–84 (1975) (noting “some informal give-and-take” will give the student the opportunity to explain his conduct).

<sup>120</sup> *See Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1385–88 (W.D. Mich. 1983).

<sup>121</sup> *See Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1249 n.2 (E.D. Mich. 1984), *aff’d*, 787 F.2d 590 (6th Cir. 1986) (characterizing the act of cheating as a disciplinary rather than academic matter because evaluation of the matter was factual, not subjective).

<sup>122</sup> *See Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 365 (8th Cir. 1988) (stating that “the University and through it the Student Senate are creations of the State”).

itself in what would otherwise be deemed private activity;”<sup>123</sup> therefore, private colleges are not automatically exempt from due process requirements.

Both mandatory withdrawal and eviction plans violate the constitutional due process guarantee. If the university withdraws the student without granting him the opportunity to be heard—as was the case with Jordan Nott and The George Washington University<sup>124</sup>—the university violates the due process clause. When the *Mathews* factors<sup>125</sup> are applied to expulsion policies, students should have an absolute right to be heard before the university withdraws them.<sup>126</sup> The first factor, the affected private interests, includes the student’s future academic and professional career, as well as his overall mental health. Withdrawal from a postsecondary school is not trivial because a student’s academic record will permanently reflect the dismissal and may affect future academic pursuits as well as career prospects.<sup>127</sup> Additionally, removing the student from school without giving him a chance to explain himself may cause added emotional and mental harm.

The “risk of erroneous deprivation,” the second *Mathews* factor, is considerably high.<sup>128</sup> If, as in the Jordan Nott case, officials remove a student without first discussing the situation with him, there is a risk that an overly eager administrator, in trying to shield himself from liability, will remove the student for expressing non-threatening depressive thoughts.<sup>129</sup> The risk is at least high enough for schools to err on the side of caution and provide the additional safeguard of an informal hearing.<sup>130</sup> Instituting at least an “informal give-and-take” between the student and the administrator is a beneficial safeguard because it reduces the risk of erroneous deprivation.<sup>131</sup>

---

<sup>123</sup> *Mu Chapter of Delta Kappa Epsilon v. Colgate Univ.*, 176 A.D.2d 11, 13 (N.Y. App. Div. 1992) (quoting *Matter of Belilis v. Albany Med. Coll. of Union Univ.*, 136 A.D.2d 42, 44 (N.Y. App. Div. 1988)).

<sup>124</sup> See *supra* notes 3–6 and accompanying text.

<sup>125</sup> See *supra* 107–15 and accompanying text.

<sup>126</sup> See *supra* notes 98–99, 107 and accompanying text.

<sup>127</sup> See *Greenhill v. Bailey*, 519 F.2d 5, 9 (8th Cir. 1975) (stating the student’s “dismissal would potentially stigmatize his future as a medical student elsewhere”).

<sup>128</sup> *Connecticut v. Doe*, 501 U.S. 1, 11 (1991); see *Mathews v. Eldrige*, 424 U.S. 319 (1976); *supra* note 108 and accompanying text.

<sup>129</sup> Nott said he was not suicidal on the night that he went to the university hospital; he was only having depressive thoughts. Capriccioso, *Counseling Crisis*, *supra* note 14.

<sup>130</sup> See *supra* note 109 and accompanying text.

<sup>131</sup> See *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

The final factor, the interest of the university<sup>132</sup> in foregoing a hearing, arises out of university's desire to avoid liability.<sup>133</sup> Families often sue postsecondary institutions for large sums of money, providing the institution with a substantial interest in avoiding payment of damages.<sup>134</sup> A university also has an interest in protecting its students from anyone, including a suicidal student who poses a threat.<sup>135</sup> The government's interest in providing or forgoing additional safeguards is also relevant under the third prong.<sup>136</sup> Given that the government has highlighted suicide as a pressing national concern,<sup>137</sup> state schools have an interest in preventing student suicides.

Weighing the factors shows that, before withdrawing a student, universities must give him an opportunity to be heard. Although a university's desire to avoid negative publicity and to protect financial assets are a legitimate and substantial interests, they do not outweigh the first two factors, which favor the student's due process rights. The government's interest in preventing suicides does not clearly favor either providing or forgoing an opportunity to be heard because the government does not want to exacerbate the student's severe depression, but instead wants the university to address the situation promptly. Only when a student poses an imminent danger or threat to other students should the third factor equal or outweigh the first and second factors.<sup>138</sup>

A due process analysis of eviction policies produces the same result as the above analysis of mandatory withdrawal policies under the *Mathews* test. The private interest at stake is both a liberty interest in reputation<sup>139</sup> and a property

---

<sup>132</sup> The text of the test reads the "[g]overnment's interest," *Mathews*, 424 U.S. at 335, and any public university would be considered an arm of the state. Additionally, a private university receiving governmental funding may be subject to the same constitutional rules as is a public university. See *supra* note 123 and accompanying text.

<sup>133</sup> See *infra* notes 231, 249, 314 and accompanying text.

<sup>134</sup> For example, the Shin family sued MIT for \$27,650,000. Capriccioso, *Counseling Crisis*, *supra* note 14.

<sup>135</sup> Goss, 419 U.S. at 582–83.

<sup>136</sup> See *supra* note 111 and accompanying text.

<sup>137</sup> S. Res. 84, 105th Cong. (1997). The Senate resolution states:

[The Senate] recognizes suicide as a national problem and declares suicide prevention to be a national priority . . . [and] encourages the development, and the promotion of accessibility and affordability, of mental health services, to enable all persons at risk for suicide to obtain the services, without any fear of stigma.

*Id.*

<sup>138</sup> See *supra* note 135 and accompanying text.

<sup>139</sup> See *supra* note 98 and accompanying text.

interest in the place of residence<sup>140</sup>—particularly if the student has nowhere else to stay.

The risk of erroneous deprivation, the second factor, is substantial only if the housing contract contains broad language stating that the student must vacate the dormitory “if [the student] attempts to harm him or herself.”<sup>141</sup> Overly cautious university officials could manipulate such language to remove every student that exhibits the slightest hint of severe depression.<sup>142</sup> A more specific contract, stating that the school will evict the student if he attempts suicide, might nonetheless wrongly deprive the student of his interest, especially if the school never allows the student to explain himself. As with mandatory withdrawals, the additional safety net of an informal hearing is beneficial because it reduces the possibility of a university evicting the student based on misinformation.

Finally, as with mandatory withdrawal policies, the interest of the university centers upon avoiding liability, payment of potentially several million dollars, and negative publicity.<sup>143</sup> Again, the government’s interest is in the prevention of student suicides, and it is unclear whether this interest favors providing an opportunity to be heard or forgoing that safeguard.<sup>144</sup> The university’s interests are substantial; generally, however, these interests do not outweigh the first two factors. As with mandatory withdrawals, the university’s interest in foregoing a hearing should only outweigh the first and second factors when the suicidal student is a danger to those living around him.<sup>145</sup> As is the case with withdrawal policies, unless such extreme circumstances exist, students should have a proper opportunity to be heard before they are evicted from campus housing.

The due process analyses of withdrawal and eviction programs demonstrate that no university should use mandatory withdrawal or eviction as the first

---

<sup>140</sup> Cf. *Ruffin v. Hous. Auth. of New Orleans*, 301 F. Supp. 251, 253 (E.D. La. 1969) (assuming, for the purposes of unrelated analysis, that students have a right to remain in school).

<sup>141</sup> See *supra* note 91.

<sup>142</sup> See *supra* notes 1–6 and accompanying text.

<sup>143</sup> See *supra* notes 134–43 and accompanying text.

<sup>144</sup> See *supra* notes 110–15, 132–43 and accompanying text.

<sup>145</sup> See *supra* notes 135–43 and accompanying text. For example, the student in *Jain v. State* committed suicide by locking himself in a room with a running moped. 617 N.W.2d 293, 296 (Iowa 2000). The student’s roommate awoke feeling dizzy, and the entire dormitory was evacuated. *Id.* While universities may face difficulties in predicting whether a student will be a danger to others, they should err on the side of caution and deprive the student of an opportunity to be heard only when the threat is credible and supported by evidence.

response to a potentially suicidal student.<sup>146</sup> Before either action becomes a serious possibility, the university must grant the student an opportunity to be heard.<sup>147</sup> When suicide is at stake and the social stigma of suicide is on the line, due process rights should trump the need for limiting tort liability.<sup>148</sup>

Even if universities use mandatory withdrawal as a second or third response to a suicidal student, one scholar believes that universities should carefully reject ambiguous language indicating when withdrawal is appropriate.<sup>149</sup> For example, one university authorized withdrawal when the student's "'state of mind' so 'recommend[ed].'"<sup>150</sup> Such broad language lends itself to interpretive abuse by officials who are approaching the issue from a risk-management angle.<sup>151</sup> With imprecise language, universities risk violating students' due process rights through arbitrary removal.<sup>152</sup> Schools or the government must precisely define under what circumstances a "health emergency" exists.<sup>153</sup> Any model plan should not use withdrawal as the first course of action and should employ a succinct definition of health and safety "emergency."

## 2. *The Family Educational Rights and Privacy Act*

Although the Constitution does not explicitly protect a right to privacy, the Supreme Court has interpreted other constitutionally protected rights as implying a right to privacy.<sup>154</sup> The Supreme Court initially derived the right to privacy from many of the Constitutional Amendments, but for the past few decades the Court has carved the right to privacy out of the Fourteenth Amendment guarantee of substantive due process.<sup>155</sup>

---

<sup>146</sup> See *supra* notes 122–50 and accompanying text.

<sup>147</sup> See *supra* note 145 and accompanying text.

<sup>148</sup> See PAVELA, *supra* note 16, at 15.

<sup>149</sup> *Id.* at 1.

<sup>150</sup> *Id.* at 11.

<sup>151</sup> See *id.* at 11; see also Hoover, *supra* note 48, at A1 ("What these cases are saying is that [administrators] should err on the side of overreaction.").

<sup>152</sup> See PAVELA, *supra* note 16, at 12 (discussing *Aronson v. North Park College*, 418 N.E.2d 776 (Ill. App. 1981), where the court held the vague standard violated due process).

<sup>153</sup> See John S. Gearan, Note, *When is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1045 (2006).

<sup>154</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a right to privacy in the "penumbras" of other constitutionally protected rights); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (discussing the right to privacy in the abortion context).

<sup>155</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992).

In 1974, Congress passed the Family Educational Rights and Privacy Act (FERPA) to codify the right of privacy in the educational context.<sup>156</sup> FERPA protects the privacy of student educational records by allowing parents to “review and inspect” a student’s records only if the student’s school receives any federal financial assistance.<sup>157</sup> Once a student reaches the age of eighteen or is in a postsecondary educational institution, the student is deemed an “eligible student,” and the FERPA rights conferred upon the parents transfer to the student.<sup>158</sup> Therefore, for most college students, FERPA allows disclosure of records to only the student himself, unless he consents to making the information available to others.<sup>159</sup>

Regulations interpreting the Act, however, recognize specific exceptions to the general rule.<sup>160</sup> In particular, FERPA allows for disclosure of educational records without consent when made “in connection with a health or safety emergency”<sup>161</sup> and when “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>162</sup> Nonetheless, healthcare workers may only disclose the information to an “appropriate person” within the university system.<sup>163</sup>

Mandatory withdrawal procedures run the risk of violating such privacy rights. FERPA mandates that records for students over eighteen years are to be disclosed only to the student himself, except for disclosure to an “appropriate

---

<sup>156</sup> 20 U.S.C. § 1232g (2006). Congress derives the authority to enact such legislation through the Constitution’s spending power. U.S. CONST. art. I, § 8; U.S. DEP’T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 1, <http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf> (2002). Private universities that receive federal funds are also subject to FERPA’s regulations. See 20 U.S.C. § 1232g(a)(3) (“[T]he term ‘educational agency or institution’ means any public or private agency or institution which is the recipient of funds under any applicable program.”). Colleges are subject to FERPA even if their only federal funding is from students who receive federal loans such as a Pell Grant. Family Educational Rights and Privacy Regulations, 34 C.F.R. § 99.1(c)(2) (2007).

<sup>157</sup> 20 U.S.C. § 1232g(a)(1)(A)–(B) (2006); U.S. DEP’T OF EDUC., *supra* note 156. The term “educational record” is broad and includes all records that are “directly related to the student” and “maintained by an educational institution or party.” *Id.* § 1232g(a)(4); 34 C.F.R. § 99.3 (2007).

<sup>158</sup> 20 U.S.C. § 1232g(d); see 34 C.F.R. §§ 99.3, 99.5 (2007).

<sup>159</sup> See Lake & Tribbensee, *supra* note 31, at 137–38.

<sup>160</sup> See 34 C.F.R. § 99.31 (2007).

<sup>161</sup> *Id.* § 99.31(a)(10).

<sup>162</sup> *Id.* § 99.36(a).

<sup>163</sup> 20 U.S.C. § 1232g(b)(1)(I) (2006). The Department of Education suggested that “teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student” should receive the information. 34 C.F.R. § 99.36(b)(2) (2007).

official” if the health and safety of the student is at risk.<sup>164</sup> This provision should take effect if a student expressed suicidal thoughts.

Two possible issues arise with using the health and safety risk exception to withdraw a student. First, if the university health center does not have a clear and structured framework for dealing with such situations, a healthcare worker will possibly notify someone who does not qualify as an “appropriate person” and, as a result, violate the student’s privacy rights.<sup>165</sup> Second, supposing again that there is no framework in place, the healthcare worker might report a student for behavior that is less than an absolute emergency, such as general depression.<sup>166</sup> In both of these situations, the breach of privacy would not fall under the exception to the FERPA rule, and the university would have violated the student’s privacy.<sup>167</sup>

Effective suicide prevention appropriately balances student health and safety against the student’s right to privacy.<sup>168</sup> Scholars assert that the FERPA “escape hatch” provision for health and safety of the student evinces a legislative goal to circumscribe the privacy right in favor of overarching social and national policy concerns.<sup>169</sup> While the right to privacy is an important substantive right granted to every postsecondary student, this right should not be an absolute bar when the student is putting his own life at risk.<sup>170</sup>

Thus, scholars support the imposition upon universities of a duty to notify.<sup>171</sup> A duty to notify a family member is a lesser burden upon educational institutions than a duty to prevent suicide.<sup>172</sup> Congress should narrowly define what constitutes a health and safety emergency so that

---

<sup>164</sup> See *supra* notes 161–69 and accompanying text.

<sup>165</sup> See *supra* note 163 and accompanying text.

<sup>166</sup> See *supra* notes 141–42 and accompanying text.

<sup>167</sup> See *supra* notes 157–69 and accompanying text. Improperly disclosing a student’s records to higher officials or third parties is a common FERPA violation. John Lowery, *FERPA as a Defender of Education and Privacy Rights on Today’s College Campuses*, 10 SYNTHESIS: L. & POL’Y HIGHER EDUC. 716, 732 (1998), reprinted in *THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT* 171, 174 (Stephen J. McDonald ed., 2d ed. 2002).

<sup>168</sup> Lake & Tribbensee, *supra* note 31, at 137.

<sup>169</sup> See *id.* at 138.

<sup>170</sup> See *id.* at 137–38 (indicating that, while FERPA generally prohibits a university from releasing a student’s educational records, it expressly allows disclosure when a student’s health or safety are endangered).

<sup>171</sup> See *id.* at 145–51.

<sup>172</sup> *Id.* at 146. The student-university relationship is unique in that it is not a clear fiduciary relationship, like the relationship between a secondary institution and a student, yet colleges and administrators should not shy away from providing some guidance. *Id.* at 146–47. A belief that they have a duty to prevent suicide is what causes universities to withdraw suicidal students. See *supra* notes 42–59 and accompanying text.

counselors and administrators have a bright-line rule telling them when and under what circumstances they can divulge private information.<sup>173</sup>

### 3. Federal Disability Discrimination Laws

#### a. The Rehabilitation Act of 1973

Like FERPA, the Rehabilitation Act of 1973 uses receipt of federal funds to extend its grasp over institutions of higher education.<sup>174</sup> The Rehabilitation Act attacks disability discrimination, including discrimination under, denial of benefits from, or participation in “any program or activity receiving Federal financial assistance.”<sup>175</sup> For colleges and universities, section 504 of the Act proscribes “discrimination [on the basis of a handicap in] any . . . postsecondary education aid, benefits, or services,” against a qualified student with a handicap.<sup>176</sup>

A student is handicapped within the meaning of section 504 if he “(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”<sup>177</sup> The Department of Education has specifically identified mental or emotional illness as a mental impairment.<sup>178</sup> The Department also states that “caring for one’s self, . . . seeing, hearing, speaking, . . . learning, and working” are all major life activities.<sup>179</sup> Thus, the student must prove that he is otherwise qualified, and his mental illness substantially limited a major life activity.<sup>180</sup>

Section 504 requires the postsecondary educational institution to reasonably accommodate the disability and refrain from discrimination.<sup>181</sup>

---

<sup>173</sup> Gearan, *supra* note 153, at 1044–45; *see infra* Part IV.B.1.

<sup>174</sup> Nondiscrimination Under Federal Grants and Programs (Rehabilitation) Act § 504, 29 U.S.C. § 794(a) (2006).

<sup>175</sup> *Id.* Unlike FERPA, section 504 creates a private right of action. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, A GUIDE TO DISABILITY RIGHTS LAWS 17 (2005), available at <http://www.usdoj.gov/crt/ada/cguide.pdf>; Lake & Tribbensee, *supra* note 31, at 138 n.96.

<sup>176</sup> Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.43(a) (2007).

<sup>177</sup> *Id.* § 104.3(j)(1). To qualify as disabled under the Americans with Disabilities Act, a plaintiff must satisfy the same three elements. *See* BECKHAM, *supra* note 156, at 324.

<sup>178</sup> 34 C.F.R. § 104.3(j)(2)(i)(B) (2007).

<sup>179</sup> *Id.* § 104.3(j)(2)(ii).

<sup>180</sup> *See infra* note 192 and accompanying text.

<sup>181</sup> BECKHAM, *supra* note 156, at 334.

Under the statute, a student whose disability poses a direct threat to the health and safety of others that the university cannot reasonably accommodate is not “otherwise qualified.”<sup>182</sup> Although section 504 and the Americans with Disabilities Act (ADA)<sup>183</sup> are similar in purpose and construction,<sup>184</sup> the major difference between the two is section 504’s requirement that the discrimination occur *solely* because of the handicap.<sup>185</sup>

*b. The Americans with Disabilities Act*

While the Rehabilitation Act was Congress’s first foray into proscribing disability discrimination, its most expansive legislation in the area of disability law was the Americans with Disabilities Act.<sup>186</sup> Title II of 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.”<sup>187</sup> Under the definition of “public entity,” a public university would qualify as an “instrumentality of a State.”<sup>188</sup>

Additionally, Title III of the ADA prohibits discrimination by entities that provide public accommodation.<sup>189</sup> The ADA states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who

---

<sup>182</sup> See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.16 (1987) (“[A] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”); *EEOC v. Amego*, 110 F.3d 135, 143 (1st Cir. 1997) (using section 504 precedent to interpret the ADA).

<sup>183</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

<sup>184</sup> *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999) (“The ADA and Rehabilitation Act generally are construed to impose the same requirements due to the similarity of the language of the two acts.”).

<sup>185</sup> 29 U.S.C. § 794(a) (2006). Compare *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979) (stating that section 504 “requires only that an ‘otherwise qualified handicapped individual’ not be excluded from participation in a federally funded program ‘solely by reason of his handicap,’ indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context”), with *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073–77 (11th Cir. 1996) (stating that the ADA language “because of” or “by reason of” disability does not mean “solely because of”).

<sup>186</sup> 42 U.S.C. § 12101. Although the ADA granted extensive protection, especially in the private domain, the impact of the ADA on schools was less significant because “[d]iscrimination against handicapped persons in schools receiving federal funds was already prohibited by section 504.” MICHAEL W. LA MORTE, *SCHOOL LAW: CASES AND CONCEPTS* 345 (7th ed. 2002).

<sup>187</sup> 42 U.S.C. § 12132.

<sup>188</sup> *Id.* § 12131.

<sup>189</sup> *Id.* § 12182.

owns, leases (or leases to), or operates a place of public accommodation.”<sup>190</sup> Consequently, Title III has a broader reach into the private sector than Title II because private colleges that offer housing facilities fall under Title III’s purview.<sup>191</sup>

A student that files a claim under either Title II or Title III of the ADA must meet the elements of a claim. To establish a prima facie claim of Title II disability discrimination, the student must show that (1) he is a qualified individual with a disability;<sup>192</sup> (2) he “was excluded from participation in or was denied the benefits of services, programs, or activities of a public entity”;<sup>193</sup> and (3) his disability was a reason for the discrimination.<sup>194</sup> A Title III claim consists of the same three basic elements; however, the second element applies to denials of accommodation by owners or operators of places of public accommodation.<sup>195</sup> Courts make fact-intensive inquiries to judge the severity of the impairment and to decide whether it is chronic or temporary.<sup>196</sup> When a student claims he is impaired because of severe depression and suicidal tendencies, the court usually has little difficulty determining that he is disabled under the ADA.<sup>197</sup>

Once an expelled or evicted student establishes his disability, his best strategy in suing under the ADA is to make a claim based on a theory of failure

---

<sup>190</sup> *Id.*

<sup>191</sup> See BECKHAM, *supra* note 156, at 323–24.

<sup>192</sup> 42 U.S.C. § 12131(2) (2006). Under Title II, a student is a “qualified individual” if he “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity,” with or without reasonable modification of programs and policies. *Id.* Title III uses the word “individual,” not “qualified individual.” *Id.* § 12182(a).

<sup>193</sup> Ann K. Wooster, Annotation, *When Does a Public Entity Discriminate Against Individuals in its Provision of Services, Programs, or Activities Under the Americans with Disabilities Act*, 42 U.S.C.A § 12132, 163 A.L.R. FED. 339, 361 (2000).

<sup>194</sup> *Id.*

<sup>195</sup> 42 U.S.C. § 12182 (2006).

<sup>196</sup> See *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1174 (9th Cir. 1998). Compare *Rivera Sanchez v. Autoridad de Energia Electrica*, 360 F. Supp. 2d 302, 316–17 (D.P.R. 2005) (holding that an employee was “disabled within the meaning of the Act” based on “major severe depression with psychotic traces which [was] documented by . . . treatment he has received including several hospitalizations”), with *Mescall v. Marra*, 49 F. Supp. 2d 365, 373 (S.D.N.Y. 1999) (holding that an employee is not disabled under the ADA if the employee is unable to work for a specific employer because that employer “caused or exacerbated” a mental illness).

<sup>197</sup> See, e.g., *Chandler v. Specialty Tires of Am., Inc.*, 134 Fed. App’x 921, 924–27 (6th Cir. 2005); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 464–68 (4th Cir. 1999); *EEOC v. Amego, Inc.*, 110 F.3d 135, 138–41 (1st Cir. 1997).

to reasonably accommodate the disability.<sup>198</sup> Withdrawing or evicting the student without attempting to find a less severe course of action may constitute a failure to reasonably accommodate. Like the Rehabilitation Act, when a student poses a direct threat to the health and safety of others and the university cannot reasonably accommodate the threat, he is no longer an “otherwise qualified” individual.<sup>199</sup>

*c. Application of Disability Laws to Withdrawal and Eviction Policies*

Compulsory withdrawal procedures may violate both the Rehabilitation Act and the ADA. Under both statutes, a court may classify a severely depressed or suicidal student as disabled.<sup>200</sup> Assuming the student is otherwise qualified to attend classes,<sup>201</sup> the university violates both section 504 and the ADA if it removes the student only because he is suicidal.<sup>202</sup> If the school withdraws the student for other reasons in addition to his suicidal tendencies, it does not violate section 504 because of that statute’s “solely” language; however, the university may still violate the ADA.<sup>203</sup>

Under Title II of the ADA, the withdrawal may qualify as the university’s denial of its “benefits, services, or programs” because the school denied the student access to academic and athletic programs and other student activities.<sup>204</sup> Similarly, under section 504, exclusion from educational opportunities constitutes a denial of benefits from, participation in, and discrimination under an academic program.<sup>205</sup> Unless the university allowed for a reasonable accommodation, such as allowing the student to remain enrolled in classes as long as he seeks counseling, a court may find the school violated both disability laws.<sup>206</sup>

---

<sup>198</sup> Charles Shanor, Professor of Law, Emory Univ. Sch. of Law, Employment Discrimination Law Lecture (Nov. 13, 2006) (on file with author).

<sup>199</sup> *Bragdon v. Abbott*, 524 U.S. 624, 648–49 (1998).

<sup>200</sup> See *supra* notes 178, 196 and accompanying text.

<sup>201</sup> See *supra* note 192.

<sup>202</sup> See *supra* notes 183–91.

<sup>203</sup> See *supra* notes 183–91.

<sup>204</sup> See *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998) (holding that a student’s inability to play football was a denial of benefits, services, or programs). *But see McGraw v. Bd. of Educ. of Montgomery County*, 952 F. Supp. 248, 254 (D. Md. 1997) (holding that where the school provided many educational opportunities to the student, there was no denial of benefits, programs or services based on his disability). For additional analysis, see *supra* note 187 and accompanying text.

<sup>205</sup> See *supra* note 176 and accompanying text.

<sup>206</sup> See *supra* notes 181, 198 and accompanying text.

Eviction policies violate section 504 of the Rehabilitation Act and the ADA as well. As with mandatory withdrawal policies, a suicidal student is disabled within the meaning of both statutes.<sup>207</sup> If the university evicts a student because he threatened suicide, then the school housing program discriminated against the student because of his disability.<sup>208</sup> Again, if the university evicts him for other reasons in addition to his suicide threats, then he will not have a claim under the Rehabilitation Act, but his Title III cause of action may stand.<sup>209</sup> If the university did not allow the student to remain in housing conditioned upon, for example, his attendance at counseling sessions, then a court may find the school failed to reasonably accommodate the student.<sup>210</sup> Depending upon the danger posed to other students in the dormitory, however, the university may have a valid argument that the student is not otherwise qualified under section 504 because the accommodation is unreasonable.<sup>211</sup>

### III. FILLING THE GAPS IN ACADEMIA

Universities currently face a high-stakes dilemma in their approaches to suicidal students. If a university does not respond to the threat of a suicidal student, then, under tort law, it might be liable for the student's death.<sup>212</sup> If the university preemptively evicts or withdraws a student, it may violate constitutional and statutory rights.<sup>213</sup> Due to the gravity of the issue, various scholars have attempted to come up with a workable solution that protects students' interests and keeps colleges free from tort liability and constitutional violations.

---

<sup>207</sup> See *supra* notes 178, 196 and accompanying text. Unlike Title II of the ADA or section 504, Title III of the ADA does not require the student to be an otherwise *qualified* individual with a disability. See *supra* note 192. In most situations, a student will be qualified so long as he meets the university's basic housing requirements, such as enrollment as a full-time student. See generally *Betts v. Rectors & Visitors of Univ. of Va.*, 939 F. Supp. 461 (W.D. Va. 1996) (holding that a medical school applicant with poor test scores and low undergraduate grade point average was not "otherwise qualified" under the ADA or Rehabilitation Act).

<sup>208</sup> He would be denied the benefits, services, or participation in the housing program. See *supra* notes 175, 187 and accompanying text.

<sup>209</sup> See *supra* notes 183–91 and accompanying text.

<sup>210</sup> See *supra* notes 181, 198 and accompanying text.

<sup>211</sup> See, e.g., *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1408–09 (5th Cir. 1983) (considering the danger to others under the ADA in an employment context and holding that the defendant acted properly in terminating plaintiff's employment because plaintiff's suicidal tendencies would have had a negative effect on the patients with whom she worked).

<sup>212</sup> See *supra* notes 42–59 and accompanying text.

<sup>213</sup> See *supra* Part II.B.

Peter Lake and Nancy Tribbensee have addressed the role that the judiciary should play in alleviating the threat of tort liability.<sup>214</sup> They argue that courts should consider imposing upon universities a duty to notify parents, or a designated third party, because a duty to prevent suicide is too heavy a burden,<sup>215</sup> and imposing a lesser burden is appropriate because the relationship between a college and student turns upon the institution providing support and direction to its student body.<sup>216</sup> Moreover, such a duty is easier to discharge than a duty to prevent suicide.<sup>217</sup>

Lake and Tribbensee, however, erroneously assume that a traditional negligence standard is the standard courts should apply to determine a university's tort liability.<sup>218</sup> In a *prima facie* case of negligence, the trier of fact has overly broad discretion to decide whether a university breached its duty.<sup>219</sup> A duty to notify regarding a suicidal student is inherently more difficult to discharge because the act involves only one person, as opposed to other actions monitored by universities, most of which involve two individuals. Thus, it is critical for courts to adopt a higher standard for tort liability than mere negligence. As noted in Part I, universities promulgate eviction and withdrawal policies because they fear liability and its consequences. The scholarship promoting imposition of a classic negligence standard to student suicide cases does not achieve the necessary goal of allaying universities' fears of tort liability.<sup>220</sup> To achieve this goal, courts must raise the standard of liability for universities such that an institution is legally required, among other things, to provide sufficient mental health care services, make the services easily accessible, and publicize the services.<sup>221</sup>

---

<sup>214</sup> Lake & Tribbensee, *supra* note 31, at 146–51.

<sup>215</sup> *Id.* at 146.

<sup>216</sup> *Id.* at 146–47.

<sup>217</sup> *See id.* at 149 (claiming that the demands of foreseeability required for a university to notify a potentially suicidal student's parents are much lower than those required to place the student in custodial or supervisory care).

<sup>218</sup> *Id.* at 148–50.

<sup>219</sup> *See* Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. No. 25 570, 574–78 (Mass. Super. Ct. 2005) (applying both simple and gross negligence standards); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 606–13 (W.D. Va. 2002) (applying simple negligence standard).

<sup>220</sup> *See supra* notes 215–25 and accompanying text.

<sup>221</sup> For a description of a model suicide prevention plan, see Part V.A, *infra*.

Other academics have focused on the role universities play in safeguarding student health<sup>222</sup> by developing a campus environment receptive to the needs of severely depressed and suicidal students.<sup>223</sup> These scholars suggest certain actions that universities can take in order to minimize the number of suicides, such as educating individuals about the signs of suicide and creating an administrative committee to “monitor high-risk student[s].”<sup>224</sup> Other academics propose step-by-step procedures that universities, administrators, and faculty should employ to avoid violating constitutional and statutory rights, such as the right to due process.<sup>225</sup> While their scholarship may support plans different from the model university suicide prevention plan endorsed in Part V, these observers present strong arguments in support of the course of action that they believe colleges should take. Yet, their propositions leave gaps as to the roles that legislatures should take to buttress suicide prevention plans. Furthermore, while these scholars propose solutions for administrators, administrators will be reluctant to adopt and enforce the proposed plans without a minimized risk of tort liability. To ensure that universities and administrators do not fear implementing the scholars’ proposed prevention plans, federal and state legislatures must pass laws to limit the liability of administrators who respond to suicidal students in a way that comports with the universities’ suicide prevention plans.

Another scholar, John Gearan, proposes amending FERPA to clearly delineate what constitutes an “emergency situation” and to require universities to notify parents during such emergencies.<sup>226</sup> Gearan’s proposal merits support, although it does not provide a specific recommendation as to how colleges should structure a parental or third-party notification scheme.<sup>227</sup> Essentially, his argument gives universities a clear directive, but leaves a gap as to how universities should execute the command. To fill that gap, state legislatures should devise notification schemes that alleviate administrators’ fears of violating FERPA privacy law.

Generally, these academics have confronted the dilemma faced by universities by focusing on only one entity—the judiciary, the legislature, or

---

<sup>222</sup> Lake & Tribbensee, *supra* note 31, at 126–27. See generally PAVELA, *supra* note 16 (suggesting sample standards and procedures related to mandatory withdrawals which would correctly reflect the legal duty owed by universities to mentally ill students).

<sup>223</sup> Lake & Tribbensee, *supra* note 31, at 153–57.

<sup>224</sup> *Id.* at 153.

<sup>225</sup> PAVELA, *supra* note 16, at 80–86.

<sup>226</sup> Gearan, *supra* note 153, at 1045–46.

<sup>227</sup> See *id.*

the university itself. As a result, their solutions are ineffectual because gaps develop between their proposed solutions and their desired goals. This Comment argues that a collaborative approach incorporating all three bodies is the only way to effectively resolve universities' current legal dilemma. Universities should adopt suicide prevention plans that do not violate constitutional or statutory rights. To give universities an incentive to carry out these suicide prevention plans, courts should abandon negligence in favor of a higher tort liability standard. Legislatures should afford immunity to administrators who act in accordance with a prevention plan as a means to alleviate administrators' fears of liability. The legislature should also develop third-party notification schemes for colleges to implement so that they do not fear violating the privacy that FERPA affords to students. Each entity plays a unique role in decreasing a university's liabilities for both tortious conduct and statutory and constitutional violations. Additionally, each entity's action would not be as effective if not for the other two entities acting as buttresses.

#### IV. UNITING THE GAVEL AND THE PEN

Universities are withdrawing students from school and evicting them from campus housing because families are suing the schools for negligence and wrongful death.<sup>228</sup> The universities' actions often violate basic constitutional and statutory rights.<sup>229</sup> Scholars agree that schools and officials must find a balance between preserving the student's health and protecting his rights.<sup>230</sup> Universities cannot successfully create such policies on their own. They need the assistance of both the judicial and legislative branches if they are to strike the right balance.

##### A. *From Negligence to Deliberate Indifference*

The judiciary should take the first step in minimizing the current threat of tort liability by reconsidering the applicable liability standard. The establishment of a liability standard can have profound effects on how individuals and entities view their risk of accountability, depending on whether the standard is set too high, too low, or is balanced.<sup>231</sup>

---

<sup>228</sup> See *supra* notes 1–19 and accompanying text.

<sup>229</sup> See *supra* Part II.B.

<sup>230</sup> See *supra* Part III.

<sup>231</sup> See The Bridge, Economic Analysis of Alternative Standards of Liability in Accident Law, <http://cyber.law.harvard.edu/bridge/LawEconomics/neg-liab.htm> (last visited Mar. 3, 2007) (“If courts set the

Currently, courts apply liability standards that are either too high or too low. The traditional rule, that suicide is a deliberate and intervening act that cuts off negligence liability, is too high of a standard.<sup>232</sup> It provides no recourse for parents who believe that their child is in the university's care and that the school either ignores their child's problems or does not ensure the student's well-being. In contrast, when the *Schieszler* and *Shin* courts applied a basic negligence standard, they allowed for imposition of a duty of care that removed the incentive for the universities to look out for the student's interests.<sup>233</sup>

Due to public policy concerns, state courts that confront such a case must establish a standard that strikes a balance between these two extremes. Congress has demonstrated its commitment to preventing youth suicides by enacting the health and safety "escape hatch" provision in FERPA<sup>234</sup> and by conducting hearings on youth suicide.<sup>235</sup> Additionally, contrary to the notion that college students are adults, many parents want postsecondary institutions to take a more active role in the development of their children.<sup>236</sup>

Borrowing from Title IX<sup>237</sup> jurisprudence, courts should use an effectively balanced standard known as the deliberate indifference standard.<sup>238</sup> The Supreme Court has applied this standard to the educational context in two Title IX sexual harassment cases, *Gebser v. Lago Vista Independent School*

level of proscribed care too high . . . efficient activity will be deterred. If courts set the proscribed level of care too low, inefficient injuries will occur.")

<sup>232</sup> See *supra* notes 31–32 and accompanying text.

<sup>233</sup> See *supra* notes 42–59 and accompanying text.

<sup>234</sup> 20 U.S.C. § 1232g(b)(1)(I) (2006); see Lake & Tribbensee, *supra* note 31, at 138.

<sup>235</sup> See, e.g., *Examining the National Health Crisis Regarding Teen and Young Adult Suicide Issues: Hearing Before the Subcomm. on Children and Families of the S. Comm on Health, Educ., Labor, and Pensions*, 107th Cong. 1 (2001) (focusing on the "specific matter of teenage suicide" as a "compelling issue"); *Suicide Prevention and Youth—Saving Lives: Hearing Before the Subcomm. on Substance Abuse and Mental Health Serv. of the S. Comm. of Health, Educ., Labor, and Pensions*, 108th Cong. 1–34 (2004). As Cheryl A. King, an Associate Professor of Psychiatry at the University of Michigan, stated:

[T]he history of these university and college counseling centers really was a different mission, and that was to provide academic counseling . . . . It was really not to deal . . . with bipolar disorder, massive depressive disorder, someone who has made multiple suicide attempts. And yet, these other services are not usually readily available to all youth when they are away from home.

*Id.* at 27.

<sup>236</sup> See *supra* note 69 and accompanying text.

<sup>237</sup> See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

<sup>238</sup> See *infra* notes 244–54 and accompanying text.

*District*<sup>239</sup> and *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.<sup>240</sup> Both dealt with imputing liability to a school district or school board for the sexual harassment of a student.<sup>241</sup> In *Gebser*, a high school student sued the school district after her sexual relationship with a teacher was discovered.<sup>242</sup> *Davis* took place in the primary school context and involved a fifth-grade student's sexual harassment of his classmate.<sup>243</sup> The cases established a two-prong test to decide whether the school system should be liable for the hostile work-environment sexual harassment<sup>244</sup> of a student: it is liable only if (1) it has actual notice of the events that allegedly created the environment,<sup>245</sup> and (2) the system's behavior exhibits deliberate indifference to the problem.<sup>246</sup> The *Davis* Court defined "deliberate indifference" to mean "clearly unreasonable in light of the known circumstances."<sup>247</sup> Courts have applied this "deliberate indifference" standard to postsecondary educational institutions.<sup>248</sup>

Commentators have criticized the standard, however, for not strictly adhering to Title IX principles, for imposing a financial burden on schools defending suit, for encouraging administrators to act irresponsibly, and for giving too much protection to schools.<sup>249</sup> Despite its flaws, the standard

---

<sup>239</sup> 524 U.S. 274 (1998).

<sup>240</sup> 526 U.S. 629 (1999). This "deliberate indifference" standard was taken from jurisprudence surrounding 42 U.S.C. § 1983. *Gebser*, 524 U.S. at 291.

<sup>241</sup> See *Davis*, 526 U.S. at 632–33; *Gebser*, 524 U.S. at 277.

<sup>242</sup> *Gebser*, 524 U.S. at 277.

<sup>243</sup> *Davis*, 526 U.S. at 633–35.

<sup>244</sup> Hostile work environment sexual harassment is one of two types of sexual harassment under Title VII of the Civil Rights Act of 1964. See Sexual Harassment, 29 C.F.R. § 1604.11 (2007).

<sup>245</sup> *Gebser*, 524 U.S. at 289–90.

<sup>246</sup> *Davis*, 526 U.S. at 650. The harassment must also be severe and pervasive so as to deprive the student of her educational opportunity. *Id.*

<sup>247</sup> *Id.* at 648.

<sup>248</sup> See, e.g., *Wills v. Brown Univ.*, 184 F.3d 20, 40 (1st Cir. 1999) (citing *Gebser* and *Davis*).

<sup>249</sup> See, e.g., Heather R. Redmond, *Davis v. Monroe County Bd. of Educ.: Scant Protection for the Student Body*, 18 LAW & INEQ. 393 (2000) (arguing that the narrowly drawn deliberate indifference standard used by the Court in *Davis* defeats the purpose of Title IX); Melissa M. Solocinski, Case Note, *Opening the Floodgates—Deliberate Indifference, Causation and Control as Means of Authorizing Unlimited Litigation Under Title IX: Davis v. Monroe County Board of Education*, 55 U. MIAMI L. REV. 147 (2000) (claiming that the control, causation, and deliberate indifference tests used in *Davis* run contrary to Title IX); Kelly Titus, Note, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 LA. L. REV. 321 (1999) (contending that the "actual notice" standard employed in *Gebser* provides incentives for schools to avoid knowledge of misconduct in order to prevent liability, contrary to the purpose of Title IX); Fermeen Fazal, Note, *Is Actual Notice an Actual Remedy? A Critique of Gebser v. Lago Vista Independent School District*, 36 HOUS. L. REV. 1033 (1999) (proposing that, because victims of sexual harassment are unlikely to report the harassment, an "actual notice" standard frustrates the purpose of Title IX). But see, e.g., Deborah L. Brake, Symposium, *School Liability for Peer Sexual Harassment After Davis: Shifting From Intent to Causation in*

should work in the student suicide context because suicide is a personal act involving one depressed individual and his own mind. Schools have more difficulty regulating the actions of one individual than regulating interactions between two people. Because of the difficulty of regulation, families should not expect universities to prevent suicide in the same way they are expected to prevent sexual harassment.<sup>250</sup> Therefore, the deliberate indifference standard may be more successful in dealing with student suicides than student sexual harassment.

The deliberate indifference standard represents a relatively high standard for imposing liability. The *Gebser* Court believed that a lower standard created the risk of a school facing liability for the independent decision of an employee, but not for its own official decision.<sup>251</sup> Universities confront the same dilemma with student suicide cases—they face liability not for their own decisions, but for the independent decision of a student.<sup>252</sup> Because policy considerations behind university liability for sexual harassment and student suicide are similar, courts should apply the deliberate indifference standard to student suicide cases. A university should be liable only if it (1) has actual notice of credible suicide threats or attempts; and (2) responds in a manner exhibiting deliberate indifference to the situation.<sup>253</sup>

The notice element poses a challenge to courts applying the standard to a student suicide case. When deciding if a university had notice of a student's suicidal tendencies, the judiciary must discourage the violation of privacy laws.<sup>254</sup> To do so, courts should preserve the *Gebser-Davis* requirement of actual notice and not allow for constructive notice.<sup>255</sup> If courts require universities to act on information received constructively, they would effectively sanction leaks in the privacy safeguarded by FERPA.<sup>256</sup> A

---

*Discrimination Law*, 12 HASTINGS WOMEN'S L.J. 5 (2001) (insisting that that the *Davis* Court correctly focused on institutional inaction as a cause of sexual harassment rather than focusing on actual intent by school officials).

<sup>250</sup> See generally, e.g., Redmond, *supra* note 249.

<sup>251</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998).

<sup>252</sup> See *supra* notes 44–59 and accompanying text.

<sup>253</sup> Cf. *Gebser*, 524 U.S. at 289–90 (explaining the imposition of an actual notice requirement as opposed to an implied notice requirement); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (stating that an education institution must be deliberately indifferent to severe, pervasive, and objectively objectionable); see also *supra* notes 244–49 and accompanying text.

<sup>254</sup> See *supra* Part II.B.2.

<sup>255</sup> See *supra* note 245 and accompanying text.

<sup>256</sup> See 20 U.S.C. §1232g (2006); Family Educational Rights and Privacy Regulations, 34 C.F.R. §§ 99.1–99.67 (2007).

constructive-notice requirement has its advantages, such as discouraging administrators from ignoring a suicidal student they inadvertently come across.<sup>257</sup> These advantages do not outweigh the benefits of creating a bright-line rule delineating when a school will be liable because, with a bright-line rule, colleges and officials will not want to breach the students' privacy out of fear of litigation.

University counselors should provide actual notice to administrators only under the narrow circumstances outlined in FERPA. FERPA allows school healthcare workers to disclose a student's records to an "appropriate official" if the disclosure is connected with the health and safety of the student.<sup>258</sup> The Act foresees a breach of a student's privacy in this limited manner when two requirements are met: (1) the student faces a health emergency; and (2) the information is revealed only to specified administrators.<sup>259</sup> University health centers should refrain from notifying an official if the student is facing something less than an emergency, such as general depression. Additionally, they should protect student information and privacy such that actual notice is the only way the university could learn of the student's suicidal tendencies.

The second element of the test, which asks whether the university exhibits deliberate indifference to the student's condition,<sup>260</sup> should be maintained as a high standard the way the *Gebser* Court intended.<sup>261</sup> The university should not be liable for the suicide if it takes "timely and reasonable" measures to assess the student's condition and to guide him to the appropriate mental health facilities (without violating privacy laws).<sup>262</sup> When the university becomes aware that its actions are not helping the student, it should be liable if it does not try to help the student through different means.<sup>263</sup> To demonstrate that it is not deliberately indifferent, a university should develop an active suicide-prevention system.<sup>264</sup> What steps are necessary to shield a university from liability is ultimately a question for each court to answer.

---

<sup>257</sup> As discussed earlier, suicide prevention is a significant government goal. *See supra* note 137.

<sup>258</sup> 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.31(a)(10).

<sup>259</sup> *See* 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.31(a)(10).

<sup>260</sup> *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642–43 (1999).

<sup>261</sup> *See Gebser*, 524 U.S. at 285 (stating "it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official").

<sup>262</sup> *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

<sup>263</sup> *See id.* ("If [the university] learns that its measures have proved inadequate, it may be required to take further steps to avoid new liability.")

<sup>264</sup> *See infra* Part V.A for further discussion of a model suicide prevention system.

With such a standard in place, a university that establishes an effective mental healthcare program and creates a system of alerting appropriate authorities should not need to fear liability. The minimized risk of liability will allow it to make decisions that are purely in the best interest of the student.<sup>265</sup> Another advantage of this standard is that it provides the family of deceased students some recourse when a university has notice of a suicidal student and completely ignores him. If the university does not have a suicide-prevention system, the family will likely succeed on a claim that the school should have done more to help their child.<sup>266</sup> The only issue that the judiciary cannot address is the administrators' fears of being sued in their personal capacities; however, that is a problem for the legislature.

### *B. Legislating Changes*

As discussed previously, principles of economics and risk management demonstrate that insulating the university from liability will not alter the current trend in student suicide policies.<sup>267</sup> In addition to judicial action, federal and state legislatures should establish a system where students provide the name of a person whom the counselor may contact if suicide becomes a real threat. Legislatures should also grant immunity for educators sued in their personal capacity.

#### *1. Mandating Third-Party Notification Schemes*

Both federal and state legislatures should require postsecondary institutions to establish a third-party notification system. Such a notification system would allow counselors to disclose credible and life-threatening information to administrators, who could then inform the student's chosen contact person of the trouble ahead.

With respect to the federal legislature, one scholar believes that Congress should amend FERPA to mandate that universities take affirmative steps to notify a third party if a student expresses suicidal thoughts.<sup>268</sup> The existence of the health and safety exception is, in and of itself, evidence that Congress intended student safety to trump protection of privacy in a life-threatening

---

<sup>265</sup> See *supra* notes 70–71 and accompanying text.

<sup>266</sup> See, e.g., Gearan, *supra* note 153, at 1042 (“Requiring parental notification through FERPA would be successful because . . . neglecting to follow a federal statute would be incredibly damaging in a subsequent wrongful death lawsuit.”).

<sup>267</sup> See *supra* notes 70–71 and accompanying text.

<sup>268</sup> Gearan, *supra* note 153, at 1041.

situation.<sup>269</sup> Yet, “[d]espite the increasing threat of wrongful-death litigation, colleges and universities often still choose to protect a student’s privacy because they fear violating FERPA, and losing valuable federal funding.”<sup>270</sup> Admittedly, imposing a duty to notify is a lesser burden on universities than a duty to prevent suicide.<sup>271</sup> Because of the confusing and conflicting case law, the only way to discourage colleges from prioritizing privacy rights over student safety is to codify such a requirement in FERPA.<sup>272</sup> Such an amendment will appropriately balance the need for student safety and privacy, so long as counselors remain mindful that the health and safety exception calls for strict construction.<sup>273</sup>

Mental health counselors and administrators must narrowly construe the FERPA definition of “appropriate party”—the person to whom the information can be disclosed.<sup>274</sup> Usually included within the definition are medical experts, law enforcement, and public health officials.<sup>275</sup> Universities should require health centers to designate an administrative official, already in charge of student health and affairs, to whom counselors can report suicide threats and attempts. Thus, the strict construction requirement would minimize the breach of privacy because counselors could alert only a single official to the life-threatening situation.

Universities must also define exactly what constitutes an “emergency” to prevent the scales from tipping in favor of notification. As it now stands, “[t]he current FERPA exception allowing for disclosure in emergencies is essentially useless without an unambiguous definition of what a [sic]

---

<sup>269</sup> 20 U.S.C. § 1232g(b)(1)(I) (2006); see Lake & Tribbensee, *supra* note 31, at 138 (noting that while FERPA protects disclosure of student counseling records, it provides for an exception when the disclosure is made due to a health or safety emergency).

<sup>270</sup> Gearan, *supra* note 153, at 1025.

<sup>271</sup> *Id.* at 1040–41.

<sup>272</sup> See *id.* at 1042–44 (arguing that the murky case law unfairly puts institutions at legal risk when reaching out to students in need).

<sup>273</sup> See Family Educational Rights and Privacy Regulations, 34 C.F.R. § 99.36(c) (2007) (“Paragraphs (a) and (b) of this section will be strictly construed.”); Letter from LeRoy S. Rooker to Donna S. Weldon (May 24, 2002), in THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: A LEGAL COMPENDIUM 245, 246 (Stephen J. McDonald ed., 2d ed. 2002) (“The regulations provide, however, that the health or safety exception shall be narrowly construed.”).

<sup>274</sup> The Department of Education defined an “appropriate party” as “those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals.” Letter from LeRoy S. Rooker to Donna S. Weldon, *supra* note 271, at 246 (citing 34 C.F.R. § 99.36).

<sup>275</sup> *Id.*

constitutes an emergency.”<sup>276</sup> Again, counselors and administrators must narrowly construe the word “emergency” in developing their definition.<sup>277</sup> Any proposed definition should differentiate between general depression and severe depression that is accompanied by suicidal thoughts or tendencies. The former should not trigger the duty to notify because it would not comport with a strict construction of the word “emergency.” Additionally, notification of general depression will deter students from seeking counseling, especially if such a plan becomes common knowledge among the student body. Clear guidelines informing universities of their responsibilities decrease the chance that they will act unlawfully and increase the chance that they will take appropriate steps to help the student.<sup>278</sup>

If Congress imposes a duty to notify upon universities, then state legislatures must develop notification schemes that balance student safety against student rights. These schemes should define the “appropriate party” to notify under FERPA’s mandate.<sup>279</sup> A few state legislatures have recently experimented with different notification schemes in colleges and universities. Tennessee adopted such a scheme first, and the Colorado legislature soon followed suit.<sup>280</sup>

Tennessee passed the Student Information in Higher Education Act in 2005,<sup>281</sup> mandating that postsecondary educational institutions offer students the option to release certain information, made confidential by federal law, to a chosen parent.<sup>282</sup> The Act also established a one-year pilot program at Middle Tennessee State University (MTSU).<sup>283</sup> While the program waivers clarify that “access to confidential counseling and health information is not provided through participation in the . . . program,” the Act provides an interesting

---

<sup>276</sup> Gearan, *supra* note 153, at 1045.

<sup>277</sup> See 34 C.F.R. § 99.36(c) (indicating that the definition of an emergency is to be strictly construed).

<sup>278</sup> See Gearan, *supra* note 153, at 1044–45 (arguing that clearer regulations will eliminate the guesswork on the front end as to what a school’s obligations are, thus enabling schools to reach out to students in need without risking legal consequences).

<sup>279</sup> See *supra* notes 163–69 and accompanying text.

<sup>280</sup> See Student Information in Higher Education Act of 2005, TENN. CODE ANN. §§ 49-7-1101 to -1104 (2006); Colorado Higher Education Student Suicide Prevention Act, COLO. REV. STAT. §§ 23-20-101 to -105 (2006); April M. Washington, *Panel Backs Anti-Suicide Measure*, ROCKY MTN. NEWS, Mar. 2, 2006, at A27.

<sup>281</sup> TENN. CODE ANN. §§ 49-7-1101 to -1104.

<sup>282</sup> *Id.* § 49-7-1103.

<sup>283</sup> *Id.* § 49-7-1104. The program is entitled the Partners in Education Program. TENN. GEN. ASSEMBLY, OFFICE OF ADMIN., LEGISLATION AFFECTING TBR AND MEMBER INSTITUTIONS 19 (2006), available at [http://www.tbr.state.tn.us/legislative\\_digest/2006%20Legislative%20Digest.pdf](http://www.tbr.state.tn.us/legislative_digest/2006%20Legislative%20Digest.pdf).

framework that other states might adopt.<sup>284</sup> Under the Act, the university contacts the student's parent only in certain serious situations,<sup>285</sup> such as when the student is a victim of a crime of violence.<sup>286</sup>

The "serious situations" exception should include suicide threats or attempts. Other state legislatures adopting a similar program could include threats to one's own life in the definition of "crime of violence," as do the counselors at the University of Illinois.<sup>287</sup> Just as with FERPA interpretation, counselors and administrators should narrowly construe the definition of a "crime of violence against oneself" such that third parties receive reports only about actual suicide attempts or substantiated threats.

In June 2006, the Colorado legislature followed Tennessee's lead and adopted a notification pilot program.<sup>288</sup> Unlike the Tennessee plan, this program allows disclosure when a student is suicidal and poses a danger to himself.<sup>289</sup> The Act required the Colorado Commission on Higher Education to select, by July 2007, colleges and universities to implement the program for a period of two years.<sup>290</sup> These institutions will develop a consent form allowing the school to notify a person of the student's choice if the student threatens suicide.<sup>291</sup> The disclosed information must directly relate to the threat of suicide or self-inflicted harm and must be based on a reasonable belief that the student is a danger to himself.<sup>292</sup>

---

<sup>284</sup> TENN. GEN. ASSEMBLY, *supra* note 283.

<sup>285</sup> *See id.* Such situations include being the victim of "a crime of violence or non-forcible sex offense," as well as a drug or alcohol related offense if the student is under the age of 21. *Id.* Otherwise, parents who join the program are expected to contact the university if they want disclosure of confidential records. *Id.* at 20.

<sup>286</sup> *Id.* at 19.

<sup>287</sup> The University of Illinois counselors state that, "just as murders or assaults are not dismissed as acts of helplessness, neither should acts of violence against one's self." *Suicide Prevention Program Takes a New Approach, Works to Fight Violence Against Self*, DAILY ILLINI, Oct. 7, 2004, <http://media.www.dailyillini.com/media/storage/paper736/news/2004/10/07/News/Suicide.Prevention.Program.Takes.A.New.Approach.Works.To.Fight.Violence.Against-744761.shtml>. For further discussion regarding the University of Illinois model, see *infra* notes 307–24 and accompanying text.

<sup>288</sup> *See* COLO. REV. STAT. § 23-20-103(2)(b)(II) (2006).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* § 23-20-103(1). The Act must be repealed in 2010, allowing for modifications or abandonment of the program after the first "test run." *See id.* § 23-20-105.

<sup>291</sup> *Id.* § 23-20-103(2)(b)(I). The consent form is not a bar to receiving treatment, though, as the student may refuse to sign the form, change the person listed, or revoke the form at a later date. *Id.* § 23-20-103(3)–(4).

<sup>292</sup> *Id.* § 23-20-103(2)(b)(II).

From the outset, the program promises to balance privacy and welfare concerns. The program comports with the policy goal of slightly favoring student safety over privacy in life-threatening situations.<sup>293</sup> The statute also seemingly calls for narrow construction by requiring the university's belief to be reasonable.<sup>294</sup> In addition, universities should disclose the least amount of information necessary to communicate the reasonableness of the belief.<sup>295</sup> Whether the program ultimately succeeds at striking a balance between privacy rights and student safety depends upon counselors' strict application of the statute; it should not devolve into means of intruding into a student's personal life.

Both the federal and state legislatures should require universities to develop third-party notification schemes. To force the schemes to prioritize student safety only minimally over student privacy, colleges should narrowly construe all legislative acts addressing student suicide. The legislature's final step is to insulate administrators from personal liability lawsuits.

## 2. *Extending Immunity to Administrators*

In addition to mandating that universities develop suicide notification systems, the legislature should protect administrators from personal lawsuits. The *Schieszler* and *Shin* courts allowed wrongful death and negligence claims against individual administrators to survive summary judgment.<sup>296</sup> This decision was particularly surprising in *Shin* because the court granted summary judgment in favor of the university.<sup>297</sup> Legislatures should prevent families from suing university administrators in their individual capacities.<sup>298</sup> Combined with the deliberate indifference standard, administrators will have minimal incentive to act with self-interest because, as long as they take affirmative steps to help suicidal students, their risk of tort liability will be inconsequential.<sup>299</sup>

---

<sup>293</sup> See *supra* note 267 and accompanying text.

<sup>294</sup> See COLO. REV. STAT. § 23-20-103(2)(b)(I).

<sup>295</sup> *Id.* § 23-20-103(2)(b)(II).

<sup>296</sup> See *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002); *Shin v. Mass. Inst. of Tech.*, 19 Mass. L. Rptr. 570, 576–78 (Mass. Super. Ct. 2005).

<sup>297</sup> *Id.* at 574.

<sup>298</sup> Such legislation prevents the deceased student's family from suing an administrator, even one who acted extremely egregiously, in his personal capacity. To remedy this situation, the legislation should contain an exception allowing universities to sue administrators if the court finds they acted with deliberate indifference to a suicidal student. See *supra* Part IV.A.

<sup>299</sup> See *supra* notes 70–71 and accompanying text (discussing the notion that subjecting administrators to personal liability creates an incentive for them to prioritize their own interests over those of the student).

Granting educators immunity from suit is not unfamiliar territory for the federal government. The No Child Left Behind Act of 2001<sup>300</sup> includes a provision that limits the liability of teachers.<sup>301</sup> Teachers are immune from liability under the following three conditions: (1) the teacher acted lawfully and within the scope of her employment and responsibilities; (2) her actions were focused on maintaining order and control in the school; and (3) “the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher.”<sup>302</sup> Congress recognized the importance of educators’ ability to build an “appropriate educational environment.”<sup>303</sup> Such an environment can exist only when teachers have the necessary “tools,” particularly the tool of qualified immunity.<sup>304</sup>

While the Act specifically exempts “teachers,” the purpose behind the statute’s enactment also applies to administrators in postsecondary education.<sup>305</sup> University administrators require qualified immunity from personal lawsuits in order to maintain a healthy academic environment for severely depressed and suicidal students.<sup>306</sup> Similar protection for college administrators, when coupled with a deliberate indifference standard for university liability, would eradicate the benefit of acting with self-interest.

A few state legislatures have granted immunity to educators in specific contexts. The Colorado Higher Education Student Suicide Prevention Act<sup>307</sup> calls for the creation of a pilot program where students may consent to disclosing their suicidal tendencies to a contact person.<sup>308</sup> The Act includes a provision affording immunity to the employee who makes the disclosure in conformity with the consent form.<sup>309</sup> As the program only went into effect in July 2007,<sup>310</sup> the effect of the immunity provision is currently unknown. The

---

<sup>300</sup> No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (Supp. IV 2006).

<sup>301</sup> Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. §§ 6731–6738 (Supp. IV 2006).

<sup>302</sup> *Id.* § 6736(a)(4).

<sup>303</sup> *Id.* § 6732. “The purpose of this subpart is to provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment.” *Id.*

<sup>304</sup> *See id.*; *see also* Perry A. Zirkel, *The Coverdell Teacher Protection Act: Immunization or Illusion?*, WEST’S EDUC. L. REP. 547, 547 (2003).

<sup>305</sup> 20 U.S.C. § 6733(6).

<sup>306</sup> *See supra* notes 66–72 and accompanying text.

<sup>307</sup> COLO. REV. STAT. §§ 23-20-101 to -105 (2006); *see supra* notes 286–294 and accompanying text.

<sup>308</sup> COLO. REV. STAT. § 23-20-103(2)(b).

<sup>309</sup> *Id.* § 23-20-104.

<sup>310</sup> *Id.* § 23-20-103.

existence of the provision, however, demonstrates the Colorado legislature's belief that the fear of litigation burdens school officials' ability to act in the students' best interest. It also demonstrates that the legislature ultimately places a higher value on preventing suicide than on protecting students' privacy.<sup>311</sup>

Federal and state legislatures must encourage third-party notification to combat university policies that evict or withdraw suicidal students.<sup>312</sup> The judiciary should establish a deliberate indifference standard of liability. The legislature should develop optional privacy waiver legislation. In Part V, this Comment contends that universities should implement a suicide prevention policy that effectively thwarts suicide and places the minimum burden on students' rights.

## V. THE FINAL PIECE OF THE PUZZLE

University administrators who withdraw or evict suicidal students from the school or campus housing risk violating several federal laws and constitutional rights.<sup>313</sup> An integrated approach will balance the student's rights against the school's interest in preventing on-campus suicides. The judiciary should establish a middle ground through a deliberate indifference standard of tort liability. The legislatures, both federal and state, should grant immunity to officials who face personal suits, as well as develop and implement optional privacy waivers for life-threatening situations. Creating a policy that is a *de minimis* burden on a student's constitutional and statutory rights is the final piece in attacking the student suicide epidemic.

### A. A Model Plan

Colleges around the country are slowly adopting a plan that the University of Illinois developed in 1984.<sup>314</sup> Illinois's program requires any student who attempts or threatens suicide to attend four one-hour sessions with a mental

---

<sup>311</sup> Undoubtedly, privacy remains a substantial concern, considering that the immunity provision applies only when an administrator discloses the information exactly as the consent form delineates. *Id.*

<sup>312</sup> See *supra* notes 274–300 and accompanying text.

<sup>313</sup> See *supra* Part II.B.

<sup>314</sup> Mark Moran, *Liability Issues Shape Colleges' Response to Suicide Attempts*, 41 PSYCHIATRIC NEWS, June 2, 2006, at 1. Other schools that have implemented similar plans include the University of Washington Seattle, Case Western Reserve University, University of Puget Sound, and University of South Dakota. *Id.*

health professional.<sup>315</sup> The university threatens disciplinary or academic action only when a student fails to adhere to the policy.<sup>316</sup> To date, the University of Illinois has withdrawn only one student who fully complied with the policy.<sup>317</sup> The program has been successful; it has reduced the number of campus suicides by half,<sup>318</sup> and it strikes the appropriate balance between student rights and student safety.

The “Illinois plan” does not violate due process rights because it does not threaten a student’s educational or residential property.<sup>319</sup> The student’s property interests are not at stake unless he fails to satisfy the four-session counseling requirement.<sup>320</sup> Unlike mandatory withdrawal or eviction policies, even if a university ultimately withdraws a student for not attending the sessions, the due process analysis does not lean in the student’s favor. Applying the *Mathews* test,<sup>321</sup> the student’s private interest in this situation is avoiding mandated therapy.<sup>322</sup> Unlike a mandatory withdrawal policy, this program clarifies that the suicide report and counseling sessions will remain off the student’s academic record and will not negatively affect the student’s future academic and career pursuits.<sup>323</sup>

---

<sup>315</sup> Univ. of Ill. Counseling Ctr., Mandated Assessment Following Suicide Threats and Attempts, <http://www.couns.uiuc.edu/SuicidePolicy.html> (last visited Mar. 3, 2007). The sessions only mandate the student to discuss his previous and current suicidal tendencies; any other counseling or therapy is the student’s voluntary choice. *Id.* The university defines suicide as an act of violence. *Suicide Prevention Program Takes a New Approach, Works to Fight Violence Against Self*, *supra* note 287.

<sup>316</sup> Univ. of Ill. Counseling Ctr., *supra* note 315. The Dean of Students will determine the appropriate course of disciplinary action. *Id.*

<sup>317</sup> Gary Pavela, *Should Colleges Withdraw Students Who Threaten or Attempt Suicide?*, 54 J. AM. C. HEALTH 367, 369 (2006). The student returned and finished his degree. *Id.*

<sup>318</sup> Moran, *supra* note 314, at 1. At all other Big Ten schools, suicide rates remained stable, but the University of Illinois’ suicide rate fell by 45.3 percent. *Id.* Additionally, of the approximate two thousand students who have gone through the program, not one has subsequently committed suicide. *Suicide Prevention Program Takes a New Approach, Works to Fight Violence Against Self*, *supra* note 287.

<sup>319</sup> See *supra* notes 97, 140 and accompanying text.

<sup>320</sup> See Univ. of Ill. Counseling Ctr., *supra* note 315 (stating that failure to fulfill the program’s requirements may result in academic suspension or withdrawal).

<sup>321</sup> See *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (confirming the factors stated in *Mathews v. Eldridge* and, in addition, including the interest of the party against affording an opportunity to be heard to the governmental interest); *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (stating that the court should examine and weigh the affected private interest, the risk of erroneous deprivation and benefit of additional safeguards, and the interest of the government); see also *supra* notes 107–15.

<sup>322</sup> See *supra* note 315 and accompanying text.

<sup>323</sup> See Univ. of Ill. Counseling Ctr., *supra* note 315.

The plan poses a minimal risk of erroneous deprivation because the school will not withdraw the student unless he fails to attend the required sessions.<sup>324</sup> The university can determine easily, and accurately, whether or not he attended all four sessions.<sup>325</sup> The second *Mathews* factor also weighs the value of additional or alternative safeguards.<sup>326</sup> If a student believes the university is overreacting, he may appeal the mandatory counseling to the dean of students.<sup>327</sup> The appeals process acts as a safeguard, and a school may argue the counseling sessions themselves guard against improper withdrawal and deprivation of educational opportunities.

The university's interest should not be in avoiding tort liability, but rather in providing the student with necessary help.<sup>328</sup> In providing the counseling sessions, the government has an ancillary interest in preventing youth suicide.<sup>329</sup>

The university's and government's interests, coupled with the low risk of erroneous deprivation, outweigh the student's interest in avoiding counseling. Additionally, if the student appeals the university's determination that his actions were life-threatening and the Dean of Students affirms the determination, then the student must only attend four hours of counseling.<sup>330</sup> This deprivation of the student's liberty is *de minimis* because discouraging student suicide is important public policy,<sup>331</sup> and the plan requires counseling only after receiving a credible report.<sup>332</sup>

This plan also avoids violating FERPA privacy rights.<sup>333</sup> The plan delineates that only a suicide-prevention team<sup>334</sup> will keep the records, and that it will keep them separately from the academic record to further ensure their confidentiality.<sup>335</sup> The counseling sessions are kept confidential among

---

<sup>324</sup> See *id.* and accompanying text.

<sup>325</sup> See *id.*

<sup>326</sup> Doehr, 501 U.S. at 11; see *supra* note 109 and accompanying text.

<sup>327</sup> See Univ. of Ill. Counseling Ctr., *supra* note 315. A student who argues his threats were not real or credible can appeal the reported severity of the suicide threat. *Id.*

<sup>328</sup> See Doehr, 501 U.S. at 11 (articulating the interest of the party seeking the prejudgment remedy as the third factor to be weighed in a due process analysis); see also *supra* note 110 and accompanying text.

<sup>329</sup> See Doehr, 501 U.S. at 11 (indicating that any ancillary interests of the government are also to be weighed in a due process analysis); see also *supra* notes 111, 136–42, 144 and accompanying text.

<sup>330</sup> Univ. of Ill. Counseling Ctr., *supra* note 315.

<sup>331</sup> See *supra* notes 168–76 and accompanying text.

<sup>332</sup> Univ. of Ill. Counseling Ctr., *supra* note 315.

<sup>333</sup> See *supra* notes 156–69 and accompanying text.

<sup>334</sup> *Id.* The prevention team is a division of the counseling center. See *id.*

<sup>335</sup> *Id.*

members of the suicide-prevention team, except when the student does not attend the sessions or when the circumstances of the suicide threat or attempt were extremely dangerous.<sup>336</sup> In those cases, the Dean of Students is informed of the circumstances; when there are one or more “*potentially* lethal” suicide attempts, the Dean of Students may notify certain third parties.<sup>337</sup> It has been argued that a duty to notify third parties in severe cases should be imposed upon universities because Congress prioritized suicide prevention over privacy rights when it added the “health and safety” FERPA exception.<sup>338</sup> With this public policy as an undercurrent, the Illinois plan does not explicitly violate FERPA, and in the situation where a student poses a real and significant threat to himself, the student shoulders a congressionally supported *de minimis* burden on his privacy.

Lastly, the Illinois plan does not discriminate against suicidal and severely depressed students. The university does not violate the Rehabilitation Act or the ADA because it does not deny any benefits of, services of, or participation in school programs if the student complies with the counseling requirement.<sup>339</sup> The student remains enrolled in school and part of campus life and, therefore, suffers no discrimination based on his disability.

There are two drawbacks to the Illinois plan. First, at times, the plan imposes slight burdens on the due process and privacy rights of students.<sup>340</sup> As stated above, however, those burdens are minimal, and overarching congressional policy to prioritize student health and safety necessitates these burdens.<sup>341</sup> Second, students who go through the plan might still commit suicide on campus, and families may still sue universities and administrators. Still, university officials should find reassurance in the plan because it comprehends university involvement when the school receives notice of a suicidal student.<sup>342</sup> Coupled with a deliberate indifference liability standard,

---

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* Usually the student’s parents or significant other qualify as third parties. *Id.*

<sup>338</sup> See, e.g., Lake & Tribbensee, *supra* note 31, at 138.

<sup>339</sup> See 29 U.S.C. § 794(a) (2006) (“No otherwise qualified individual with a disability . . . shall, solely by reason of his or her 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 . . . .”); 42 U.S.C. § 12132 (2006) (“[N]o 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.”).

<sup>340</sup> See *supra* notes 325–44 and accompanying text.

<sup>341</sup> See generally, e.g., S. Res. 84, *supra* note 137 (recognizing suicide as a national problem and encouraging the development of initiatives designed to address it).

<sup>342</sup> See *supra* notes 315–24 and accompanying text.

universities implementing this program should avoid tort liability if a deceased student's family takes the university to court.<sup>343</sup>

This program best protects each party's interests: the student's due process and privacy rights; the university's and administrator's interests in avoiding legal liability, and the student's and family's interests in getting the student help. Colleges and universities around the country should adopt this plan to combat the growing number of student suicides every year.<sup>344</sup>

### *B. Resolution: An Integrated Approach*

Universities' current approach to student suicides is dangerous because it forces them to decide between two undesirable choices. On the one hand, they keep their hands out of students' affairs and risk facing a wrongful death or negligence suit. On the other hand, they can preemptively remove the student before he can commit suicide and run the risk of a due process or ADA claim. The courts created this confusion when they deviated from the principle that suicide is an intentional and intervening act that cuts off third-party liability. Society is also partially to blame because many parents now demand universities to take a more "hands on" approach to their students, especially where health and safety is concerned. Yet, mandatory withdrawal and eviction plans are not the best programs for schools to enforce because, although they may remove the threat of a wrongful death suit, they expose the school to allegations of civil or statutory violations.

To resolve this legal and social dilemma, the legislature, the judiciary, and universities must work together. State and federal legislatures should take two actions. First, they should shield university officials from suits against them in their personal capacities. Second, they should enact laws allowing colleges to ask students for limited and voluntary privacy waivers. The courts must reconcile the new belief that failing to prevent a suicide is at least negligent with the old belief that no third party can be responsible for a suicide. In doing so, they should promulgate a deliberate indifference standard to reward schools that develop effective suicide prevention programs and to punish those that turn a blind eye to the problem. Finally, universities should abandon eviction and withdrawal programs in favor of the Illinois model. This integrated approach is most beneficial to schools, students, and families because no one party's concerns are favored over another's.

---

<sup>343</sup> See *supra* Part IV.A (advocating the imposition of a deliberate indifference standard).

<sup>344</sup> See *supra* note 15 and accompanying text.

\*\*\*

Suicide and depression are complicated health and legal issues that necessitate complex solutions. Ultimately, the only person who can keep a student from committing suicide is the student himself. Nevertheless, all facets of society should influence him not to take his own life. If an integrated approach existed a few years ago, Jordan Nott may have continued to live a relatively normal and uninterrupted life. Instead, completing his undergraduate degree became “a challenge,”<sup>345</sup> and his experience left him wary of university health care. He has stated, “I would go outside to a private doctor, something not affiliated with a university . . . . It stinks because I don’t want to discourage people from getting help. You just have to be really careful about where you’re going to go.”<sup>346</sup> The relationship between a university and a suicidal student poses a legal dilemma with a very human face. But it is a dilemma with an integrated solution.

JUHI KAVEESHVAR\*

---

<sup>345</sup> Capriccioso, *Counseling Crisis*, *supra* note 14.

<sup>346</sup> *Id.*

\* Managing Editor, *Emory Law Journal*. J.D. Candidate, Emory University School of Law (2008); B.A., History, Economics, University of Michigan (2005). I would like to thank Professors Kimberly Robinson and Kay Levine for their guidance and critique of this Comment, as well as my family and friends for their unwavering support and incredible patience.

