COLLEGE AND UNIVERSITY POLICY AND PROCEDURAL RESPONSES TO STUDENTS AT RISK OF SUICIDE

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INTRODUCTION

In October 2004, Jordan Nott, a sophomore at George Washington University (GWU), voluntarily admitted himself to the GWU Hospital, reporting suicidal ideation.[1] The day after his admission, the assistant director of Student Judicial Services delivered a letter to Nott informing him that he was placed on interim suspension from GWU and charged with a disciplinary violation for exhibiting "endangering behavior."[2] Under the student code, according to the university letter cited by Nott's complaint, "[b]ehavior of any kind that imperils or jeopardizes the health or safety of any person or persons is prohibited. This includes any actions that are endangering to self or to others."[3] Jordan was barred from GWU property, including his dorm room, and all events at the university, even after his release from the hospital. He was informed that if he entered the campus "for any reason, [he would] be trespassing and may be arrested."[4] In response, Nott voluntarily withdrew and sued GWU. In *Nott v. George Washington University*, Nott alleged discrimination, breach of confidentiality, intentional infliction of emotional distress, and violation of federal laws,[5] including the Americans with Disabilities Act[6] and

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1. Complaint at 4, Nott v. George Washington Univ., No. 05-8503 (D.C. Super. Ct. 2005), *available at* http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf.
2. *Id.* at 6.
3. *Id.* at 12.
4. *Id.*
5. *Id.* at 3.
6. 42 U.S.C. §§ 12101–12213 (2000).

the Fair Housing Amendments Act.[7]

Similarly, in *Doe v. Hunter College*, a student filed action against Hunter College of the City University of New York (CUNY) after she was barred from her dormitory residence after she was hospitalized following a suicide attempt.[8] The Hunter College Housing Contract at the time stated:

> A student who attempts suicide or in any way 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.[9]

This housing contract applied to all students who have attempted suicide, without an inquiry into the reason behind the attempt.[10] The plaintiff brought a disability discrimination action against the college pursuant to the Americans with Disabilities Act, Section 504 of the Rehabilitation Act,[11] and the Fair Housing Amendments Act.[12]

Both *Nott* and *Hunter* fueled public criticism of college and university policies regarding students at risk for suicide[13]—an area already characterized by serious discussions within the community of college and university administrators, legal counsel, and mental health professionals.[14] *Nott* was settled in October 2006, and the terms of settlement were not disclosed.[15] University officials at GWU stated that they are reviewing and revising their policies on involuntary mental health withdrawal.[16] *Hunter* was settled in August 2006 in favor of the plaintiff for $65,000,[17] and the New York Attorney General announced a review of CUNY's suicide policy.[18] A spokesperson at Hunter College stated that the automatic

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7. 42 U.S.C. §§ 3601, 3610–3614, 3614a (2000).

8. Second Amended Complaint, Doe v. Hunter College, No. 04 CV 6470 (S.D.N.Y. 2004), *available at* http://www.bazelon.org/pdf/Doe-v-Hunter-Second-Amended-Complaint.pdf. For more facts, visit http://www.bazelon.org/incourt/docket/hunter.html.

9. Second Amended Complaint, *supra* note 8, at 9. *See also* Memorandum of Law in Support of Motion to Dismiss at 4, Doe v. Hunter College, No. 04 CV 6470 (S.D.N.Y. 2004), *available at* http://www.bazelon.org/pdf/HunterDefMemoSupportDismiss.pdf.

10. Second Amended Complaint, *supra* note 8, at 9.

11. 29 U.S.C. § 794 (2000 & Supp. IV 2004).

12. Second Amended Complaint, *supra* note 8, at 17–22.

13. *See* Editorial, *Depressed? Get Out!*, WASH. POST, Mar. 13, 2006, at A14; Julie Rawe & Kathleen Kingsbury, *When Colleges Go On Suicide Watch*, TIME, May 22, 2006, at 62.

14. In particular, colleges and universities were struck by the court's decision in *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

15. Marty Niland, *College, Student Settle Suit Over Health*, ASSOCIATED PRESS, Oct. 31, 2006, *available at* http://abcnews.go.com/US/wireStory?id=2620070.

16. *Id.*

17. Bazelon Center for Mental Health Law, *Hunter College Settles Lawsuit by Student Barred from Dorm after Treatment for Depression*, Aug. 23, 2006 http://www.bazelon.org/newsroom/2006/8-23-06-hunter-settlement.html.

18. Letter from Antoinette W. Blanchette, Assistant Attorney General, State of N.Y., to David Goldfarb, Goldfarb Abrandt Salzman & Kutzin, LLP (Aug. 15, 2006), *available at* http://www.bazelon.org/pdf/Doe-v-hunter-letter.pdf.

eviction policy for students who attempt suicide has been withdrawn.[19]

The institutional response in both *Nott* and *Hunter* leads to several questions: What is a well-informed, fair policy toward students who have made suicide attempts or engage in behaviors of self-harm? How do colleges and universities strike the right balance between the civil liberties and rights of students with mental illness against both institutional rights of the academic institution and community rights of institutional members? How can colleges and universities ensure adequate due process and fairness in their decisions, and yet not subject students to adversarial proceedings normally used for disciplinary infractions? This article focuses on the procedural aspect of college and university policies and advocates the interim step of mediation before resorting to disciplinary or involuntary medical withdrawals as a way of negotiating these difficult questions.

The main purposes of this article are (1) to conduct a review of the case law and the current state of policies of college and university procedural responses to students with a high risk of suicide and self-harm or those that have made significant suicide attempts, (2) to identify major challenges and pressures surrounding the formation of such procedural responses, (3) to assess disciplinary and non-disciplinary responses and identify problems and shortcomings in these approaches to the implementation of college and university policies, (4) to propose an interim step of mediation prior to resorting to formal disciplinary hearings, and (5) to assess future needs and goals for more effective and just procedural responses to students.

The article focuses on the challenge of dealing with students who do not voluntarily agree to withdraw or seek treatment. In particular, the article points out the limitations of the doctrine in higher education law, namely, the dichotomy of academic and disciplinary dismissals. This article shows how neither model is appropriately well-suited to handling students who are dealing primarily with mental health issues and illustrates how minimal due process should be afforded to students being withdrawn from schools based on their mental health issues. The article considers a third, non-disciplinary, non-academic procedural method, which some institutions have used to withdraw students—involuntary psychiatric and medical withdrawals. For situations where the student refuses to withdraw voluntarily or seek treatment, this article proposes the adoption of an intermediary step of mediation before resorting to disciplinary hearings or non-disciplinary, involuntary withdrawal. The proposal for mediation seeks to accommodate goals articulated by courts and colleges and universities, including (1) to preserve the student-institution relationship, (2) to support the student in working toward educational and developmental achievement, and (3) to protect minimal due process rights of students.

The policy and legal research is supplemented by the author's extensive, detailed, informal phone interviews of thirty-four college and university counseling center directors. A request for interview was sent via email to 363 directors who

19. Eve Bender, *Lawsuit Prompts College to End Policy on Suicide Attempts*, 41 PSYCHIATRIC NEWS 27 (2006).

participated in the 2005 National Survey of Counseling Center Directors.[20] The aim of these interviews was not merely to survey the colleges and universities, but to inquire more deeply into informal decision-making procedures.

I. MENTAL HEALTH TRENDS AT COLLEGES AND UNIVERSITIES

Nott occurs amidst a context of heightened concern among college and university counselors and counseling center directors about the increased pressures on mental health centers on college and university campuses. Annual surveys of directors of college and university counseling centers indicate that many directors are worried about an increase in self-injury reports, a growing demand of services without an increase in resources, and a higher demand for crisis counseling.[21]

Furthermore, counselors and administrators report that students are coming in with more serious and severe mental health problems.[22] Surveys of students between 1920 to the present suggest that psychiatric disturbance among college and university students has remained relatively constant, between 6% and 16% of the student population.[23] Although it is not known whether the increased numbers of students seeking treatment may be due to improved awareness, increased acceptance of mental health service, or increasing psychiatric needs, the fact remains that more students at colleges and universities are seeking treatment at college and university counseling centers.[24] Whether students actually have more severe problems than in previous years is unclear and highly-debated.[25] Although directors and staff contend that clients are more distressed than years before, studies based on systematic assessment of students have found no evidence of an increase in client acuity at student counseling centers from the mid-1980s through the early

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20. ROBERT P. GALLAGHER, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 26–56 (2006), *available at* http://www.iacsinc.org/2006%20National%20front%20page.html.

21. *Id. See also* RICHARD KADISON & THERESA FOY DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT, 156–57 (2004) (noting director concerns about budget cuts, limited resources, and more severely troubled students).

22. *See* GALLAGHER, *supra* note 20, at 5. Staff and directors at counseling centers have long been reporting that students are more distressed or disturbed now than in previous years. *See* K.O. O'Malley, et al., *Changes in Levels of Psychopathology Being Treated at College and University Counseling Centers*, 31 J. C. STUDENT DEV. 464, 464–65 (1990); Steven B. Robbins, et al., *Perceptions of Client Needs and Counseling Center Staff Roles and Functions*, 32 J. COUNS. PSYCHOL. 641, 641–44 (1985).

23. Clifford B. Reifler, *Epidemiologic Aspects of College Mental Health*, 54 J. AM. C. HEALTH 372–76 (2006). Most studies of college mental health use incidence of clinic usage by students, which should not be confused with illness rates. A small proportion of students are seen professionally, and some of those seen professionally do not necessarily have an illness. Other students seek services privately and are not recorded in college and university statistics.

24. Sherry A. Benton, et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF. PSYCHOL. 66–72 (2003) (examining trends in counseling center clients' problems from the perspective of the therapist at the time of therapy termination); Rebecca Voelker, *Mounting Student Depression Taxing Campus Mental Health Services*, 289 JAMA 2055, 2055–56 (2005).

25. Carol T. Mowbray, et al., *Campus Mental Health Services: Recommendations for Change*, 76 AM. J. ORTHOPSYCHIATRY 226, 226 (2006).

2000s.[26] Nevertheless, the number of students who are seen, referred, and prescribed medication has indisputably increased at a dramatic rate.[27]

The popular media has also emphasized this growing problem of mental illness at colleges and universities.[28] Although the media has also portrayed a growing "crisis" in suicide among college and university students,[29] little evidence supports a dramatic increase in suicide rates among college and university students.[30] In fact, suicide rates at colleges and universities are reported to be half of the age-matched population not in higher education.[31] Suicide remains, however, the second leading cause of death among college and university students.[32] Suicide attempt rates in colleges and universities have been estimated at 4 to 8 per 10,000 students,[33] notwithstanding a bias toward underreporting.[34] Suicidal ideation has been reported in anywhere between 20% and 65% of college and university students.[35] In response to concerns about student suicide, researchers have conducted several studies of student suicide on multiple campuses.[36]

Colleges and universities have responded by introducing and implementing different programs aimed at suicide prevention and awareness.[37] Paul Joffe

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26. Allan J. Schwartz, *Are College Students More Disturbed Today? Stability in the Acuity and Qualitative Character of Psychopathology of College Counseling Center Clients: 1992–1993 through 2001–2002*, 54 J. AM. C. HEALTH 327, 328 (2006). Schwartz suggests that the perception that student clients are more seriously troubled over the past few decades may actually be due to "changes in the perceiver rather than in the persons being perceived." *Id.* at 336.

27. *Id.* at 334.

28. Lynette Clemetson, *Off to College Alone, Shadowed by Mental Illness*, N.Y. TIMES, Dec. 8, 2006, at A1.

29. Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1; Anne H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, CHRON. HIGHER EDUC., June 25, 2004, at B18.

30. Allan J. Schwartz, *College Student Suicide in the United States: 1990–1991 Through 2003–2004*, 54 J. AM. C. HEALTH 341, 342 (2006).

31. Morton M. Silverman, et al., *The Big Ten Student Suicide Study: A 10-Year Study of Suicides on Midwestern University Campuses*, 27 SUICIDE & LIFE THREATENING BEHAV. 285 (1997) (finding that the overall student suicide rate of 7.5/100,000 in the Big Ten schools was one-half of the national suicide rate of 15/100,000 for a matched sample).

32. *Id.* (finding accidents are the leading cause of death).

33. Allan J. Schwartz & Clifford B. Reifler, *College Student Suicide in the United States: Incidence Data and Prospects for Demonstrating the Efficacy of Preventative Programs*, 37 J. AM. C. HEALTH 53, 56 (1988).

34. Brian L. Mishara, et al., *The Frequency of Suicide Attempts: A Retrospective Approach Applied to College Students*, 133 AM. J. PSYCHIATRY 841 (1976).

35. Nancy D. Brener, et al., *Suicidal Ideation Among College Students in the United States*, 67 J. CONSULT. & CLINICAL PSYCHOL. 1004 (1999) (questionnaire in a national sample of undergraduate students found that 10% of students had seriously considered attempting suicide in the twelve months preceding the survey); Philip W. Meilman, et al., *Suicide Attempts and Threats on One College Campus: Policy and Practice*, 42 J. AM. C. HEALTH 147, 147 (1994).

36. Silverman, et al., *supra* note 31. Several campuses have convened mental health task forces to improve their services. *E.g.*, *MIT Mental Health Task Force Report*, Nov. 6, 2001, http://web.mit.edu/chancellor/mhtf.

37. For a discussion of such programs and considerations in implementing programs, see SUICIDE PREVENTION RESOURCE CENTER, PROMOTING MENTAL HEALTH AND PREVENTING SUICIDE IN COLLEGE AND UNIVERSITY SETTINGS (2004), *available at* http://www.sprc.org/

identifies four approaches to the different programs: (1) to cultivate a community of caring; (2) to identify and refer at-risk students; (3) to reduce academic stress; and (4) to work with survivors of completed suicide.[38] The Jed Foundation has articulated four goals of its own programs: (1) to increase the evidence base and studies of suicide in student populations; (2) to strengthen campus services; (3) to raise awareness and decrease stigma of mental illness; and (4) to promote health seeking.[39] Of note, colleges and universities have not agreed upon what are the best policies or programs. In response to this "lack of consensus among colleges and universities about what constitutes a comprehensive, campus-wide approach to managing the acutely distressed or suicidal student,"[40] the Jed Foundation in 2005 held a roundtable discussion which included senior college and university administrators, college and university counselors, mental health practitioners, and attorneys.[41] Based on this meeting, the Jed Foundation released a framework for college and university policies, which listed issues to consider when drafting or revising protocols relating to the management of students in acute distress or at-risk for suicide.[42] Significantly, the framework provides a series of questions to highlight problem areas but does not articulate a standard of practice.

This article focuses in particular on the procedural responses of colleges and universities in situations where the college or university must determine whether the student should pursue a leave of absence or withdrawal. The Jed Foundation states that the goal of leave protocols should be "to both normalize leave-taking, so that students feel that this is a viable option, and to make the process itself less intimidating."[43] The framework also proposes that institutions make information about the leave and re-entry process easily-accessible in handbooks and on websites.[44]

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library/college_sp_whitepaper.pdf.

38. PAUL JOFFE, AN EMPIRICALLY SUPPORTED PROGRAM TO PREVENT SUICIDE AMONG A COLLEGE POPULATION (2003), *available at* http://jedfoundation.org/articles/joffeuniversityofillinoisprogram.pdf.

39. JED FOUNDATION, 2005 ANNUAL REPORT (2005), *available at* http://www.jedfoundation.org/documents/2005AnnualReport.pdf.

40. JED FOUNDATION, FRAMEWORK FOR DEVELOPING INSTITUTIONAL PROTOCOLS FOR THE ACUTELY DISTRESSED OR SUICIDAL COLLEGE STUDENT, *available at* http://www.jedfoundation.org/documents/frameworkbw.pdf.

41. *Id.*

42. *Id.*

43. *Id.* at 19.

44. *Id.*

II. CHALLENGES AND PRESSURES FACING COLLEGE AND UNIVERSITY PROCEDURAL RESPONSES

Policymakers at colleges and universities, including administrators, legal counsel, and mental health professionals, face a difficult dilemma. The college or university must balance the rights of the individual with those of the campus community, minimize liability while weighing what is in the best interest of the student, and act with flexibility and consideration while ultimately maintaining control over whether a student is allowed on campus. The best interest of the student is not always clear. At the center of the dilemma is a difficult balance between civil rights concerns (e.g. patient autonomy, privacy, confidentiality, and due process) and a paternalistic drive to protect the student from himself or herself (i.e. not exposing the student to pressures of remaining in school). Administrators of colleges and universities have claimed "no matter what a school official chooses to do, someone will be unhappy."[45]

Several sources generate different pressures on college and university administrators, mental health professionals, and attorneys when considering how to structure college and university procedural responses to the suicidal student. Although liability is often cited as a reason behind these decisions, this section addresses both liability and additional influences on decision-making and policy in this area.

A. Liability for Student Suicides and Suicide Attempts

One factor pressuring college and university policies is the specter of liability. Colleges and universities have traditionally retained much discretion over the management of their students in a setting of governmental and judicial abstention.[46] The early doctrine of *in loco parentis* gave colleges and universities the power to determine the educational environment.[47] Under *in loco parentis*, colleges and universities had significant discretion over their students and were insulated from the judgment of courts.[48] One scholar characterized American higher education as a "Victorian gentleman's club whose sacred precincts were not to be profaned" by traditional governmental intrusion and that colleges and universities "tended to think of [themselves] as removed from and perhaps above the world of law and

45. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999) (Kennedy, J., dissenting) (internal citation omitted).

46. MICHAEL CLAY SMITH & RICHARD FOSSEY, CRIME ON CAMPUS: LEGAL ISSUES AND CAMPUS ADMINISTRATION (1995). *See, e.g.*, Morris v. Brandeis Univ., No. CA002161, 2001 WL 1470357, at *4 (Mass. Super. Ct. Sept. 4, 2001) (stating that courts defer to college and university decision-making in academic and disciplinary matters).

47. For a discussion of the evolving legal relationship between the student and college or university, see ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999).

48. *See, e.g.*, Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. Ct. App. 1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.").

lawyers," with an idea of self-regulation, operating "autonomously . . . thriv[ing] on the privacy which autonomy afforded."[49]

Courts shifted away from this doctrine in the 1960s and 1970s,[50] which saw a movement toward institutional administrations yielding students more independence.[51] During this time, courts treated colleges and universities as bystanders,[52] fiduciaries, or parties to a contractual relationship with students.[53] Courts also began to recognize the constitutional rights of students on campuses of public institutions and began to see an increase in litigation brought by students and their families.

Currently, 88.3% of counseling center directors reported an increased level of concern on campus about liability risks regarding student suicides.[54] Commentators suggest that the heightened concern for liability has adversely shaped institutional policies, causing colleges and universities to push out students with a risk of suicide and depression with policies that withdraw or dismiss these students.[55] *Nott* and *Hunter* are part of a growing number of legal actions brought against colleges and universities involving students who attempted or completed suicide.[56] Colleges and universities have faced lawsuits for inaction (under negligence or breach of contract),[57] inadequate action,[58] or action that may have been harmful or discriminatory.[59] Colleges and universities can be liable for exercising "too little

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49. WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 4 (1978).

50. William A. Kaplin, *Law on the Campus 1960–1985: Years of Growth and Challenge*, 12 J.C. & U.L. 269, 272 (1985).

51. SMITH & FOSSEY, *supra* note 46, at 4 (noting the dramatic change in the late 1960s and 1970s toward increased student autonomy and independence).

52. BICKEL & LAKE, *supra* note 47, at 28.

53. E.K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C. & U.L. 191 (1981). *See also* ROBERT M. HENDRICKSON & ANNETTE GIBBS, THE COLLEGE, THE CONSTITUTION, AND THE CONSUMER STUDENT: IMPLICATIONS FOR POLICY AND PRACTICE 1 (1986).

54. GALLAGHER, *supra* note 20, at 6.

55. Paul S. Appelbaum, *"Depressed? Get Out!": Dealing With Suicidal Students on College Campuses*, 57 PSYCHIATRIC SERVICES 914 (2006) (ascribing blanket college and university policies to fear of legal liability); Editorial, *Depressed? Get out!*, *supra* note 13.

56. Franke, *supra* note 29, at B18–19. However, lawsuits against mental health centers are reported at low rates: six reported lawsuits (one involved suicide) in a national survey of 366 college and university counseling centers conducted in 2005, and four lawsuits (two involved suicide) in the same survey of 367 centers in 2006. GALLAGHER, *supra* note 20, at 3. Despite low numbers of lawsuits in this area against colleges and universities, colleges and universities seem concerned about the high-profile nature and negative publicity of such cases.

57. *See, e.g.*, Jain v. State, 617 N.W.2d 293 (Iowa 2000) (father of university student who committed suicide in his dormitory room brought wrongful death action against university alleging negligence); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005) (where parents brought action against university, its administrators, and medical professionals for negligence, among other claims).

58. *Jain*, 617 N.W.2d at 296–97.

59. *See* Complaint at 4–5, *supra* note 1 (complaint in action against university, claiming violation of the ADA and Fair Housing Amendment Act, breach of confidentiality, and intentional infliction of emotional distress). *See also* Doe v. N.Y. Univ., 666 F.2d 761 (2d Cir. 1981) (where

[or] too much restraint."[60]

These questions are complicated by the specter of college and university liability for student suicides.[61] A number of cases caused some colleges and universities to perceive an increased threat of liability, namely *Schieszler v. Ferrum College*[62] and *Shin v. Massachusetts Institute of Technology*.[63] In these two cases, the parents filed charges against college and university administrators for negligence in preventing the suicide of a student.[64] Whether these cases (and the courts' denial of motions to dismiss several claims in these cases) represent a real trend of increased liability for colleges and universities is disputed.[65] Such a trend would indicate a significant departure from a tradition in which colleges and universities have not been found liable for students who have committed suicide unless there is a "special relationship."[66] The holdings in these cases may be very fact-specific, and their precedential value is untested.

Regardless of the true impact of these cases, colleges and universities concerned with this potential liability, when deciding whether to keep a student where there may be doubt in the student's capacity to remain safe, will systematically err on the side of precaution. This occurs not simply because of considerations of liability and publicity, but also considerations of ensuring the safety of the student. Such a systematic preference for false positives (where the student is withdrawn from school when they might have done well in school had they been allowed to stay) rather than false negatives (where the student is allowed to stay and either attempts suicide again or, worse yet, completes suicide) is a product of the more general process of decision-making in this area. As the University of Illinois Dean of

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plaintiff failed in claim to seek readmission to medical school under Rehabilitation Act).

60. BENJAMIN M. SCHUTZ, LEGAL LIABILITY IN PSYCHOTHERAPY 75 (1982). ("Both too little and too much restraint may be grounds for liability—the former for malpractice, the latter for the abridgement of civil rights.").

61. For an analysis of liability for student suicides, see GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 4 (2006). For a discussion of college and university responsibility for students who committed suicide and the duty to prevent suicide, see 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 (2002).

62. 236 F. Supp. 2d 602, 610 (W.D. Va. 2002) (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983) ("[P]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.").

63. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. 2005).

64. *Schieszler*, 236 F. Supp. 2d at 605; *Shin*, 2005 WL 1869101, at *8–9.

65. *Shin* was settled for an undisclosed amount. PAVELA, *supra* note 61, at 4–9 (arguing that liability risks for suicide remain low and the coverage in the *Shin* case has amplified the importance of this state trial court opinion). For cases that limit the duty to prevent suicide, see Lee v. Corregedore, 925 P.2d 324 (Haw. 1996); Donaldson v. Young Women's Christian Ass'n of Duluth, 539 N.W.2d 789 (Minn. 1995); Nally v. Grace Cmty. Church, 763 P.2d 948 (Cal. 1988); Bogust v. Iverson, 102 N.W.2d 228 (Wisc. 1960).

66. Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000) (in an action for negligence, knowledge by university officials of prior suicide attempt in the residence halls by a freshman did not result in a "special relationship" that created a duty of care).

Students explained, "I'd rather get sued for saving a kid's life than for ignoring a kid's life."[67] This discussion points to a deeper, more fundamental challenge in this area—the unpredictability and individualistic nature of suicide and suicide attempt.

B. Unpredictability and Individualistic Nature of Suicide and Suicide Attempt

One major challenge contributing to underlying anxiety surrounding policy development in this area is the inherent uncertainty of clinical decision-making for patients with suicidal ideation and/or attempts.[68] Developing accurate clinical instruments to identify individuals at risk for suicide has been an extremely difficult task due to the low incidence of suicide.[69] Suicide continues to defy prediction, despite the development of dozens of assessment tools and models.[70] Some have proposed that prediction of imminent suicide should borrow from models and methods for evaluation or prediction of violence.[71] This suggestion, however, is unhelpful, given that predictions of violence are equally as unreliable.[72] Clinicians therefore stress that it is "axiomatic" that psychiatrists and clinicians are unable to predict dangerousness or suicide of individual patients.[73] No psychological test, clinical technique, or biological marker can make a short-term prediction of suicide in an individual with sufficient specificity or sensitivity.[74]

Psychiatrists have responded to this challenge by moving away from the search for keys to suicide prediction and turned instead to risk assessment.[75] Clinicians

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67. Ernest Sander, *Some Colleges Try Zero-Tolerance Toward Suicide Attempts*, WALL ST. J., Oct. 15, 2004, at B1.

68. Alex D. Pokorny, *Prediction of Suicide in Psychiatric Patients: Report of a Prospective Study*, 40 ARCHIVES GEN. PSYCH. 249 (1983).

69. Douglas G. Jacobs, et al., *Suicide Assessment: An Overview and Recommended Protocol*, *in* THE HARVARD MEDICAL SCHOOL GUIDE TO SUICIDE ASSESSMENT AND INTERVENTION 3, 4 (Douglas G. Jacobs, ed., 1999); A. Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULT. & PSYCHOL. 397 (1954).

70. J. Powell, et al., *Suicide in Psychiatric Hospital In-Patients: Risk Factors and Their Predictive Power*, 176 BRITISH J. PSYCH. 266–72 (2000) (finding only 2% of in-patients with a suicide risk of one in twenty or higher could be correctly identified using five predictive factors); James R. Rogers & Kimberly M. Oney, *Clinical Use of Suicide Assessment Scales: Enhancing Reliability and Validity through the Therapeutic Relationship*, *in* ASSESSMENT, TREATMENT, AND PREVENTION OF SUICIDAL BEHAVIOR, 7, 7 (Robert I. Yufit & David Lester, eds., 2005) (reviews of suicide assessment instruments show weaknesses in suicide assessment scales both in terms of reliability and validity); Robert I. Simon, *Imminent Suicide: The Illusion of Short Term Prediction*, 36 SUICIDE & LIFE-THREATENING BEHAV. 296 (2006).

71. M.F. Rotherdam, *Evaluation of Imminent Danger for Suicide Among Youth*, 17 J. ORTHOPSYCHIATRY 102 (1987).

72. Sukhwinder S. Shergill & George Szmukler, *How Predictable is Violence and Suicide in Community Psychiatric Practice?* 7 J. MENTAL HEALTH 393–401 (1998).

73. William H. Reid, *Risk Assessment, Prediction, and Foreseeability*, 9 J. PSYCH. PRACTICE 82 (2003) (emphasizing the "nearly axiomatic" view that psychiatrists and other clinicians cannot predict dangerousness or suicide but that they can assess risk); Rogers & Oney, *supra* note 70, at 7.

74. Rogers & Oney, *supra* note 70.

75. *Id.*

can place individuals along a suicide risk continuum and make an intervention appropriate for the level of risk.[76] The decision for what is the appropriate level of intervention is determined by clinical judgment, and decisions may vary from clinician to clinician.

Furthermore, students who have suicidal ideation, have attempted suicide, or have completed suicide are "not a homogenous group" and suicidal thoughts and acts have "intense individual meanings and purposes that can be understood only in the context of an individual's life."[77] This individual nature of suicide attempt and self-harm suggests that the appropriate response to these students also requires a very individual-centered inquiry.

C. Biopsychosocial Vulnerability of Adolescents and Young Adults

Suicide management in the adolescent and young adult population that lives on-campus or without immediate family support requires particular considerations. First, this age group is particularly susceptible to risk-taking behavior and often values short-term over long-term gains.[78] The underlying neurobiological factors of this increased risk-taking behavior of adolescents is an area of recent research.[79] The biological vulnerability of the adolescent population is supported by evidence of a tenfold increase in the rates of both attempts and completion compared to the child population.[80] Second, in terms of developmental factors, adolescents are facing primary tasks of adolescence, including separation and identity formation, both of which may contribute to suicide attempts or completions.[81] Third, students living at colleges and universities are usually living away from home for the first time and are without the familiar sources of social support or family members that can ensure that the student will remain safe or follow the treatment plan. This change in social environment leads to another reason for these students' particular vulnerability.

This biopsychosocial vulnerability of adolescents in colleges and universities leads to the question of how much responsibility the institution should take on in the absence of parental authority. Many assert that the institution should provide as many educational and support resources in order to fulfill its role as educator. Gary Pavela states that the aim "is to keep students in school, not to dismiss them."[82]

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76. *Id.* at 5–6.

77. Stuart Goldman & William R. Beardslee, *Suicide in Children and Adolescents*, *in* THE HARVARD MEDICAL SCHOOL GUIDE TO SUICIDE ASSESSMENT AND INTERVENTION, *supra* note 69, at 421–22.

78. *See, e.g.*, Adriana Galvan, et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCIENCE 6885 (2006).

79. *Id.*

80. Goldman & Beardslee, *supra* note 77, at 422 (noting an increase from 1% to 9% for attempts and 1 per 100,000 to 1 per 10,000 for completions as one progresses from childhood to adolescence).

81. *Id.* at 423.

82. Gary Pavela, Director, Judicial Programs, University of Maryland, College Park, Address at Cornell University (Oct. 12, 2005) (transcript available at http://www.gannett.cornell.edu/

While most colleges and universities would probably agree on the importance of educating and supporting the student, the more problematic question is how far the college or university should go in order to satisfy a good faith effort to help the student stay and be successful. Institutions have limited resources and also have other duties to their students more broadly. Moreover, the campus setting in certain cases simply cannot provide an appropriate substitute for the kind of social support that some students require to remain safe and successfully in treatment.[83]

D. Difficulty of Categorizing Behavior

The definition and terminology for suicide and suicidal attempt or behaviors has been a long-standing challenge to the field of public health, research, and clinical practice.[84] The World Health Organization (WHO) working group defined "parasuicide" as:

> An act with a non-fatal outcome in which an individual deliberately initiates a non-habitual behaviour that, without intervention from others, will cause self-harm, or deliberately ingests a substance in excess of the prescribed or generally recognized therapeutic dosage, and which is aimed at realizing changes which the subject desired, via the actual or expected physical consequences.[85]

Other terms have been used, such as deliberate self-harm, self-injury, or self-poisoning, but these terms can cover other behavior patterns that have nothing to do with suicidal behavior.[86] The WHO group later shifted to using the terms "fatal" and "non-fatal" suicidal behavior, indicating that the intention to die is not always present.[87]

Self-destructive behavior is difficult to assess at a clinical level. Furthermore, administrators face the difficulty of deciding what kind of behavior is unacceptable for students. Adolescents who have suicidal ideation, have attempted suicide, or have completed suicide are all individualized cases.[88] The level of lethality and intent (and thus the severity of the behavior) vary widely.[89] Categorizing behavior as a suicide attempt is further complicated by the fact that suicidal ideation may exist transiently, and that the patient may later deny or even forget the original intent of self-harm.[90] Another major challenge is differentiating between behavior with suicidal intent and self-destructive behavior that is non-suicidal, which may be

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downloads/campusIniatives/mentalhealth/SuicidePreventionWebcast101205.pdf).

83. *See* Unni Bille-Brahe & Borge Jensen, *The Importance of Social Support*, *in* SUICIDAL BEHAVIOUR 197 (Diego De Leo, et al., eds., 2004) (showing that if the attempter receives less social support than needed, the risk of repeated suicide attempts increases).

84. Diego De Leo, et al., *Definitions of Suicidal Behaviour*, *in* SUICIDAL BEHAVIOUR, *supra* note 83, at 17.

85. *Id.* at 26.

86. *Id.* at 27.

87. *Id.* at 28.

88. Goldman & Beardslee, *supra* note 77, at 421.

89. Eve K. Mościcki, *Epidemiology of Suicide*, *in* THE HARVARD MEDICAL SCHOOL GUIDE TO SUICIDE ASSESSMENT AND INTERVENTION, *supra* note 69, at 43.

90. Goldman & Beardslee, *supra* note 77, at 418.

self-soothing to the person.[91] Does suicidal behavior have to include intent to kill oneself? How consistent, long-standing, and in what contexts does suicidal ideation indicate a need for intervention? For example, consider a student who, in an intoxicated state, mentions to his roommates that he has thought about killing himself, but the next day, the same student is confronted by this fact and denies any suicidal ideation. Colleges and universities face difficult questions both at a descriptive level, when assessing the level of risk of the student, but also at a normative level, when deciding what behavior is unacceptable at the institution and the appropriate sanction or response.

E. Weighing Impact on the Community

The suicidal student is often not the only student involved. Roommates, dorm residents, residence hall assistants, professors, and others can be deeply affected by a suicidal student. Therefore, whether a student is able to or should remain as a resident on-campus (or more broadly a student of the institutional community) is not a question that should be considered in isolation, with a narrow focus on the student's psychological state. A college or university has to consider the impact on the educational community as a whole, including other students residing in the dorm, classmates, and professors. Colleges and universities have a duty to protect other students and to maintain a safe, healthy learning environment for all members of their community.

This consideration may sometimes lead to a tension between decisions based on the interests of the student alone versus those based on community interests. For example, consider a student who is publicly cutting and bleeding in the residence hall in front of the other students in shared bathrooms. The other students are extremely distressed by this public behavior. This student may not have any more or less ability to remain safe than a student who cuts privately in his or her room. However, the college or university cannot consider the student in isolation, but must consider the negative impact on other students and may therefore decide to remove the student from campus, and, perhaps even, from the college or university.

Another important community concern is the copycat suicide phenomenon.[92] Youth are particularly susceptible to the influence of reports and portrayals of suicide in the news media.[93] Research has suggested suicide clusters as a phenomenon of "behavioral contagion" in which "the same behavior spreads quickly and spontaneously through a group."[94] Unlike the consideration of a treating physician when deciding the management of a student in a physician-patient relationship, the institutional actor must afford significant weight to the impact on other students and has a duty to provide a safe and healthy environment to all those in the community.

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91. Jacobs, et al., *supra* note 69, at 14.

92. Madelyn Gould, et al., *Media Contagion and Suicide Among the Young*, 46 AM. BEHAV. SCIENTIST 1269, 1271 (2003).

93. *Id.*

94. *Id.*

F. Maintaining Student-Institutional Relationship

Both institutions and courts agree on the importance of maintaining positive student-institution relationships. Courts have emphasized that "[t]he educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students."[95] Courts seek to protect the faculty-student relationship and refrain from "bring[ing] an adversary flavor to the normal student-teacher relationship."[96] Institutional actors, including mental health professionals, agree with the importance of building and keeping a good relationship with the student and the student's family.[97] The maintenance of this on-going relationship is particularly important since the student may wish to return to school. Ideally, when the college or university has decided the student cannot remain on campus or in school, mental health professionals and administrators state that the preferable method is for the student to leave or withdraw voluntarily. However, when the institution must initiate adverse proceedings in order to withdraw the student, the institution should still seek to maintain the relationship and implement a procedure that is least detrimental to the relationship with the student or the student's family. Thus, when colleges and universities develop decision-making policies, one consideration is whether the policy will foster and maintain positive relationships with the student, as well as the student's family.

In terms of the relationship with the student's family, another consideration is the question of parental notification. The college or university must comply with the Family Educational Rights and Privacy Act,[98] which permits but does not require parental notification where the student is a dependent for tax purposes or in emergencies. This policy consideration is flagged here, but is outside the scope of this paper.[99]

G. Antidiscrimination Principles: Compliance with Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

Institutions are also faced with the challenge of avoiding discrimination of students with disabilities. Colleges and universities must be compliant with Section 504 of the Rehabilitation Act[100] and the Americans with Disabilities Act.[101] Pursuant to Section 504 of the Rehabilitation Act,[102] an "individual with a

95. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978).

96. *Id.*

97. Interviews with thirty-four college and university counseling center directors (Dec. 2006) [hereinafter *Interviews*].

98. 20 U.S.C. § 1232g (2000 & Supp. IV 2004); 34 C.F.R. § 99.1 (2006). For a detailed discussion of FERPA, see Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393 (2008).

99. For a discussion of the question of whether colleges and universities should notify parents of students at risk of suicide, see PAVELA, *supra* note 61, at 13–16.

100. 29 U.S.C. § 794 (2000 & Supp. IV 2004). An Office for Civil Rights document on Section 504 is available at http://www.ed.gov/about/offices/list/ocr/504faq.html.

101. 42 U.S.C. §§ 12101–12213 (2000).

102. 29 U.S.C. § 794. Section 504 provides that "[n]o otherwise qualified individual . . .

disability" is defined as any person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities; . . . has a record of such impairment; or . . . is regarded as having such an impairment."[103]

"Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[104] Physical and mental impairment have been defined to cover "any mental or psychological disorder," including an "emotional or mental illness."[105]

Section 504 is enforced by the U.S. Department of Education, Office for Civil Rights (OCR). The OCR has issued rulings regarding how institutions should properly address students at risk of suicide or engaging in self-injuring behavior. In a 2001 enforcement letter to Woodbury University in California, the OCR addressed a case where a student engaged in self-injuring behavior in the residence halls.[106] The OCR stated that

> [N]othing in Section 504 of the Rehabilitation Act prevents educational institutions from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of others, or individuals whose dangerous conduct violates an essential code of conduct provision, even if such an individual is a person with disability. A "direct threat" is a significant risk of causing substantial harm to the health or safety of the student or others that cannot be eliminated or reduced to an acceptable level through the provision of reasonable accommodations.[107]

As stated in the OCR letter to Bluffton University, a college or university that involuntarily withdrew a student after a suicide attempt cannot simply rely on the defense that the withdrawal was based on a fear of a repeat suicide attempt.[108] The institution must conduct a direct threat analysis. A "direct threat" analysis has been described as "painstaking, highly individualized, and contextual, including analysis of 'various settings in which the student may be situated,' and the requirement to consider 'reasonable accommodation.'"[109] The college or university is required (1) to determine the nature, duration, and severity of the risk, (2) to assess the probability that the potentially threatening injury will actually occur, and (3) to determine whether reasonable modification of policies, practices, or procedures will

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shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

105. 29 U.S.C. § 705(20)(B) (2000).

104. 45 C.F.R. § 84.3(j)(2)(ii) (2006).

105. 45 C.F.R. § 84.3(j)(2)(i)(B) (2006).

106. Letter from Robert E. Scott, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Kenneth R. Nielsen, President, Woodbury Univ. (June 29, 2001), *available at* http://www.bazelon.org/pdf/OCRComplaintWoodbury.pdf [hereinafter *Woodbury Letter*].

107. *Id.* at 3.

108. Letter from Rhonda Bowman, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Lee Snyder, President, Bluffton Univ. (Dec. 22, 2004), *available at* http://www.bazelon.org/pdf/OCRComplaintBluffton.pdf [hereinafter *Bluffton Letter*].

109. PAVELA, *supra* note 61, at 19 (quoting Thomas v. Davidson Academy, 846 F. Supp. 611, 618 (M.D. Tenn. 1994)).

sufficiently mitigate the risk.[110] In Bluffton University's case, the OCR found that the evidence did not support that the university based its decision on a "direct threat" since

> [t]he University did not consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, or consider mitigating the risk of injury to the [s]tudent or other students. The University made the decision without providing the [s]tudent notice of a hearing or an opportunity to be heard.[111]

The university had instead made a decision to withdraw the student within forty-eight hours of the student's suicide attempt.[112]

In addition to conducting a "direct threat" analysis, the college or university must develop grievance procedures. The OCR ruled that the college or university must, in accordance with Section 504, develop "grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of Section 504 complaints" alleging discrimination based upon disability.[113] Furthermore, the OCR "requires postsecondary institutions to make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability."[114]

The OCR does allow for emergency responses, however, where safety is of "immediate concern."[115] The institution can take interim steps, like suspension, pending a final decision regarding an adverse action against a student as long as it includes minimal due process in the meantime and full due process later.[116]

Of note, courts have allowed colleges and universities to refrain from accepting students who present a substantial risk to themselves or others, specifically in the context of mental health, even when challenged under Section 504 of the Rehabilitation Act. In *Doe v. New York University*,[117] the plaintiff was denied readmission to New York University's medical school after exhibiting "numerous self-destructive acts and attacks upon others" along with a long-standing history of "serious psychiatric and mental disorders."[118]

The court held that the institution had not violated Section 504, specifying that the level of risk did not have to be greater than 50%:

> In our view [the student plaintiff] would not be qualified for readmission if there is a significant risk of such recurrence [of behavior harmful to herself and others]. It would be unreasonable to infer that Congress intended to

110. Letter from Michael E. Gallagher, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Jean Scott, President, Marietta Coll. (Mar. 18, 2005) at 3, *available at* http://www.bazelon.org/pdf/OCRComplaintMarietta.pdf [hereinafter *Marietta Letter*].

111. *Bluffton Letter*, *supra* note 108, at 5–6.

112. *Id.* at 2.

113. *Id.* at 6.

114. *Id.* at 5.

115. *Id.* at 4.

116. *Id.*

117. 666 F.2d 761 (2d Cir. 1981).

118. *Id.* at 766.

> force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others, even if the chances of harm were less than 50%. Indeed, even if [the student] presents any appreciable risk of such harm, this factor could properly be taken into account in deciding whether, among qualified applicants, it rendered [the student] less qualified than others for the limited number of places available.[119]

The OCR emphasizes that colleges and universities need to provide due process for students at risk of suicide in cases where the institution dismisses the student as part of preventing discrimination against disability. This due process requirement is explored in more detail in the following section.

H. Procedural Due Process

The requirement for due process is closely intertwined with the aim toward anti-discrimination. Due process requires the institution to "adhere to procedures that ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice, or stereotypes."[120] The OCR ruled that institutions should afford some sort of due process when removing students with psychological disabilities exhibiting self-injuring behavior. The OCR has ruled that "[w]ith regard to allegations of self-destructive conduct by an individual with a disability, OCR will accord significant discretion to decisions of post-secondary institutions made through a due process proceeding."[121]

In cases where the institution is taking adverse action against the student, the OCR has ruled that minimal due process (i.e. notice and an opportunity to address the evidence) is required in the interim, and full due process (i.e. a hearing and the right to appeal) is required later.[122]

The need for due process also has a constitutional basis. Even though courts are generally deferential to educational institutions, public institutions and private institutions with requisite interaction with the state to amount to "state action" are required to provide procedural due process under the Fourteenth Amendment of the United States Constitution.[123] In *Mathews v. Eldridge*,[124] the Court held that the level of due process protection depends on the private interest, the risk of an erroneous deprivation of such interest, and the value of additional or other procedural safeguards weighed against the fiscal and administrative burdens of any additional or substitute procedural requirements.[125]

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119. *Id.* at 777.

120. *Marietta Letter*, *supra* note 110, at 3.

121. *Woodbury Letter*, *supra* note 106.

122. *Marietta Letter*, *supra* note 110, at 3.

123. Esteban v. Cent. Mo. State Coll., 277 F. Supp. 649, 650–51 (W.D. Mo. 1967) (holding that the Due Process Clause of the Fourteenth Amendment applies to state educational institutions). *See* Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 9 n.30 (2004).

124. 424 U.S. 319 (1976).

125. *Id.* at 335.

In the landmark decision *Dixon v. Alabama State Board of Education*,[126] the Fifth Circuit held in 1961 that public institutions of higher learning must follow minimal procedural due process prior to disciplinary action.[127] *Dixon* represents a break from the doctrine of *in loco parentis* as a guide to the student-institution relationship to one based on the Constitution.[128] One court described minimal due process when an institution initiates adverse proceedings in order to withdraw the student:

> When a sanction is imposed for disciplinary reasons, the fundamental requirements of due process are notice and an opportunity for a hearing appropriate to the nature of the case. In order to be fair in the due process sense, the hearing must afford the person adversely affected the opportunity to respond, explain, and defend. For school expulsion, due process requires an informal give-and-take between the student and the disciplinarian, where the student is given an opportunity to explain his version of the facts. Due process further requires that a university base an expulsion on substantial evidence.[129]

Private institutions, in contrast with public institutions, do not have to follow constitutional minimal procedural due process.[130] But many private institutions still

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126. 294 F.2d 150 (5th Cir. 1961).

127. *Id.* at 155. *Dixon* was a sea change in the relationship between the student and institution. *See* NCAA v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor. When it decides to impose a serious disciplinary sanction . . . it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."). *See also* Donald Reidhaair, *The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and University*, 12 J.C. & U.L. 343, 346 (1985).

128. HENDRICKSON & GIBBS, *supra* note 53.

129. Gagne v. Trs. of Ind. Univ., 692 N.E.2d 489, 493 (Ind. Ct. App. 1998) (internal citations omitted).

130. Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209–10 (Md. Ct. Spec. App. 2000) ("Although the actions of public universities are subject to due process scrutiny, private universities are not bound to provide students with the full range of due process protection. . . . [W]hen reviewing a private university's decision to discipline a student . . . [c]onstitutional due process standards should not be used to judge the College's compliance with contractual obligations.") (internal citations omitted). *See* Holert v. Univ. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990)

> Courts have adopted this deferential standard because of a reluctance to interfere with the academic affairs and regulation of student conduct in a private university. . . . A private university may prescribe the moral, ethical and academic standards that its students must observe; it is not the court's function to decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards.

Id. (internal citations omitted). *See also* Morris v. Brandeis Univ., No. CA002161, 2001 WL 1470357, at *4 (Mass. Super. Ct. Sept. 4, 2001) ("Courts are generally reluctant about second-guessing academic and disciplinary decisions made by private schools. This deference derives from a commendable respect for the independence of private educational institutions and a well-justified laissez-faire attitude toward the internal affairs of such institutions.") (citing Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000)); Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990) ("[S]tudents [of private institutions] who are being disciplined are entitled only to those procedural safeguards which the school specifically

provide some procedural rights, and commentators have advised private institutions to follow general requirements of minimal procedural due process, in order to appear more fair and reasonable to courts, students, and the public.[131]

Other courts have been more specific about requirements for due process in public colleges and universities. In *Esteban v. Central Missouri State College*,[132] the court required (1) written notification of the specific charges ten days before the hearing, (2) a hearing before the agent or agents with the power to expel, (3) an opportunity to inspect documents or evidence the institution will present at the hearing, (4) the opportunity to have counsel present at the hearing, (5) the opportunity for the accused student to present her statement or witnesses on her behalf, (6) a determination of the outcome based solely on the evidence presented at the hearing, (7) a written statement of the hearing agent's findings, and (8) the right of the student, at her expense, to record the hearing.[133]

However, most courts have not prescribed specific due process requirements and instead give administrative flexibility to colleges and universities.[134] Courts continue to show great deference to colleges and universities in the area of discipline and a reluctance to interfere with institutional decisions. "School discipline is not an area in which courts lay claim to any expertise. Consequently, courts will not generally interfere in the operations of colleges and universities. Courts must enter the realm of school discipline with caution and allow schools flexibility in establishing and enforcing disciplinary procedures." [135]

In *Goss v. Lopez*,[136] the Court held that due process requires some form of notice and hearing in connection with the suspension of a student from a public school for disciplinary reasons.[137] However, the Court did not require formal hearings[138]—a holding later reemphasized in *Board of Curators of the University of Missouri v. Horowitz*.[139] The Court held that "[a]ll that *Goss* required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'"[140]

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provides."); Stoner II & Lowery, *supra* note 123, at 1 n.30 (discussing how the Fourteenth Amendment does not apply to private parties, including private colleges and universities).

131. Stoner II & Lowery, *supra* note 123, at 13.

132. 277 F. Supp. 649 (W.D. Mo. 1967).

133. *Id.* at 651–52.

134. Wright v. Tex. S. Univ., 392 F.2d 728 (5th Cir. 1968) (requiring that the institution only make a "best effort" to deliver notice to a student).

135. *Harwood*, 747 A.2d at 209–10 (internal citations omitted).

136. 419 U.S. 565 (1975).

137. *Id.* at 581 (requiring that the student "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story").

138. *Id.* at 580–81.

139. 435 U.S. 78 (1978).

140. *Id.* at 85–86 (quoting *Goss*, 419 U.S. at 584).

III. DISCIPLINARY PROCEDURAL RESPONSES

Given strong judicial deference to higher education institutions, colleges and universities are in a position to choose among a variety of procedural responses to a student at risk of suicide or self-harm. The Supreme Court has recognized the need for flexibility in how one provides due process. The Court has "frequently emphasized that [t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[141] In addition, the OCR has admitted:

> [A]lthough there is no inherent reason that issues particular to students with disabilities cannot be heard in the pertinent traditional due process forums, both the institution and the student may be better served by referring such issues to forums staffed by college personnel with more expertise in and familiarity with such issues. However, such nontraditional forums cannot deny the student with a disability the same opportunity as any other student to challenge the truth and accuracy of the accusations concerning his/her conduct and its perceived dangerousness.[142]

One such method is to use disciplinary proceedings. Such proceedings are both a method of last resort when a student is adamant about staying against the college's or university's recommendations, and also may serve as leverage to persuade a student to voluntarily withdraw or seek help. Under such a method, the college or university can choose to treat a self-harm or suicide attempt as a violation of the student conduct code, and start adverse proceedings against the student for a disciplinary dismissal. This method has been used in cases where the student has poor insight into his or her medical or mental health problem and refuses to withdraw from the institution voluntarily.[143] In these proceedings, courts require that colleges and universities give a student timely notice of his or her suspension.[144] Courts have determined that "rudimentary precautions" of disciplinary dismissals include timely notice of the charges, an opportunity to present a defense, and a speedy hearing.[145] Thus, notice of disciplinary action and status, such as suspension or expulsion from the college or university, is commonly delivered to the student very soon after the triggering event.[146]

A. Disciplinary Versus Academic Dismissals

Courts have required minimal due process specifically in cases of disciplinary dismissals. *Goss* illustrates how courts distinguish between disciplinary and academic proceedings.[147] While academic dismissals are well-insulated from court

141. *Id.* at 86 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

142. *Woodbury Letter*, *supra* note 106.

143. *Interviews*, *supra* note 97.

144. Goss v. Lopez, 419 U.S. 565, 581 (1975).

145. *Id.*

146. *See, e.g.*, Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978) (plaintiff received a university letter indicating that he was suspended from school while being processed at the police station for charges of assault with intent to commit rape).

147. Horowitz v. Bd. of Curators of the Univ. of Mo., 435 U.S. 78, 87 (1978) ("[S]tate and

intervention, requiring very minimal procedural safeguards,[148] disciplinary dismissals require minimal due process. For example, hearings are not required for academic dismissals.[149] Academic dismissals are treated differently because

> [m]isconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.[150]

The limited dichotomy between academic and disciplinary proceedings leaves open the question: How should colleges and universities handle students with mental health issues? The decision of a student who is suicidal may not fall clearly under either the academic or disciplinary model.

B. Advantages of Disciplinary Responses

One important advantage to a disciplinary response is that the college or university focuses on the conduct alone and not necessarily on making any judgment of the student's disability, unless the student wants to raise it as a defense. Such a response therefore does not require a psychological inquiry and can be based merely on the behavior of the student. The OCR stated that the institution should engage in an analysis in a nondiscriminatory way, where a determination is "based on a student's observed conduct, actions, and statements, not merely knowledge that the student is an individual with a disability."[151]

A second advantage to using the disciplinary system is that it ensures that minimal due process will be afforded to the student, contrary to a non-disciplinary decision.[152] Requiring minimal due process would make sense for a number of reasons. Fact-finding is crucial to determining the disposition of a student with mental health issues, as in disciplinary decisions. The OCR issued a ruling that

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lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.").

148. Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 271 (1992) (tracing judicial deference in the academic decisions to common law roots and hesitation to interfere with the teacher-student relationship); Jeanette DiScala, et al., *College and University Responses to the Emotionally or Mentally Impaired Student*, 19 J.C. & U.L. 17, 21 (1992); K.B. Melear, *Judicial Intervention in Postsecondary Academic Decisions: The Standards of Arbitrary and Capricious Conduct*, 177 EDUC. L. REP. 1, 1 (2003). Disciplinary hearings have not escaped critique either. *See* Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L. 785 (1995).

149. *Horowitz*, 435 U.S. at 78; Nickerson v. Univ. of Alaska Anchorage, 975 P.2d 46 (Alaska 1999).

150. *Horowitz*, 435 U.S. at 87 (quoting Barnard v. Inhabitants of Shelburne, 102 N.E. 1095, 1097 (1913)).

151. *Woodbury Letter*, *supra* note 106, at 5.

152. For a thorough examination of mandatory medical withdrawals and an argument that they do not have sufficient due process, see Gary Pavela, *Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus*, 9 J. C. & U. L. 102 (1982).

emphasizes the importance of fact-finding when colleges and universities assess the dangers posed by an individual who represents a direct threat to the health and safety of himself or others.[153] "[A] postsecondary education institution needs to make an individualized and objective assessment of the student's ability to safely participate in the institution's program based on reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence."[154]

Under the balancing factors articulated by the Court in *Mathews*,[155] the private interests at stake—the disruption or end of an academic career and the imposition of the stigma of mental illness—are significant. In *Addington v. Texas*,[156] the Court recognized the stigma of being involuntarily committed to a mental hospital and thus required a "clear and convincing" standard of proof.[157] Although the stigma in *Addington* can be distinguished as the stigma of involuntary commitment, the holding in *Addington* suggests that the Court recognizes that the label of mental illness[158] and holding people against their will can trigger the need for procedural protections under the Due Process Clause. The Court has held that the interest of "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful."[159]

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153. *Marietta Letter*, *supra* note 110, at 3.

154. *Id.*

155. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

156. 441 U.S. 418 (1979).

157. *Id.* at 425–26.

> [I]nvoluntary commitment to a mental hospital after a finding of possible dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Id.

158. The court also recognized the stigma of being labeled mentally ill in *Vitek v. Jones*, 445 U.S. 480 (1980). The question in *Vitek* was whether the involuntary transfer of a state prisoner to a mental hospital implicated a liberty interest protected under the Due Process Clause. The court identified two liberty interests protected under the Due Process Clause: (1) the right not to be transferred without a finding that he was suffering from a mental illness that could not be treated in the correctional facility and (2) the "stigmatizing consequences" of being labeled mentally ill, together with mandatory behavior modification treatment. *Id.* at 488. The court required procedural safeguards, including notice and an adversarial hearing. *Id.* The *Vitek* case involved a prisoner at a correctional facility and should be distinguished from the situation at colleges and universities, because colleges and universities are not required to guarantee due process found in other situations like criminal proceedings. *See* Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1090 (8th Cir. 1969) ("[S]chool regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure."); Schaer v. Brandeis Univ., 735 N.E.2d 373, 380–381 (Mass. 2000). The *Schaer* court stated:

> It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject [in student disciplinary proceedings]. . . . A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts.

Id.

159. *Vitek*, 445 U.S. at 495. Leaving the decision to medical professionals alone does not

The seriousness of being labeled as mentally ill was reiterated in *Lombard v. Board of Education of the City of New York*,[160] where the court found that a teacher had the right to a full hearing before being dismissed based on a report that he had a mental disorder because "[a] charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding."[161] Therefore, medical leave and dismissals involve significant stakes for the student—interests that should not to be left entirely to the unchecked discretion of the college or university. Some lower courts have held that procedural protections are required before dismissing a student based on mental health.[162] In *Evans v. West Virginia Board of Regents*,[163] the court held that a former student, who was dismissed based on "mental anguish," had a sufficient property interest in the continuation and completion of his medical education to "warrant the imposition of minimal procedural due process protections."[164]

A third advantage of the disciplinary system is that the college or university ultimately has a tool with which to withdraw students who suffer from a lack of insight or denial of their mental illness or ability to stay safe. The problem with an automatic policy of withdrawal after suicidal behavior should be distinguished from the case where the college or university has already tried several other strategies of working with the student and has not been able to come to a compromise or workable treatment plan where the student can remain at the institution. In such cases where the student continues to refuse to withdraw, the college or university needs a mechanism to either pressure the student to voluntarily withdraw or ultimately to initiate proceedings to involuntarily withdraw the student.

C. Disadvantages of Disciplinary Responses

College and university administrators admit that traditional disciplinary policies

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necessarily provide sufficient protection. "[T]he medical nature of the inquiry . . . does not justify dispensing with due process requirements." *Id.*

160. 502 F.2d 631 (2d Cir. 1974).

161. *Id.* at 637–38.

162. *See* Pavela, *supra* note 152, at 128–29 n. 171. Pavela cites cases that were settled, including a case where a state court reinstated a student who was withdrawn on psychiatric grounds from Amherst College.

163. 271 S.E.2d 778 (W. Va. 1980).

164. *Id.* at 780. The court reinstated the student and held the school was required to provide "due process protections" in the form of a hearing, opportunity to retain counsel, and formal written notice of the reasons for dismissal. *Id.* at 780–81. In some cases, courts have upheld psychiatric withdrawals based on unilateral decisions by private universities. In *Aronson v. North Park College*, the court rejected a breach of contract claim and upheld a psychiatric withdrawal based on a policy which stated that "[t]he institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to himself or his fellow students." 418 N.E.2d 776, 781 (Ill. 1981). But the court never reached the merits of the original federal action claiming violation of plaintiff's due process rights because plaintiff's attorney failed to appear in court. *Id.*

were not drafted with psychiatric problems in mind.[165] In the context of suicidal students, it is much less desirable to have an adversarial hearing. The student's condition may be jeopardized or destabilized by an adversarial process. The process would potentially exacerbate the student's relationship with the college or university and its teachers and administrators. Additionally, an adversarial hearing which pits the student against the institution defeats educational goals. Even if the kind of due process provided is minimal it may not be worth the emotional or more public (even if confidential) costs of going through this procedure.

Furthermore, a process traditionally associated with disciplinary action would stigmatize and moralize a mental health issue. Such stigmatization is a problem both in a utilitarian and non-utilitarian way. Students may be deterred from seeking help or voicing suicidal ideation. Students will internalize this moralization and interpret symptoms of depression or other disorders as a sign of being a bad person rather than having a medical issue. In fact, many mental health professionals find it inappropriate to consider suicidal thoughts or underlying mental health issues like depression as a disciplinary issue. Only 4.4% of college and university counseling center directors favor sending such students to judicial boards for disposition.[166]

Moralizing a mental health issue and "equating acts of self-harm with acts of violence and suicide with self-murder," is both inappropriate and archaic.[167] Suicide has a long history of being treated as a violent crime and a crime of moral turpitude.[168] In fact, clinicians have shown that if suicide is defined as a crime or

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165. GARY PAVELA, THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS: LEGAL ISSUES, POLICY CONSIDERATIONS, AND ALTERNATIVE RESPONSES 1 (1990).

166. GALLAGHER, *supra* note 20, at 6.

167. Paul Joffe, *The Illinois Plan*, *in* QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE, *supra* note 61, at 115.

168. Suicide carries a long history of being equated with a violent crime. Suicide was considered a felony under English common law, described by Blackstone as a "felonious homicide" or "self-murder." Benjamin P. Fay, Note, *The Individual Versus Society: The Cultural Dynamics of Criminalizing Suicide*, 18 HASTINGS INT'L & COMP. L. REV. 591, 593 (1995). In fact, the word "suicide" appeared in 1642, but was not in popular use as late as 1755. Instead, the act was referred to as "self-murder," "self-destruction," "self-killer," "self-homicide," and "self-slaughter." A. ALVAREZ, THE SAVAGE GOD: A STUDY OF SUICIDE 50–51 (Random House 1972). Suicide was punishable by a burial on the highway, with a stake driven through the body at a crossroads for public execution. *Id.* at 46 (finding that the last known such public execution in England was in 1823, but also occurred throughout Europe, including France). It resulted in forfeiture of the suicide's goods and chattels to the king. Steiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907 (W.D.N.Y. 1947); Krischer v. McIver, 697 So. 2d 97 (Fla. 1997); Prudential Ins. Co. of Am. v. Rice, 52 N.E.2d 624 (Ind. 1944); State v. Campbell, 251 N.W. 717, (Iowa 1933); Wilmington Trust Co. v. Clark, 424 A.2d 744 (Md. 1981); Wackwitz v. Roy, 418 S.E.2d 861 (Va. 1992). Most states in the United States no longer consider suicide a crime. *See* Tate v. Canonica, 5 Cal. Rptr. 28 (Cal. Dist. Ct. App. 1960) (common-law suicide was a felony but it is not and never has been a crime in California); State v. Fuller, 278 N.W.2d 756 (Neb. 1979); State v. Sage, 510 N.E.2d 343 (Ohio 1987); Akron v. Head, 657 N.E.2d 1389 (Akron Mun. Ct. 1995). But some jurisdictions continue to consider suicide a criminal act. *See* Brown v. Harris, 240 F.3d 383 (4th Cir. 2001) (to commit common law suicide a person must take his own life, be of "years of discretion," and be of sound mind); Wallace v. State, 116 N.E.2d 100 (Ind. 1953) (self-destruction is against the law of God and man); Shamburger v. Grand Casino of Miss., Inc., 84 F. Supp. 2d 794 (S.D. Miss. 1998) (suicide is a common law crime); Clift v. Narragansett Television L.P., 688

seen as immoral, then unbiased discussion and research are impeded.[169]

Nonetheless, even apart from implementing a procedural disciplinary response, some colleges and universities operate with an *underlying disciplinary philosophy* in dealing with suicide behavior. Most notably, the University of Illinois (UI) suicide-prevention program requires any student who threatened or attempted suicide to attend four sessions of professional assessment, and failure to comply with the program can result in forced withdrawal from the university.[170] Paul Joffe, the creator of the UI program states:

> Traditionally, suicidal behavior has been seen as a mental health issue. Clinicians who meet with such students are expected to provide support and assist them in finding reasons to continue living. I would argue that the mental health culture is not nearly as effective at deterring inappropriate in-chargeness as the conduct and discipline culture. In this respect, the Suicide Prevention Program has far more in common with an office of conduct and discipline than with a counseling center.[171]

Joffe explains that contemplating suicide is an issue of being "fundamentally in-charge of their continued existence" and points out that the "criminal justice system (or on campus, the conduct and discipline system) is an institution that specializes in entering into contests with citizens who inappropriately take charge of other peoples' property and decisions."[172] Joffe asserts that the program is a way to "persuad[e] these students to stand down from their current state of in-chargeness" and asserts that "[e]xperience has shown that the best way . . . is not necessarily through being more warm, more caring or concerned."[173]

Mandatory sessions are actually very controversial among mental health professionals, and a survey in 2006 found that 40% of directors are in favor of

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A.2d 805 (R.I. 1996) (suicide is a felony); State v. Reese, 633 S.E.2d 898 (S.C. 2006) (suicide is an unlawful act). Some jurisdictions criminalize the attempt to commit suicide, but not suicide itself. *See* Meacham v. N.Y. State Mut. Benefit Ass'n, 24 N.E. 283 (N.Y. 1890). Other state legislatures have rescinded punishment for suicide by statute, but without decriminalizing the act. *See* Hill v. Nicodemus, 755 F. Supp. 692 (W.D. Va. 1991).

169. D. J. Mayo, *What is Being Predicted? The Definition of "Suicide," in* ASSESSMENT AND PREDICTION OF SUICIDE 88 (R. Maris et al., eds., 1992).

170. For a description and philosophy behind the University of Illinois program, see JOFFE, *supra* note 38; Univ. of Ill. at Urbana-Champaign Counseling Center, *Mandated Assessment Following Suicide Threats and Attempts*, Aug. 6, 2004, http://www.couns.uiuc.edu/SuicidePolicy.html.

171. Joffe, *supra* note 167, at 113.

172. *Id.*

173. *Id.* Joffe describes the message that the Suicide Prevention Team of the UI program sends to the student as this:

> It is clear from your recent suicide attempt that you currently deem yourself to be in-charge of your continued existence. We are contacting you to inform you that we deem suicidal behavior to be an act of self-directed violence. Given the campus's zero tolerance of violence, your recent behavior is unacceptable. As you may or may not already be aware, the university is in-charge of your continued enrollment as a student. If you persist in being in-charge of your continued existence, I will petition the Dean to exercise his in-chargeness over your continued enrollment and ask him to withdraw you.

Id.

mandating a certain number of counseling sessions for students who mention suicidal thoughts to anyone on campus.[174] This approach is detrimental insofar as students may be deterred from seeking help or sharing their suicidal ideation to others since they know it could trigger a mandatory disciplinary process. Even more troubling, the UI program mandates sessions but does not provide minimal due process. The student can appeal the accuracy of the report to the team and the Dean of Students, but the requirement of the four sessions is not subject to appeal, and no hearing is available.[175] This philosophy thus enhances the disadvantages of disciplinary responses while neglecting to provide the advantages.

The UI program also addresses only a certain segment of those who have suicidal ideation. Since suicide ideation can be traced to "intense individual meanings and purposes that can be understood only in the context of an individual's life,"[176] the idea that the program assumes that the students with suicidal ideation and behavior are seeking control over their own life is too narrow and over-simplified. It does not address many other reasons why students may think about or attempt suicide. Although suicide may be, for some, a way to regain control, it can also be retaliatory—a result of psychological pain.[177]

Institutions that choose to implement the disciplinary response should use it as a method of last resort, and furthermore should seek to provide the advantages of such a system while seeking to minimize the disadvantages.

IV. NON-DISCIPLINARY PROCEDURAL RESPONSES: PSYCHIATRIC OR MEDICAL WITHDRAWAL, MEDICAL LEAVE OF ABSENCE, AND OTHER APPROACHES

In contrast, several colleges and universities do not approach suicidal ideation, attempt, and self-harm as disciplinary issues at all.[178] Students are encouraged to get treatment and are managed informally on a case-by-case basis under an unwritten policy without hearings or disciplinary action.[179] Some institutions that use the disciplinary system reserve them for situations where the student has been behaviorally disruptive to the community and affected roommates or other students.[180] For example, if a student is repeatedly public with his or her self-cutting and causes distress to fellow roommates, he or she may face disciplinary action.[181] Even then, there is much reluctance to apply disciplinary proceedings to

174. GALLAGHER, *supra* note 20, at 6.

175. Univ. of Ill. at Urbana-Champaign Counseling Center, *supra* note 170.

176. Goldman & Beardslee, *supra* note 77, at 422.

177. *Id.*

178. One out of thirty-four of the counseling center directors said that the college or university handled suicidal ideation or attempt by itself (i.e. when it did not involve disruptive behavior to other students) as a disciplinary issue. *Interviews*, *supra* note 97.

179. *Id.*

180. The majority of directors interviewed expressed that the disciplinary system would be triggered if the student was causing disruption to the community. *Id.*

181. Several directors cited this example during interviews and said that it would be potentially sent through disciplinary systems or the student's housing rights would be terminated. *Id.*

students in these situations.[182] Other institutions do not use the disciplinary system at all if a suicidal student is involved. One institution utilizes a behavioral contract to manage students in residence halls. Suicidal students returning to on-campus residential halls agree to follow a behavioral contract with clear terms that if the student repeats the behavior, he or she would no longer be able to stay in the dormitory.[183]

Forced withdrawals under these unwritten, informal policies are not well-studied or reported. Directors of college and university counseling centers have cited low numbers of forced withdrawals on their campuses,[184] but such numbers largely remain confidential[185] or unreported.[186] It is not known how many of these policies have an appeals process or other provisions for minimal due process.

A. Psychiatric and Medical Withdrawals

Some institutions have developed written provisions for mandatory medical or psychiatric withdrawal of students[187] and have applied them to suicidal students.[188] For example, Iowa State University has a policy of involuntary medical withdrawal, which states:

> The University may order involuntary withdrawal of a student if it is determined that the student is suffering from a mental disorder as defined by the current American Psychiatric Association Diagnostic Manual such that the disorder causes, or threatens to cause, the student to engage in behavior which poses a significant danger of causing imminent harm to the student, to others or to substantial property rights, or renders the student unable to engage in basic required activities necessary to obtain an education.[189]

Under this policy, the student has a hearing before the Dean of Students, the Director of Student Health and a member of the Student Counseling staff and has at least forty-eight hours to review the psychological or psychiatric evaluation prior to

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182. *Id.*

183. Interview with Bradford King, Dir. of Student Counseling Servs., Univ. Park Health Ctr., Univ. of S. Cal. (Dec. 4, 2006).

184. *Interviews*, *supra* note 97 (directors cited a wide range of forced withdrawals, ranging from none to one in eleven years, to five per year).

185. Arenson, *supra* note 29 (officials at Columbia said that the number of students withdrawn under their policy was confidential); Interview with Lorraine Siggins, Chief Psychiatrist, Yale Univ. Health Serv., in New Haven, Conn. (Dec. 15, 2006).

186. Pavela, *supra* note 152, at 102 n.2 (noting lack of published data or cases on mandatory psychiatry withdrawals at institutions of higher education). Some have estimated about two-thirds of higher education public institutions provide for mandatory psychiatric withdrawals. *Id.*

187. PAVELA, *supra* note 165; B.H. Steele, et al., *Managing the Judicial Function in Student Affairs*., J. C. STUDENT PERSONNEL, 337–42 (1984).

188. *Interviews*, *supra* note 97. PAVELA, *supra* note 165. In 1976, the University of Michigan created an ad hoc procedure to bar students from campus "until such time as [it is] given reasonable assurances that present psychiatric problems have been successfully resolved." *Id.* at 1.

189. IOWA STATE UNIV., POLICIES AND PRACTICES 15, *available at* http://www.nacua.org/lrs/Policies/docs/IowaState_InvolMedWithdrawal.pdf.

the hearing.[190] A written decision is rendered by a committee, which states the reasons for its determination.[191] The decision may be appealed to the Vice President for Student Affairs.[192]

Some colleges and universities do not offer a hearing or appeals process.[193] Cornell University has a policy of involuntary student leave of absence for "reasons of personal or community safety," which is invoked under "extraordinary circumstances."[194] The policy states:

> Separation of a student from the university and its facilities may be necessary if there is sufficient evidence that the student is engaging in or is likely to engage in behavior that either poses a danger of harm to self or others, or disrupts the learning environment of others.[195]

Cornell's involuntary policy does not articulate an appeals process or hearing, perhaps because it is used only in very extreme circumstances.[196] But one commentator observed that an appeals process is often unavailable in this medical leave or mental health approach and criticized that "there often is no genuinely neutral fact finder or decisionmaker in internal institutional proceedings."[197]

B. Medical Leave of Absence: Voluntary and Involuntary

Along the same lines, some medical leave of absence policies allow the student to voluntarily take a certain period of time off from school. Additionally, some schools also have involuntary medical leave of absence policies. For example, the University of Pennsylvania has an involuntary medical leave of absence regulation.[198] The policy states:

> The University may place a student on an involuntary leave of absence or require conditions for continued attendance under the following circumstances when the student exhibits behavior resulting from a psychological, psychiatric, or other medical condition that: harms or threatens to harm the health or safety of the student or others; causes or threatens to cause significant property damage; or significantly disrupts the educational and other activities of the University community.[199]

Under this policy, the provost, in consultation with the school dean, may place the student on an involuntary leave of absence. The student will, "[w]hen

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190. *Id.*

191. *Id.*

192. *Id.*

193. For a critique of the amount of due process and abuse of mandatory medical withdrawals, see Pavela, *supra* note 152.

194. CORNELL UNIV. POLICY LIBRARY, INVOLUNTARY STUDENT LEAVE FOR REASONS OF PERSONAL OR COMMUNITY SAFETY 1 (Mar. 1999), *available at* http://www.policy.cornell.edu/CM_Images/Uploads/POL/vol7_2.pdf.

195. *Id.*

196. *Id.*

197. Pavela, *supra* note 152, at 129.

198. UNIV. OF PA., THE PENNBOOK: RESOURCES, POLICIES & PROCEDURES HANDBOOK, *available at* http://www.vpul.upenn.edu/osl/involleave.html.

199. *Id.*

reasonably possible . . . be given the opportunity to confer with the Provost and to provide additional information for consideration."[200] The decision does not have an appeals process.[201]

C. Advantages of Non-Disciplinary Responses

These non-disciplinary responses are individualized, informal meetings that treat the issue as a mental health problem. The student's problem is addressed as one that deserves treatment, not sanctions. Other advantages over the disciplinary response are that it lacks the moralization and stigmatization that the disciplinary system imposes on the student. Mental health professionals are often consulted by the decision-maker or administrator and may therefore provide a more objective and independent analysis of the situation in contrast to the adversarial process, in which both sides bring in their own experts. These informal meetings also can protect the student-institution relationship and provide grounds for the student to return to school when he or she is ready.

D. Disadvantages of Non-Disciplinary Responses

One major problem with these non-disciplinary approaches is that minimal due process is often not provided, as it is in disciplinary procedures. Students are unable to challenge the institution's allegations in an adversarial context and may have limited opportunity to present their side of the story. These approaches also require an inquiry into psychological issues and do not focus on conduct alone, which risks discrimination against those with mental health issues. Furthermore, students who are forced to withdraw can face the stigma of failure,[202] which may not be any more or less detrimental than the stigma that comes with a disciplinary dismissal.

For the medical or psychiatric withdrawal, another challenge is that readmission can often be a difficult process for students to navigate.[203] Where readmission can vary based on a distinction between medical and personal withdrawals, students have alleged that withdrawals based on mental health reasons are particularly disadvantaged.

The next section provides an alternative solution that balances the advantages and disadvantages of both types of responses and seeks to treat suicidal students in a non-judgmental, neutral, fair manner disassociated from the moralization of disciplinary action, while also protecting due process rights and the student-institution relationship.

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200. *Id.*

201. *Id.*

202. Jessica Feinstein, *Withdrawn Students Face Negative Stigma*, YALE DAILY NEWS, Feb. 11, 2004, *available at* http://www.yaledailynews.com/articles/view/10006.

203. Jessamyn Blau, *Readmission Must Be Fair After Withdrawal*, YALE DAILY NEWS, Oct. 24, 2003, *available at* http://www.yaledailynews.com/articles/view/8824.

V. PROPOSAL FOR AN INTERMEDIATE MEDIATION STEP

In order to provide minimal due process and fact-finding while also respecting suicidal ideation or attempt as mental health issues, I propose the use of mediation before resorting to a disciplinary hearing or mandatory psychiatric or medical withdrawal.

Five different criteria apply to the effectiveness and appropriateness of campus judiciaries and can be used here to help colleges and universities craft their procedural response: (1) competence, (2) impartiality, (3) acceptability, (4) suitability for the task, and (5) consistency with the traditions of the institution.[204] The structure and process of mediation—or whatever response the institution chooses—should incorporate these goals.

Mediation has several advantages over adversarial systems.[205] Cases that involve determining the disposition of a student at risk for suicide or self-harm are particularly suited to mediation. First, in contrast to the oppositional or confrontational nature of disciplinary proceedings, mediation aligns parties and operates with shared goals, protecting the relationship among parties, such as the student-teacher relationship or the psychiatrist-patient relationship.[206] An agreement through mediation would provide a better foundation for a continued relationship between the student and academic institution.

Second, this non-adversarial environment with an impartial mediator would be less intimidating for students, particularly since they do not have a right to counsel in disciplinary proceedings.[207] Students would be encouraged to participate and work through the problems rather than have to assess risk, endure the stress of an adversarial proceeding, or voluntarily withdraw without having been heard. The informality of mediation can be more reassuring to students and administrators, and allow both sides to feel less defensive and work together.[208] Some policies for medical leave and withdrawal indicate language consistent with a goal of creating a non-adversarial, non-coercive environment, and share similar goals to protect these relationships.[209] But one problem has been that "there often is no genuinely neutral

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204. Theodore J. St. Antoine, *The Administrative Tribunal*, *in* LAW AND DISCIPLINE ON CAMPUS 51 (Grace W. Holmes ed., 1971).

205. In general, the appropriateness of mediation is case-dependent. For a discussion of pros and cons of mediation, see Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of ADR Rules*, 57 AM. JUR. TRIALS 555 (2006).

206. *Id.* at § 3 ("While the adversarial process produces winners and losers, mediation allows the parties to creatively fashion a noncoercive resolution of their dispute in which both parties benefit.").

207. For an example of a student policy that explicitly does not allow students to bring legal counsel to hearings, see E. MICH. UNIV., INVOLUNTARY ADMINISTRATIVE WITHDRAWAL, *available at* http://www.emich.edu/sjs/involuntarywd.html.

208. *Id.*

209. UNIV. OF ILL. AT URBANA-CHAMPAIGN, STUDENT CODE: SECTION 2-105, http://www.admin.uiuc.edu/policy/code/article_2/a2_2-105.html (providing that student should have the opportunity to examine the psychiatric or other evaluations in an informal proceeding and can be assisted by a member of the faculty, a mental health professional, or by other counsel); E. STROUDSBURG UNIV., UNIVERSITY POLICIES, http://www.esu.edu/judicialaffairs/universitypol.html (providing an informal hearing that is "conversational and non-adversarial" for

fact-finder or decision-maker in internal institutional proceedings."[210] Mediation can correct this by including a neutral decision-maker who is not associated with the college or university.[211]

Third, mediation does not have the same element of blame and does not assign "winners" or "losers."[212] The lack of blame is particularly appropriate in situations regarding mental illness.

Fourth, mediation is a forum in which the participant will have an opportunity to be heard. The student would be able to relate his or her perspective and not be limited by the specific questions in a formal disciplinary proceeding or adversarial procedures. The ability for the student to articulate his or her own version to a neutral third-party may prove therapeutic.

Fifth, mediation can be an educational process for the student, just as it is for clients in legal matters, compared to the adversarial system.[213] Given that these procedures are within the context of an educational relationship, mediation is a way that the student can see and learn about his or her own case more objectively.

Sixth, mediation allows for greater flexibility and narrowly-tailored solutions. Rather than being restricted to the rules of disciplinary proceedings and a limited set of results like suspension or leaves of absence, the terms of a medical leave or withdrawal, treatment, or expectations for readmission can be discussed based on the individual case.

Finally, mediation proceedings could potentially result in savings of time and costs,[214] but more research in this area needs to be done. Administrative costs and efficiency should be researched and compared to current policies like disciplinary action or mandatory withdrawals.

One of the main challenges of mediation will be confronting problems of confidentiality.[215] Mediation, like hearings, should be kept confidential, in order to allow both parties to feel free to speak. The college or university should consider a signed agreement between the parties which would require the statements made in mediation to be confidential. The parties could also agree to make statements in mediation unavailable to later proceedings. This may prove to be a drawback to either party, but can be negotiated. An imbalance of power may still be present in mediation. This problem can be partially remedied by allowing the student to have

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involuntary administrative withdrawal for reasons of mental health"); E. MICH. UNIV., *supra* note 207 (stating that the behavioral evaluation team hearing should be "conversational and non-adversarial, whenever possible").

210. Pavela, *supra* note 152, at 129.

211. For a discussion of problems with college and university administrators serving as mediators, see Jeffrey C. Sun, *University Officials as Administrators & Mediators: The Dual Role Conflict & Confidentiality Problems*, 1999 BYU EDUC. & L. J. 19 (1999).

212. Valentine-Rutledge, *supra* note 205.

213. *Id.* (noting that mediation helps clients to see the strengths and weaknesses of a case and presents an objective view of the case through the third-party mediator).

214. Mediation has been shown to save parties time and expense compared to litigation. *Id.*

215. *See generally* Sun, *supra* note 211 (discussing the importance of confidentiality in college or university sponsored mediation).

a representative with institutional ties during the proceedings.[216] Another risk involved in mediation is that the student may reveal undesirable attributes during proceedings. The student may reveal too much information, which would normally be kept confidential under other adversarial circumstances. This risk should be weighed against the costs of other available options, and the college or university should offer the student the option of a disciplinary hearing. The institution must decide whether to make mediation results final or subject to appeal. Furthermore, if mediation does not arrive at a solution, then the college or university must decide whether parties could resort to hearings or the other procedures already in place. Mediation would at least be a non-adversarial step that provides due process before resorting to formal disciplinary proceedings or withdrawals that do not offer as many due process protections.

The limitation in this area is the lack of empirical data on how many students have been dismissed and under what informal procedures. Although experts in this area have expressed the need for "[e]stablishing a centralized registry for suicides and suicidal behavior among college and university students in order to provide sound and consistent information about the magnitude and trends of the problem,"[217] such a registry of that information or information about the disposition and withdrawal of students may face resistance by college and university administrators and counseling centers who will consider such data confidential or may not want these figures to be public. Major barriers to collecting this data include the confidential nature of medical and administrative records and the strong disincentives of colleges and universities to release such information to the public.

CONCLUSION

Colleges and universities should preserve the minimal due process protections of disciplinary systems, along with a mental health approach, by employing principles of mediation. This article has delineated the difficult questions that colleges and universities must face regarding students with a risk of suicide or self-harm, specifically procedural protections. I have set forth the framework for a proposal that will require more detailed development in later work, including studies of administrative and efficiency cost comparisons. This is a policy area that may be reactionary to lawsuits. More studies are needed to assess changes in current written or unwritten policies at colleges and universities and, in particular, the number of students affected. As more colleges and universities may implement forced withdrawals, mandatory sessions, and the medical model, the need to ensure adequate procedural protections becomes ever more pressing.

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216. Pavela has suggested including a tenured faculty member as a student representative. Pavela, *supra* note 152, at 132–33.

217. SUICIDE PREVENTION RESOURCE CENTER, *supra* note 37, at 27.

APPENDIX: CHARACTERISTICS OF COLLEGES AND UNIVERSITIES INTERVIEWED

Table 1. Characteristics of Counseling Center Directors Interviewed

Characteristic	**Percentage (Number)**
Male	68 (23)
Female	32 (11)
Current Director	92 (31)
Former Director	8 (3)

Table 2. Characteristics of Schools Interviewed

Undergraduate School Size	Under 2,500 18% (6)	2,500–7,500 35% (12)	7,500–15,000 18% (6)	Over 15,000 29% (10)	Total 100% (34)
School Status					
Private	100% (6)	58% (7)	50% (3)	20% (2)	53% (18)
Public	0% (0)	42% (5)	50% (3)	80% (8)	47% (16)

Table 3. List of Colleges and Universities Interviewed

(2 colleges and universities are not listed at their request)
Brigham Young University
Central Michigan University
Colorado State University–Pueblo
Cornell University
Dickinson College
Keene State College
Loras College
McMurry University
National Louis University
Northern Arizona University
Rollins College
Sacred Heart University
Sarah Lawrence College
St. John Fisher College
Truman State University
University of Alaska–Fairbanks
University of California, Davis
University of California, Irvine
University of Denver
University of Massachusetts Dartmouth
University of Florida
University of Hartford
University of Iowa
University of Miami
University of Pittsburgh
University of Puget Sound
University of Rhode Island
University of Southern California
University of Tulsa
University of Wisconsin
Virginia Commonwealth University
Yale University