THE JOURNAL OF
COLLEGE AND UNIVERSITY LAW

Volume 34 2008 Number 2

ARTICLES

Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis

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This article discusses and describes recent legal precedent and argues that that there is insufficient legal guidance for most colleges and universities. Case law is sparse and inconsistent. Legislatures have not provided any form of comprehensive guidance to colleges either. Even the reports regarding events at Virginia Tech leave many open questions. Facing a mental health crisis, many colleges and universities must speculate as to their legal responsibilities to prevent student suicide. The law has been slow to react and respond, and the absence of sufficient legal guidance for compliance is itself dangerous and vexing. The author issues a call to action, imploring the American legal system to develop guiding rules and principles for dealing with a population with significant mental health issues and risks.

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STILL WAITING: THE SLOW EVOLUTION OF THE LAW IN LIGHT OF THE ONGOING STUDENT SUICIDE CRISIS

PETER F. LAKE*

INTRODUCTION

College and university student mental health issues—especially student suicide—have emerged as matters of national concern. Modern college and university students face an array of mental health challenges. The risks associated with suicide, which in some situations may include an attendant risk of homicide, have become signature risks in an ongoing college and university student mental health crisis. Suicide is neither the only, nor the most prevalent, mental health issue for students, but it has become salient. Just a few years ago, there was much less public discussion of the mental health challenges of the modern student and very little by way of systemic and proactive suicide prevention for a college and university community as a whole. The times have changed. Dealing with suicide risk in college and university populations is now a top concern for administrators.

In 2002, Nancy Tribbensee and I wrote of the emerging crisis of college and university student suicide.[1] We addressed the wave of mental health issues menacing institutions of higher education and sounded an alarm that the delivery of higher education and litigation patterns would change. We acknowledged that, at the time, alcohol and drug use dominated the agendas of many college and university administrators.[2] Events at Virginia Tech in April of 2007,[3] however, put

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1. 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).

2. *Id.* at 125.

greater priority upon issues of self-inflicted injury and attendant violence. While college and university mental health issues had continued to garner interest prior to 2007, the Virginia Tech tragedy served as a catalyst for greater intervention by colleges and universities with respect to mental health issues. In 2002, we anticipated "that in the near term, however, attention paid to suicide and other serious forms of self-inflicted injury will continue to increase and that these concerns may begin to gain prominence."[4] The April, 2007, tragedy has made our prediction regarding issues of suicide and related violence come true faster than we imagined. Unfortunately, although suicide and related risks have jumped in priority, the law has evolved at a frustratingly slow pace.

This article is an update to my earlier article with Nancy Tribbensee and a call to action: colleges and universities desperately need more legal guidance on the parameters of managing student suicide danger.[5] The first wave of litigation has served to bring student suicide and student wellness issues out of the closet, but we need more than a smattering of cases with inconsistent results. Everywhere in America, in every type of institution of higher education, administrators make life and death decisions with imprecise and incomplete guidance from the law. While it is odd to call for *more* law in an era of such legal complexity, many colleges and universities simply need *some* law to govern their affairs. In an era where judicial activism is frowned upon, it is odd that legal inactivism—either in the form of legislative inertia or courts showing an unwillingness to apply existing doctrines, principles, or legislation—can be its own form of legal evil. Legal inactivism in the context of college and university student suicide is dangerous, and played a role, along with misperceptions of law, in events at Virginia Tech. There is a cost when neither courts nor legislatures articulate the ways in which general legal principles apply in the college and university context and fail to consider the impact upon administrators of partial, incomplete, or inconsistent legal commands. At this time, the law is failing colleges and universities with respect to the mental health crisis.

The college and university student suicide crisis is now in full swing. Suicide and self-inflicted violence remain major issues for the traditional college and university-aged population, and, in some ways, the dangers may have even increased. According to the Center for Disease Control and Prevention (CDC), suicide is the "second leading cause of death among 25–34 year olds and the third leading cause of death among 15– and 24–year olds." [6] Thus, suicide prevention is not simply a focus for traditional college- and university-aged populations, but must also be a focus for graduate and professional schools. The 25–34 year-old demographic factors prominently in most graduate and professional school programs and applies to the many college and university students who extend their

3. Shaila Dewan, *Drumbeat of Shots, Broken by Pauses to Reload*, N.Y. TIMES, Apr. 17, 2007, at A1.

4. Lake & Tribbensee, *supra* note 1, at 125.

5. As this article is an update, I recommend reviewing the prior article in conjunction with this article. *See id.*

6. CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC), SUICIDE FACTS AT A GLANCE (2007), http://www.cdc.gov/ncipc/dvp/Suicide/SuicideDataSheet.pdf.

education.[7] Newly published research also indicates that for some groups suicide rates have increased significantly.[8]

Males still successfully complete suicide at a much higher rate than females and constitute nearly 80% of all suicides in the United States.[9] The fact that "[f]irearms are the most commonly used method of suicide among males"[10] means that a very large percentage of total suicides involve firearm violence—which, as we have seen, can be directed at others as well. Moreover, data from the National Violent Death Reporting System (NVDRS) suggests the vast majority of murder-suicide perpetrators are male, and that most male murder-suicide violence is directed at females with whom they have shared or sought an intimate relationship.[11] The typical murder-suicide occurs in the twenties to early thirties, which of course overlaps with college and graduate school for many individuals.[12] We now see more clearly the connections between murder and suicide, and the dangers presented to all members of a college or university community by what was once seen as a self-regarding harm or risk.

The crisis has forced colleges and universities to accept a greater role in the mental health of the educational community as a whole. Yet, higher education is still waiting for the legal system to catch up to the crisis. As Tribbensee and I pointed out in 2002, "[t]he American legal system has been reluctant to hold institutions liable for suicide or self-inflicted injury."[13] This remains true; however, it is now evident that the legal system itself is reluctant to even approach issues regarding college and university student suicide and self-inflicted injury at all. What is remarkable, perhaps, is how little has happened in college and university law since 2002. In many states, and with respect to many issues, colleges and universities, students, parents, and others must still wait to receive necessary, basic governing rules. Higher education desperately needs such governing legal rules to manage its affairs effectively. Legal uncertainty is good in

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7. *See* LUTZ BERKNER ET AL., U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS, NCES 2003–151, DESCRIPTIVE SUMMARY OF 1995–96 BEGINNING POSTSECONDARY STUDENTS: SIX YEARS LATER 16 (2002) (finding that only 50.7% of students beginning at a four-year institution completed a bachelor's degree at that institution within 6 years and 58.2% of students completed a bachelor's degree at any institution within 6 years).

8. *See* KM Lubell et al., *Suicide Trends Among Youths and Young Adults Aged 10–24 Years—United States, 1990–2004*, MORBIDITY AND MORTALITY WEEKLY REPORT, Sept. 7, 2007, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5635a2.htm. It is also noteworthy that adult males age 75 years and older have the highest rate of suicide. Thus, as colleges and universities increasingly offer services to older Americans, they should expect to be working with groups that have the highest suicide rates in the United States. CDC, *supra* note 6.

9. CDC, *supra* note 6.

10. *Id.*

11. *See* Katherine van Wormer, Family Safety Current Trends—About Domestic Homicide and Murder-Suicide, http://www.helpstartshere.org/Default.aspx?PageID=1248 (last visited Feb. 27, 2008). The National Violent Death Report System provides data from several states regarding murder-suicide.

12. *See id.* Thus, it is likely that law enforcement will respond to a murder-suicide as an event between domestic partners or between an individual who is obsessed and the target of that obsession.

13. Lake & Tribbensee, *supra* note 1, at 126.

some areas, but not here. This article serves as a call to action for courts and legislatures to move quickly in assisting higher education. To some extent, the three major reports regarding events at Virginia Tech in April of 2007 give higher education some guidance,[14] but reports are not statutes or case decisions from courts of final jurisdiction. Indeed, it is eminently likely that courts and legislatures will ultimately reject some features of these reports.

What follows is a description of key cases and events since my 2002 article with Nancy Tribbensee. However, reporting the outcomes of a handful of battles and skirmishes hardly amounts to making predictions about the outcome of the war. The law is drifting, and seems to have no particular course. Most disturbing is the fact that lawmakers have shown no sense of urgency in, at least, offering basic governing principles to most or all institutions. This does not mean courts should all hold that colleges and universities have legal duties to prevent suicide, but, if there is no legal duty owed, courts should make that known. Thus, other actors, like parents, will understand what they must do.

Nonetheless, despite a general climate of little progress, some ideas have emerged in both the law and policy dimensions that will help colleges and universities manage the student mental health crises. First, law and policy makers now realize suicide is not primarily an individual event. Suicide affects an entire community whether or not violence is directed at others. However, as events at Virginia Tech demonstrated, when suicide combines with outward violence, it creates particularly grave danger for a campus community. Second, there is a renewed recognition that violence and suicide go hand in hand. All too often, we imagine suicidal individuals engaging in behaviors that are injurious but not particularly violent: for example, females typically use poisons to commit suicide.[15] But the facts of suicide belie such an image, given that so many suicides are gruesome, violent, and dangerous to others. Thus, violence prevention is suicide prevention, and vice versa. Third, suicide and self-inflicted injury problems do not exist in isolation. Instead, suicide and self-inflicted injuries are phenomena that exist in an educational environment. Now, we recognize that suicide and self-inflicted injury are connected to general environmental wellness issues and intimately connect to both the safety and academic wellness of the community. Fourth, particularly in light of events at Virginia Tech in April 2007, weaknesses in higher education's business model have become evident. Higher education too often promotes or tolerates balkanization, information siloing, and self-help over collaboration. Our institutions were designed in another era to protect and preserve truth and information for subsequent generations. The very

14. *See* VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 21 (2007), *available at* http://www.vtreviewpanel.org/report/index.html [hereinafter GOVERNOR'S REPORT]; *See also* DEP'T OF JUSTICE ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (2007), *available at* http://www.hhs.gov/vtreport.pdf [hereinafter PRESIDENT'S REPORT]; OFFICE OF THE INSPECTOR GENERAL FOR MENTAL HEALTH, MENTAL RETARDATION, AND SUBSTANCE ABUSE SERVICES, INVESTIGATION OF APRIL 16, 2007 CRITICAL INCIDENT AT VIRGINIA TECH, (2007), *available at* http://www.oig.virginia.gov/documents/ VATechRpt-140.pdf [hereinafter INSPECTOR GENERAL REPORT].

15. CDC, *supra* note 6.

virtues that brought American higher education into the 21st century—such as careful deliberation and curriculum division—now appear in some situations to be weaknesses. Suicide and self-inflicted injury issues have illuminated the need to rapidly improve American higher education's ability to adapt to crises and generate environmental and coordinated responses. While American higher education has made important strides in violence prevention and student wellness, the changes and improvements have been incomplete.

KEY RECENT CASES AND EVENTS INVOLVING STUDENT SUICIDE AND/OR SERIOUS SELF-INFLICTED INJURY

Since 2002, there have been several reported decisions relating to college and university student suicide or serious self-inflicted injury. There also have been a number of cases filed.[16] However, there has not been a landslide of reported decisions, nor have all the decisions that have been reported come from courts of final resort. As the description of the cases and events that follow indicates, we have learned a number of things since 2002, but there is far more to come.

A. *Schieszler v. Ferrum College*[17]

In our 2002 article, Nancy Tribbensee and I referred to the *Ferrum College* case as a case "worth noting" and described the sad facts leading to the death of Michael Frentzel, who, at the time of his death, was a student at Ferrum College.[18] In *Ferrum College*, Frentzel committed suicide in his dormitory room.[19] Ferrum College knew he was a danger to himself. Indeed, it had gone as far as requiring him to attend anger management classes and had required him to sign a statement promising not to injure himself.[20] Ferrum College officials also knew Frentzel told his girlfriend and another friend of his intentions to kill himself.[21] The representative of his estate claimed Ferrum College had a duty to prevent Frentzel's suicide.[22] When Ferrum College attempted to dismiss the case by arguing no duty to prevent suicide was owed, the court refused to grant the motion to dismiss.[23] Subsequently, the case settled.[24]

In settling the lawsuit, Ferrum College admitted "shared responsibility" for the

16. *See, e.g.*, Jordon Nott v. George Washington University, Civil Case No. 05-8503 (D.C. Super. Ct.). The *Nott* case was settled under undisclosed terms. Daniel de Vise, *GWU Settles Lawsuit Brought by Student Barred for Depression*, WASH. POST, Nov. 1, 2006, at B05; Eric Hoover, *George Washington U. Settles Lawsuit With Ex-Student It Suspended After He Sought Help For Depression,* CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 10, 2006, at A39.

17. 236 F. Supp. 2d 602 (W.D. Va. 2002).

18. Lake & Tribbensee, *supra* note 1, at 135.

19. *Ferrum Coll.*, 236 F. Supp. 2d at 605.

20. *Id.* at 609.

21. *Id.*

22. *Id.* at 605.

23. *Id.* at 614.

24. Eric Hoover, *Ferrum College Concedes 'Shared Responsibility' in a Student's Suicide*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 8, 2003, at A31.

freshman's suicide and acknowledged "errors in judgment and communication."[25] Although such an admission of shared responsibility was path-breaking,[26] the fact that only preliminary legal decisions were reached in the *Ferrum College* case leaves the case with limited precedential value. After all, refusing to grant Ferrum's motion to dismiss on no-duty grounds is not equal to granting summary judgment on duty grounds in favor of the plaintiff, nor is it equivalent to a jury determination that Ferrum failed to operate with reasonable care.

The *Ferrum College* matter is a clear example of how settlements reached in the private law system deprive colleges and universities of helpful precedent. Nonetheless, the fact that a federal trial court refused to grant a motion to dismiss on no-duty grounds and the case was settled on such broad terms will have, and has had, an effect on college and university administrators and attorneys. Although some may believe Ferrum College settled too quickly and broadly, many administrators think situations at their institutions are indistinguishable (partly because so many questions of liability remain unanswered) from the *Ferrum College* case and may be moved to revise practices or accept responsibility for student self-harmings.

B. *Mahoney v. Allegheny College*[27]

Mahoney arose from the suicide of Charles Mahoney IV, an Allegheny College ("Allegheny") junior, in February of 2002 at an off-campus fraternity house.[28] Charles Mahoney had received counseling with the Allegheny College Counseling Center over the course of his two and a half years at Allegheny.[29] During football camp his freshman year, Mahoney visited the counseling center and was diagnosed with depression.[30] He received regular counseling throughout his freshman year in addition to medical treatment by his doctor.[31] At the beginning of his sophomore year, he was hospitalized after an evaluation by the counseling center determined he was suicidal.[32] Subsequently, he had continued and regular counseling throughout his sophomore year.[33] Upon returning for his junior year, he quit the football team and became increasingly distant from his few friends.[34] He continued receiving counseling from counseling services, and his counselor was aware of his suicidal thoughts.[35]

In early February, 2002, Mahoney's counselor spoke with the Associate Dean

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25. *Id.*
26. *See id.*
27. No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005) (memorandum and order granting defendant's motion for summary judgment).
28. *Id.* at 1–2.
29. *Id.* at 3–4.
30. *Id.* at 3.
31. *Id.*
32. *Id.* at 3–4.
33. *Id.* at 4.
34. *Id.*
35. *Id.* at 3–11.

of Students.[36] Prior to this meeting, the Dean was unaware of Mahoney. Mahoney had been in disciplinary trouble and the counselor wanted to consider an involuntary leave of absence for health (due to the suicidal thoughts) and disciplinary problems.[37] While the counselor was restricted from contacting Mahoney's parents, the Dean was able to do so. Nonetheless, the dean refrained because the counselor thought it would do more harm than good.[38] At the meeting, the counselor informed the Dean of a troubling email in which Mahoney stated he "hate[d] living."[39] On February 11 of his junior year, Mahoney hung himself in his fraternity room.[40]

His parents alleged that Allegheny breached its duty of care to prevent their son's suicide and had a duty to notify them regarding his mental health issues.[41] The parents also made claims regarding Allegheny's failure to take appropriate actions under Pennsylvania medical health law regarding leave of absence procedures.[42] Finally, Mahoney's parents argued breach of contract.[43] Prior to these claims, specific claims against the fraternity had been dismissed.[44]

In response to these claims, Allegheny and affiliated defendants filed motions for summary judgment.[45] On December 22, 2005, a state trial court in Pennsylvania granted Allegheny's motion for summary judgment with respect to the counts alleging negligence and granted motions for summary judgment in favor of Allegheny with respect to the contract and misrepresentation claims.[46] Claims for punitive damages were also dismissed.[47]

The court analyzed the determination of duty by balancing various factors.[48] Pennsylvania law recognized that duty is a result of the balancing of various considerations or factors.[49] The court, however, stated that the matter was a "case of first impression" and that there were no previous cases "imposing a duty to prevent suicide on a college or its employees."[50] Regardless, it performed the

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36. *Id.* at 11–12.
37. *Id.* at 13.
38. *Id.*
39. *Id.* at 8.
40. *Id.* at 2.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 27.
47. *Id.*
48. *See id.* at 14–15. The factors are: "1. The relationship between the parties, 2. The social utility of defendant's conduct, 3. The nature of risk imposed and foreseeability of harm incurred, 4. The consequences of imposing a duty upon the defendant, and 5. The overall public interest in a proposed solution." *Id.* These factors derive from the earlier Pennsylvania case of *Sinn v. Burd,* 404 A.2d 672, 681 (Pa. 1979).
49. Phillips v. Cricket Lighters, 841 A.2d 1000, 1008 (Pa. 2003) (quoting Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000)).
50. *Mahoney*, No. AD 892-2003, at 15. The issue was not entirely novel. There had been a previous case regarding responsibility to prevent suicide. *See McPeake v. William T. Cannon,*

required factor balancing.[51]

The court noted that American law is "reluctant to find civil liability arising out of a failure to prevent suicide."[52] However, it went on to point out that the old proximate cause rule[53] no longer dominates and "rather than relying on the rules of proximate causation to resolve cases involving students' suicides, courts are increasingly looking at duty within the ambit of the existence of a 'special relationship' and whether an event is 'reasonably foreseeable' or 'imminently probable.'"[54] After reviewing several recent decisions the court made extensive findings.

Several of the court's findings are pertinent. First, it decided there was no law "imposing a personal duty on lay non-mental health professional college employees to prevent suicide."[55] Second, it found "there was no 'special relationship' nor 'reasonably foreseeable' events that would justify creating a duty to prevent suicide or notify Mahoney's parents of any impending danger."[56] Third, it found that *Shin v. MIT* and *Schieszler v. Ferrum College* were unpersuasive and not precedential, because, in this instance, the student had not previously injured himself.[57] Fourth, the court held that finding a duty based on a special relationship would be "reactive" and not the "careful and precise legal analysis required in a duty of due care."[58] In this finding, the court implied that such a duty may exist in a custodial context, but not in the present college/university–student relationship.[59] Fifth, if nonprofessionally trained lay persons were required to notify of impending dangers, many issues would arise, including foreseeability, "the disruption of a professional confidential clinical relationship," and "a student's right to privacy and expressed wishes involving notification."[60]

The court seemed focused upon the fact that the relationship between the Dean and Mahoney existed only for a matter of a few days and was not extensive in scope.[61] The court, of course, recognized that Mahoney had an ongoing relationship with a mental health counselor, although the liability of any mental health care provider was not before the court in the pendant motions.[62] The court did not impute any knowledge from the counselor to the College or the Dean. Presumably, mental health care professionals are like independent contractors and thus do not typically subject their principal employers to rules of imputation of

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Esquire, P.C., 553 A.2d 439 (Pa. Super. Ct. 1989).

51. *Mahoney*, No. AD 892-2003, at 15.

52. *Id.* at 19.

53. *See* Lake & Tribbensee, *supra* note 1, at 126.

54. *Mahoney*, No. AD 892-2003, at 20.

55. *Id.* at 22.

56. *Id.*

57. *Id.* at 23. See *infra* Part II.D. for a discussion of *Shin v. Mass. Inst. of Tech.*, No. 02 0403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

58. *Mahoney*, No. AD 892-2003, at 23.

59. *Id.* at 22.

60. *Id.* at 23.

61. *Id.* at 22.

62. *Id.*

knowledge under the law of agency (although the court engaged in no such discussion).[63] Moreover, the court also failed to address any issues regarding vicarious liability of Allegheny for potential counseling errors; presumably, the answer would be the same under rules of agency law.

Finally, and critically, the court also focused upon the fact that although there was evidence of Mahoney diving into a progressively deeper state of depression, there had been no specific acts or threats of self-harm.[64] In terms of foreseeability, the parents' claim was lacking. The court was unwilling to impose a duty to anticipate suicide by extrapolating from limited connections with a student and the mere fact that a student has some mental health issues. Moreover, there is a hint that the court thought the fact that a mental health counselor had an ongoing relationship with a patient should weigh in favor of the institution. To the extent that someone should be notified, or an intervention should take place, the person to initiate such action should be the mental health professional. Again, *Mahoney* did not so hold, but it does suggest that mental health professional responsibility may alter the responsibility of other individuals connected to a suicidal student. Speculating further, *Mahoney* may signal that some courts will think that a student suicide is typically a matter involving questions of medical professional responsibility, and litigation risk should be allocated first to professional malpractice carriers, not host institutions or non-medical staff. If that is so, *Mahoney* may imply that potential liability differs significantly for different classes of college and university employees, and that utilizing mental health care professionals on staff does not create an assumption of larger legal responsibilities for student wellness. That would certainly be a better way to interpret *Mahoney* than interpreting it to mean that the presence of treating mental health care professionals in the management of students with wellness issues absolves non-medical staff from engaging in reasonable interventions. *Mahoney* may simply be signaling that a college or university is not a hospital simply because it has medical staff.

As to the issue of the existence of a special relationship between the suicidal student and the institution, the court was unimpressed with authority expanding the meaning of special relationship and even the use of special relationship terminology "outside the context of custody and/or control."[65] The court went on

63. *See generally id.*

64. *Id.* at 23.

65. *Id.* The court's findings under heading VI are its least articulate and accurate. Special relationships have been found commonly in situations other than custody and/or control. When the question presented is one regarding protecting third parties from dangerous individuals—and in duty to prevent suicide cases—courts so limit special relationships, but do not always do so in other contexts. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976). Indeed, the Pennsylvania Supreme Court specifically adopted the very balancing test that Dean Prosser advocated which has formed the basis of many courts holding that custodial relationships are not necessary for relationships to be special. *See, e.g.*, Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97 (1994). Moreover, the court's concern over special relationship analysis shows a certain level of disagreement with its own high court's pronouncements—it is as if the *Mahoney* court was unwilling to follow the "balancing" directions of the Pennsylvania Supreme Court in prior cases. And, suggesting that acknowledging special relationships is tantamount to adopting in

to rule in favor of Allegheny with respect to the contract and misrepresentation counts of the complaint as well.[66]

Despite exonerating the institution, the court expressed its concern and issued a call to action:

> Clearly the increasing incidents of suicide on campuses throughout the United States is [sic] cause for grave concern. In the view of some commentators, suicide is a confession, actually multiple confessions of failure, and like most failures, it is shrouded in blame and rationalizations. However, incurring or creating a new duty of care in such cases is not the answer. Nevertheless, "failure" to create a duty is not an invitation to avoid action. We believe the "University" has a responsibility to adopt prevention programs and protocols regarding students [sic] self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective. In our view, the likelihood of a liability determination (even where a duty is established) is remote, when the issue of proximate causation (to be liable the university's act/omissions would have to be shown to be substantial) is considered. By way of illustration, even as to the issues of the lesser duty of notification of parents/others, there is always the possibility that such may make matters worse and increase the pressure on the student to commit the act. Rather than create an ill-defined duty of due care the University and mental health community have a more realistic duty to make strides towards prevention. In that regard, the University must not do less than it ought, unless it does all that it can.[67]

Many colleges and universities would have trouble understanding the precise message of this important paragraph in the *Mahoney* decision. Certainly, the court was aware of the fact that institutional protocols regarding student suicide should be considered in light of the fact that they might make situations worse for students. Perhaps some colleges and universities will take comfort in the court's

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loco parentis is misguided and incoherent. In higher education law, the doctrine of *in loco parentis* never created responsibility; it was merely a form of immunity. *See* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY 17–34 (1999). The *Mahoney* court follows an unfortunate tendency among American courts and legal commentary to assume in dicta that *in loco parentis* somehow existed in higher education to create duty or responsibility. Such a conclusion is fallacious, completely unsupported by any evidence, and illogical because *in loco parentis* existed as an immunity in higher education, not a responsibility-creating norm. Unfortunately, such misleading statements of law are common in lower court and unreported decisions. This further supports this article's thesis that the law regarding college and university student suicide remains in transition. It is not always well formulated.

66. *See Mahoney*, No. AD 892-2003, at 27. Moreover, the court pointed out that under Pennsylvania law the authority to involuntarily hospitalize a student lies only with "physicians, peace officers or others authorized by the County Administrator." Thus, the college and its employees could not be implicated under the Pennsylvania Mental Health Procedures Act, 50 P.S. § 7302. *Id*. at 23.

67. *Id.* at 25.

statement that legal duty is not "the answer" in student suicide litigation, or, perhaps, some institutions will heed the call to action and shun avoidance behavior as they "adopt prevention programs and protocols" that are both "humanistic and therapeutic."[68] This important paragraph in the *Mahoney* decision is reminiscent of crucial paragraphs in decisions by Judge Cardozo, which as Judge Posner has pointed out, have meta-significance. The final quoted sentence is particularly mysterious and open to different interpretations.[69]

Mahoney leaves as much open as it closes. For example, would *Mahoney* come out differently if facts indicating greater levels of foreseeability on the part of non-medical staff were involved? Would *Mahoney* be decided differently if the student had failed to engage, on an ongoing basis, with a medical health professional to assist with depression or other mental health issues? Would it be different if administrators had a longer and wider opportunity to observe and evaluate a student across multiple dimensions? Would *Mahoney* have come out differently had it considered precedents not discussed in the case such as *Eisel v. Board of Education*,[70] which reached a different result in a similar case involving a high school student? And, finally, would it have been decided differently had the suicide been a murder-suicide or a suicide that negligently or even innocently caused injury to third parties? Does *Mahoney* stand for the proposition that a student must cross a bright line, such as engaging in self-harm or make specific threats of self-harm, to trigger a duty? All of these questions remain open after *Mahoney*.

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68. *Id.*

69. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 41–42, 92–124 (1990).

70. Eisel v. Bd. of Educ., 597 A.2d 447 (Md. 1991). In *Eisel*, Nicole Eisel, a thirteen year old student, consummated a murder-suicide pact with another student. *Id.* at 448. Prior to her death, Nicole's friends informed a school counselor of Nicole's stated intention to kill herself. *Id.* at 449. The counselor questioned Nicole, she denied making the statements, and the counselor took no further action. *Id.* The court focused on the special relationship that results between the suicidal person and one with knowledge of the suicidal intent. *Id.* at 450. While the court noted that most cases declined to extend such a duty, it found Nicole's adolescence and the therapeutic role of the school counselor made such a duty applicable in this instance. *Id.* at 452. The court then considered several factors: (1) the "Foreseeability and Certainty of [the] Harm," (2) the "Policy of Preventing Future Harm," (3) the closeness of the connection between the school's conduct and the injury, (4) the general reaction to the event (moral blame), (5) the burden imposing a duty would have on the defendant, (6) the community consequences of finding liability, and (7) the insurability of the proposed duty. *Id.* at 452–56. Using these factors, the court held "school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent." *Id.* at 456.

C. *Bash v. Clark University*[71]

Perhaps, as the *Mahoney* court indicated, foreseeability is the crux of judicial concern and interest regarding duties to prevent self-inflicted injury. The Massachusetts Superior Court case of *Bash v. Clark University*[72] is illustrative. *Bash* did not involve a suicide, but a student who died on campus after overdosing on heroin.[73] Following the student's death, the family brought a wrongful death action against Clark University ("Clark") and several administrators.[74] Clark administrators moved to dismiss the claims brought against them. Ultimately, the court granted the defendants' motions to dismiss after assuming the facts as alleged in the complaint to be true.

Michele Bash, the decedent, entered Clark in August of 2003.[75] She was housed in an on-campus residence hall, as was required for all first-year students.[76] Clark prohibited drug and alcohol use by underage students on school property.[77] While Clark prohibited drug use, the City of Worcester, where Clark is located, had a notable drug problem, possessing one of the three highest rates of heroin overdoses in Massachusetts.[78] During her first year, Michele had typical issues regarding alcohol use, resulting in police and RA intervention.[79] At one point, her parents became concerned with her illegal drug use and reported her to the campus counseling center.[80] Despite meeting with campus mental health administrators, Michele denied using drugs.[81] She was eventually placed on academic probation and was given an academic advisor.[82] The advisor met with Michele on several occasions and saw that she "did not look well, was not sleeping, and was homesick."[83] The advisor also "recommended that Ms. Bash go to the Counseling Center and Clark's Health Center."[84] Just about a month prior to her death in February 2004, Michele again ran into trouble regarding potential drug use on campus.[85] At this point, Michele finally admitted having used heroin but promised not to do it again.[86] Michele's mother was informed that Clark administrators had met with her.[87] The day before her death, Michele's residential advisor recognized

71. No. 06745A, 2006 WL 4114297 (Mass. Super. Ct. Nov. 20, 2006).
72. *Id.*
73. *Id.* at *1.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at *2.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

problems, although he did not attribute them to heroin use.[88] Subsequently, Michele overdosed on heroin and died.[89]

The court concluded that Clark owed Michele no duty to protect her from her own self-inflicted injury:

> After carefully reviewing the circumstances involved in this case and the challenges faced by university officials and staff in attempting to eradicate drug use on college campuses, recognizing a special relationship in this instance would impose on university officials and staff an unreasonable burden that would be at odds with contemporary social values and customs.[90]

The court began by recognizing that, typically, "'[people] do not owe . . . a duty to take action to rescue or protect [someone] from conditions [they] have not created.'"[91] Quoting from Section 314(a) of RESTATEMENT (SECOND) OF TORTS, the court pointed out that the ordinary no-duty rule can be trumped if an appropriate special relationship exists.[92] The court went on to point out that under Massachusetts law special relationships often turn principally on the existence of foreseeability.[93] The court stated:

> The Supreme Judicial Court explained the basis for imposing a duty where a "special relationship" exists in *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). It stated that special relationships are "based to a large extent on a uniform set of considerations. Foremost among these is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff for failure to do so."[94]

Recognizing that Massachusetts to date had no case specifically dealing with duties to protect students from self-imposed harm arising from the voluntary use of drugs or alcohol, the court turned to other jurisdictions to help it determine foreseeability. Reviewing the cases, the court saw three principal themes all pointing to no-duty in the case at hand.

First, *Bash* interpreted prior precedent to the effect that foreseeability—leading to a determination of special relationship and a duty—turns on a "balancing approach."[95] The court believed the appropriate balancing approach is balancing the risk of harm against the efforts needed to protect against the harm.[96] Performing this balancing, the court stated:

> The evidence before the court, viewed in the light most favorable to the plaintiffs, does not support the conclusion that the tragic death of

88. *Id.*
89. *Id.*
90. *Id.* at *4.
91. *Id.* at *3 (quoting Cremins v. Clancey, 612 N.E.2d 1183, 1187 (Mass. 1993)).
92. *Id.*
93. *Id.*
94. *Id.* at *4 (quoting Irwin v. Town of Ware, 467 N.E.2d 1292, 1300 (Mass. 1984)).
95. *Id.*
96. *Id.*

> Michele Claudia Bash from a heroin overdose was reasonably foreseeable to the defendants. The complaint states that Ms. Bash admitted to trying heroin once, several months before her death. It also states that it made her sick and she had not done any illegal drugs since. Furthermore, nowhere in the complaint does it state that Ms. Bash was suicidal or made any reference to wanting to end her life. This court believes that although there is ample evidence to suggest that Ms. Bash was homesick, or looked mad and upset without additional facts, the risk of death or serious injury resulting from a drug overdose was not so plainly foreseeable that a special relationship existed between the student and the university. In addition, as discussed below, this court has grave reservations about the capacity of any university to undertake measures to guard against the risk of a death or serious injury due to the voluntary consumption of drugs other than those provided by or with the approval of the university.[97]

In analyzing relevant case law, the court put significant emphasis on the famous bystander era cases[98] of *Bradshaw v. Rawlings*[99] and *Baldwin v. Zoradi.*[100] *Bash* relied upon these cases to make the point that college and university students are fundamentally different from students who are in "elementary, middle and secondary levels."[101]

Second, the *Bash* court also thought it is inappropriate to impose legal duties on colleges and universities to protect students from dangers associated with voluntary usage of alcohol or drugs. As *Bash* stated, "it is not appropriate to ground the existence of a legal duty on the part of university officials and staff on the basis of unrealistic expectations about their ability to protect their students from the dangers associated with the voluntary use of illegal drugs."[102] The court distinguished cases imposing a duty in situations where third parties created the danger as opposed to danger created on a first party basis:[103]

> It is not possible for the most vigilant university to police all drug use and protect every student from the tragic consequences of voluntary drug use. In *Crow v. State of California*, the court held imposing a duty of care on a university to protect its students from the risks of harm flowing from the use of alcoholic beverages would be "unwarranted and

97. *Id.* (internal citation omitted).

98. BICKEL & LAKE, *supra* note 65, at 49–103 (defining and examining "bystander era" cases).

99. Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979). In *Bradshaw*, a student was injured in a drunk driving accident and sued Delaware Valley College. The drunk driver was underage and had been supplied alcohol by Delaware Valley College. *Id.* at 137. Following a jury verdict for the plaintiff, the Third Circuit reversed. *Id.* at 141. Following the demise of *in loco parentis* and the campus revolutions of the 1960s and 1970s, colleges and universities owed no duty to their students to prevent foreseeable harm. *Id.* at 139.

100. 176 Cal. Rptr. 809. The *Baldwin* court largely relied on *Bradshaw*'s reasoning. *Id.* at 816.

101. *Bash*, 2006 WL 4114297, at *4.

102. *Id*. at *5 (internal citations omitted).

103. *Id.* at *5–6.

> impracticable." To impose liability on the part of university officials and staff in this case would be tantamount to imposing on them the duty of an insurer against the type of tragedy that happened to Ms. Bash. The inherent nature of drugs is that they are small, easily transportable, easily obtainable, and can be easily concealed. As such, this court is not of the view that the tragic consequences of the voluntary use of drugs by Ms. Bash was reasonably foreseeable. As the defendants have pointed out, a university cannot prevent these incidents from occurring "except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis" This is not the type of burden that one may expect a party or a social institution such as a university to assume as the basis of a special relationship.[104]

The *Bash* court lumped voluntary alcohol usage, voluntary drug usage, and voluntarily overdosing into the same category with respect to special relationship analysis. While it may be true that stopping an individual student from overdosing would be practically impossible given the same facts as *Bash*, this is not the case in all situations. Surely, *Bash* does not purport to hold that an institution, knowing a student is about to overdose, can watch and stand idle. Furthermore, modern science does not support the broad statement that alcohol and drug use are not preventable.[105] Although preventing an individual student from using alcohol or drugs may be difficult in a given situation, there are interventions that, in the aggregate, can help to reduce high risk alcohol and drug usage.[106] The *Bash* court, like many courts, falls into the trap of conflating particular intervention strategies directed at one student with general intervention strategies designed to make the entire academic environment safer and more reasonable. Moreover, the *Bash* court also failed to consider the possibility that, in some situations, institutions may engender or facilitate alcohol or drug risk by decisions such as permitting the usage of certain facilities, permitting certain kinds of advertising, or through choice of architecture (for example, high density residence halls—especially those using triples—can intensify alcohol and drug problems) and staffing. In short, *Bash* utilized language that was overbroad for the issue presented; there are many further issues to be decided on a case-by-case basis in Massachusetts.

Third, the *Bash* court believed that a duty to intervene in a case like *Bash* would conflict with student privacy rights.[107] As the court stated:

> [R]ecognition of the existence of a legal duty on the part of university officials and staff in this case would conflict with the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students. The incursion upon a student's

104. *Id.* at *5.

105. *See generally* REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY 87–249 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004), *available at* http://books.nap.edu/openbook.php?record_id=10729&page=87. *See also* College Drinking, 4 Tiers, http://www.collegedrinkingprevention.gov/StatsSummaries/4tier.aspx (last visited Feb. 27, 2008).

106. *See generally* REDUCING UNDERAGE DRINKING, *supra* note 105, at 87–249.

107. *Bash*, 2006 WL 4114297, at *5.

> privacy and freedom that would be necessary to enable a university to monitor students during virtually every moment of their day and night to guard against the risks of harm from the voluntary ingestion of drugs is unacceptable and would not be tolerated.[108]

Undoubtedly, no court would require general twenty-four hour monitoring of college students in all spaces—students remain tenants with legal rights and do not lose their tenancy rights simply by matriculating to a college or university.[109] However, the court's broad statements of student privacy rights are interesting when juxtaposed with concerns regarding misunderstandings of student privacy law expressed in reports relating to events at Virginia Tech.[110]

Bash may be the case that turns a no-negligence determination into a no-duty determination. Clark University officials did intervene on behalf of Ms. Bash and involved her family.[111] However, according to the record in *Bash*, Michele deliberately hid and lied about her heroin usage.[112] Unless a person could detect with reasonable care that statements are false, or that hidden information is readily discoverable, there should be no reason to impose responsibility. Sometimes, courts refuse to recognize students' claims, or claims that arise on behalf of the student, when the injured student voluntarily participated in dangerous behavior and lied about or misrepresented the nature of the behaviors or the risks associated with them.[113]

Bash, however, is the wrong case to set precedent suggesting colleges and universities should have no duty whatsoever to protect students from any form of voluntary intoxication or illegal drug use. For one thing, in some environments, a duty will obviously arise because of a landowner relationship, which is considered a legally special relationship such that it imposes duties on the landowner.[114] As a matter of law, broad statements of no responsibility are inconsistent with existing special relationship law. Moreover, courts should be careful to extrapolate from individual prevention intervention situations to general environmental intervention situations. Courts frequently distinguish a duty to provide a generally safe environment from a duty to prevent a foreseeably dangerous individual's attacks.[115] In the matter of self-inflicted injury, courts should do the same. Although Michele's individual heroin overdose was not foreseeable, self-inflicted injury by drugs, alcohol, or otherwise can be foreseen. Reasonable measures should be commensurate with what is reasonably within the college or university's control. Thus, it would be a mistake to consider *Bash* as a case that suggests

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108. *Id.*

109. *See* Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993) ("A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants.").

110. *See* discussion *infra* Part II.E.

111. *Bash*, 2006 WL 4114297, at *2.

112. *Id.*

113. *See, e.g.*, Lloyd v. Alpha Phi Alpha Fraternity, No. 96-CV-348, 1999 WL 47153, at *4 (N.D.N.Y. Jan. 26, 1999).

114. *Bash*, 2006 WL 4114297, at *4.

115. JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 244–45 (2001).

institutions should not engage in more proactive environmental strategy to generally reduce risks of alcohol, drug, or self-inflicted injury.

Finally, in light of events at Virginia Tech, it has become painfully apparent that individuals who inflict self-harm often present a serious danger to others. While the *Bash* scenario is not such a case, other cases of voluntary drug overdose could present such a scenario. For example, a student overdosing on certain types of drugs could have hallucinations, leading him or her to commit violence on others. Again, the law is quite clear that if a college or university has a foreseeably dangerous individual on its premises it must take action to protect other invitees on its premises.[116]

D. *Shin v. Massachusetts Institute of Technology*[117]

It is instructive that the Massachusetts lower courts have already split, at least in terms of result, in student self-inflicted injury scenarios. In *Shin v. Massachusetts Institute of Technology*, a Massachusetts Superior Court held that certain administrators at the Massachusetts Institute of Technology ("MIT") could be responsible for the burning death of a student.[118] The case is hard to reconcile with either *Bash* or the decision in *Mahoney*.[119]

The facts of *Shin* arose out of the death of Elizabeth Shin,[120] a student enrolled at MIT in September 1998.[121] Elizabeth was hospitalized in the spring of 1999 after an overdose of codeine Tylenol.[122] As a result of this episode, she was taken to a non-university hospital where she was treated for a week.[123] During her treatment, Elizabeth acknowledged that she suffered from mental illness and engaged in cutting prior to college.[124] An MIT administrator notified the Shin family that Elizabeth had been admitted to the hospital.[125] The family visited and, following a recommendation from clinicians at the hospital, Shin's father brought her to a psychiatrist at the MIT mental health services department.[126]

The initial trip to the hospital and subsequent meeting with MIT staff initiated a long, complicated, and painful series of interactions with Elizabeth. During her time at MIT, she suffered academic difficulty, relationship difficulty, dormitory

116. *See, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

117. No. 02 0403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005) (memorandum and order on defendants' motion for summary judgment).

118. *Id.* at *12–14.

119. Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).

120. Initially, the Shin family argued that the death of their daughter was a suicide. *See Shin*, 2005 WL 1869101, at *1. However, when the case ultimately settled, the Shins asserted that Elizabeth's death was accidental. *See* Eric Hoover, *In a Surprise Move, MIT Settles Closely Watched Student-Suicide Case*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 14, 2006, at A41.

121. *Shin*, 2005 WL 1869101, at * 1.

122. *Id.*

123. *Id.*

124. *Id.* "Cutting" is the practice of deliberately cutting one's own skin with a sharp object.

125. *Id.*

126. *Id.*

issues, and had multiple interactions with administrators and clinical staff.[127] Her suicidal propensities became known to a number of MIT personnel, and, at certain points, effort was expended to determine whether she was acutely suicidal.[128]

Early in the morning on April 10, 2000, students in Elizabeth's residence hall notified an administrator that Elizabeth indicated to them that she "planned to kill herself that day."[129] The administrator contacted the MIT mental health center and spoke with a psychiatrist that had worked with Elizabeth.[130] The psychiatrist was not as alarmed as the administrator and directed the administrator to "check on" Elizabeth but not to bring her to the medical center because the psychiatrist had received assurances from Elizabeth that she was fine and that "her friends had overreacted."[131] The administrator found Elizabeth sleeping at approximately 6:30 AM, and, later, had a conversation with her just before 10:00 AM.[132] The conversation was accusatory and disturbing, prompting the administrator to contact another psychiatrist regarding Elizabeth.[133]

A previously scheduled meeting between the deans and mental health professionals occurred on the morning of April 10 with several deans and mental health professionals attending.[134] The meeting attendees reviewed Elizabeth's situation.[135] There was some dispute as to what exactly occurred at the meeting and what information individual attendees possessed,[136] but, at the conclusion of the meeting, an appointment was made for Elizabeth to receive further treatment.[137] Elizabeth was informed of this new appointment by a message left on her answering machine.[138] Apparently, no one made direct contact with her later that day.[139] Just before 9:00 PM, students in Elizabeth's residence hall heard the "smoke alarm sounding in Elizabeth's room."[140] Campus police and the local fire department quickly responded and broke open her dormitory door, only to find her in flames.[141] Emergency response and subsequent hospitalization failed and Elizabeth Shin died in the early morning of April 14.[142] A medical examiner later determined her cause of death was "self-inflicted thermal burns."[143]

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127. *See id.* at *2–5.
128. *See id.*
129. *Id.* at *5.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* This meeting was commonly referred to as the "deans and psychs" meeting. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at *6.
143. *Id.* Others concurred that Elizabeth's death was a suicide as well. *See id.* When the Shin family settled with MIT for an undisclosed sum, Elizabeth's father stated in a written statement that her death was "likely a tragic accident." *See* Eric Hoover, *supra* note 120.

Ruling on MIT's motion for summary judgment, the *Shin* court rendered a complex and somewhat surprising decision. The court granted MIT's motion for summary judgment to the Shins' claim for breach of contract.[144] The court also granted summary judgment to MIT for the Shins' claim under a Massachusetts statute relating to trade and commerce.[145] With respect to MIT's medical professionals, the decision granted summary judgment to MIT for the Shins' claim under Massachusetts' consumer protection statute for negligent delivery of medical care.[146] It also granted summary judgment with respect to the Shin family's claim for negligent infliction of emotional distress.[147]

However, the court was unwilling to grant summary judgment with respect to gross negligence claims.[148] As the court stated:

> The Plaintiffs argue that the MIT medical professionals individually and collectively failed to coordinate Elizabeth's care. As a "treatment team," the professionals failed to secure Elizabeth's short-term safety in response to Elizabeth's suicide plan in the morning hours of April 10. During the "deans and psychs" meeting on the morning of April 10, plans to assist Elizabeth were discussed, however, an immediate response to Elizabeth's escalating threats to commit suicide was not formulated. By not formulating and enacting an immediate plan to respond to Elizabeth's escalating threats to commit suicide, the Plaintiffs have put forth sufficient evidence of a genuine issue of material fact as to whether the MIT Medical Professionals were grossly negligent in their treatment of Elizabeth.[149]

The court focused heavily upon intervention responses; Shin may have needed more urgent care.[150]

Of course, simply because the matter created a triable issue of fact in the eyes of the court does not mean MIT medical professionals committed some form of "gross negligence." Nonetheless, because many administrators would prefer avoiding trial on issues involving care, denying summary judgment in a situation like this is *almost* like losing the case. Lawyers, of course, recognize the case is far from over, but, for clients, being forced to try issues of fact is often viewed as a loss. Lost time, increased cost, elevated stress, and the high scrutiny occurring in trial litigation all are significant.

Thus, although there was no determination of liability in the case, administrators will likely look for guidance from this particular "procedural" determination. Clients will naturally seek to behave in ways that allow them to *win* summary judgment, even if they are not able to articulate this desire the way trained lawyers would. What administrators might glean from the *Shin* court's

144. *Shin*, 2005 WL 1869101, at *8.
145. *Id.*
146. *Id.* at *9.
147. *Id.* at *9–11.
148. *Id.* at *8–9.
149. *Id*. at *9.
150. *See id.*

unwillingness to grant summary judgment at this stage in the proceedings is that the court may have been concerned that mental health professionals and others allowed regularly scheduled meetings to drive response coordination, as opposed to the specific needs of an individual student. For example, it may have been necessary for "deans and psychs" or others to meet again as a group either in person or by phone later in the day. Moreover, the court's summary judgment ruling may also signal to administrators and others around the country that closer contact with a student in peril may be appropriate. For example, merely leaving a telephone message for a suicidal student may not be enough even if there is disagreement among treatment professionals regarding the acuteness of the suicide risk. Again, much of this is left to speculation. The case would have been much more helpful in guiding administrators had it been a decision after trial in post-trial motions on determined facts.

One medical health professional independently moved for summary judgment essentially arguing that no sufficient physician/patient relationship had formed to create a duty.[151] However, the court was unwilling to grant this health professional summary judgment because the mental health professional was "part of the 'treatment team.'"[152] The court concluded there was sufficient evidence to raise an issue "as to whether [the health professional] was part of the 'treatment team' treating Elizabeth at the time of the suicide; thereby establishing a physician-patient relationship at the time of Elizabeth's suicide."[153] Thus, a mental health professional who is not a primary care deliverer, and even one who has never met a patient face to face, may be asked to explain his or her conduct at trial. Understanding that many colleges and universities around the country now have risk-management or other assessment teams means that membership on this team itself potentially implicates health care professionals.

In a sense, *Shin* seems to treat Elizabeth's suicide as an issue of mental health care responsibility, as if arising under medical malpractice law. In a surprising move, however, the court indicated that individual administrators at MIT might themselves be liable for the wrongful death of Shin.[154]

Certain administrators argued they had no duty to Elizabeth.[155] As non-treating non-clinicians they argued "persons who are not treating clinicians have a duty to prevent suicide only if (1) they caused the decedent's uncontrollable suicidal condition, or (2) they had the decedent in their physical custody, such as a mental hospital or prison, and had knowledge of the decedent's risk of suicide."[156] The court quickly pointed out that neither of these situations occurred, and, therefore, no duty arose under those conditions.[157] The court went on to note that Section 314(a) of the RESTATEMENT (SECOND) OF TORTS recognizes special relationships can exist in certain circumstances beyond the two situations presented by MIT

151. *Id.* at *11.
152. *Id.*
153. *Id.*
154. *Id.* at *14.
155. *Id.* at *11.
156. *Id.*
157. *Id.*

administrators.[158] Quoting from Section 314A the court stated:

> This Section states exceptions to the general rule, stated in § 314[,] that the fact that the actor realizes or should realize that this action is necessary for the aid and protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relationships between the parties, which create a special responsibility, and take the case out of the general rule. The relations [common carrier, innkeeper, land owner, one who is required by law or voluntarily takes custody of another] are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid and protection of another may be found . . . The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence.[159]

Thus, the court correctly pointed out that special relationship analysis under Section 314 was intended to have an open-ended and evolving quality.[160]

In considering several precedents imposing an affirmative duty, the court pointed to numerous instances in which administrators were made aware of Elizabeth's "self-destructive behavior."[161] The court went on to state that there was sufficient evidence to show that certain administrators "could reasonably foresee that [Elizabeth] would hurt herself without proper supervision. Accordingly, there was a 'special relationship' between [certain MIT administrators] and [Elizabeth] imposing a duty on [those administrators] to exercise reasonable care to protect [Elizabeth] from harm."[162] Moreover, the court refused to grant summary judgment in favor of certain MIT administrators because they became "actively a part of [Elizabeth's] 'treatment team.'"[163] The court stated:

> [T]he . . . administrators failed to secure [Elizabeth's] short-term safety in response to [her] suicide plan in the morning hours of April 10. By not formulating and enacting an immediate plan to respond to

158. *Id.* at *12.

159. *Id.* (alterations in original).

160. Some courts seem to overlook and neglect this feature of special relationship analysis. In the recent case of *Iseberg v. Gross*, 879 N.E.2d 278 (Ill. 2007), the Illinois Supreme Court refused to find a special relationship when a victim of a shooting sued former business partners of an attacker who allegedly failed to warn him that a former investor had made threats against the victim's life. *Id.* at 292. In refusing to recognize a duty to prevent or warn of such an attack, the court analyzed Section 314 but mistakenly limited special relationships to the four specifically named special relationships contained within. *See id.* at 284–85. Somehow, the court completely ignored the language in Section 314 that points to the adoption of special relationships beyond those enumerated. The court relied heavily on the doctrine of *stare decisis*, but the flaw in the court's reasoning is apparent: by previously relying upon Section 314 and special relationship analysis, the court had already opened the door to the possibility it would expand special relationships beyond those enumerated. Although the result of the case may be correct, the reasoning is somewhat suspect.

161. *Shin*, 2005 WL 1869101, at *13.

162. *Id.*

163. *Id.* at *14.

> [Elizabeth's] escalating threats to commit suicide, the Plaintiffs have put forward sufficient evidence of a genuine issue of a material fact as to whether the MIT administrators were grossly negligent in their treatment of [Elizabeth].[164]

However, following its own path with respect to MIT and the health care providers, the court refused to recognize negligent infliction of distress or negligent misrepresentation claims against these administrator defendants.[165]

The decision is, to say the least, somewhat confusing. There is nothing remarkable about the *Shin* summary judgment ruling to the extent that it holds medical health care providers have a duty when participating in treatment planning or providing direct treatment service. The remarkable feature of *Shin* is that non-health care *administrators* can be brought to trial for their participation in a treatment plan process as well. Although this was not explicitly contained in the decision, and may not be true, *Shin* leaves the distinct impression that by participating in an intervention planning process involving mental health care, administrators may be brought into some form of hybrid malpractice responsibility. Indeed, it is hard to avoid the comparison to hospital administrators in cases involving medical negligence. But, even if administrators do not actively participate in intervention planning, the *Shin* court held that an affirmative duty to act on behalf of a student may still exist. The *Shin* court seemed to rely heavily upon the indicia of foreseeability. This analysis of why certain administrators should become individually responsible is particularly interesting because Section 314 of the RESTATEMENT (SECOND) OF TORTS specifically states that foreseeability alone does not create an affirmative duty. However, Section 314 does indicate that relations of dependence may change the result. Nonetheless, the court seemed to focus more upon foreseeability than dependence in the facts giving rise to denying the administrators' motions for summary judgment. Thus, *Shin* may represent a significant extension of affirmative responsibility, one that other courts may be chary to follow.[166]

To the extent *Shin* holds that foreseeability alone can create a duty to prevent a student suicide, it would be a novel and very broad departure from existing law. It is also interesting that the court did not engage in an analysis of whether or not MIT administrators had assumed a duty to Elizabeth by their involvement with her.

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164. *Id.* Similarly, the court refused to grant summary judgment in favor of the administrators with respect to the negligence/wrongful death and conscious pain and suffering counts. *Id.*

165. *Id.* at *14–15.

166. *See, e.g.*, Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005), where the court stated:

> The *MIT* and *Ferrum* cases are factually distinctive in their neither precedential, nor non-persuasive finding of a "special relationship" and "imminent probability" of self-harm in consideration of the student's [sic] assertions that they were going to kill themselves as well as their past and contemporaneous attempts to do so; such was within the knowledge of said college employees, as compared to Mahoney who despite a progressively deepening depression, had neither engaged in nor threatened any specific acts of self-harm.

Id. at 23.

The court never considered if the administrators had somehow increased the hazard to her with partial or incomplete interventions. Moreover, even though the court cited *Mullins v. Pine Manor College*,[167] it did not focus upon the land-owner relationship with respect to either MIT or its administrators. Instead, referencing *Irwin v. Town of Ware*,[168] the court placed heavy emphasis upon foreseeability as creating a duty.[169] Again, generally speaking, the law does not impose a duty simply from foreseeability alone, although foreseeability may be a prime determinant in whether a duty exists.[170]

Shin's broad ruling suggests three possible, if inconsistent, hypotheses for why the court reached so broadly. First, perhaps *Shin* is nothing more than a trial court's decision in a case it believed would ultimately be decided in a court of last resort. Few observers believed that the case would settle at all, let alone as early in the proceedings as it did. If the court anticipated creating a record for appeal, it arguably makes judicial sense to allow a case to be tried and resolved in post judgment motions. Indeed, one principal contention in the case, that Elizabeth's death was not suicide, might have been better developed upon a full trial.

Second, possibly, *Shin* is reaching for the stars. In some quarters, there may be judicial intuition that, at least in some cases, foreseeability should be a prime determinant in deciding whether or not a duty exists. But, certainly, at least with respect to cases involving suicide, a rule establishing responsibility to prevent suicide based on mere foreseeability would be a very significant expansion in existing case law. (In suicide cases, furthermore, over-use of foreseeability might breed strange arguments of comparative fault to the effect that parent plaintiffs knowing of their son's or daughter's propensities for suicide might be partially to blame for the very injuries with respect to which they are suing.)

Third, *Shin* might also be expressing, intuitively, the idea that as foreseeability becomes more important, and countervailing policy considerations wane, a duty of care to intervene and protect may be more appropriate. For example, in the *Shin* matter, privacy arguments were weak, especially by April 10. Elizabeth had already consented to share certain information and had engaged in a variety of public behaviors, making her issues far from private. Moreover, to the extent that Elizabeth asserted some concern about others interfering with her, these statements were themselves evidence of her very problem: suicidal people often resist intervention even at the time of imminent crisis.[171] Any assertions of privacy at this point trail into admissions of danger. The law has always had an instinct to consider the responsibility of parties or individuals who had the last, best chance to stop serious injury or damage from occurring.[172]

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167. 449 N.E.2d 331 (Mass. 1983).

168. 467 N.E.2d 1292 (Mass. 1984).

169. *Shin*, 2005 WL 1869101, at *12.

170. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342–43 (Cal. 1976).

171. Mayo Clinic Staff, *Suicide: Understand Causes, Signs, and Prevention*, Apr. 14, 2006, http://mayoclinic.com/health/suicide/MH00053.

172. This is sometimes referred to as the last clear chance doctrine. *See* DIAMOND, *supra* note 115, at 408–11, 590. Although not a bright line rule by any means, the fact that individuals had become situated to be in the best position to take care and avoid injury or danger is a factor to

Foreseeability becomes particularly salient in situations where a particular individual becomes a high risk. The vast majority of students glide through college with few problems, if any. But, a small percentage of students occupy a great deal of administrative time and cause administrators and others a great deal of concern. These individuals are often involved in repeated interventions (or should be) and, essentially, elect themselves to a class of individuals for whom administrators may be required to take extra care. Compare *Mullins v. Pine Manor College,* in which a student was a victim of background crime,[173] to a situation like *Shin*, where Elizabeth was not the victim of general background conditions, but was herself a particularized and known risk. This was also the case with Seung Hui Cho, the attacker at Virginia Tech in April 2007.[174] Cho exhibited a number of negative behaviors and issues before becoming a shooter.[175] Although it may not have been foreseeable that Cho would become a murderer, it was arguably foreseeable that he would be problematic and possibly dangerous.

It is an odd situation indeed when an actor or institution takes many steps to protect or assist an individual, and later asserts those efforts did not, as a matter of law, require reasonable care. This is especially true in situations where highly foreseeable dangers arise. These situations are very different from those where a defendant must exert unusual effort to assist others, or where a claim was made that an actor should engage in efforts to determine whether someone requires assistance in the first place. The duty determination is not black and white—there is a small gray area between a situation where an actor assumes a duty (or an actor increases the risk of harm through behavior), and a situation where an actor merely engages in beneficial conduct towards a dangerous or endangered individual. *Shin* is exactly that case. The *Shin* court did not consider issues of assuming a duty or creating a hazard and there are solid arguments to be made that neither situation occurred. Nonetheless, the magic combination of gratuitous undertakings, a very high degree of foreseeability, and the absence of strong countervailing policy reasons for not imposing a duty, suggest the possibility that *Shin*'s result is not so unusual.

In the end, however we interpret the *Shin* decision, the settlement of the matter deprived higher education of the possibility of a very clear directive in an all too common scenario. The *Shin* decision is, after all, an intermediate appellate court decision and has limited precedential value. In other jurisdictions that do not have a clear directive, it is likely administrators will behave as if such rulings are possible and operate with reasonable care when a student foreseeably endangers self or others. Moreover, the *Shin* decision does, at least, offer a nugget of wisdom to the effect that intervention processes should be tailored to present needs and

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consider. It is perhaps for this reason that the newest Restatement of Torts has acknowledged the possibility that the law may evolve to recognize a duty when a victim is in a remote location and the individual or small group of individuals is situated to effect a rescue. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL HARM § 44, Reporters' Note cmt. d (Proposed Final Draft No. 1, 2005).

173. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 333 (Mass. 1983).

174. *See* GOVERNOR'S REPORT, *supra* note 14, at 5.

175. *Id.* at 52.

dangers. Higher education sometimes has a preference for routine meetings when danger is anything but routine. Even if there is a regular meeting such as the "deans and psychs" meeting at MIT, that meeting should not be the one and only opportunity for team members to collaborate, especially during crisis situations.

E. Virginia Tech

On April 16, 2007, David Cho killed thirty-two students and faculty members, and injured two dozen more before killing himself.[176] Cho had a long history of mental illness and had displayed "suicidal and homicidal ideations" as early as 1999 when he was in eighth grade.[177] Various individuals in different capacities had a great deal of information regarding Cho prior to the shootings, but that information was never collected, synthesized, and analyzed by individuals who might have been in a position to prevent the tragedy.[178] The events at Virginia Tech may not illustrate a failure of an academic environment so much as opportunities for one. Virginia Tech illustrates, among other things, the need and opportunity for better information collection, transmission, collation, synthesis, and analysis.

The events at Virginia Tech and subsequent reports are important to suicide prevention and suicide prevention law.[179] As of February of 2008, there have been three major reports on the Virginia Tech incident: (1) INVESTIGATION OF APRIL 16, 2007, CRITICAL INCIDENT AT VIRGINIA TECH, ("INSPECTOR GENERAL REPORT");[180] (2) REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY ("PRESIDENT'S REPORT");[181] and (3) MASS SHOOTINGS AT VIRGINIA TECH ("GOVERNOR'S REPORT").[182]

The reports on Virginia Tech are not court cases, nor are they legislation or official regulation. For example, the GOVERNOR'S REPORT contains critical statements that may suggest campus police were negligent in their response to the initial reports of a shooter on campus.[183] However, should the victims or any of their families sue, a jury might disagree with the GOVERNOR'S REPORT. Thus, the various reports do not have force of law in the usual sense. Nonetheless, they are very helpful in illustrating potential areas for future development of the law.

Collectively, the reports repeatedly return to a common theme. Over and over again, both in terms of particular recommendation and general observation, the reports point to opportunities to improve communication on campus and among various actors in the campus community. For example, the INSPECTOR GENERAL REPORT recommends reviewing procedures to insure notification occurs very quickly after an emergency custody period has been initiated for a student

176. INSPECTOR GENERAL REPORT, *supra* note 14, at 3.
177. *See* GOVERNOR'S REPORT, *supra* note 14, at 21.
178. *Id.* at 21–24.
179. Many of these implications are beyond the scope of this article.
180. INSPECTOR GENERAL REPORT, *supra* note 14.
181. PRESIDENT'S REPORT, *supra* note 14.
182. GOVERNOR'S REPORT, *supra* note 14.
183. *Id.* at 25.

suffering a psychiatric emergency.[184] The PRESIDENT'S REPORT focuses upon five "recurring and interconnected themes,"[185] two of which are "Critical Information Sharing Faces Substantial Obstacles" and "Improved Awareness and Communication are Key to Prevention."[186] With respect to critical information sharing, the PRESIDENT'S REPORT emphasizes frequent reports of "information silos" and expresses concern regarding the ways in which the interpretations of federal and state privacy laws may block the flow of critical information.[187] The PRESIDENT'S REPORT also focuses on improved communication and awareness. It states:

> Recognizing that there were warning signs that preceded many school violence incidents, participants in our meetings discussed ways to address school cultures, including tacit "codes of silence," that may impede identifying and responding to those in crisis. Students may know of someone in need or someone who has made a threat, but frequently they do not share that information with individuals who can take appropriate action. Participants stressed the need to promote cultures of trust, respect, and open communication, to reduce student isolation, to normalize the act of seeking help by and for those who pose a threat to self or others, and to de-stigmatize mental illness. Underscoring the theme that information sharing is key, participants repeatedly identified the need for communication strategies that build bridges between education and mental health systems.
>
> Participants in our meeting also focused on promoting prevention and early intervention.[188]

Based on the information gathered the PRESIDENT'S REPORT develops specific

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184. INSPECTOR GENERAL REPORT, *supra* note 14, at 15.

185. PRESIDENT'S REPORT, *supra* note 14, at 6.

186. *Id.*

187. *Id.* at 7. As the report stated:

> We repeatedly heard reports of "information silos" within educational institutions and among educational staff, mental health providers, and public safety officials that impede appropriate information sharing. These concerns are heightened by confusion about the laws that govern the sharing of information. Throughout our meetings and in every breakout session, we heard differing interpretations and confusion about legal restrictions on the ability to share information about a person who may be a threat to self or to others. In addition to federal laws that may affect information sharing practices, such as the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the Family Educational Rights and Privacy Act (FERPA), a broad patchwork of state laws and regulations also impact how information is shared on the state level. In some situations, these state laws and regulations are more restrictive than federal laws.
>
> A consistent theme and broad perception in our meetings was that this confusion and differing interpretations about state and federal privacy laws and regulations impede appropriate information sharing.

Id. Similar observations occurred in the GOVERNOR'S REPORT. *See* GOVERNOR'S REPORT, *supra* note 14, at 63. Analysis of complex state and federal privacy laws and their impact upon college suicide law are beyond the scope of this article.

188. PRESIDENT'S REPORT, *supra* note 14, at 12.

recommendations for colleges and universities. Among its most important recommendations was that colleges and universities should:

> Develop cultures within schools and institutions of higher education that promote safety, trust, respect, and open communication. Create environments conducive to seeking help and develop culturally appropriate messages to de-stigmatize mental illness and mental health treatment.
>
> Educate and train parents, teachers, and students to recognize warning signs and other known indicators of violence and mental illness and to alert those who can provide for safety and treatment.
>
> Establish and publicize widely a mechanism to report and to respond to reported threats of violence.[189]

Coupling these observations and recommendations with the federal report's emphasis on information siloing, that report obviously points to a needed administrative culture shift in higher education towards better information sharing, transfer, collation, and information–based action.

The GOVERNOR'S REPORT makes similar statements. For example, it states that Virginia Tech officials misperceived information sharing law and wide-spread confusion about privacy law is common among colleges and universities.[190] In a notable section of the report entitled "Missing the Red Flags," the GOVERNOR'S REPORT states:

> The Care Team at Virginia Tech was established as a means of identifying and working with students who had problems. That resource, however, was ineffective at connecting the dots or heeding the red flags that were so apparent with Cho. They failed for various reasons, both as a team and in some cases in the individual offices that make up the core of the team.
>
> Key agencies that should be regular members of such a team are instead second tier, non-permanent members. One of these, the VTPD, knew Cho had been cautioned against stalking—twice, that he had threatened suicide, that a magistrate had ordered a temporary detention order, and that Cho spent a night at St. Albans as a result of such detention order. The Care Team did not know the details of all these occurrences.
>
> Residence Life knew through their staff (two resident advisors and their supervisor) that there were multiple reports and concerns expressed over Cho's behavior in the dorm, but this was not brought before the Care Team. The academic component of the university spoke up loudly about a sullen, foreboding male student who refused to talk, frightened classmates and faculty with macabre writings, and refused faculty exhortations to get counseling. However, after Judicial

189. *Id.*

190. GOVERNOR'S REPORT, *supra* note 14, at 2.

> Affairs and the Cook Counseling Center opined that Cho's writings were not actionable threats, the Care Team's one review of Cho resulted in their being satisfied that private tutoring would resolve the problem. No one sought to revisit Cho's progress the following semester or inquire into whether he had come to the attention of other stakeholders on campus.
>
> The Care Team was hampered by overly strict interpretations of federal and state privacy laws (acknowledged as being overly complex), a *decentralized corporate university structure*, and the absence of someone on the team who was experienced in threat assessment and knew how to investigate the situation more broadly, checking for collateral information that would help determine if this individual truly posed a risk or not.[191]

The statements are striking in their critical tone (keeping in mind that the report is not a jury verdict or legal determination of negligence or fault). They are especially important in the themes they develop. The GOVERNOR'S REPORT, like the PRESIDENT'S REPORT, points to falsely perceived information barriers, a culture of information non-sharing, and administrative governance structures not designed to promote information sharing.

Although the reports raise many different issues, one issue for suicide prevention law that clearly emerges is the need to improve information sharing, transfer, collation, synthesis and information-based action. As the GOVERNOR'S REPORT hints, some of the problem in higher education lies with the very administrative structures in which it operates. Higher education is not designed to be a rapid response institution—quite the contrary. As a result, higher education's organizational models tend to work against the very needs that arise in critical incident response and prevention. Moreover, higher education institutions remain highly political in internal operation. Competition among departments, fear of responsibility, a desire to blame others, and often false hopes that ignoring a problem will make it go away while in a specific department—all contribute to an overall environment in which rapid response to critical incidents is not encouraged. As a result of the Virginia Tech incident, and perhaps despite the inconclusive nature of court decisions to date regarding the issue of student suicide and self-inflicted injury, colleges and universities around the country should critically examine their organizational structures.

These points could be lost in the rapid effort to improve critical incident response. Simply forming critical incident response teams may not be enough. In other words, creating an autonomous team within higher education charged with the mission of critical incident response may not itself generate the culture necessary for the team to function effectively. For example, if students, faculty, and others do not share information with team members, the team will not be in possession of the information critical for effective action. The events at Virginia Tech illustrate the fact that every individual in the higher education environment plays a role in gathering and recognizing information that should be shared with

191. *Id.* at 52 (emphasis added).

others. Unfortunately, a culture promoting a "protect your turf" mentality could result in vast over-sharing of information by individuals who are attempting only to move a problem out of their area. To the extent this happens on a campus, it illustrates that the Virginia Tech reports' recommendations have not yet been implemented.

An appropriate culture is neither a tattletale culture nor an informant culture. Instead, it is one where individuals share information when that information would cause a reasonable person to share information or otherwise trigger an intuition or instinct that something is awry or dangerous. The particular facts regarding Seung Hui Cho show it may not be essential for each and every person who had a contact with him to share information for the big picture to emerge. Occasionally, it will be one puzzle piece among a thousand others that is the exact piece of information putting the puzzle together. However, most homicidal, suicidal, or otherwise dangerous students are train-wrecks, demonstrating numerous problems evidenced in a variety of situations, such as in the classroom or with roommates. In other words, there is ample over-determining information of a problem available through multiple sources. For example, Cho's complete residential hall profile was needed before rational observers could see some of his behavior raised red flags.

Events at Virginia Tech also illustrate another issue beyond the issue of critical information sharing, collation, synthesis, and action. Homicide and suicide all too often occur together.[192] Although recent decisional law in the college and university environment does not illustrate this directly, colleges and universities must acknowledge the risk that self-harming individuals will harm others. Such a risk presents itself in at least two forms. First, an individual might negligently or otherwise cause injury to others while attempting self-harm. For example, in *Jain v. Iowa*[193] and *Shin*[194], it is somewhat miraculous that other students were not harmed: Jain succeeded in killing himself through carbon monoxide poisoning in his room[195] and Shin died by fire, also in her room.[196] Carbon monoxide and fire have traditionally been enormous risks to residential facilities, including college and university facilities. In both situations, wrongful death or serious injury lawsuits were averted simply because emergency response, or other factors, prevented injury to third parties. Second, as illustrated by events at Virginia Tech, an individual may be both homicidal and suicidal. In this situation, a college or university faces a risk of responsibility not simply for preventing suicide, but also for preventing deadly violence.

It has been well established since *Mullins v. Pine Manor* that colleges and universities owe a duty of care to protect students on campus from foreseeable violent attack.[197] Often, cases involving criminal attacks on campus arise from a

192. VIOLENCE POLICY CENTER, AMERICAN ROULETTE: MURDER-SUICIDE IN THE UNITED STATES 11, *available at* http://www.vpc.org/studies/amroul2006.pdf.

193. 617 N.W.2d 293 (Iowa 2000).

194. Shin v. Mass. Inst. of Tech., No. 02 0403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

195. *Jain*, 617 N.W.2d at 296.

196. *Shin*, 2005 WL 1869101 at *5–6.

197. Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983); Peter F. Lake, *The Rise of*

general risk of criminal behavior in the area.[198] After Virginia Tech, campuses may now recognize that a background responsibility to use reasonable care to protect against foreseeable criminal violence is not identical to a responsibility to use reasonable care to protect against violence arising from an individual known or expected to be dangerous. In other words, a college or university must use reasonable care to protect against foreseeable non-specific risks, such as the general risk of a type of crime that has occurred in the area in the past, and/or must use reasonable care to protect against risks arising from a foreseeably dangerous individual. Such a responsibility can arise in one of two ways. On one hand, to the extent an institution has charge or control over a dangerous individual, the relationship with the dangerous individual alone may create a duty to protect others from foreseeable danger.[199] College and university students, however, are rarely under such charge and control, and courts are loath to expand this type of special relationship to broader circumstances.[200] Nonetheless, such a duty is not simply an incident arising from a relationship *vel non* with a dangerous person. Instead, the responsibility to prevent foreseeable danger from a particular individual can arise from relationships with potential *victims* because of a special relationship with them. Thus, for example, students in residential facilities and students on campus often stand in a commercial or business invitor/invitee, landlord/tenant relationship with institutions sufficient to create a duty to protect them from foreseeable violence in a general and particular sense. Colleges and universities must contend with the fact that attempted or successful suicides are not simply self-harming acts, and liability may exist for the negligent or intentional injuries caused to others. Duty in these situations arises largely from foreseeability and the standard of reasonable care. To the extent that a jury conforms its determinations to statements made in sections of the GOVERNOR'S REPORT, for example, liability might be hard to avoid.[201]

Thus, the events at Virginia Tech and the reports that followed, suggest a need for American higher education to re-conceive its organizational approach to information gathering, sharing, collation, synthesis, and action. Moreover, the need for this shift occurs precisely because of the potential for responsibility for self-inflicted injury, but more precisely because self-harming behavior does not occur in a vacuum and often results in serious injury or death to others. Until the events at Virginia Tech unfolded, it was common to discuss self-inflicted injury situations from the troubled student's point of view. Suicide and self-harming

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Duty and the Fall of In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999); Michael Clay Smith, *Institutional Liability Resulting From Campus Crime: An Analysis of Theories of Recovery*, 55 EDUC. L. REP. 361 (1989).

198. *See, e.g.*, *Mullins*, 449 N.E.2d 331.

199. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976); *see also* Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).

200. *See* Iseberg v. Gross, 879 N.E.2d 278, 292 (Ill. 2007) (finding no special relationship between dangerous person and former business associates sufficient to impose duty to warn third party of dangerous person).

201. Recall these statements were not statements regarding fault under a negligence standard nor were they determinations by a court or a special verdict by a jury. As such, they are not binding, and most likely not even admissible or probative in a court case.

issues were lumped into self-harm categories and were often dealt with under the rubric of preventing harm to the individual. After Virginia Tech, the luxury of compartmentalizing self-harming situations is no longer available.

CONCLUSION

Much has happened, and much more has not happened, regarding the law of responsibility for college student suicide in the past six years. A dearth of judicial precedent, coupled with the fact that much of the decisional law comes from lower courts and incomplete litigations, means that specific legal guidance regarding the duty to prevent college and university student suicide is very sparse. There is something for everyone under the current judicial precedent. Those who wish to avoid legal responsibility for student suicide have precedent to support their position. Those who believe such a duty exists also have precedent to back their position. No clear line of authority has developed for most colleges and universities, and only a few states have directly relevant precedent. In the field of tort law generally, there has been a slow evolution towards rules requiring more responsibility to prevent suicide, but many matters presented to courts regarding college and university student suicide ask courts to develop suicide law in ways that heretofore they have not.

Perhaps we should be content with small lessons. For example, *Mahoney* teaches that colleges and universities may not be required to discover undiscoverable facts regarding students who lie or conceal information about their mental health status, intentions, etc. *Bash* underscores the reality that much self-inflicted harm from serious drug usage is unpreventable, especially at point of use. *Shin* teaches that risk management teams should be adaptable to the needs of an individual student and not simply rely upon routine meetings to solve issues.

On the other hand, perhaps we should not be so comfortable with small messages. The events at Virginia Tech in April of 2007 stand in strange juxtaposition with the dearth and inconsistency of recent decisional law on college and university student suicide. Particularly, the GOVERNOR'S REPORT is critical and action-oriented in ways that many cases are not. Moreover, those events send a strong message that dramatic shifts in organizational strategies and attitudes towards responsibility for so-called "individual" self-harm must occur.

In the end, however, I detect three themes that have emerged from the case law and reports.

First, some of the facts of the cases suggest, and the events at Virginia Tech prove, that suicidal behavior puts others at risk and harms the academic environment. Suicide is no longer an individual problem.

Second, violence and suicide often go hand in hand, and violence can negligently or intentionally cause harm to others.

Third, the response to suicide risk must be holistic and environmental.

It is noteworthy that all three reports on Virginia Tech, especially the PRESIDENT'S REPORT and GOVERNOR'S REPORT, emphasize the need for multi-level action by actors from students to Congress. The reports illustrate the need for environmental action, collective response, and holistic solutions. More than ever,

preventing self-harm, and harm to others, requires rapid collection of, transmission of, synthesizing of, and acting upon information. There has been no point in American higher education history in which individual students, administrators, faculty, and others have carried so much responsibility and have had such an opportunity to prevent harm by sharing what they hear, see, and think. This is also a time, paradoxically, when there is a need not to over-share information and overreact. In a moment, students, faculty, administrators, and others, have become radically empowered as agents of safety on all American campuses. In the same moment, the exercise of judgment in not becoming a tattletale or snoop has never been more important. Administrators now walk the razor's edge, unsure of the legal consequences of falling.

To conclude, a word of caution. Critical incident prevention and response is certainly an important mission of the modern higher education environment. However, critical incidents, such as the one that occurred at Virginia Tech, are not as common as the ongoing risks on a day-to-day basis of college and university life.[202] Active shooters are rare; yet, everyday, high-risk alcohol use threatens academic communities. It would be wise to remember a simple formula first espoused by Justice Learned Hand in the *Carroll Towing* case: the B times P and L formula.[203] This formula, restated for higher education, essentially encourages actors, including colleges and universities, to weigh the risks against the efforts they expend.[204] We can assess risk by considering the fact that we should incorporate both the probability and the magnitude of potential harm and then weight the risk appropriately. From here we should be able to balance the burden to take precautions against the risk. Thus, a very low probability event, such as that which occurred at Virginia Tech, should be weighed against the unthinkable magnitude of the tragedy. This, in turn, would counsel that very significant effort should be directed to preventing such an incident and dealing with one in progress, though not all possible efforts, because there are many common risks of day-to-day college and university life that result in serious injury or academic risk. Persistent rates of high risk alcohol use, sexual assault, etc., undermine our educational communities on a daily basis. Virginia Tech is a call to action but should not be regarded as a complete re-prioritization of all of higher education's needs and goals. We may find that, in a balanced and measured approach to the entire academic environment, solutions are not as expensive, time-consuming, nor costly as we might think. Suicide and suicide/harming of others remain top issues for colleges and universities, but are not the only issues we face.

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202. *See* GOVERNOR'S REPORT, *supra* note 14, at 14.

203. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

204. The actual meaning of the terms is as follows: "[I]f the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P: i.e., whether B [is] less than PL." *Id.* In other words, if the burden on the defendant is less than the cost of the injury to the plaintiff multiplied by the probability of that injury, then the defendant should, in principle, be liable to the plaintiff.

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

MARLYNN H. WEI, J.D., M.D.*

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

* Resident at MGH/McLean Adult Psychiatry Residency Program, Harvard University. I am deeply grateful to Professors Robert A. Burt, J.D., of Yale Law School and Howard Zonana, M.D., of Yale School of Medicine for their invaluable mentorship and comments. I am indebted to Chad W. Flanders, Ph.D., for his generous support and insightful comments. I owe a special thanks to Richard Belitsky, M.D., for showing me that compassion and kindness in psychiatry can and should persevere in the most challenging clinical situations. I would also like to thank Professor Paul Appelbaum, M.D., of Columbia University for his generous help and thoughts. Finally, I owe much gratitude to the college counseling center directors who generously and thoughtfully shared their experiences, insight, and, most of all, demonstrated a compassionate attitude toward their students.

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

COLLEGE AND UNIVERSITY LIABILITY FOR VIOLENT CAMPUS ATTACKS

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INTRODUCTION

On April 16, 2007, an otherwise serene university campus became the scene of the deadliest shooting in U.S. history.[1] Twenty-seven students and five faculty members were killed by Seung-Hui Cho at Virginia Tech in Blacksburg, Virginia.[2] That Monday, Americans were reminded that colleges and universities, often viewed as sheltered enclaves of higher learning, are vulnerable to the brutal acts of disturbed individuals.

In the weeks and months following the tragedy, Cho was not the sole focus of the nation's interest. The administrators of Virginia Tech also came under scrutiny as questions loomed about the university's response, its efforts to identify the risk posed by Cho, and whether the violent rampage could have been prevented.[3]

While they garner intense media exposure and overshadow more commonplace

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The authors extend special thanks to Emily Damron, Esq., an Associate in the Litigation Department at Saul Ewing LLP, for her research, editing, and contributions to this article.

1. John M. Broder, *32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1.

2. Shaila Dewan & John M. Broder, *Rampage Gunman Was Student; Warning Lag Tied to Bad Lead*, N.Y. TIMES, Apr. 18, 2001, at A1.

3. *See, e.g.*, Duncan Adams, *Lawsuit Against Tech Could Emerge*, ROANOKE TIMES, Apr. 22, 2007, at 8; Marcus Baram, *Who's Legally Responsible? Lawsuits Are Certain but Liability Unclear*, ABC NEWS ONLINE, Apr. 28, 2007, *available at* http://abcnews.go.com/US/story?id=3060605&page=1 (last visited Feb. 17, 2008); Liza Mandy, *What Comes After*, WASH. POST, Nov. 11, 2007, at W12; Anthony J. Sebok, *Could Virginia Tech be Held Liable for Cho Seung Hui's Shootings, If an Investigation Were to Reveal It Had Been Negligent?*, FINDLAW, Apr. 24, 2007, http://writ.lp.findlaw.com/sebok/20070424.html (last visited Feb. 17, 2008).

acts of violence, mass shootings on college and university campuses are rare. Therefore, this article examines not just high visibility incidents, but those legal developments relating to a range of violent acts on college and university campuses, including suicides, individual homicides, and multiple homicides. Using the Virginia Tech tragedy as a reference point, this article assesses the potential liability of colleges and universities for incidents of campus violence and crimes, the statutory limits on liability—including governmental immunity and damage limitations—and the strategies that can be implemented to minimize campus violence and subsequent liability exposure.

I. VIOLENCE ON CAMPUS AND POTENTIAL LIABILITY FOR NEGLIGENCE

It is likely only a matter of time before lawsuits are commenced against Virginia Tech and its administrators, and there is much debate over whether the university could be held liable for deaths directly caused by Cho.[4] Indeed, the town of Blacksburg, Virginia received notice of the possible filing of lawsuits against the town and its employees in October 2007.[5] Notice of a claim against Virginia Tech or the state must be filed within one year of the shooting.[6]

In order to succeed in court, the plaintiffs must establish that Virginia Tech was negligent either in how it addressed the potential threat posed by Cho based on its knowledge of his mental state or how it responded to the events of April 16, 2007. It is unlikely that university administrators' and employees' alleged knowledge of Cho's apparent depression, violent writings and antisocial behavior made his horrific final acts foreseeable such that the university could have done something to prevent them.[7] It is equally unlikely that doing anything more, or differently, would have changed the outcome after the shootings began.

Despite this, the following section begins by discussing selected circumstances which might trigger a "duty to prevent violence" on the part of a college or university, including: (i) the special relationship theory; (ii) duties owed by a college or university based on its status as a landowner; and (iii) duties owed by campus police who undertake to render services for the protection of students. Next, the section examines how an alleged failure to honor these duties could form the basis for negligence actions against the college or university, satisfying the breach and causation prongs of the negligence inquiry. Finally, this section addresses the effect of a plaintiff's negligence in states following contributory or comparative negligence theories, including Virginia.

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4. *See* Sue Lindsey, *Lawsuits Possible from Virginia Tech Shooting*, USA TODAY, Oct. 13, 2007, *available at* http://www.usatoday.com/news/topstories/2007-10-13-2173352867_x.htm.

5. *Id.*

6. *Id.*

7. *See infra* notes 41–49 and accompanying text.

A. Finding a Duty

Establishing that the school owed a duty to protect its students may be the most significant challenge faced by a plaintiff seeking to bring a negligence action against a college or university for injury caused by a violent student.[8] Because the relationship between postsecondary schools and their students is not easily defined, courts have struggled to delineate what measures institutions must take to keep their students safe.[9] Overall, society views college and university students as independent citizens responsible for making choices that will shape their futures.[10] Does the fact that students are considered adults completely absolve colleges and universities of any legal obligation to put forth best efforts in providing a safe campus environment? Some would say it does, pointing to case precedents that seem to strongly support a "no duty" stance for college and university administrators.[11]

The initial reluctance of courts to impose a general duty of protection on colleges and universities was the result of a historical shift occurring in the mid-twentieth century. Yet, this could be in the process of reversing itself, or at least evolving toward a modern middle ground.[12] Prior to the 1960s, postsecondary schools stood *in loco parentis* to students, who were viewed as being under the control and custody of the schools.[13] The schools' status as stand-in parents to students in their custody was the obvious foundation for the existence of a duty to protect students.[14] As the anti-establishment and civil rights movements progressed, students sought greater independence and colleges and universities

8. *See* Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 418 (2007) (acknowledging that the pivotal inquiry in negligence cases brought by students against colleges and universities revolves around the existence and scope of a duty).

9. *Cf.* Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 485 (2003) (noting that, although tort actions against colleges and universities have increased, courts have inconsistently imposed liability).

10. *See* Griffin, *supra* note 8, at 415.

11. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

12. Gary Pavela, the director of judicial programs at the University of Maryland, believes that the pendulum is swinging back "dramatically" toward a period where colleges and universities take more control over regulating students. *See* Randy Barrett & Neil Munro, *Paved With Good Intentions?*, NAT'L J., Apr. 28, 2007, at 60. Another commentator indicates that concerns about a return to the days when colleges and universities were held *in loco parentis* have been expressed for decades, but distinguishes the movement toward recognizing duties of colleges and universities as "both entirely new and familiar." *See* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 2 (1999). In essence, Lake states that what is happening is not actually a reverse in a trend or a return to an outdated historical view of institutions' relationships with students, but rather an evolution toward a modern view that holds colleges and universities to standards to which other businesses are already held. *Id.*

13. *See* Lake, *supra* note 12, at 5; *Bradshaw*, 612 F.2d at 139.

14. *Bradshaw*, 612 F.2d at 139.

moved toward treating students as adults.[15]

Bradshaw v. Rawlings signified the death of the view that institutions owed a duty to students based solely on the existence of a custodial relationship (or *in loco parentis* status).[16] In that case, the Court of Appeals for the Third Circuit stated: "the modern American college is not an insurer of the safety of its students."[17] The *Bradshaw* court emphasized that students were determined to break free from the paternalistic bond characterizing their relationships with their schools, and the court noted that the inevitable consequence of gaining autonomy was the loss of a measure of protection.[18] Phrased with less legalese, the court in essence said: "*You got what you asked for; now live with it.*"[19]

In several cases that followed, American courts declined to impose a general duty to protect upon colleges and universities when adult students were harmed on campus.[20] This "no duty" approach seems sensible when students are harmed as a result of adult decisions to engage in potentially risky behaviors—*e.g.*, excessive consumption of alcohol[21] or jumping on a trampoline in the dark.[22] But the Virginia Tech scenario has brought a tougher question to the fore: is the "no duty" approach also sensible where innocent students are harmed by a dangerous third party?

While the broadly-recognized rule is that colleges and universities do not owe their students a general duty of protection, some courts have carefully avoided using a one-size-fits-all approach, drawing distinctions between cases that focus on a school's ability to police students' routine, adult decisions[23] and others that focus on the reasonableness of a school's efforts to protect students' physical safety from threats of violence.[24] While a school is not charged with an automatic, broad duty of protection upon a student's matriculation, certain duties can be triggered under unique circumstances. Three of the more commonly raised circumstances are: (1) a duty arising from a special relationship between the institution and an individual based on the institution's knowledge of foreseeable harm;[25] (2) a duty based on the institution's status as a landowner, business owner, or landlord;[26] and (3) the duty of the college or university and campus police to exercise reasonable care in

15. *Id.*

16. *Id.*

17. *Id.* at 138.

18. *Id.* at 139.

19. The *Bradshaw* court seemed to imply that college administrations were reluctant to give in to the dilution of their "authoritarian role" by the movement of students demanding more and more rights. *Id.* at 138–39 (emphasis added). The acknowledgment of students' success in claiming rights coupled with the refusal to preserve any general duty of protection owed to students seems like an attempt to even the score. *Id.*

20. *See, e.g.*, *id.*; Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).

21. *Beach*, 726 P.2d at 413.

22. *Whitlock*, 744 P.2d at 54.

23. *See, e.g.*, *Bradshaw*, 612 F.2d at 135; *Whitlock*, 744 P.2d at 54; *Beach*, 726 P.2d at 413.

24. *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993).

25. *See infra* notes 41–62 and accompanying text.

26. *See infra* notes 63–86 and accompanying text.

undertaking security-related services.[27] These will be discussed in turn.

1. Duty Arising from a Special Relationship

Colleges and universities are not charged with a duty to protect their students under all circumstances, but once the school has certain knowledge about a particular student's potential to harm either himself or others, a duty may arise.[28] As discussed above, there has been a pronounced shift away from viewing colleges and universities as acting *in loco parentis*. As such, there is no solid basis for imposing a general duty based solely on the character of the relationship between the college or university and its students.[29] Section 314A of the Restatement (Second) of Torts recognizes various special relationships that create an affirmative duty of reasonable care, including the relationship between common carriers and their passengers, innkeepers and guests, and landowners and invited members of the public.[30] The relationship between colleges and universities and their students is not listed by Section 314A, but the comments to that section make it clear that the list was not intended to be exclusive, and courts have found that certain circumstances give rise to a special relationship between schools and their students.[31]

There may be an emerging trend toward recognition of a special relationship between colleges and universities and their students. In fact, Section 40 of the Proposed Restatement (Third) of Torts: Liability for Physical Harm, which has been approved for publication, lists the relationship between a school and its students as a special relationship.[32] The comments to Section 40 indicate that the special relationship status applies to primary and secondary schools and possibly to colleges and universities, as well.[33] If Section 40 is widely adopted, the former general rule "that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students"[34] may be replaced with a general rule that a college or university possesses a special relationship with each and every one of its students, and thus owes its students a duty of reasonable care with regard to risks that arise within the scope of the

27. *See infra* notes 87–105 and accompanying text.

28. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608–10 (W.D. Va. 2002).

29. Courts have, of course, found limited exceptions to this rule, such as the relationship between an institution and its student-athletes, and where a college received repeated warnings that a student was suicidal. *See* Freeman v. Busch, 349 F.3d 582, 588 n.6 (8th Cir. 2003).

30. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

31. *Id.* cmt. *b*.

32. RESTATEMENT (THIRD) OF TORTS § 40(b) (Proposed Final Draft No. 1, Apr. 6, 2005).

33. *Id.* cmt. *l*. The Restatement specifically acknowledges that the duty of K-12 schools has "been imposed on higher-education institutes, at least with regard to risks from conditions on the college's property or risks created by the acts of others on the confines of college property." *Id.*

34. *Freeman*, 349 F.3d at 587 (finding no special relationship between a student and her resident assistant which would impose a legal duty on the resident assistant to act for the student's protection). In *Freeman*, the negligence claim against the college failed because, if the plaintiff could not establish a duty on the part of the resident assistant, she could not establish a duty on the part of the college under a vicarious liability theory. *Id.* at 589.

school-student relationship.[35]

i. Special Relationships Arising From Non-Violent Activities

Many of the cases addressing whether a special relationship exists between a college or university and its students do not deal with acts of violence, but rather with students who are engaging in adult behaviors typically considered part of campus life.[36] In trying to determine whether a special relationship exists in situations where a student is harmed while engaging in social or extra-curricular activities on campus, courts consider whether the college or university exercised control or supervision over the student in a situation presenting foreseeable danger.[37] Generally, a student's private or recreational pursuits that are unrelated to education are not considered to be within the control of the college or university; in fact, administrative regulation of those pursuits runs counter to the dominant objective of fostering student growth and creating an environment in which the student will thrive educationally and personally.[38] Even so, a special relationship has been recognized when a student participates in intercollegiate sports—an activity encouraged and regulated by the school.[39] A special relationship has also been recognized when a student pledges an on-campus fraternity—particularly where the seriousness of fraternity hazing and the fact that it was taking place on college or university property were well known to the school.[40]

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35. RESTATEMENT (THIRD) OF TORTS § 40(b) (Proposed Final Draft No. 1, Apr. 6, 2005).

36. *See, e.g.*, Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993) (negligence claim arising from a student-athlete's death during a practice session held by the college's intercollegiate lacrosse team); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (negligence claim arising from harm caused by a student driving after consuming alcohol at a class picnic arguably sponsored by the college); Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (negligence claim by a student who was injured while jumping on a trampoline on the university's grounds); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991) (negligence claim arising from injuries sustained by a student who had been hazed by members of a fraternity located on university property).

37. *See Kleinknecht*, 989 F.2d at 1367; *Furek*, 594 A.2d at 522; Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 761–62 (Neb. 1999).

38. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 239 (E.D. Pa. 1992) (finding that where the college had adopted an alcohol policy that accorded "certain amounts of responsibility to college students as intelligent, responsible members of society," the college had no special duty to control students because "[a] college may not 'control' the behavior of its students as may have been possible in the past"); *Whitlock*, 744 P.2d at 60.

39. *See Kleinknecht*, 989 F.2d at 1367; *but cf.* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 930 (N.C. Ct. App. 2001) (holding that where the university voluntarily undertook to advise and educate cheerleaders regarding safe performance of cheerleading stunts, the university owed the students a "duty of care upon which a claim of negligence may be based, independent of the duty arising from the special relationship between the parties").

40. *Furek*, 594 A.2d at 522; *Knoll*, 601 N.W.2d at 765 (holding that where the university knew of prior hazing instances, the university "owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing").

ii. Special Relationships Arising From Foreseeability of Violence

Where harm results from an act of violence by a student, colleges and universities typically argue that the act is an intervening and superseding cause severing the "chain of causation" and, therefore, cutting off any liability that could be imposed on the school.[41] However, if a special relationship is found to exist, the intervening and superseding cause may not negate a college or university's duty to protect students from harm posed by potentially dangerous individuals.[42] Postsecondary schools offer a wide array of services aimed at ensuring that students are psychologically and mentally able to cope with the pressures of maturation and higher education—*e.g.*, psychological and counseling services, faculty and staff advisors, and peer outreach/support groups. In some cases, a counselor or mental health professional employed by the school is in a position to know that a student is likely to commit harm to him or herself or others. The relationship between the institution's psychologist, therapist, or counselor and the student is similar to that of any mental health professional and a patient. Furthermore, it can give rise to a special relationship if the professional knows or should know that the patient poses a serious danger to others.[43]

Conversely, in cases where a student does not seek therapeutic help, other members of the campus community may have knowledge that a student is likely to act violently.[44] However, members of the campus community, and especially those who are not agents of the college or university, are under no duty to pool their knowledge or report every observation pertaining to a potentially dangerous student.[45] Similarly, administrators have no duty to seek out information held by every person affiliated with the school's programs in an effort to determine whether an individual is likely to commit a violent act.[46] Practicality and privacy concerns dictate that a college or university cannot amass all the facts necessary to understand the potential danger posed by each troubled student.[47]

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41. *See, e.g.*, Jain v. Iowa, 617 N.W.2d 293, 300 (Iowa 2000); Johnson v. Washington, 894 P.2d 1366, 1371 (Wash. Ct. App. 1995).

42. *See, e.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001).

43. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

44. "[D]angerous people rarely show all of their symptoms to just one department or group on campus. . . . Acting independently, no department is likely to solve the problem. In short, colleges must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions." Peter F. Lake, *Higher Education Called to Account*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B6.

45. *Id.*

46. Generally, a college or university is under no duty to inquire or seek out information to identify potentially dangerous individuals. *See, e.g.*, Eiseman v. New York, 511 N.E.2d 1128 (N.Y. 1987). In *Eiseman*, the court held that a college had no special relationship with a student admitted under a special program for the admission of ex-felons, where the student had previously been identified as a potential killer. *Id.* at 1137. Because the college had no duty to inquire about the student's potential for committing violence, the college had no knowledge that would alert them to the need to protect other students. *Id.*

47. Nancy Shute, *What Went Wrong*, U.S. NEWS & WORLD REPORT, Apr. 30, 2007, at 42 (highlighting some of the difficulties colleges and universities face in identifying and treating

Even if it were feasible, ethical, or desirable to cull the collective observations made by members of the campus community about particular individuals, it is uncertain whether information obtained in that manner would pinpoint imminently foreseeable harm.[48] In fact, as is likely the case with observations made about Cho by some Virginia Tech professors and students, many of the day-to-day observations that campus community members are in a position to make, even if considered as a whole, will not be enough to make imminent harm foreseeable.[49] Reports of a student's disturbing writings, expressions of anger toward particular groups, and antisocial behavior are unlikely to trigger a duty unless the student makes statements or takes actions that clearly show intent to harm someone on campus.[50]

Another challenge faced by plaintiffs trying to assert that a college or university has a duty to act is the fact that potentially violent individuals often may not specifically identify the target of their ill-will. Mass shootings by disturbed individuals are often random and their victims are determined by chance. The court in *Tarasoff v. Regents of the University of California*[51] understood this reality. In *Tarasoff*, the court determined that the duty to warn others about threatened harm arises only when there is a specifically foreseeable person or group of persons targeted by the threat of harm.[52] At this point, a mental health professional that possesses knowledge about the dangerous person is obligated to disclose the information to potential victims.[53] Where the potentially violent person is targeting a specifically identifiable victim or group of victims, it may be relatively easy to warn or take measures to protect those persons. But where the threat appears to be directed at the world at large, the correct course of action is less clear. Of course, where a student poses an imminently foreseeable threat to a large or unidentifiable group of persons, colleges and universities may want to look beyond the mental health professional construct set forth in *Tarasoff*. If the threat is sufficiently serious, it would be reasonable to expect colleges and universities to focus their efforts on removing the potentially dangerous individual from campus, whether via mental health professionals or otherwise.

Colleges and universities can learn from recent cases involving student suicides,

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troubled students).

48. A Secret Service study conducted in 2000 found that there was no "profile" that would help identify school shooters before they acted. *Id.* at 42. Also, institutions should note that if they undertake heightened efforts to identify students based on characteristics they believe to be early warning signs, they may be, in essence, creating special relationships or assuming duties to prevent harm beyond those that they normally have.

49. Manny Fernandez & Marc Santora, *In Words and Silence, Hints of Anger and Isolation*, N.Y. TIMES, Apr. 18, 2007, at A1.

50. Counseling professionals struggle with the task of pinpointing when a student's strange behavior rises to the level of creating an imminent risk. *See* Elyse Ashburn et al., *Sounding the Alarm*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 27, 2007, at A6. Maggie Olona, Director of the Student Counseling Service at Texas A&M University, sums up the difficulty surrounding when to act, stating, "Odd behavior is not a crime." *Id.*

51. 551 P.2d 334 (Cal. 1976).

52. *Id.* at 342–43.

53. *Id.* at 345.

where the special relationship theory has been most frequently tested. While the issue of identifying the target of potential harm does not arise in a suicide case, there are lessons that can be learned about foreseeability. *Schieszler v. Ferrum College*[54] and *Shin v. Massachusetts Institute of Technology*,[55] which were both settled out of court, involved troubled students who had made their suicidal thoughts known to someone on campus.[56] However, under the special relationship theory, it is not enough for a plaintiff to illustrate someone at the school knew a student had considered suicide or an act of violence.[57] A plaintiff must show that the college or university had specific knowledge, putting it on reasonable notice that the person would act imminently to cause harm.[58] In both *Schieszler* and *Shin*, the plaintiffs argued that the notice was clear.[59] Specifically, they alleged that: (1) administrators in each case knew that the student made repeated suicide threats; (2) each student had previously suffered self-harm; and (3) each student had been under the care of a mental health professional.[60] In *Schieszler*, the U.S. District Court for the Western District of Virginia highlighted that the dean of students required the suicidal student to sign a statement affirming that he would not harm himself.[61] The court viewed this as an admission of the administration's knowledge of an imminently foreseeable suicide attempt. Where the school knows or should know self-harm is an "imminent probability," a special relationship may be created.[62] Similarly, where the student is not suicidal, but rather exhibits behavior that should put the school on notice of an imminent probability that he or she will harm others, the school may have a special relationship and a duty to prevent harm.

iii. Special Relationship Arising From a Landowner's Duty to Maintain Safe Premises

A plaintiff pursuing a negligence action against a college or university based on the violent acts of another student may seek to establish that the school has a duty as a landowner, business owner, or landlord, to maintain safe and secure premises for its students. While this duty is applied frequently where a dangerous condition exists on the land, such duties have been extended in some cases to protect persons

54. 236 F. Supp. 2d 602 (W.D. Va. 2002).

55. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

56. *Schieszler*, 236 F. Supp. 2d at 605; *Shin*, 2005 WL 1869101, at *2.

57. *Schieszler*, 236 F. Supp. 2d at 609.

58. *Id.*

59. *Id.*; *Shin*, 2005 WL 1869101, at *12–15.

60. *Schieszler*, 236 F. Supp. 2d at 609; *Shin*, 2005 WL 1869101, at *1–4.

61. *Schieszler*, 236 F. Supp. 2d at 609.

62. *Id.* Similarly, in *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006), the court determined that an institution's knowledge of a student's alcohol and drug abuse did not trigger a special relationship giving rise to a duty to protect her from overdosing on heroin. In a second action commenced by filing an amended complaint, the court suggested that such a duty may exist if an institution had notice of "multiple incidents involving heroin." Bash v. Clark Univ., No. 200600745, 2007 WL 1418528, at *2 (Mass. Super. Ct. Apr. 5, 2007). In other words, a special relationship is not likely to arise unless and until the student's potentially harmful behaviors are overt, repeated, and clearly tied to foreseeable harm.

on the land from harm resulting from the foreseeable acts of third parties.[63]

The duty that a college or university owes as a landowner varies depending on its relationship with persons on the land. If the school is considered a landlord and the student a tenant, as may be the case where a student is harmed while in his or her residence hall room, the duty to protect from harm by third parties will not be recognized unless a physical condition in a common area contributes to the harm.[64] For example, failure to maintain working locks or to adequately monitor who is entering the building could be considered a breach of the landlord's inherent duty. Where that breach results in harm perpetrated by one who is not authorized to enter the residence hall, a plaintiff could bring a negligence action.[65]

In *Rhaney v. University of Maryland Eastern Shore*,[66] a student who was assaulted by his roommate in their shared on-campus room attempted to argue that the university, in its capacity as his landlord, owed a duty to protect him from his roommate.[67] Rhaney did not attempt to argue that any physical condition on the property contributed to the assault, but, rather, that his roommate was the dangerous condition and that the school knew the roommate had been involved in a physical fight on campus at least once before.[68] The court declined to accept the view that the roommate himself qualified as a "dangerous condition," pointing out that if it were to accept the argument, colleges and universities would be forced to take on an unworkable "floating duty" owed to every resident of the building as the roommate moved from room to room.[69]

The duty owed by a landowner to a business invitee is more demanding than that owed by a landlord.[70] The landowner has an affirmative duty to "use reasonable and ordinary care to keep the premises safe and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover."[71] Such unreasonable risks may include those posed by third persons—*e.g.*, employees of the landowner and other business invitees.[72] Unlike the special relationship theory, the landowner does not need to know that there is an "imminent probability" that a particular person will act to cause harm to a business invitee. The plaintiff only needs to prove that the business owner, as a prudent person, should have anticipated the

63. *See* Rhaney v. Univ. of Md. Eastern Shore, 880 A.2d 357, 366–67 (Md. 2005); Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001); *see also* Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984).

64. *Rhaney*, 880 A.2d at 367.

65. *See, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983).

66. 880 A.2d 357 (Md. 2005).

67. *Id.* at 361–62.

68. *Id.* at 365.

69. *Id.* at 366 n.9.

70. *Id.* at 366–67.

71. *Id.* The court in *Rhaney* rejected the argument that the university and plaintiff had a business owner/invitee relationship, restricting that relationship to students when they were in the university's common areas, dining halls, and academic buildings. *Id.* at 367. *See also* RESTATEMENT (SECOND) OF TORTS § 343 (1965) (regarding Dangerous Conditions Known to or Discoverable by Possessor).

72. *Rhaney*, 880 A.2d at 367.

possible occurrence of harm from third parties and failed to take reasonable steps to prevent it—steps that could, if implemented, have prevented the harm.[73] The specific contours of this liability have been set forth in Restatement (Second) of Torts, Section 344, as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to: (a) discover that such acts are being done or are likely to be done; or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[74]

This Restatement section has been explicitly extended to colleges and universities, which, among other things, do business with the public.[75] However, the Restatement also realizes that imposing liability for criminal activities may be too much, and limits the noted liability theory, as follows:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[76]

In *Stanton v. University of Maine System*,[77] a female student was sexually assaulted by a person who accompanied her to her residence hall.[78] The court imposed a duty on the university because it held students to be business invitees.[79] Pursuant to the university's security measures, telephones providing access to the University Police 24-hour dispatch were installed inside and outside of residence hall entrances, resident assistants lived in the residence halls, and students were provided keys to the residence hall entrance and their own rooms.[80] There were no signs posted in the residence halls informing residents of who should or should not

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73. *Id.*

74. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

75. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 521–23 (Del. 1991); Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993). Moreover, a student may be fairly characterized as an invitee. *See id.* at 780.

76. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

77. 773 A.2d 1045 (Me. 2001).

78. *Id.* at 1048.

79. *Id.* at 1049. Similarly, the court in *Williams v. Louisiana*, 786 So.2d 927 (La. Ct. App. 2001), found that "[t]he university/student relationship, where students reside as guests or patrons in a dormitory, parallels the relationship of a business and its customers." *Id.* at 932. Thus, colleges and universities have "a duty to implement reasonable measures to protect [their] students in dormitories from criminal acts when those acts are foreseeable." *Id.*

80. *Stanton*, 773 A.2d at 1048.

be allowed to enter.[81] The court found that the occurrence of a sexual assault in a student's room was foreseeable and that such foreseeability was evidenced by the security measures implemented by the university.[82] Thus, the court held that the university owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.[83]

In sum, even where there is no specific threat from a particular third person with whom the college or university has a relationship, colleges and universities could be compelled as landowners to take additional precautions to prevent harm based on a generalized knowledge that violent acts are likely to occur on campus.[84] When an intentional and horrific crime such as that committed at Virginia Tech takes place, the law generally recognizes that the proximate (and sole) cause of the harm is the shooter himself, not the school,[85] *unless* the school created the situation that allowed the shooter to engage in his criminal activity and failed to take steps to rectify that situation.[86]

2. Duty to Act Reasonably When Acting to Protect Students

Although there is no well-defined duty to provide security and law enforcement personnel on campuses,[87] there is certainly a growing expectation that such services will be provided. "[A]dequate security is an indispensable part of the bundle of services, which colleges . . . afford their students."[88] Public colleges and universities could argue that the "public duty rule" insulates them from any duty to provide police protection to particular students. Under this "public duty rule," municipalities owe no duty to provide police protection to individuals.[89] Thus, a

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81. *Id.*

82. *Id.* at 1050.

83. *Id.*

84. *See Williams*, 786 So.2d at 932 ("The university/student relationship, where students reside as guests or patrons in a dormitory, parallels the relationship of a business and its customers. Accordingly, . . . we find that a university likewise has a duty to implement reasonable measures to protect its students in dormitories from criminal acts when those acts are foreseeable.").

85. *Cf.* Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (finding that where a student was abducted from campus, driven to a quarry and murdered, and evidence of other incidents of violence on campus made the abduction and murder unforeseeable, the college was not negligent because it took adequate security measures). Indeed, one judge has questioned whether any college or university could take sufficient precautions to protect students from unforeseeable, random, violent acts. Setrin v. Glassboro State Coll., 346 A.2d 102, 106 (N.J. Super. Ct. App. Div. 1975) (Botter, J., concurring) ("[I]t is fairly simple to decide how many ushers or guards suffice . . . to deal with the crush of a crowd and the risks of unintentional injury . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? Must the owner prevent *all* crime?").

86. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

87. Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1202 (Cal. 1984).

88. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983).

89. Riss v. City of New York, 240 N.E.2d 860, 861 (N.Y. 1968); *see also* Martin v. Malhoyt, 830 F.2d 237, 259 (D.C. Cir. 1987) ("[O]nly where the police and the individual are in a special relationship different from that existing between police and citizens generally, can a sufficiently particularized 'duty to protect' arise rendering the officer potentially liable for a

college or university could argue that, as a public entity, it owes no special duty to protect any one student, but only owes a duty to implement procedures to protect the student body and perform those procedures non-negligently. However, where the police assist an individual, they assume a duty, and a special relationship is created such that they must act in a reasonable manner.[90]

The most likely basis for a negligence action arising from an alleged failure of campus security or campus law enforcement personnel is provided by the Restatement (Second) of Torts, Section 323, which states that one who undertakes to render services for the protection of another can be held liable for physical harm resulting from failure to exercise reasonable care in providing such services, if the harm is (1) made worse because of the failure, or (2) suffered because of the other's reliance on the undertaking.[91]

In *Mullins v. Pine Manor College*,[92] the Massachusetts Supreme Court held that the college had a duty to protect students from criminal acts of third parties.[93] It found that this duty existed because the college voluntarily provided services to protect students.[94] But, under Section 323 of the Restatement, the voluntary provision of security measures was insufficient on its own to establish liability. The plaintiff had to show that the harm was either made worse by the college's conduct or that the plaintiff suffered by relying on the undertaking of provision of security. This argument should have proved difficult because the complaint was inaction, as opposed to the affirmative undertaking of protective action, which is the common target of Section 323. However, the court held the burden to show reliance on the college's conduct could be met by arguing that prospective students visiting with their parents observed a fence around the campus, the presence of security guards, and other steps taken to ensure student safety, and relied on those measures in deciding to enroll at the college.[95] The *Mullins* opinion was rare in two respects: (1) Section 323 of the Restatement is unlikely to be applied in a situation where the conduct complained of is a failure to act,[96] and (2) modern courts are reluctant to impose a duty based on a student's reliance on an institution's vague representations about campus safety.[97]

When courts forego the Section 323 analysis, they generally find that if a college or university assumes a duty to protect its students, it must do so non-negligently.[98] In *Coghlan v. Beta Theta Pi Fraternity*,[99] Rejena Coghlan attended

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failure to act.") (citation omitted).

90. McNack v. Maryland, 920 A.2d 1097, 1108 (Md. 2007) ("[T]he 'special duty rule' is a 'modified application of the principle that although generally there is no duty in negligence terms to act for the benefit of any particular person, when one does indeed act for the benefit of another, he must act in a reasonable manner.'").

91. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

92. 449 N.E.2d 331 (Mass. 1983).

93. *Mullins*, 449 N.E.2d at 336.

94. *Id.*

95. *Id.*

96. *See* Jain v. Iowa, 617 N.W.2d 293, 300 (Iowa 2000).

97. *See* Bash v. Clark Univ., No. 06745A, 2006 WL 4114297, at *7 (Mass. Super. Ct. Nov. 20, 2006).

98. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 237–38 (E.D. Pa. 1992); Coghlan v.

a fraternity party where two University of Idaho employees were present to provide supervision.[100] Coghlan became intoxicated and, after being put to bed in the third floor sleeping area of a sorority house, fell thirty feet from the third floor fire escape platform to the ground below.[101] The court found that the university had assumed a duty to exercise reasonable care by "safeguard[ing] the underage plaintiff from the criminal acts of third persons, *i.e.*, furnishing alcohol to underage students."[102]

Another convincing case for finding a voluntary assumption of duty on the part of a college or university could be made where the campus police department took some specific action in relation to an existing threat and that action induced students to rely or put them in a more dangerous position than they faced before. In *Jain v. Iowa*,[103] the court refers to a case in which a defendant communicated incorrect information about the location of a distressed vessel needing rescue.[104] The miscommunication caused some searchers to abandon their efforts, prolonging the rescue, and leading to the deaths of the ship's crew members.[105] An analogous situation would exist where a student tells a campus police officer that he has received a threat, and the officer undertakes to communicate the information to appropriate persons in the administration, causing the student to rely on the officer and forego speaking with administrators himself. If the officer fails to properly communicate the information, thereby preventing the issue from being addressed, and the student is then harmed, it is arguable that the officer's actions put the student in a more dangerous position than had he communicated the information to the appropriate persons himself.

Much has been made of the fact that Virginia Tech did not take particular measures after learning of the first murders committed in West Ambler Hall, the residence hall where Cho killed two students.[106] Questions persist about whether a campus that size could effectively be put under lockdown and why students were not immediately notified after the initial murders.[107] These questions may be misplaced, and, under Section 323, liability is unlikely. As the *Jain* case demonstrates, advising students where to go in a time of crisis, when the facts are not clear, may create more problems than it solves. What if Virginia Tech students were advised to flee their residence halls (leading them to go to class)? What if they were advised to stay in their rooms and Cho returned to West Ambler Hall? It is difficult to imagine the law imposing a duty on an institution that uses its best

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Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999).

99. 987 P.2d 300 (Idaho 1999).

100. *Id.* at 305, 312.

101. *Id.* at 305.

102. *Id.* at 312.

103. 617 N.W.2d 293 (Iowa 2000).

104. *Id.* at 300 (citing United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960)).

105. *Id.*

106. Ian Urbina, *Virginia Tech Criticized for Actions in Shooting*, N.Y. TIMES, Aug. 30, 2007, at A1; *see generally*, Olivia Winslow & Melanie Lefkowitz, *Massacre at Virginia Tech: Campus Safety*, NEWSDAY, April 23, 2007, at A04.

107. Dave Lenckus, *Shootings Raise Liability Questions*, BUS. INS., Apr. 23, 2007, at 21.

efforts to gather facts before moving folks around campus during a crisis, but colleges and universities must be sensitive to this contention.

B. Establishing Breach and Causation

Although this article focuses heavily on the various duties[108] that colleges and universities should be aware of, it is important to note that a plaintiff could still face challenges in establishing two of the remaining elements of a negligence action—breach of duty and causation—in cases arising from campus violence. It is inevitable that some violent individuals will find a way to commit harmful acts despite the most diligent efforts of administrators, mental health professionals, faculty, and campus police. Even if a school is able to have a student expelled or otherwise removed, given the free and open nature of American campuses, there is no guarantee that the violent individual would not return to exact revenge. The requirement to exercise reasonable care in fulfilling a duty is not a mandate for perfection, but it does require colleges and universities to pursue an intelligent plan and quickly respond to known and suspected risks of campus violence.

1. Breach

Courts look to measures taken by a college or university to determine whether it has breached a duty to its students.[109] For example, in *Brown v. North Carolina Wesleyan College, Inc.*,[110] the court held that the murder of a non-resident student was unforeseeable, and, therefore, the college owed no duty to keep its campus safe.[111] Even if a duty had existed, the court noted that the college would not have breached it because the college had maintained adequate security staff, equipment, and procedures.[112]

Courts have hinted that they may be willing to find a duty to provide protection

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108. Until now, courts have tended to focus their analysis on whether a duty is owed to an institution's students. Courts may have been able to avoid or minimize the discussion of breach and causation because they disposed of claims largely by holding that a college or university owed no duty to students based on a special relationship. If the Third Restatement is adopted and interpreted to impose an affirmative duty on colleges and universities based on a special relationship that automatically exists between an institution and its students, courts likely will need to enhance the focus on the elements of breach and causation in order to determine whether a college or university was negligent. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, Apr. 6, 2005), cmt. *l* (stating that, in many school cases, the facts show that there was no reasonable way to prevent the harm, so the no-duty decisions "may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law."). Moreover, even if a special relationship is recognized between colleges or universities and their students, courts may not necessarily be more inclined to find negligence. Instead, where a particular violent act can be deemed unforeseeable, they can find that there was no breach of the duty, or where the institution's fulfillment of the duty would not have prevented the violent act, they can find that causation is lacking.

109. *See* Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983).

110. 309 S.E.2d 701 (N.C. Ct. App. 1983)

111. *Id.* at 703.

112. *Id.*

based on an institution's custom and practice.[113] Under this theory, a duty is created when "colleges of ordinary prudence customarily exercise care to protect the well-being of their residents students, including seeking to protect them against the criminal acts of third parties."[114] Using this approach, a court could look to colleges and universities as a whole in determining whether a duty to provide protection exists.[115] If such a duty existed, the court could measure the institution's conduct against the custom and practice of colleges and universities in general to determine whether the institution has breached its duty.

2. Causation

A defendant's conduct generally must be both the "cause in fact" and "proximate cause" of harm before liability is imposed.[116] The most common expression of the "cause in fact" test is the "but for" formulation: "the defendant's conduct is a cause in fact of some harm if the harm would not have occurred but for the defendant's conduct."[117] Proximate cause, on the other hand, "is a more explicitly policy-based determination of whether an actor's conduct, despite its being a cause in fact**,** is too tenuously linked to the injury to hold the actor liable."[118] To satisfy the proximate cause standard the injury must have been a reasonably foreseeable result of the actor's negligence.[119] Thus, precise foreseeability is not required. Only the degree of foreseeability that would be apparent to a reasonable person is necessary.

113. *See* Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993) (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983)).

114. *Mullins*, 449 N.E.2d at 335.

115. The custom and practice theory is used in other situations to judge an entity's conduct against the conduct of other similarly situated entities. For example, when determining whether an employer has violated a law requiring it to provide personal protection for its employees, some courts evaluate the custom and practice of the industry to determine whether the employer has acted reasonably. *See, e.g.*, Voegele Co. v. Occupational Safety & Health Review Comm'n, 625 F.2d 1075, 1078–79 (3d Cir. 1980).

116. *See, e.g.*, United States v. Robinson, 167 F.3d 824, 831 (3d Cir. 1999). *But cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, Apr. 6, 2005) ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."). The Third Restatement proposes that "[l]imiting liability to harm arising from the risks created by the tortious conduct has the virtue of relative simplicity." *Id.* cmt. e. Thus, this test "provides a more refined analytical standard than a foreseeability standard or an amorphous direct-consequences test." *Id.*

117. United States v. Neadle, 72 F.3d 1104, 1119 (3d Cir. 1995) (Becker, J., dissenting).

118. *Id.*

119. *See* Boudreaux v. Swift Transp. Co., 402 F.3d 536, 541 (5th Cir. 2005).

C. Contributory and Comparative Negligence

In Virginia, if a plaintiff is negligent, his contributory negligence completely bars recovery.[120] However, a defendant who is guilty of willful and wanton negligence cannot rely upon the plaintiff's contributory negligence as a defense.[121] In Virginia, "[i]f a person has voluntarily assumed the risk of injury from the behavior of another, regardless of whether that behavior amounts to simple negligence, gross negligence, or willful and wanton behavior, such a person is not entitled to compensation for his injury by the tortfeasor."[122] Most other states use different "comparative negligence" structures, where the plaintiff is entitled to a share of her injury in proportion to her contributory negligence.[123]

Of course, there is no support for the argument that student victims killed at Virginia Tech voluntarily assumed the risk that they would be subjected to a mass shooting on campus. It is also unlikely that the university could show that any of Cho's victims were contributorily negligent. However, in Virginia and other states that follow a contributory negligence scheme, so long as an institution is found liable for only ordinary negligence and not for willful or wanton negligence, any failure by a student to take reasonable steps to protect his own safety could completely bar the student's recovery. In other states that follow a comparative negligence scheme, such failures by student victims could reduce their potential recovery. Although it would be difficult, colleges and universities could succeed in proving negligence by victims in rare situations—*e.g.*, where a student knows that an individual is planning to commit a violent act and fails to take precautions, such as reporting the individual, where a student does not heed a college or university's warning regarding a dangerous condition, or where a student knowingly fails to take advantage of an institution's safety procedures.

II. SOVEREIGN IMMUNITY—PROTECTION FROM NEGLIGENCE ACTIONS

This section discusses immunity of public institutions from tort liability based

120. *See, e.g.*, Wilby v. Gostel, 578 S.E.2d 796, 802 (Va. 2003) (Kinser, J., dissenting). As of 2002, only three other states besides Virginia follow the contributory negligence rule: Alabama, Maryland, and North Carolina. Gorski v. Smith, 812 A.2d 683, 700 (Pa. Super. Ct. 2002); *see also* Duval v. OM Hospitality, LLC, No. COA06-1359, 2007 N.C. App. LEXIS 2190, at *8 (N.C. Ct. App. Oct. 16, 2007) ("[A] finding of contributory negligence is a bar to recovery from a defendant for acts of ordinary negligence.").

121. Bane v. Mayes, No. CL03-245, 2004 Va. Cir. LEXIS 274, at *2 (Va. Cir. Ct. July 27, 2004). There is, however, an exception to the general rule. "When the plaintiff's contributory negligence itself amounts to willful and wanton conduct, recovery is barred." *Id.* (quoting Griffin v. Shively, 315 S.E.2d 210, 213 (Va. 1983)).

122. *Id.*

123. In Pennsylvania, for example, a plaintiff is entitled to a proportionate share of the damages when her contributory negligence does not exceed fifty percent. *See* 42 PA. CONS. STAT. § 7102(a) (2004). Other states, like Florida, allow the plaintiff to recover even if she was comparatively 99% negligent. FLA. STAT. § 768.81(2) (2006) ("[A]ny contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.").

on violent acts by students. Private colleges and universities are not immune from tort actions, and even in cases where a private institution maintains a sworn police force, it is unlikely those officers could claim governmental immunity for acts committed in their official capacities.[124] The scope of immunity can vary widely from jurisdiction to jurisdiction, and this section will highlight the level of protection afforded to public universities by various state statutes and precedents. For example, some states have waived governmental immunity for certain types of actions, such as wrongful death suits or failure to maintain safe conditions on real estate. However, the scope of waivers may be narrow, and the limitation of damages may prohibit plaintiffs from recovering enough to justify the expense and difficulty of litigation.

A. The Basis for Sovereign Immunity Protection from Suit

The Eleventh Amendment to the United States Constitution precludes judicial action against a state by another state's citizens.[125] This recognition that states should not be required to defend suits brought by citizens of other states has been broadly read as prohibiting any suit against an unconsenting state in federal court.[126] Additionally, the protection extends to state instrumentalities—*e.g.*, state agencies, officials, or other entities that serve as arms of the state.[127] While the Eleventh Amendment does not, standing alone, protect a state from suit in its own courts, states are empowered to reserve their immunity from suit and define the parameters of such immunity. They generally do so within state constitutions and statutes.[128]

State-funded colleges and universities are generally considered state instrumentalities and afforded sovereign immunity from suit in federal and state courts.[129] The test for determining whether an entity is entitled to sovereign immunity protection focuses on two factors: (1) whether the state controls the entity in question, and (2) whether the state treasury would be exposed to liability in damages if suit were brought against the entity.[130] Often, state statutes define state-affiliated colleges and universities as instrumentalities of the state and set forth requirements for how they are to be run. This is likely sufficient to show state control. Additionally, courts have held that when lawsuits against state

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124. Private police officers generally lack the protection of qualified immunity. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1185–86 (1999); *see also* Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 523–25 (Mass. 2006) (holding that "special State police officers" used by Harvard College were not public officials for the purpose of open documents requirement).

125. U.S. CONST. amend. XI.

126. *See* Hoeffner v. Univ. of Minn., 948 F. Supp. 1380, 1384 n.5 (D. Minn. 1996).

127. *Id.* at 1384–85.

128. *See id.* at 1391.

129. *Id.* at 1385. The effect of this immunity is significant in limiting the opportunities for plaintiffs to proceed against higher education institutions. According to one report, in 2003, state colleges and universities comprised roughly 40% of the nation's degree-granting institutions, and they granted about 75% of the degrees. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 311, 327 (2005).

130. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47–48 (1994).

colleges and universities expose the state treasury to damages, the fact that the instiution may also receive funds from private sources is irrelevant.[131]

Private colleges and universities are not entitled to state sovereign immunity, and they can be sued in court in the same manner as any other business.[132] Even where a private school maintains sworn or deputized police officers, such officers will not be afforded the governmental immunity available to state police officers.[133] In recent years, courts have grappled with the characterization of police officers on private campuses, acknowledging that many of them carry the same qualifications and responsibilities for providing "governmental" services as state police officers.[134] However, the fact that these officers are employed by private colleges or universities weighs against finding that they are instrumentalities of the state, and it is unlikely that a court would extend sovereign immunity protection.[135]

B. Waiver of Sovereign Immunity

States typically make a broad reservation of sovereign immunity in their constitutions or statutes. As a general rule, sovereign immunity cannot be waived

131. *See, e.g.*, Hall v. Med. Coll. of Ohio, 742 F.2d 299, 304–05 (6th Cir. 1984) (holding that defendant was entitled to sovereign immunity protection because some state funds would be required to pay judgment because Ohio law provided for the commingling of private and public funds by state institutions). *But see* Kovats v. Rutgers State Univ., 822 F.2d 1303, 1308–09 (3d Cir. 1987) (holding that where a judgment can be paid exclusively out of private funds not controlled by the state, the fact that the institution receives substantial public funding does not entitle it to sovereign immunity).

132. 15A AM. JUR. 2D *Colleges and Universities* § 48 (2007). In jurisdictions where charitable institutions enjoy immunity from tort liability, however, private colleges and universities may be immune. *Id.*

133. Sklansky, *supra* note 124, at 1185–86.

134. Harvard Crimson v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 523–25 (Mass. 2006) (holding that "special State police officers" used by Harvard College were not public officials for the purpose of open documents requirement); Mercer Univ. v. Barrett & Farahany, LLP, 610 S.E.2d 138, 142 (Ga. Ct. App. 2005) (holding that private universities' sworn police officers were not public officials, but stating that the "public importance of disclosing police records is just as high when the officers at issue, although not state and local police officers, are authorized to perform and often do perform the same functions as the state and local police officers. This, however, is a matter best left for the legislature to consider.").

135. *Harvard Crimson*, 840 N.E.2d at 523–25. There may be some exceptions, such as officers acting under a special statute. 71 PA. STAT. ANN. § 646 (West 2003) is one example. That section applies to Pennsylvania campus police of "all State colleges and universities, State aided or related colleges and universities and community colleges," and it specifically states that when acting in their capacity as campus police, officers will be considered state employees and afforded all rights and benefits accruing from such employment. Although this article does not address actions brought under 42 U.S.C. § 1983, it is worth noting that sworn police officers at private colleges and universities may be considered state actors for purposes of such actions. Hence, they may be entitled to qualified immunity for the performance of their job functions unless plaintiffs can show that they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1138 (D. Utah 1999).

without a clear statutory expression of intent.[136] Courts have held that the carrying of liability insurance by a college or university is not a waiver of sovereign immunity.[137] However, removal of an action to federal court by the college or university will waive Eleventh Amendment immunity from suit in federal court.[138]

Many states have enacted statutory waivers of immunity to allow for suit in state courts under certain circumstances. Negligence actions based on campus violence can only proceed against a state college or university if the state has waived tort immunity for such an action. Even if a state has waived tort immunity, it may still reserve immunity for government entities or government employees acting within the scope of their employment to conduct functions that are considered discretionary—*i.e.*, those functions that require administrators to exercise judgment and involve the weighing of alternatives based on policy concerns.[139]

The purpose of this discretionary immunity is to protect government entities from liability for certain functions that are essential to government.[140] Courts have typically found decisions about the implementation of safety measures and the proper use of campus police forces are discretionary functions.[141] Arguably, most decisions made by administrators with respect to handling a threat of violence or a potentially violent individual could also be considered discretionary. However, some courts have held that immunity under the discretionary function exception should not be granted where a public college or university violates a clear statutory or common law duty.[142]

Waiver of sovereign immunity is frequently accomplished through a State Tort Claims Act ("TCA"). The scope and limitations on state waivers of sovereign immunity vary widely from state to state. By way of example, this section will discuss the distinct statutory waivers enacted by four states: (1) Pennsylvania; (2) California; (3) Virginia; and (4) Minnesota.

The Commonwealth of Pennsylvania only allows for a waiver of sovereign

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136. 15A AM. JUR. 2D *Colleges and Universities* § 47 (2006).

137. *Id.*; Livingston v. Regents of N.M. Coll. of Agric. & Mech. Arts, 328 P.2d 78, 80–82 (N.M. 1958); Taylor v. Nevada, 311 P.2d 733, 734 (Nev. 1957); Olson v. Univ. of N.D., 488 N.W.2d 386, 390–91 (N.D. 1992).

138. *See* Mandsager v. Univ. of N.C. at Greensboro, 269 F. Supp. 2d 662, 680 (M.D.N.C. 2003).

139. *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780–81 (Kan. 1993) (applying the discretionary function exception to the Kansas Tort Claims Act). The statutory waivers of tort immunity enacted by California and Minnesota, which are discussed in this section, also contain discretionary function exceptions. CAL. GOV'T CODE § 820.2 (West 1995); MINN. STAT. § 3.736 Subd. 3 (West 2005 & Supp. 2008).

140. *See* Gonzalez v. Univ. Sys. of N.H., No. 451217, 2005 Conn. Super. LEXIS 288, at *48–49 (Conn. Super. Ct. Jan. 28, 2005) ("It is essential, in making this calculation, to be mindful that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern." (internal quotation marks omitted)).

141. *See* Relyea v. Florida, 385 So. 2d 1378, 1381–82 (Fla. Dist. Ct. App. 1980) (superseded by statute) (applying Florida's former discretionary function exception to statutory waiver of tort immunity and stating that decisions relating to use of the campus police force are discretionary or planning functions).

142. *See Nero*, 861 P.2d at 782.

immunity in very narrow circumstances.[143] The statute provides exceptions under which actions arising from specialized activities may be brought against the state.[144] The exceptions include, but are not limited to, the state's care of highways, professional medical liability against employees of state medical facilities, and dangerous conditions on state-owned real estate.[145] Pennsylvania courts have construed the real estate exception narrowly as allowing suits where one is injured by a dangerous condition on the land itself, and the exception does not create state liability for acts by dangerous third persons on the property.[146] Because there is no general provision allowing for a negligence action, plaintiffs would be barred from recovering from a Pennsylvania state college or university based on campus violence.

California's statutory waiver of sovereign immunity is less limiting than Pennsylvania's, but does not allow ordinary negligence actions to proceed solely against the state or a state agency.[147] The statute provides that a public entity is not liable in court except for specific claims identified by the statute, but also provides that the state can be vicariously liable for harm caused by the acts and omissions of public employees.[148] Public employees are held liable in the same manner as a private person under the statute.[149] Yet, there is one very important exception that a plaintiff bringing a negligence action will need to address. Under the California statute, a public employee will not be held liable if the negligent act or omission was the result of an exercise of discretion related to his or her employment.[150] One court has held that a community college's failure to warn a student about a stairway that was obscured by overgrowth and connected to the college's parking lot, which contributed to the student being assaulted and raped in the parking lot, was not an omission stemming from discretionary action by the public employee.[151] The public employee knew of the dangerous condition and that a rape had occurred there before, and as such, the employee had a duty to act.[152] The California statute provides no explicit damage limitations, except that a public entity cannot be liable for punitive or exemplary damages.[153]

The Minnesota Tort Claims Act provides a complex scheme of exceptions and limitations that plaintiffs need to work through to determine if they can bring suit against a college or university for negligence.[154] The general rule is that the state will pay compensation for loss of property, personal injury, or death caused by acts or omissions of a state employee under circumstances where a private person

143. 42 PA. CONS. STAT. ANN. § 8522 (West 2007).
144. *Id.*
145. *Id.*
146. *See* Douglas v. Phila. Hous. Auth., 578 A.2d 1011, 1013 (Pa. Commw. Ct. 1990).
147. CAL. GOV'T CODE § 815 (West 1995).
148. *Id.* at §§ 815, 815.2.
149. *Id.* at § 820.
150. *Id.* at § 820.2.
151. Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984).
152. *Id.*
153. CAL. GOV'T CODE § 818.
154. MINN. STAT. ANN. § 3.736 Subd. 1 (West 2005 & Supp. 2008).

would be liable to the claimant, whether arising out of a governmental or proprietary function.[155] There is an exclusion that bars state liability based on a loss caused by the performance of or failure to perform a discretionary duty.[156] If a plaintiff is able to overcome the bar for discretionary duties, the recovery for any single claim will be limited to between $300,000 and $500,000 depending on when the claim arose.[157] The statute also provides a cap on aggregate claims—*i.e.*, "any number of claims arising out of a single occurrence"—of $750,000.00 to $1.5 million, which would have to be divided among plaintiffs joined in an action.[158]

Finally, Virginia's Tort Claims Act provides a broad waiver of sovereign immunity.[159] The statute provides that the Commonwealth of Virginia can be held liable for money damages

> on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth . . . if a private person, would be liable to the claimant for such damage, loss, injury or death.[160]

There are no exceptions that would preclude a plaintiff from bringing a negligence action against the state, but it is important to note that the Virginia TCA does not allow plaintiffs to bring suit against Commonwealth agencies.[161] Therefore, a plaintiff cannot sue a college or university like Virginia Tech directly; instead it must name the Commonwealth of Virginia as the defendant.[162] The Virginia TCA does impose a fairly low limitation on damages of $100,000 for any claim.[163]

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155. *Id.*

156. *Id.* at § 3.736 Subd. 3(b). It appears Minnesota courts view the concept of discretionary duties broadly, holding in one case that a college's failure to repair a sidewalk and to warn of the dangerous condition was not actionable because the college made its decision based on economic and budgetary concerns. Christensen v. Rainy River Cmty. Coll., No. A04-5, 2004 Minn. App. LEXIS 1084, at *8 (Minn. Ct. App. Sept. 21, 2004).

157. MINN. STAT. ANN. § 3.736 Subd. 4 (West 2005 & Supp. 2008).

158. *Id.*

159. VA. CODE ANN. § 8.01-195.3 (West 2007).

160. *Id.*

161. Rectors & Visitors of the Univ. of Va. v. Carter, 591 S.E.2d 76 (Va. 2004).

162. *Id.*; VA. CODE ANN. § 8.01-195.4.

163. VA. CODE ANN. § 8.01-195.3.

III. PRIVACY CONCERNS, CONFIDENTIALITY CONCERNS, AND RECOMMENDATIONS TO MINIMIZE FUTURE VIOLENCE ON CAMPUS

With the above in mind, how should colleges and universities proceed? They face various challenges, not the least of which is reconciling the tension between students' privacy rights and the necessity of making disclosures and taking action in situations where harm is likely to befall members of the campus community. The following sections will examine the parameters of the rights to privacy and confidentiality.

A. FERPA, HIPAA and Statutory Privilege

The Family Educational Rights and Privacy Act of 1974 ("FERPA")[164] is a federal law designed to protect the privacy of eligible students' education records.[165] It applies to all schools that receive funds under any applicable program of the U.S. Department of Education.[166] Practically, this means that FERPA applies to almost all institutions of higher education in the United States. FERPA gives parents certain rights with respect to their children's education records.[167] These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level.[168] Students to whom the rights have transferred are "eligible students."[169]

The Health Insurance Portability & Accountability Act of 1996 ("HIPAA")[170] amended the Internal Revenue Service Code of 1986.[171] The law was designed to ensure confidentiality and security of health data by setting and enforcing uniform standards, to improve efficiency by standardizing electronic data interchange, and to enact standardized security measures to protect confidentiality and integrity of individually identifiable health information.[172] Health data and information includes patient health, administrative, and financial information.[173]

Medical records are not "education records" according to FERPA. FERPA clearly defines "education records" as those records, files, documents, and other materials which: "(i) contain information directly related to a student; and (ii) are

164. 20 U.S.C. § 1232g (2000 & Supp. V 2005); 34 C.F.R. § 99 (2007).

165. Senator James Buckley also sponsored amendments that were enacted on December 31, 1974, and made retroactive to the original effective date of November 19, 1974. These amendments were designed to address a number of ambiguities and concerns identified by parents, students, and institutions. 120 CONG. REC. 39862–66 (1974).

166. 20 U.S.C. § 1232g (2000 & Supp. V 2005).

167. *Id.* § 1232g(1)(A).

168. *Id.* § 1232g(c).

169. FAMILY POLICY COMPLIANCE OFFICE, U.S. DEP'T OF EDUC., PARENT'S GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (2007), *available at* http://www.ed.gov/policy/gen/guid/fpco/brochures/parents.pdf.

170. Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 10 U.S.C., 29 U.S.C., and 42 U.S.C.). HIPAA is also known as the Kennedy-Kassebaum Act.

171. *Id.*

172. *Id.*

173. 42 U.S.C. § 1320d(4) (2000).

maintained by an educational agency or institution or by a person acting for such agency or institution."[174]

FERPA is equally clear in indicating that "education records" do not include:

> records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.[175]

This indicates that medical or psychological records, while subject to the confidentiality owed to any patient, are not subject to the additional protections FERPA extends to the records of a student. Institutions, and the medical and counseling/psychological professionals employed by them who are utilizing effective prevention and assessment techniques that involve the internal sharing of limited information, may believe they are in violation of FERPA, HIPAA, or their own professional standards by sharing even very limited information—*e.g.* whether or not a student attended a counseling session.[176] However, in an attempt to clarify potential conflicts between HIPAA and FERPA, the Family Policy Compliance Office ("FPCO") and the Department of Health and Human Services ("HHS") determined that education records protected by FERPA are not subject to HIPAA and medical records exempted from FERPA are not subject to HIPAA.[177]

When implementing or considering any prevention strategy regarding incidents of conduct that may be self-injurious or injurious to others, these laws, and the professional and ethical standards that govern physicians, psychiatrists, psychologists, and other counseling professionals all have provisions allowing for appropriate sharing of information in cases of emergency.[178]

FERPA does not prevent institutions from sharing information internally. Even in its most conservative interpretation,[179] the internal disclosure of information to individuals is permissive when they have a "legitimate educational interest."[180] HIPAA also allows for the sharing of information with outside entities such as family members or other persons "if the [patient] is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance," and, "in the exercise

174. 20 U.S.C. § 1232g(a)(4) (2000); *see also* 34 C.F.R. § 99.3 (2007).

175. 20 U.S.C. § 1232g(a)(4).

176. This *may* not include any diagnosis, results or content of the session.

177. *See* Family Educational Rights and Privacy Act, 60 Fed. Reg. 82,379 (Dec. 28, 2000).

178. 34 C.F.R. § 99.31(a) (2007).

179. Albeit an erroneous interpretation, it is one that has been cited by college and university officials who do not wish to disclose information to fellow administrators.

180. 34 CF.R. § 99.31(a)(1) (2007).

of professional judgment, [the treating professional] determine[s] whether the disclosure is in the best interests of the individual."[181] Counseling professionals can rely upon *Tarasoff* or other applicable state standards in these emergency situations.[182] Colleges and universities may also utilize appropriate procedures during training and orientation and/or adopt published policies that would allow for explicit or implied consent in cases where the *Tarasoff* standard may not be met.

Thus, in dealing with a situation such as the one at Virginia Tech, colleges and universities and their agents are not as hampered as they may believe in making choices about sharing information with appropriate parties. These decisions, when made properly, may indeed enable the institutions not only to better serve their immediate and peripheral constituencies, but may also serve to limit their liability.[183]

B. The Clery Act

Undoubtedly, Virginia Tech will, in the fall of 2007, report the highest incidence of crimes against persons tabulated since the Clery Act[184] was enacted in 1990. One might query, however, what role the Clery Act has in violent campus attacks, other than reporting statistics of their aftermath. The answer is that the Clery Act's timely warning requirement is potentially in play in any instance of campus violence.[185] Media pundits criticized Virginia Tech's administrators for a two-hour gap between the first shootings and the warning announcement made on the morning of the attacks.[186] The savvier talking heads even suggested that it was a failure of the timely warning requirement of the Clery Act. Time will likely prove them incorrect. As soon as Virginia Tech's administrators knew that continued harm was foreseeable, they put out alerts in a variety of formats. Let's examine what exactly is required.

At common law, the duty of property owners to warn those present in the owner's domain of all known, foreseeable dangers is an accepted tenet.[187] This duty was codified in federal law by the Clery Act, though with more limited scope. The Clery Act imposes a requirement to alert the campus community to crimes "considered by the institution to represent a [serious and continuing] threat to

181. 45 C.F.R. § 164.510(b)(3) (2006).

182. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (holding that when a psychotherapist determines, or, pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger). The discharge of such duty, depending on the nature of the case, may call for the therapist to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances. *Id.* at 345–46.

183. For practical applications of these suggestions, see the Conclusion *infra*.

184. 20 U.S.C. § 1092(f) (2000).

185. 20 U.S.C. § 1092(f)(3).

186. Urbina, *supra* note 106, at A1.

187. *See* RESTATEMENT (SECOND) OF TORTS §§ 334, 342–43 (1965).

students and employees."[188] To prompt the warning requirement, the crimes must have been reported to campus security authorities or local police.[189] Crimes reported to confidential sources, such as campus counselors, are exempt from the timely warning requirement.[190]

The law does not specify what is timely, but *The Handbook for Campus Crime Reporting* states that warnings should occur as soon as the pertinent information is available so that campus community members can take steps to protect themselves and ensure their safety.[191] The scope of the warning is also not specified by the law, but should be "reasonably likely to reach the entire campus community and aid in the prevention of similar crimes."[192] It should include all available information that would promote safety without compromising an ongoing investigation or the ability to apprehend a suspect. The decision to issue a warning "must be decided on a case-by-case basis in light of all the facts surrounding the crime."[193]

Concerns with FERPA were clarified in a 1996 "Dear Colleague Letter" sent to institutions of higher education by the Department of Education, noting that in cases of health or safety emergencies, it is permissible to release personally identifiable information from a student's educational records, including the identity of a student as a suspect.[194] Unlike at common law, where a failure to warn can give rise to liability in negligence, the Clery Act specifically notes that it cannot give rise to a private right of action to enforce its terms, and by its terms notes that it does not establish a standard of care.[195] The enforcing authority for Clery Act violations is the U.S. Department of Education.[196]

The best practice: Warn with as much as you can, as soon as you can, to as many as you can, with as many means as possible.

C. Prevention and Intervention Strategies

News reports following Cho's attack repeated other stories of violent killings on college and university campuses—the University of Texas tower shootings, the deaths at Kent State, and the more recent shootings at Appalachian School of Law. Cho's were not the first acts of senseless violence on an American campus, and

188. 34 C.F.R. § 668.46(e) (2007).

189. *Id.*

190. 34 C.F.R. §§ 99.31(b), 99.36 (2007).

191. OFFICE OF POSTSECONDARY EDUCATION, U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 62, *available at* www.ed.gov/admins/lead/safety/handbook.pdf.

192. *Id.*

193. *Id.*

194. DAVID A. LONGANECKER, U.S. DEP'T OF EDUC., MAY 1996 DEAR COLLEAGUE LETTER ON CAMPUS SECURITY ISSUES (1996), *available at* http://www.ed.gov/Speeches/06-1996/coll.html.

195. 20 U.S.C. § 1092(f)(14)(A) (2000).

196. *See* 20 U.S.C. § 1092(f)(13); Security on Campus, Inc., *The Jeanne Clery Act*, http://www.securityoncampus.org/students/cleryact.html (last visited Feb. 8, 2008).

they are not likely to be the last.[197] School administrators and their advisors will be expected to learn from "Bloody Monday," and all the previous tragedies, to prevent similar occurrences going forward.

Factually, it would not take much more than a reasonably detailed advance threat to make a campus homicide or suicide foreseeable to college or university officials, thereby imposing duties accordingly. While this article suggests that anxious colleges and universities need not fear a sudden and meaningful liability shift, they should anticipate an increase in filed cases. The collateral costs and consequences of violence on the scale of Virginia Tech are enormous and likely to grow. Litigation is likely to ensue over the recent distribution of the $8.5 million Hokie Spirit Fund regarding who, how, and to what extent the families and the injured are compensated.[198] The financial costs to Virginia Tech will be significant, the effects on morale and student mental health cannot yet be known, and the media coverage has been mixed, at best, for the university and its profile. Regardless of the potential for liability, colleges and universities need to seek effective means of earlier intervention.

Rarely is this type of violence truly random and without any forewarning. Colleges and universities must attempt to become more adept at reading warning signs and responding appropriately. This does not mean to suggest a duty of monitoring every campus activity with a security camera, or a need to invest in high-cost profiling software that claims to predict which students will go over the edge. It does mean, however, that a well-functioning behavioral intervention model should be in place on each college and university campus. A team composed of some combination of representatives from the following departments should be in place: student affairs administration (preferably someone with authority over student conduct), counseling, campus law enforcement, campus women's center, human resources, disability services, housing and residence life, general counsel, and faculty.[199] This type of team, called a CARE Team at Virginia Tech[200] and a Behavioral Intervention Team at the University of South Carolina,[201] may vary in membership but should not vary in function. Its job is to be the central clearinghouse for at-risk student (and possibly staff) behavior, to make decisions about each behavioral report, to ensure follow-up and provision of support, and to track and monitor both institutional response and the progress of

197. It is with great sadness that this prediction proved true at Northern Illinois University shortly after the authors completed this article. [EDS.] *See* Susan Saulny & Monica Davey, *Gunman Slays Five in Illinois at a University*, N.Y. TIMES, Feb. 15, 2008, at A1.

198. *See* Larry Hincker, *Virginia Tech Distributes Hokie Spirit Monies to Families of Those Slain on April 16 and to Selected Others*, VIRGINIA TECH NEWS, Oct. 31, 2007, *available at* http://www.vtnews.vt.edu/story.php?relyear=2007&itemno=645.

199. For a comprehensive behavioral intervention Whitepaper, see BRETT A. SOKOLOW & STEPHANIE F. HUGHES, RISK MITIGATION THROUGH THE NCHERM BEHAVIORAL INTERVENTION AND THREAT ASSESSMENT MODEL (2008), *available at* http://www.ncherm.org/pdfs/2008-whitepaper.pdf.

200. *See* VA. TECH DEAN OF STUDENTS OFFICE, CARE TEAM MANUAL (2007), *available at* www.dos.vt.edu/documents/CareTeamManual.pdf.

201. *See* Univ. of S.C., *Behavioral Intervention Team*, www.sc.edu/BIT (last visited Feb. 27, 2008).

students and staff who come to its attention.

Part of an effective behavioral intervention model is to create on campus a widespread culture of reporting. From faculty members to residence hall housekeepers to administrative support staff, every employee should have the responsibility to report incidents of misconduct, disruption, or student distress to the care team immediately. In that way, the team acts as a funnel, taking in a wide swath of reports and issuing narrow responses specific to the needs indicated by the reported behaviors or pattern of behaviors. Each team should act in accordance with a rubric used to classify behavior and response into escalating levels of seriousness. Communication should flow effectively between the reporters and team members with a feedback loop to the reporters of actions taken by the team. Teams should be empowered to meet with students, rather than simply determining support, response, or intervention in a vacuum.

Teams should have the authority to mandate assessment of the student by a therapist, either at the campus counseling center or within the community. If the campus culture does not at present support a mandated assessment approach to student mental health crises or suicidality, use the tragedy of Virginia Tech to catalyze discussions of positive changes for how the campus will address behavioral intervention going forward. Assessment requires good communication with campus or community mental health resources who need to notify the team immediately if a student ignores the mandate or discontinues the evaluation before its completion. Reaction from the team should be swift and strong, with the threat of a conduct code violation or referral to the campus conduct office. Interim suspension authority should be vested in the team, as well.

Effective behavioral intervention models have developed common alarms that signify trouble. While one campus may simply view a student being transported to the hospital as the inevitable result of overzealous drinking, behavioral intervention teams assess each student for signs that the alcohol usage was the result of self-medicating, possible depression, or other critical condition. Behavioral intervention teams also note excessive absenteeism as an at-risk factor, and collaborate successfully with faculty to monitor and respond. Training campus faculty, staff, administrators and students on these and other signs of risk are critical.

At Virginia Tech, the killer had alarming contact with faculty, roommates, the CARE team, counselors, police, residence hall staff, parents of other students, and the office of judicial affairs.[202] Many of these were contacted multiple times, including two police reports and discussions amongst at least four faculty members.[203] When functioning well, a behavioral intervention team will know about each of these contacts, and when it does, has the best chance of seeing the whole picture. By creating a resource that can view the entire constellation of disruption, distress, and dysregulation[204] from a broader perspective unavailable to

202. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, 40–46 (2007), *available at* www.governor.virginia.gov/TempContent/techPanelReport.cfm.

203. *Id.*

204. Dysregulation is the disruption of cognitive, affective, behavioral, and neurophysiological processes. Jane F. Gilgun, *Overview of Emotional Dysregulation*, June 2004,

the individuals interacting with the student on campus, effective interventions can be designed and implemented.

Take note when a person being tracked by the team suddenly goes quiet. As we all know, the Virginia Tech killer dropped off the radar screen after a series of alarming incidents, and was not heard from after December 2005 until April of 2007.[205] While it may be accurate that a student who goes quiet has found support and is having his or her needs met, it may be just as true that the student has learned that acting out brings unwanted attention. We tend to give our attention to the students demanding it most loudly, when, in fact, we ought to be concerned about a sudden pattern disruption where someone who is not coping effectively becomes quiescent. As they say in England, "Mind the Gap."

CONCLUSION

While colleges and universities may, in certain circumstances, have special relationships with members of the campus community, and may assume certain legal duties voluntarily, special relationship and assumption of duty theories rarely support a cause of action in negligence against a college or university that experiences violence. Even in jurisdictions that recognize a special relationship between the institution and its students, a plaintiff would still be required to show that someone of sufficient authority at the college or university knew that imminent harm was likely to result if no action was taken. Because violence is random, and colleges and universities are not in the business of predicting threats, shootings and other violent acts are rarely foreseeable. But, where there are warning signs, a court may find that a college or university owes a duty to its students under one of the other theories discussed above. In particular, it appears likely that characterization of the school and students as landowner and invitees may become a more popular basis for arguing for the existence of a duty. Once a duty is found, the question of liability in negligence—whether the college or university met that duty with reasonable care—then becomes a question for a jury.

Sovereign immunity generally shields public colleges and universities from liability for the acts of third parties who may visit violence on the campus. Most states have statutory waivers of immunity that will apply in some circumstances, though they may be limited. Planning, communication, and prevention efforts are extremely important for minimizing future risks. The increased frequency of violent acts on the campuses of educational institutions should serve as a warning to colleges and universities to take action and implement effective strategies to prevent, to the extent possible, future atrocities like the Virginia Tech shooting.

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http://ssw.cehd.umn.edu/img/assets/5661/Conditions_Dysregulation.pdf (last visited Feb. 18, 2008).

205. VA. TECH REVIEW PANEL, *supra* note 202, at 52.

COLLEGE AND UNIVERSITY STUDENTS WITH MENTAL DISABILITIES: LEGAL AND POLICY ISSUES

BARBARA A. LEE* & GAIL E. ABBEY**

INTRODUCTION

The prevalence of college and university students with mental disabilities has increased substantially over the past decade. A 2003 study found that the percentage of college and university students who sought counseling for psychological disorders doubled from 21 percent to 41 percent between 1989 and 2001.[1] During the same period, the number of students reporting problems with stress, anxiety, and learning disabilities also doubled.[2] More recently, a 2006 study by the National College Health Assessment reported that 44 percent of the nearly 95,000 college and university students surveyed replied that they "felt so depressed [that] it was difficult to function" during the previous year and 9.3 percent reported that they had "seriously considered attempting suicide" during the previous year.[3] Whether the nature of the mental disorder is a cognitive disorder (a "learning disability") or a psychiatric disorder, these impairments make a student's college or university experience more complicated and difficult, and, in some cases, affect the student's academic and/or social conduct as well.[4]

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1. Erica Goode, *More in College Seek Help for Psychological Problems*, N.Y. TIMES, Feb. 3, 2003, at A11.

2. *Id.*

3. Am. Coll. Health Ass'n, *American College Health Association National College Health Assessment Spring 2006 Reference Group Data Report (Abridged)*, 55 J. OF AM. C. HEALTH 195, 205 (2007).

4. For resources on developing accommodations for students with mental disorders, see ACCOMMODATING STUDENTS WITH LEARNING AND EMOTIONAL DISABILITIES (Ellen M. Babbit ed., 2d ed. 2005); THOMAS J. FLYGARE, STUDENTS WITH LEARNING DISABILITIES: NEW CHALLENGES FOR COLLEGES AND UNIVERSITIES (2d ed. 2002); Holly A. Currier, *The ADA Reasonable Accommodations Requirement and the Development of University Services Policies: Helping or Hindering Students with Learning Disabilities?*, 30 U. BALT. L.F. 42 (2000); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA*

In order to ensure that discrimination on the basis of disability will not contribute to these students' troubles, federal laws require colleges and universities to provide students who suffer from mental disabilities with reasonable accommodations under certain circumstances. The Individuals with Disabilities Education Act ("IDEA")[5] requires elementary and secondary schools receiving federal funding to accommodate students with disabilities;[6] thus, college and university students with mental disabilities may have been accommodated by schools in their pre-college years. As a result, members of the current generation of college and university students are likely to have heightened expectations about receiving services at the postsecondary level.[7]

Lawsuits by students with mental disorders usually challenge either a negative academic judgment made by a college or university (such as an academic dismissal) or a disciplinary decision (such as suspension or expulsion for misconduct). Students with these disorders have also challenged college and university decisions concerning housing assignments, service animals, and other forms of accommodation. In addition, the U.S. Office for Civil Rights ("OCR") has been confronted with a flurry of administrative complaints about the use by colleges and universities of "mandatory" or "involuntary" withdrawal policies for students who are at risk of self-inflicted harm.

This article discusses the responsibilities of colleges and universities (and the responsibilities of students) when a student informs an institution that he or she has a mental disability (either a cognitive disorder or a psychiatric disorder). Section I reviews the two primary federal laws that protect students against disability discrimination and require colleges and universities to provide reasonable accommodations under certain circumstances. Section II then analyzes student challenges to academic decisions—including denials of academic accommodations, dismissals for failure to meet academic standards, dismissals for academic misconduct, dismissals for failure to meet technical standards, and denials of readmission. Section II concludes that due to the rigorous requirements of federal law as interpreted by the Supreme Court and the principle of judicial deference to academic decisions, such challenges rarely succeed. Section III moves to disciplinary dismissals and the response of courts when students claim that the discipline imposed was a form of disability discrimination, finding that while student challenges to disciplinary decisions also generally fail, courts are less deferential to these decisions than to academic ones, and the cases of students who are able to provide evidence that a disciplinary decision was motivated by

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Requirements, 32 J.L. & EDUC. 217 (2003); Marie-Thérèse Mansfield, Note, *Academic Accommodations for Learning-Disabled College and University Students: Ten Years After* Guckenberger, 34 J.C. & U.L. 203 (2007); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560 (1998).

5. 20 U.S.C. §§ 1400–1487 (2000).

6. *Id.*

7. For an interesting discussion of heightened expectations regarding the *nature* of such services as a result of the "enrollment of 'millennials'—students born after 1982 who have grown up" during the "Information Age," see Laura Rothstein, *Millennials & Disability Law: Revisiting* Southeastern Community College v. Davis, 34 J.C. & U.L. 169, 170 (2007).

animosity will generally proceed to trial. Section IV turns to the troubling problem of students who are at-risk of self-inflicted harm and the rights and responsibilities of institutions and students in these circumstances. This article concludes by making a variety of suggestions for college and university policy and practice when dealing with students with mental disorders.

I. WHAT THE ADA AND THE REHABILITATION ACT REQUIRE

Two federal statutes authorize discrimination suits by students against colleges and universities: the Americans with Disabilities Act of 1990 ("ADA")[8] and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act").[9] When students allege discrimination against colleges and universities, claims under the ADA and the Rehabilitation Act are "largely the same."[10] The statutes differ in only two relevant respects: (1) a college or university must receive federal funds in order to be liable under the Rehabilitation Act, but the ADA contains no similar requirement[11] and (2) the wording of the Rehabilitation Act's causation standard differs from that of the ADA.[12]

Title II of the ADA declares: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[13] Public colleges and universities are public entities subject to Title II.[14] Title III imposes largely the same prohibition on "places of public accommodation," a term which specifically includes

8. 42 U.S.C. § 12182(a) (2000).

9. 29 U.S.C. § 794 (2000 & Supp. 2004). While this article uses the term "Rehabilitation Act" as shorthand for the disability discrimination provisions of Section 504 of the Rehabilitation Act of 1973, many cases and scholarly articles refer to the same provisions under the moniker "Section 504."

10. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *22 (S.D. Ohio June 3, 2005). *See, e.g.*, Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 536 n.12 (3d Cir. 2007); Mershon v. St. Louis Univ., 442 F.3d 1069, 1074 n.3, 1076 n.4 (8th Cir. 2006); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005) ("The ADA and the Rehabilitation Act are generally construed to impose the same requirements."); Amir v. St. Louis Univ., 184 F.3d 1017, 1029 n.5 (8th Cir. 1999) ("Rehabilitation Act claims are analyzed in a manner similar to ADA claims."); Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 78 n.2 (2d Cir. 1998) (holding that Titles II and III of the ADA and the Rehabilitation Act "impose largely the same requirements"); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) ("[The] ADA and Rehabilitation Act 'are frequently read in sync.'" (quoting Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 133 (D. Mass. 1997))).

11. *See Mershon*, 442 F.3d at 1076 n.4 (citing Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)). *See also* Pangburn v. N. Ky. Univ., No. 99-5474, 2000 U.S. App. LEXIS 6413, at *4 (6th Cir. Mar. 23, 2000) (per curiam) ("The 'principal distinction between the two statutes is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance.'" (quoting McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997))).

12. *See infra* Section I.A.3.

13. 42 U.S.C. § 12132 (2000).

14. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997) (citing Coleman v. Zatechka, 824 F. Supp. 1360, 1367 (D. Neb. 1993)).

"undergraduate or postgraduate private school[s]."[15] Title III also explicitly "prohibits discrimination against persons with disabilities in professional examinations" such as bar examinations and medical boards.[16] The Rehabilitation Act similarly states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[17] The regulations of the Rehabilitation Act recognize its applicability to colleges and universities.[18]

Under both statutes, the disability discrimination inquiry is guided by regulations issued by the Equal Employment Opportunity Commission ("EEOC"), despite the regulations' reference to employment relationships.[19] But, "unique considerations . . . come into play when the parties to a [discrimination] case are a student and an academic institution."[20] In this setting, courts generally conduct the required case-by-case analysis with "a certain degree of deference . . . to the [judgment] of an academic institution."[21] "Universities have long been considered to have the freedom to determine 'what may be taught, how it shall be taught, and who may be admitted to study.'"[22] Thus, "when reviewing the substance of academic decisions, courts show great respect for the faculty's professional judgment," giving faculties "the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."[23] Yet decisions made by academic institutions are by no means insulated from judicial review.[24]

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15. *Guckenberger II*, 974 F. Supp. at 133 n.24 (quoting 42 U.S.C. § 12181(7)(J) (1994)). *See Amir*, 184 F.3d at 1027–28. *See also Mershon*, 442 F.3d 1069; Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997).

16. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000).

17. 29 U.S.C. § 794(a) (2000).

18. *Guckenberger II*, 974 F. Supp. at 133 n.24 (quoting 34 C.F.R. § 104.41 (1990)).

19. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1387–88 (S.D. Ga. 2002).

20. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 88 (D. Mass. 1997) (quoting Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 793 (1st Cir. 1992)).

21. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)). *See Wynne II*, 976 F.2d at 792; Anderson v. Univ. of Wis., 841 F.2d 737, 741 (7th Cir. 1988); Falcone v. Univ. of Minn. & Bd. of Regents, No. Civ. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *14 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) ("Courts regularly apply the academic deference rule to challenges arising under the [ADA] and Rehabilitation Act.").

22. *Guckenberger II*, 974 F. Supp. at 148 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

23. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) (internal citations omitted).

24. *See infra* Section II.

A. The Elements of a Claim

To state a claim under the Rehabilitation Act or the ADA a student-plaintiff "must establish that: (1) she has a disability as defined by the acts; (2) she is otherwise qualified for the benefit or program at issue; and (3) she was excluded from the benefit or program on the basis of her disability."[25] The vast majority of ADA and Rehabilitation Act claims allege that a college or university failed to make reasonable accommodations to known physical or mental limitations.[26] In such cases, "there is no requirement to demonstrate any adverse action other than the failure to accommodate itself."[27] Rehabilitation Act and ADA claims may also be brought on the basis of retaliation.[28] In order to show retaliation, a plaintiff "must show that he engaged in protected activity and that there was a causal connection between that activity and the adverse action."[29] Protected activity consists of such things as "filing a charge, or testifying, participating, or assisting in any investigation or proceeding relating to discrimination."[30] A retaliation claim can succeed when a student asserts that a college or university discriminated against her in retaliation for her allegations of disability discrimination, even when the student cannot demonstrate that she is actually disabled.[31]

Some student-plaintiffs also bring actions under state disability laws. Many of

25. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord* Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 553 n.32 (3d Cir. 2007); Buhendwa v. Univ. of Colo. at Boulder, 214 F. App'x 823, 827 (10th Cir. 2007); Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005); Carten v. Kent State Univ., 78 F. App'x 499, 500 (6th Cir. 2003); Dicks v. Thomas More Coll., 73 F. App'x 149, 151 (6th Cir. 2003); *Kaltenberger*, 162 F.3d at 435; Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798 (S.D. Ohio June 3, 2005).

26. Under the ADA, the definition of "discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A) (2000). Both statutes prohibit such discrimination. *See* 29 U.S.C. § 794(a) (2000); 42 U.S.C. § 12182(b)(2)(A)(ii) (2000); Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006) (citing 42 U.S.C. § 12182(a) (2000)); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000) (quoting 42 U.S.C. § 12112(b)(5)(A) (1994)). *Accord* Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997); *Guckenberger II*, 974 F. Supp. at 145 (citing 42 U.S.C. § 12182(b)(2)(A)(ii) (1994)).

27. *Mershon*, 442 F.3d at 1077 n.5.

28. Title V of the ADA governs claims for retaliation. *See* 42 U.S.C. § 12203(a) (2000) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

29. Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2 (M.D. Tenn. Aug. 8, 2007) (citing Penny v. United Parcel Serv., 128 F.3d 408, 417 (6th Cir. 1996)). *Accord Mershon*, 442 F.3d at 1074; Amir v. St. Louis Univ., 184 F.3d 1017, 1025 (8th Cir. 1999).

30. *Kazerooni*, 2007 WL 2300379, at *2 (citing McElroy v. Phillips Med. Sys. of N. Am., Inc., 127 F. App'x 161, 171 (6th Cir. 2005)).

31. Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 240 (D. Mass. 1999).

these state statutes parallel the federal laws and are interpreted accordingly,[32] while others contain differing language and thus provide either less or more protection against disability discrimination.[33]

1. Disabled

"The plaintiff bears the burden of proving that he or she is disabled."[34] Under both the ADA and the Rehabilitation Act, an individual is disabled "if he or she:

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32. *See, e.g.*, Pangburn v. N. Ky. Univ., No. 99-5474, 2000 U.S. App. LEXIS 6413, at *4–5 (6th Cir. Mar. 23, 2000) (per curiam) (stating that the Kentucky Civil Rights Act "mirrors the ADA and Rehabilitation Act"); Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998) (holding that a plaintiff must make the same showing under the Ohio Civil Rights Act as under the ADA and Rehabilitation Act); Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *10 (D. Mass. Dec. 9, 2003) (Massachusetts Equal Rights Act, Mass. Gen. Laws ch. 93 § 103 and the definition of disability in ch. 151B § 1(17) "parallel" the ADA and the Rehabilitation Act and therefore such "state law claims are subject to the same disposition as [a student's] federal claims"); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (stating that Vermont's Public Accommodations Act is "to be construed so as to be consistent with the [ADA]"); *Pacella*, 66 F. Supp. 2d at 242–43; Hash v. Univ. of Ky., 138 S.W.3d 123, 125 (Ky. Ct. App. 2004); Tori v. Univ. of Minn., No. A06-205, 2006 WL 3772316, at *3 (Minn. Ct. App. Dec. 26, 2006) ("Because the statutes use similar language and promote the same purpose, Minnesota courts have relied on interpretations of the ADA, the Rehabilitation Act, and the [Minnesota Human Rights Act] to construe one another."); Columbus Civil Serv. Comm'n v. McGlone, 697 N.E.2d 204, 206–07 (Ohio 1998) ("The federal [ADA] is similar to the Ohio handicap discrimination law. . . . We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").

33. See, e.g., Cole v. State Farm Ins. Co., 128 P.3d 171, 176–77 (Alaska 2006), where the court noted the difference between the state disability law and the ADA:

> Cole also contends that insurance is a "public accommodation" under the Human Rights Act. He correctly notes that an insurance office is specifically listed as a public accommodation under the Americans with Disabilities Act. But similar language is absent from the Human Rights Act. In addition, the Human Rights Act dates from 1965, well before the ADA, and Cole fails to explain why it should be understood to incorporate the ADA's later definition of public accommodation.

See also Soules v. Mount Holiness Mem'l Park, 808 A.2d 863, 866 (N.J. Super. Ct. App. Div. 2002). The *Soules* court compared New Jersey's disability law with the ADA and Rehabilitation Act:

> The error in the judge's rationale, and in his reliance upon these federal and out-of-state cases, is that [the definition of handicap in New Jersey's Law Against Discrimination or "LAD"], and its scope, is not comparable to the definitions and scope of handicap or disability under the ADA, the RA, or comparable other state laws. As we have recently observed, "our statute is very broad and does not require that a disability restrict any major life activities to any degree."

Id. Cf. Haskins v. President & Fellows of Harvard Coll., No. 993405, 2001 WL 1470314, at *2–3 (Mass. Super. Ct. Sept. 18, 2001) ("[Massachusetts General Law ch. 272, § 98] prohibits discrimination based on physical disability in any 'place of public accommodation, resort or amusement' . . . . Even so, the list of examples [provided in the statute] patently does not include anything akin to educational facilities or academic programs. . . . This should be compared with the Americans [w]ith Disabilities Act, which specifically defines public accommodation to include secondary, undergraduate, and post-graduate private schools." (internal citations omitted)).

34. Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1063 (9th Cir. 2005).

(1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."[35] Where there is a claim of "perceived disability," a plaintiff must prove that the college or university mistakenly believed that the student had an impairment that substantially limited her ability to learn.[36] A plaintiff qualifies under the "regarded as" prong if the plaintiff:

> (1) has an impairment that does not substantially limit a major life activity, but is treated by [a college or university] as though it does; (2) has an impairment that limits a major life activity only because of the others' attitudes towards the impairment; or (3) has no impairment whatsoever, but is treated by [a college or university] as having a disability as recognized by the ADA.[37]

"The mere fact that [a college or university] makes an accommodation is not evidence that it regarded plaintiff as having a disability."[38]

The statutes provide some exclusions defining certain categories of individuals as not "disabled." For example, the Rehabilitation Act states that "the term individual with a disability does not include an individual who is *currently* engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."[39] Yet in most cases, determining whether an individual is disabled must be done pursuant to an "individualized inquiry" into each of the three prongs of the disability test: whether the individual has an impairment, whether that impairment affects a "major life activity," and whether that affected major life activity is "substantially limited" by the impairment.[40]

"'Impairment,' in addition to covering physiological disorders, includes 'any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.'"[41] Mental disorders such as clinical anxiety, depression, obsessive compulsive

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35. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord Wong*, 410 F.3d at 1063; *Pacella*, 66 F. Supp. 2d at 237–38.

36. Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005). *Accord Marlon*, 2003 WL 22914304, at *9.

37. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002) (quoting 29 C.F.R. § 1630.2(l) (1991)). *Accord* Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2 (M.D. Tenn. Aug. 8, 2007) ("[T]o succeed on a 'regarded as' claim, the perceived condition must be an 'impairment' under the ADA." (quoting EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 440 n.2 (6th Cir. 2006))).

38. *Marlon*, 2003 WL 22914304, at *9 (citing Mahon v. Crowell, 295 F.3d 585, 592 (6th Cir. 2002). *See* Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001); Plant v. Morton Int'l, Inc., 212 F.3d 929, 938 (6th Cir. 2000)).

39. *Fedorov*, 194 F. Supp. 2d at 1388 (quoting 29 U.S.C. § 705(20)(C)(i) (2000)).

40. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *22 (S.D. Ohio June 3, 2005).

41. Wynne v. Tufts Univ. Sch. of Med. (*Wynne I*), 932 F.2d 19, 23 n.3 (1st Cir. 1991) (quoting 34 C.F.R. Ch. 1, § 104.3(j)(2)(i) (1990)). *Accord Brown*, 2005 U.S. Dist. LEXIS 40798, at *23 (citing 29 C.F.R. § 1630.2(h) (1991)); Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 134 (D. Mass. 1997) (citing 28 C.F.R. § 36.104 (1994)).

disorder, and bipolar disorder are clearly "impairments" under the statutes.[42] The definition of impairment is so broad that the disability inquiry rarely turns upon the existence of an "impairment."[43] Instead, the issues of whether a life activity is "major" and "substantially limited" are generally dispositive of the disability question. The Supreme Court has emphasized that these two terms must be "interpreted strictly to create a demanding standard for qualifying as disabled."[44] While one might assume that federal disability laws extend their protective provisions to all individuals who consider themselves "disabled," the concept of "disability" as defined by the Supreme Court is significantly more restrictive. As a result, many individuals who are "impaired" are not, under federal law, "disabled."

"Major life activities" refers to those activities that are "of central importance to most people's daily lives."[45] The court must determine, after an "individualized assessment,"[46] "whether the life activity is 'major' as contemplated by the ADA, not whether the life activity is particularly important to the plaintiff."[47] Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, sleeping, and breathing, as well as reading, writing, learning, studying, and working.[48] Yet an impairment that "interferes with an individual's ability to perform a particular function, but does not significantly decrease that individual's ability to obtain a satisfactory education otherwise, does not substantially limit the major life activity of learning."[49] Thus, "[h]andling a dental

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42. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 3 (D. Mass. 2001). *See* Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (obsessive compulsive disorder); Satir v. Univ. of New England, No. Civ. 04-42-P-S, 2005 WL 757576, at *6 (D. Me. Feb. 10, 2005) (depression); *Marlon*, 2003 WL 22914304, at *6 (depression and panic attacks).

43. For example, both alcoholism, see Bailey v. Georgia-Pac. Corp., 306 F.3d 1162, 1167 (1st Cir. 2002), and addiction to controlled substances, see *Fedorov*, 194 F. Supp. 2d at 1387–88, have been treated as impairments.

44. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

45. *Id.* at 198.

46. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1104 (D.C. Cir. 2007).

47. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 79 (2d Cir. 1998). *Accord Amir*, 184 F.3d at 1027 ("Major life activities do not include those activities that, although important to the individual plaintiff, are not significant within the meaning of the [statutes].").

48. *See* 28 C.F.R. § 35.104 (1991) (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working). *See also Bartlett*, 226 F.3d at 80 (reading and working); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000) (reading and writing); *Amir*, 184 F.3d at 1027 (eating, drinking, and learning); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 155 (1st Cir. 1998) (learning); Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2–3 (M.D. Tenn. Aug. 8, 2007) (sleeping and studying); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (walking, speaking, and working); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238–39 (D. Mass. 1999) (seeing and learning). For an extended discussion of the required showing where "working" is alleged to be a substantially impaired major life activity, see Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *6–7 (D. Mass. Dec. 9, 2003).

49. *Pacella*, 66 F. Supp. 2d at 239 (quoting Knapp v. Nw. Univ., 101 F.3d 473, 481 (7th Cir. 1996)). *See also Singh*, 508 F.3d at 1104 (explaining that in employment cases, the relevant question is whether the plaintiff can "'perform the variety of tasks central to most people's daily lives,' as opposed to the class of 'tasks associated with [their] specific job[s]'" (quoting *Toyota*, 534 U.S. at 200–01)); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir.

drill and participation in the clinics and classes of a dental school are not activities 'essential' to daily living,"[50] nor is "test-taking" a major life activity.[51] The argument that a college or university prevented a student from "learning" by expelling her cannot succeed since such an interpretation "would expand the definition of 'disability' to a point unjustified by the [statutes]."[52]

The word "substantially" in the phrase "substantially limits," "suggests 'considerable' or 'to a large degree' [and] clearly precludes impairments that interfere in only a minor way" with such major life activities.[53] An individual with an impairment is only considered disabled under federal disability law "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed."[54] "Any impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation under the ADA."[55] The "substantially limits" phrase also incorporates a causation requirement. Thus, the definition of "disability" "encompasses the requirement that it be the impairment, and not some other factor or factors, that causes the substantial limitation."[56]

An individual is substantially limited if she is "unable to perform a major life activity that the average person in the general population can perform."[57] The statutes thus compare "the performance of an individual who alleges a restriction in a major life activity to that of 'most people,'"[58] requiring that an individual be "restricted to a greater degree than a majority of people."[59]

Take, for example, two hypothetical students. Student A has average

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1998) (holding that medical student with test anxiety disorder was not an individual with a disability because the student failed to demonstrate that the condition impeded performance in a wide variety of disciplines).

50. Millington v. Temple Univ. Sch. of Dentistry, No. 04-3965, 2006 WL 2974141, at *7 (E.D. Pa. Oct. 13, 2006), *aff'd*, 2008 WL 185792 (3d Cir. Jan. 23, 2008).

51. *Singh*, 508 F.3d at 1104.

52. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002).

53. Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1064 (9th Cir. 2005) (quoting *Toyota*, 534 U.S. at 197). *See* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 424 (S.D. W. Va. 1997) (stating that the ADA's legislative history establishes that "substantially limiting impairments cannot be 'minor' or 'trivial'").

54. 28 C.F.R. pt. 35, app. A § 35.104 (1991).

55. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *25 (S.D. Ohio June 3, 2005) (citing Mahon v. Crowell, 295 F.3d 585, 590–91 (6th Cir. 2002)).

56. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 84–85 (2d Cir. 1998).

57. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626–27 (6th Cir. 2000). *See Price*, 966 F. Supp. at 425 ("[Federal] regulations state that, '[a]n individual is not substantially limited in a major life activity if the limitation does not amount to a significant restriction when compared with the abilities of the average person.'" (quoting 29 C.F.R. pt. 1630, app. (1996))).

58. *Gonzales*, 225 F.3d at 626–27. *See id.* at 629 (holding "Gonzales's impairment simply does not meet the . . . definition of 'substantially limits,' because he can read as well as the average person"); *Brown*, 2005 U.S. Dist. LEXIS 40798, at *31 ("Dr. Layne's specific findings comparing plaintiff with other highly-educated 30 year-olds do not support a determination that plaintiff is disabled because they do not show that plaintiff is significantly restricted in the ability to learn as compared to most people or to 'the average person in the general population.'").

59. *Price*, 966 F. Supp. at 425.

> intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[60]

Many student plaintiffs have argued that they are "substantially limited in the major life activity of learning as compared 'with a population of similar age and education level,' or, alternatively, 'with what [they] could achieve if [they were] either free of . . . learning disabilities or [were] provided reasonable accommodations."[61] But the majority of courts have concluded that the "most people" or "general population" standard requires that where "plaintiffs are able to learn as well as or better than the average person in the general population," the court must rule in favor of the college or university.[62] As a result, when a student "has a history of significant scholastic achievement," courts will rarely find "any substantial limitation on learning ability."[63]

The most thorough examination of the issue of "substantially limited" occurred in a case related to, but not involving, postsecondary education. In *Bartlett v. New York State Board of Law Examiners*,[64] a law school graduate with dyslexia, Marilyn Bartlett, requested accommodations from state bar examiners on three occasions. On each occasion, the accommodation request was denied and Bartlett failed the bar examination.[65] She sued, claiming that denying her the accommodations violated the ADA and the Rehabilitation Act. The trial and

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60. *Id.* at 427. The ADA's legislative history provides an additional example in the physical disability context: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because *most people* would not be able to walk eleven miles without experiencing some discomfort." *Id.* at 425 (quoting S. REP. NO. 101-116, at 23 (1989)). For an example of a case applying this principle, see Knapp v. Nw. Univ., 101 F.3d 473, 481 (7th Cir. 1996) (playing intercollegiate basketball).

61. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1100 (D.C. Cir. 2007).

62. *Price*, 966 F. Supp. at 422.

63. *Id.* at 427. For the seminal case addressing this issue, see Wong v. Regents of the Univ. of Cal., 410 F.3d 1052 (9th Cir. 2005). *See also Singh*, 508 F.3d at 1100 ("There is something poignant, in some cases even tragic, in the plight of a person cut off from exceptional achievement by some accident of birth or history. But the ADA is not addressed to that plight. Rather, it is designed to enable the disabled, as a group, to participate in mainstream society.").

64. 226 F.3d 69 (2d Cir. 1998).

65. *Id.* at 75. Bartlett took the bar examination twice without requesting accommodations. While the case was pending, she took the bar examination a sixth time with certain accommodations, but did not pass. *Id.* at 76–77.

appellate courts concluded that she was "substantially limited" and thus was protected under these laws.[66] The bar examiners appealed to the Supreme Court, and the Court, in a one-sentence opinion, vacated the appellate court's opinion, instructing it to analyze Bartlett's claims under its recent ruling in the *Sutton* trilogy,[67] a series of cases in which the Court analyzed and defined the concept of "substantially limited."[68] On remand, the appellate court stated that the proper standard is whether Bartlett's limitations on her ability to read "amount to a substantial limitation in comparison to most people or only a 'mere difference.'"[69] Given the results in *Bartlett* and the other cases discussed above, college and university students who compare themselves with other students, rather than to "most people" (who are not college or university students) will have difficulty persuading a court that they meet the disability statutes' "substantially limited" requirement.

In the *Sutton* trilogy, the Supreme Court extended the "average-person criterion,"[70] holding that an individual is only disabled under the disability statutes if her impairment substantially limits her major life activities even when she uses corrective devices or employs other mitigating measures,[71] including "*non*-artificial offsetting measures"[72] and "self-accommodations,"[73] such as "a vision-impaired person's 'learning to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects.'"[74] In other words, in determining whether individuals are disabled "they should be examined in their corrected state."[75]

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66. *Id.* at 74.

67. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

68. *Bartlett*, 226 F.3d at 74–75.

69. *Id.* at 81. On remand, the trial court ruled that Bartlett was substantially limited in both reading and working, and ordered the bar examiners to give her the following accommodations: (1) double the normally allotted time, over four days; (2) use of a computer; (3) permission to circle multiple choice answers in the exam booklet; and (4) large print on both the state and multistate exams. The court also ordered the bar examiners to pay Bartlett compensatory damages. No. 93 Civ. 4986, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).

70. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1101 (D.C. Cir. 2007).

71. *See Sutton*, 527 U.S. 471; *Murphy*, 527 U.S. 516; *Albertson's*, 527 U.S. 555.

72. *Singh*, 508 F.3d at 1101.

73. *Bartlett*, 226 F.3d at 80.

74. *Singh*, 508 F.3d at 1101 (quoting *Albertson's*, 527 U.S. at 565) ("[M]easuring Singh's limitations by comparison to her hypothetical achievements without impairment, to her fellow medical students, or to others of similarly elite educational background (individuals selected in part on the basis of their intelligence and dedication), would place the same mitigating factors on both sides of the comparison, rendering them effectively irrelevant.").

75. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 630 (6th Cir. 2000). *See, e.g.*, Morgan v. Nova Se. Univ., Inc., No. 07-60759, 2007 WL 2320589, at *3 (S.D. Fla. Aug. 10, 2007) ("From an examination of the four corners of Plaintiff's complaint, and when taking into account Plaintiff's mitigating measures, there is no basis for finding that Plaintiff is disabled under the ADA."); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238 (D. Mass. 1999) ("In light of *Sutton* and *Albertsons*, Pacella cannot claim a disability with respect to his eyesight because, as corrected, it does not substantially limit a major life activity.").

2. Otherwise Qualified[76]

A plaintiff who demonstrates that she is disabled must also prove that she is "otherwise qualified."[77] Being "otherwise qualified" for retention is not the same as being qualified for admission.[78] "A handicapped or disabled person is 'otherwise qualified' to participate in a program if she can meet its necessary requirements with reasonable accommodation."[79] Conversely, a college or university is "entitled to summary judgment if [it] can show that [the student] is not qualified . . . because even with the accommodation, he could not meet the institution's academic standards."[80] "Thus, in determining whether an individual meets the 'otherwise qualified' requirement . . . it is necessary to look at more than the individual's ability to meet a program's *present* requirements."[81]

However, a college or university is "not obligated to provide accommodation until [the student] provides a proper diagnosis . . . and [requests] specific accommodation."[82] An institution "does not have to accept any statement by a

76. In *Singh*, the D.C. Circuit expressed its "legal uncertainty as to whether a Title III plaintiff must be 'otherwise qualified' [since] Title III of the ADA contains neither the phrase 'otherwise qualified' nor 'qualified individual,' [as do] . . . Titles I and II, as well as . . . the Rehabilitation Act." 508 F.3d at 1105. The court noted that the First, Sixth, and Eighth Circuits have "read an equivalent requirement into Title III" but ultimately concluded that it was not presented with the issue due to a procedural point. *Id.* at 1106.

77. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *16 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906, 909 (8th Cir. 2000)).

78. McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 854 (5th Cir. 1993) ("In argument, McGregor often ignores the difference between being otherwise qualified for admission and being otherwise qualified for retention.").

79. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998). *Accord McGregor*, 3 F.3d at 855; el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001).

80. *Falcone*, 2003 U.S. Dist. LEXIS 15787, at *21.

81. Wynne v. Tufts Univ. Sch. of Med. (*Wynne I*), 932 F.2d 19, 24 (1st Cir. 1991).

82. *Kaltenberger*, 162 F.3d at 437 ("That plaintiff told an academic counselor at the College that she thought she might have adult attention deficit disorder simply did not impose an obligation to offer accommodations."). *See* Singh v. George Wash. Univ. Sch. of Med. & Health Scis., 508 F.3d 1097 (D.C. Cir. 2007); Mershon v. St. Louis Univ., 442 F.3d 1069, 1077 (8th Cir. 2006) ("Mershon bears the initial burden of demonstrating that he requested reasonable accommodations and that those accommodations would render him otherwise qualified for admission to the professional degree program." (internal citations omitted)); Goldstein v. Harvard Univ., 77 F. App'x 534, 537 (1st Cir. 2003) (per curiam) ("The operative provision, 42 U.S.C. § 12182(b)(2)(A)(ii), requires a person with a disability to request a reasonable and necessary modification, thereby informing the operator of a public accommodation about the disability." (internal citation omitted)); Carten v. Kent State Univ., 78 F. App'x 499, 500 (6th Cir. 2003) (affirming grant of summary judgment where student presented no evidence sufficient to raise a material question of fact as to whether he requested accommodations); Rosenthal v. Webster Univ., No. 98-2958, 2000 WL 1371117, at *1 (8th Cir. Sept. 25, 2000) (per curiam) (affirming grant of summary judgment where "Rosenthal did not produce any valid evidence that [the university] knew of his bipolar disorder before they suspended him."); Satir v. Univ. of New England, No. Civ. 04-42-P-S, 2005 WL 757576, at *6 (D. Me. Feb. 10, 2005) ("A plaintiff pursuing a discrimination claim against an educational institution must demonstrate that she or he requested a reasonable and necessary modification, putting the defendant on notice of the

student, or even a medical professional, as to the disability of a student."[83] It "may impose certain requirements regarding the nature of the evidence demonstrating the disability."[84] Yet "a university is prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation."[85] The onus is also on the student to request specific accommodations[86] and to demonstrate that they are available[87] and reasonable.[88] Once a student asserts that she is an individual with a disability and requests reasonable accommodations, "the institution has responsibilities as well."[89]

But "discrimination laws do not require 'an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.'"[90] Where the requested accommodations would "result in a fundamental alteration of services or impose an undue burden," the ADA and Rehabilitation Act do not require them.[91] Thus, for example, a college or university "is not required to 'accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a

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student's disability, be the claim be brought under Title III of the ADA or the Rehabilitation Act." (internal citation omitted)); *Falcone*, 2003 U.S. Dist. LEXIS 15787, at *17–18.

83. Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (citing Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 135 (D. Mass. 1997)).

84. *Id.*

85. *Id.* *See generally Guckenberger II*, 974 F. Supp. at 134–42. The type of documentation, the qualifications of the individual providing the documentation, and the age of the documentation have all been the subject of litigation. For a discussion of issues related to documentation, see Rothstein, *supra* note 7, at 179–81. *See also* LAURA F. ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 3.2 (3d ed. 2006).

86. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *36 (S.D. Ohio June 3, 2005).

87. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (citing Phelps v. Optima Health, Inc., 251 F.3d 21, 27 (1st Cir. 2001)).

88. *Abdo*, 263 F. Supp. 2d at 777 (citing Stone v. City of Mt. Vernon, 118 F.3d 92, 96–97 (2d Cir. 1997)); *Guckenberger II*, 974 F. Supp. at 146.

89. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *20 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)). It is unclear whether these "responsibilities" include the provision of accommodations in "regarded as" or "perceived disability" cases. *See* Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 15 (4th Cir. 2005) ("The parties dispute whether the ADA's accommodation requirement applies with equal force to a 'regarded as' disabled plaintiff. . . . This question has not been decided by this circuit, and our sister circuits are divided on the issue."). *Compare* Shannon v. N.Y. City Transit Auth., 332 F.3d 95, 104 n.3 (2d Cir. 2003), *and* Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999), *with* Katz v. City Metal Co., 87 F.3d 26, 33–34 (1st Cir. 1996).

90. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979)). *Accord* McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 858 (5th Cir. 1993); Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997) (affirming summary judgment for university since "[e]ven assuming that Scott is disabled, any modification in WSU's practices would fundamentally alter the nature of its services") (internal citation omitted)).

91. Toledo v. Sanchez, 454 F.3d 24, 32 (1st Cir. 2006) (internal citation omitted). *See* Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006).

course of study.'"[92] Additionally, under both the ADA and the Rehabilitation Act, a student who presents a "direct threat" to the health and safety of others, "is not 'otherwise qualified' even if the behavior was precipitated by her mental illness."[93]

Once a plaintiff has established that the request for the accomodation is reasonable, "the burden shifts to [the college or university] to demonstrate that the requested [accomodation] would fundamentally alter the nature of its . . . program,"[94] that the accommodation constitutes an "undue" burden or hardship,[95] or that a student is a "direct threat."[96] Institutions can also avoid liability for failing to provide accommodations by demonstrating that the student "failed to request any real accommodation, that further accommodations would not have been of any use, that reasonable accommodations had already been advanced, or that the requested accommodations were unreasonable under the circumstances."[97] "The contour of a postsecondary institution's affirmative duty to accommodate a [disabled] student is shaped on a case-by-case basis."[98] "[W]hat is reasonable in a particular situation may not be reasonable in a different situation. Ultimately, what is reasonable depends on a variable mix of factors."[99]

3. Causation

A student plaintiff who demonstrates that she is both "disabled" and "otherwise qualified" must also prove that she was excluded from a program or benefit *because* of her disability.[100] Here the language of the ADA and the Rehabilitation

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92. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 90 (D. Mass. 1997) (quoting Doherty v. S. Coll. of Optometry, 862 F.2d 570, 575 (6th Cir. 1988)).

93. Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999).

94. Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 147 (D. Mass. 1997).

95. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *20 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)).

96. *Ascani*, 1999 WL 220136, at *1.

97. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1105 (D.C. Cir. 2007) (internal citations omitted).

98. McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 862 (5th Cir. 1993). *See, e.g.*, Finger v. Univ. of Wis. Sys. Bd. of Regents, No. 92-1779, 1993 WL 217161, at *1 (7th Cir. June 18, 1993). The *Finger* court held that university satisfied its duty to provide a student with educational "auxiliary aids" where the university

> completed tapings within an average of four to six weeks, although occasionally the delays were longer, . . . Finger had the option to pick up the tapes in installments, so that he did not need to wait for each book to be recorded in full. . . . Recordings for the Blind and the Milwaukee Public Library taped texts free of charge, and the Golda Meir Library at UWM housed a Kurzweil Reading machine, which Finger was trained to use.

Id.

99. Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 795 (1st Cir. 1992).

100. *See, e.g.*, Buhendwa v. Univ. of Colo. at Boulder, 214 F. App'x 823, 827 (10th Cir. 2007) (affirming grant of summary judgment where "[t]he alleged discrimination she experienced was not based on language-induced test-taking anxiety, but was instead caused by the fact that she fell asleep during the examination.").

Act diverge.[101] The Rehabilitation Act requires that plaintiffs "demonstrate that the discrimination occurred 'solely by reason of' their disability,"[102] while under the ADA, plaintiffs "need only demonstrate that their disability played a motivating role in the discriminatory action."[103] In other words, under the ADA a student plaintiff must show "that but for his disability he would have been allowed to continue in the . . . program" or would have been awarded the benefit.[104] There is some debate as to how much these two standards differ, especially after recent amendments to the Rehabilitation Act.[105] It is clear that under both statutes the required showing of causation is made when a plaintiff demonstrates that the college or university dismissed the student "even though it would have graduated a student whose academic performance was as poor but whose difficulties did not stem from a disability."[106]

In both ADA and Rehabilitation Act cases, a student-plaintiff who provides no direct evidence of discrimination can still succeed under the disparate treatment model of discrimination enunciated in *McDonnell Douglas Corp. v. Green*.[107] The plaintiff must first "make a threshold showing . . . by offering indirect evidence of discrimination."[108] However, if the college or university articulates "a non-discriminatory justification for dismissing the plaintiff from the program" or denying the plaintiff a benefit, "then the plaintiff must prove that the defendant's proffered justification is a mere pretext concealing its true discriminatory motive, namely, one motivated by plaintiff's disability" and not by legitimate academic, disciplinary, or safety concerns.[109] "When pretext is at issue in a discrimination case, it is a plaintiff's duty to produce specific facts which, reasonably viewed, tend logically to undercut the defendant's position."[110]

If a plaintiff fails to provide direct evidence of discriminatory animus or offer indirect evidence of discrimination, her claims under the ADA and Rehabilitation Act must fail.[111] When a college or university learns of a student-plaintiff's

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101. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 n.2 (4th Cir. 2005); el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 3 n.1 (D. Mass. 2001).

102. *Betts*, 145 F. App'x at 10 n.2 (citing 29 U.S.C. § 794(a) (2000)). *Accord* Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006); Amir v. St. Louis Univ., 184 F.3d 1017, 1029 n.5 (8th Cir. 1999).

103. *Betts*, 145 F. App'x at 10 n.2.

104. *El Kouni*, 169 F. Supp. 2d at 3.

105. *Id.* at 3 n.1.

106. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *27 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004).

107. 411 U.S. 792 (1973). *See Mershon*, 442 F.3d at 1074; *Betts*, 145 F. App'x at 12–13. *See also Amir*, 184 F.3d at 1025 (applying *McDonnell Douglas* framework to retaliation claim).

108. *El Kouni*, 169 F. Supp. 2d at 3 (citing Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996)). *Accord Mershon*, 442 F.3d at 1074.

109. *El Kouni*, 169 F. Supp. 2d at 3 (citing *Katz*, 87 F.3d at 30; Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 796 (1st Cir. 1992)). *Accord Mershon*, 442 F.3d at 1074.

110. *Wynne II*, 976 F.2d at 796.

111. *See* Sadik v. Univ. of Houston, No. Civ.A. H-03-4296, 2005 WL 1828588, at *6 (S.D. Tex. Aug. 1, 2005) ("Plaintiff's own allegations establish nothing more than that his professor,

disability only after taking the contested action, the plaintiff cannot prove causation.[112] A college or university will also always prevail where "the uncontradicted evidence before the court establishes that [it] made extensive efforts to accommodate the plaintiff and dismissed her only after she repeatedly failed to satisfy the school's academic requirements" and thus its "decision to discontinue the plaintiff's enrollment was due to her academic failure, not her disabilities."[113] Additionally, colleges and universities are likely to successfully defend claims in true "direct threat" situations, such as cases where students threaten violence against faculty or other students.[114] In cases of both academic and disciplinary dismissal, institutions can prevail even when the academic failure or threatening behavior results from a disability. The statutes forbid "discrimination based on stereotypes about a [disability]," but do not forbid "decisions based on the actual attributes of the [disability]."[115]

B. Immunity and Other Limitations on Applicability

Students alleging disability discrimination do not always bring their claims against colleges or universities alone. Student-plaintiffs also routinely name as defendants governing boards, individual administrators, and even professors. Where private colleges and universities are concerned, "there is no colorable claim under Title III of the ADA" against an official "in the absence of a claim that an individual owns, leases, or operates a place of public accommodation."[116] "[E]mployees and administrators do not 'operate' a university so as to open themselves to ADA liability."[117] When the accused college or university is a public entity, the institution and its board are generally state agencies and its administrators are considered state officials.[118] The boards and administrators, as

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acting on an objectively reasonable suspicion of academic dishonesty, attempted to ensure that Plaintiff suffered the ordinary consequences of cheating on an exam.").

112. Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997) ("[B]ecause Scott was dismissed before WSU knew about his alleged disability, he was clearly not excluded solely by reason of his disability.").

113. Millington v. Temple Univ. Sch. of Dentistry, No. 04-3965, 2006 WL 2974141, at *7–8 (E.D. Pa. Oct. 13, 2006).

114. *See, e.g.*, Rosenthal v. Webster Univ., No. 98-2958, 2000 WL 1371117, at *1 (8th Cir. Sept. 25, 2000) (per curiam) (affirming grant of summary judgment where the record was "quite clear that Rosenthal's suspension was not based upon his disability but upon his disorderly conduct—including, but not limited to, carrying a gun and threatening to use it.").

115. Anderson v. Univ. of Wis., 841 F.2d 737, 740 (7th Cir. 1988). *But see* Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007).

116. White v. Creighton Univ., No. 8:06CV536, 2006 WL 3419782, at *3 (D. Neb. Nov. 27, 2006) (internal citation omitted).

117. *Id.* at *3 (citing Emerson v. Thiel Coll., 296 F.3d 184 (3d Cir. 2002)).

118. This may not always be the case, however. In *Bowers v. Nat'l Collegiate Athletic Ass'n*, the Third Circuit recognized:

> Whether a public university is entitled to Eleventh Amendment immunity is a fact-intensive review that calls for individualized determinations. Although we have held in the past that the Pennsylvania System of Higher Education was entitled to Eleventh Amendment immunity, we have also held that Rutgers, the State University of New Jersey, was not.

well as the institutions, often assert Eleventh Amendment immunity defenses against ADA and Rehabilitation Act claims.[119]

The Eleventh Amendment grants States (and thus state agencies and officials) immunity from suits in federal court, including cases brought "'by citizens against their own states.'"[120] However, a plaintiff "may overcome Eleventh Amendment immunity in two ways. First, the State may waive it. Second, Congress may abrogate it."[121] Through the receipt of federal funds, state agencies and institutions waive Eleventh Amendment immunity,[122] exposing public institutions, their boards, and their administrative officials to liability under the Rehabilitation Act.[123] However, a plaintiff may seek recovery under the Rehabilitation Act against public college and university officials only in their official capacities (not as individuals), because the Rehabilitation Act prohibits discrimination only by programs and activities receiving federal financial assistance.[124]

Because the ADA's applicability is not conditioned on receipt of federal funds, no such general waiver applies to causes of action under Title II,[125] and immunity turns solely upon abrogation. In order to "abrogate immunity, Congress must clearly express an intent to do so and 'act pursuant to a valid grant of constitutional authority.'"[126] The first prong of this test is satisfied by Congress' declaration that

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475 F.3d 524, 546 (3d Cir. 2007) (internal citations omitted).

119. If, however, a State party fails to raise Eleventh Amendment immunity, "a court can ignore it." Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 11 (4th Cir. 2005) (quoting Wis. Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998)).

120. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1386 (S.D. Ga. 2002) (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001)).

121. *Id.*

122. "Receipt of federal funds" includes those federal funds which are received by a college or university yet are earmarked for and eventually funneled to individual students (such as funds under the Federal Work Study and Pell Grant programs). *See* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 452–53 (5th Cir. 2005).

123. *Fedorov*, 194 F. Supp. 2d at 1387 (citing Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 276 F.3d 1227, 1228–29 (11th Cir. 2001)); 29 U.S.C. § 794 (2000)). *Accord Bowers*, 475 F.3d at 545 ("[A] state program or activity that accepts federal funds waives its Eleventh Amendment immunity to Rehabilitation Act claims."); Shepard v. Irving, 77 F. App'x 615, 619 (4th Cir. 2003) ("A State may constructively waive its Eleventh Amendment immunity by voluntarily accepting federal funds when Congress expresses a clear intent to condition receipt of those funds on a State's consent to waive its Eleventh Amendment immunity." (citing Booth v. Maryland, 112 F.3d 139, 145 (4th Cir. 1997))); Doe v. Bd. of Trs. of Univ. of Ill., 429 F. Supp. 2d 930, 940 n.2 (N.D. Ill. 2006) ("[T]he Eleventh Amendment does not immunize the states from lawsuits under the Rehabilitation Act" (citing Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000))).

124. *See* Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002). *Accord Shepard*, 77 F. App'x at 619 n.3; White v. Creighton Univ., No. 8:06CV536, 2006 WL 3419782, at *4 n.4 (D. Neb. Nov. 27, 2006).

125. However, where a case is originally filed in state court and the state defendants remove the case to federal court, "the University waive[s] its immunity from suit in [federal court] with respect to any and all claims asserted against it, regardless of whether those claims arise under federal or state law." Sadik v. Univ. of Houston, No. Civ.A. H-03-4296, 2005 WL 1828588, at *5 (S.D. Tex. Aug. 1, 2005) (citing Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002)). *See* Meyers ex rel. Benzing v. Texas, 410 F.3d 236 (5th Cir. 2005).

126. *Fedorov*, 194 F. Supp. 2d at 1386 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62,

a State "shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."[127] With respect to the second requirement, the Supreme Court issued a seminal decision in *Tennessee v. Lane*.[128]

In that case, the Court acknowledged that in enacting Title II of the ADA Congress purported to exercise "the sweep of congressional authority, including the power to enforce the fourteenth amendment."[129] The Court noted that Congress' "power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment," while "a broad power indeed," is not "unlimited."[130] Rather, legislation invoking Section 5 is only valid "if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[131] Where "congruence and proportionality" are found between the "history and pattern of unequal treatment" of the disabled[132] and the means adopted by Title II, the ADA validly abrogates state sovereign immunity against both "a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment,"[133] and against "prophylactic [provisions of Title II] that [proscribe] facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[134]

Application of this test to conduct violating the Fourteenth Amendment is fairly straightforward. However, appellate courts have split on how to apply *Lane* to determine "on a claim-by-claim basis . . . insofar as [the state's alleged] misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid."[135] Some appellate courts have interpreted the case as conclusively establishing that all provisions of Title II qualify as prophylactic measures intended to prevent and deter unconstitutional conduct, leaving only the congruence and proportionality of the particular provisions of Title II at issue for future cases that concern areas of government conduct not addressed in *Lane*.[136]

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73 (2000)).

127. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 484 (4th Cir. 2005) (citing 42 U.S.C. § 12202 (2000)). *Accord* Tennessee v. Lane, 541 U.S. 509, 518 (2004) ("The first question is easily answered in this case. . . . [N]o party disputes the adequacy of th[e] expression of Congress' intent to abrogate the States' Eleventh Amendment immunity."); Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006); Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 957 (11th Cir. 2005).

128. 541 U.S. 509 (2004).

129. *Id.* at 516 (quoting 42 U.S.C. § 12101(b)(4) (2000)).

130. *Id.* at 518, 520.

131. *Id.* at 520 (quoting Boerne v. Flores, 521 U.S. 507, 520 (1997)).

132. *Id.* at 522–29.

133. United States v. Georgia, 546 U.S. 151, 159 (2006).

134. *Lane*, 541 U.S. at 518. *Accord* Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006).

135. *Sanchez*, 454 F.3d at 31 (quoting *Georgia*, 546 U.S. at 159).

136. *Id.* at 35. *See, e.g.*, Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 554–55 (3d Cir. 2007); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 487 (4th Cir. 2005); Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 958 (11th Cir. 2005). *See also* Klinger v. Dir., Dep't of Revenue, State of Mo., 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in *Lane* that Title II targeted a pattern of unconstitutional conduct forecloses the

However, the First Circuit has found that "the sounder approach is to focus the entire . . . test on the particular category of state conduct at issue."[137] Despite this disagreement, all appellate courts that have considered "whether Title II validly abrogates state sovereign immunity in the context of public education" have concluded that it does, since "Title II's prophylactic measures are justified by the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination."[138] Thus, while it is still largely unclear in many circuits how courts will interpret *Lane* and its progeny, those courts that have decided the issue find that in passing the ADA, Congress exposed States, public colleges and universities, other state agencies such as boards of public colleges and universities, and state officials including public college and university administrators to ADA claims.

Yet, since the ADA "only allows institutions, not individuals, to be sued for monetary damages,"[139] claims seeking monetary recovery cannot be brought against school officials regardless of their immunity. As far as equitable relief is concerned, however, even when the Eleventh Amendment bars ADA suits against States and state agencies, under the doctrine of *Ex parte Young* "a plaintiff may receive *prospective* equitable relief against state officers."[140] To determine whether the *Ex parte Young* doctrine is applicable "a court 'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[141] Claims for readmission "state a violation that continues during the period the plaintiff is excluded from the benefits to which he is entitled."[142]

II. STUDENT CHALLENGES TO ACADEMIC DECISIONS

A. Deference to the Professional Judgment of Colleges and Universities

Beginning with the Supreme Court's decision in *Board of Curators of the University of Missouri v. Horowitz*,[143] courts have treated judgments of colleges and universities that are "academic" in nature with great deference.[144] In that case,

need for further inquiry.").

137. *Sanchez*, 454 F.3d at 35.

138. *Id.* at 40. *See Constantine*, 411 F.3d at 490; *Ass'n for Disabled Ams.*, 405 F.3d at 959.

139. Doe v. Bd. of Trs. of Univ. of Ill., 429 F. Supp. 2d 930, 940 (N.D. Ill. 2006) (citing Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000)).

140. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1386 (S.D. Ga. 2002) (emphasis added). *Accord* Shepard v. Irving, 77 F. App'x 615, 620 (4th Cir. 2003).

141. *Shepard*, 77 F. App'x at 620 (quoting Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002)).

142. Carten v. Kent State Univ., 282 F.3d 391, 396 (6th Cir. 2002).

143. 435 U.S. 78 (1978).

144. For a discussion of judicial deference to academic judgments, see Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?* 41 AM. U. L. REV. 267 (1992). For a critical analysis of judicial deference to academic decisions, see Joseph M. Flanders, *Academic Student Dismissals at*

the Court rejected a student's challenge to her dismissal from medical school, stating that courts are "particularly ill-equipped to evaluate academic performance."[145] Seven years later, in *Regents of the University of Michigan v. Ewing*,[146] the Court again rejected a medical student's challenge to his academic dismissal, and this time used very strong language to warn courts against usurping the judgment of colleges and universities:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[147]

Under the *Ewing* rationale, courts usually refuse to second-guess the professional judgment of faculty in academic dismissals and other decisions that require academic expertise. Where disciplinary dismissals are concerned, courts have distinguished between student challenges to discipline meted out on academic grounds (such as discipline for plagiarism) and discipline meted out for social misconduct (such as assaults or drug offenses). While the line between academic and social misconduct is not always clear (such as in the area of cheating, for example),[148] courts typically defer to the judgments of faculty and administrators in cases of academic misconduct to the same extent as purely academic dismissals, while they are much less deferential to the decisions of administrators when it comes to matters of social misconduct. Thus, when required to review a purportedly academic dismissal challenged by a student who claims the dismissal was a result of a failure to accommodate her (or in retaliation for a request for accommodations), the court first determines whether the decision is solely an academic one. If it is, the court scrutinizes the institution's actions only to ensure that the institution followed the "professional judgment" dictates of the ADA and Rehabilitation Act.

However, what the "professional judgment" test actually requires has been refined over time. In an early disability discrimination case following on the heels of *Horowitz*, *Doe v. New York University*,[149] the Second Circuit exhibited great deference to the institution's judgment that a student's psychiatric disorder was incompatible with the requirements of her graduate program, and allowed the existence of her disability alone, without analyzing whether accommodations were appropriate, to justify the university's refusal to admit her.[150] A decade later, this

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145. *Horowitz*, 435 U.S. at 92.

146. 474 U.S. 214 (1985).

147. *Id.* at 225.

148. For a critique of the distinction between judicial review of academic and social misconduct, see Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?* 29 J.C. & U.L. 619 (2003).

149. 666 F.2d 761 (2d Cir. 1981).

150. *Id.* at 777–79.

very broad deference was criticized by the First Circuit in *Wynne v. Tufts University School of Medicine* (*Wynne I*),[151] the case that developed the standard of review of academic decisions that persists today. The *Wynne* court first explained why the broad deference approach of *Doe* is inappropriate in light of legal and technological developments.

> In the context of an "otherwise qualified-reasonable accommodations" inquiry under the Rehabilitation Act, the . . . principle of respect for academic decisionmaking applies but with two qualifications. First, . . . there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the *Ewing* formulation, hinging judicial override on "a substantial departure from accepted academic norms," is not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person. We say this because such alternatives may involve new approaches or devices quite beyond "accepted academic norms." As the [Supreme] Court acknowledged in [*Southeastern Community College v.*] *Davis*, "technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment."[152]

The *Wynne* court therefore "rejected a 'broad judicial deference resembling that associated with the 'rational basis' test'" applied in *Doe*,[153] and instead formulated a standard for courts that protects students from decisions made in bad faith, but preserves institutions' right to determine whether requested accommodations will fundamentally alter their programs' academic requirements.

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a "purely legal one." Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.[154]

Thus, under the *Wynne* formulation, courts should grant summary judgment in

151. 932 F.2d 19 (1st Cir. 1991).

152. *Id.* at 25–26 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979)).

153. *Id.* at 25 (quoting Strathie v. Dep't of Transp., 716 F.2d 227, 231 (3d Cir. 1983)).

154. *Id.* at 26 (internal citation omitted).

favor of an institution if it has provided one or more accommodations that are reasonable within the parameters of the requirements of the academic program and demonstrated that further accommodations would either not help the student perform at an acceptable level or would require "substantial" alterations to the academic program.[155]

A district court applied *Wynne*'s reviewing criteria in a widely-publicized case brought by students with learning disabilities against Boston University. In *Guckenberger v. Boston University* (*Guckenberger I*),[156] students challenged a variety of university policies, including the requirement that they produce a recent diagnosis and update it regularly.[157] They also challenged the university's requirement that all students in the College of Arts and Sciences complete one semester of mathematics and four semesters of a foreign language, arguing that other courses (taught in English) could be substituted for foreign language courses without fundamentally altering the academic program.[158]

The court ruled that the documentation requirements imposed by the university violated the ADA.[159] With respect to the students' challenges to the math and language requirements, the court agreed that the university did not need to lower its academic standards, but found that the university had not considered the alternatives suggested by the students (or any other alternatives) that would have provided an appropriate accommodation while maintaining academic standards and programmatic integrity.[160] Instead, "the university simply relied on the status quo as the rationale."[161] The court ordered the university to develop a "deliberative procedure" for considering whether other courses could be substituted for the foreign language requirement without fundamentally altering the nature of its liberal arts degree program.[162] After the university created a faculty committee that heard the views of the students, examined the curricula of other liberal arts programs, and concluded that the foreign language requirement was "fundamental to the nature of the liberal arts degree at Boston University,"[163] the district court, applying the standards of *Wynne*, found that the process used to evaluate the language requirement was appropriate and the exercise of academic judgment was sound.

The standards articulated in *Wynne* and the "deliberative process" used in *Guckenberger* provide important guidance to institutions when dealing with

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155. For a discussion of judicial deference when reviewing a challenge brought by a student under the ADA or the Rehabilitation Act, see James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27 (1996).

156. 957 F. Supp. 306 (D. Mass. 1997).

157. *Id.* at 311.

158. *Id.* at 317. *See also* Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 114 (D. Mass. 1997).

159. *Id.* at 114–15.

160. *Id.* at 116.

161. *Id.* at 115.

162. *Id.* at 154.

163. Guckenberger v. Boston Univ. (*Guckenberger III*), 8 F. Supp. 2d 82, 87 (D. Mass. 1998).

students with mental disabilities, whether they be cognitive or psychiatric. The fundamental issue is the consideration of the needs of the student in light of the academic and technical standards that the student must meet in order to achieve academic success. The review of the case law that follows confirms that courts generally validate the judgments of faculty and academic administrators when students challenge academic decisions.

B. Academic Deference Applied

1. Academic Dismissals and Denials of Academic Accommodations.

As noted in Section I, students challenging academic dismissals under the ADA and Rehabilitation Act typically claim that institutions either refused to sufficiently accommodate their mental disabilities or retaliated against them for seeking accommodations or challenging their denial.[164] In order to make such a claim, a student must first prove that the relevant institutional officials either knew of the disorder or regarded the student as disabled, and then satisfy a three part test, proving that (1) the student is disabled, (2) the student is "otherwise qualified" to continue in the program, and (3) the student was dismissed from the program on the basis of the disability.[165] In order to prove that she is "disabled," the student must demonstrate that the mental disorder "substantially limits" a "major life activity."[166]

Many courts have rejected students' mental disability discrimination claims after finding that while the students may be "impaired," they are not "disabled" under federal law. Students encounter the most trouble satisfying the "substantial limitation" prong of the "disabled" test. The outcome of many recent cases turns upon the finding that a student has enjoyed substantial academic success previously and thus is not "substantially limited" in learning, despite the student's current problems making satisfactory academic progress. In the seminal case *Wong v. Regents of the University of California*,[167] the Ninth Circuit affirmed the trial court's determination that a medical student's learning disabilities did not "substantially impair" his ability to learn, even though he had been dismissed on academic grounds, because he had made satisfactory academic progress during his first two years of medical school and had been academically successful in high school and college.[168] Similarly, in *Steere v. George Washington University School of Medicine and Health Sciences*,[169] a medical student who did not meet the school's academic standards was dismissed.[170] Despite becoming aware of the

164. *See supra* Section I.

165. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998).

166. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001).

167. 410 F.3d 1052 (9th Cir. 2005). For a critique of the *Wong* decision, see Dylan Gallagher, Wong v. Regents of the University of California: *The ADA, Learning Disabled Students, and the Spirit of Icarus*, 16 GEO. MASON U. CIV. RTS. L.J. 153 (2005).

168. *Wong*, 410 F.3d at 1065.

169. 439 F. Supp. 2d 17 (D.D.C. 2006).

170. *Id.* at 20.

student's Attention Deficit Hyperactivity Disorder (ADHD) and other learning disabilities prior to making the final decision, the dean of the medical school decided to dismiss Steere.[171] The court ruled that Steere was not disabled because he had "enjoyed a great deal of academic success throughout his life . . . and performed extremely well in many subjects."[172]

Those student plaintiffs who succeed in convincing courts that their disorders are substantially limiting often find their claims rejected for failure to satisfy the "otherwise qualified" element of ADA and Rehabilitation Act claims. Students with mental disorders have had difficulty demonstrating that, with or without reasonable accommodation, they can meet the academic and technical standards of a program.[173] In *el Kouni v. Trustees of Boston University*,[174] for example, a student with clinical anxiety, depression, and bipolar disorder was dismissed from the M.D./Ph.D. program because he was unable to meet the program's academic standards.[175] The medical school had given el Kouni a number of accommodations, including extra time on exams.[176] In addition to his academic problems, el Kouni engaged in disruptive behavior during lectures.[177] A jury found for the medical school on el Kouni's ADA and Rehabilitation Act claims.[178] El Kouni then sought an injunction to expunge his academic record so that he could be reinstated to the medical school.[179] The court rejected his motion, accepting the university's argument that the plaintiff lacked the scientific aptitude for the M.D./Ph.D. program and ruling that he was not qualified because no reasonable accommodation could enable him to satisfy its academic requirements.[180]

Similarly, in *Falcone v. University of Minnesota*[181] a medical student with ADD and hearing loss was given all of the accommodations he requested at the time he enrolled, including part-time status, but could not earn grades that met the minimum criteria for retention in the program.[182] After providing numerous accommodations and affording Falcone four hearings to determine the source of his academic problems (after each of which additional accommodations were provided), the medical school dismissed him because he could not demonstrate that "he could synthesize data in a clinical setting to perform clinical reasoning, an essential element of functioning as a medical student and physician."[183] The court

171. *Id.*

172. *Id.* at 21–22. *See also* Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304 (D. Mass. Dec. 9, 2003) (finding law student with anxiety and depression not substantially limited in ability to learn because of previous academic success).

173. 34 C.F.R. § 104.3(*l*)(1) (2006).

174. 169 F. Supp. 2d 1 (D. Mass. 2001).

175. *Id*. at 3.

176. *Id.*

177. *Id.* at 4.

178. *Id.*

179. *Id.* at 2.

180. *Id.* at 4–5.

181. No. Civ. 01-1181, 2003 WL 22076604 (D. Minn. Sept. 3, 2003).

182. *Id.* at *2.

183. *Id.* at *4. *Cf.* Lemson v. Mich. State Univ., No. 232227, 2002 Mich. App. LEXIS 1528

concluded that Falcone was not "otherwise qualified" to continue as a student.[184]

The few courts that have moved to the third step of the analysis—whether the plaintiff was dismissed *because* of the mental disability—have concluded that the institutions' attempts to accommodate were sufficient and it was the students' inability to meet academic standards that led to the dismissals. For example, in *Betts v. Rector and Visitors of the University of Virginia*[185] the court detailed the medical school's attempts to accommodate a student with short-term memory problems and a slow reading speed.[186] Ultimately, the student was dismissed for failing to maintain the requisite grade point average.[187] The court concluded that there was no causal link between the student's disability and his dismissal.[188] And in *Satir v. University of New England*[189] a medical student with depression and learning disorders was dismissed for failing to meet the medical school's academic standards.[190] The school had allowed her to repeat courses and provided all of the accommodations she requested.[191] The court concluded that the plaintiff had been dismissed for her academic failings, not because of her depression.[192] Similarly, the court in *Falcone* noted that the medical school had allowed Falcone to repeat several classes, which was forbidden by medical school policy, as a method of accommodating his learning disabilities, and that further accommodation was not required.[193]

In cases involving challenges to academic decisions, courts have shown considerable deference to the academic judgments of faculty and administrators. One reason may be that, in most of these cases, students have been provided multiple opportunities to redeem their prior academic performance, including being given the opportunity to retake classes they have failed,[194] take a lighter course load,[195] postpone certain courses so that they can study for national examinations,[196] or receive additional personalized feedback on their performance.[197] For example, in *Pangburn v. Northern Kentucky University*,[198] a

(Mich. Ct. App. Nov. 1, 2002) (deciding claim under Michigan's Persons With Disabilities Civil Rights Act, Mich. Comp. Laws §§ 37.1201–14 (2001)).

184. *Falcone*, 2003 WL 22076604, at *7.

185. 145 F. App'x. 7 (4th Cir. 2005) (per curiam).

186. *Id.* at 13–14.

187. *Id.* at 8.

188. *Id*.

189. No. 04-42-P-S, 2005 WL 757576 (D. Me. Feb. 10, 2005).

190. *Id.* at *4.

191. *Id.* at *2–4.

192. *Id*. at *7.

193. Falcone v. Univ. of Minn., No. Civ. 01-1181, 2003 WL 22076604, at *7 (D. Minn. Sept. 3, 2003).

194. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *8–10 (S.D. Ohio June 3, 2005); Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *2 (D. Mass. Dec. 9, 2003).

195. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 434–35 (6th Cir 1998).

196. *Brown*, 2005 U.S. Dist. LEXIS 40798, at *11.

197. *Falcone*, 2003 WL 22076604, at *2.

198. No. 99-5474, 2000 U.S. App. LEXIS 6413 (6th Cir. Mar. 23, 2000).

student with a math learning disability was permitted to take a required mathematics course six times, yet could not pass the course.[199] Although the student claimed that the university should exempt her from the math course, which was required for teacher certification, the court stated the course was a necessary requirement of the university's elementary education program.[200] "This finding was made in light of the courts' deference to educational institutions and the Kentucky Department of Education on such issues."[201]

And in *Shaboon v. Duncan*,[202] the court, reviewing the dismissal of a student with major depression and obsessive compulsive disorder, concluded that the student's refusal to cooperate with her treating psychiatrists was a "sound academic basis for her dismissal,"[203] citing *Horowitz* for its conclusion that Shaboon's dismissal was based upon the academic judgment that she was not fit to perform as a doctor.[204]

In sum, these cases demonstrate that students' challenges to academic dismissals will rarely succeed and are virtually doomed to failure where a student who has previously experienced academic success fails to satisfy academic criteria despite an institution's provision of multiple accommodations.

2. Dismissals for Academic Misconduct and Failure To Meet Technical Standards.

As the cases involving the academic dismissal of medical students attest,[205] students preparing for professional careers must not only be able to perform acceptably in the classroom but must also be able to meet the technical and conduct standards of a professional program, such as clinical observation and analysis for medical students[206] or professional behavior for prospective teachers.[207] Courts, following the lead of *Horowitz*[208] (in which the Supreme Court characterized difficulties with personal hygiene and interactions with patients and instructors as *academic* failings),[209] have viewed dismissal for failure to comply with technical standards as academic rather than disciplinary and have, accordingly, been deferential to the judgment of those making the dismissal

199. *Id.* at *2.

200. *Id.* at *6.

201. *Id.*

202. 252 F.3d 722 (5th Cir. 2001).

203. *Id.* at 731.

204. The court addressed the distinction between academic and disciplinary dismissals, concluding that Shaboon's dismissal was based upon academic grounds, not solely on conduct. *Id.*

205. *Id.* at 722 (student refused treatment for her depression, did not attend required rounds, stopped taking required medication, and allegedly threatened the children of a staff member); el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1 (D. Mass. 2001) (persistent offensive and disruptive behavior during lectures).

206. *See, e.g.*, *el Kouni*, 169 F. Supp. 2d 1.

207. *See, e.g.*, Davis v. Univ. of N.C., 263 F.3d 95 (4th Cir. 2001).

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

209. *Id.* at 91.

decision.

In *Davis v. University of North Carolina*,[210] a student who had dissociative identity disorder ("multiple personality disorder") enrolled in a master's degree program and sought certification as a special education teacher.[211] After several incidents of "inappropriate and sometimes aggressive behavior" toward several of her professors and fellow students, the student was removed from the teacher certification program in special education.[212] The program's technical requirements included "professional demeanor; professional interactions with university students, faculty, staff, and administrators; . . . and adherence to school rules and ethical standards."[213] The faculty who made the decision to withdraw the student from the certification program were also concerned about her ability to work with children, particularly those with special needs.[214] The university allowed Davis to continue in the master's program but refused to allow her to complete the requirements that would enable her to teach.[215] In ruling for the university, the court assumed, without deciding, that Davis was qualified to be a graduate student but concluded that Davis was not "substantially limited" in her ability to work.[216] At most, said the court, she might be limited in her ability to work in a job that involved unsupervised interaction with young children, but she was not limited in her ability to perform a wide range of other jobs.[217] The court noted, "neither the ADA nor the Rehabilitation Act protects 'every dream or desire that a person might have.'"[218]

Disposition of a similar claim against the California State University at Bakersfield turned upon the "otherwise qualified" and causation requirements rather than the student's failure to demonstrate substantial limitation (and thus disability). A student who had been denied entry into a special education master's program at the university filed a complaint with the OCR under the Rehabilitation Act.[219] The student needed a service dog to perform certain functions for her.[220] She did not control her service dog on several occasions during a laboratory class and the dog disrupted the work of students and staff.[221] When asked to control her service dog, the student made threatening gestures and cursed at university staff.[222] A faculty committee determined that her misconduct did not meet the professional standards of students enrolled in the special education certification program and

210. 263 F.3d 95 (4th Cir. 2001)
211. *Davis*, 263 F.3d at 96–97.
212. *Id*. at 97.
213. *Id.* at 98.
214. *Id.* at 99.
215. *Id.* at 98.
216. *Id.* at 100.
217. *Id.*
218. *Id.* (quoting Knapp v. Northwestern Univ., 101 F.3d 473, 481 (7th Cir. 1996)).
219. Cal. State Univ., Bakersfield, No. 09-02-2183, 2003 NDLR (LRP) LEXIS 920 (Off. for Civ. Rts. W. Div. May 30, 2003).
220. *Id.* at *1.
221. *Id.*
222. *Id.*

denied her admission to that program, although it did allow her to complete her master's degree.[223] The committee concluded that the student did not "possess the disposition, the character, nor the self-control which are requirements for the credential."[224] Framed through the lens of causation, OCR ruled that the university's decision was based solely upon its application of its professional standards of conduct for teachers, after the university was able to point to a second, nondisabled student who was also denied admission to the credentialing program because of similar concerns about the student's behavior.[225]

223. *Id.* at *10–11.
224. *Id.* at *11.
225. *Id.* at *14.

3. Denials of Readmission.

Although most cases involving students with mental disabilities who challenge academic decisions involve dismissal from an academic program, in some cases students challenge the refusal to readmit them rather than the dismissal decision. Courts often decide these cases at the "otherwise qualified" stage after applying the principle of academic deference. For example, in *Anderson v. University of Wisconsin*,[226] a case brought under the Rehabilitation Act, a student with alcoholism was dismissed for poor academic performance after being readmitted two times previously.[227] On the student's fourth attempt at admission to the law school, the institution denied readmission.[228] The student claimed that the law school had made its decision based upon his alcoholism. The court affirmed the lower court's award of summary judgment for the university, noting that the denial of readmission was based upon "honest judgments about how Anderson had performed in fact and could be expected to perform."[229] The court rejected the student's argument that a jury should decide his case, stating, "The Act does not designate a jury, rather than the faculty of the Law School, as the body to decide whether a would-be student is up to snuff."[230]

Similarly, academic deference played a deciding role in *Hash v. University of Kentucky*,[231] where a student with depression who had academic difficulties withdrew from the University of Kentucky Law School and then sought readmission.[232] The student's application for readmission contained information that troubled the dean, including newspaper articles about mental illness and information about a law student at another institution who had walked down a street firing an M-1 rifle.[233] The dean required Hash to obtain letters from treating psychiatrists and to be evaluated by the law school's doctor to establish that he was not a threat to himself or others.[234] The student did not provide the requested

226. 841 F.2d 737 (7th Cir. 1988).

227. *Id.* at 739.

228. *Id.*

229. *Id.* at 741.

230. *Id.* If, however, the court finds that the institution did not perform an individualized determination of whether the student could be successful in the program if accommodated, it will deny summary judgment. *See, e.g.*, Carlin v. Trs. of Boston Univ., 907 F. Supp. 509 (D. Mass. 1995) (denying summary judgment where student with depression was refused readmission despite prior record of acceptable academic performance and plaintiff provided sufficient evidence of pretext to require case to be tried).

231. 138 S.W.3d 123 (Ky. Ct. App. 2004) (deciding claim under the Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.010–344.500 (West 2003)).

232. *Id.* at 124.

233. *Id.* at 127.

234. *Id.* at 127–28. OCR has ruled that requesting updated medical and/or psychiatric information from a student applying for readmission when the student has withdrawn, voluntarily or involuntarily, because of the psychiatric disorder, does not violate the Rehabilitation Act. *See, e.g.*, Regent Univ., No. 11-03-2022, 2003 NDLR (LRP) LEXIS 890 (Off. for Civ. Rts. S. Div. Nov. 20, 2003) (student with bipolar disorder had academic and behavioral problems while enrolled as a graduate student, including telling administrators that he would "take heads and

information and the school refused to readmit him.[235] The court ruled that the dean's concerns were legitimate and deferred to the university's judgment that Hash was not "otherwise qualified" to fulfill the academic requirements of the law school curriculum.[236]

Thus, a review of the case law regarding the types of academic decisions challenged most frequently—academic dismissals, denials of academic accommodations, dismissals for academic misconduct, dismissals for failure to meet technical standards, and denials of readmission—confirms that courts generally apply the principle of academic deference and validate the judgments of faculty and academic administrators when students challenge decisions that are primarily academic in nature.

III. STUDENT CHALLENGES TO DISCIPLINARY DECISIONS

As noted in Section II, courts are far less deferential to colleges and universities when reviewing their disciplinary decisions such as suspensions or expulsions for social misconduct.[237] Although most student challenges to disciplinary actions involve Constitutional[238] or contract[239] claims, some students with mental disorders have challenged disciplinary actions taken against them as violations of the ADA and/or the Rehabilitation Act. Despite the greater scrutiny accorded these decisions, courts have generally rejected student challenges to disciplinary dismissal. Some courts hold that a student who cannot comply with an institution's rules of conduct is not "otherwise qualified" for retention.

Childress v. Clement[240] involved the expulsion of a student for cheating and plagiarism.[241] Childress, a graduate student in the criminal justice program, had several learning disabilities of which the university was aware. He was charged with violations of the university's Honor System when he submitted the same paper for two different courses without permission and allegedly plagiarized portions of a comprehensive examination.[242] The Honor Council found him guilty of three counts of academic misconduct, and the president expelled Childress.[243]

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stick them on poles"). *See also* Cmty. Coll. of S. Nev., No. 10-02-2045, 2002 NDLR (LRP) LEXIS 938 (Off. for Civ. Rts. W. Div. Oct. 18, 2002) (student with schizophrenia stated that he had homicidal tendencies and was declared by the Department of Veterans Affairs to pose a danger to himself and others).

235. *Hash*, 138 S.W.3d at 127–28.

236. *Id.*

237. *See supra* Section II.

238. *See, e.g.*, Esteban v. Cent. Mo. State Coll., 415 F.2d 1077 (8th Cir. 1969). *See also* Sadik v. Univ. of Houston, No. Civ. A. H-03-4296, 2005 WL 1828588, at *9 (S.D. Tex. Aug. 1, 2005) (academic dishonesty); Fedorov v. Bd. of Regents for Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002).

239. *See, e.g.*, Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575 (Pa. Super. Ct. 1990). *See also* Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209–13 (Md. Ct. Spec. App. 2000).

240. 5 F. Supp. 2d 384 (E.D. Va. 1998).

241. *Id.* at 387.

242. *Id.*

243. *Id.*

In his claims under federal and state disability discrimination law, Childress claimed the university had not taken into account his disability when it determined that he had engaged in academic misconduct.[244]

Although the court assumed without deciding that Childress was disabled, it determined that he was not "otherwise qualified" because of his academic misconduct.[245] It found that the Honor Council and various levels of appeal had taken Childress' disability into consideration as a possible mitigating reason not to punish him, but had concluded that his conduct was too serious to allow him to continue as a graduate student.[246] The court ruled that Childress could not establish that he could perform the essential functions of a graduate student because he did not comply with the requirements of the Honor Code. The court rejected Childress' argument that the university should accommodate him by not applying its Honor Code to his conduct.[247]

In defending against the claims of students with mental disorders who are dismissed for misconduct, some institutions have alleged that the student was a "direct threat" to himself or others. For example, in *Ascani v. Hofstra University*,[248] a graduate student with an unspecified "mental illness" harassed and threatened a professor, and pled guilty to harassment and trespass charges.[249] She was expelled as a result of that conduct. The sole issue addressed by the court—whether the university's determination that the student was a "direct threat" and thus not qualified to be a graduate student—was supported.[250] The court summarily determined that the university's analysis was reasonable and upheld summary judgment for the university.[251]

Other courts rejecting challenges to disciplinary decisions under the federal disability discrimination statutes hold that the student's misconduct, even if itself caused by a disability, provides a nondiscriminatory "cause" for the institution's disciplinary decision. A medical resident with ADHD and dyslexia challenged his dismissal for both academic and misconduct reasons in *Tori v. University of Minnesota.*[252] The student, a resident in the family-practice and psychiatry training program, had been accused of engaging in a sexual relationship with a patient (a serious ethical violation, according to the American Medical Association),[253] failing to attend required lectures, interacting inappropriately with female medical residents, and behaving disrespectfully to a chief resident.[254] He was also accused of inappropriately withdrawing medicine from a patient in order

244. *Id.*
245. *Id.* at 391–92.
246. *Id.* at 391.
247. *Id.*
248. No. 98-7756, 1999 WL 220136 (2d Cir. Apr. 9, 1999).
249. *Id.* at *1.
250. *Id*.
251. *Id.*
252. No. A06-205, 2006 WL 3772316 (Minn. Ct. App. Dec. 26, 2006).
253. *Id*. at *2.
254. *Id.* at *7.

to punish the patient.[255] Although the court assumed, without deciding, that Tori was "otherwise qualified," it decided that the medical school's reasons for dismissing him were nondiscriminatory and affirmed the trial court's award of summary judgment for the university.[256]

In *Mershon v. St. Louis University*,[257] another case that involved both academic and social misconduct, a student with cerebral palsy challenged the university's refusal to allow him to enroll in a history graduate program because he lacked the undergraduate preparation.[258] He had already received a number of accommodations from the university.[259] When the student learned that he would not be admitted to the graduate program, he allegedly contacted an OCR investigator and threatened to shoot the faculty director of the graduate program. The investigator contacted the Department of Homeland Security, who advised the university's director of public safety.[260] The university issued an order prohibiting the student from entering campus.[261] The student challenged his barring from campus under the ADA and Rehabilitation Act, claiming both failure to accommodate and retaliation.[262] The court rejected the student's retaliation claim, noting that the student admitted to calling the OCR investigator (although not to the threat) and that the university's prompt action to bar him from campus was a direct result of the alleged threat made by the student.[263] With respect to the accommodation claim, the court deferred to the university's judgment concerning the student's qualifications to enroll in the graduate program, as well as its history of accommodating the student in the past.[264]

In *Rosenthal v. Webster University*,[265] when a student with bipolar disorder carried a gun on campus and threatened to use it, he was suspended and given a set of conditions he had to fulfill before being readmitted.[266] Because the student did not fulfill the university's requirements for readmission, which included refraining from additional misconduct, the university refused to readmit him. The court made short work of affirming the lower court's award of summary judgment to the university, ruling that the student was not suspended because of his disability but rather because of his conduct.[267]

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255. *Id.*
256. *Id.* at *7–9.
257. 442 F.3d 1069 (8th Cir. 2006).
258. *Id.* at 1072–73.
259. *Id.* at 1071.
260. *Id.* at 1073.
261. *Id.*
262. *Id.*
263. *Id.* at 1075–76.
264. *Id.* at 1078.
265. No. 98-2958, 2000 WL 1371117 (8th Cir. Sept. 25, 2000).
266. *Id.* at *2.
267. *Id.* The prevailing view of courts interpreting the ADA in the employment context has been that an employee may be disciplined for misconduct, even if that misconduct is a result of a disability. However, the Ninth Circuit, interpreting Washington law, reached a different conclusion in *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007). The court agreed with the plaintiff's assertion that the jury, which had found for the employer who

These cases should not, however, be taken to indicate that academic deference applies with equal force in the disciplinary decision context. An interesting example of a court's refusal to defer to the finding of a student disciplinary board regarding a dismissal is *Stathis v. University of Kentucky*.[268] In *Stathis*, a medical student was dismissed for threatening a fellow student and for exhibiting "inappropriate hostile behavior on several occasions."[269] The student was not disabled but filed a number of claims, including a disability discrimination claim under Kentucky law, alleging that the medical school regarded him as having a mental impairment because the medical school required him to submit to two psychiatric evaluations as a result of the incident with the fellow student.[270] The court determined that Stathis did not meet the test of "regarded as" disabled because he did not provide evidence that the medical school viewed him as substantially limited in some major life activity.[271] Rather, "he was regarded as having a quick temper and as using poor judgment . . . by making threats toward a fellow student."[272] The court awarded summary judgment to the medical school on the disability discrimination claim, but denied summary judgment on his breach of contract claim because there was evidence that the student with whom Stathis had the dispute may have provoked the confrontation.[273]

Similarly, in *Amir v. St. Louis University*,[274] a court reviewing a dismissal for a mixture of academic and disciplinary reasons rejected the student's discrimination claim but denied summary judgment on the student's retaliation claim.[275] The medical student, with obsessive compulsive disorder, engaged in several minor incidents of misconduct for which he was not disciplined by the medical school.[276]

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dismissed the plaintiff after she engaged in a "violent outburst," should have been told that "[c]onduct resulting from a disability is part of the disability and not a separate basis for termination." *Id.* at 1093–95. The plaintiff had bipolar disorder and argued that her conduct was a result of that mental illness. *Id.*

268. No. 2004-CA-000556-MR, 2005 WL 1125240 (Ky. Ct. App. May 13, 2005).

269. *Id.* at *1.

270. *Id.* at *7.

271. *Id.* at *8.

272. *Id.*

273. *Id.* at *8–10. The court allowed the plaintiff's breach of contract claim to go forward, noting that "a fact-finder might [reasonably] believe that his conduct did not rise to the level such that he breached the conduct code of the Medical School, and, accordingly, did not breach the contract between the parties." *Id.* at *10. This ruling engendered a strong dissent by a judge who would have been more deferential to the finding of the disciplinary committee. The dissenting judge wrote: "Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions [were] arbitrary or capricious." *Id.* (Vanmeter, J., concurring in part and dissenting in part) (internal citations omitted). The dissenting judge also suggested that the "substantial evidence standard of review applicable to the decisions of administrative agencies" should be used to review the findings of fact of an internal student judicial board. *Id.* at *10–11.

274. 184 F.3d 1017 (8th Cir. 1999).

275. *Id.* at 1021.

276. *Id.* at 1022. Amir posted flyers using former students' names without their permission and offered a former student's baseball tickets to others for free without her permission. *Id.*

He also encountered academic problems during his third year and voluntarily committed himself to hospitalization when his disorder became worse.[277] Because of his absence from his clinical duties in his psychiatric clerkship, he was required to seek readmission.[278] The supervising professor, who had originally insisted that Amir obtain in-patient treatment for his disorder, at first refused his readmission request.[279] Amir filed a grievance against the professor. Later, when Amir was finally allowed to complete the psychiatric clerkship, the professor gave him a failing grade.[280] Amir was then dismissed from the university.[281] Amir sued the university, claiming both discrimination and retaliation.[282] The court awarded summary judgment to the university on Amir's disability discrimination claim, ruling that there was no evidence that the decision to dismiss him was based on his disability.[283] However, it refused to rule for the university on Amir's retaliation claim, stating that Amir had provided sufficient evidence to suggest that retaliation for filing the grievance may have been a motive for the failing grade he received in the psychiatry clerkship.[284]

A review of cases involving student challenges to disciplinary decisions demonstrates that courts often reject such claims after finding that the student is not "otherwise qualified" or that her misconduct constituted the "cause" of the decision. However, it is also clear that courts are less deferential to these decisions than to academic ones. Thus, in cases where the challenged decision is based upon a mixture of academic performance and social misconduct, students are less likely to prevail. If, however, a student is able to provide evidence that a disciplinary decision was motivated, in whole or in part, by animosity of an individual or group toward the student or is a form of retaliation, the court will generally require the case to go to trial.

277. *Id.* at 1023.
278. *Id.*
279. *Id.*
280. *Id.* at 1023–24.
281. *Id.* at 1024.
282. *Id.*
283. *Id.*
284. *Id.* at 1026.

IV. AT-RISK STUDENTS AND SELF-INFLICTED HARM

As noted in the introduction to this article, students are reporting more, and more serious, psychiatric disorders. One source estimates that 1,100 college and university students die by suicide each year.[285] Lawsuits such as those brought by the parents of Elizabeth Shin, who allegedly committed suicide while attending the Massachusetts Institute of Technology,[286] have motivated some institutions to be proactive and to attempt to prevent on-campus suicide by barring suicidal students from campus. In some instances, colleges and universities have required students to withdraw until they can present a psychiatrist's assurance that the student is not a risk to himself or others. These "mandatory withdrawal" or "emergency withdrawal" policies have engendered a number of OCR complaints and, in at least one case, a lawsuit. Other institutional decisions such as barring at-risk students from campus housing or requiring supervised housing have also prompted OCR complaints.

A. Mandatory Withdrawals

Most student challenges to mandatory withdrawals have involved complaints to OCR rather than litigation under the ADA or the Rehabilitation Act. This strategy may be an attempt to obtain resolution faster than the judicial process allows. The Rehabilitation Act authorizes OCR to investigate alleged violations of that law through review of relevant documents and interviews with the complainant, the complainant's parents (if relevant), and college and university faculty and staff.[287] In response to complaints challenging a mandatory withdrawal, the college or university typically argues that the student was a "direct threat" to himself or others, and that the institution could not provide a reasonable accommodation that would reduce or remove that threat.

Under OCR interpretation, in order to demonstrate that an individual is a "direct threat," a college or university must determine that there is a "high probability of substantial harm and not just a slightly increased, speculative, or remote risk."[288] The college or university must make an "individualized and objective assessment" as to whether the student can continue to participate in the institution's programs safely, "based on a reasonable medical judgment relying on the most current

285. NAT'L MENTAL HEALTH ASS'N & JED FOUND., SAFEGUARDING YOUR STUDENTS AGAINST SUICIDE (2002), *available at* http://www.jedfoundation.org/articles/SafeguardingYourStudents.pdf. For a discussion of the prevalence of suicidal students on campus and the law and policy issues relevant to this problem, 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).

286. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Sup. Ct. June 27, 2005).

287. 34 C.F.R. § 105.41 (1990).

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

medical knowledge or the best available objective evidence."[289] The assessment "must determine the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur, and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk."[290]

In a complaint brought against Guilford College,[291] a student with post-traumatic stress and disassociative disorder complained that the college required her to withdraw because of her disabilities.[292] The college was on notice of her disorders and the student had sought assistance from the college's director of counseling services on two occasions. The counselor knew that the student was "a cutter."[293] The student cut herself shortly before her parents were scheduled to visit for parents' weekend and was taken to the emergency room by another student.[294] After a second and then a third cutting incident, the student was committed involuntarily to a hospital, but doctors there determined that she was not a suicide threat.[295] Upon her return to campus, she was informed that the college was requiring her to withdraw for medical reasons.[296] Although the student requested a hearing to appeal the withdrawal decision, the college refused, stating that the withdrawal was not disciplinary.[297] She was required to leave campus that day. Approximately ten days after the student left campus, the associate dean, who had not been involved in the decision to impose the involuntary withdrawal, reviewed the student's appeal and the college's actions. He upheld the college's decision.[298]

OCR found that the decision to impose involuntary withdrawal was made prior to the student's second serious cutting incident and prior to her involuntary hospitalization.[299] OCR criticized college staff for not contacting the student's previous psychologist to ask for his opinion and for inviting the student's parents to parents' weekend despite the student's repeated statements that she was estranged from them and did not want to see them.[300] Most importantly, the college "did not consider any alternatives less severe than withdrawal from all College programs as a modification for the [student], such as whether she was still qualified to participate in the academic program even if she may not have been qualified to participate in the College's housing program."[301] There was no

289. *Id.*
290. *Id.*
291. Guilford Coll., No. 11-02-2003, 2003 NDLR (LRP) LEXIS 627 (Off. for Civ. Rts. S. Div. Mar. 6, 2003).
292. *Id.* at *1.
293. *Id.* at *10.
294. *Id.*
295. *Id.* at *12–14.
296. *Id.* at *13–14.
297. *Id.* at *14.
298. *Id.* at *16–17.
299. *Id.* at *26–27.
300. *Id.* at *28.
301. *Id.* at *28–29.

evidence that the academic environment was the cause of the student's cutting behavior, according to OCR, and the college had not provided the student with due process in making a determination that the student was a direct threat to herself or other students.[302] Furthermore, the college did not provide rudimentary due process protections to the student such as a notice of its intent to impose mandatory withdrawal and an opportunity for the student to be heard prior to her exclusion from campus.[303] Finally, OCR criticized the college for imposing certain conditions on the student if she wished to return, such as requiring her to demonstrate that she was no longer engaging in self-injurious behavior since not all "self-injurious behavior may be sufficiently serious as to constitute a direct threat."[304] OCR required the college to revise its policies to reflect the concerns that arose in the case.[305]

In a case brought against Bluffton University, OCR again found for the student, who was required to withdraw after she attempted suicide.[306] After the attempted suicide, the student was hospitalized for a week, during which she was diagnosed with bipolar disorder, a condition previously unknown to the student, her family, or the university.[307] Before her release, a university official contacted the student's mother and informed her that the student would be withdrawn.[308] The university did not contact the student's treating professionals or others before making this decision and refused to consider documentation from the student's mental health counselor indicating that she was no longer suicidal and could return to campus.[309] Shortly after she was told to leave campus, the student and her mother met with the administrator who made the withdrawal decision, asking him to allow the student to return to campus. The official refused and rejected further requests by the student's mother to reconsider or modify his decision.[310]

OCR criticized the staff member responsible for making the withdrawal

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302. *Id.* at *29.

303. *Id.* at *33–34.

304. *Id.* at *35.

305. OCR required the college to:

1. Revise its policies regarding students with mental or psychological disabilities.
2. Develop and publicize procedures for disability discrimination complaints.
3. Establish a policy for assessment for students who are suspected of being a "direct threat."
4. Establish reasonable conditions for readmission based upon "direct threat" standards.
5. Train personnel on the new policies and procedures.
6. Remove references to involuntary withdrawal from the complaining student's records.
7. Consider the complaining student's application for readmission in a nondiscriminatory manner, if submitted.

Id. at *2–3.

306. *Bluffton*, *supra* note 288.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

decision, saying that the official "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 Student or other students."[311] Instead, "the evidence showed that the University made a determination to withdraw the Student within forty-eight hours of her attempted suicide based on a conversation between the Official [who made the decision] and [the university president]."[312] OCR determined that the university regarded the student as disabled as a result of her suicide attempt and that it had denied her due process by refusing to reconsider the withdrawal decision once the student provided information from mental health professionals stating that she could return to campus.[313]

Likewise, in a complaint brought against Marietta College,[314] a student who had been admitted to the college claimed that the college had dismissed him one month after the beginning of his freshman year when it learned that he had a history of depression and suicide attempts.[315] The college explained that it had made the mandatory withdrawal decision because, during his month on campus, the student had resisted meeting with his psychologist as frequently as the psychologist believed necessary and had talked to his roommate about death.[316] OCR determined that college officials had not obtained enough information to determine whether the student was a direct threat to himself.[317] According to OCR, the college

> never conducted an individualized and objective assessment of the Student's ability to safely participate in the College's program, based on a reasonable medical judgment, and did not consider whether the perceived risk of injury to the Student could have been mitigated by reasonable modifications of College policies, practices, or procedures.[318]

Furthermore, the parents were never advised of their right to appeal the college's decision.[319]

Jordan Nott, a student who was similarly subjected to his university's mandatory withdrawal policy, brought a lawsuit rather than filing a complaint with OCR.[320] Nott, who suffered from depression, had checked himself into the George

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311. *Id.*

312. *Id.*

313. *Id.*

314. Marietta Coll., No. 15-04-2060, 2005 NDLR (LRP) LEXIS 371 (Off. for Civ. Rts. Midwestern Div. July 26, 2005).

315. *Id.* at *4–5.

316. *Id.* at *9–10.

317. *Id.* at *12–13.

318. *Id.*

319. *Id.* at *13.

320. Brittany Levine, *University, Nott Reach Settlement*, DAILY COLONIAL (Wash., D.C.), Nov. 1, 2006, *available at* http://www.dailycolonial.com/go.dc?p=3&s=3334. For background on the Nott situation, see Eric Hoover, *Dismissed for Depression*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A44.

Washington University hospital because he was having suicidal thoughts.[321] Several hours after his hospitalization, the university sent Nott a notice barring him from his residence hall and the following day he was told that he had violated the university's code of student conduct. He was barred from campus and was told that if he did not leave he would be suspended or expelled.[322] He was given the opportunity to appear before a student judicial board to contest the university's actions but withdrew instead and sued the university.[323] Nott filed claims against George Washington University under the ADA, the Rehabilitation Act, the District of Columbia Human Rights Act,[324] and the Fair Housing Act,[325] asserting that the university's mandatory withdrawal policy was unlawful.[326] The case settled. As part of the settlement agreement the university pledged to revise its policies for dealing with at-risk students.[327]

In every one of the OCR cases involving mandatory withdrawal reviewed for this article, the agency found for the student, often concluding that the university failed to satisfy the "direct threat" standard by neglecting to conduct an "individualized and objective assessment" and consider reasonable modifications that would mitigate risk.

B. Campus Housing Refusals

Students with mental disabilities have also challenged institutional decisions that, short of mandating their withdrawal from school, bar them from on-campus housing for engaging in self-injurious activity. In a complaint against DeSales University,[328] a student with depression reported that the university had required him to leave campus for three days[329] and denied him on-campus housing for one semester.[330] The university had barred the student from campus after several incidents, including self-cutting, persuaded university staff that the student needed to be seen by a doctor.[331] He was told that he could return when a doctor cleared him. The student obtained the note and was allowed to return to campus and to his residence hall.[332] After his return to campus, the student engaged in questionable behavior on two occasions, including visiting the campus health center and requesting a tranquilizer dart to use on certain emergency room staff.[333] These

321. Levine, *supra* note 320.

322. *Id.*

323. Nott then enrolled at the University of Maryland–College Park and has since graduated. He was represented in his lawsuit by the Bazelon Center for Mental Health Law. *Id.*

324. D.C. Code § 2-1401–11 (2007).

325. 42 U.S.C. § 3601–31 (2000).

326. Levine, *supra* note 320.

327. *Id.*

328. DeSales Univ., No. 03-04-2041, 2005 NDLR (LRP) LEXIS 568 (Off. for Civ. Rts. Feb. 17, 2005).

329. *Id.* at *6–7.

330. *Id.* at *10.

331. *Id*. at *6–7.

332. *Id.* at *7.

333. *Id.* at *8–9.

additional incidents persuaded the university to prohibit the student from living in campus housing the following semester until his mental disorder was under control. The student returned as a day student and filed a complaint with OCR.[334]

OCR ruled that the university was justified in removing the student from campus for three days until he obtained medical clearance because it was concerned for his safety and the safety of others.[335] But the university's denial of on-campus housing violated the student's rights under the Rehabilitation Act because the university did not make an individualized determination as to the student's ability to participate safely in campus housing.[336] OCR criticized the university for failing to consult with the student's doctor or require the student to develop a treatment plan as a condition of returning to campus housing.[337] In addition, the university's decision to allow the student to attend classes and other activities was inconsistent with its position that the student might pose a threat and consequently could not live in campus housing.[338] OCR required the university to develop a grievance procedure that would enable students to challenge decisions on accommodations.[339]

Yet in a similar complaint against Vassar College,[340] OCR ruled in favor of the college.[341] The complaining student had been hospitalized after she was evaluated as a suicide risk by two treating physicians.[342] The college made the required individualized assessment of the student's ability to continue attending classes, reviewing her medical history and consulting with the team of doctors who had treated her at the hospital. It concluded that she could continue attending classes, but only if she lived in supervised housing to ensure that she would take her medication.[343] After living in supervised housing for several months, the student asked to return to campus housing. The college demanded updated medical information before it would respond to her request.[344] When the student failed to supply the requested information and the college did not allow her to return to unsupervised campus housing, OCR concluded that no violation of the Rehabilitation Act had occurred.[345]

OCR's treatment of these two housing refusal claims indicates that institutions may take steps to reduce the risk that self-injurious students will commit suicide on campus. However, they clarify that prior to excluding a student, a college or university must make an individualized determination as to the student's ability to

334. *Id.* at *10–11.
335. *Id.* at *16.
336. *Id.* at *17.
337. *Id.* at *18.
338. *Id.*
339. *Id.* at *22–23.
340. Vassar Coll., No. 02-95-2121, 1996 NDLR (LRP) LEXIS 709 (Off. for Civ. Rts. Region II Jan. 24, 1996).
341. *Id.* at *3.
342. *Id.* at *4.
343. *Id.* at *4–5.
344. *Id.*
345. *Id.* at *5–6.

participate safely in campus housing.

C. Model Policies

The Bazelon Center for Mental Health Law, which represented Jordan Nott in his lawsuit against George Washington University, released a "Model Policy for Colleges and Universities" to consider when developing or revising their policies for dealing with at-risk students.[346] The Model Policy covers the availability of counseling and mental health services and under what circumstances students will be referred to these services; assurances of the confidentiality of counseling and mental health services; the accommodation process for students with mental health disorders; and the process by which voluntary and involuntary leaves of absence will be granted.

With respect to involuntary leave, the Model Policy requires that only if the student cannot remain on campus safely, even with accommodations and other supports, will such a leave be considered,[347] and it tracks the "direct threat" evaluation language used in the OCR decisions discussed above.[348] The Model Policy also provides (1) an opportunity for the student and/or the student's representative to appear before the committee making the decision concerning involuntary leave and (2) a process for returning from leave that does not penalize the student because the reason for the leave was a mental health reason rather than a physical health reason.[349]

The Model Policy also states that students who engage in self-injurious behavior—i.e., students who attempt suicide, have suicidal thoughts, or engage in self-cutting—will not be disciplined.[350] However, if a student violates the disciplinary code and then takes a voluntary leave for mental health reasons, the Model Policy provides that the relevant disciplinary proceedings will be stayed until the student returns rather than suspended entirely.[351]

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346. BAZELON CTR. FOR MENTAL HEALTH L., SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES (2007), *available at* http://www.bazelon.org/pdf/SupportingStudents.pdf.

347. *Id.* at 7.

348. *Id.* at 8.

349. *Id.* at 7–8.

350. *Id.* at 9. This provision of the model policy raises the issue of the institution's responsibility to other students, such as roommates of the troubled student, whose lives and studies may have been disrupted by the self-injurious behavior. Administrators and counsel may wish to review their student codes of conduct to see if they allow, or require, the institution to hold a self-injurious student responsible for harm to fellow students affected by their behavior.

351. *Id.* For a discussion of the legal and policy issues related to disciplining suicidal college and university students, see Gary Pavela, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE (2006). For a review of litigation regarding student suicide and a proposal that colleges and universities implement a "mandatory counseling" policy for suicidal students, see Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081 (2007).

CONCLUSION

Despite the prevalence of students with mental health problems on college and university campuses, most such students avoid the serious problems and conflicts discussed in this article.[352] Colleges and universities have been successfully evaluating and accommodating students with mental disabilities for decades.[353] A review of federal laws and cases interpreting them indicates that the key to dealing with students with mental disorders whose academic or social misconduct violates institutional policies is to make the process governing their conduct the same as that used for students whose misconduct is not linked to a mental disorder. Although institutional staff should make sure that the student is not being disciplined (or dismissed) because of the disability itself (such as self-inflicted harm), students who cannot meet academic standards or who cannot follow the rules for living in campus housing, for example, may be treated in the same manner as nondisabled students.

The important caveat to this approach, however, is that institutional staff must make an *individualized determination* about the student prior to enforcing academic or disciplinary standards. Is the misconduct or failure to meet academic standards a manifestation of the disorder or is it independent? Is there an accommodation that would mitigate the effect of the disorder and result in an improvement in academic performance or social conduct? Does the accommodation require the institution to lower academic or conduct standards? If it does, the accommodation may not be a reasonable one. If the student's behavior is considered threatening to himself or others, have the proper steps in the "direct threat" review been followed? Has the student's treating psychiatrist or other provider been consulted and has that information been considered? Have all the staff members who potentially have information about this student been consulted? If the student is not emancipated, have the student's parents been contacted and their opinions considered? Is the student enrolled in a program where children, patients, or other vulnerable populations may be exposed to erratic or unprofessional behavior? Does the institution have a grievance procedure for students who wish to challenge the institution's decision to discipline or dismiss them or who object to the denial of requested accommodations? Has the institution disseminated this information to students and made it easily accessible to them?

The review of litigation by students with mental disorders, both in court and before OCR, suggests that if an institution follows the steps outlined above, it will have complied with the dictates of the ADA and the Rehabilitation Act (and very likely with state law as well). More importantly, the institution will have used the ultimate sanction of exclusion as a last resort and only when other possibilities have been considered and rejected as unworkable.

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352. Furthermore, research has shown that individuals who are mentally ill are no more likely to engage in violence than individuals who are not mentally ill. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., UNDERSTANDING MENTAL ILLNESS (2007), *available at* http://www.samhsa.gov/MentalHealth/understanding_MentalIllness_Factsheet.aspx.

353. The Rehabilitation Act was enacted in 1973.

PRIVACY AND CONFIDENTIALITY: BALANCING STUDENT RIGHTS AND CAMPUS SAFETY

NANCY TRIBBENSEE*

"There is only one thing in the world worse than being talked about, and that is not being talked about."
OSCAR WILDE[1]

INTRODUCTION

College and university administrators worry about the welfare of students and their safety on campus. They have always been aware of potential risks to students from criminal activity in the surrounding community, but they are increasingly apprehensive about the risks that students pose to themselves and to other students on campus. Campus administrators, student health professionals, psychologists, and conduct officials regularly see students who abuse alcohol and other drugs at dangerous levels.[2] They recognize that students arriving on campus are more likely to have serious mental health issues, many of which are more severe than have been seen in the past.[3] As a result, many campus administrators worry about school shootings and student suicides. In the past, concerns about student privacy may have discouraged some campus administrators from talking to each other and to the students' families about these students; however, concerns about public

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1. OSCAR WILDE, THE PICTURE OF DORIAN GRAY AND SELECTED STORIES 20 (New American Library 1983) (1891).

2. Daniel Ari Kapner, *Infofacts Resources: Alcohol and Other Drugs on Campus–The Scope of the Problem*, THE HIGHER EDUCATION CENTER FOR ALCOHOL AND OTHER DRUG ABUSE AND VIOLENCE PREVENTION, June 2003, http://www.higheredcenter.org/pubs/factsheets/scope.pdf.

3. ROBERT P. GALLAGHER, INT'L ASS'N OF COUNSELING SERVS., NAT'L SURVEY FOR COUNSELING CTR. DIRS. 4–5 (2007), *available at* http://www.iacsinc.org/NsccdSurveyFinal_v2.pdf.

safety and litigation may be working to convince the higher education community that the only thing worse than talking about these students is not talking about them.

Concerns about balancing student privacy and confidentiality rights against the safety interests of the campus and larger community are included among the many related concerns about students who appear to be at risk for harming themselves or others. These issues may arise in diverse contexts, such as when a student submits a troubling essay to a teaching assistant or faculty member, when a participant in a study abroad program behaves erratically while traveling out of the country, when a student in a residence hall expresses concern over a roommate's eating disorder, or when a conduct official suspects that a student's violation of the student conduct code may be related to a bigger and potentially more threatening problem. In these examples, as in numerous others, the individual with the concern about the student may not know whom to tell. Some of these individuals may even worry that by getting involved they may be inappropriately subjecting the institution to additional liability. In the worst cases, an individual may believe that the law limits his or her ability to consult with others on campus about the best course of action regarding a student's welfare. Even after appropriate campus consultations have been made, the question may again be raised as to the ability of campus officials to disclose their concerns to a student's family, the police, or community mental health resources.

This article reviews the interplay between campus safety and student privacy and confidentiality.[4] Part I discusses the provisions of the Family Educational Rights and Privacy Act ("FERPA")[5] as they relate to making disclosures about a student for the safety of the student or others. Part II discusses the relationship between FERPA and the Health Insurance Portability and Accountability Act ("HIPAA")[6] and contrasts the requirements of FERPA with those of medical confidentiality laws and ethical obligations of psychologists, physicians, and other health care providers for the limited purpose of distinguishing these obligations from the requirements of FERPA. Part III discusses issues that arise in campus communications and in notifying families of troubling student behavior. Part IV reviews examples of the consultative models that many campuses have employed to address distressed and distressing students and describes strategies to facilitate appropriate communications within these models without violating student privacy rights or laws relating to confidentiality.

4. For an excellent discussion of the history of FERPA and a review of FERPA in the context of other factors that influence and govern student privacy, see Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003).

5. 20 U.S.C. § 1232g (2000 & Supp. IV 2004).

6. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 & 42 U.S.C.).

I. FERPA AND STUDENT PRIVACY RIGHTS

Passed by Congress in 1974, the Family Educational Rights and Privacy Act requires colleges and universities[7] to allow students[8] to inspect and review their own education records.[9] FERPA limits the disclosure of certain information contained in a student's education record to third parties—including parents—without the student's consent.[10] It also gives students the right to request a hearing to contest alleged inaccuracies in their records.[11] FERPA requires institutions to give students annual notice of their rights under the law.[12] The law applies to all colleges and universities that receive federal funding,[13] and the statutory remedy for a policy or practice that fails to comply is the withdrawal of that funding.[14] Although students and their families have filed complaints with the Department of Education Family Policy Compliance Office for alleged violations of FERPA, to date no higher education institution has lost federal funding as a result of alleged violations of FERPA.

A. Records Covered by FERPA

FERPA applies to "education records," which it defines as those records maintained by an institution that contain information directly related to a student.[15] Education records include almost all records maintained by the institution about a student and go well beyond just the academic record, class schedule, or transcript.[16] The broad definition of "education records" also includes many records that are not educational or academic in nature, such as disciplinary records, financial records, disability accommodation records, photographs, e-mails, and electronic database records.[17] Records are personally identifiable to a student if they include the student's name or other identifiable information or if the student is readily identifiable from the descriptive information contained in the record.[18]

In evaluating a potential disclosure or other issue relating to information about a

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7. 20 U.S.C. § 1232g; 34 C.F.R. § 99.1 (2006) (stating that FERPA applies to every educational institution to which funds are made available under any program administered by the Secretary of the Department of Education).

8. 20 U.S.C. § 1232g(d) ("[W]henever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.").

9. *Id.* § 1232g(a)(1)(A).

10. *Id.* § 1232g(b).

11. *Id.* § 1232g(a)(2).

12. *Id.* § 1232g(e); 34 C.F.R. § 99.7 (2006).

13. 20 U.S.C. § 1232g.

14. *Id.* § 1232g(a)–(b).

15. *Id.* § 1232g(a)(4)(A).

16. *See id.*

17. *See id.*; *but see id.* § 1232g(a)(4)(B) (excluding certain records from the definition of "education records").

18. 34 C.F.R. § 99.3 (2006).

student in identifying any possible FERPA implications, the preliminary question will be whether the information is in the form of a record. Direct personal experience or observation by a college or university employee is not a "record" as that term is used in FERPA,[19] although it may at some point be documented in a record. Consequently, disclosure of a direct observation, as when an employee reports a difficult personal interaction with a student, is not a FERPA issue. Other considerations may come into play in deciding the extent to which the experience should be disclosed to others, but FERPA will not be relevant. Only if the experience is documented in an institutional record will FERPA be relevant to reviewing the potential disclosure of that record.

This distinction between a personal experience and an education record is often overlooked because over time campuses have come to misunderstand FERPA as a student privacy law, rather than as a student *record* privacy law. To the extent that this misunderstanding has contributed to any reluctance by faculty or staff members to disclose information about difficult or threatening interactions with students for fear of violating FERPA, colleges and universities need to clarify the law with respect to both personal experiences and student records. For personal experiences, such disclosures may be made to appropriate persons with the expertise to provide counsel on the issues of concern without implicating FERPA. If the disclosure involves student record information, FERPA applies but allows disclosures intended to address health or safety emergencies.[20]

Some records on campus are expressly excluded from FERPA.[21] Examples of records that are excluded from FERPA and are relevant to this discussion of campus safety include law enforcement records, treatment records, and sole possession records.[22] While these records may contain information about a student, they either are governed by other laws and considerations as to their disclosure, as with law enforcement records and treatment records, or are excluded because they are by definition not disclosed, as with sole possession records.

1. Law Enforcement Records

Records created by a law enforcement unit for a law enforcement purpose are not "education records" and while in the hands of the law enforcement unit are not covered by FERPA for purposes of controlling their access or disclosure.[23] If those records are shared with a campus unit or official, perhaps in connection with a conduct investigation, then the copy of the record in the college or university's possession—apart from law enforcement—is subject to FERPA.[24] FERPA records that a college or university shares with law enforcement (e.g., as school officials with a legitimate educational interest or pursuant to the health or safety exception) remain subject to FERPA and cannot be re-disclosed by the law enforcement unit

19. 20 U.S.C. § 1232g(a)(4).
20. 34 C.F.R. § 99.36(a) (2006).
21. 20 U.S.C. § 1232g(a)(4)(B).
22. *Id.*
23. *Id.* § 1232g(a)(4)(B)(ii).
24. 34 C.F.R. § 99.8 (2006).

except as permitted by FERPA.[25] These records may be subject to other laws, however, such as state open records laws.[26]

2. Treatment Records

FERPA also excludes certain treatment records from the definition of "education records." FERPA coverage does not extend to records of a college or university student that are

> made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity . . . and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.[27]

As discussed further below, these records are protected by state and federal medical record confidentiality and privacy laws; their exemption from FERPA does not mean that they may be freely disclosed.

3. Sole Possession Records

FERPA excludes "sole possession records" from the definition of "education records." Sole possession records are "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute."[28] The key concept here is that the records are not intended to be disclosed and are not accessible to others. For example, if a faculty member's personal notes about a student are placed in a department file, they become accessible to others and are no longer within the "sole possession" exception.

B. FERPA Access Rights

FERPA gives college and university students the right to inspect and review their education records.[29] In most cases this right to "inspect and review" does not include the right to receive a copy of the record, although a school may choose to provide a copy to the student for convenience.[30] A college or university may, but is not required to, permit anyone with written consent from the student to inspect and review the student's education records. The right to inspect or review does not

25. *Id.*
26. *E.g.*, WIS. STAT. § 19.31 (2000).
27. 20 U.S.C. § 1232g(a)(4)(B)(iv).
28. *Id.* § 1232g(a)(4)(B)(i).
29. *Id.* § 1232g(a)(1).
30. A school may be required to provide copies if failure to do so may effectively prevent access, as when a student does not live within commuting distance of the school. *See* 34 C.F.R. § 99.10 (2006).

extend to the student's agents, and an academic institution is not required to honor a student's request to permit access by an agent such as a parent or attorney.[31] Under FERPA, a college or university is required to provide an opportunity to inspect and review the education record only to the student.[32] If a given record contains information about more than one student, the requesting student has the right to see only the portions dealing with himself or herself,[33] so information relating to other students should be redacted or otherwise not disclosed.

For students in elementary and secondary school, parents have the right to access the student's records without the consent of the student, but the paradigm changes at the post-secondary level.[34] Once the student is in attendance at a college or university, the student holds the rights provided by FERPA, regardless of the student's age.[35] This is sometimes a surprising shift for parents who may have been accustomed to having access to their child's records in earlier grades. As students are entering colleges and universities at younger ages, this is becoming increasingly challenging. This is an area worthy of education for parents who may be more closely involved with their children than ever before and who may not be aware of this change in legal rights as their child moves from high school to postsecondary education.

C. FERPA Disclosure

FERPA generally provides that education records or the information contained in an education record may be disclosed only if one of three conditions is met: 1) the student consents to the disclosure, 2) the information falls within the definition of "directory information," or 3) the disclosure falls within one of the express exceptions provided by FERPA. The limitations on an institution's ability to disclose information from a student's record without the student's consent apply even to information in the record that is otherwise publicly available[36] or that the student has himself or herself already disclosed.[37] This may seem counterintuitive,

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31. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to C. L. "Butch" Otter, Member, House of Representatives (July 29, 2002), *available at* http://www.ed.gov/policy/speced/guid/idea/letters/20023/otter0729023q 2002.pdf.

32. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Parent (Aug. 20, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/hastings82004.doc.

33. 34 C.F.R. § 99.12(a) (2006).

34. 20 U.S.C. § 1232g(d).

35. *Id.* ("[W]henever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.").

36. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to W. Joseph Hatley, Attorney, Lathrop & Gage (Mar. 8, 2005), *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/ks030805.doc.

37. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Dr. Hunter Rawlings III, President, Cornell Univ., *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/cornell.doc (last visited Mar. 6, 2008); Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Jerome D.

especially with regard to a student who may have disclosed significant information about himself or herself through a social network such as MySpace or Facebook.

However, this important right to limit the disclosure of information to third parties comes with several significant limitations. The exceptions discussed below are not an exhaustive list but are those exceptions most relevant to disclosures made in the context of campus or individual safety.

1. Consent

In working with distressed students, consent[38] is sometimes overlooked as a means to provide information to a student's family about trouble the student may be having at school. A student initially may be reluctant to communicate with family for fear of disappointing or angering a parent but may be willing to do so if the institution provides some support. Sometimes having a knowledgeable campus employee in the meeting or on the phone when the information is shared may provide some perspective for parents, support for the student, and information about options for services on campus or for taking time away from studies. The law does not favor finding implied consent for disclosure, but in instances in which a student brings a parent to a meeting, such implied consent has been assumed. In other cases, however, consent is not a realistic option, and the institution will need to pursue other means for disclosure.

2. Directory Information

FERPA allows institutions to designate certain classes of information as "directory information." Directory information is information contained in an education record that is not generally considered harmful if disclosed, and it may be released to anyone, inside or outside the institution, without the student's consent.[39] Each institution may designate the types of information that may be treated as directory information. Directory information includes, but is not limited to, information such as the student's name, address (local, permanent, e-mail), telephone number(s), dates of attendance, major course of study, degrees and awards received, participation in recognized sports and activities, photograph, and date and place of birth.[40] If an institution makes directory information available, it must allow students the opportunity to block the release of their directory information.[41] A student's decision to affirmatively block the release of directory information will not affect releases made under other FERPA provisions.

3. Legitimate Educational Interest

A fundamental limit on the student's right to control the disclosure of

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Schad, Attorney, Hudgson Russ LLP (Dec. 23, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/schadj122304.doc.

38. 20 U.S.C. § 1232g(d).

39. *Id.* § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (2006).

40. 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (2006).

41. 20 U.S.C. § 1232g(a)(5)(B).

personally identifiable information is the ability of college and university personnel to share information with school officials who have a legitimate educational interest in the information.[42] The statute does not offer a precise definition of what constitutes a "school official" or a "legitimate educational interest" but is explicit that it is the institution that makes these determinations.[43] These definitions may be broad and need not be strictly limited to a "need to know" basis. A legitimate educational interest is not strictly limited to academic or educational matters, and permitted disclosures are not limited to those that may address the student's interest or that may be to the benefit of the student. The Family Policy Compliance Office has offered the following model definitions:

> A school official is a person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted as its agent to provide a service instead of using University employees or officials (such as an attorney auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.
>
> A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibilities for the University.[44]

As a result of efforts to protect student privacy on campus, especially as it may relate to records that contain potentially stigmatizing information such as conduct records and disability accommodation records, tensions may arise on campus over access to information. The officials who administer student conduct and who provide services for students seeking accommodations for disabilities may be reluctant to share information from their files with others on campus, including faculty and administrators, and may feel that they are in the best position to decide which offices and personnel have a need to know such information. These officials may believe that following the terrorist attacks of September 11, 2001 and in the aftermath of recent campus tragedies some people on campus may be unduly fearful and may be overreacting by demanding to know which students have previous conduct records or have requested disability accommodations. In addition, they may have real concerns that the information may be used to discriminate against students or to treat students unfairly. While the institution may want to consider the important student development issues and the risks associated with having sensitive information widely distributed on campus, FERPA does not limit the sharing of this information with other school officials so long as the purpose for the disclosure is within the institution's definition of

42. *Id.* § 1232g(b)(1).

43. *Id.*

44. U.S. Dep't of Educ., Family Policy Compliance Office, Model Notification of Rights under FERPA for Postsecondary Institutions, http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html (last visited Mar. 6, 2008).

legitimate educational interest. The decision is an institutional one and not the sole purview of the office that creates or holds the record, although that office may have important input to be weighed in making the institutional decision.

4. Health or Safety Emergency

One of the most important FERPA exceptions in the area of campus safety permits the disclosure of information from student education records "to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals."[45] Health concerns may include issues such as a student reporting to a resident hall assistant a recent diagnosis of a highly contagious disease such as measles or meningitis. The institution may share this information with others with whom the student has had close contact, without the student's consent, to encourage them to seek appropriate testing or medical care.[46] Safety concerns may include concerns for a student's welfare such as a serious eating disorder, dangerous high-risk behavior such as heavy or binge drinking, suicidal ideation or threats, or erratic and angry behaviors that others might reasonably perceive as threatening.[47]

Although the FERPA health or safety exception does not require the same level of serious and imminent harm that would be required for disclosing confidential information from a medical or mental health record,[48] disclosures should only be made in good faith based upon the available facts and should be limited to individuals or entities in a position to address or respond to the concern appropriately. The Family Policy Compliance Office has issued guidance to clarify that educational institutions have significant discretion in determining whether a specific situation constitutes an "emergency" and has indicated that it will not question this determination unless it is "manifestly unreasonable or irrational."[49]

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45. 34 C.F.R. § 99.36(a) (2006).

46. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Martha Holloway, State Sch. Nurse Consultant, Ala. Dep't of Educ. (Feb. 25, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/ alhippaa.doc [hereinafter Holloway Letter]; Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Melanie P. Baise, Assoc. Univ. Council, Univ. of N.M. (Nov. 29, 2004), *available at* http://www.ed.gov/policy/gen/ guid/fpco/doc/baiseunmslc.doc [hereinafter Baise Letter].

47. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Dr. J. Chris Toe, President, Strayer Univ. (Mar. 11, 2005), *available at* http://www.ed.gov/policy/gen/guid/fpco/doc/strayer031105.doc.

48. *E.g.*, CAL. CIV. CODE § 56.10 (West 2007); TEX. OCC. CODE ANN. § 159.004(2) (Vernon 2004) (allowing disclosure of confidential information by physicians to "medical or law enforcement personnel" if there is a risk of "(A) imminent physical injury to the patient, the physician, or another person; or (B) immediate mental or emotional injury to the patient.").

49. Baise Letter, *supra* note 46. The Department of Education has proposed amendments to the FERPA regulations, 34 C.F.R. § 99.36, to clarify this section. *See* Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). The proposed amendments would remove language requiring strict construction of this section and expressly permit institutions to take into account the totality of the circumstances in making determinations. *Id.* at 15,589. If the institution finds an "articulable and significant threat to the safety or health of the student or other

For issues involving distressed or distressing students, the initial disclosure should be made to campus professionals who may then assist in determining whether further disclosure is appropriate. Colleges and universities may rely upon this exception to contact family members with concerns about the student. This will permit families to provide additional support, to partner with the student and the school to develop appropriate short and long term strategies, and to share information with the school, such as information regarding the student's past behavior or conduct at home, that may assist in determining the best services to recommend for the student and that may contribute important information to any threat assessment being considered.

5. Disclosures to Parents or Family

Discussions of troubling student behavior, suicidal ideation or threats, and perceived risks to others often include consideration of communicating campus concerns to parents or family. This is particularly true when the student is of traditional college or university age or younger. For older students, the issue may be communication with a spouse or other family member rather than a parent.

General FERPA exceptions, such as the health or safety exception, will permit communications with parents and family as well as with other appropriate persons or entities such as law enforcement and community mental health providers when a student is in distress or is behaving in a threatening manner. FERPA also provides two additional exceptions that apply specifically to parents. First, a college or university may, but is not required to, provide information to a parent or legal guardian regarding any violation of law or of an institutional policy governing the use or possession of alcohol or a controlled substance.[50] To rely on this exception, the institution must determine that the student committed a disciplinary violation with respect to such use or possession and the student is under the age of twenty-one at the time of the violation and the disclosure.[51] Second, FERPA also permits disclosures of education record information to a student's parent if the student is the parent's dependent for federal tax purposes.[52] To rely on this exception the institution must verify the student's status, which may be done by asking the student for confirmation or by asking the parent for a copy of the relevant portion of the most recent year's tax return.

The U.S. Department of Education has published a series of pamphlets describing the balance of student privacy and campus safety.[53] The pamphlets include information for elementary and secondary schools, for colleges and

individuals", the proposed rule would permit disclosure to any person whose knowledge of the threat is necessary to protecting the student or others. *Id.* "If, based on information available at the time of the determination, there is a rational basis for the determination, the Department of Education will not substitute its judgment for that of the educational agency or institution." *Id.*

50. 20 U.S.C. § 1232g(i) (2000).

51. *Id.*

52. *Id.* § 1232g(b)(1)(H).

53. U.S. Dep't of Educ., FERPA Guidelines on Emergency Management, http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html (last visited Mar. 6, 2008).

universities,[54] and for parents.[55] These pamphlets provide information about FERPA to address common misunderstandings that suggest that FERPA may prohibit certain communications. While reinforcing the important protections provided by FERPA, the pamphlets provide information about communications with parents and disclosures made for the purpose of protecting students and others.[56]

Proposed amendments to the Higher Education Reauthorization Act, also known as the College Opportunity and Affordability Act of 2007,[57] include a brief section titled "Guidance on Mental Health Disclosures for Student Safety."[58] The new language requires the Secretary of Education to provide additional guidance within ninety days after the enactment of the Act, to clarify the role of higher education institutions

> with respect to the disclosure of education records, including to a parent or legal guardian of a dependent student, in the event that such student demonstrates that the student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault.[59]

The Act further requires the guidance issued by the Secretary to clarify that "an institution . . . that, in good faith, discloses education records or other information in accordance with the requirements of this Act and . . . [FERPA] shall not be liable to any person for that disclosure."[60] This express statement may address some current misunderstandings; however, as discussed above, even without this addition FERPA has permitted appropriate communications by colleges and universities with parents under existing exceptions.[61]

6. Disclosing Disciplinary Information

FERPA expressly permits the institution to include information in a student's education record concerning disciplinary action taken against the student "for

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54. U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (Oct. 2007), *available at* http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf.

55. U.S. DEP'T OF EDUC., PARENTS' GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: RIGHTS REGARDING CHILDREN'S EDUCATION RECORDS, *available at* http://www.ed.gov/policy/gen/guid/fpco/brochures/parents.pdf.

56. *Id.*

57. H.R. 4137, 110th Cong. (2007).

58. *Id.* § 865.

59. *Id.*

60. *Id.*

61. At the time this article went to press, the Department of Education issued proposed regulations to amend various sections of the FERPA regulations, 34 C.F.R. § 99. Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). The proposed amendments provide several updates and clarifications, and for the most part, codify guidance that the Family Policy Compliance Office has provided in individual guidance letters. *See id.* The revisions include updated definitions and clarifications regarding permissible disclosures to parents and other disclosures without consent. *See id.* Proposed updates to the health and safety exception are described in footnote 49, *supra*.

conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community."[62] It also permits the disclosure of that information to "teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student."[63]

In a separate and independent provision, FERPA permits institutions to disclose to anyone the final results of a disciplinary proceeding conducted against a student who is an alleged perpetrator of a crime of violence or a non-forcible sex offense if the institution determines as the result of that disciplinary proceeding that the student committed a violation of the institution's own rules or policies with respect to the crime or offense.[64] FERPA also permits an institution to disclose the final results of such a proceeding to the victim regardless of whether the alleged perpetrator was found to be in violation of the institution's rules or policies.[65] For the purpose of these two exceptions, "final results" is limited to the name of the student who is the alleged perpetrator, the violation found to have been committed, and any sanction imposed against the student by the institution.[66]

7. Disclosure to Another Institution

A new institution may learn that a troubled student is leaving a previous institution, perhaps in an effort to avoid the consequences of past bad conduct or to make a clean start at a new institution. FERPA expressly permits the previous institution to disclose information from the student's education record to the new institution at which the student seeks or intends to enroll.[67] The information may be disclosed without the student's consent and may include concerns about health or safety but is not limited to information of that nature. To make the disclosure, the institution must either inform its students generally in its annual FERPA notice of its practice or make a reasonable attempt to notify the individual student that it has made such a disclosure.[68] In either case, upon the student's request, the institution must provide the student with a copy of the disclosed records[69] and give the student an opportunity for a hearing to challenge the content of the disclosed records.[70] Of the FERPA exceptions that generally permit disclosure to another institution, the health or safety exception discussed above expressly includes teachers and officials at other schools if they have a legitimate educational interest

62. 20 U.S.C. § 1232g(h)(1) (2000).

63. *Id.* § 1232g(h)(2).

64. *Id.* § 1232g(b)(6)(B).

65. *Id.* § 1232g(b)(6)(A).

66. *Id.* § 1232g(b)(6)(C).

67. *Id.* § 1232g (i); 34 C.F.R. § 99.31(a)(2) (2006). The Department of Education has proposed amendments to this section to permit disclosure to another institution even after the student has already enrolled or transferred. Family Education Rights and Privacy, 73 Fed. Reg. 15,573, 15,595 (proposed Mar. 24, 2008).

68. 34 C.F.R. § 99.34(a) (2006).

69. *Id.* § 99.34(a)(2).

70. *Id.* § 99.34(a)(3).

in the behavior of the student.[71]

8. Disclosures Pursuant to a Subpoena or Court Order

FERPA expressly permits an institution to disclose education record information in response to a judicial order or lawfully issued subpoena.[72] The general requirement is that the institution is required to notify the student of the order or subpoena in advance of compliance.[73] In cases of a law enforcement subpoena,[74] grand jury subpoena,[75] or an order for records sought pursuant to an investigation of domestic or international terrorism,[76] the subpoena or order may include an order to the institution not to disclose the existence or contents of the subpoena or order to anyone, including the student.

II. CONTRASTING FERPA PRIVACY RULES WITH PROFESSIONAL OBLIGATIONS OF CONFIDENTIALITY

Campus personnel who mistakenly believe that FERPA presents an obstacle to sharing information that appears to be necessary or desirable to address issues of campus safety may have confused the non-disclosure rules or privacy protections of FERPA with the much higher legal protections in place for medical and mental health care patient and client communications. This misunderstanding results in two types of problems that interfere with effective and necessary campus communications.

In the first instance, some members of the campus community mistakenly believe that very rigorous standards imposed by state and federal medical confidentiality laws for certain patient communications and medical records apply to all communications about mental health issues, even those that occur outside of the context of a professional relationship. As a result, these individuals may be reluctant to discuss dangerous, suspicious, or high-risk student behavior with others on campus who should be advised of the concerns. They may fail to recognize instances in which the disclosure does not involve education records and thus is not governed by FERPA. On the other hand, if education records are involved, they may fail to understand that the more permissive FERPA standard applies to these discussions among college or university personnel who are not bound by medical confidentiality laws. In this instance, important communications should occur so that the college or university does not miss an opportunity to develop an effective early response to an escalating student issue. Even if the student issue does not worsen, the individuals who believe they cannot discuss the problem may continue to have concerns and may be frustrated that the college or university is not providing more assistance or support. This may result in these

71. 20 U.S.C. § 1232g(b)(1)(B) (2000 & Supp. 2004); *Id.* § 1232g(h)(2000); 34 C.F.R. § 99.36(b) (2006).

72. 20 U.S.C. § 1232g(b)(2)(B) (2000); 34 C.F.R. § 99.31(a)(9) (2006).

73. 20 U.S.C. § 1232g(b)(2)(B).

74. *Id.* § 1232g(b)(1)(J)(ii).

75. *Id.* § 1232g(b)(1)(J)(i).

76. *Id.* § 1232g(j).

individuals being less likely to report future problems and may make them feel the need to address problems themselves without the benefit of the expertise of other college or university offices. Moreover, even if the situation does not ultimately pose a real danger, multiple offices or campus personnel may be involved with the student in a way that is neither efficient nor productive. Poor communication among campus offices rewards forum shopping and manipulative behavior and fails to provide clear guidance for students in need of assistance.

In the second instance, some people on campus may not realize that their colleagues who work directly with students in a medical or mental health capacity on campus are bound by more restrictive legal and professional standards with regard to medical confidentiality. Physicians, psychologists, and other health care providers who see students as patients or clients generally are not permitted to share information they learn in their professional interaction with students because they are bound by strict state and federal medical confidentiality laws[77] and professional rules of ethics.[78] As a result, many of these providers may not disclose otherwise confidential information that they learn in the course of treatment about a student patient or client unless they reasonably believe that the client or patient is at imminent risk of causing serious harm to self or others.[79] This may result in frustration when faculty members or other campus officials are concerned about a student's aberrant behavior and want to know whether the student is being seen by the counseling service or want a psychologist or other provider to disclose a student's diagnosis.

Campus mental and physical health professionals are subject to ethical rules and legal constraints that significantly limit what they may share with others on campus. For example, the code of Ethics of the American Medical Association provides:

> The physician should not reveal confidential communications . . . or information without the express consent of the patient, unless required by law . . . .
>
> The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities.[80]

The Ethical Principles of Psychologists and Code of Conduct similarly provide:

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77. *E.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 201 (2000); Electronic Privacy Information Center, Legislative Survey of State Confidentiality Laws with Specific Emphasis of HIV and Immunization, http://www.epic.org/privacy/medical/cdc_survey.html (last visited Mar. 6, 2008) (containing a survey compiling state medical confidentiality laws).

78. *E.g.*, AM. MED. ASSOC., CODE OF ETHICS § E-5.05 (June 1994), *available at* http://www.ama-assn.org/ama/pub/category/8353.html.

79. The standards under state laws vary.

80. AM. MED. ASSOC. CODE OF ETHICS § E-5.05.

> Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to . . . protect the client/patient . . . from harm . . . in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.[81]

As discussed above,[82] FERPA does not apply to treatment records that are:

> [M]ade or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity . . . and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.[83]

The Health Insurance Portability and Accountability Act ("HIPAA") defines protected health information so as to exclude individually identifiable health information that is included in education records covered by FERPA and that is in treatment records that are exempted from FERPA.[84]

In other words, if a campus medical record is created for the purpose of treatment and it is not shared with anyone who is not directly involved in treatment even for purposes of insurance reimbursement then neither FERPA nor HIPAA applies. These records are protected, however, under federal[85] and state[86] medical confidentiality and disability laws. If state or federal medical confidentiality laws permit a campus medical record to be shared with someone not directly involved in treatment, then the record may be shared only if the disclosure qualifies as an exception under FERPA. Because state and federal confidentiality laws have a higher threshold for disclosure, this is generally not an issue. For example, if a state statute requires a campus psychologist to contact the police to report that a client has made an imminent threat of serious harm to a foreseeable victim, the disclosure would easily satisfy the FERPA health and safety exception.

The Family Policy Compliance Office discussed the interplay between FERPA and HIPAA in a guidance letter explaining that the health or safety exception under FERPA permits the sharing of school health and immunization records with a state health department.[87] The guidance, relevant here, is that the release of student health-related information is not governed by HIPAA. As these are health records provided to the school by the family and not treatment records, FERPA

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81. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.05 (June 1, 2003), *available at* http://www.apa.org/ethics/code2002.html.

82. *See supra* Part I.A.2.

83. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2000).

84. Treatment records are exempted from FERPA. *Id.* § 1232g(a)(4)(B)(iv); *See also* 42 U.S.C. § 1320d (2006).

85. 42 U.S.C. § 290dd-2 (2000); *Id.* § 10841(1)(H).

86. *E.g.*, ARIZ. REV. STAT. ANN. § 36-509 (2006); N.J. STAT. ANN. § 2A:62A-16 (West 2007).

87. Holloway Letter, *supra* note 46.

applies with the following caveat:

> [A]ny release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law.[88]

With limited exceptions, campus health care providers generally may not share information learned in communications with patients and clients, even with other concerned parties on campus, the campus administration, or the student's family, unless they meet a standard much higher than that required under the FERPA health or safety exception or unless the client or patient consents to the disclosure. This issue generally arises in situations in which anxiety levels are high due to troubling or puzzling student behavior. Therefore, before any particular student issue arises, professionals should take care to educate campus constituencies of the potential constraints on communications.

When the professional relationship is initiated, the provider is responsible for explaining to the patient or client the limits of confidentiality in the relationship.[89] This is especially important when the provider is seeing students on campus. The student should be advised of the protections afforded communications made during treatment and the degree to which those communications will or will not be shared with others on campus. Implicit in this is the need to communicate to the student that any statements that indicate that the student will engage in serious self-harm or threats to others will be disclosed and acted upon as required under state law.

To address the tensions that arise on campus when a member of the campus community such as a faculty member, an administrator, a conduct official, or the parent of the student's roommate seeks information from a mental health care provider or other medical or mental health care professional on campus regarding a student's aberrant or challenging behavior, the provider is limited in providing information within the constraints of the confidential relationship. The providers may not be able to acknowledge or disclose any information about their relationship with a student if they do not believe that the student poses the imminent threat to self or others as required by law for disclosure.[90] The provider may, however, be able to provide some information that may ease this tension. First, the professional staff should explain the requirements of applicable state law. Second, the professional staff should then assure those concerned that if the staff had a basis for believing an imminent threat to be present with respect to the behavior of any patient or client, they would have a duty to disclose that

88. *Id.* at 4 (emphasis added).

89. AM. PSYCHOLOGICAL ASS'N, *supra* note 81, § 4.02(b) ("Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.").

90. *See, e.g.*, CAL. CIV. CODE § 56.10(c)(19) (West 2007) (allowing disclosure by psychotherapists where the psychotherapist thinks disclosure is necessary to "prevent a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims").

information as required under the applicable state standard.[91] Third, the provider may also encourage the concerned individual to contact other campus officials, such as the Dean of Students, to report conduct violations or to discuss problematic behavior. The Dean's office and most other offices on campus will be bound only by FERPA which imposes a "lower" standard and which expressly contemplates sharing information with other school officials, parents, and other interested parties when appropriate. Behavior that appears to be threatening to the student or to others should also be immediately reported to campus security or police.

III. ISSUES IN CAMPUS COMMUNICATION AND FAMILY NOTIFICATION

Disclosure of information about a distressed student to the student's parent raises many of the same general issues as disclosure to another family member or an outside mental or physical health provider, although disclosures to parents are facilitated by several FERPA exceptions that are limited to parents. Colleges and universities have come to understand that while in the majority of cases family members may provide excellent support for a student, in some cases these relationships also may be problematic. To add a layer of complication, the student —particularly when in distress—may not be the best judge of whether the family or parent will be a good source of support. A student may be reluctant to contact a parent out of fear that the parent will be angry or disappointed over the student's "failure" when in fact the parent, once contacted, may be very supportive and understanding.

As discussed above, the privacy obligations of administrators and campus personnel under FERPA provide much greater flexibility than the confidentiality obligations of professional medical and mental health care staff in notifying parents or family of a student in distress.[92] Administrators operating under FERPA may notify a family member of a distressed student by meeting any of several exceptions under FERPA. They may disclose information to parents who have established that the student is their tax dependent.[93] They may disclose information about disciplinary proceedings and about drug or alcohol violations to parents of students under the age of twenty-one[94] as described above.[95] Even if proceeding under the health or safety exception, administrators do not need to establish an imminent threat of serious harm to an identifiable victim. FERPA permits disclosure of information regarding a student's high-risk behavior or troubling statements "in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons . . . ."[96] The goal should be to facilitate appropriate

91. State law may determine to whom the permissible disclosure is made and may include the foreseeable victim and law enforcement.

92. *See supra* Part II.

93. 20 U.S.C. § 1232g(b)(1)(H) (2000).

94. *Id.* § 1232g(i).

95. *See supra* note 51 and accompanying text.

96. 20 U.S.C. § 1232g(b)(1)(I).

communication with family members to prevent harm to the student and to the campus community.

Reluctance to communicate with parents may at times be a function of campus culture rather than any constraint under the law. Student affairs and other campus administrators have long seen assisting students in the transition and development from child to adult as part of their role in working with students. This effort has often involved reinforcing the role of the student as an autonomous adult decision-maker and responding to parent inquiries by encouraging parents to discuss their concerns with their son or daughter rather than having the college or university play an intermediary role. This student development paradigm has been challenged in recent years as students and parents have closer and more involved relationships than were presumed by the previous model. The mildly pejorative "helicopter parent"[97] has been used to describe the hovering parent, always ready to participate in decisions affecting the student. Many college and university administrators may have previously seen themselves as advocates assisting students in separating from unwanted interference by overbearing parents. More recently, however, institutions are recognizing that many students seek and desire this support from parents and are very comfortable with this level of involvement by their parents. Students use instant messaging and e-mails to keep in regular contact with parents and may not be asking to be rescued from this involvement by well-intentioned college administrators. Colleges and universities are reexamining these relationships, and some research suggests that this enhanced relationship between parents and students may even advance learning outcomes.[98]

Parents have also challenged the previous paradigm as they increasingly demand to be contacted by colleges and universities when their student is in distress. If a parent is not contacted and the student inflicts self-harm or injures another, the family may file legal action against the institution for failure to disclose this important information to the family, alleging or implying that had the family known what the institution knew, it could have taken steps to prevent or avoid the harm.

Two related questions arise in the context of what has come to be known as "parental notification." The first question is under what circumstances a college or university may notify parents of a student's serious distress, either without the consent of the student or even over the express objection of the student.[99] The second question is whether colleges and universities ever have a duty to notify parents of a student in distress.

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97. Sara Lipka, *Helicopter Parents Help Students, Survey Finds*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Nov. 9, 2007, at A1.

98. *Id.*

99. A general discussion of the broader liability issues with respect to campus safety and assault or suicide is beyond the scope of this article. Other contributors to this volume provide a thorough and detailed analysis of potential tort liability. *See generally* Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing College Student Suicide Crisis*, 34 J.C. & U.L. 253 (2008); Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Implications*, 34 J.C. & U.L. 349 (2008); Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

As discussed above, FERPA permits appropriate communications with family under several provisions, including: with the consent of the student, following a determination that the student is a tax dependent, under certain circumstances with respect to alcohol and drug violations, serious conduct violations, and in circumstances as appropriate to address a health or safety emergency.[100]

Although FERPA permits appropriate communications with parents, courts have not yet held that colleges or universities have an affirmative duty to notify parents of a distressed student. In many cases, however, such notification may permit parents to intervene and may create a partnership between the family and the college or university to coordinate an appropriate response to concerns about the distressed student. Even if parents are not able to respond, or choose not to respond, notification will also preclude a later claim alleging that notification should have been made. Furthermore, colleges and universities now regularly contact parents for financial support and send a multitude of brochures, pamphlets, letters, e-mails, and promotional materials to families.[101] It would be ironic indeed if the one time institutions were reluctant to communicate with families was when the student was at risk, the time when families were most interested in hearing from them.

The first case to address the issue of an affirmative duty to notify parents was *Jain v. Iowa*.[102] After a freshman at the University of Iowa committed suicide in his dormitory room, his father sued the University for wrongful death.[103] He sought damages for the University's failure to notify him of serious concerns regarding the student's self-destructive behavior.[104] The Iowa Supreme Court affirmed the lower court in dismissing the case on the basis that FERPA does not create a legal duty to notify parents of a health or safety emergency.[105]

The student's first semester was troubled. He did not do well academically, and he was disciplined for smoking marijuana.[106] His parents were not contacted, even after the student's girlfriend reported (and he later admitted) that he was attempting to commit suicide by inhaling exhaust fumes from his moped.[107] The student assured the resident assistants who reviewed this incident that he would seek counseling and would talk to his parents.[108] Later in the semester, the student

100. *See supra* Part I.C.

101. Promotional materials may raise other issues. In *Bash v. Clark University*, the family of a student who overdosed on narcotics raised a negligent misrepresentation claim arising from representations in a handbook distributed by the university to parents at orientation. Bash v. Clark Univ., No. 200600745, 2006 WL 4114297 (Mass. Super. Ct. Nov. 20, 2006). The handbook stated that "the '[s]taff in the Dean of Students Office manages the nonacademic services that [they] provide to ensure the health and safety of the individuals who are living and learning at Clark University.'" *Id.* at *1. The claim failed, in part, because it was deemed to be too vague and indefinite to give rise to a cause of action. *Id.* at *7.

102. 617 N.W.2d 293 (Iowa 2000).

103. *Id.* at 296.

104. *Id.* at 296.

105. *Id.* at 297.

106. *Id.* at 295.

107. *Id.* at 295–96.

108. *Id.*

brought his moped into the residence hall suite and asphyxiated himself through carbon monoxide poisoning, also endangering but not killing his suitemates.[109]

At the time, the University of Iowa had an unwritten policy permitting the Dean of Students to notify parents in case of a suicide attempt.[110] Unfortunately, no relevant information about this student was shared with the Dean of Students until after the student's death.[111] The Supreme Court of Iowa did not find a special relationship between the student and the University sufficient to give rise to a duty to prevent his suicide.[112] The student's father argued that because an exception to FERPA would have permitted the University to contact the family, the University had a duty to contact them.[113] The Iowa Supreme Court held that this issue was not properly before the court on appeal but not without commenting that it entertained "serious doubts" about the merits of this argument because the claim rested "not on a violation of the Act but on an alleged failure to take advantage of a discretionary exception to its requirements."[114]

When parents of a deceased student sued Massachusetts Institute of Technology ("MIT") in *Shin v. Massachusetts Institute of Technology*[115] over the apparent suicide of their daughter,[116] the country and the media focused intently on the issue of parental notification. Although the case ultimately settled on terms that indicated that the student's death may have been accidental,[117] the lawsuit inspired serious consideration of the issue of parental notification and student mental health issues. *Shin* involved a sophomore student with an apparent history of psychiatric problems which predated her enrollment at MIT.[118] The student experienced a series of incidents while at MIT, including hospitalization for an overdose of Tylenol with codeine, at which time her parents were notified.[119] She received counseling by MIT but continued to make increasingly serious threats of self-harm.[120] MIT employed a collaborative case management model approach to working with this student,[121] but unfortunately the student died of burns sustained in a fire she started, perhaps accidentally, in her residence hall room.[122]

Although the case settled before the court reached any decision on liability,[123] it caused administrators and health care providers on campus to have additional

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109. *Id.* at 296.
110. *Id.*
111. *Id.*
112. *Id.* at 296–97.
113. *Id.* at 298.
114. *Id.*
115. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).
116. *Shin*, 2005 WL 1869101 at *1.
117. Marissa Vogt, *MIT Settles Shin Case, Parents Agree Death Likely an Accident*, THE TECH ON-LINE EDITION, Apr. 4, 2006, http://www-tech.mit.edu/V126/N15/15shin.html.
118. *Shin*, 2005 WL 1869101 at *1–2.
119. *Id.* at *1.
120. *Id.* at *1–2.
121. *Id.* at *5.
122. *Id.* at *5–6.
123. Vogt, *supra* note 117.

concerns for liability when working with distressed students.[124] It also highlighted the relationships among the student, the institution, and the family and the importance of timely and effective communications among all parties.[125]

Mahoney v. Allegheny College[126] involved a junior student with some history of depression.[127] He sought counseling and medication, and his parents were notified when he was hospitalized.[128] Apparently stabilized, he returned to Allegheny but continued to be distressed.[129] He hung himself in an off-campus fraternity house.[130]

The student's family moved for summary judgment against Allegheny, alleging breach of the duty of care,[131] duty to notify parents,[132] and breach of contract.[133] The court weighed the importance of the therapist-patient privilege and student privacy and considered problems with involuntary withdrawal policies and disability discrimination. It relied on *Jain*[134] to find "no 'special relationship' nor 'reasonably foreseeable' events that would justify creating a duty to prevent suicide or notify . . . parents . . . ."[135] The court encouraged efforts at prevention rather than search for a legal duty.[136]

The previous cases discuss claims that arose when seriously troubled students remained at school and ultimately took their own lives. The issue of communications with parents may also arise when schools are evaluating the need or desire to dismiss students involuntarily. Cases in which involuntary dismissal is considered based on concerns that a student may be a threat to self or others raises important disability law issues that are beyond the scope of this article, but the evaluation of such a student also raises issues involving disclosure of information and communications with families that reinforce the issues discussed above.

The Office of Civil Rights ("OCR") has confirmed that nothing in § 504[137] prevents educational institutions from addressing the dangers posed by a student who represents a "direct threat" even if that student has a disability. OCR has issued several rulings with regard to the involuntary dismissal of students who threaten self-harm or harm to others, reviewing complaints from students who have been dismissed and students who allege disability discrimination.[138] To rise to the

124. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, Apr. 4, 2006, http://www.insidehighered.com/news/2006/04/04/shin.

125. *Id.*

126. No. AD 892-2003, (Pa. Ct. Com. Pl. Dec. 22, 2005), *available at* http://www.asjaonline.org/attachments/articles/35/Allegheney%20college%20SJ%20decision. pdf.

127. *Id.* at 1–2.

128. *Id.* at 4.

129. *Id.* at 7.

130. *Id.* at 2.

131. *Id.* at 15–18.

132. *Id.* at 18–22.

133. *Id.* at 23–26.

134. *Id.* at 20–22.

135. *Id.* at 22.

136. *Id.* at 25.

137. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000).

138. *E.g.*, Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-

level of direct threat, the school needs to show a high probability of substantial harm not merely a speculative or remote risk.[139] To establish this, the school will need to conduct an individualized and objective assessment based on the most current medical knowledge or best available objective information.[140] The purpose of the assessment is to evaluate the probability that the potentially threatening action or injury will occur and to consider whether reasonable modifications of policies, practices or procedures could mitigate the risk.[141] The student is entitled to receive due process, based on the student's observed conduct.[142]

To conduct a direct threat analysis, the institution will need current and accurate information from a variety of sources. For this to occur, faculty and staff will need to understand their ability to communicate with appropriate individuals on campus regarding student concerns. The institution may also wish to contact the student's family, both to apprise them of the concern and to solicit additional information that may be relevant to the threat analysis. Many campuses have chosen to coordinate these communications, as well as communications regarding continuing students who intend to remain on campus during a period of distress, through a consultative campus group using some form of case-management model.

IV. CONSULTATIVE CASE MANAGEMENT MODELS

Many colleges and universities have developed effective communication protocols as part of a coordinated approach to address environmental issues such as drugs, alcohol, high-risk behavior, and disruptive or dangerous student conduct. Although these protocols may be both preventive and reactive, the focus in this section is on the use of case management strategies to combine information from multiple sources across campus (and, as appropriate, including family and off-campus providers) to inform decisions made with regard to distressed and distressing students. A consultative approach across departments and administrative lines is very useful in managing the campus response to difficult student issues. The approach should be interdisciplinary to develop comprehensive and campus-wide responses.

Many campus models involve some form of a consultative group to coordinate the response to student conduct that has engaged multiple offices or issues. To be successful, the group should include a diverse membership from various offices across campus. This is necessary to gather information about a student who may be visiting multiple offices across campus (either as a "forum shopper" to seek the most advantageous response to an inquiry or perceived problem or simply because the nature of the behavior creates problems in multiple arenas, from academic departments to administrative units). This consultative model works best when the

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06-2060 (Mar. 18, 2005); Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-04-2042 (Dec. 22, 2004).

139. *E.g.*, Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-04-2042 (Dec. 22, 2004) at 4–5.

140. *Id.*

141. *Id.*

142. *Id.*

participants have diverse experience and problem solving skills from different offices and professions across campus. It is also valuable to have representation from campus health and counseling centers if available. Sometimes these offices are initially reluctant to participate due to concerns about confidentiality and, if necessary, legal counsel may assist in explaining the applicable FERPA and other legal issues to the group. Without revealing any protected information about an individual student, physicians, psychiatrists, and psychologists can listen to everything that other members of the group share, can encourage appropriate referrals to their campus offices or off-campus providers, and can describe for the group the general response they and other professionals would have for a student presenting any serious issues described, such as the general protocol for responding to a student with an eating disorder, a student who makes serious threats, or a student who describes suicidal ideation. The group may decide to appoint a primary point of contact for the student to limit the number of offices the student contacts for services and may also agree on common and consistent messages to be provided to the student. If parents are to be notified, police contacted, or involuntary commitment sought, the group can develop a coordinated approach and may agree on services to be provided to the student in the transition. These groups generally do not, as a single entity, work with the student directly, but by sharing information, these groups are effective in coordinating the responses of individual units within the college or university. If the group maintains notes or minutes of its discussions about an identifiable student, then the student would have the right under FERPA to review and inspect those notes or minutes as part of the education record.[143] The student also would be able to inspect any records maintained by the offices that interact with the student directly.[144] Some of these groups may avoid this issue by not maintaining minutes or notes of the group meetings regarding the students they discuss. In addition, the group approach can be valuable in both coordinating services for students and in coordinating appropriate responses by the campus to difficult and dangerous behavior.

CONCLUSION

FERPA has become an integral part of campus life. Protecting the privacy of student records reflects values that many on campus share. In addition, these protections have been used by student affairs professionals and academic administrators to foster and support a student development model that facilitates the student's transition from high school to higher education. Colleges and universities regularly encourage students and parents to embrace this transition by placing appropriate decision-making responsibility in the hands of students while recognizing the importance of sharing information with families and other appropriate persons when necessary to address serious issues of individual or campus safety.

FERPA does not create an obstacle to effective communications to promote student welfare or to protect campus safety. Accurate information about FERPA

143. 20 U.S.C. § 1232g(a)(1) (2000).

144. *Id.*

may be used to encourage appropriate sharing of information to benefit students, their families, and the campus community. FERPA not only provides important protections for the privacy of student records but also provides for appropriately limited disclosure of records under several exceptions designed to address campus safety and student well being. Some campus records may be more difficult to disclose under applicable state and federal medical confidentiality laws, but a collaborative approach that draws on the expertise of multiple campus professionals from diverse fields will increase communication options necessary to promote campus safety.

Campuses should take immediate steps to address any misinformation about the role of FERPA in campus safety. Anyone worried about violating FERPA in making a disclosure intended to protect a student or another person from serious harm should make campus safety the priority. If the potential harm does not appear to be imminent, concerned individuals should consult first with legal counsel or other campus resources to address any uncertainty about the permissibility or scope of an intended communication. Through the appropriate sharing of information, campuses will be able to make better decisions to protect students and the community.

BACKGROUND CHECKS IN THE UNIVERSITY ADMISSIONS PROCESS: AN OVERVIEW OF LEGAL AND POLICY CONSIDERATIONS

DARBY DICKERSON*

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* Vice President, Dean, and Professor of Law, Stetson University College of Law. Thanks go to Sheila Trice Bell, Esq., with whom I co-presented a program in June 2007 sponsored by the Center for Excellence in Higher Education Law and Policy at Stetson University College of Law on the "Risks of the Law School Admissions Process," during which we discussed background checks; my Stetson colleague Peter F. Lake, Charles A. Dana Chair and Director of the Center for Excellence in Higher Education Law and Policy; Deborah C. Brown, Associate Vice President for Legal Affairs and Human Resources at Stetson University College of Law, for her insightful comments regarding various employment law issues; Professor Brooke J. Bowman and Stetson law student Kathryn Lewis, for their comments on earlier drafts; Stetson law students Michael Davis and Matthew Kahn, for their research assistance; Stetson law reference librarian Sally Waters, for helping to locate unusual sources; and several other individuals, who reviewed and provided thoughtful comments on earlier drafts.

INTRODUCTION

In the time since the tragedy at Virginia Tech, the primary question for college and university administrators, faculty, and students has been how to keep our campuses safe.[1] One debate is whether colleges and universities should require criminal background checks on prospective students.[2] Although this issue presents a virtual jigsaw puzzle of legal and policy considerations, the crux of the debate is illustrated by the polar positions of S. Dan Carter, Senior Vice President of Security on Campus, Inc.,[3] and Barmak Nassirian, Associate Executive Director, External Relations, of the American Association of Collegiate Registrars and Admissions Officers.[4]

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1. As one observer noted, "There's a new age of vigilance in academia." Jon Weinbach, *The Admissions Police*, WALL ST. J., Apr. 6, 2007, at W1. *Editor's Note:* This article was substantially through the editing process when the shootings at Louisiana Tech and Northern Illinois University occurred.

2. Outside the academy, the number of background checks conducted has risen each year since the September 11, 2001 attacks. Julie Carr Smyth, *Background Checks on the Rise*, CINCINNATI POST, Nov. 12, 2007, at A1 (indicating that background checks are growing at a rate of about 12% per year and that, to date during 2007, "25 million Americans have had background checks by the federal government"). *See Background Checks Are on the Rise: A Special Report on Background Screening*, HRFOCUS (New York, N.Y.), July 2007, *available at* http://www.ioma.com/issues/HRF/2007_7/1613081-1.html (reporting the results of a survey of human resources professionals, which revealed that 85.9% run criminal checks of new hires and that 3% plan to implement such checks within twelve months); Judy Greenwald, *Employers Must Exercise Caution with Background Checks*, 41 BUS. INS. 4, Apr. 30, 2007 (indicating that a 2004 survey by the Society for Human Resource Management found that 96% of respondents used some sort of background or reference check for job applicants). Within the academy, more colleges and universities have adopted a risk-management culture. *See* Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 656–58 (2005) (noting "more thorough scrutiny of new hires [and] more background checks" for employees, including faculty); Elizabeth Redden, *Criminals and Colleges in the Capital*, INSIDE HIGHER EDUC., Feb. 14, 2007, http://www.insidehighereducation.com/news/2007/02/14/dc. *See generally* Barbara Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655 (2006) (discussing background checks on faculty and staff).

3. Security on Campus, Inc. is a nonprofit organization "dedicated to safe campuses for college and university students." Sec. on Campus, Inc., About Us, http://www.securityoncampus.org/aboutsoc/index.html (last visited Feb. 27, 2008). The organization was co-founded in 1987 by Connie and Howard Clery, whose daughter, Jeanne, was beaten, raped, and murdered on April 5, 1986 in her dorm room at Lehigh University. The assailant was another Lehigh student. *Id.*

4. The American Association of Collegiate Registrars and Admissions Officers (AACRAO) is a voluntary nonprofit organization that consists of "more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Am. Ass'n Collegiate Registrars & Admissions Officers, About Us, http://www.aacrao.org/about (last visited Feb. 27, 2008).

> The mission of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services. It also provides a forum for discussion regarding policy initiation and development, interpretation and implementation at the institutional level and in the global educational community.

Id.

Mr. Carter argues that background checks can help promote campus safety and urges parents and students to ask whether colleges and universities conduct background checks as part of their campus safety audit.[5] In supporting his position, Mr. Carter notes that, "[w]hen it comes to GPAs and standardized test scores, [colleges and universities] just don't accept the student's word for it. They require proof from an independent source. . . . Yet when it comes to giving information for more serious matters—a criminal history for example—they require no verification."[6]

Mr. Nassirian disagrees. In his view, colleges and universities should not conduct background checks or ask about applicants' past crimes. Background checks and application questions about criminal history, he notes, "are not likely to catch the 'next Jack the Ripper' but are more likely to harm 'the perfectly ordinary mischievous kid without much utility in preventing the next tragedy.'"[7] He also believes that the college and university admissions process is not the correct forum in which to evaluate candidates' criminal records: "If an individual is at liberty in our society, why should that individual be denied education? What makes colleges competent to make extra-judicial judgments on people?"[8]

A better solution integrates aspects of both positions. With the safety of our campuses and students at stake, reasonably researching an applicant's criminal history is prudent from both safety and liability perspectives. As Mr. Carter notes, colleges and universities do not trust applicants to report their academic credentials, such as SAT scores, without independent verification. It seems logical, therefore, that if a college or university believes it is important enough to ask about prior crimes, the institution should verify that information through a reliable, independent source. Today, many services conduct reasonably thorough background checks quickly and at affordable prices[9]—prices that can be borne directly by the applicant or built into the admissions fee.[10] Thus, for most schools, therefore, the twin obstacles of cost and human resources needed to conduct the checks have evaporated. On the other hand, statistics show that few applicants have criminal records, and even fewer have felony records.[11] In addition, Mr.

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5. SEC. ON CAMPUS, INC., CAMPUS SAFETY AUDIT (2005), *available at* http://www.securityoncampus.org/students/audit.pdf.

6. Ellen Crowley Fullerton, *Screening College Applicants for a History of Violence*, COLUMBIA NEWS SERV., Dec. 13, 2005, http://jscms.jrn.columbia.edu/cns/2005-12-13/fullerton-collegesafety.

7. Larry Gordon, *Does a Pot Bust Trump a 4.0 GPA?*, LA TIMES, Dec. 5, 2007, Main News, at 1.

8. Scott Jaschik, *Errors of Admission*, INSIDE HIGHER EDUC., May 18, 2006, http://www.insidehighered.com/news/2006/05/18/suit.

9. See *infra* Part IV.A for a discussion of costs.

10. At least in the law school context, some schools are starting to eliminate admissions fees because of the efficiencies associated with online applications. Interview with Laura Zuppo, Dir. of Admissions, Stetson Univ. Coll. of Law (Sept. 2007). Schools in this situation may consider keeping their former fee and applying it to the costs associated with background checks.

11. *See, e.g.*, United Educators, *Preventing Child Molestation by Student Interns*, RISK RES. BULL., Aug. 2005, *available at* http://www.ue.org/membersonly/getDocument.asp?id=753&date=20050822 (estimating that less than 5% of criminal background checks on student internship applicants reveal undisclosed criminal records). *See infra* notes 80–82 and

Nassirian is correct that questions regarding past crimes scare away at least some qualified candidates who have committed only minor infractions.[12]

An early caveat is that background checks are not a panacea. They will not prevent all crime or injury on campus.[13] But they likely will prevent some crimes, and also will impact the culture by signaling that the college or university is concerned about student safety and is working to create a reasonably safe learning and living environment. As with other campus-safety strategies—including community policing; mental-health counseling; alcohol, other drug, and violence prevention strategies; and mass-notification systems—background checks should be just one part of a comprehensive, environmental risk-management and campus-safety plan.[14]

"Environmental management means moving beyond general awareness and other education programs to identify and change those factors in the physical, social, legal, and economic environments that promote or abet" the specific problem.[15] Environmental management, which has its roots in public health, recognizes that many factors influence health-related behavior, including individual factors, group factors, institutional factors, community factors, and

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accompanying text (regarding 2007 statistics from applicants using The Common Application). *See also* UNIV. N.C., OFFICE OF THE PRES., TASK FORCE ON THE SAFETY OF THE CAMPUS COMMUNITY: FINAL REPORT 4 (2004), *available at* http://intranet.northcarolina.edu/docs/aa/reports/Final_safety_task_force_report.pdf [hereinafter UNC TASK FORCE] ("Among the 250,000 individual students enrolled on a UNC campus during the three-year time period examined, only 21 who committed a campus crime also had a prior criminal history."). *But see* AM. ASS'N OF COLLS. OF PHARMACY, REPORT OF THE AACP CRIMINAL BACKGROUND CHECK ADVISORY PANEL 14 (2006), *available at* http://www.aacp.org/Docs/MainNavigation/ForStudentsApplicants/7803_AACPBackgroundChkRpt.pdf [hereinafter AACP REPORT] (noting that "as many as 1 out of 7 Americans have some form of criminal record").

12. Gordon, *supra* note 7 (recounting the story of an Oregon teenager with a stellar academic record, but who was convicted four years earlier for shoplifting a shirt; "[the student] has only applied to universities that do not ask about such issues and he is hesitant to apply to those that do.").

13. For example, "[a] recent search of state-by-state records found 2,570 incidents of sexual misconduct in public schools between 2001 and 2005, *despite background checks of teachers being required* in many states." Smyth, *supra* note 2 (emphasis added). Also, it is well documented that high-risk alcohol use causes significant injury and death among college and university student populations. A Snapshot of Annual High-Risk College Drinking Consequences, http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx (last visited Feb. 27, 2008) (noting, among other statistics, about 1,700 annual deaths, 599,000 unintentional injuries, and more than 696,000 assaults).

14. For general information on campus risk-management plans, see Darby Dickerson & Peter F. Lake, *A Blueprint for Collaborative Risk Management Teams*, CAMPUS ACTIVITIES PROGRAMMING, Apr. 2006, at 16; Peter F. Lake & Darby Dickerson, *Alcohol and Campus Risk Management*, CAMPUS ACTIVITIES PROGRAMMING, Oct. 2006, at 19; Darby Dickerson, *Risk Management and the Millennial Generation*, CAMPUS ACTIVITIES PROGRAMMING, Jan. 2007, at A12.

15. WILLIAM DEJONG ET AL., ENVIRONMENTAL MANAGEMENT: A COMPREHENSIVE STRATEGY FOR REDUCING ALCOHOL AND OTHER DRUG USE ON COLLEGE CAMPUSES, *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/ac/c0.pdf; Higher Education Center, Effective Prevention, http://www.higheredcenter.org/framework (last visited Feb. 27, 2008).

public policy.[16] Thus, colleges and universities that have adopted the environmental model implement multiple strategies that impact the campus environment as a whole.[17] Within this context, colleges and universities should consider adding pre-matriculation student background checks as one of their campus-safety strategies.

As a legally trained university administrator, when I consider a new policy or program, I generally need answers to these questions: What is the problem? What are the possible solutions? What are other schools doing and what are the experts saying? What are the legal implications? What are the policy implications? What steps are necessary to implement and evaluate the program or policy?

Following this decision-making rubric, this article will begin by examining recent incidences of student-on-student violence. Having already identified pre-matriculation background checks as one possible solution, I will then discuss current college and university practices regarding student background checks. Next, I will explore several legal and policy issues related to student background checks and provide steps schools can follow to implement student background checks as one part of a broader environmental-management philosophy.

I. CRIME ON CAMPUS

Unfortunately, higher education does not lack for examples of violence on campus. Although some crime is committed by individuals not associated with the college or university,[18] by vendors who work on campus,[19] and by school employees,[20] students are the main perpetrators.[21] In addition, traditional-age students are also the most at-risk for becoming a victim of violent crime on campus.[22] Three sources provide some sense about crime on campus: articles and

16. DEJONG ET AL., *supra* note 15, at 12. "The environmental management approach is intellectually grounded in the field of public health, which emphasizes the broader physical, social, cultural, and institutional forces that contribute to problems of human health." *Id.* at 6.

17. *Id.*

18. Serial killer Ted Bundy, for example, murdered several college students. Dave Wilma, *Serial Killer Ted Bundy Dies in the Electric Chair in Florida on January 24, 1989*, HISTORYLINK.ORG, Aug. 25, 2000, http://www.historylink.org/essays/output.cfm?file_id=2637.

19. *E.g.*, Blair v. Defender Servs., Inc., 386 F.3d 623 (4th Cir. 2004) (student assaulted by custodian employed by janitorial service hired by the university).

20. *E.g.*, Slagle v. State, 606 So. 2d 193 (Ala. Crim. App. 1992) (faculty member murdered student); Chris Cadelago, *City College Sued by Rape Victim*, CHANNELS ONLINE (Santa Barbara, Cal.), Nov. 30, 2005, http://media.www.thechannelsonline.com/media/storage/paper669/news/2005/11/30/News/City-College.Sued.By.Rape.Victim-1116735.shtml (student allegedly raped by campus security officer); Adam Ferrise, *Ex-Employee Arrested: Ex-Residence Life Employee, Shaun Harkness, Allegedly Installed a Camera in a Dorm Shower*, BUCHTELITE (Akron, Ohio), Nov. 8, 2007, http://media.www.buchtelite.com/media/storage/paper1203/news/2007/11/08/News/ExEmployee.Arrested-3086738.shtml (male employee installed cameras in a women's dorm shower and stole photographs out of their dorm rooms; he was indicted on ten counts of burglary, two counts of extortion, and two counts of voyeurism).

21. JOHN NICOLETTI ET AL., VIOLENCE GOES TO COLLEGE 25 (2001) ("[M]ost campus violence experts agree that the overwhelming majority of violent incidents are perpetrated by students.").

22. *Id.* at 33.

cases about recent student-on-student violence, national campus crime statistics, and information regarding the number of convicted felons within the student body.

In addition to the Virginia Tech massacre,[23] below is a small sampling[24] of recent,[25] reported[26] student-on-student[27] violence on and near college and university[28] campuses. When available, information about the student-perpetrator's criminal history is provided.

In November 2007, a senior at the University of Pennsylvania was charged with stalking, harassment, burglary, and theft after being found in other students' rooms within his own residence hall, and after police found missing property in his room.[29]

In September 2007, Taylor Bradford, a University of Memphis football player, was shot and killed during an off-campus robbery attempt. Devin Jefferson, a fellow student who had past brushes with law enforcement, was among those

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23. *See generally* VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007), *available at* http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf.

24. Other instances can be found in the *Campus Security Watch* newsletter. SEC. ON CAMPUS, INC., CAMPUS WATCH NEWSLETTER (2007), *available at* http://www.securityoncampus.org/aboutsoc/campuswatch/index.html. In addition, the Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention provides a weekly subscription service of nationwide press clippings called "News: Alcohol, Other Drug, and Violence-Related Incidents" at http://www.higheredcenter.org/news/incidents, and another service called "Campus Press Watch," at http://www.higheredcenter.org/news/campus.

25. Violence on campus is not a new phenomenon. *See generally* NICOLLETI ET AL., *supra* note 21 (recounting many instances of violence on campus over the decades).

26. See *infra* notes 53 to 55 and accompanying text regarding underreporting.

27. Students have also committed crimes against campus employees and individuals outside the college and university community. *E.g.*, Posting of Elyse Ashburn to Chronicle of Higher Education News Blog, http://chronicle.com/news/article/3543/my-tuition-made-me-do-it (Dec. 4, 2007) (two college students "tried to raise tuition money with two armed robberies"); *4 Dead in U. of Ariz. Shooting*, CBS NEWS, Oct. 29, 2002, http://www.cbsnews.com/stories/2002/10/29/national/main527308.shtml (reporting that a "failing student" fatally shot three members of the nursing faculty); *List of Deadliest Campus Shootings in United States*, FOX NEWS, Apr. 16, 2007, http://www.foxnews.com/story/0,2933,266368,00.html (listing the November 1, 1991 murders of five University of Iowa employees by Gang Lu, a graduate student in physics).

28. Student-on-student violence is not limited to higher education. Examples abound of violence in the K–12 context, with the best known being the massacre at Columbine High School in April 1999. *See In-Depth Specials, Columbine Report*, CNN, http://www.cnn.com/SPECIALS/2000/columbine.cd/frameset.exclude.html (last visited Feb. 27, 2008). *See also* Infoplease.com, A Time Line of Recent Worldwide School Shootings, http://www.infoplease.com/ipa/A0777958.html (last visited Feb. 27, 2008). On a positive note, "[b]etween 1992 and 2004, the rate of nonfatal crime against students ages 12–18 at school declined 62 percent." NAT'L CTR. EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2007, at 73 (2007).

29. Julie Cohn, *Senior Arrested for Stalking Mayer Females*, DAILY PENNSYLVANIAN, Nov. 28, 2007, at 1, *available at* http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2007/11/28/News/Senior.Arrested.For.Stalking.Mayer.Females-3119326.shtml. Also, in March 2007, the University of Pennsylvania discovered that a twenty-five-year-old convicted child molester was taking graduate courses while commuting from his prison cell in a neighboring county. Posting of Kathy Boccella to Real Cost of Prisons Weblog, http://realcostofprisons.org/blog/archives/2007/03/todays_college.html (Mar. 27, 2007).

charged with the murder.[30]

In September 2007, a University of Arizona freshman was charged with murdering her roommate.[31]

In May 2007, on the last day of final examinations, a Keene State College student shot and wounded his roommate and then killed himself in their off-campus apartment.[32] The assailant did not have a prior criminal record.[33]

In February 2007, a University of Santa Barbara soccer player was arrested for allegedly raping a fellow student at a local beach.[34]

In December 2006, Eastern Michigan University freshman Laura Dickinson was found dead in her dorm room.[35] Following initial denials by EMU officials,[36] police determined that Ms. Dickinson was likely raped and murdered by fellow EMU student Orange Taylor III, who admitted being in Ms. Dickinson's room around the time of her death.[37]

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30. Christopher Conley, *U of M Student Hatched Plot to Rob Bradford, Enlisted 3 Others, Police Say*, COM. APPEAL (Memphis, Tenn.), Oct. 9, 2007, at A1. ("Jefferson was arrested at a student dorm on campus last November on trespassing charges. It was not clear how the charges were resolved. Jefferson was also questioned in a second-degree murder last year, but released without charges, according to court records.").

31. Claire Conrad, *U. Arizona Student Killed; Roommate Charged with Murder*, DAILY WILDCAT (Tucson, Ariz.), Sept. 6, 2007, *available at* http://www.uwire.com/2007/09/06/u-arizona-student-killed-roommate-charged-with-murder.

32. *Keene State College Student Shoots Roommate, Kills Self*, FOX NEWS, May 4, 2007, http://www.foxnews.com/story/0,2933,270066,00.html.

33. *Id.*

34. Nikki Moore, *Authorities Arrest SB Soccer Player on Rape Charges*, DAILY NEXUS (Santa Barbara, Cal.), Feb. 21, 2007, *available at* http://www.dailynexus.com/article.php ?a=13332. In November 2004, the father of a student who left the University of California, Santa Barbara after she was assaulted on campus started a website called "The Dark Side of UCSB" that, among other things, reports incidents of crime on and near campus. Andrea L. Foster, *UC-Santa Barbara Won't Challenge Web Site That Spotlights Crime on the Campus*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 25, 2005, at A33.

35. BUTZEL LONG, P.C., THE REPORT OF THE INDEPENDENT INVESTIGATION INTO EASTERN MICHIGAN UNIVERSITY'S RESPONSE TO THE DEATH OF STUDENT LAURA DICKINSON 8 (2007), *available at* http://www.emich.edu/regents/Butzel_Long_investigation/BL_report.pdf. The exact date Ms. Dickinson died is not known; she was last seen on December 12 and was found by housing and custodial employees on December 15. *Id.*

36. Sara Lipka, *Eastern Michigan U. is Found to Violate Crime-Reporting Law on Multiple Counts*, CHRON. HIGHER EDUC. (Wash., D.C.), June 13, 2007, at A25. The Department of Education fined EMU $375,000 for violating the Clery Act in this and other situations. Marisa Schultz, *Feds Slap EMU with $358K Fine*, DETROIT NEWS, Dec. 19, 2007, at 1A. EMU also paid Ms. Dickinson's family and estate $2.5 million to settle claims associated with her death. Lori Higgins, *EMU to Pay Family Millions*, DETROIT FREE PRESS, Dec. 14, 2007, News, at 1. EMU's president was fired in connection with the cover-up of Ms. Dickinson's death, and the vice president for student affairs and the director of campus police both were "separat[ed] from" the university. Sara Lipka, *Regents at Eastern Michigan U. Fire President and 2 Others in Aftermath of Murder Investigations*, CHRON. HIGHER EDUC., July 17, 2007, http://chronicle.com/daily/ 2007/07/2007071701n.htm.

37. Emanuella Grinberg, *Dorm Murder Defendant Was in Woman's Room, But Didn't Kill or Try to Rape Her, Lawyer Says*, COURT TV, Oct. 16, 2007, http://www.courttv.com/trials/ taylor/101507_ctv.html; Posting of Susan L. Oppat to MLive.com, http://blog.mlive.com/ annarbornews/2007/10/trial_to_start_monday_in_emu_k.html (Oct. 13, 2007) (describing

In May 2006, a jury awarded the family of a slain Knox College student over $1 million; the student was beaten to death in 1998 by another student in a college building.[38]

In February 2006, a male Adelphi University student was charged with the first-degree rape of a female student in an on-campus dorm room.[39]

In April 2006, a West Chester University of Pennsylvania student was arrested on charges related to a dormitory stabbing and a fatal off-campus shooting.[40] The student had a criminal record dating back more than 10 years that included robbery and drug-dealing charges.[41] The university did not conduct criminal background checks and did not know about the student's prior criminal record.[42]

In June 2003, Baylor University basketball player Carlton Dotson killed his teammate Patrick Dennehy; Dotson plead guilty to the crime and was sentenced to 35 years in prison.[43]

In November 2002, Morehouse College student Gregory Love was beaten by a fellow student with a baseball bat; the student claimed that Love, who is gay, "look[ed] at him in the shower."[44]

In January 2002, former law student Peter Odighizuwa shot and killed Appalachian School of Law Dean L. Anthony Sutin, Professor Thomas F. Blackwell, and first-year student Angela Dales; he also shot and injured three other female students.[45]

Taylor's past brushes with law enforcement on campus and noting that Taylor had been banned from his dormitory "in connection with a report of a student selling marijuana" on campus). Taylor was tried in October 2007, but the judge declared a mistrial when the jury could not reach a verdict following three days of deliberation. Schultz, *supra* note 36.

38. *Knox College, IL Murder*, 12 CAMPUS WATCH NEWSLETTER 5 (2006), *available at* http://www.securityoncampus.org/aboutsoc/campuswatch/v12i1.pdf.

39. *Adelphi University-NY Rape*, 13 CAMPUS WATCH NEWSLETTER 6 (2007), *available at* http://www.securityoncampus.org/aboutsoc/campuswatch/v13i1.pdf.

40. Posting to Chron. Higher Educ. News Blog, http://chronicle.com/news/article/332/a-reason-to-run-criminal-checks-on-would-be-students (Apr. 25, 2006).

41. *Id.*

42. *Id.*

43. Analiz González, *Carlton Dotson Sentenced to 35 Years for Murder of Baylor Basketball Player*, ASSOC. BAPTIST PRESS, June 16, 2005, http://www.abpnews.com/386.article.

44. Jessica Lee Reece, *Assault Ups Fears for Homosexuals*, RED AND BLACK (Athens, Ga.), Nov. 21, 2002, http://media.www.redandblack.com/media/storage/paper871/news/2002/11/21/News/Assault.Ups.Fears.For.Homosexuals-2581095.shtml. Love's assailant was convicted of aggravated assault and battery and was sentenced to prison. Love v. Morehouse Coll., Inc., 652 S.E.2d 624, 625 n.1 (Ga. Ct. App. 2007). Love also sued Morehouse for negligence and gross negligence, premises liability, and negligent and intentional infliction of emotional distress. *Id.* at 625. Morehouse moved to dismiss the complaint on the ground that it did not owe Love a legal duty. *Id.* Although the trial court granted that motion, the appellate court reversed. *Id.* at 627.

45. Wendy B. Davis, *The Appalachian School of Law: Tried But Still True*, 32 STETSON L. REV. 159, 159 (2002). Odighizuwa pled guilty to the murders and was sentenced to multiple life sentences. Chris Kahn, *Former Law School Student Pleads Guilty in Appalachian Slayings*, Mar. 1, 2004, http://www.lawschool.com/appalachianguilt.htm. Three wounded students and the family of the slain student sued the law school, arguing that the school "should have foreseen the violence because the 46-year-old Odighizuwa—who was diagnosed with paranoid schizophrenia—had a history of outbursts, threats and other disruptive behavior." *Settlement*

In November 2000, a Princeton University student was arrested on charges of aggravated assault, aggravated criminal sexual contact, and burglary after he allegedly entered a dorm room and assaulted a female student.[46] The assailant did not have a prior criminal record.[47]

Although this list is far from exhaustive, it reflects that serious crime occurs on campus, but that serious crime is not as prevalent on most campuses as it is in society as a whole.[48] Both of these anecdotal reflections are supported by national campus crime statistics.

The U.S. Department of Education maintains national campus crime statistics pursuant to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act").[49] Under the Clery Act, all U.S. institutions of higher education that receive federal funding must report data about crimes that occurred on their campuses during the prior calendar year.[50] Since 2000, the U.S. Department of Education has been charged with collecting this information.[51] Although the data does not identify whether the perpetrators and victims were students, it does reflect the level of serious crime on college and university

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Reached in Suits Over Law School Shooting Rampage, Jan. 3, 2005, http://www.law.com/jsp/article.jsp?id=1104154541130. The school settled with the plaintiffs for one million dollars. *Id.*

46. Bill Beaver, *Student Arrested on Charges of Sexual Assault and Burglary*, DAILY PRINCETONIAN (Princeton, N.J.), Nov. 17, 2000, http://www.dailyprincetonian.com/archives/2000/11/17/news/1820.shtml.

47. *Id.*

48. *E.g.*, UNC TASK FORCE, *supra* note 11 (finding that crime on UNC campuses was only about one-sixth of that in the general area).

49. 20 U.S.C. § 1092(f) (2000). The law took effect on September 1, 1991. U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 135 (2005), *available at* http://www.ed.gov/admins/lead/safety/handbook.pdf [hereinafter CLERY HANDBOOK]. The Federal Bureau of Investigation also maintains national crime statistics, but the most recent collated figures combine crime on college and university campuses with crime committed at K–12 schools. *See generally* JAMES H. NOONAN & MALISSA C. VAVRA, CRIME IN SCHOOLS AND COLLEGES: A STUDY OF OFFENDERS AND ARRESTEES REPORTED VIA NATIONAL INCIDENT-BASED REPORTING SYSTEM DATA (2007), *available at* http://www.fbi.gov/ucr/schoolviolence/2007/schoolviolence.pdf. Figures are available by individual college and university, and by state. U.S. DEP'T JUSTICE, FBI, CRIM. JUSTICE INFO. SERVS. DIV., 2006 CRIME IN THE UNITED STATES TBL. 9 (2006), *available at* http://www.fbi.gov/ucr/cius2006/data/documents/06tb109.xls.

50. CLERY HANDBOOK, *supra* note 49, at 6. The reporting period is January 1 through December 31. 34 C.F.R. § 668.46 (2003). The following are the crimes a college or university must report: Criminal Homicide, Manslaughter by Negligence, Forcible Sex Offenses, Non-Forcible Sex Offenses, Robbery, Aggravated Assault, Burglary, Arson, Motor Vehicle Theft, Hate Crimes–Race, Hate Crimes–Gender, Hate Crimes–Religion, Hate Crimes–Sexual Orientation, Hate Crimes–Ethnicity, Hate Crimes–Disability, Liquor Violations/Arrests, Drug Abuse Violations/Arrests, and Weapon Law Violations/Arrests. CLERY HANDBOOK, *supra* note 49, at 38.

51. CLERY HANDBOOK, *supra* note 49, at 135. The Department makes this data available on its Campus Security Data Analysis Cutting Tool Website, which allows users to seek information about particular campuses or groups of campuses, or particular types of crime. Users also can compare specific campuses against national averages. U.S. Dep't of Educ., Office of Postsecondary Educ., Campus Security Statistics Search Page, http://ope.ed.gov/security/Search.asp (last visited Feb. 27, 2008).

campuses.[52]

As a caveat, it is important to understand that the Clery Act crime data is both under-inclusive and over-inclusive. The data is under-inclusive because neither schools[53] nor victims[54] report all relevant criminal activity, particularly with regard to sexual assaults.[55] The data is over-inclusive because the statistics "represent alleged criminal offenses reported to campus security authorities and/or local police agencies . . . [but] do not necessarily reflect prosecutions or convictions for crime."[56]

Below are the aggregate crime statistics for 2002–04, the most recent years for which data is available on the U.S. Department of Education's website:[57]

Clery Act Statistics: Criminal Offenses (2002–04)

Crime	**2002**	**2003**	**2004**
Aggravated Assault	9,695	7,871	7,076
Arson	1,829	1,326	1,244
Burglary	51,549	42,068	39,740
Forcible Sex Offenses	3,902	3,842	3,680
Motor Vehicle Theft	22,018	15,601	13,874
Negligent Manslaughter	15	5	6
Non-Forcible Sex Offenses	801	104	38
Robbery	9,367	6,768	5,915

52. *See generally* CLERY HANDBOOK, *supra* note 49. The data is from more than 6,400 institutions of higher education, including two-year and four-year colleges and universities, public and private institutions, and nonprofit and for-profit schools. Eric Hoover, *For the 12th Straight Year, Arrests for Alcohol Rise on College Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), June 24, 2005, at A31.

53. *E.g.*, Puneet Kollipara, *FBI Statistics Show Crime Underreported on Many Campuses,* STUDENT LIFE (St. Louis, Mo.), Nov. 8, 2006, http://media.www.studlife.com/media/storage/paper337/news/2006/11/08/News/Fbi-Statistics.Show.Crime.Underreported.On.Many.Campuses-2445984.shtml; Donna Leinwand, *Campus Crime Underreported*, USA TODAY, Oct. 4, 2000, at 1A; Schultz, *supra* note 36; Zachary Seward, *FBI Stats Show Many Colleges Understate Campus Crime*, WALL ST. J., Oct. 23, 2006, at B1; Lara Turner, *Sexual Assaults, Other Campus Crime Hidden at Salem International University*, Jan. 15, 2002, http://www.securityoncampus.org/update/news/011502.html.

54. *E.g.*, NAT'L ASS'N OF ATT'YS GEN., TASK FORCE ON SCHOOL AND CAMPUS SAFETY 6 (2007), *available at* http://www.naag.org/assets/files/pdf/2007.TaskForceOnSchoolAndCampusSafety.pdf; U.S. DEP'T JUST., OFF. JUSTICE PROGRAMS, NAT'L INST. JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 2–3 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/205521.pdf; Joann Pan, *Sexual Violence: an Underreported Crime*, SPECTRUM (Buffalo, N.Y.), Nov. 27, 2007, http://spectrum.buffalo.edu/article.php?id=34558.

55. NICOLETTI ET AL., *supra* note 21, at 18–20, 124 (explaining why campus crimes, particularly rapes and sexual assaults, are underreported).

56. U.S. Dep't of Educ., Office of Postsecondary Educ., Statistics Report Index, http://ope.ed.gov/security (last visited Feb. 27, 2008).

57. U.S. Dep't of Educ., Office of Postsecondary Educ., Summary Campus Crime and Security Statistics 2002–2004, http://www.ed.gov/admins/lead/safety/crime/summary.html (last visited Feb. 27, 2008).

Clery Act Statistics: Hate Crimes (2002–04)

Crime	**2002**	**2003**	**2004**
Aggravated Assault	168	23	20
Arson	23	3	0
Bodily Injury	27	41	19
Forcible Sex Offenses	56	12	0
Motor Vehicle Theft	3	2	0
Murder/Manslaughter	12	0	0
Negligent Manslaughter	1	0	0
Non-Forcible Sex Offenses	2	0	0
Robbery	0	0	2

Clery Act Statistics: Arrests (2002–04)

Crime	**2002**	**2003**	**2004**
Drug Arrests	1,133	957	1,057
Weapons Possession	2	5	9
Liquor Law Violations	48,807	47,904	50,642

This information reflects that, with regard to violent crimes such as homicide, college and university campuses are relatively safe and seem to have become safer over time.[58] As one columnist explained, "When compared with virtually any metropolitan area, a student's [chance] of dying by homicide actually decreases once he or she steps on campus. And of the homicides reported on campuses, the majority were acquaintance killings or drug deals gone bad."[59]

On the other hand, FBI researchers have concluded that because "[s]chools and colleges are valued institutions that help build upon the Nation's foundations and serve as an arena where the growth and stability of future generations begin[,] [c]rime in schools and colleges is . . . one of the most troublesome social problems in the Nation today."[60] And both the statistics and anecdotal information above show that our students are not immune to violence, especially in residence halls.[61]

58. KATRINA BAUM & PATSY KLAUS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf (indicating that, while sixty-one per one thousand college and university students were victims of violence annually between 1995 and 2002, they "experienced violence at average annual rates lower than those for nonstudents in the same age group"). Some campuses are, of course, safer than others. *See* U.S. Dep't of Educ., Office of Post-Secondary Educ., Campus Security Statistics Report Index, http://www.ope.ed.gov/security/main.asp (last visited Feb. 27, 2008) (allowing students, parents, and others to obtain crime statistics for a particular campus or group of campuses, and to compare campuses or groups of campuses).

59. James Alan Fox, Op-Ed, *Q: Are College Campuses Safe? A: Yes*., USA TODAY, Aug. 28, 2007, at 11A. *See also* UNC TASK FORCE, *supra* note 11, at 3 (reporting that "the crime rate for UNC campuses is only one-sixth of the statewide crime rate and that the data clearly indicated the vast majority of UNC students will not be directly impacted by or become the victim of a violent crime while enrolled as a student on a UNC campus").

60. NOONAN & VAVRA, *supra* note 49, at 1.

61. *See infra* Part II.A.4 (discussing background checks on dorm residents).

In addition to reporting actual crime statistics, some colleges and universities have disclosed information about convicted felons within the student body. This information does not, of course, predict future violence. But it does contribute to the overall analysis of whether background checks can impact campus safety. The University of Georgia recently found sex offenders on campus by cross-referencing a local sex-offender list with its list of enrolled students. The school found matches and also learned that most of the offenders had not disclosed their past offenses during the admissions process.[62] In addition, two schools in Gainesville, Florida—the University of Florida and Santa Fe Community College—have released information about the number of applicants and admitted students with disclosed criminal records.[63] The University of Florida reported that 197 applicants voluntarily disclosed a "criminal/conduct history."[64] The school denied two applicants and requested additional information from twenty-one others.[65] Santa Fe Community College reported that seventy-eight applicants voluntarily disclosed felony convictions; of this number, nine were denied admission and six had decisions deferred.[66] Because this information is based on voluntary disclosures, the number of offenders on campuses may actually be higher than reported.

Of course, the information presented above begs the primary question: Would background checks decrease crime on campus? The answer appears to be "yes, but not completely." While some of these student-perpetrators had criminal records that may have been discovered through a criminal background check, others, like Sueng-Hui Cho at Virginia Tech, did not have criminal histories.[67] Therefore, while background checks can be one tool that institutions use to improve campus safety, they are not a complete remedy. As one student journalist editorialized, "University officials have no way of protecting students from every security threat society presents, but they can and should eliminate loopholes that can be fixed quickly and inexpensively."[68] This leads to the next question: How many colleges and universities are using this tool to help improve campus safety?

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62. Rachel Feyre, *Student Background Checks Come into Question*, MIRROR (Fairfield, Conn.), Sept. 20, 2007, http://media.www.fairfieldmirror.com/media/storage/paper148/news/2007/09/20/News/Student.Background.Checks.Come.Into.Question-2977985.shtml. Virginia recently enacted a statute that requires schools to report to the Virginia State Police the following information for all applicants who are accepted for admission: (1) name; (2) social security number or other identifying number; (3) date of birth; and (4) gender, so that the names can be cross-referenced against the state sex offender registry. VA. CODE ANN. § 23-2.2:1 (2007).

63. Nathan Crabbe, *UF, SFCC Ask Applicants About Crime*, GAINESVILLE SUN, Aug. 31, 2007, http://www.gainesville.com/article/20070831/NEWS/708310330.

64. *Id.*

65. *Id.*

66. *Id.*

67. VA. TECH REVIEW PANEL, *supra* note 23, at 44; Monica Davey, *Gunman Showed Few Hints of Trouble*, N.Y. TIMES, Feb. 16, 2008, at A1. Although Cho did not have a criminal record, he was alleged to have stalked at least one female student at Virginia Tech. VA. TECH REVIEW PANEL, *supra* note 23, at 44.

68. Amy Hallford, *Applicants Need Background Checks*, DAILY SKIFF (Fort Worth, Tex.), Nov. 30, 2006, http://media.www.tcudailyskiff.com/media/storage/paper792/news/2006/11/30/TheSkiffView/Applicants.Need.Background.Checks-2514099.shtml.

II. CURRENT PRACTICES

Although background checks have been discussed frequently post-Virginia Tech, most undergraduate programs have not adopted policies requiring pre-matriculation checks.[69] This section describes current practices and trends in general undergraduate programs, with separate discussions of athletes, international students, and dormitory residents. It then explores practices in specialized programs, such as medicine, nursing, pharmacy, and other health professions, which are more apt to require pre-matriculation checks. It then shifts to law schools, which typically do not conduct checks, and briefly examines other professional courses of study, including education, social work, divinity, and business, that sometimes incorporate checks into their admissions processes.

A. General Practices and Trends

1. Application Questions About Criminal History

Today, most colleges and universities do not require prospective undergraduates to undergo a criminal background check. Post-Virginia Tech, however, many institutions have become more sensitive to the myriad risks related to the admissions process.[70] While more are implementing background-check policies[71] and some have started spot-checking information submitted by applicants,[72] most have opted for a middle ground that adds questions on the admissions application about criminal and disciplinary histories.[73] Some also ask applicants whether they

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69. Despite this fact, Security on Campus, Inc., in its Campus Safety Audit brochure, urges parents and potential students to ask, "Does the Admissions Office Require Background Checks on Matriculated Students?" SEC. ON CAMPUS, INC., CAMPUS SAFETY AUDIT (2005), *available at* http://www.securityoncampus.org/students/audit.pdf.

70. Gordon, *supra* note 7.

71. Mary Beth Marklein, *'An Idea Whose Time Has Come'? Schools Increasingly Subjecting Applicants to Background Checks*, USA TODAY, Apr. 18, 2007, at 7D (reporting that Certified Background, which was conducting background checks on students for fewer than a dozen colleges and universities, now conducts checks for about 500 colleges and universities).

72. Weinbach, *supra* note 1 (indicating that some colleges and universities run internet checks and compare SAT essays, which can now be downloaded, with admissions essays; some also ask applicants to submit materials to verify information about extra-curricular activities and other experiences mentioned in the application; for example, one applicant was asked to verify information about an archeological dig in Switzerland that she featured in an essay).

73. *See infra* note 81 and accompanying text (regarding The Common Application). The University of Pittsburgh is an anomaly in that it states on its website that it generally does not ask applicants about their past criminal history:

> *Q: Does Pitt screen its prospective students . . . for criminal history?*
>
> A: Except for some graduate school and financial aid applications, the University of Pittsburgh does not ask prospective students about prior criminal records

Univ. of Pittsburgh, http://www.pitt.edu/~safety/information/crime_records.html (last visited Feb. 27, 2008). The University does, however, provide warnings to and regarding registered sex offenders:

> Under the federal Campus Sex Crimes Prevention Act, any person who is required to register with the commonwealth as a sex offender under Pennsylvania's Megan's Law requirement must notify the state if they are

are registered sex offenders.[74] At most schools that adopt this middle approach, if an applicant answers "no" to these questions, the inquiry ends;[75] if the applicant answers "yes," then additional explanation or documentation is required.[76]

Although many colleges and universities started asking these types of questions before Virginia Tech, "admissions officers say that the murders made them more vigilant about students' personal troubles. They say they won't reject otherwise strong applicants because of one schoolyard fight or a beer arrest, but they may be wary of troubling patterns."[77] Schools that have added questions about criminal history since Virginia Tech have done so, at least in part, because they understand they are being held to "a greater standard of accountability."[78] And, as one official noted, information about criminal and disciplinary histories "is important because students come to campus not just to study, but to live together."[79]

> employed or are enrolled as a student at a college or university. The law also requires institutions of higher education to advise the campus community how to obtain information on current registered sexual offenders and [predators] residing within the campus community.

Id.

74. *E.g.*, Amanda Dolasinski, *Three Registered Sex Offenders Accepted After University Fails to Run Background Checks*, LANTERN (Columbus, Ohio), Nov. 14, 2007, *available at* http://media.www.thelantern.com/media/storage/paper333/news/2007/11/14/Campus/Admitted-3100266.shtml.

75. However, many admissions officers also obtain information about students through personal relationships cultivated with high school admissions counselors. Aaron Kessler, *UVa School May Probe Applications*, DAILY PROGRESS (Charlottesville, Va.), Apr. 30, 2007, *available at* http://www.dailyprogress.com/servlet/Satellite?pagename=CDP/MGArticle/CDP_BasicArticle&c=MGArticle&cid=1173351007413.

76. Feyre, *supra* note 62 (quoting and paraphrasing Karen Pellegrino, Director for Admissions, Fairfield University). For an example of an admissions policy that requires applicants who disclose a criminal record to provide additional information, see Indiana University–Purdue University Indianapolis (IUPUI), Admissions, http://enroll.iupui.edu/admissions/undergraduate/freshmen/disclosure.shtml (last visited Feb. 27, 2008), which states:

> IUPUI is committed to maintaining a safe environment for all members of the university community. As part of this commitment, the University requires applicants who have (1) been convicted of any felony or a misdemeanor such as simple battery or other convictions for behavior that resulted in injury to a person(s) or personal property or (2) who have a history of formal disciplinary action at any college or university attended to disclose this information as a mandatory step in the application process. A previous conviction or previous college disciplinary action does not automatically bar admission to the University, but does require review.

77. Gordon, *supra* note 7.

78. *Id. See also* Peter F. Lake, *Higher Education Called to Account: Colleges and the Law After Virginia Tech*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B6.

> In the final analysis, the changes in college-safety law have been essentially changes in accountability, a trend that will accelerate in light of Virginia Tech. Higher-education law is moving, steadily, to consolidate around paradigms of reasonableness and foreseeability—which focus much more on conduct, choices, and information—and away from the concept of colleges' special status and their disengagement from students to avoid risk.

Id.

79. Gordon, *supra* note 7. *See also infra* note 485 and accompanying text (analogizing college and university campuses to city-states); NICOLETTI ET AL., *supra* note 21, at 30–32

In 2007, The Common Application, which is accepted by approximately 300 colleges and universities nationwide,[80] added the following questions:

> Have you ever been found responsible for a disciplinary violation at an educational institution you have attended from 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in your probation, suspension, removal, dismissal, or expulsion from the institution? Have you ever been convicted of a misdemeanor, felony, or other crime?[81]

Of those who used The Common Application in 2007, 2.32% (6,176 out of 266,087 applicants) indicated they had been suspended or dismissed from school, and 0.26% (692 applicants) indicated they had been convicted of a misdemeanor or felony.[82]

2. Post-Matriculation Checks in Connection with Special Programs and State Licensing Requirements

In addition to asking questions related to criminal history, some colleges and universities also explain in their admissions materials that students may be required to pass background checks after they are admitted, either in connection with an internship or before seeking licensure for some professions. The University of Maine at Augusta, for example, posts a "Responsible Admissions Policy," which cautions applicants about these issues:

> Students who are pursuing degrees leading to application for professional licensure or certification, and/or who will be participating in clinical placements, internships, or practica through their UMA program should be aware that their host facility may require a criminal background check, finger printing, or drug screening. In such situations, each student is responsible for obtaining and paying for the background check or other screening process and for delivering required documentation to the facility. Although the University will make reasonable efforts to place admitted students in field experiences and internships, it will be up to the host facility to determine whether a student will be allowed to work at that facility. Students should further be aware that a criminal record may jeopardize licensure by the State certification body. Students may consult the certification body corresponding to their intended occupation for more details. Successful

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(explaining how college and university settings and operations impact crime on campus).

80. The Common Application, History, https://www.commonapp.org/CommonApp/History.aspx (last visited Feb. 27, 2008).

81. THE COMMON APPLICATION, 2007–08 FIRST-YEAR APPLICATION (2007), https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf. *See* Jessica Eisenbrey, *Common Application Questions Students' Criminal Records*, REVIEW (Newark, Del.), Mar. 20, 2007, http://media.www.udreview.com/media/storage/paper781/news/2007/03/20/News/Common.Application.Questions.Students.Criminal.Records-2781562.shtml (exploring the reasons The Common Application added the questions and canvassing reactions to the questions from campus officials and students).

82. Marklein, *supra* note 71.

completion of a program of study at UMA does not guarantee licensure, certification, or employment in the relevant occupation.[83]

3. Criminal Background Checks on All Admitted Applicants

Research has revealed just one undergraduate institution that requires a type of criminal background check on every admitted student. In response to increased violence on campus, St. Augustine's College—a historically black college located in Raleigh, North Carolina—required all students entering during the 1993–1994 academic year "to produce a statement from their hometown police department certifying whether they have a criminal record."[84] As of December 2007, the requirement is still in place.[85]

Although slightly different, some university systems are beginning to add background-check requirements for all admitted students in selected programs. On December 20, 2007, North Dakota's State Board of Higher Education approved a policy requiring fingerprint-based background checks[86] for all system students entering into certain fields.[87] A newspaper article describing the new policy indicates that checks will be primarily in fields that require similar checks for licensure after graduation, such as education, social work, and nursing.[88] The Board indicated that the new policy was triggered by "recent tragic incidents on or near college campuses."[89] As explained in subsections (B) and (D) below, an increasing number of schools now require pre-matriculation checks on applications in certain programs of study, especially in health-related fields and in fields in which students or graduates will work with vulnerable populations.[90]

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83. Univ. of Maine at Augusta, Admissions, http://www.uma.edu/coursecatalog-admissions.html (last visited Feb. 27, 2008). *See also* IDAHO STATE UNIV., FACULTY/STAFF HANDBOOK, *available at* http://www.isu.edu/fs-handbook/part6/6_4/6_4o.html (last visited Feb. 27, 2008) (indicating that a "background check as a condition of admission is not a general University requirement," but noting that some students will need to undergo checks in conditions with clinical placements, field experiences, and other similar programs and explaining why and how checks should be conducted).

84. B. Drummond Ayres Jr., *College Requires Applicants to Come Clean About Crime*, N.Y. TIMES, Sept. 3, 1993, at A14 (In the prior year, "one student was fatally shot by another, four students were held up in their dormitory room by a masked man and an 8-year-old boy was shot and wounded in a basketball game. Off campus, several students were mugged, several others were assaulted and at least one was shot.").

85. St. Augustine's Coll., Police Record Check, http://www.st-aug.edu/prospective/pdfs/Police_Record_Check.pdf (last visited Feb. 27, 2008).

86. *See infra* note 506 for more information on fingerprint-based systems.

87. *Board Approves Background Checks*, IN-FORUM (Fargo, N.D.), Dec. 21, 2007, http://www.in-forum.com/News/articles/186724; N.D. UNIV. SYS., STATE BD. HIGHER EDUC., MINUTES—DEC. 20, 2007 (2007), *available at* http://www.ndus.edu/uploads/document-library/1603/12-20-07-MINUTES-FOR-THE-WEB.PDF [hereinafter N.D. AGENDA].

88. *Board Approves Background Checks*, *supra* note 87.

89. N.D. AGENDA, *supra* note 87, at 9.

90. *See infra* Parts II.B & D.

4. Selective Background Checks

Within just one month in 2004, the University of North Carolina Wilmington received a double shock. On May 4, freshman Jessica Faulkner was drugged, raped, and murdered in her dorm by fellow student Curtis Dixon.[91] Then on June 4, student Christen Naujoks was shot and killed by fellow student John Peck.[92] Both Dixon and Peck had criminal records, but neither disclosed his full criminal or disciplinary record when applying for admission.[93] At the time, UNC Wilmington did not conduct criminal background checks on applicants.[94]

Following his daughter Jessica's murder, John Faulkner filed two lawsuits. One complaint named Curtis Dixon's father as the defendant.[95] James Ellis Dixon was an administrator in the University of North Carolina system;[96] his son Curtis had been expelled from another UNC campus following a stalking incident in which he brandished a knife in a female student's dorm room.[97] Mr. Dixon allegedly completed his son's application and did not reveal this or other information about his son's past troubles.[98] Mr. Faulkner voluntarily dismissed this lawsuit.[99] The second suit, against the university, was submitted to the North Carolina Industrial Commission.[100] That suit, which recently settled,[101] alleged that UNC Wilmington was negligent for admitting Curtis Dixon "despite a well documented history of violence against women, including incidents at other UNC campuses."[102]

After the murders, but before the Faulkner lawsuits, the university created a

91. Ken Little, *Father Fighting for Safer Campus*, STAR NEWS (Wilmington, N.C.), July 5, 2007, *available at* http://www.starnewsonline.com/article/20070705/NEWS/707050389. Dixon confessed to the murder, but committed suicide in December 2004 while in jail awaiting trial. *Id.*

92. Little, *supra* note 91. For additional details about Christen Naujoks' murder, see Kiara Jones, *Another UNCW Student Murdered*, SEAHAWK (Wilmington, N.C.), Aug. 26, 2004, *available at* http://media.www.theseahawk.org/media/storage/paper287/news/2004/08/26/News/Another.Uncw.Student.Murdered-722867.shtml. For the UNC Wilmington Chancellor's official statement regarding the two murders, see *Chancellor DePaolo's Talking Points About UNCW Student Deaths*, June 8, 2004, http://appserv02.uncw.edu/news/artview.aspx?ID=1258.

93. Little, *supra* note 91.

94. *Id.* For an article that details the discrepancies in Curtis Dixon's application, see Carrie Van Brunt, *Dixon's Death Ends Faulkner Trial,* SEAHAWK (Wilmington, N.C.), Jan. 6, 2005, *available at* http://media.www.theseahawk.org/media/storage/paper287/news/2005/01/06/News/Dixons.Death.Ends.Faulkner.Trial-830678.shtml.

95. Estate of Faulkner v. Dixon, No. 06CVS6106 (N.C. Sup. Ct. May 17, 2006).

96. Little, *supra* note 91. James Dixon had served as UNC Charlotte's executive assistant to the chancellor and assistant secretary of the Board of Trustees since 1990. UNCW Fighting Crime Problem, http://www.bluelineradio.com/FAULKNER.html (last visited Feb. 27, 2008).

97. Little, *supra* note 91.

98. Van Brunt, *supra* note 94.

99. E-mail from Eileen Goldgeier, Gen. Counsel, Univ. of N.C. Wilmington, to Darby Dickerson, Vice President & Dean, Stetson Univ. Coll. of Law (Jan. 7, 2008) (on file with author).

100. Claim for Damages Under Tort Claims Act by Estate of Jessica Lee Faulkner, No. A19561 (N.C. Indus. Comm'n May 17, 2006); Estate of Faulkner v. Univ. N.C., No. T-TA-19561 (N.C. Indus. Comm'n Sept. 4, 2007).

101. E-mail from Eileen Goldgeier, *supra* note 99.

102. Jaschik, *supra* note 8.

system-wide safety task force that studied both crime and admissions practices on the sixteen UNC campuses.[103] Among other things, the task force recommended that the UNC System add standard questions to the admissions application that address student integrity and behavior.[104] The applications should include "clear and consistent questions concerning disciplinary, criminal, military, and enrollment history."[105] The application should also emphasize "that failing to provide complete and accurate information will constitute grounds for immediate denial of admission, withdrawal of admission, and/or withdrawal of enrollment."[106] In addition, applicants should be required "to report criminal history between the date of application and the date of enrollment."[107]

The task force also recommended that the UNC System "[d]evelop reasonable and cost-effective methods to verify completeness and accuracy of applicant information."[108] Before a student enrolls, campus officials should "compare applicants against the UNC expulsion/suspension database"[109] and "compare applicants against the National Student Clearinghouse and/or a system-wide enrollment-history database to determine if the student has attended other educational institutions that were not listed on the application."[110] In addition, schools should request "long-term secondary-school suspensions and expulsions on transcripts or on transcript supplements"[111] and "[r]equest that the North Carolina Community College System . . . report campus-based reported crimes and non-academic suspensions and expulsions on transcripts or on transcript supplements."[112]

On a related point, the task force urged the university to develop a "concise, behavior-related checklist that would help screen students for further scrutiny" and "a mechanism through which campuses could request, on a case-by-case basis, criminal background checks of applicants, admitted students, and/or enrolling

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103. UNC TASK FORCE, *supra* note 11, at 1–2.

104. *Id.* at 6.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. UNC TASK FORCE, *supra* note 11, at 6.

> The National Student Clearinghouse, a non-profit organization founded by the higher education community, streamlines the student record verification process for colleges and universities, high schools and high school districts, students and alumni, lending institutions, employers, the U.S. Department of Education and other organizations. The Clearinghouse maintains a comprehensive electronic registry of student records that provides a single, automated point-of-contact for organizations and individuals requiring timely, accurate verification of student enrollment, diploma, degree, and loan data.

Nat'l Student Clearinghouse, About Us, http://www.studentclearinghouse.org/about/aboutus.htm (last visited Feb. 27, 2008). According to one source, "Nearly 3,000 schools use National Student Clearinghouse to exchange and confirm details about a student's previous college enrollment." Patti Jones, *Increase Your Chances of Getting Accepted*, SEATTLE TIMES, Oct. 27, 2007, at J14.

111. UNC TASK FORCE, *supra* note 11, at 7.

112. *Id.*

students."[113] Finally, the task force

> concluded that given the extremely small number of students who failed to provide accurate and truthful information [about criminal histories] and went on to commit a campus crime, the widespread and routine use of criminal background checks on all students would be neither cost-effective nor significantly improve safety. However, there are specific "triggers" that can be identified and that do warrant the need for a more thorough background check, e.g., an unexplained gap in time between high school graduation and application for admission.[114]

In October 2006, the UNC System, drawing heavily from the task force's recommendations, adopted a detailed "Regulation on Student Applicant Background Checks."[115] The Regulation provides that certain checks, such as cross-referencing enrollment at other UNC campuses, be conducted for all admitted applicants or all admitted applicants who indicate an intent to attend.[116] With limited exceptions,[117] the Regulation also provides that background checks should be conducted.[118] If a background check is positive, the Regulation provides guidance about how admissions officers should evaluate the data and emphasizes the importance of attempting to determine whether the applicant poses "a significant threat to campus safety."[119]

When asked about the background-check policy, UNC Wilmington's Chancellor explained, "Not even the best background checks can entirely and utterly eliminate the risk of a potentially dangerous student being enrolled. But becoming a model for campus safety is what we must aim for, to bring good from the tragedy of young lives cut so tragically short."[120] The Fall 2007 admissions

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113. *Id.* Other "triggers" may include withdrawals or leaves of absence from another institution of higher education; suspensions or expulsions while a K–12 student; dishonorable military discharge; loss of a professional license; wildly fluctuating grades; disturbing remarks in a personal statement or in reference letters; and contradictions or inconsistencies within the candidate's admissions materials.

114. *Id.* The task force found that, for the three-year period from July 1, 2001 through June 30, 2004, only 21 (out of approximately 250,000) students who committed a campus crime also had a prior criminal history; of this number, 13 failed to disclose their prior history on the admissions application. *Id.* at 4.

115. UNIV. OF N.C., THE UNC POLICY MANUAL: 700.5.1[R], REGULATION ON STUDENT APPLICATION BACKGROUND CHECKS (2006), *available at* http://www.northcarolina.edu/content.php/legal/policymanual/uncpolicymanual_700_5_1_r.htm. The policy is effective for students who matriculate after August 1, 2007. *Id.* See *infra* Appendix A for the full-text of the regulation.

116. *Id.* at ¶ 1.

117. *Id.* at ¶ 3 ("Constituent institutions are not required to perform criminal background checks on applicants who are younger than 16 years old at the time of the acceptance or on residents of North Carolina who have attained the age of 65 and are entitled to a tuition waiver.").

118. *Id.* In addition, the admissions application now includes six questions about criminal and disciplinary history. UNIV. OF N.C. WILMINGTON, APPLICATION FOR ADMISSION, (2007), *available at* http://www.uncwil.edu/ admissions/documents/AdmiApp2007-2008.pdf. See *infra* Appendix B for the full-text of the campus safety questions on the application.

119. *Id.* at ¶ 10. *See infra* Appendix A.

120. Van Brunt, *supra* note 94 (quoting Chancellor Rosemary DePaolo).

process marked the first system-wide use of the new system.[121] "Based on the checks, 101 applicants were denied admission, 30 of whom had applied to Wilmington," where the murders had occurred.[122]

Georgia College and State University ("GCSU") has adopted a similar approach to pre-matriculation background checks. As part of its "Undergraduate Application for Admission," the school asks, "Have you ever been convicted of a crime other than a traffic offense, or are any criminal charges now pending against you?"[123] In addition, the school requires applicants to consent to allow campus officials "to conduct a criminal background check and such other background investigations as the university deems appropriate."[124]

The GCSU background-check policy was added to help improve campus safety by verifying information that applicants provided in response to questions regarding criminal history.[125] The school felt it was important to give applicants notice about the fact that they may be subject to a check.[126] The school conducts checks on all admitted students in some disciplines, such as nursing and education, and also conducts checks on all applicants who answer "yes" to application questions regarding criminal history.[127] The school also conducts checks when the admissions file reveals inconsistencies or other matters of concern.[128] In the school's experience, the background checks often reveal additional information the applicant should have revealed.[129] In addition, the school has run background checks following admission when students are involved in certain types of incidents on campus.[130] As with the pre-matriculation checks, these checks have revealed that some students were not candid on their admissions application.[131] GCSU has exercised its authority to revoke offers of admission based on

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121. Some schools within the system implemented background checks and other task-force recommendations earlier. Erin France, *UNC Schools Implement Background Checks*, DAILY TARHEEL (Chapel Hill, N.C.), Aug. 29, 2005, http://media.www.dailytarheel.com/media/storage/paper885/news/2005/08/29/StateNational/Unc-Schools.Implement.Background.Checks-1359541.shtml (noting, among other things, that the UNC Charlotte campus had conducted "150 background checks out of 15,000 applicants" and that UNC Chapel Hill ran 19 checks on transfer students).

122. Marklein, *supra* note 71.

123. GA. COLL. & STATE UNIV., UNDERGRADUATE APPLICATION FOR ADMISSION 10 (2007), *available at* http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad_appl.pdf.

124. *Id.*

125. Telephone Interview with Paul Jones, Vice President for Institutional Res. & Enrollment Mgmt., Professor of Educ. Admin., Ga. Coll. & State Univ. (Jan. 17, 2008). GCSU had questions regarding criminal history on its admissions application before adopting the background-check policy. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* GCSU has a committee that includes individuals such as legal counsel, an admissions representative, a student affairs representative, and faculty that decides how to proceed with an applicant with a criminal record. *Id.* For example, if an offer of admission is extended, the student may be placed on immediate probation. *Id.*

130. *Id.*

131. *Id.*

applicants' or students' failure to provide complete information.[132]

5. Athletes

Some colleges and universities conduct background checks on prospective student-athletes.[133] The University of Oklahoma, for example, runs criminal background checks on all potential recruits.[134] Baylor, Kansas State, and the University of Kansas screen at least some potential student-athletes.[135]

Factors that led schools to implement background checks on incoming student-athletes include a number of high-profile incidents involving athletes,[136] some of

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132. *Id.*

133. Shawn Courchesne, *Colleges Digging a Little Deeper: Screening Incoming Student Athletes an Ongoing Issue*, HARTFORD COURANT, Feb. 4, 2007, at E12; Marklein, *supra* note 71. *See also* Andy Gardiner, *Colleges Look into Background Check Options*, USA TODAY, July 15, 2005, at C14 ("The National Association of Collegiate Directors of Athletics believes background checks for scholarship athletes are the wave of the future, and it wants to catch that wave now."). "But many schools, including Florida, Florida State and South Florida, still limit that radar to asking recruits and their parents, coaches and teachers if a student has had any disciplinary problems." Greg Auman, *Background Checks Vary; Schools Fear Surprises*, ST. PETERSBURG TIMES, Mar. 6, 2005, at 1C. Some security firms cater to colleges and universities who desire to conduct background checks on student-athletes. *E.g.*, NACDA Consulting, http://www.nacdaconsulting.com/managex/index.asp?ArticleSource=206&CatID=201 (last visited Feb. 27, 2008). One author has called for the NCAA to adopt a background-check regulation that would apply to all schools. Lindsay M. Potrafke, Comment, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427, 436–40 (2006).

134. Marklein, *supra* note 71; Eddie Timanus, *Oklahoma Investigates Athletes' Backgrounds*, USA TODAY, Mar. 3, 2005, at 6C.

135. Marklein, *supra* note 71. Baylor limits checks to transfer athletes. Todd Datz, *Background Checks on Campus*, CSO MAGAZINE (Framingham, Mass.), July 2005, *available at* http://www.csoonline.com/read/070105/briefing_background.html.

136. *See supra* note 43 and accompanying text (regarding Baylor basketball player Carlton Dotson). *See also* Auman, *supra* note 133 (revealing that several recruits at major Florida universities had violent criminal records). Jack Carey, *Legal Woes Big Challenge in Recruiting*, USA TODAY, Jan. 28, 2007, at 3C (recounting incidents regarding football recruits with pending criminal charges); Jesse Hyde, *Rape Allegation Stuns BYU*, DESERET MORNING NEWS (Salt Lake City, Utah), Aug. 30, 2004, at A1 (reporting an alleged rape of a seventeen-year-old girl by two BYU football players and recounting other incidents of violence involving student-athletes at other schools).

> In 1995, for example, no fewer than 220 college athletes were the subject of criminal proceedings, for alleged crimes ranging from illegal gambling to manslaughter. . . . More particularly, 112 athletes were charged with sexual assault or incidents of domestic violence during 1995 and 1996. . . . The majority of the victims were female college students.

Jeffery Benedict, *Colleges Must Act Firmly When Scholarship Athletes Break Laws*, CHRON. HIGHER EDUC. (Wash., D.C.), May 9, 1997, at B6.

"Several studies have found male athletes to be more likely than other men on campus to commit sexual assaults." U.S. Dep't of Educ., Higher Educ. Ctr. for Alcohol & Other Drug Abuse & Violence Prevention, Infofacts Resources: College Athletes and Alcohol and Other Drug Use (2002), *available at* http://www.higheredcenter.org/pubs/factsheets/fact_sheet3.pdf.

> In a study of victims of sexual aggression at a large midwestern university, male athletes were greatly overrepresented among the assailants described by the women

which have resulted in lawsuits against the institution,[137] and studies concluding that athletes account for a higher percentage of crime on campus than their numbers should warrant. A study of criminal activity at Georgetown University, for instance, found that "[a]lthough varsity student-athletes make up just over 11 percent of Georgetown's undergraduate population, they have been arrested on and around Georgetown's campus and charged with violent assaults by D.C. prosecutors at a rate more than double that of the general student body."[138] In addition, a 1995 Northeastern University study that scrutinized judicial records at ten institutions found that although male athletes comprised just over 3% of the student population, they committed 19% of sexual assaults and 35% of all domestic assaults.[139]

Because student-athletes are often hand-picked, awarded full scholarships, play in multimillion dollar facilities financed by the school, and on the whole have higher public and campus profiles than most other students, schools that conduct background checks on student-athletes, but not all students, are likely to survive legal challenges based on selective screening.[140]

> surveyed. Though men on sports teams were less than 2 percent of the total male population on campus, they made up 23 percent of the attackers in sexual assaults and 14 percent in attempted sexual assaults. At another university, an anonymous survey found that men on varsity, revenue-producing teams, such as football and basketball, self-reported higher rates of sexually abusive behavior. Gang rapes on campus are most often perpetrated by men who participate in intensive male peer groups that foster rape-supportive behaviors and attitudes. One review of 24 alleged gang rapes found that in 22 of the 24 documented cases, the perpetrators were members of intercollegiate athletic teams or fraternities.

Id. (internal citations omitted).

137. *E.g.*, Crow v. State, 271 Cal. Rptr. 349 (Cal. Ct. App. 1990); Korellas v. Ohio St. Univ., No. 2001-09206, 2004 WL 1598666 (Ohio Ct. Cl. July 12, 2004); Boyd v. Tex. Christian Univ., 8 S.W.3d 758 (Tex. Ct. App. 2000). *See generally* Thomas H. Sweeney, *Closing the Campus Gates—Keeping Criminals Away from the University—The Story of Student-Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 SETON HALL J. SPORT L. 226 (1999).

138. Moises Mendoza, *Most Assault Charges Filed Against Athletes*, THE HOYA (Wash., D.C.), May 2, 2006, *available at* http://www.thehoya.com/node/6214. *But see* Jill Sederstrom, *Athletes with Criminal Record Not Common*, IOWA STATE DAILY, Dec. 9, 2002, http://media.www.iowastatedaily.com/media/storage/paper818/news/2002/12/09/News/Athletes.With.Criminal.Record.Not.Common-1093365.shtml ("[A]n Iowa State Daily investigation revealed a relatively low number [6.6%] of ISU student-athletes having a criminal record in Iowa.").

139. Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault*, 19 J. SPORT & SOCIAL ISSUES 126, 128 (1995).

140. *See* Timanus, *supra* note 134. Law professor Matt Mitten, director of the National Sports Law Institute at Marquette, explained:

> My sense is that a court would have no problem finding it's a reasonable basis that student-athletes are much more high-profile than a typical student. . . . You're seeing more lawsuits trying to hold universities liable for student-athletes' misconduct. I think the school could say, "Look, we're making a substantial investment in this student-athlete—potentially a four- or five-year scholarship—and we want to make sure he has the requisite character."

Id. See also Ashley Zuelke, *U. Montana Regents Call For Accountability After Arrest of Athletes*, U.S. COLL. HOCKEY ONLINE, Nov. 16, 2007, http://www.uscho.com/

6. International Students

Most institutions of higher education do not have specific background-check policies for international students. In light of the federal government's SEVIS program,[141] most schools likely have determined that a separate background check is not necessary. Instead, most notify prospective international students that certain U.S. consulates may require a background check before issuing a visa.[142]

7. Dormitory Residents

Even if schools do not seek information about applicants' criminal histories or conduct pre-matriculation background checks on all or some students, they may seek information about the criminal pasts of dorm residents.[143] National statistics

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collegesports/activism/uid,TUYA111620071960875/UMontanaRegentsCallForAccountabilityAfterArrestOfAthletes.html.

141. SEVIS is a web-based program administered by U.S. Immigration and Customs Enforcement

> to track and monitor schools and programs, students, exchange visitors and their dependents throughout the duration of approved participation within the U.S. education system. SEVP [Student and Exchange Visitor Program] collects, maintains and provides the information so that only legitimate foreign students or exchange visitors gain entry to the United States. The result is an easily accessible information system that provides timely information to the Department of State, U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement.

U.S. Immigr. & Customs Enforcement, International Students and Exchange Visitor Program (SEVP), http://www.ice.gov/sevis/index.htm (last visited Feb. 27, 2008).

142. *E.g.*, OFF. OF INT'L AFF., UNIV. CHICAGO, FORESTALLING/SHORTENING BACKGROUND CHECKS AT CONSULAR POSTS (2006), *available at* https://internationalaffairs.uchicago.edu/ pdf/letter_for_background_checks.pdf.; Canisius Coll., Undergraduate Admissions, Visa Tips, http://www.canisius.edu/admissions/visa_tips.asp (last visited Feb. 27, 2008); Stanford Univ., Bechtel Int'l Ctr., General Information on SEVIS and Immigration Issues for Stanford Faculty and Staff, http://www.stanford.edu/dept/icenter/sevis/sevisqanda.html (last visited Feb. 27, 2008) ("If students/scholars are from certain countries . . . they should be prepared for lengthy background checks before obtaining their visa. These background checks can take up to 6–8 months and there is NO guarantee that the visa will be issued after the background check.").

143. *E.g.*, CENT. ARIZ. COLL. OFF. RES. LIFE, TERMS OF LICENSE FOR USE OF RESIDENCE HALL FACILITIES, http://www.centralaz.edu/documents/students/Residence_Life/licenseapp.pdf (last visited Feb. 27, 2008) (requiring applicants to disclose felony and misdemeanor convictions). The terms of license state:

> Applicants who have been previously convicted of a misdemeanor or felony will be required to go through an interview process and background check (including contacting your parole officer when applicable) before being admitted to the Residence Halls. Registered Sex Offenders must disclose their status on this application. The Director of Student Life and the Dean of Student Services . . . may impose conditions upon the student's admission into the Residence Halls. Applicants found dishonest or falsifying this section of the application will have their License Agreement cancelled and [be] immediately evicted from the halls . . . . Students convicted of criminal offenses or charged with serious or violent crimes against others while living in the halls may have their housing privileges revoked.

Id. *See* HARRIS-STOWE STATE UNIV., APPLICATION FOR HOUSING (2007), *available at*

reveal that a significant amount of campus crime occurs in residence halls.[144] In addition, recent news stories reflect problems associated with students living in dorm rooms absent background checks.

The University of Akron has experienced multiple incidents regarding offenders living in campus dorms.[145] In 2006, the university assigned a 45-year-old undergraduate who had served prison time for robbery to live in a dorm room with a 19-year-old freshman.[146] Just a few weeks later, two additional students reported they were assigned to live in university housing with convicted felons.[147] In one situation, within minutes of moving in, a 23-year-old student told his 18-year-old roommate that he had just been released from prison after serving three years for aggravated robbery and burglary.[148] In the other situation, a traditional-age freshman was assigned to live with a 41-year-old student who had served time for drug trafficking and burglary; the ex-convict was removed from campus housing when he was accused of new crimes.[149] Also, in a 2004 incident, the university assigned a 36-year-old drug informant to room with a 23-year-old law student.[150] Following the most recent of these incidents, the university's board of trustees announced that the school would begin asking student housing applicants about their criminal histories.[151]

When considering whether to conduct background checks on potential dorm residents, colleges and universities should note that off-campus landlords likely will require prospective student-tenants to pass a check.[152] Private landlords are

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http://www.hssu.edu/deptdocs/17/HousingApp07.pdf ("Applicants who have been convicted of . . . a misdemeanor or felony may be required to go through an interview process and background check before being admitted to the Residence Hall.").

144. *E.g.*, U.S. Dep't of Educ., Off. of Postsecondary Educ., Summary Campus Crime Statistics, http://www.ed.gov/admins/lead/safety/crime/criminaloffenses (last visited Feb. 27, 2008) (reflecting that of 7076 assaults reported under the Clery Act for 2004, 957 occurred within residence halls, of 3680 forcible sexual assaults reported under the Clery Act for 2004, 1938 occurred in residence halls, and of 39,740 burglaries reported under the Clery Act for 2004, 12,838 occurred in residence halls). *See also* UNC TASK FORCE REPORT, *supra* note 11, at 4 ("58% of campus crimes occurred inside residence halls or other campus buildings.").

145. *Felon in Dorm Raises Issues at Akron College*, COLUMBUS DISPATCH, Nov. 27, 2006, at E4.

146. *Id.*

147. Carol Biliczky, *2 More Felons in Dorms*, AKRON BEACON JOURNAL (Akron, Ohio), Dec. 5, 2006.

148. *Id.*

149. *Id.*

150. *Id.*

151. *University of Akron Begins Asking Housing Applicants About Criminal Records*, 13 CAMPUS WATCH NEWSLETTER 4 (2007), *available at* http://www.securityoncampus.org/aboutsoc/campuswatch/v13i1.pdf; Univ. Akron, Housing Contract Terms and Conditions, http://www.uakron.edu/reslife/contract.php (last visited Feb. 27, 2008).

152. *See, e.g.*, Apartments911.com, Austin Apartments and Your Background, http://www.apartments911.com/austinapartmentbackground.html (last visited Feb. 27, 2008); David Henke, *From Dorm to Apartment: How to Make the Smart Switch*, MANITOU MESSENGER (Northfield, Minn.), Nov. 2, 2007, http://fusion.stolaf.edu/messenger/print.cfm?article_id=3706 (local landlord indicating that he runs background checks on tenants). *See generally* Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following*

generally free to rent to whomever they choose,[153] so long as they comply with the Fair Housing Act[154] and disability laws.[155] With regard to public housing,

> [u]nder federal regulations currently in place, state public housing authorities may require criminal background checks of prospective and current tenants. Consequently, in a majority of states, the public housing authorities consider a person's criminal background, including an arrest that did not lead to conviction, in making individualized determinations as to an applicant's eligibility for public housing. In addition, three states immediately reject any applicant who has a criminal record.[156]

Landlords conduct background checks to minimize the chances of lessees not paying rent, damaging property, or injuring other tenants[157]—all considerations that apply in the higher-education context. Therefore, background checks on residents are relevant in the campus context and would bring colleges and universities in line with a significant number of off-campus landlords.

B. Medicine, Nursing, Pharmacy, and Other Health Professions

On the whole, health-related programs have been more aggressive than others in requiring background checks for admitted students. Although some programs have implemented checks due to pressure from clinical sites and licensing boards, some have done so because they realize the importance of protecting the campus community.

Disasters, 31 NOVA L. REV. 467, 480 (2007) ("No known law exists preventing a landlord from conducting a criminal background check before renting to a prospective tenant.").

153. Rodriguez-Dod & Duhart, *supra* note 152, at 479.

154. "The FHA makes it unlawful for a landlord 'to refuse to rent or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'" *Id.* (quoting 42 U.S.C. § 3604(a) (2000)).

155. *Id.*

156. *Id.* at 478. *See generally* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344 (2007) (describing the increase in tenant screening measures).

157. Joe Hoover et al., *How to Conduct a Tenant Background Screening*, Apr. 1, 2007, http://howtoinvestigate.com/articles/tenant_screening.htm.

1. Medical Schools

The trend in medical schools is to conduct background checks. Currently, about 25% of all medical schools require criminal background checks on admitted applicants.[158] While most conduct checks on their own initiative,[159] schools in Illinois are required to do so pursuant to state law.[160] In addition, the Association of American Medical Colleges ("AAMC") has recommended that all medical schools conduct background checks and has developed its own service to facilitate that process. Medical schools most typically justify background checks on the basis that students are likely to work with vulnerable segments of society,[161] but many implemented checks after a murder-suicide by a University of Arkansas medical student.[162]

Illinois is the only state that requires pre-matriculation background checks for medical students.[163] The Illinois Medical School Matriculant Criminal History

158. Gina Shaw, *Applicant Criminal Background Check Moves Forward*, AAMC REP. (Wash., D.C.), May 2007, http://www.aamc.org/newsroom/reporter/may07/background.htm.

159. *E.g.*, Creighton Univ. Sch. of Med., Background Check Policy, http://www2.creighton.edu/medschool/medicine/oma/cbc/index.php (last visited Feb. 27, 2008); Today at the Brody School of Medicine, http://www.ecu.edu/cs-dhs/today/aug2007.cfm (last visited Feb. 27, 2008); Johns Hopkins Sch. Med., How to Apply, http://www.hopkinsmedicine.org/admissions/admissions.html (last visited Feb. 27, 2008); S. Ill. Univ. Sch. of Med., Criminal Background Check Policy, http://www.siumed.edu/students/criminal_background_check_policy.pdf (last visited Feb. 27, 2008); Univ. of Iowa Carver Coll. of Med., Criminal Background Check, http://www.medicine.uiowa.edu/OSAC/admissions/bgcheck.htm (last visited Feb. 27, 2008); Univ. of Med. & Dentistry of N.J., University Policy, http://www.umdnj.edu/oppmweb/Policies/HTML/AcademicAff/00-01-20-95_00.html (last visited Feb. 27, 2008); Univ. of Okla. Coll. of Med., Background Checks, http://www.medicine.ouhsc.edu/admissions/background%20checks.asp (last visited Feb. 27, 2008); Off. of the Gen. Counsel, Univ. of Tex., Student Background Check Model Policy, http://www.utsystem.edu/Ogc/docs/general/studentbackgroundpol.doc (last visited Feb. 27, 2008); Univ. of Utah, Sch. of Med., Admission Policies, http://medicine.utah.edu/admissions/policies/index.htm (last visited Feb. 27, 2008); Univ. of Va., Criminal Background Check Requirement, http://healthsystem.virginia.edu/internet/admissions/criminalbackground.cfm (last visited Feb. 27, 2008). Some foreign medical schools also require background checks. *E.g.*, Univ. of Bath, Applicants and Students with Criminal Convictions, http://www.bath.ac.uk/admissions/policy/criminalconviction.html (last visited Feb. 27, 2008).

160. 110 ILL. COMP. STAT. 57/1–99 (2007).

161. *See* Whitney L.J. Howell, *Medical Schools Seek Security of Student Background Checks*, AAMC REP. (Wash., D.C.), Oct. 2004, http://www.aamc.org/newsroom/reporter/oct04/background.htm ("Identifying students with criminal records before they enter medical school could prevent situations where potentially violent individuals could be given access to hospitals and lethal doses of medication.").

162. In August 2000, "[a] college student who had just been dropped from a graduate program bought a box of bullets less than an hour before walking into his advisor's office at the University of Arkansas, shooting him three times and then killing himself." *U. Arkansas Deaths Murder-Suicide,* CBS NEWS, Aug. 30, 2000, http://www.cbsnews.com/stories/2000/08/28/national/main228544.shtml. *See* Myrle Croasdale, *More Med Students Facing Background Checks*, AM. MED. NEWS (Chi., Ill.), Nov. 7, 2005, http://www.ama-assn.org/amednews/2005/11/07/prsd1107.htm.

163. In 2005, the North Carolina legislature considered, but did not pass, an act to require all students at medical schools within the state to undergo a criminal background check. H.B. 1515,

Records Check Act[164] mandates criminal background checks for medical students in both public and private schools in Illinois.[165] The check, which occurs after conditional admission, is conducted by the Illinois State Police.[166] Schools are permitted to pass the cost of the check on to the student.[167] Medical schools may deny admission when the check reveals a violent felony conviction or adjudication as a sex offender.[168] The Act also provides immunity to medical schools from civil suits filed by a medical school applicant for decisions made pursuant to this statute.[169]

In 2004, the AAMC started studying the issue of pre-matriculation background checks.[170] In June 2005, the AAMC's Executive Council approved a recommendation that "a criminal background check be completed on all applicants accepted annually to medical school entering classes."[171] Then, in May 2006, the AAMC issued the *Report of the AAMC Criminal Background Check Advisory Committee*, which contains a more comprehensive analysis of the issues concerning background checks.[172]

The Committee identified four rationale for requiring background checks on admitted medical students: to bolster the public's continuing trust in the medical profession; to enhance the safety and well-being of patients; to ascertain the ability of accepted applicants and enrolled medical students to eventually become licensed

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2005 Sess. (N.C. 2005), *available at* http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1515v2.html.

164. 110 ILL. COMP. STAT. 57/1–99 (2007).

165. 110 ILL. COMP. STAT. 57/10.

166. *Id.*

167. 110 ILL. COMP. STAT. 57/15. The pertinent provision provides:

> The Department of State Police shall charge each requesting medical school a fee for conducting the criminal history records check under Section 10 of this Act, which shall be deposited in the State Police Services Fund and shall not exceed the cost of the inquiry. Each requesting medical school is solely responsible for payment of this fee to the Department of State Police. Each medical school may impose its own fee upon a matriculant to cover the cost of the criminal history records check at the time the matriculant submits to the criminal history records check.

Id.

168. 110 ILL COMP. STAT. 57/20. The statute states:

> The information collected under this Act as a result of the criminal history records check must be considered by the requesting medical school in determining whether or not to officially admit a matriculant. Upon a medical school's evaluation of a matriculant's criminal history records check, a matriculant who has been convicted of a violent felony conviction or adjudicated a sex offender may be precluded from gaining official admission to that medical school; however, a violent felony conviction or an adjudication as a sex offender shall not serve as an automatic bar to official admission to a medical school located in Illinois.

Id.

169. 110 ILL COMP. STAT. 57/25.

170. ASS'N AM. MED. COLLEGES, REPORT OF THE AAMC CRIMINAL BACKGROUND CHECK ADVISORY COMMITTEE 1 (2006), *available at* http://www.aamc.org/members/gsa/cbc_final_report.pdf [hereinafter AAMC REPORT].

171. *Id.*

172. *Id.*

as physicians; and to minimize the liability of medical schools and their affiliated clinical facilities.[173]

It also articulated nine goals for a criminal background-check system: community ownership and involvement; equity; full disclosure; simplicity; accuracy; affordability; risk mitigation; scalability; and effectiveness.[174]

After reviewing several options for a background-check system, the committee recommended that the AAMC develop its own "national, centralized system for completing and reporting on criminal background checks for potentially all AAMC-member medical schools."[175] Under this system, applicants would pay a single fee for a background check and the results would be made available to any member school.[176] Juvenile offenses will not be checked.[177] The committee also recommended that schools consider the results only after making a conditional decision to admit the applicant.[178] Although the AAMC initially planned to have a pilot system in place by Summer 2007, with the final system being ready to screen the 2009 entering class at all 125 AAMC schools,[179] the pilot is now scheduled to occur with 10 schools[180] in Fall 2008.[181]

Of the medical schools that do not currently require pre-matriculation background checks, many ask students to self-report criminal histories as part of the admissions application,[182] while some warn students that a criminal past may preclude them from completing academic requirements associated with clinics.[183] In addition, many require students to undergo background checks before advancing to clinical settings.[184] But within the next few years, all or most accredited medical schools will move to pre-matriculation checks.

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173. *Id.*

174. *Id.* at 2, app. B.

175. *Id.* at 2.

176. Dana Forde, *Criminal Background Checks to Become Part of Medical School Application Process*, DIVERSE (Fairfax, Va.), Nov. 2, 2006, http://www.diverseeducation.com/artman/publish/printer_6602.shtml.

177. Gina Shaw, *Criminal Background Checks for Medical Students Moving Forward*, AAMC REP., Sept. 2006, http://www.aamc.org/newsroom/reporter/sept06/backgroundchecks.htm. For a discussion of the challenges associated with criminal background checks and juvenile records, see *infra* Part III.B.3.

178. AAMC REPORT, *supra* note 170, at 2.

179. Forde, *supra* note 176.

180. Am. Med. Coll. Admissions Serv., AAMC Background Check Service, http://www.aamc.org/students/amcas/faq/background.htm (last visited Feb. 27, 2008).

181. Shaw, *supra* note 158.

182. *See, e.g.*, Va. Commw. Univ. Sch. of Med., Criminal Background Checks, http://www.medschool.vcu.edu/studentactivities (last visited Feb. 27, 2008).

183. *E.g.*, Admissions, Univ. of Ariz. Coll. of Med., Criminal Background Checks, http://www.admissions.medicine.arizona.edu/backgroundChecks.cfm (last visited Feb. 27, 2008).

184. *E.g.*, GEORGETOWN UNIV. SCH. OF MED., 2008 APPLICATION POLICIES AND PROCEDURES 2 (2008), http://www3.georgetown.edu/som/admissions/admitdocs/2008%20Application%20Policies%20and%20Procedures-1.pdf.

2. Nursing Programs

As with medical schools, nursing schools are increasingly requiring pre-matriculation background checks.[185] Judy Farnsworth and Pamela J. Springer recently conducted a survey of 398 nursing schools and 258 responded.[186] Of these schools, 41% did not require self-disclosure of criminal history or criminal background checks, but 38% conducted checks.[187] Of the schools that required background checks, 25% required the check as a condition of admission.[188] Although a few conducted background checks at the end of the program to assist students with licensure requirements,[189] most conducted checks in connection with clinical programs.[190]

Nursing programs typically adopt checks because students work with vulnerable populations and because many internship sponsors and state licensing boards require them.[191] In other words, the checks are primarily to benefit external constituencies and to ensure that admitted students will be eligible to complete the academic program.

3. Pharmacy Programs

The American Association of College Pharmacies ("AACP") has been a leader in exploring the issue of student background checks. In November 2006, the AACP issued a comprehensive *Report of the AACP Criminal Background Check Advisory Panel* to "introduce pharmacy colleges and schools to the important

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185. Judy Farnsworth & Pamela J. Springer, *Background Checks for Nursing Students: What Are Schools Doing?* 27 NURSING EDUC. PERSPECTIVES 148, 150 (2006). *See also* Charles Bradley, *Full Disclosure or Fingerprints: Standardizing the Landscape of Nursing Program Admissions Requirements*, 36 J.L. & EDUC. 573 (2007) (discussing varying approaches by nursing schools in Ohio).

186. Farnsworth & Springer, *supra* note 185, at 150.

187. *Id.*

188. *Id.* For examples of this policy type, see Boise State Univ. Nursing Dept., Background Checks, http://nursing.boisestate.edu/admissions/backgroundchecks.asp?ID=admissions (last visited Feb. 27, 2008); Univ. of Tex. at El Paso, Coll. of Health Scis., Policy: Background Checks and Drug Screening for Students, http://academics.utep.edu/Portals/280/4.11.07.Final%20CoHS%20CBC%20and%20Drug%20Screen%20Policy.doc (last visited Feb. 27, 2008).

189. Farnsworth & Springer, *supra* note 185, at 150. Ursuline College informs nursing students that they will be "subject to two thorough criminal background checks during their educational progression." Ursuline Coll., Breen Sch. Nursing, Felony and Misdemeanor Records Checks, http://www.ursuline.edu/academics/breen/background.pdf (last visited Feb. 27, 2008). The first check occurs during a student's sophomore year as a condition to entering a clinical setting; the second is required by the Ohio Board of Nursing before graduation. *Id.*

190. Farnsworth & Springer, *supra* note 185, at 150. The researchers reported that 9% conducted checks before admitting students to certain clinical sites and that 48% conducted checks as a pre-clinical requirement. *Id.* For examples of this policy type, see MONTANA STATE UNIV., COLL. NURSING, POLICY #A-36, STUDENT BACKGROUND CHECKS (2007), *available at* http://www.montana.edu/wwwnu/pdf/A36.pdf; VILLANOVA UNIV. COLL. OF NURSING, POLICY ON CRIMINAL BACKGROUND CHECK FOR MATRICULATING STUDENTS (2007), *available at* http://www.villanova.edu/nursing/assets/documents/criminal_background_check_policy.pdf.

191. Farnsworth & Springer, *supra* note 185, at 150.

issues regarding access to, and use of, criminal records of pharmacy students."[192] The report provides detailed guidance for schools about how to design a background-check policy,[193] considerations about how to conduct criminal background checks,[194] advice about how to analyze the results of criminal background checks,[195] and directions regarding confidentiality and proper disclosure.[196]

The report explains that "[p]harmacy students may be subject to criminal background checks earlier in their educational career . . . than medical school students due to the use of early experiential educational experiences required at the beginning of the curriculum versus at the end of the didactic program."[197] "AACP does not encourage the use of criminal background checks for student pharmacists; but recognizes that legal, legislative, and organizational demands may force some member institutions to adopt a CBC [criminal background-check] process."[198]

Despite this statement, the report proposes that AACP members adopt selected recommendations of the AAMC report, including that criminal background checks be initiated after an applicant is conditionally accepted into a program.[199] In 2006, the AACP surveyed member schools regarding their criminal background-check policies and practices.[200] Of the schools surveyed, 63.4% had a criminal background-check policy for professional pharmacy degree students;[201] 33.3% completed the check after the admissions offer, and another 17.4% conducted the check during the students' first year;[202] 63.4% implemented background checks as a result of requirements imposed by experiential sites;[203] at least 37.7% indicated that students undergo multiple criminal background checks while enrolled; [204] and 68.1% responded that the student is responsible for paying the background-check fee, whether to the school, an outside service, or to another entity.[205] Thus, as with medical schools, the clear trend favors pre-matriculation checks.

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192. AACP REPORT, *supra* note 11, at 3. The report likely would prove helpful to any institution contemplating adding or revising a policy regarding student background checks.

193. *Id.* at 9–14.

194. *Id.* at 4–9.

195. *Id.* at 14–18.

196. *Id.* at 18–21.

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 22.

200. *Id.* at app. E. Sixty-three institutions participated in the survey. *Id.*

201. *Id.* at 38. For examples of criminal background checks at pharmacy schools, see Thomas Jefferson Univ., Jefferson Coll. of Health Profs., Criminal Background Check and Child Abuse Clearance Letter, http://www.jefferson.edu/jchp/CBCletter.cfm (last visited Feb. 27, 2008); Univ. of Wash. Sch. of Pharmacy, Interview and Admission Process, http://depts.washington.edu/pha/students/interview.html (last visited Feb. 27, 2008).

202. AACP REPORT, *supra* note 11, at app. E.

203. *Id.*

204. *Id.* Another 12.6% indicated that the number "varies significantly," and 15.8% answered "other" in response to the frequency question. *Id.*

205. *Id.* at 40.

4. Other Health Professions

Programs for other health professions, including anesthesiologist assistant,[206] athletic training,[207] clinical-community psychology,[208] clinical lab sciences,[209] dentistry,[210] dental hygiene,[211] health sciences,[212] kinesiology,[213] occupational therapy,[214] paramedic training,[215] physician's assistants,[216] radiography,[217] respiratory therapy,[218] sonography,[219] and speech and language pathology[220] may also require pre-matriculation criminal background checks. Many of these checks are driven by the fact that, to complete their degree requirements, students must participate in clinics at hospitals and other sites that are subject to the jurisdiction of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO").[221] Although JCAHO itself does not require background checks, it

206. *E.g.*, S. Univ., Applicant Reference Form, http://www.southuniversity.edu/campus/pdf/AA_application_append.pdf (last visited Feb. 27, 2008).

207. *E.g.*, Univ. of Tulsa Coll. of Bus. Admin., Athletic Training—Admission Information, http://www.cba.utulsa.edu/Depts/athletic/admissions (last visited Feb. 27, 2008).

208. Univ. of Alaska Fairbanks, http://psyphd.alaska.edu/appprocedures.htm (last visited Feb. 27, 2008).

209. *E.g.*, Univ. of Tex. at El Paso, Coll. of Health Scis., Policy: Background Checks and Drug Screening for Students, http://academics.utep.edu/Portals/280/4.11.07.Final%20CoHS%20CBC%20and%20Drug%20Screen%20Policy.doc (last visited Feb. 27, 2008).

210. F.L. JORDAN & M.L. ROWLAND, DENTAL STUDENTS PERCEPTIONS OF THE BACKGROUND CHECKS AND TECHNICAL STANDARDS (2006), *available at* http://iadr.confex.com/iadr/2006Orld/techprogram/abstract_76158.htm (presenting the results of a ten-question survey piloted to 104 first-year dental students at The Ohio State University College of Dentistry during new-student orientation; 38% responded to the survey; of this group, 70% agreed that background checks should be an admission requirement).

211. *E.g.*, Univ. of S.D., Terms of Acceptance, http://www.usd.edu/dhyg/termsofacceptance.cfm (last visited Feb. 27, 2008).

212. *E.g.*, HILLSBOROUGH CMTY. COLL., HEALTH SCIENCES APPLICATION 5 (2007), http://www.hccfl.edu/depts/healthsci/files/C0422C12F2C343D0BCE7DFB56A9C15A4.pdf.

213. *E.g.*, UNIV. OF WYO., APPLICATION FOR ADMISSION (2007), http://uwacadweb.uwyo.edu/kandh/forms/Application_Form_KHP.pdf.

214. *E.g.*, Univ. of Kan. Med. Ctr., Application Procedures, http://alliedhealth.kumc.edu/programs/ot/documents/PDF/otd_application.pdf (last visited Feb. 27, 2008).

215. *E.g.*, Gulf Coast Cmty. Coll., Paramedic Program, http://ems.gulfcoast.edu/pdf/Paramedic%20Application%20Packet.pdf (last visited Feb. 27, 2008).

216. *E.g.*, Univ. of N.D., Applicant Information, http://www.med.und.nodak.edu/physicianassistant/applicant.html (last visited Feb. 27, 2008).

217. *E.g.*, Portland Cmty. Coll., Radiography Program Admission, http://www.pcc.edu/programs/radiography/admission (last visited Feb. 27, 2008).

218. *E.g.*, Washburn Univ. Sch. of Applied Studs., Admissions Criteria, http://www.washburn.edu/sas/ah/rt/application.html (last visited Feb. 27, 2008).

219. *E.g.*, George Washington Univ. Med. Ctr., Entrance Requirements, http://www.gwumc.edu/healthsci/programs/sonography_bs/admissions.cfm (last visited Feb. 27, 2008).

220. OFF. OF THE GEN. COUNSEL, UNIV. OF TEX., STUDENT BACKGROUND CHECK MODEL POLICY (2005), *available at* http://www.utsystem.edu/Ogc/docs/general/studentbackgroundpol.doc.

221. JOINT COMM'N, REQUIREMENTS FOR CRIMINAL BACKGROUND CHECKS (2005), http://www.jointcommission.org/NR/exeres/A116AF30-8785-423D-90C1-89035DFCB9C8.htm.

does monitor members' compliance with state laws, regulations, and organizational policies that require background checks.[222]

C. Law Schools

Unlike most health professions, law schools rarely conduct pre-matriculation background checks. The American Bar Association, which accredits law schools, does not require background checks as part of the admissions process. In fact, the *Standards and Rules of Procedure for Approval of Law Schools* do not mention background checks.[223] On the other hand, the *Standards* do not prohibit schools from conducting background checks.[224] In addition, the Law School Data Assembly Service ("LSDAS"), which serves as a clearinghouse of student information such as grades, transcripts, and letters of recommendation, does not conduct or include background-check information as part of the candidate packet provided to member schools.[225]

Instead, law schools tend to rely on self-disclosure through application questions and honor code provisions.[226] At least one school, however, expressly reserves the right to conduct background checks on applicants.[227]

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222. *Id.* *See* Russell Ford et al., Address at NACUA Virtual Seminar Series, Students with Criminal Backgrounds: Checks and Balances (June 15, 2006).

223. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS 36–41 (2007), *available at* http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%205.pdf.

224. *See id.*

225. Law School Admission Council, About the LSDAS, http://www.lsac.org/Applying/lsdas-general-information.asp (last visited Feb. 27, 2008).

226. John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 927 (2004) ("Every application surveyed in this study asks information about an applicant's conduct relating to the criminal laws."); *Id.* at 935 (discussing discipline systems for applicants who fail to disclose accurate information).

227. THOMAS M. COOLEY LAW SCHOOL, JURIS DOCTOR APPLICATION FOR ADMISSION (2007), *available at* http://www.cooley.edu/admissions/application.pdf. The application states:

> CHARACTER AND FITNESS QUESTIONS: The remaining questions require you to disclose whether you have a history of criminal or civil offenses or academic, work-related, or military disciplinary actions, whether those matters appear on your record or not. The Thomas M. Cooley Law School does not necessarily deny admission simply because an applicant has a history of criminal or civil offenses or disciplinary matters. In making admission decisions, the Law School considers the nature, number, and date of offenses in light of the requirements for participation in its programs. If you do not disclose your complete history here, regardless of your reason or state of mind, the Law School may, upon discovering your failure to disclose, subject you to discipline up to and including denial of admission, revocation of admission, suspension or dismissal after matriculation, withdrawal of certification of graduation to bar authorities, or revocation of degree. The Law School has imposed all of these sanctions. Even if the law school does not discover your history before you graduate, bar investigation and licensing authorities will do so when you apply for bar admission. These authorities will inform the law school, which may initiate disciplinary proceedings for failure to disclose. *The Thomas M. Cooley Law School reserves the right to conduct complete history checks of any applicant*. Failure to cooperate completely in this process will result in denial of the opportunity to matriculate and revocation of acceptance. (If you are not sure about the nature or ultimate disposition of a particular charge, you must check court records before you answer the following

In addition to requiring applicants to disclose criminal histories, law schools typically issue stern warnings to applicants that state boards of bar examiners will conduct a thorough character and fitness examination before an individual is permitted to practice law in the jurisdiction, and that the investigation will compare answers given on the bar application with information the student provided to the law school.[228] They also warn students that a felony conviction or pattern of criminal conduct may make admission to the bar difficult, if not impossible.[229] Some spend time during orientation emphasizing the importance of candor on the admissions application and providing students with a window within which to amend their applications.[230] For amendments that disclose serious crimes or a pattern of criminal conduct, law schools may revoke admission or impose other discipline.[231]

Despite warnings, some students fail to disclose and are caught only after having graduated from the law school. Published cases provide examples of bar examiners and state courts addressing this type of issue.[232] In addition, through their honor codes, law schools often maintain jurisdiction for conduct that occurred when the individual was an applicant or student; they also expressly reserve the

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questions.)

Id.

228. Dzienkowski, *supra* note 226, at 936. *See also* Brigham Young Univ. Law Sch., Quotes from Law School Admissions Deans on Addendums, http://ccc.byu.edu/prelaw/PDF_Files/Quotes_from_Admissions_Deans_on_Addendums.pdf (last visited Feb. 27, 2008) (providing advice about disclosing criminal records).

229. *E.g.*, Univ. of Wash. Sch. of Law–Seattle., J.D. Admissions, http://www.law.washington.edu/Admissions/Apply/JD/Default.aspx (last visited Feb. 27, 2008).

> Applicants who have been convicted of a felony or other serious crime are still eligible for admission to the University of Washington School of Law; however, because state bar associations often prohibit persons with criminal records from being admitted to the bar regardless of their degrees or training, it may be impossible for such individuals to practice in some states. Persons who have been arrested or convicted for any crime are strongly urged to inquire directly of the bar association in the jurisdiction in which they intend to practice, before applying to law school.

Id.

230. Clara Hogan, *Law Students Given Chance to 'Fess Up'*, DAILY IOWAN (Iowa City, Iowa), Nov. 26, 2007, http://media.www.dailyiowan.com/media/storage/paper599/news/2007/11/26/Metro/Law-Students.Given.Chance.To.fess.Up-3115011.shtml. *See also* Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 710–11 (2004) (noting that, at the University of Iowa College of Law, during a three-year period, 7.6–10% of students in each entering class "admitted making misrepresentations about their criminal histories and past misconduct on their applications," but arguing "that, in most cases, a modified amnesty approach, rather than revoking admission or proceeding with misconduct, strikes the right balance in favor of teaching important professional values.").

231. *E.g.*, Univ. of Ark. Sch. of Law., Character and Fitness, http://law.uark.edu/pdfs/download.php/char_and_fitness.pdf?asset_id=869&revision= (last visited Feb. 27, 2008).

232. *E.g.*, *In re* Kleppin, 768 A.2d 1010 (D.C. 2001) (individual failed to disclose his past criminal record to two law schools); Gagne v. Trs. of Ind. Univ., 692 N.E.2d 489 (Ind. Ct. App. 1998) (law school subjected student to discipline after discovering that he concealed his criminal record); *In re* Dabney, 836 N.E.2d 573 (Ohio Ct. App. 2005) (individual failed to disclose criminal record on her law school and bar applications).

right to take action, including revoking a diploma, when students hide their criminal pasts.[233] But they do not seem to be contemplating background checks as a way to avoid such late discovery of candidates' criminal records.

D. Other Programs of Study

Other programs in which pre-matriculation background checks may be required include education, [234] counseling, [235] and social work. [236] As with health-related professions, students in these programs often perform clinical work in settings with children, the elderly, and other vulnerable populations. In addition, seminary and divinity schools often require background checks, not only to protect congregations with whom students may work, but also to uphold their schools' reputations. [237] Although some business schools now conduct background checks

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233. *E.g.*, STETSON UNIV. COLL. OF LAW, ACADEMIC HONOR CODE §§ III, IX (2004) *available at* http://www.law.stetson.edu/policies/AcademicHonorCode.pdf. *See generally* Mary Ann Connell & Donna Gurley, *The Right of Educational Institutions to Withhold or Revoke Academic Degrees*, 32 J.C. & U.L. 51 (2005).

234. UTAH STATE UNIV., APPLICATION FOR ADMISSION TO THE TEACHER EDUCATION PROGRAM 2 (2007), *available at* http://elementaryeducation.usu.edu/pdf/application_for_admission.pdf ("Applicants must complete an online background check at the time of application. . . . Because background checks expire after three years, some students may need to complete a background check more than once before finishing the program."); Ne. Ill. Univ., Coll. of Educ. Background Check Policy, http://www.neiu.edu/~edudept/background.htm (last visited Feb. 27, 2008) ("Candidates seeking admission to the College of Education after the beginning of the Spring 2004 term . . . must submit a background check."); Univ. of Alaska Anchorage, Coll. of Educ., Mandatory Background Checks, http://coe.uaa.alaska.edu/background.cfm (last visited Feb. 27, 2008) (explaining different types of disclosures and checks required for programs within the College of Education). *See also* Michael Childs, *Teacher Education Majors Subject to Background Checks*, COLUMNS CAMPUS NEWS (Athens, Ga.), Sept. 13, 1999, http://www.uga.edu/columns/990913/campnews.html ("[S]tudents seeking admission to teacher education status are required to undergo a criminal background check.").

235. Wesley J. Erwin & Maria Enerson Toomey, *Use of Criminal Background Checks in Counselor Education*, 44 COUNS. EDUC. & SUPERVISION 305 (2005).

236. Univ. of Wash.–Tacoma, Admissions Requirements, http://www.tacoma.washington.edu/social/academics/msw/admission.cfm (last visited Feb. 27, 2008).

> Washington state law requires that individuals who have access to children under 16 years of age, persons with developmental disabilities and vulnerable adults such as older people disclose background information. . . . Therefore, a background check is a required part of the master of Social Work Program's admissions process. Effective for Autumn 2008, the Social Work Program will require that all newly admitted students use an on-line service, Verified Credentials INC., to obtained required background checks.

Id. See generally Gail M. Leedy & James E. Smith, *Felony Convictions and Program Admissions: Theoretical Perspectives to Guide Decision-Making*, J. SOC. WORK VALUES & ETHICS, Spring 2005, http://www.socialworker.com/jswve/content/view/16/34.

237. Brite Divinity Sch., Frequently Asked Questions, http://www.brite.tcu.edu/admission/faqs.asp (last visited Feb. 27, 2008) ("For those granted provisional admission to Brite, the next step is for the applicant to grant permission for the Divinity School to conduct a criminal background check and to pay the required $20.00 fee."); Garrett-Evangelical Theological Seminary, Admissions Procedures, http://www.garrett.educ/content.asp?C=1329 (last visited Feb. 27, 2008) ("A criminal background check is required of all applicants."); Luther Seminary, Background Checks and Boundary Maintenance, http://www.luthersem.edu/student_services/

on applications, those checks tend to focus on credential verification, not criminal histories.[238]

III. THE LEGAL LANDSCAPE

The legal landscape regarding criminal background checks on prospective students can be viewed in three parts: (A) laws that impact whether background checks are permitted or required in certain situations, (B) laws that may be implicated if a school decides to conduct background checks, and (C) legal theories regarding whether an individual injured by a student may sue the college or university for failing to conduct background checks.

A. Whether Background Checks Are Permitted or Required

Only one published case addresses whether colleges and universities may be obliged to conduct criminal background checks on prospective students.[239] In addition, except for the Illinois statute that requires pre-matriculation background checks on medical students, no current state[240] or federal[241] statute requires

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background_checks.asp (last visited Feb. 27, 2008) ("The communities in which they learn and to which they are called need to be safe places for all persons. Luther Seminary is committed to strengthening congregations in becoming such safe places. Furthermore, Luther Seminary is committed to being a safe place itself.").

238. Francesca Di Meglio, *Background Checks Are Front and Center,* BUS. WK., Jan. 1, 2007, http://www.businessweek.com/bschools/content/jan2007/bs20070101_101796.htm; Aaron Kessler, *UVa School May Probe Applications,* DAILY PROGRESS (Charlottesville, Va.), Apr. 30, 2007, *available at* http://www.dailyprogress.com/servlet/Satellite?pagename=CDP%2FMGArticle%2FCDP_BasicArticle&c=MGArticle&cid=1173351007413&path=.

239. Eiseman v. New York, 511 N.E.2d 1128 (N.Y. 1987). See *infra* Part III.C.1 for further discussion of this case.

240. At least two states recently have considered, but failed to pass, legislation that would either require or permit institutions of higher education to conduct background checks on applicants for admission. *E.g.*, Joseph Boone, *Backgrounds of Students Could Soon Be Fair Game*, DAILY TEXAN (Austin, Tex.), Apr. 24, 2007, *available at* http://media.www.dailytexanonline.com/media/storage/paper410/news/2007/04/24/TopStories/Backgrounds.Of.Students.Could.Soon.Be.Fair.Game-2876674.shtml (noting that Texas bill would have permitted colleges and universities to conduct background checks on students); Stephen Moore, *UNC System Strongly Against Checks*, DAILY TARHEEL (Chapel Hill, N.C.), Aug. 19, 2006, *available at* http://media.www.dailytarheel.com/media/storage/paper885/news/2006/08/19/StateNational/Unc-System.Strongly.Against.Checks-2221686.shtml (discussing a North Carolina bill that would require fingerprinting and criminal background checks on all admitted students in the state's public universities).

On a related topic, in 2006, Virginia amended its sex-offender law to require in-state colleges and universities to report to the state police the full names, genders, dates of birth, and Social Security numbers or other identifying numbers for all accepted applicants. VA. CODE ANN. § 23-2.2:1 (2007). *See also* Letter from LeRoy S. Rooker, Dir., Fam. Pol'y Compliance Off., to Jonathan D. Tarnow (Aug. 16, 2007), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/vasexoffenderlaw081607.html (discussing the relationship of the new Virginia requirements with FERPA).

241. *But see* 20 U.S.C. § 1091(r) (2000) (making federal financial aid recipients ineligible for federal aid for a predetermined period if convicted of a federal or state offense involving possession or sale of a controlled substance); U.S. DEP'T OF EDUC., STUDENT AID ELIGIBILITY

institutions of higher education to conduct background checks on applicants for admission. Conversely, no state or federal law prohibits institutions of higher education from requiring admissions applicants or admitted students to submit, or submit to, criminal background checks.[242]

The lack of specific law increases the difficulty of predicting how courts may rule if presented with the issue. And the degree of difficulty is enhanced because colleges and universities may face suit in a variety of ways. For example, a student denied admission based on a criminal background check may sue the institution. Alternatively, a person injured by a student may sue the institution if a background check was not conducted and the student had a criminal history. Indeed, the latter situation resembles the suit filed by the father of murdered UNC Wilmington student Jessica Faulkner.[243] Despite the dearth of specific case and statutory law, we can gain a better understanding of how courts may approach the issue by examining the impact of academic freedom and substantive due process on the college and university admissions process and by reviewing cases in which institutions have revoked or denied offers of admission based on a student's voluntarily disclosed, or concealed, criminal record.

1. Academic Freedom, Substantive Due Process, and the Admissions Process

Historically, courts have afforded institutions of higher education great discretion in making admissions decisions.[244] This discretion is based partially on the concept of academic freedom.[245] As Justice Frankfurter wrote in his

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WORKSHEET FOR QUESTION 31 (2008), http://www.ifap.ed.gov/fafsa/attachments/20082009DrugWksheetAttA1120.pdf; (drug conviction worksheet for students seeking federal financial aid). *See* Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Apr. 17, 2006, at 3A.

242. In early 2007, members of the Council of the District of Columbia introduced the Human Rights for Ex-Offenders Amendment Act of 2007. The legislation, which was not enacted, sought to prohibit discrimination in Washington, D.C. based on arrest or conviction record, other than when a "rational relationship" exists between a position and a past conviction. Redden, *supra* note 2. The legislation would have applied to institutions of higher education and would have prohibited colleges and universities from asking about an applicant's criminal record on the admissions application and from considering a past criminal record if disclosed or otherwise discovered. *Id.* Arguably, the legislation would have allowed schools to make conditional offers of admission and then ask applicants to disclose criminal offenses that have occurred in the past ten years, and, regardless of timing, serious criminal offenses, such as murder, assault with a deadly weapon, and sex offenses. *Id.*

243. *See supra* notes 95–102 and accompanying text.

244. 1 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 752 (4th ed. 2006). *See also* Elizabeth Bunting, *The Admissions Process: New Legal Questions Creep Up the Ivory Tower*, 60 EDUC. L. REP. 691, 691 (1990) (opining that until the 1950s, "a college's decision to admit or reject an applicant was judicial no-man's land"); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 323–27 (1989) (noting a long history of judicial deference toward college and university decision-making).

245. Sweezy v. New Hampshire, 354 U.S. 234 (1957) (Frankfurter, J., concurring). *See* Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 EDUC. L. REP. 733, 734, 734 n.5 (2001) (citing additional precedent for this proposition).

concurrence in *Sweezy v. New Hampshire*:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail *the four essential freedoms of a university*—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study*.[246]

In addition, courts consistently have held that, for purposes of substantive due process, "pursuit of an education is not a fundamental right or liberty."[247] Moreover, applicants for admission to post-secondary, graduate, or professional schools do not have a property interest in admission.[248] As one university general counsel has explained:

> [T]o the extent that either interest has been discussed by courts in higher education admissions cases, those courts have assumed rather than found such interests to exist for applicants. Absent a property or liberty interest, applicants do not have a procedural due process right in their application, and thus have no right to a hearing to prove their admission. Indeed, at least one court has analogized denial of admission to an academic dismissal which, unlike a disciplinary dismissal, requires no hearing and even greater judicial deference.[249]

Despite courts' historic deference to the college and university admissions process, the twentieth century brought legal challenges and some constraints.[250] Specifically, colleges and universities now must ensure that their selection processes are not arbitrary or capricious;[251] must, under contract theory, abide by their published admissions standards and, absent unusual circumstances, such as concealed information, honor their admissions decisions;[252] and must not discriminate on the basis of protected characteristics such as age, disability, citizenship, race, or sex.[253]

Using these basic principles, colleges and universities that conduct background checks should ensure that students subjected to background checks are not selected in an arbitrary or capricious manner. Thus, schools may conduct checks on all students, or on all students in programs with special health and safety concerns, such as pharmacy. "Red flag" programs, like that implemented by the UNC

246. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added).

247. Tobin v. Univ. of Me. Sys., 59 F. Supp. 2d 87, 90 (D. Me. 1999) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973)).

248. *E.g.*, Phelps v. Washburn Univ., 632 F. Supp. 455, 459 (D. Kan. 1986) (law school); Selman v. Harv. Med. Sch., 494 F. Supp. 603, 619 (S.D.N.Y. 1980), *aff'd*, 636 F.2d 1024 (2d Cir. 2000) (medical school); Szejner v. Univ. Alaska, 944 P.2d 481, 486 (Alaska 1997) (graduate school). *See generally* Langhauser, *supra* note 245, at 734.

249. Langhauser, *supra* note 245, at 734–35 (internal citations omitted).

250. KAPLIN & LEE, *supra* note 244, at 752–53.

251. *Id.*

252. *Id.*

253. *Id.*

System,[254] would also likely survive judicial scrutiny, if the "red flags" were related to the school's mission, or to health, safety, or other legitimate institutional interests. On the other hand, background-check policies that have a disparate impact on protected classes may be subject to challenge. For example, background checks that include information related to arrests that did not lead to conviction have been shown to have a disparate impact on African Americans.[255]

Colleges and universities should ensure that written policies regarding background checks are clear and should adhere to those policies.[256] Also, if a college or university performs background checks after deciding to admit candidates, that school should inform the applicant that admission is subject to and conditioned on receipt of an acceptable criminal background check[257] and should articulate what "acceptable" means.

2. Cases Involving Denials or Revocations of Admission Based on Applicants' Criminal Records

Outside the background-check context, several cases have upheld the right of colleges and universities to deny or revoke admission because of a student's criminal record, especially when the student concealed that record.[258]

In *Gagne v. Trustees of the University of Indiana*,[259] a law school applicant answered "no" to questions asking whether he had "ever been arrested or convicted of any criminal offense other than a minor traffic violation" or had "any criminal charges pending."[260] Several weeks into his first semester at the school, the dean of students learned that the student had misrepresented his criminal history.[261] Specifically, the student had been convicted for disorderly conduct and served a short jail term for reckless driving.[262] The school initiated and followed its disciplinary process and ultimately expelled the student.[263] The student sued, arguing both violation of due process and breach of contract. The appellate court, affirming the trial court ruling,[264] held that the law school had provided the student with notice and an opportunity to be heard and had followed its written procedures

254. *See supra* notes 115–18 and accompanying text.

255. AACP REPORT, *supra* note 11, at 16.

256. *E.g.*, Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000) (holding, in a student discipline case, that a university should follow its own rules, but that minor deviations will not support a cause of action in contract if the student receives basic fairness). *See infra* note 454 and Appendix D for drafting suggestions.

257. Langhauser, *supra* note 245, at 734–36 (explaining variations in law between denials and revocations of admission).

258. For additional situations, see Jerome W.D. Stokes & Allen W. Groves, *Rescinding Offers of Admission When Prior Criminality Is Revealed*, 105 EDUC. L. REP. 855 (1996).

259. 692 N.E.2d 489 (Ind. Ct. App. 1998).

260. *Id.* at 491.

261. *Id.* The student also misrepresented his educational background on materials submitted to the office of career services—materials which were submitted to future employers. *Id.*

262. *Id.* at 492.

263. *Id.* at 492–93.

264. *Id.* at 493.

regarding discipline.[265] The court also held that the law school had the authority to expel the student based on his concealment of the misconduct.[266]

In another case, the United States Court of Appeals for the Seventh Circuit ruled in favor of the University of Wisconsin Law School, which revoked a candidate's admission when school officials learned he had lied about his criminal record.[267] On his application, Henry Martin answered "yes" to questions regarding whether he had a criminal record, but also indicated that he had been pardoned by the governor.[268] In fact, at the time of his admission, Martin was serving a ten-year prison sentence for interstate transportation of forged securities.[269] Martin argued that the law school violated his due process and sought to enjoin the revocation of admission.[270] In addition to determining that Martin had been granted sufficient process, including the opportunity to supplement and explain his original application,[271] the court noted that "[t]he threatened injury to the appellant—delay in beginning his law school career . . . pales before the threatened injury to the Law School and the public interest if an unsuitable candidate is admitted. . . . Both the Law School's and society's interest in producing honest lawyers is deserving of great protection."[272]

In *Burgos v. University of Central Florida Board of Trustees*,[273] an applicant was denied immediate admission, but was offered admission for a future term.[274] The deferral was based on the fact that the applicant had been convicted of serious drug charges, had served a prison sentence, and was still on supervised release when he applied.[275] The applicant sued for violation of due process under the

265. *Id.* at 494–95.

266. *Id.* at 494–96.

267. Martin v. Halstead, 699 F.2d 387 (7th Cir. 1983).

268. *Id.* at 388.

269. *Id.*

270. *Id.* at 389.

271. *Id.* at 391.

272. *Id.* at 392.

273. 283 F. Supp. 2d 1268 (M.D. Fla. 2003).

274. *Id.* at 1270.

275. *Id.* In a letter from the university to the applicant, a senior admissions officer provided a detailed explanation of the admissions decision:

> The decision was reached based upon several factors. Your criminal activity involved the distribution of illegal narcotics, which is of special concern to any university, especially ours. Your length of time served, the short period of time since you left prison and the time you have remaining on probation, were all considered. . . . In considering this combination of facts, the Director also took into consideration your efforts to attend Valencia Community College to pursue academic endeavors, your current compliance with your probation, and your involvement in martial arts. However, you have held no employment since your release from prison and have continued to live with your mother and step-father without any demonstration of self support. After weighing all of these facts, the Director . . . recommended that you not be offered admission for the fall 2003 term, but that you be offered admission for the fall 2004 term, assuming there are no further violations of the law.

Id.

federal and Florida constitutions.[276] The court, ruling in favor of the university, found that the applicant did not have a constitutional right to admission "for a particular term at a state university."[277] It thus determined that his request for an injunction should fail and did not address the propriety of the university's actions.[278]

Finally, in a recent case described in the *Chronicle of Higher Education*, the Alaska Superior Court held that the University of Alaska at Anchorage had the authority to deny "admission to its social-work program to a man who had been jailed for 20 years for killing a convenience-store clerk in a botched robbery."[279] The applicant argued that his rights under an Alaska constitutional provision guaranteeing the rehabilitation of criminals had been violated.[280] The university rejected the applicant under the school of social work's policy that applicants "may be rejected if they have a criminal record that leaves them 'unfit for social-work practice.'"[281] The university also used an extensive process to reach its decision.[282] The court held that the school had not deviated from its written policy regarding the admission of felons into the social-work program and that the process used to deny the application was not arbitrary. The court also rejected the applicant's reliance on the Alaska constitutional provision, which "extends only to prisoners who are actually serving sentences."[283]

In each case above, the court found the school had acted appropriately by following its policies and procedures. And in some of the cases, the court acknowledged the school's interest in protecting its reputation, professions, and ultimate client—the public. As Derek Langhauser, General Counsel of Maine's public two-year college system, has summarized:

> [T]he test for an institution is one of reasonableness; whether the college's decision is not arbitrary, unreasonable or capricious; and whether it is consistent with standards of professional judgment. This may be shown by demonstrating a mere rational relationship between

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276. *Id.* at 1270–71.

277. *Id.* at 1271.

278. *Id.* at 1272.

279. Peter Monaghan, *Judge Upholds Univ. of Alaska's Right to Deny Felon Admission to Social-Work Program*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 3, 2006, at A40.

280. *Id.*

281. *Id.* The school adopted the felony policy

> after a student was admitted to the program but then was discovered to have had a felony conviction for the sexual abuse of a minor. Since that time, university officials have said, students have been rejected for having convictions for felonies or such misdemeanors as driving under the influence of alcohol.

Id.

282. The process included interviews by faculty members, votes by the social-work faculty, consideration by the university's Academic Decision Review Committee, and review by the dean of the College of Health and Social Welfare. *Id.*

283. *Id.* The rejected applicant opted not to appeal this decision to the Alaska Supreme Court. Lisa Demer, *Murderer Ends Pursuit of Social Work Degree from UAA; ACLU: He Will Not Appeal Judge's Decision That Sided With the University*, ANCHORAGE DAILY NEWS, Apr. 4, 2007, at B2.

> the nature, severity, recency of the crime; the truthfulness of the applicant; and the interests of the college.[284]

Translated to the background-check context, courts will be more likely to rule for colleges and universities sued by rejected students when the institutions abide by their written policies, provide notice and an opportunity to students with positive results to respond, and base policies on their educational missions, core values, and important priorities, including campus safety.

B. Laws That May Be Implicated if a School Conducts Background Checks

Colleges and universities that conduct background checks on prospective students must be aware of federal and state laws that may impact (1) how criminal background checks may be used within the admissions process, (2) how checks may be conducted, and (3) what information may be available when a check is conducted. In addition, colleges and universities should understand that rejected applicants may sue the institution under various tort and discrimination theories.

1. Anti-Discrimination Laws Concerning Prior Convictions

Although most states do not forbid discrimination based on an individual's conviction record, fourteen states prohibit discrimination in certain circumstances, primarily employment and licensure.[285] Although none of these laws expressly apply to the college and university admissions process,[286] schools in these jurisdictions should study these laws. Specifically, schools may be able to determine which graduates may be barred from obtaining occupational licenses; they may also discern preferred procedures for notifying applicants about the results of background checks. And, based on legislative language or history, they may locate guidance about which applicants may be denied admission following a positive check. Finally, these statutes reflect legislative attitudes regarding the rehabilitation of individuals convicted of crimes, which in turn may impact college and university policies in that regard.

Despite the fact that the New York statute is expressly limited to the employment and occupational-license contexts, a 1998 system-wide policy of the State University of New York assumed the state non-discrimination statute[287]

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284. Langhauser, *supra* note 245, at 736 (internal citation omitted).

285. *See* ARIZ. REV. STAT. ANN. § 13-904(E) (2006); COLO. REV. STAT. § 24-5-101 (2006); CONN. GEN. STAT. § 46a-80 (2004); FLA. STAT. § 112.011 (2002); HAW. REV. STAT. § 378-2.5 (2006); KAN. STAT. ANN. § 22-4710(f) (2006); KY. REV. STAT. §§ 335B.020, 335B.070, 335B.010(4) (2007); LA. REV. STAT. ANN. § 37:2950 (2007); MINN. STAT. § 364.03 (2004); N.M. STAT. §§ 28-2-3 to -6 (2007); N.Y. EXEC. LAW § 296(15) (McKinney 2005); N.Y. CORRECT. LAW §§ 750–54 (McKinney 2003); 18 PA. CONS. STAT. § 9125 (2000); WASH. REV. CODE §§ 9.96A.020, 9.96A.060, 9.96A.030 (2003); WIS. STAT. § 111.335 (2002). *See also* Legal Action Center, Standards for Hiring People with Criminal Records, Overview of State Laws That Ban Discrimination By Employers, http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf (last visited Feb. 27, 2008).

286. Unlike the statutes identified in *supra* note 285, the proposed Washington, D.C. legislation described in *supra* note 242 would have applied to applicants for admission.

287. N.Y. CORRECT. LAW § 751. The statute states:

applied to the admissions context and developed a procedure to evaluate applications from potential students with prior convictions.[288] Even if this interpretation of the state corrections law is too broad, the policy reflects how a college or university in a state with anti-discrimination legislation that protects individuals with prior convictions may draw from underlying state policy to develop admissions procedures.

2. Statutory Requirements for Conducting Background Checks

Both federal and some state statutes[289] regulate how certain background checks may be conducted. The federal Fair Credit Reporting Act ("FCRA"),[290] for example, regulates "consumer reports." A "consumer report"

> means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics*, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.[291]

None of the "other purposes" in § 1681b mention or refer to college and university admissions processes. Thus, although institutions of higher education must abide by the FCRA when conducting background checks on current or prospective employees, the law does not appear to apply to prospective students.[292] This view is supported by the fact that no reported cases have extended, or even

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> The provisions of this article shall apply to any application by any person for a *license or employment* at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any *license or employment* held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct.

Id. (emphasis added).

288. State Univ. N.Y., Admission of Persons with Prior Felony Convictions or Disciplinary Dismissals, http://www.suny.edu/sunypp/documents.cfm?doc_id=342 (last visited Feb. 27, 2008). *See infra* Appendix C for the full-text of the admissions policy.

289. For a list of state statutes, see Lee, *supra* note 2, at 663 n.83. None of the listed statutes appear to apply to the admissions processes of educational institutions; however, a current search in your jurisdiction is advised. As discussed at *supra* note 164, Illinois has a statute that relates to background checks for medical students; that statute includes some procedural requirements. Also, as Professor Lee notes, "[i]nternational background checks may require compliance with the laws of other countries or aggregations of countries." Lee, *supra* note 2, at 665.

290. 15 U.S.C. §§ 1681–1681x (2000 & Supp. 2003).

291. *Id.* § 1681a(d)(1) (emphasis added).

292. *See* AACP REPORT, *supra* note 11, at 13 ("Although FCRA does not explicitly include educational institutions, the applicability to colleges . . . may depend on legal interpretation and circumstances.").

discussed extending, the statute to the college and university admissions context. In addition, the FCRA does not apply even in the employment context if the college or university conducts background checks without using third-party services[293] or if checks are conducted by the state police or FBI.[294]

Although the FCRA likely does not apply in the admissions context, schools would be wise to study the Act and, out of a sense of basic fairness, adopt some of its procedural safeguards. Using the FCRA as a guide, colleges and universities that conduct background checks may take the following steps:[295]

1. Notify admissions applicants, in a separate disclosure document, that a background check will be conducted and the results will be considered in making the admissions decision.[296] The disclosure should, among other things, describe the scope of the check to be conducted.

2. Obtain applicants' written consent, on a separate form, to use an outside agency to conduct the check.[297]

3. If the report is positive and the college or university is going to reject the applicant, revoke a conditional offer of admission, or make some other negative decision, provide the applicant with a copy of the report and a reasonable opportunity to respond before finalizing the negative decision under consideration.[298] Reports, for a variety of reasons, are not always accurate. Thus, providing the candidate with a pre-decision opportunity to respond can help minimize the impact of "false positive" results.

4. If the college or university rejects the applicant, revokes a conditional offer of admission, or makes some other negative decision, provide the candidate with written notice of that decision.[299] Whether a college or university provides an explanation of the decision is a policy decision that admissions and other officials should make in connection with counsel.

3. Juvenile Records

State law can also impact what types of information are available when a background check is conducted. Juvenile records present the greatest challenge. Specifically, depending on how states treat juvenile records, questions and background checks about juvenile offenses may not be accessible or may not be appropriate considerations in the admissions process.

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293. Lee, *supra* note 2, at 63; Wendy L. Rosebush, *Conducting Employee Background Checks Triggers Employer Obligations Under the Fair Credit Reporting Act*, EDWARDS & ANGELL LLP LAB. & EMP. BULL. (2004), *available at* http://www.eapdlaw.com/files/News/9a3565fa-1a3b-4982-a10b-d50e33d315bd/Presentation/NewsAttachment/68e8072b-46c7-430a-92ed-dae27820451b/media.191.pdf.

294. Lee, *supra* note 2, at 664 (citing Letter from Clarke W. Brinckerhoff, Att'y, Fed. Trade Comm'n, Div. Credit Prac. Bureau of Consumer Prot., to A. Dean Pickette, Att'y, Magnum, Wall, Stoops & Warden (July 10, 1998)).

295. This section follows the structure in Lee, *supra* note 2, at 664.

296. *Cf.* 15 U.S.C. § 1681b(b)(2)(A)(i).

297. *Cf.* 15 U.S.C. § 1681b(b)(3)(B)(ii).

298. *Cf.* 15 U.S.C. § 1681b(b)(3)(A).

299. *Cf.* 15 U.S.C. § 1681b(b)(3)(B)(i).

Sealed[300] and expunged[301] records pose particular problems. "The federal government and nearly every state have enacted some type of statute providing for either the sealing, expungement, or limited access to juvenile records."[302] The primary goal underlying these statutes is to allow offenders to start anew by removing the stigma associated with a criminal record.[303] But state laws differ regarding "the procedure, criteria, and intended effect of sealing juvenile records."[304]

Currently, no state statutes expressly prohibit educational institutions from asking admissions applicants about juvenile records, whether sealed, expunged, or otherwise. Previously, Maryland prohibited educational institutions from requiring, "in any application, interview, or otherwise, disclosure of any information pertaining to an expunged record."[305] But this provision was repealed in 2001.[306] Some states, however, prohibit questioning about expunged records, regardless of the context. For example, a New Hampshire statute provides that, "[i]n any application for employment, license or other civil right or privilege . . . a person may be questioned about a previous criminal record only in terms such as 'Have you ever been arrested for or convicted of a crime that has not been annulled by a court?'"[307]

In addition, college and university officials should understand that most states authorize offenders whose records have been expunged to answer "no"[308] when asked whether they have a criminal history.[309] Some states also permit offenders

300. Sealing "refers to those steps taken to segregate certain records from the generality of records in order to ensure confidentiality." Luz A. Carrion, *Rethinking Expungement of Juvenile Records in Massachusetts: The Case of* Commonwealth v. Gavin G., 38 NEW ENG. L. REV. 331, 331 (2004) (quoting Police Comm'r Boston v. Mun. Ct. Dorchester Dist., 374 N.E.2d 272, 277 (Mass. 1978)).

301. "[E]xpungement removes and destroys records so that no trace of the information remains." *Id.* at 331.

302. Carrie Hollister, Comment, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 928 (1997).

303. *Id.*

304. *Id.* at 930.

305. *Id.* at 936–37.

306. Michael L. Altman, *Standards Relating to Juvenile Records and Information Services*, *in* JUVENILE JUSTICE STANDARDS ANNOTATED 196, 198 (Robert E. Shepherd, Jr. ed., 1996) (recommending that states adopt statutes that would prohibit educational institutions from "inquiring, directly or indirectly, and from seeking any information relating to whether a person has been arrested as a juvenile, charged with committing a delinquent act, adjudicated delinquent, or sentenced to a juvenile institution").

307. *E.g.*, N.H. REV. STAT. ANN. § 651:5(X)(c) (2007).

308. One student author referred to the ability to answer "no" to criminal history questions following sealing or expunction as a "legally sanctioned lie." Hollister, *supra* note 302, at 926.

309. For example, in New Jersey, the expungement statute provides that if a person is ever asked whether he or she has been arrested, convicted and/or charged with a crime, the person is to respond "no." N.J. STAT. ANN. § 2C:52-27 (West 2007). *See also* N.J. STAT. ANN. § 2C:52-15 (indicating that government agencies should respond that no record exists if asked about an individual's expunged record). The statute also provides that another person's disclosure of an individual's expunged record constitutes a criminal offense. N.J. STAT. ANN. § 2C:52-30. The Children's Law Center of Massachusetts, Inc. advises individuals as follows: "How do I respond

to respond that they do not have a criminal history if records have been sealed.[310] Despite these laws, some admissions applications declare that "[t]he entry of an expungement or sealing order does not relieve you of the duty to disclose the matter on this statement."[311] This conflict between state law and admissions requirements can and does confuse applicants,[312] particularly young adults who have been advised by their attorneys or parents that their record has been wiped clean and that they need not reveal the past offense.[313] This issue is complicated by the fact that, in this age of rapidly advancing technology, very little information is truly erased, meaning that information about an expunged or sealed juvenile record can easily surface.[314] In light of these competing considerations, schools should evaluate whether they will request information about expunged records.

For the reasons noted above, some commentators advise against seeking such information.[315] That generally is the best course, given the challenges of obtaining the information and the confusion schools can cause by requiring students to reveal information that the law deems never to have existed or not to be available. But if

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to employment or college applications that ask about my criminal record? A person with a juvenile record may answer 'no record' regarding any juvenile court cases or CHINS proceedings that are tried in juvenile court, regardless of whether or not the juvenile record is sealed." Children's L. Ctr. Mass., Inc., Sealing Juvenile Records, http://www.clcm.org/sealing_records.htm (last visited Feb. 27, 2008). Similarly, the Western Ohio Legal Services Association has drafted a brochure on expungements that provides that "[o]nce your record is expunged nothing will show up when your record is checked. After expungement is finished, when asked about your past criminal record, you can honestly say that you have none. You can act as if the arrest and conviction never took place." W. OHIO LEG. SERVS. ASS'N, EXPUNGEMENTS OR SEALING OF RECORDS, *available at* http://www.ohiolegalservices.org/OSLSA/PublicWeb/Library/Documents/1036702580.19/wolsaexpungbroch.pdf. *See generally* Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1059 (1997).

> The first element of expungement is the extent to which an offender may deny the existence of his record after it has been expunged. This element is based on the premise that an offender may not be fully reintegrated into society unless he is authorized to deny with legal honesty that he ever possessed a criminal record. To this end, most states authorize offenders whose records have been expunged to respond negatively when questioned whether they have been convicted of a crime. In Colorado, for example, an offender with an expunged record is authorized to deny his criminal record ever existed to employers, educational institutions, and state government agencies. The Colorado State Bar, however, is authorized to "make further inquiries" into an expunged record if they learn about the record from an unofficial source.

Id. (internal citations omitted).

310. *E.g.*, OHIO REV. CODE ANN. § 2151.357(G) (West 2007).

311. *E.g.*, Univ. of Toledo Coll. of Law, Univ. of Toledo Law College Admissions Form, https://utssl.utoledo.edu/lawforms/form.asp (last visited Feb. 27, 2008).

312. McGuire, *supra* note 230, at 717–18, 736.

313. *See, e.g.*, Dzienkowski, *supra* note 226, at 948.

314. *E.g.*, Stokes & Groves, *supra* note 258, at 858 (explaining, in the high-profile case of Gina Grant, that newspaper clippings from the state in which her juvenile offense of manslaughter occurred were mailed anonymously to Harvard, which had admitted her, and to the Boston Globe, which had run stories about her success in high school).

315. *E.g.*, Dzienkowski, *supra* note 226, at 946–48.

a school decides to seek those records, school officials should consult with counsel and take several steps in advance. First, the institution should develop a statement indicating why it needs to understand applicants' complete criminal history. Next, the institution should develop a statement explaining that it understands the impact of expunction and sealing laws, but still requires applicants to disclose information concerning juvenile records, even if expunged or sealed. The institution should be quite clear that, although it recognizes some state laws would permit applicants to truthfully answer "no" to questions regarding criminal history, they should not do so, even if counsel has advised otherwise. In addition, the institution should determine in advance how school officials will handle applicants' failure to provide requested information about expunged records, and should clearly explain any negative consequences[316] of failing to disclose the requested information.

A related challenge is whether a school or a background-screening company will be able to access expunged or sealed juvenile records. In Missouri, for example, a court, when granting a motion to expunge a juvenile record, may order those records to be destroyed.[317] In other states, access to even unsealed juvenile records is severely limited; thus, background checks may not reflect those offenses.[318]

A final challenge relates to terminology. Colleges and universities that seek information regarding juvenile offenses should avoid using the term "conviction." Most juvenile systems use alternative language such as "adjudication" or "diversion;" thus, using the term "conviction" may confuse the applicant, and may also result in an accurate "no" answer to the question as written.[319]

4. Lawsuits by Applicants

In the employment context, job applicants have sued employers for torts such as defamation, negligence, and invasion of privacy, and for discrimination.[320] Although no reported cases have involved suits by admissions applicants rejected based on the results of a background check, schools should follow the guidance provided in similar situations.

First, colleges and universities should share the results of background checks

316. Depending on the circumstances, negative consequences may range from an oral or written reprimand, to community service, interim suspension, revocation of admission, or expulsion.

317. MO. REV. STAT. § 211.321(5) (2007).

318. *E.g.*, N.Y. CRIM. PROC. LAW § 720.35(2) (McKinney 2007). Some states, however, permit access to persons or organizations that have a "legitimate interest." *E.g.*, ALASKA STAT. § 47.10.092–93 (2006); CONN. GEN. STAT. § 46b–124(c) (2007); NEV. REV. STAT. § 62H.030(1)–(2) (2007). Kansas permits disclosure of a juvenile's record to educational institutions, but does not specifically mention institutions of higher education. KAN. STAT. ANN. § 38-1608(a)(5) (2000).

319. Dzienkowski, *supra* note 226, at 946–48.

320. Lee, *supra* note 2, at 665. For a case in which a prospective employee sued for discrimination regarding a detailed background questionnaire, but lost, see *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (finding that questionnaire, which was required of all employees, did not violate Title VII or have a disparate impact on minorities, where municipality demonstrated a compelling need and kept material confidential).

only with individuals who have a legitimate need for that information.[321] In the admissions context, this may include admissions officers and certain staff members, and members of a faculty admissions committee. If a student with a criminal record is admitted, those with a legitimate interest may expand to include the director of financial aid (if a recent drug conviction is noted),[322] the chief of security, the chief student affairs officer, the chief residence life professional (if the student seeks to live in campus housing), and potentially state licensing boards.[323] Colleges and universities should educate individuals who will have access to background-check results about the sensitivity of these documents, and how to handle and store the documents in a way that will minimize inadvertent disclosure.[324] Colleges and universities also should advise staff members who receive the results not to share the information with others absent good and legitimate cause.

Second, colleges and universities should not ask for arrests that did not lead to conviction, other than arrests on pending charges, because using those records may lead to disparate impact claims based on race.[325] Also, colleges and universities should be aware that some state statutes prohibit *employers* from asking questions about most arrests that did not lead to conviction.[326] Further, colleges and universities should be sensitive to questions or checks that may discriminate based on a candidate's religion, ethnicity, or country of origin.[327]

Third, although invasion of privacy claims against employers who conduct background checks usually are not successful, to avoid invasion of privacy claims,[328] colleges and universities and their vendors should ask students to sign a release or consent form before conducting a background check.[329]

Finally, to help avoid a negligence action based on incorrect, incomplete, or

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321. *See* Lee, *supra* note 2, at 665.

322. *See* 20 U.S.C. § 1091(r)(2000) (rendering certain individuals with drug convictions ineligible for federal financial aid).

323. *See, e.g.*, AACP REPORT, *supra* note 11, at 19. If the results of background checks will be released to outside agencies, like licensing authorities, student should be notified about that in advance; a release under FERPA also would be prudent. *See id.* at 21.

324. *See generally* Edward G. Phillips, *Protecting Sensitive Employee Information*, 43-FEB. TENN. B.J. 18 (2007) (discussing employer liability to employees for identity theft of information in background checks and other consumer reports).

325. Lee, *supra* note 2, at 667 n.188; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959–62 (2003) (discussing racial differences in the effect of criminal records).

326. James M. Jordan, III, *Privacy and Security in the Workplace: Employees as the Problem and Employees as the Victim*, 903 PLI/PAT 277 (2007); Nancy B. Sasser, *"Don't Ask, Don't Tell": Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. RICH. L. REV. 1063, 1068–72 (2007). *See supra* note 285 (discussing other state laws that prohibit discrimination, typically in the employment context, based on an applicant's conviction record).

327. Jo Anne Chernev Adlerstein & Camille Fraser, *Background Checks of Foreign Workers*, 12 INT'L. HUM. RTS. J. 4 (2003).

328. *E.g.*, Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990); Baughman v. Wal-Mart Stores, Inc., 592 S.E.2d 824 (W. Va. 2003).

329. STEVEN FRENKIL & D. FRANK VINIK, EMPLOYEE BACKGROUND CHECKS: ADVANCED ISSUES (2006).

inappropriate checking, the college or university should carefully select the vendor or vendors who will be conducting the checks. Because courts likely would categorize these screeners as independent contractors,[330] a school may not be vicariously liable for the screener's faulty checks, but it may be liable under a direct theory for negligent selection.[331]

C. Third-Party Negligence Actions Against the Institution

Colleges and universities have been sued by individuals injured by students. This section will address three tort theories under which injured individuals may sue institutions of higher education for failing to conduct a pre-matriculation background check on admitted students: negligent admission, and duties to protect or warn if a student with a criminal history is admitted.

1. Negligent Admission

a. Two Iterations of the Tort

It is conceivable that injured individuals may sue an institution for negligent admission of a dangerous student. In the past, lawsuits alleging negligent admission typically have been filed by students who did not succeed in the school's academic program. In this variant of an educational malpractice claim, the student usually alleges that, during the admissions process, the school should have realized that he or she did not have the ability or credentials to complete the program successfully.[332] To date, this type of action has been unsuccessful.[333] As the United States Court of Appeals for the Seventh Circuit explained:

> We believe that Illinois would reject this claim for "negligent admission" for many of the same policy reasons that counsel against recognizing a claim for educational malpractice. First, this cause of action would present difficult, if not insuperable, problems to a court attempting to define a workable duty of care. [The student] suggests that the University has a duty to admit only students who are "reasonably qualified" and able to perform academically. *However, determining who is a "reasonably qualified student" necessarily requires subjective assessments of such things as the nature and quality*

330. *See generally* DAN B. DOBBS, THE LAW OF TORTS 917 (2000) (describing factors a court will determine when analyzing independent contractor status).

331. RESTATEMENT (SECOND) OF TORTS § 411 (1965). *See* DOBBS, *supra* note 330, at 917 ("The putative general rule is that employers are not subject to vicarious liability for the torts of *carefully selected* independent contractors." (internal citations omitted) (emphasis added)); J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 8.03 (2d ed. 2002) ("An employer may be liable for the negligent acts of an independent contractor if the employer fails to exercise due care in the selection of a competent independent contractor.").

332. *E.g.*, Ross v. Creighton Univ., 957 F.2d 410, 411–17 (7th Cir. 1992).

333. Indeed, more generally, educational malpractice claims have been rejected by courts. *E.g.*, Watts v. Fla. Int'l Univ., No. 02-60199-CIV, 2005 WL 3730879, at *12 (S.D. Fla. June 9, 2005), *aff'd in part, vacated in part* 495 F.3d 1289 (11th Cir. 2007); Doe v. Yale Univ., No. CV 900305365S, 1997 WL 766845, at *1 (Conn. Super. Ct. 1997).

> *of the defendant institution and the intelligence and educability of the plaintiff. Such decisions are not open to ready determination in the judicial process*. Second, such a cause of action might unduly interfere with a university's admissions decisions, to the detriment of students and society as a whole. As the district court noted, if universities and colleges faced tort liability for admitting an unprepared student, schools would be encouraged to admit only those students who were certain to succeed in the institution. The opportunities of marginal students to receive an education therefore would likely be lessened. Also, the academic practice of promoting diversity by admitting students from disadvantaged backgrounds might also be jeopardized.[334]

In another context, an individual—particularly a student[335]—injured by another student's criminal act may sue the institution for negligent admission, arguing that she would not have been injured had the school more thoroughly researched the perpetrator-student's background before offering admission. Indeed, some commentators have speculated that this type of action may be viable.[336] The Faulkner lawsuit against the University of North Carolina made just this type of claim.[337] Specifically, the suit alleged that UNC Wilmington was negligent "for admitting Dixon despite a well documented history of violence against women, including incidents at other UNC campuses."[338]

Mr. Faulkner was not the first to make this sort of claim. In *Eiseman v. New York*,[339] the parents and estate of a murdered student sued various government entities, including the State University of New York at Buffalo, for negligence. The perpetrator-student, Larry Campbell, was previously indicted for attempted murder, attempted assault, robbery, larceny, and criminal possession of weapons and drugs; after negotiations with the prosecutor, he plead guilty to criminal possession of dangerous drugs and received a six-year prison sentence.[340] While incarcerated, Campbell was treated for mental disorders, including "chronic schizophrenia, paranoid type, with a schizoid, impulsive/explosive personality."[341] He was determined to have "a high criminal potential, . . . a low rehabilitation potential, . . . [and] a potential for killing," and was diagnosed "as antisocial, temperamental, belligerent, unpredictable and disruptive, with a guarded prognosis."[342] However, "[i]n his day-to-day prison life, Campbell apparently was comparatively well behaved," and was released after about three and one-half years.[343] While still incarcerated, Campbell applied to SUNY Buffalo under a

334. *Ross*, 957 F.2d at 415 (internal citations omitted) (emphasis added).

335. NICOLETTI ET AL., *supra* note 21, at 33 (explaining that traditional age college and university students are the most likely victims of violent crime on campus).

336. *E.g.*, Stokes & Groves, *supra* note 258, at 862–76.

337. S*ee supra* note 91 and accompanying text for a discussion of Jessica Faulkner's murder.

338. Jaschik, *supra* note 8.

339. 511 N.E.2d 1128 (N.Y. 1987).

340. *Id.* at 1130.

341. *Id.*

342. *Id.* at 1130–31.

343. *Id.*

legislatively created program for disadvantaged undergraduates.[344] The statutory criteria did not permit the university to consider applicants' criminal or psychological histories.[345] But Campbell's application did list his residence as a state prison and he also noted a prior incarceration.[346]

Because Campbell was a "high risk" individual, the university required him to meet twice a week with a university official, imposed a curfew, and had campus security monitor him closely.[347] Although his first year started relatively well, about ten months after he enrolled, Campbell raped and murdered Rhona Eiseman, murdered another student, and seriously injured a third student.[348] Among other claims, the plaintiffs alleged that SUNY Buffalo was negligent "in admitting [Campbell] to the College without appropriate inquiry."[349]

Two lower courts found the university liable for negligence:

> The trial court, while acknowledging the limited scope of judicial review of college admissions decisions, concluded that liability should be predicated on the College's failure to reject or restrict Campbell because of the unreasonable risk of harm and foreseeable danger he presented: "the College's duty, simply put, was not to subject its students to an unreasonable risk of harm from the conduct of one such as Campbell whom it knew or should have known posed such a risk." The Appellate Division found a breach of statutory duty to develop criteria for eligibility, concluding that if rational criteria had been established Campbell would not have been admitted. The Appellate Division, moreover, posited the College's duty of heightened inquiry on the fact that this was "an experimental program for the admission of convicted felons."[350]

The New York Court of Appeals reversed.[351] The court determined that the university was not liable because it admitted Campbell under a special program created by the state legislature that made admission mandatory if the statutory criteria were met.[352] In addition, the court refused to find that the university, by participating in this special program, "undertook either a duty of heightened inquiry in admissions, or a duty to restrict his activity on campus, for the protection of other students."[353] The court supported its decision with policy considerations

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344. *Id.* at 1131.

345. *Id.* (The statutory criteria for admission into the program were "economic and educational—a high school diploma or its equivalent; the potential for completing a postsecondary program; and economic and educational disadvantage.").

346. *Id.*

347. *Id.* at 1132.

348. *Id.*

349. *Id.*

350. *Id.* at 1136 (internal citations omitted).

351. *Id.*

352. *Id.*

353. *Id.* The court continued:

> As noted earlier, the imposition of duty presents a question of law for the courts. While both lower courts soundly disavowed the imposition of liability on the basis of

that focused on the state legislature's desire to provide significant rehabilitation opportunities to former offenders.[354] Also, once admitted, the university had no duty to restrict Campbell's contacts with other students, as "[p]ublicly branding him on campus as a former convict and former drug addict would have run up against the same laws and policies that prevented discriminating against him."[355]

The court did caution, however, that the case was limited to the circumstances involving the legislative enactment:

> [I]t is apparent that there are profound social issues underlying this case. It therefore bears emphasis that the question before us for resolution is simply whether the College had a *legal duty* in the circumstances, that requires it to respond in damages for Campbell's rape and murder of a fellow student; we do not consider whether a college might or even should investigate and supervise its students differently.[356]

This second version of negligent admission seems similar to negligent hiring in the employment context. Of course, because students, unlike employees, do not have an agency relationship with the institution, that tort is an imperfect analogy. But a review of how courts have responded to negligent hiring claims is still instructive.

b. The Negligent Hiring Analogy

An individual injured by an employee may sue the employer for negligent hiring. Under this theory, the injured party may argue that the employer should have screened the perpetrator-employee more thoroughly.[357] In a nutshell, "[a]n employer hires negligently when he employs a person with *known propensities*, or

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> the doctrine of *in loco parentis*—concluding that colleges today in general have no legal duty to shield their students from the dangerous activity of other students—the question before us today, in essence, is whether such a duty should nonetheless be recognized when a college admits an ex-felon such as Campbell as part of a special program. As claimants recognize, we have not previously imposed such a duty, and we see no justification for doing so now.

Id. (internal citations omitted).

354. *Id.* at 1136–37.

355. *Id.* at 1137. The court noted the circumstances of the case:

> [T]he fact that Campbell had a criminal record was apparently known on campus, even to Eiseman and Schostick. In actual fact, Campbell was diligently monitored, as both lower courts found; until his brutal explosion, there was no complaint regarding his campus behavior. No greater restriction is even suggested that might have avoided this off-campus tragedy. As the college and university *amici* cogently contend, imposing liability on the College for failing to screen out or detect potential danger signals in Campbell would hold the college to a higher duty than society's experts in making such predictions—the correction and parole officers, who in the present case have been found to have acted without negligence.

Id.

356. *Id.*

357. James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 753 (2004).

propensities which could have been discovered with a reasonable investigation."[358] Thus, two important questions are (1) whether an employer has a duty to conduct a criminal background check on employees, and (2) whether an employer may be held liable for injuries caused by an employee hired with a known criminal record.

As in any negligence claim, a plaintiff in a negligent hiring case must plead and prove duty, breach, actual and proximate causation, and damage.[359] Also, as in other negligence contexts, foreseeability—both with regard to duty and causation—is a critical concept.[360] Regarding duty, an employer typically "owes a duty of care to those persons the employer reasonably foresees could be harmed by an unfit employee."[361]

To establish breach of this duty, the plaintiff must show that the employer failed to use reasonable care under the circumstances.[362] Here, the nature of the employer's business can impact the amount of care owed a plaintiff. For example, certain employers, such as common carriers and landlords, will owe special duties to passengers and tenants, respectively.[363] Also,

> [b]ecause an employer is only liable for negligent hiring when it knew or should have known of the employee's propensity to engage in harmful conduct, a central question is whether an employer had a duty to investigate an applicant's fitness for the job where required by law . . . or where the employer has some reason to question an applicant's

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358. *Id.* (citing Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 879 (1996)).

359. *Id. See* Louis P. DiLorenzo, *An Emerging Trend in State Employment Law—Employers' Responsibility to Conduct Employment Background Checks*, SJ079 ALI-ABA 359, 362 (2004) .

> A negligent hiring claim can be established by showing: 1) the existence of an employer-employee relationship, 2) the employee was incompetent or unfit for the job, 3) the employer knew or could have known with reasonable effort of the incompetence or danger, 4) the act or omission caused the injury, and 5) the employer's negligence in hiring . . . the employee directly caused the claimant's injury.

Id.

360. In *McCain v. Florida Power Corp*., 593 So. 2d 500, 502–03 (Fla. 1992), the court observed that courts sometimes mistakenly merge the duty-foreseeability analysis with the causation-foreseeability analysis.

> The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. . . . The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

Id. (internal citation omitted).

361. DiLorenzo, *supra* note 359, at 362.

362. Todd, *supra* note 357, at 754.

363. *Id.*

fitness.[364]

Next, the plaintiff must establish that the employer's breach of duty caused the injury. Here, foreseeability again plays a role; the fact-finder will determine whether the injury suffered was foreseeable based on the employee's prior bad conduct.[365] Two tests have emerged to evaluate foreseeability under the causation element. Some courts use the "prior similar incidents" test, which focuses primarily on whether the conduct in question was foreseeable in light of the perpetrator's past convictions.[366] Others use the "totality of the circumstances" test, under which the court considers not only the conviction, but other variables, including "elapsed time since conviction, mitigating factors, and number of convictions."[367] Under both tests, the determination of foreseeability will be intensively fact-based.

That being said, other than in a few high-risk industries, such as child care, K–12 education, health care, law enforcement, security services, and transportation, and in certain licensed professions like law,[368] courts and legislatures have been reluctant to impose on employers a general duty to conduct pre-hiring background checks.[369] As one scholar noted, "a reasonable investigation 'does not generally

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364. DiLorenzo, *supra* note 359, at 362. Since 2003, many states have enacted laws to require employers to conduct background checks on employees, or at least certain employees, in particular industries, such as child care, education, health care, law enforcement, security services, and transportation, and in certain licensed professions like law. *Id.* at 371–74.

365. *Id.* at 362.

366. Todd, *supra* note 357, at 754. In *Doe v. Boys Clubs of Greater Dallas, Inc*., 868 S.W.2d 942 (Tex. Ct. App. 1994), *aff'd*, 907 S.W.2d 472 (Tex. 1995), a volunteer at a boys club, whom the court treated as an employee for purposes of the negligent hiring analysis, sexually molested several boys he met through the club. *Id.* at 947. The victims sued the club for negligent hiring, asserting that if it had done a criminal background check, it would have found Mullens's two convictions for driving while intoxicated and would not have let him work around children. The court first determined that the club had a duty to conduct a criminal background check because of the heightened duty that applied to organizations caring for children. *Id.* at 952. Yet the court also determined that it was not foreseeable that Mullens would molest children simply because he had two convictions for driving while intoxicated. *Id.*

367. Todd, *supra* note 357, at 754.

368. DiLorenzo, *supra* note 359, at 371–74.

369. *E.g*., Rozzi v. Star Pers. Servs., Inc., No. CA2006-07-162, 2007 WL 1531427, at *3 (Ohio Ct. App. May 29, 2007). *But see* Munroe v. Universal Health Servs., Inc., 596 S.E.2d 604, 607 n.4 (Ga. 2004).

> We recognize that criminal background checks of employees are statutorily-mandated only in certain industries. . . . However, while there may be no statutory requirement that employers in other businesses conduct background or criminal checks on potential employees, we reject the position that employers who fail to conduct such searches can never be found liable for negligent hiring because of this failure. Whether or not an employer's investigative efforts were sufficient to fulfill its duty of ordinary care is dependent upon the unique facts of each case. . . . Thus, while investigation of an employee's past may not be necessary when filling the position of parking lot attendant . . . a jury may find that employers who fill positions in more sensitive businesses without performing an affirmative background or criminal search on job applicants have failed to exercise ordinary care in hiring suitable employees, even absent a statutory duty to conduct such background searches.

Id. (internal citation omitted).

require a criminal background check.'"[370] But employers cannot simply ignore "red flags" that exist on an employment application.

In *Brimage v. City of Boston*,[371] for example, a former employee sued the City of Boston for negligently hiring another employee who raped her. Upon denying the City's motion for summary judgment, the court found that the City failed to act reasonably before hiring the perpetrator.[372] The court noted that

> had the City conducted a criminal background check, it would have been revealed that [the perpetrator] had recently served time in prison for rape, *but even without a criminal background check*, [his] resume itself reflected a long, unexplained gap in his employment history representing the time he served in prison, which should have put the City on notice to make reasonable inquiry.[373]

Commentators have noted that some courts' treatment of negligent hiring cases has had two potentially negative consequences. First, employers who are not legally required to conduct a background check—and do not—may be in a better legal position than those who do.[374] Second, employers will be understandably reluctant to hire most applicants with criminal records, particularly if the past bad conduct involved violence.[375] On the first point, because background checks are now relatively easy to obtain, at a relatively low cost, we may see judicial attitudes shift in coming years.[376] Thus, the burden of obtaining a check may be less than the probability of serious injury occurring.[377] Also, at least some courts, like the Massachusetts court in *Brimage*, have found that employers have a duty to investigate "red flags" on employment applications, even absent a criminal background check.[378]

Regarding the second point, some legislatures have responded with statutes that provide employers a presumption against negligent hiring, if the statutory requirements are followed.[379] In Florida, for example,

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370. Sasser, *supra* note 326, at 1088.

371. No. CIV.A. 97-1912, 2001 WL 69488 (Mass. Super. Ct. Jan. 24, 2001).

372. *Id.* at *7.

373. *Id.* (emphasis added).

374. *E.g.*, Sasser, *supra* note 326, at 1088–90.

375. *E.g.*, Todd, *supra* note 357, at 754–60.

376. *See also supra* note 2 (sources describing the increase in the number of background checks conducted post-9/11).

377. See *infra* note 392 (Judge Learned Hand's B < PL test for determining breach).

378. *See also* Meghan Oswald, Comment, *Private Employers or Private Investigators? A Comment on Negligently Hiring Applicants with Criminal Records in Ohio*, 72 U. CIN. L. REV. 1771, 1790 (2004) (advising businesses to conduct criminal background checks if the employer notices any discrepancies or contradictions in information provided in the employment application, in-person interview, and reference checks).

379. *Id.* at 1790–92 (discussing statutes in Florida and Louisiana). See also Sasser, *supra* note 326, at 1090, stating:

> Virginia should soften its foreseeability requirement and implement uniform standards for judging potential employees' past convictions. Such guidelines will help employers make informed, individual assessments of potential employees without discouraging them from checking criminal records. Virginia's negligent hiring law would improve

> [i]n a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, such employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general.[380]

This background investigation must include a criminal background check by the Florida Department of Law Enforcement;[381] checking references and former employers "concerning the suitability of the prospective employee for employment;"[382] requiring the applicant

> to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;[383]

if relevant to the job, checking the applicant's driver's license record;[384] and "[i]nterviewing the prospective employee."[385]

Another point regarding negligent hiring involves the inherent tension between an employer's duty to conduct a reasonable investigation and state laws that either forbid employers to ask certain questions about past criminal activity and/or with sealing and expunction laws. Because reasonableness and foreseeability are central to the negligence analysis, courts have ruled for the employer when an employee with a criminal record is hired but governmental regulation has prevented the employer from obtaining information about the employee's past conduct.[386] Interestingly, this point is illustrated by the previously discussed

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> with decisions that help minimize discrimination against ex-convicts, by telling employers when a potential employee's criminal record matters and by setting forth factors for employers to use in individualized assessments of job applicants. These improvements would benefit public safety by helping to reduce recidivism through rehabilitation and by keeping potentially dangerous persons out of jobs in which they may pose a serious risk to the public.

380. FLA. STAT. § 768.096 (2005).

381. *Id.* § 768.096(1)(a). "The election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee." *Id.* § 768.096(3).

382. *Id.* § 768.096(1)(b).

383. *Id.* § 768.096(1)(c).

384. *Id.* § 768.096(1)(d).

385. *Id.* § 768.096(1)(e).

386. An interesting question, however, is what would happen if the information should not have been available as a matter of law, but actually could have been located had a diligent search been conducted. For an example of what opposing counsel may do in this type of situation, see *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 754 (Fla. Dist. Ct. App. 1991).

Eiseman v. New York,[387] which implicated a university's admission decision.[388]

c. The "New" Negligent Admission Theory in Higher Education

It is difficult to determine how courts may approach future negligent admissions claims based on an institution's failure to conduct a background check. Very likely, courts may reach different conclusions.

Relying on concepts such as academic freedom, some courts may hesitate to second-guess college and university admissions decisions.[389] Others may reject the claims on a policy argument, as in *Eiseman*,[390] that colleges and universities do not have a duty to reject candidates who have been freed by the judicial system and/or given certain rights by the state legislature.

Still other courts may view colleges and universities more like businesses that have a duty to protect invitees, such as students and employees, from dangers of which the institution knew or should have known.[391] And if a court finds that a duty exists, given the ease and relatively-low cost with which background checks can now be run, a rough B < PL[392] analysis may establish breach. Of course,

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387. 511 N.E.2d 1128 (N.Y. 1987).

388. *See supra* notes 339–356 and accompanying text. *See also* Oswald, *supra* note 378, at 1794 ("Notably, though, the outright prohibition against criminal record discrimination could benefit employers as well. If an employer is forbidden by law from discriminating based upon these factors, the employer can use these requirements in its defense against a negligent hiring claim.").

389. *See supra* note 244 and accompanying text (discussion of academic freedom in the college and university admissions context). This is particularly true if the criteria or processes at issue relate to the academic program, which an admissions program arguably does. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985), where the Court stated:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

See also Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 91 (1978) (holding that a medical school's decision to dismiss a student for failure to possess the "clinical ability to perform adequately as a medical doctor . . . is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision."); *id.* at 96 n.6 (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.").

390. *Eiseman*, 511 N.E.2d 1128.

391. *E.g.*, Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 90 (Fla. 2000) ("There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.").

392. The B < PL test was developed by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947). "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL." *Id.* Under the formula, a defendant will have breached his duty of care—have acted unreasonably—when "the burden of avoiding the harm is less than the probability of that harm occurring, multiplied by the seriousness of the harm if it does occur." JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 60 (3d ed. 2007).

application of a negligent admission theory does not depend on a background-check requirement. As in *Brimage*,[393] courts may determine that colleges and universities should be aware of "red flags"—contradictions, inconsistencies, and odd gaps—in an applicant's file and should conduct a more thorough investigation into the applicants' history. This is the approach adopted by the UNC System.[394] In addition, a university general counsel has argued that

> the sex offender registration system effectively put the university on notice of such history, . . . [and] when there is such notice, there is then a duty to inquire into the circumstances and risk presented or there is the possibility of negligence if someone on campus is injured by the registered sex offender.[395]

Finally, Congress or state legislatures may determine that the best approach is to develop a set of standards, similar to those found in the Florida negligent hiring statute,[396] that would provide a presumption that a college or university was not negligent if the prescribed steps were followed.

Apart from the question of duty, the issues of breach and causation are also important to the negligent admission analysis. Even if an applicant has a criminal record, admitting that student may not breach the general duty of care to act reasonably under the circumstances. Given the educational missions of colleges and universities, it may not be unreasonable to admit applicants whose past records are remote, whose record reflects a single offense as opposed to a pattern of crime, or whose past offenses were not violent. Also, even if a student with a known past record is admitted and injures another person, the injury must relate to the alleged negligence. Thus, a plaintiff who is raped likely will not be able to establish causation if the prior offense was shoplifting; a jury likely would not find that it was foreseeable that a former shoplifter would commit a violent offense.

If courts do adopt a negligent admission theory, the first place colleges and universities may see the doctrine applied is in residence halls. In the employment context, a perpetrator's proximity to potential victims can be a factor. For example, in *Or v. Edwards*,[397] a landlord gave apartment keys to a custodial worker, who murdered a tenant's child. The murdered child's estate sued the landlord for negligent selection and entrustment. The landlord had not required the perpetrator to complete an employment application and had not conducted a background check.[398] The perpetrator had, however, told the landlord he was on probation and had been under hospital observation.[399] The landlord did not know

393. Brimage v. City of Boston, No. CIV.A. 97-1912, 2001 WL 69488, at *7 (Mass. Super. Ct. Jan 24, 2001).

394. *See supra* note 115 and accompanying text. *See also* Potrafke, *supra* note 133, at 447–48 (discussing potential negligent recruitment claims in the context of university athletics).

395. RICK D. JOHNSON, STRATEGIES: DEALING WITH THE CAMPUS SEXUAL OFFENDER 7 (2002).

396. FLA. STAT. § 768.096 (2005).

397. 818 N.E.2d 163 (Mass. Ct. App. 2004).

398. *Id.* at 168.

399. *Id.*

that he had been arrested for kidnapping and raping a child.[400] In affirming a jury verdict against the landlord, the court explained that the landlord need not have worried about the perpetrator's fitness so long as he was used "for handyman jobs that involved little if any contact with other people."[401] However, the landlord's sensitivity to the worker's background should have increased significantly when he gave the worker keys, and thus access to tenants' apartments.[402]

Students in residence halls live in close proximity to each other and are in a home-like setting in which their normal defenses may be lowered.[403] In addition, and particularly for freshman and transfer students, the college or university often makes housing assignments and students have little say or control over who their roommates, suitemates, or hallmates will be. These facts—coupled with some courts' determination that the landlord-tenant relationship is a special relationship that would give rise to the landlord's duty to protect the tenant from the intentional torts of third parties[404]—may lead a court to adopt a negligent admission argument more readily in the residence hall situation than under other scenarios.

2. Duties to Warn or Protect

If the college or university knowingly admits a student with a criminal record, the next questions that arise are whether the institution has a duty to warn other students about the admittee's past criminal history or to protect them from potential future criminal acts by that person.

Absent a special relationship or the power to control a third-person, there is no general duty to warn others about danger,[405] or to protect them from it.[406] Control

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400. *Id.*

401. *Id.* at 169.

402. *Id.* Along the same lines, we often see background checks required by state law or company policy when adults work in close proximity to vulnerable populations. *See* Marcie A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1165–69 (2004). *See also* NICOLETTI ET AL., *supra* note 21, at 32–33 (describing recent state legislation on background checks for workers in certain fields).

403. *See*, NICOLETTI ET AL., *supra* note 21, at 32–33 (discussing living arrangements and trust in college dorms).

404. *E.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983); Griffin v. West RS, Inc., 18 P.3d 558, 565 (Wash. 2001) ("A special relationship exists between a landlord and a tenant. It is difficult to distinguish between this duty and the duty owed by an innkeeper to a guest, a university to a resident student, or a business to an invitee."). *See also* RESTATEMENT (THIRD) OF TORTS § 40 (Proposed Final Draft No. 1, Apr. 6, 2005) (adding employer-employee, school-K–12 student, and landlord-tenant as additional "special relationships"). *But see* Rhaney v. Univ. of Md. E. Shore, 880 A.2d 357, 364–66 (Md. 2005) (refusing to characterize the school-dorm student relationship as a special relationship).

405. Stokes & Groves, *supra* note 258, at 872. *See generally* DIAMOND ET AL., *supra* note 392, at 120.

406. RESTATEMENT (SECOND) OF TORTS § 315 (1965); DIAMOND ET AL., *supra* note 392, at 120. It is possible that an injured individual might invoke RESTATEMENT (SECOND) OF TORTS § 321, which provides that "[i]f the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." Although some plaintiffs have attempted to use this section when injured by the criminal acts of third persons, at least some

sufficient to trigger a duty generally is limited to situations such as employer-employee, jailer-inmate, and hospital-admitted in-patient.[407] Courts repeatedly have held that the school-student relationship is not inherently "special" as a matter of law.[408] But as my colleague Professor Peter F. Lake has observed,

> with no hint of irony, courts continue to hold that adult college students are not in a special relationship with [an institution of higher education ("IHE")], except when they are. The courts appear to be saying that there is no *general* special relationship, but students do have specific duty-creating relationships with IHE's, some of which are legally "special." Thus, IHE's do not have "custody" over their adult students, but do have other legal relationships, some of which are technically and legally "special," giving rise to a duty of reasonable care.[409]

Recognizing, therefore, that the law in this area is not clear-cut, administrators should note that courts in some circumstances have found that colleges and universities, especially in dormitory situations, owe students a duty of reasonable protection from the acts of third persons, whether students or not. While courts emphasize that colleges and universities are not insurers of students' safety, and that students must take reasonable steps to protect themselves, colleges and universities also have a role in protecting students from danger.

A landmark case concerning an institution's duty to protect students from dangerous persons is *Mullins v. Pine Manor College*.[410] In *Mullins*, an unidentified assailant raped a female student in her dorm room. Abrogating traditional common law, the Massachusetts Supreme Judicial Court held that the college had a duty to exercise reasonable care to protect students from criminal acts of third parties.[411] The court based this conclusion on a variety of grounds, including that criminal behavior on campus was foreseeable and that the college controlled key aspects of campus safety, such as installing a security system, hiring security guards, setting a patrol policy, and installing locks.[412]

In *Nero v. Kansas State University*,[413] the rule in *Mullins* was extended to require a university to reasonably protect students against the dangerous acts of other students. In *Nero*, a male student was accused of raping a female student in a

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courts have expressed reservations about the sweep of Section 321 and have limited it to situations in which the defendant created a dangerous mechanical condition or "personally sets in motion a physical process that poses a risk to the plaintiff." Denis v. Perry, No. CV-05-330, 2006 WL 521785, at *2–3 & n.3 (Me. Super. Ct. Feb. 9, 2006).

407. RESTATEMENT (SECOND) OF TORTS § 315; DIAMOND ET AL., *supra* note 392, at 114–15.

408. *E.g.*, Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999); Knoll v. Bd. of Regents of Univ. Neb., 601 N.W.2d 757, 761–64 (Neb. 1999).

409. Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post* In Loco Parentis *College*, 37 IDAHO L. REV. 531, 535 (2001) (internal citations omitted).

410. 449 N.E.2d 331 (Mass. 1983).

411. *Id.* at 337.

412. *Id.* at 335.

413. 861 P.2d 768 (Kan. 1993).

co-ed residence hall on campus in which they both lived.[414] Following the rape accusation and pending resolution of the criminal case, the male student was reassigned to live in an all-male dorm on the other side of campus; the student also was directed not to enter any co-ed or all-female dormitories.[415] The student registered for spring intersession and was assigned to a co-ed residence hall, which was the only dormitory open.[416] A few weeks later, he sexually assaulted Shana Nero, a female resident of that dorm. Nero sued the university in negligence for failing to protect her from the sexual assault or warn her about the male student and his past conduct.[417] The court held that while "a university is not an insurer of the safety of its students," it "has a duty [to use] reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control."[418] Because the university was aware of the prior rape charge, moved the perpetrator to an all-male dorm, and prohibited him from entering co-ed and all-female dorms, the court determined that the attack on Nero could have been foreseeable, and that the issue of foreseeability in this context was a jury question.[419]

Although a college or university may have a duty to use reasonable care to protect a student from foreseeable harm, the student must also take reasonable steps to protect himself. For example, in *Rhaney v. University of Maryland Eastern Shore*,[420] the court held that the university was not liable in negligence for student-on-student violence. There, Clark punched his roommate Rhaney, breaking Rhaney's jaw.[421] On another occasion, the university had suspended Clark for fighting at an on-campus party; Clark also had been in one other altercation with a student.[422] Rhaney sued the university for, among other things, negligently failing to warn him about Clark's dangerous tendencies, and negligently assigning Clark to be his roommate.[423] The court, for various reasons, found the university did not owe a duty to Rhaney. Among other things, the court indicated that, despite Clark's past conduct, the attack on Rhaney under the circumstances was not foreseeable. Specifically, the court found that Rhaney was aware of Clark's past violence on campus, lived with him for two months without incident, and did not request a new roommate.[424] In addition, the court accepted the university's view that Clark was nothing "more than a one-time, youthful offender of the student disciplinary system."[425]

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414. *Id.* at 771.
415. *Id.*
416. *Id.* at 772.
417. *Id.*
418. *Id.* at 780.
419. *Id.*
420. 880 A.2d 357 (Md. 2005).
421. *Id.* at 359.
422. *Id.*
423. *Id.* at 359–60.
424. *Id.* at 367–68.
425. *Id.* at 366.

In light of courts' seemingly inconsistent positions and analysis, colleges and universities that admit students with known criminal records that involve violence should assume that a court is likely to find that the institution owes a duty either to warn or protect other students from known dangerous propensities of the admitted student. But assuming that a duty exists does not mean that liability also is assumed, because the injured student must still prove breach and causation.[426] Still, colleges and universities that admit students with violent records should consider whether—in light of the nature of the crime committed, and other circumstances, including how much time has passed since the student's release[427]—the institution should impose conditions on the student's attendance.

For an otherwise qualified student with either a pattern of violent conduct or a recent or serious record of violence, the college or university may limit his attendance to distance-education courses. If the violence was directed at the opposite sex, the college or university may consider banning the student from on-campus housing, or may assign the student to live in a single room in a single-sex, upper-class residence hall. Depending on the circumstances, other possibilities including having the student check in regularly either with student life professionals or campus security. And, if students with records of violence are admitted, the college or university may also consider explaining to students generally, and without identifying specific students, that educational institutions, like society as a whole, include a diverse population, some members of which have committed past crimes. The past offender also may be counseled by a person with expertise about how and when to disclose the past history to others with whom the past offender interacts regularly. The college or university should also permit roommates and others in close and regular proximity to the past offender to move, without penalty, if they become uncomfortable with the situation.

IV. POLICY CONSIDERATIONS

A debate rages regarding whether colleges and universities should conduct pre-matriculation background checks on admissions applicants. Given the current lack of law directly on point, the decision whether to conduct checks is largely a policy choice for the college or university. Those who oppose or are wary of background checks typically raise four concerns: cost, and the related issue of allocating scarce resources; whether implementing background checks will either scare applicants with minor criminal records from applying or deprive those with a criminal record of an opportunity to earn a post-secondary education, thus increasing their chances of recidivism; whether college and university officials have the appropriate expertise to evaluate criminal records; and whether background checks actually enhance campus safety.

One response to the first three concerns is that many colleges and universities are already conducting background checks, whether on employees, graduate and undergraduate students admitted into certain academic programs, or on students

426. *See* DiLorenzo, *supra* note 359, at 362.

427. *See supra* note 366 and accompanying text (discussing the "prior similar incidents" and "totality of the circumstances" tests).

before they can engage in clinical or other site work.[428] Thus, colleges and universities already have experience handling these issues and do not appear to be encountering significant legal issues related to the screening process.[429] Indeed, in the area of background checks as a whole, there appear to be as many lawsuits by individuals injured by someone negligently screened and hired as there are by applicants rejected because of a background check.[430]

A. Cost and Resource Allocation

At virtually all institutions of higher education, managing costs and properly allocating scarce resources are primary concerns. With regard to pre-matriculation background checks, critics argue that the money that may be used for background checks could be better used in other important areas, such as mental-health counseling.[431] They are also concerned about whether on-campus human resources exist to review the results of background checks.[432] A third argument is that any additional costs in the admissions process may hinder some students' access to higher education.

Estimates for the costs of a background check range from about eight[433] to eighty dollars.[434] For schools that already conduct checks on students, the average range seems to be between thirty and fifty-five dollars.[435] It is likely, though, that prices for background checks will drop as technology improves.[436] It is also worth

428. *See generally* LETA FINCH, BACKGROUND CHECKS: STAFF, FACULTY, STUDENTS, AND VOLUNTEERS 1 (2006), *available at* http://www.ajg.com/portal/server.pt/gateway/PTARGS_0_21938_547304_0_0_18/Background%20Checks.pdf. ("Almost every college and university has a background-check policy in place or they are considering one."). *See also infra* note 472 and accompanying text (discussing Finch's research).

429. *See* Lee, *supra* note 2, at 665 ("there have been few legal challenges to the use of background checks").

430. *See generally* FRENKIL & VINIK, *supra* note 329 (describing litigation concerning background checks, or the lack thereof).

431. *E.g.*, BRETT A. SOKOLOW, AN OP-ED ON THE MEDIA RESPONSE TO THE VIRGINIA TECH TRAGEDY, http://www.ncherm.org/pdfs/vtech-article.pdf. ("We should not rush to perform criminal background checks (CBCs) on all incoming students. . . . We need to spend this time, money and effort on the real problem: mental health.").

432. *E.g.*, Lucien "Skip" Capone III, *The Truth About Violent Crime on Campus*, 17 EDUC. L. (N.C. Bar Ass'n Cary, N.C.) Dec. 2004, at 1, 4, *available at* http://education.ncbar.org/Newsletters/Newsletters/ Downloads_GetFile.aspx?id=4881 ("Even if checks are obtained on just those [students] who have been admitted, current enrollment in the UNC system exceeds 189,000 students. The task of evaluating all of those checks would be enormous.").

433. *Id.*

434. SOKOLOW, *supra* note 431, at 2.

435. *E.g.*, A.T. Still Univ., Criminal Background Check, https://www.atsu.edu/registrar/background_check.htm (last visited Feb. 27, 2008) ($48.50); Loyola U. Chi., Sch. Educ., Criminal Background Check for Certification, http://www.luc.edu/education/IL_Cert-Background.shtml (last visited Feb. 27, 2008) ($30.00); N. Ky. Univ. Sch. of Nursing, Admissions Procedures & Requirements, http://www.nku.edu/~nhp/Nursing/html/2ndBSN/admission.htm (last visited Feb. 27, 2008) ($45.00).

436. Joanna L. Krotz, You Can't Skimp on Employee Background Checks, http://www.microsoft.com/smallbusiness/resources/management/recruiting-staffing/you-cant-skimp-on-employee-background-checks.aspx (last visited Feb. 27, 2008).

noting that most schools require students to bear the cost of the check, either by paying an additional fee to the school or by paying the vendor directly.[437]

Interestingly, it costs about the same, if not more, for applicants to take the SAT, ACT, LSAT, MCAT, and other entrance examinations than to pay for a background check.[438] Although we should be sensitive to increasing the cost of admission, there is not a call to eliminate entrance exams based on cost. Also, while researching this article, I located no reports indicating that programs that already require student background checks have lost applicants because of the check or the cost of the check.

If overall cost allocation is an institution's primary concern, it must evaluate where funds may be spent most effectively, in terms of its mission and overall campus safety. Background checks should be only part of a comprehensive environmental risk-management plan,[439] and other programs may take priority. When evaluating whether a school was negligent in not conducting checks, breach of the duty of care will be determined by evaluating what was reasonable under the circumstances.[440] If a school has only limited resources—and cannot shift the cost of background checks to students—a jury may not find a breach. However, if background checks become best practice within higher education, if the school has had problems with crime perpetrated by students with discoverable criminal histories, or if the cost of the checks is less than the probability of death or serious injury, then a jury may find a breach.[441] Finally, schools should consider the cost of implementing background checks against the cost of a negative verdict in one lawsuit. In the related area of negligent hiring, the average verdict against employers is approximately $2 million.[442]

If human resources to evaluate the results of the checks is the institution's main

437. Scott Jaschik, *Checking Up on Your Past*, INSIDE HIGHER EDUC., Nov. 12, 2007, http://www.insidehighereducation.com/news/2007/11/12/background (indicating that the majority of schools require the student to pay the fee).

438. Registration for the basic SAT is $43. College Board, SAT, 2007–08 Fees, http://www.collegeboard.com/student/testing/sat/calenfees/fees.html (last visited Feb. 27, 2008). As part of this basic fee each applicant can send scores to four schools; each additional score report costs $9.50 for regular delivery service. *Id.* The basic ACT costs $30; the ACT that includes the writing test costs $44.50. The ACT, 2007–2008 ACT Fees, http://www.actstudent.org/regist/actfees.html (last visited Feb. 27, 2008). As with the SAT, each test-taker can send a report to four schools for no extra charge; it then costs $8.50 for each additional school, based on regular, as opposed to rush, delivery. *Id.* For those who wish to attend law school, the LSAT costs $118; in addition, most schools require applicants to register for the Law School Data Assembly Service, which costs an additional $109. Brigham Young Univ., How Much Does It Cost to Apply to Law School?, http://ccc.byu.edu/prelaw/PDF_Files/How%20much%20does%20it%20cost%20to%20apply%20to%20law%20school.pdf (last visited Feb. 27, 2008). For prospective medical students, the MCAT currently costs $210. ASS'N OF AM. MED. SCHS., MCAT ESSENTIALS 6 (2008), *available at* http://www.aamc.org/students/mcat/mcatessentials.pdf.

439. *See supra* notes 14–17 and accompanying text (discussing risk management and environmental management).

440. *See supra* note 284 and accompanying text.

441. *See supra* Part III.C.1.b (discussing breach in the context of negligent hiring).

442. ACXIOM, BACKGROUND SCREENING FOR EMPLOYMENT 9 (2007), http://www.acxiom.com/AppFiles/Download18/AISS_White_Paper-116200723101.pdf.

concern, it should remember that a background-check policy likely would be phased-in. Therefore, checks would be conducted only on admitted students—about one-fourth of the total student body. Also, vendors could flag reports with positive results. Because only about five percent are likely to have a positive return,[443] most schools will have a relatively small number to review.

If cost to the student is the primary concern, schools and professional organizations should follow the AAMC's lead[444] and develop methods so that students have to pay for only one criminal background check that may be sent to all institutions to which a student applies or is admitted. This could work similarly to the SAT and ACT in that students could pay a set rate for a specific number of reports, and then could order additional reports, if needed, for an additional cost. Another alternative is for groups of schools to work together to identify a list of vendors whose reports are acceptable; a student could then contract directly with one of the acceptable vendors, pay a single fee for the check, and then have the company send the report to designated schools. Schools also do not need to require checks on all applicants; instead, they could require reports only on conditionally-admitted applicants, or applicants who have actually paid a deposit.[445]

B. Impact on Applicants with Criminal Histories

Some critics of background checks worry about the potential negative impact on otherwise qualified applicants with criminal pasts. Some argue that applicants who have committed only a minor offense may be scared away from applying to schools that require background checks, or, in light of the extreme competition for seats at some schools, passed over because of an aberrational indiscretion.[446] Others argue that schools should not substitute their judgment for that of the judicial system or legislature that has released the offender or expunged her records.[447] Still others are concerned that depriving past offenders of an education may inhibit rehabilitation or lead to increased recidivism, since education is a proven way to reduce repeat offenses.[448]

First, institutions that conduct background checks must comply with all applicable federal and state laws. At this point, no state laws prohibit colleges and

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443. *See supra* note 11 (noting that most background checks do not yield positive results).

444. *See supra* text accompanying notes 170–181 (discussing the AAMC developing a database that can be used by applicants at any member medical school).

445. Schools should be sensitive to the fact that students will be worried about having a conditional admission revoked, particularly at a late date in the overall admissions process. Schools may also offer those placed on a wait list the opportunity to submit to the background-check process.

446. *See supra* note 7 and accompanying text. *See also supra* notes 375–385 and accompanying text (discussing similar concerns in the employment context).

447. *See supra* note 8 and accompanying text.

448. DANIEL KARPOWITZ & MAX KENNER, EDUCATION AS CRIME PREVENTION 4–5, *available at* http://www.bard.edu/bpi/pdfs/crime_report.pdf; Tamar Lewin, *Inmate Education Is Found to Lower Risk of New Arrest,* N.Y. TIMES, Nov. 16, 2001, at A22. *See also* Redden, *supra* note 2 (quoting D.C. Council member Harry Thomas Jr., who explains that "education is one thing that can change the course of an individual's life.").

universities from conducting criminal background checks on students, but some do limit the types of information sought.[449]

Second, institutions must consider the safety and welfare of all persons on campus.[450] The balance is "between trying to keep people off our campuses who may be a threat and also maintain the openness of a college or university campus."[451] Thus, it may be true that certain applicants should not be admitted,[452] should not be admitted to start immediately, or should be admitted only for distance-education programs.[453]

Third, to avoid scaring minor offenders away, schools should explain clearly in their admissions materials that most criminal convictions are not an automatic bar to admission and also explain how, and when, criminal records are considered in the admissions process.[454]

For those concerned that colleges and universities that conduct background checks will reject all applicants with a criminal record, the evidence proves otherwise. Many institutions of higher education have knowingly admitted students with past criminal records,[455] including murder,[456] and there is no reason to think that background checks would change that. Instead, as one college

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449. *See supra* note 318 and accompanying text.

450. For example, the City University of New York Graduate Center states that:

> The college reserves the right to deny admission to any student if in its judgment, the presence of that student on campus poses an undue risk to the safety or security of the college or the college community. That judgment will be based on an individualized determination taking into account any information the college has about a student's criminal record and the particular circumstances of the college, including the presence of a child care center, a public school or public school students on the campus.

The Graduate Center, CUNY—Admissions Requirements, http://www.gc.cuny.edu/admin_offices/admissions/admission_req.htm (last visited Feb. 27, 2008).

451. Marklein, *supra* note 71 (quoting Kemal Atkins, Director for Student Academic Affairs, UNC System).

452. *See* Monaghan, *supra* note 279.

453. Langara College in Vancouver, British Columbia recently barred Paul Callow from attending on-campus courses. "In the 1980s, Callow, better known as the 'Balcony Rapist,' brutally attacked and raped women at knife-point in the Toronto area. Eventually, Callow was arrested, convicted as a serial rapist, and given a 20-year prison sentence, which he served in full after repeatedly being denied parole." The college indicated that it might consider allowing Callow to participate in online courses. *Rehabilitated Rapist Requests Education*, UBYSSEY (Vancouver, B.C.), Nov. 27, 2007, at 10.

454. *See, e.g.*, George Mason Univ. Sch. of Law, Admissions, Frequently Asked Questions, http://www.law.gmu.edu/admissions/faq (last visited Feb. 27, 2008). *See infra* Appendix D for the full-text of the FAQ.

455. *See* Crabbe, *supra* note 63.

456. *The State vs. James Hamm: Should a Convicted Murderer Be Allowed to Practice Law?*, CBS NEWS, Oct. 13, 2004 http://www.cbsnews.com/stories/2004/10/13/60II/main649084.shtml (ASU's law school admitted a convicted murderer: "The admissions committee knew about his background because he had revealed his background in his application in some detail. . . . [a]nd his letters of recommendation had spoken in some detail about his background. . . . [The admissions committee] finally said, 'We think he's well-qualified for admission to this law school.'"); Randy L. Harrington, *Proof That Rhetoric About Prisoner Rehabilitation Is a Lie*, AM. CHRON. (Beverly Hills, Cal.), May 31, 2006, http://www.americanchronicle.com/articles/10481.

registrar has observed, colleges and universities will tend to deny violent and repeat offenders, not simply anyone with a record.[457]

C. Evaluating Criminal Records

A third concern, which relates to the second, is that college and university administrators do not have the expertise to evaluate criminal records. More specifically, critics contend that it is impossible even for trained experts to predict violence, [458] so any judgments by college and university officials would be merely speculative and may deprive deserving individuals of an opportunity to advance their education.[459]

While predicting future dangerousness is difficult, if not impossible, courts and juries do not require the decisions of admissions officials and committees to be correct; instead, they need to be reasonable under the circumstances.[460] It also is important to remember that college and university human resources departments routinely are called upon to make similar decisions, and their exercise of discretion frequently is supported by the courts—whether sued by the denied applicant or individual injured by a hired employee—when they followed procedures and acted reasonably.[461] Moreover, many admissions officials are already making these decisions due to the increasing number of admissions applications that require

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457. Crabbe, *supra* note 63 (quoting Santa Fe Community College registrar Lynn Sullivan).

458. *E.g.*, Joanne Silberner, *Nearly Impossible to Predict Violence*, NPR, Apr. 20, 2007, http://www.npr.og/templates/story/story.php?storyId=9706123.

459. *See* Stokes & Groves, *supra* note 258, at 867–68 (discussing the cases of two students with criminal pasts).

> The point of these divergent views is clear: if a noted law professor, a police officer, a forensic psychologist, and a basketball coach cannot agree on the degree of risk posed by an individual about whose case they have varying degrees of available facts and personal familiarity, how reasonable is it to expect an admissions officer or committee to make that same evaluation based upon a written application or brief interview? . . . To do so, we must trust an admissions committee to make an *ad hoc* evaluation of a given applicant's psychological makeup. Indeed, given that the American Psychiatric Association has acknowledged "that two out of three predictions of long-term future violence made by *psychiatrists* are wrong," it may be dubious for a committee to try.

Id. (internal citation omitted).

460. *See* Lake, *supra* note 78. Prof. Lake stated:

> As people continue to analyze what transpired at Virginia Tech, colleges around the country should be asking themselves what is foreseeable, and what reasonable efforts to provide a safe environment look like. It may be helpful to distinguish situations where a general risk exists—for instance, a risk of a riot or a general risk of violence—from those where a specific person presents risks.
>
> Although the national dialogue about the events at Virginia Tech tends to conflate those two issues, they are distinct. Courts may ask colleges to assess foreseeability in both types of situations separately. It could be foreseeable that a shooting may take place, but not foreseeable that a particular shooter will shoot—or vice versa, or neither. What is foreseeable in turn dictates what is reasonable. It might be foolish to put an entire college on lockdown because one highly dangerous person lives on an otherwise crime-free campus; perhaps the university should instead focus on that one student.

Id.

461. *See generally* FRENKIL & VINIK, *supra* note 329; Lee, *supra* note 2.

candidates to disclose criminal histories and the general knowledge that admissions officials otherwise acquire. The addition of background checks, therefore, will change the scope of the issue—not the nature of it.

It is important, though, that college and university officials reviewing and evaluating criminal records, whether obtained via background check, applicant self-disclosure, or otherwise, receive training about factors to consider and questions to ask.[462] In addition, they should have access to experts, whether on- or off-campus counselors, psychiatrists, or attorneys, to answer questions.

Although "[t]here are no bright line rules for evaluating negative information obtained,"[463] below are some considerations admission officials may use:

- How serious was the misconduct?[464]
- Are any state or federal laws implicated?
- Are any institutional policies implicated?
- How long ago did the misconduct occur?
- How old was the applicant at the time of the offense(s)?[465]
- How many offenses have occurred? Is there a pattern of misconduct?
- Did the past conduct involve violence?
- Will the misconduct prevent the applicant from completing his or her selected academic program?
- How great of a threat would the individual pose?
- What evidence exists of rehabilitation?
- Did the applicant voluntarily and accurately disclose the information (if sought on an application)?[466]
- Are there ways to lower any risks to an acceptable level?[467]

Similarly, various studies have correlated the potential for recidivism with various factors, such as time since the last offense and the individual's age.[468]

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462. *See* Jaschik, *supra* note 437.

> Lots of schools are eager to collect the info but then not adept at using it . . . . Who will evaluate the information and make decisions about individuals' suitability for employment or enrollment? What is the impact of a conviction more than 10 years old? How do you judge the relative severity of different types of crimes and plea agreements? I picked up a glossary the other day of terms commonly used in criminal background checks. Do evaluators know the difference between community service and community supervision? *Nolle prosequi* and *nolo contendere*?

Id.

463. FRENKIL & VINIK, *supra* note 329, at 30–31.

464. Often, the crime with which the individual is charged is reduced through plea-bargain, which can make the seriousness of the offense more difficult to evaluate. *See* D. Frank Vinik, *Why Background Checks Matter in Academe*, CHRON. HIGHER EDUC. (Wash., D.C.), May 27, 2005, at B13 (discussing these matters in the context of sex offenders).

465. AACP REPORT, *supra* note 11, at 15.

466. *Id.*

467. List developed substantially from FRENKIL & VINIK, *supra* note 329, at 30–31. *See* Farnsworth & Springer, *supra* note 185, at 151 (discussing how schools of social work made decisions when criminal background checks yielded positive results).

468. *See generally* NICOLETTI ET AL., *supra* note 21, at 66–69; Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POLICY & L. 409

Colleges and universities could arrange for training regarding these factors as well.

D. Enhancing Campus Safety

The final, and ultimate, policy question is whether background checks actually will enhance campus safety. In this category, critics argue that background checks will not improve campus safety and, even worse, will foster a false sense of security.[469] They also reason that background checks on prospective students are not likely to yield results any more meaningful than applicant self-disclosure.[470]

Although background checks alone will not solve the issue of campus violence,[471] at least some insurance companies believe that background-check policies can positively influence campus safety. Leta Fitch, Executive Director of the Higher Education Practice Group at Arthur J. Gallagher Risk Management Services, Inc., has noted:

> Some underwriters are refusing to quote rates if there is not a background check policy in place for staff and faculty. An underlying reason may be the fact that a growing number of workplace violence lawsuits has resulted in an employer's liability from alleged negligent hiring, retention, and promotion. OSHA's general duty clause states that employers must provide their employees with a safe work environment, which can imply an environment free from workplace violence. Background checks can be considered part of a good-faith effort in providing a safe work environment. There are indeed compelling reasons to have a background check policy, and given today's litigious environment, it may be difficult to argue against.[472]

Critics also argue that background checks may provide a false sense of security because most people do not realize that databases used by background screeners are incomplete.[473] This is a valid criticism. To address this concern, colleges and universities should select a vendor that can conduct the most complete check possible and should be aware of improvements in technology that will permit better checks in the future. Also, those responsible for admissions decisions and for campus security, which is a larger group than just campus law enforcement, should understand the limitations of the search and should, among other things,

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(2001); Craig S. Schwalbe, *Risk Assessment for Juvenile Justice: A Meta-Analysis*, 31 L. & HUM. BEHAV. 449 (2007); FLA. DEP'T CORR., RECIDIVISM REPORTS (2003), http://www.dc.state.fl.us/pub/recidivism/2003/analysis.html.

469. Smyth, *supra* note 2.

470. *See* SOKOLOW, *supra* note 431.

471. *See supra* notes 14–17 and accompanying text (discussing risk management and environmental management).

472. FINCH, *supra* note 428, at 1–2. Ms. Finch's statements reflect that insurance companies might be the group that forces change in this area.

473. Bob Sullivan, *Criminal Background Checks Incomplete*, MSNBC, Apr. 12, 2005, http://www.msnbc.msn.com/id/7467732 ("[E]xperts say the nationwide tallies are often full of holes, and contain as few as 70 percent of all felony conviction records, leading in turn to a false sense of security.").

plan how they will handle future discoveries of prior undisclosed incidents.[474] In addition, the AACP has recommended that the criminal background-check policy or student handbook include a disclaimer that a criminal background-check process does not guarantee campus safety.[475]

Some institutions have declined to conduct criminal background checks because "most college-age applicants do not yet have a criminal record, and any offenses they committed as a juvenile would most likely be sealed."[476] As explained earlier, it is possible for offenders to expunge or seal records and then, as a matter of law, truthfully deny a criminal record.[477] However, not all juvenile offenders are eligible or attempt to have their records expunged or sealed.[478] Moreover, a significant percentage of today's college and university students are non-traditional. As reported in *The Chronicle of Higher Education*'s 2005 *Almanac*, of the 17,473,000 students—graduate and undergraduate—enrolled in the nation's colleges and universities, 18.1% were age 22–24, 13.1% were 25–29, 7.5% were 30–34, 5.4% were 35–39, 4.1% were 40–44, 2.9% were 45–49, 2.1% were 50–54, and 1.8% were 55 and older.[479] Thus, in 2005, 8,299,675, or 47.5%, of the nation's students were older than 21. Thus, for many campuses, background checks do have the potential to return results beyond juvenile records.

Self-disclosure, in both academic and other settings, has proven a flawed approach to discovering criminal histories. For example, a recent Florida background check of all healthcare workers discovered that 44% of individuals guilty of felonies did not reveal the infraction.[480] Similarly, searches at VolunteerSelect have uncovered 11,000 undisclosed criminal felony records since it was launched in 2002.[481] In the college and university context, a study at the University of Iowa's law school found a significant percentage of students did not self-report criminal offenses,[482] the University of Georgia found undisclosed sex-

474. *See infra* note 490 and accompanying text (noting the need for policies to deal with discoveries of undisclosed criminal histories). For example, may students be placed on an interim suspension while the matter is investigated? Ford et al., *supra* note 222, at 14. May admission be revoked? May the student forfeit tuition and fees paid to date? May the student be denied the ability to seek readmission? *Id.* at 15.

475. AACP REPORT, *supra* note 11, at 13.

476. United Educators, *supra* note 11, at 3.

477. *See supra* notes 300–304 and accompanying text.

478. *See, e.g.*, COLO. REV. STAT. § 19-1-306 (2005) ("Any person who has been adjudicated for an offense involving unlawful sexual behavior" is not eligible to petition for an expungement of a juvenile record.). *See generally* Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 20–39 (1992) (discussing various expungement statutes and expungement eligibility requirements in different states).

479. *College Enrollment by Age of Students*, CHRON. HIGHER EDUC. ALMANAC (2005), *available at* http://chronicle.com/weekly/almanac/2007/nation/0101502.htm.

480. Howell, *supra* note 161.

481. Sullivan, *supra* note 473.

482. McGuire, *supra* note 230, at 710–11 (reporting that, during a three-year period, 7.6–10% of students in each entering class "admitted making misrepresentations about their criminal histories and past misconduct on their applications").

offenders on its campus,[483] and in North Carolina, two students with undisclosed criminal records murdered other UNC students.[484]

It is important to remember that most institutions of higher education are not simply classroom facilities where students spend small portions of their day. Instead, they are more akin to cities in which students and others eat, sleep, recreate, shop, attend classes, and study.[485] One important goal of all educational institutions should be to create reasonably-safe living and learning environments. And today's students expect just that. As one law student has explained, "Inherent in the 'bundle of services' today's students expect from colleges is a safe educational and social environment."[486]

In an environment in which hundreds, thousands, and sometimes tens of thousands of students are living together in a compressed area, and where significant percentages have proven tendencies to engage in high-risk behaviors,[487] comprehensive, environmental risk-management plans are essential to maintain a healthy, safe environment. Background checks can be one part of that plan and will help colleges and universities identify individuals with dangerous propensities or who may need additional guidance and attention. Background checks also will help set a tone for a safer campus. An old idiom says that you "reap what you sow." By requiring criminal background checks of all admitted students, colleges and universities will send a message about the type of students they want and the types of behaviors they expect on campus.

V. IMPLEMENTING BACKGROUND CHECKS

If a college or university desires to conduct background checks, it should take several steps before starting the process. First, it should develop a background-check policy. Next, in most situations, it should select a reputable screening company to conduct the checks. And third, it should determine how to evaluate the policy in terms of process, outcomes, and impact.

A. Policy Development

1. Overview

If an institution of higher education decides to conduct background checks on

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483. *See supra* note 62 and accompanying text.

484. *See supra* notes 91–114 and accompanying text.

485. Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 431 (2007) ("Indeed, modern college campuses have been called 'Athenian city-states.' . . . Where else in America can you get hotel, health club, career advice and 1,800 courses for $90 a day?" (internal citation omitted)). *See also* NICOLETTI ET AL., *supra* note 21, at 31 (discussing the twenty-four hours a day, seven days a week operation of campuses).

486. Peters, *supra* note 485, at 431. Students surveyed for different reports typically do not oppose background checks. *E.g.*, Ayres, *supra* note 84 (St. Augustine's College); McGuire, *supra* note 230, at 734 (University of Iowa College of Law). As an institution begins a background-check process, it should emphasize that the checks are not to punish students, but to help provide for their safety.

487. *See, e.g.*, *supra* note 13 (statistics regarding high-risk alcohol use).

prospective students, it should start by developing a comprehensive written policy. Institutions that already have employee[488] or student post-matriculation[489] background-check policies in place may begin by reviewing those documents. Also, as the United Educators insurance company advises,

> [i]n developing a policy, schools should take three important steps. First, ensure that the policy complies with applicable state and federal laws. . . . Second, communicate the policy to all current and prospective employees and . . . explain why the policy is necessary. Third, make the policy general enough to provide leeway when unforeseeable circumstances arise. For example, one of the most difficult issues is evaluating negative information discovered through background checks. This analysis needs to be performed on a case-by-case basis. Thus, the policy need not delineate every possible factor but can instead provide examples of factors that will be considered in evaluating negative information discovered through background checks.[490]

In addition, colleges and universities should consider following a proven model of policy development. Under one accepted model,[491] an institution would identify and articulate the risks to be addressed or the problems to be solved;[492] articulate the desired outcomes;[493] analyze the issues by reviewing the existing scholarly literature, including scientific literature, and by reviewing local conditions and problems;[494] create a collaborative team to *strategically* study, make recommendations, evaluate the issues, and determine a course of action;[495] implement the policy, which includes training and dissemination;[496] and develop

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488. *E.g.*, Ariz. St. Univ., Reference Check and Background Verification, http://www.asu.edu/aad/manuals/acd/acd126.html (last visited Feb. 27, 2008); Fairleigh Dickinson Univ., Background Checks, http://hr.fdu.edu/policies/backgroundcheck.html (last visited Feb. 27, 2008); George Mason Univ., Criminal Background Investigations, http://www.gmu.edu/facstaff/policy/newpolicy/2221adm.html (last visited Feb. 27, 2008); Tenn. Theological Univ., Background Check Policy, http://www.tntech.edu/adminpandp/perspay/pp34.htm (last visited Feb. 27, 2008).

489. *E.g.*, Creighton Univ. Sch. of Med., Background Check Policy, http://www2.creighton.edu/medschool/medicine/oma/cbc/index.php (last visited Feb. 27, 2008); FLA. ST. UNIV. COLL. OF NURSING, CRIMINAL BACKGROUND CHECK (2005), *available at* http://nursing.fsu.edu/pdf/policy/S-2%20Criminal%20Background%20Check.pdf.

490. UNITED EDUCATORS, BACKGROUND CHECKS AT INDEPENDENT SCHOOLS 6 (2006), *available at* http://www.ue.org/membersonly/getDocument.asp?i =817&date=20060725.

491. *See* Linda Langford, Address at 27th Annual National Conference on Law & Higher Education, Clearwater Beach, Fla., Student Privacy: A Scientific Approach to Policy and Program Development (Feb. 22, 2006) (on file with author).

492. *Id.* at 21.

493. *Id.*

494. *Id.* at 15.

495. See Dickerson & Lake, *A Blueprint supra* note 14, and Lake & Dickerson, *Alcohol & Campus*, *supra* note 14, for additional information on collaborative teams in the risk-management context.

496. Langford, *supra* note 491, at 28.

evaluation techniques to measure policy effectiveness.[497]

2. Specific Questions

As part of the design and drafting process, the institution's collaborative, interdisciplinary team[498] should answer the following questions:

- Which state laws, if any, control what information can be sought in a background check or how a background check must be conducted?[499]
- At what point in the admissions process will background checks be conducted?[500]
- Which applicants will be subject to the check?[501]
- What will the scope of the search be in terms of time[502] and geography?[503]
- Will the search include arrests, other than pending arrests, that did not lead to conviction?[504]

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497. *Id.*

498. *See supra* note 14 (providing information about appointing teams).

499. *See supra* notes 289–295 and accompanying text (regarding the federal Fair Credit Reporting Act).

500. A college or university could require all applicants to submit a check at the same time as other applications materials, require only conditionally-admitted students, and potentially students placed on the wait list, to submit to a background check, or might require checks only of students who accept the conditional offer and pay a seat deposit. The AACP recommends that institutions should "only conduct criminal background checks on accepted applicants so that the results of the criminal background check are not a factor in the initial admission decision." AACP REPORT, *supra* note 11, at 12. Some schools, however, may determine that an applicant's criminal record should be considered along with all other factors. Also, if a student is admitted before the background check is conducted, the acceptance should be made conditional on successful completion of the check.

501. All applicants? *See supra* Part II.A. Only applicants whose files include red flags (which the school should attempt to identify in its policy, while leaving some room for unexpected situations)? *See supra* Part II.A.4; *see also infra* Appendix A (regarding the University of North Carolina system and "red flags"). Only students who apply for particular academic programs? *See supra* Part II.B–D.

502. "Most background checks look back 7–10 years." FRENKIL & VINIK, *supra* note 329, at 32. *See also* 15 U.S.C. § 1681c (2000 & Supp. 2004).

503. *See* AACP REPORT, *supra* note 11, at 5–9 (discussing various types of background checks, such as county, state, national, and international).

504. Asking for arrests that did not lead to conviction might have a disparate impact based on race. As a Minnesota government study explained,

> [p]roblems with using arrest data for background searches . . . include: Gaps in the disposition, especially when there is a court dismissal or acquittal that does not properly update the executive branch criminal history file; The arrest charge not reflecting the actual or final charge, because people are often charged with more serious crime to provide the prosecution with flexibility in pursuing the case; and racial and socio-economic implications in using arrest data. In most states, the typical practice is to provide only arrests under a year old that do not have a disposition. . . . . In contrast, some people argue that someone is not necessarily innocent if not

- Will it include juvenile records?
- Based on the scope, what information will the applicant need to submit to enhance the chances of an accurate check (e.g., full name,[505] maiden name, aliases, social security number, current and past addresses, driver's license number, date of birth, place of birth, fingerprints,[506] etc.)?[507]
- Will the admissions application also ask questions about criminal history?[508]
- Will the college or university use a background-screening vendor?[509]

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convicted on a charge. Plea bargains, participation in diversion programs, uncooperative witnesses, and due process issues may result in no conviction. They also note that patterns of arrests, even with no resulting charges and/or convictions, may be useful for background check purposes.

MGMT. ANALYSIS & DEV., MINN. DEP'T ADMIN., CRIMNET PROGRAM, BACKGROUND CHECKS AND EXPUNGEMENTS—RESEARCH REPORT 19 (2006).

505. *Id.* at 17–18.

> Name-based searches are the most widely used because they are quicker, easier and cheaper than biometric ones. Commercial vendors claim that using two or more identifiers (name, date of birth, SSN) make name-based searches very accurate. . . .
>
> The problems with name-based searches include that many people have the same or similar names, and the widespread use of aliases by people engaged in criminal activity. The growing problem of identity theft can also cause misidentification. These situations can produce both "false positives" and "false negatives" . . . . The FBI opposes name-based checks for non-criminal justice purposes due to inaccurate identification.

Id.

506. *Id.* at 16.

> Fingerprint-based checks are very accurate and ensure that the appropriate record actually belongs to the fingerprinted person. Fingerprint-based checks substantially reduce instances of "false positives," in which a person who has no record is mistaken for an individual with one. . . .
>
> Another concern is "false negatives," in which a person's criminal record is not found using name-based search. Fingerprint-based searches reduce the possibility for false negatives, to the extent that criminal records have associated fingerprints.

Id.

507. The information required may depend on the vendor, and the type and scope of search.

508. For ideas about how to phrase these questions, see McGuire, *supra* note 230, at 735–39. Wording is particularly important if the school seeks information about expunged or sealed records. *Id. See also* AACP REPORT, *supra* note 11, at 10 (suggesting categories of information the school might ask the applicant to disclose).

509. It is possible for another party to conduct the background check. *See* Steve Milam, *Student Criminal Background Checks*, NACUA NOTES, Mar. 10, 2006, *available at* http://www.nacua.org/nacualert/docs/StudentCrimBckgndChks.asp. The FBI also conducts criminal background checks, but they can take as long as eight weeks to complete. AACP REPORT, *supra* note 11, at 7. *But see* MGMT. ANALYSIS & DEV., *supra* note 504, at 14 ("[T]he FBI data is viewed as incomplete because state repositories do not forward all case information, especially dispositions, or information on all types of crime.").

- Who will pay for the background check?[510]
- Will the results of the check be submitted directly to the college or university, to the student, or both?[511]
- Will any applicants (e.g., those who qualify for other waiver of the admissions fee, top scholarship candidates, etc.) be given fee waivers for the background check?
- If the student must order a background check directly from the vendor, by when must the results be submitted to the school for the applicant to be admitted unconditionally?[512]
- On a related point, will a student ever be permitted to enroll and start classes before the background-check process, including any appeal, is complete?
- What if an applicant refuses to participate in the criminal background-check process?[513]
- Who will review the results of the check? An admissions officer? The admissions committee? A subcommittee of the admissions committee? A separate committee? How will the school insure some level of consistency in the review process?
- Will the college or university supplement the vendor's results?[514]

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510. Most schools require students to pay for the background check. Even when students pay, the school has a variety of options: Should the applicant pay the vendor directly? Should the applicant pay the school? Should the school add the amount of the check to tuition or another fee?

511. At a minimum, the school should receive a copy directly from the vendor to ensure the results are not altered.

512. Background checks do not take a uniform time to complete. "Many people will pass the background check quickly, while others' backgrounds will require more research." MGMT. ANALYSIS & DEV., *supra* note 504, at 27.

513. *See* AACP REPORT, *supra* note 11, at 14.

514. An emerging issue concerns the use of blogs, online social networks, and other internet searches to learn more about applicants. Stephanie Gottschlich, *Online Profiles a Factor in College Admissions*, DAYTON DAILY NEWS, Nov. 25, 2007, at A4; Press Release, Univ. of Mass., Colleges and Universities Using MySpace, Facebook, Blogs and Other Online Tools to Learn More About Applicants, (Sept. 20, 2007), *available at* http://www.umassd.edu/communications/articles/showarticles.cfm?a_key=1536; Alex Kingsbury, *Oh, No, the Dean of Admissions Googled My Website*!, U.S. NEWS.com, Nov. 28, 2005; Nicole Verardi, MySpace in College Admission, *available at* http://www.nacacnet.org/MemberPortal/News/StepsNewsletter/myspace_students.htm; Deborah Zhang, *Inappropriate Blog Use May Affect Admissions*, PALY VOICE (Palo Alto, Cal.), Sept. 25, 2006, *available at* http://voice.paly.net/view_story.php?id=4509. *Cf.* Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19 (2007); Alan Finder, *When a Risque Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, §1, at 1.

> A recent study by the University of Massachusetts Dartmouth found that 25 percent of college admissions offices admit to using search engines such as Google, Yahoo, and MSN to research potential students and that 20 percent look for the same information on social networking sites such as Facebook and MySpace. The reality is that the percentages must be even higher because colleges and universities have little

- Who will be responsible for interfacing with the vendor (if any) and conducting quality-control checks on the search results?
- Will any types of crimes result in automatic disqualification?[515]
- How will applicants be notified of a positive result, and how long will they have to respond?
- What process will be used to determine whether an applicant with a criminal history will be admitted, and if so, subject to any special conditions?
- Should an appeals process be used? And if so, how should it work?[516]
- If a student with a criminal history is admitted, what notice will the student be given about matters such as the possibilities of not being able to complete a particular program of study, not being able to obtain a particular state license or certification, or needing to comply with particular rehabilitation statutes to be eligible for certain positions or licenses?[517]
- How will the college or university proceed if the applicant denies the history but cannot conclusively negate the information?
- If a conditionally admitted candidate is rejected based on the background check, will the college or university provide a reason?
- How recent must the check be?[518] For example, what if a student

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> incentive to overstate their reliance on these digital dirt web searches but they have a significant incentive to understate their use due to fear of negative public relations and likely backlash from many Gen Y candidates who view information that they post to MySpace and some of the other social networking sites as somehow being private even though it is accessible through a quick Google search.

Steven Rothberg, *College Admissions Officers Using Facebook, MySpace, and Other Social Networking Sites to Block Students*, COLL. RECRUITER (Minneapolis, Minn.), Nov. 2, 2007, http://www.collegerecruiter.com/weblog/archives/2007/11/college_admissi.php. If a college or university opts to permit these sorts of searches, it should prominently disclose this practice to applicants on the application and on the admissions webpage. Officers should also understand that information on these sources might have been created by someone other than the page owner or might not reflect actual events (e.g., altered or staged photographs).

515. *See supra* note 490 and accompanying text. *But see* AACP REPORT, *supra* note 11, at 15 (suggesting that schools might "compile a list of offenses that may automatically disqualify an individual from enrolling in the pharmacy degree program due to institutional, state, experiential site, or state board of pharmacy policies"). If the college or university does determine that certain crimes will disqualify a candidate, those crimes should be known to an applicant at the start of a process. MGMT. ANALYSIS & DEV., *supra* note 504, at 25.

516. *See* AACP REPORT, *supra* note 11, at 18–19. *See also supra* note 273 and accompanying text.

517. *E.g.*, Kathryn L. Allen & Jerome Braun, Admission to the Bar—Character and Fitness Consideration, http://www.gabaradmissions.org/pages/braun.html (last visited Feb. 27, 2008).

518. Nancy M. Ally et al., *Nurses' Promise to Safeguard the Public: Is It Time for Nationally Mandated Background Checks?* 7 JONA'S HEALTHCARE L., ETHICS, & REG. 119, 123 (2005).

defers a semester after submitting to a check?

- If a student withdraws, takes a leave of absence, is suspended or expelled, or leaves the college or university for some other reason after matriculating, will another background check be a condition of readmission?
- Will there be other reasons or situations—such as participating in a clinic or externship—when students may be required to undergo additional background checks?
- Will outside groups that require a background check before a student participates in a clinic or externship accept the pre-matriculation background check?
- Who will serve as records custodian for the results?
- Who will have access to the results of the check?[519]
- How (hard copy and/or electronic) and where[520] will the results be stored?
- What steps will be necessary to ensure that the results remain confidential? On a related point, how will personally-identifiable information, such as social security numbers, be handled?
- How will the college or university respond to a data or security breach, either at the school or at the vendor?
- How long should the college or university maintain the record for applicants who are not admitted?[521]

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519. *See* AACP REPORT, *supra* note 11, at 19–21 (discussing access by experiential sites, financial aid offices, campus security, substance-abuse counselors, residence life, state policy, and state licensing boards). See also Milam, *supra* note 509, stating that

> [g]iven the sensitive nature of criminal background check information, it is imperative to place limits on who has access to the information. . . . Only a limited number of individuals should be allowed to have access to criminal background check information, and it should be strictly on a need-to-know basis. Generally, such records should not be available to individuals whose tasks involve evaluating the student's performance because of the potential prejudicial nature of the information. Moreover, under the Family Educational Rights and Privacy Act (FERPA), such records may not be shared with students, faculty, or others generally, but can be disclosed to and used by "school officials" for legitimate educational or security purposes.

(internal citations omitted).

520. Milam, *supra* note 509 ("Counsel should advise administrators to store the information in a location separate from a student's academic record, such that those with access to the student's academic record are not permitted automatic access to his or her possible criminal record.").

521. *Cf.* Frances M. Maloney & Ronald M. Green, *Workplace Violence and Security*, VPC0411 ALI-ABA 31 (2002) ("Further, employers should document all the information received when screening applicants, including keeping notes from telephone reference checks. Should an employer subsequently need to defend against a claim for negligent hiring, detailed documentation may serve to show that an employer took the proper steps to screen an applicant.").

- How will the college or university dispose of documents and ensure confidentiality?[522]
- To whom should questions about the policy be directed?
- How will information about the policy be distributed to internal constituencies and potential applicants?
- Who will be trained about the policy, how, and with what frequency?
- How and when will the policy be evaluated?

3. Other Considerations

In addition, the team or other school officials will also need to:

- Amend the application for admission to include information about criminal history and the background-check process.
- Draft a disclosure and authorization or consent form for the applicant to sign.[523]
- Draft language for both hard-copy and online admissions materials that explains the reasons the school has decided to conduct background checks and that explains the background-check process, including information about how positive results may be used in the process. [524]
- Draft template letters that can be used as part of the process (e.g., to alert an applicant about a check that yields positive results about a criminal history).[525]
- Evaluate whether other policies are impacted and should be modified (e.g., honor code, disclosure of post-matriculation arrests or convictions,[526] FERPA policy regarding directory information, employee manual regarding access to confidential information).
- Seek guidance from the appropriate administrator, office, or expert

522. ACXIOM, *supra* note 442, at 11.

523. *E.g.*, Univ. of Med. & Dentistry of N.J., Authorization for Criminal Background Check, http://som.umdnj.edu/education/academic_program/undergrad/documents/Authorization.pdf (last visited Feb. 27, 2008).

524. For examples of background-check FAQs in the student post-matriculation context, see A.T. Still Univ., Criminal Background Checks, https://www.atsu.edu/registrar/background_check.htm (last visited Feb. 27, 2008). For examples of background-check FAQs in the employment context, see Univ. of Louisville, Criminal Background Check Frequently Asked Questions, https://louisville.edu/hr/employment/manager/CBCFAQ.html (last visited Feb. 27, 2008); Univ. of Cal., Berkeley, Working with Controlled Substances at UC Berkeley Background Checks—Questions & Answers (2007), http://www.ehs.berkeley.edu/healthsafety/csbkgrdckqa.pdf.

525. *See* INTELLICORP, PRELIMINARY NOTICE OF ADVERSE ACTION (SAMPLE) *available at* http://www.intellicorp.net/documents/preliminary_notice.pdf.

526. *E.g.*, UNIV. VA., CRIMINAL ANALYSIS REPORT & EVALUATION FOR STUDENTS (2005), *available at* www.virginia.edu/processsimplification/doc/caresfinalreport.doc.

> about whether the college or university should obtain additional insurance in connection with the background-check policy, particularly if using a screening company that disclaims responsibility for how the results are used.

B. Vendor Selection

Given that conducting a background check is a complex process, most experts and insurance companies recommend using a reputable vendor.[527] "Commercial vendors acquire publicly available information about individuals and sell it to [entities] that want to conduct background checks."[528]

When selecting a vendor, start by preparing a request for proposal (RFP) that specifically describes the types of services the school needs and other expectations, such as compliance with pertinent laws, prices,[529] average time to complete checks,[530] insurance,[531] licensing,[532] secure transmission of information,[533] and handling of applicants' confidential information.[534]

To develop the RFP, seek input from a variety of sources and perspectives on campus. For example, the team may include admissions professionals, general counsel, the provost, financial aid professionals, current student leaders, the chief technology officer, the chief security officer, a financial officer, and a student affairs representative. If the same company will be used to conduct background checks on employees, include a human resources representative. Also, librarians are often outstanding, but overlooked, sources of information and research knowledge. In addition, a school's insurance company may provide helpful expertise and advice.[535]

As part of the RFP, ask that companies provide a representative client list, sample reports, and a summary of claims lodged against the company within at least the past five years; this summary should include information about litigation,

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527. *E.g.*, FINCH, *supra* note 428, at 4; United Educators, *supra* note 11.

528. MGMT. ANALYSIS & DEV., *supra* note 504, at 15.

529. *See* Merry Mayer, *Background Checks in Focus*, HR MAGAZINE, Jan. 2002, *available at* http://www.shrm.org/hrmagazine/articles/0102/0102agn-employment.asp.

> Price also can be a misleading indicator. Average background checks can cost from $35 to $50 for a regular employee and from $150 to $200 for a more senior employee, depending on how many counties need to be checked. Yet some screening firms may quote prices 20 percent to 30 percent lower, says Schneider, adding that in many cases, these firms are relying on databases alone as their research tool.

Id. In the RFP, indicate whether payment will come directly from the school or from the applicants, or whether you would like information on both approaches.

530. *Id.*

531. *Id.*

532. W. BARRY NIXON, COMPREHENSIVE GUIDE FOR SELECTING A BACKGROUND SCREENING FIRM 8, *available at* http://www.workplaceviolence911.com/docs/Oct21 SampleSuppliers.pdf.

533. *Id.* at 10.

534. *Id.*

535. *E.g.*, FINCH, *supra* note 428; Vinik, *supra* note 464.

claims settled short of litigation, and data breaches.[536] "Ask where their information will come from, and how they make sure it's current. Court records, for instance, change daily."[537] If they will not tell you or say that the information is proprietary, that is a danger sign.[538] Colleges and universities should also ask the vendor to "certify that all staff, regular, part-time and temporary, have been criminally screened at time of hire and ongoing checks are made to ensure employees continue to have acceptable work backgrounds."[539]

Other important considerations include the privacy safeguards a company has in place and how the company handles sensitive information.[540] At least one screening company has appointed a Chief Privacy Officer.[541] A related issue is whether the company and its employees will sign appropriate confidentiality and non-disclosure agreements regarding the data collected.[542] In addition, make sure

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536. NIXON, *supra* note 532, at 10. Also, when entering into a contract, make this sort of disclosure an ongoing requirement. *Id.*

537. Krotz, *supra* note 436. *See also* United Educators, *supra* note 11, at 5.

> Schools that use background checking companies need to be aware that the industry is unregulated and that many companies charge low prices but offer outdated or inaccurate information. UE recommends that schools use one of the major national companies such as Kroll, Choice Point, or ADP. These companies have the resources to check criminal records at the county level in every state.

Id.

538. Krotz, *supra* note 436.

> How the screening firm acquires its criminal history information is important too. There are three main methods for getting this data, and many firms use a combination of the three: using their own in-house researchers, contracting local court retrieval service companies to go to the courts for them and doing database searches.
>
> "It's important for the HR industry to ferret out those who use databases," says Schneider. If a screening firm is relying on third-party databases to conduct criminal history record checks, employers should ask if the court sanctions the database and how often the material is updated, he says.
>
> Some of the firms that rely on databases merely buy a copy of a court database and then access that one copy for up to six months without updating . . . .
>
> Using a local court retrieval service can slow the process and introduce inaccuracies because the information is going through more hands, says Mather. But with more than 3,000 counties in the United States, only the largest background screening firms can rely exclusively on their own personnel for checking criminal histories.

Mayer, *supra* note 529.

539. NIXON, *supra* note 532, at 9. The National Association of Professional Background Screeners—a nonprofit membership organization—has promulgated a Code of Conduct for employees of member companies. NAT'L ASS'N PROFL. BACKGROUND SCREENERS, CODE OF CONDUCT, *available at* http://www.napbs.com/images/pdf/Code%20of%20Conduct.pdf.

540. DIANN DANIEL, BACKGROUND CHECK BASICS (2006), *available at* http://www.csoonline.com/read/110106/brf_pass_it_on.html ("The agency should also offer privacy safeguards—such as encryption and masking—for a candidate's personal information the agency delivers to you."). *See* Bob Sullivan, *Online Job Listing an ID Theft Scam*, MSNBC, Nov. 4, 2002, http://www.msnbc. msn.com/id/3078533.

541. ACXIOM, *supra* note 442, at 11.

542. NIXON, *supra* note 532, at 9.

> Require the vendor to disclose all sub-contractors that will be used that are involved

you understand the vendor's security system, and seek input from experts on your campus, such as the chief technology officer, about whether the security controls are sufficient.[543]

As part of the due-diligence process, a college or university representative may also want to visit the company's physical location. Ask how many employees the vendor has.[544] Inquire how the vendor's employees are trained and ask for a copy of the training policy.[545]

It is also important to understand whether the company is financially viable:

> Does the vendor have demonstrated financial stability over the last three years? Have your Controller or CPA review [the debt] ratio and outstanding debt to analyze whether they are within acceptable industry standards and do not indicate potential problems in the near term; [and the existence] of sufficient cash, credit and liquid assets to fund continued investments in technology to maintain a competitive position.[546]

Some vendors resell data collected from clients. Thus, ensure that "a written policy exists that states that applicant or client personal data information is never resold."[547] Then make certain this language is incorporated into the final contract.[548]

Before making a final decision, ask the company to conduct a few sample tests. For example, provide the company with names of individuals you know have criminal records and see if the company locates them.[549]

Finally, engage counsel to either draft or review a contract with the vendor that protects the interests of the institution and its admissions applicants. In addition to more traditional contract terms, the contract should memorialize key performance expectations outlined in the RFP, and continuing obligations, such as disclosures

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> with the processing of personal identifiable information or will have access to this information and ensure that these vendors and their employees be held to same standards you have established for your employees. Require that new vendors that may be hired during the duration of the contract be held to these standards and require the vendor to either provide periodic reports verifying this procedure is being followed or to allow their processes to be audited.

Id. at 13–14.

543. *Id.* at 12.

544. "This question is a good way to judge the size of the company, an indicator of the kind of resources it has." United Educators, *supra* note 11, at 5.

545. NIXON, *supra* note 532, at 11.

546. *Id.* at 13.

547. *Id.*

548. *Id.*

549. Mayer, *supra* note 529. "A small study by the *Chicago Tribune* showed that one firm called InstantPeopleCheck.com missed the criminal backgrounds on all 10 people in Illinois that the newspaper gave it to check. The company was a low-end provider that charged $9.95 per background check." FRENKIL & VINIK, *supra* note 329, at 31. Remember to either get consent from the individuals whose names you are using or use names and criminal records that already are in the public domain.

regarding data breaches.[550]

C. Review and Assessment

As with any policy or program, a college or university should develop a review and assessment process to review the policy's process, outcomes, and impact.[551] A college or university should evaluate whether the policy or program is achieving the goals for which it was designed, whether it is having any unexpected or unintended consequences, and whether it should be continued, modified, or ended. And when a third-party vendor is involved, that company's performance also should be regularly assessed.[552] Assessment should not be an afterthought. Instead, the method of assessment—including the timing of assessment, who will have access to the results of the assessment, and how those results will be used—should be established when the policy is put in place and the evaluator included in the process from the beginning, or at least the early stages.[553]

Below is a non-exhaustive list of topics associated with evaluating a background-check policy and procedure by reviewing files of candidates with criminal histories.

- Do differences exist between those accepted and those rejected?
- If the application also asked candidates to self-disclose criminal history, how many files contained discrepancies between the applicant and the background-check results?
- How many false positives occurred? Are patterns discernable?
- Is the school aware of any false negatives? If so, how many and are patterns discernable?
- What types of crimes were committed?
- For rejected applicants, were they admitted to other institutions?[554]
- For students who were admitted and who actually enrolled, did they commit additional crimes or disciplinary violations?
- Is there evidence of disparate impact based on race or other protected characteristics?[555]

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550. *See* NIXON, *supra* note 532.

551. *See generally* LANA D. MURASKIN, UNDERSTANDING EVALUATION (1993), *available at* http://www.ed.gov/PDFDocs/handbook.pdf.

552. *E.g.*, Press Release, Michigan State Univ., MSU Researchers Developing and Studying Background Check System for Care of State's Most Vulnerable Patients (Mar. 6, 2007), *available at* http://newsroom.msu.edu/site/indexer/2684/content.htm.

553. MURASKIN, *supra* note 551, at 11, 16.

554. The college or university may attempt to follow up with candidates based on permanent address information on the admissions application or check for the candidates in the National Student Clearinghouse.

555. *See supra* note 255 and accompanying text (regarding the disparate impact of requesting information about arrests that did not lead to conviction).

- Should the scope of the background check be modified?[556]
- How has the policy impacted the admissions pool in terms of number and quality of applicants; applicant demographics, especially regarding applicants of color and applicants from lower socio-economic groups; yield rates; and withdrawals after conditional acceptance?
- How has the cost of conducting background checks (if not borne by applicants) impacted the campus?
- How has the policy impacted the campus atmosphere?
- How has the policy impacted campus safety? Is it possible to determine whether the policy has impacted Core Survey results regarding high-risk alcohol and other drug use?[557]
- Have students admitted with criminal backgrounds been negatively impacted in any way (e.g., subject to taunts or harassment, asked to move from a particular residence hall)?
- Have any breaches of confidentiality, data, or security occurred?
- Has the policy caused any other unintended consequences, whether positive or negative?
- How many complaints or concerns have been submitted regarding the policy?
- By whom were they submitted (e.g., applicants, admitted students, faculty, admissions professionals, etc.)?
- Are there any patterns to the complaints or concerns?
- How did the school respond to the various complaints and concerns?
- Has litigation been threatened or filed?
- How well has the vendor performed?
- Have reports been accurate (low rates of false positives and false negatives)?
- Have reports been timely?
- Has the average time for receiving reports lengthened?
- Is the company's technology still current?[558]
- Have any claims been filed against the company since the contract was signed?
- Have company representatives worked well with college and

556. See *supra* note 502 for information regarding the scope of the background check.

557. *See* S. Ill. Univ. Carbondale, Core Institute, http://www.siu.edu/~coreinst (last visited Feb. 27, 2008).

558. MGMT. ANALYSIS & DEV., *supra* note 504, at 27 (explaining that technology in this area is changing rapidly and that this rapid change requires "continual review of policies to ensure they are up to date and [reflect] current technological capacities").

university representatives?

- Has the company worked well with applicants?
- Has the company experienced a high turnover in personnel?
- Is the company still following key policies and procedures?
- Have there been any financial disputes (e.g., payment of fees)?
- Has the company's financial position changed negatively?
- Has the company followed all provisions of the contract with the institution?

CONCLUSION

In most segments of society, including higher education, background checks are becoming increasingly common. More colleges and universities than ever are conducting background checks on prospective students. Although background checks will not shield our campuses from violence, colleges and universities should seriously consider them as part of a comprehensive, environmental policy. No laws prohibit student background checks, and indeed some laws actually require the checks in certain situations. Therefore, for many schools, the policy considerations will tip the scale in favor of conducting background checks.

Schools that decide to conduct background checks should do so with sensitivity to the legal and policy issues involved, and to the consequences, both positive and negative, on campus culture and resources.

The bottom line is that to fulfill our missions and to provide a reasonably safe living and learning environment, we must understand who our students are. And one important dimension of a person's profile is his or her history of past offenses. As with other important information we seek from potential students, such as completion of a prior degree or scores on entrance exams, we cannot, unfortunately, rely on honest self-disclosures. Accordingly, background checks are truly "an idea whose time has come."[559]

559. *See* Marklein, *supra* note 71 (quoting Catherine Bath, Exec. Dir., Sec. on Campus, Inc.).

Appendix A: The UNC Policy Manual: 700.5.1[R]*

3. UNC constituent institutions will perform criminal background checks on applicants being considered for admission, applicants admitted, or applicants offered admission who have indicated their intent to attend, before the applicant matriculates, if the application and supporting materials contain one or more of the following triggers (or red flags):

i. The application together with supporting material contains materially inconsistent answers that have not been satisfactorily explained;

ii. The applicant answers one or more of the six criminal background/ discipline questions affirmatively or submits subsequent information indicating (1) pending criminal charges, (2) acceptance of responsibility for a crime, (3) criminal convictions or (4) school disciplinary action, unless the affirmative answer or supporting material relates to a school disciplinary action that resulted from an offense that is remote in time or was insubstantial;

iii. The application omits one or more answers without an acceptable explanation for the omission;

iv. The application has an unexplained time period since graduation from high school during which the applicant was not, for example, enrolled in higher education, enlisted in the military, or employed fulltime; or

v. Any other reason sufficient to the constituent institution.

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10. If an applicant has a positive criminal or disciplinary record, the constituent institution must:

A. Compare the results of the checks to the application and supplemental information supplied by the applicant to determine discrepancies. If there are no discrepancies and if the constituent institution has made an individual determination that the applicant does not pose a significant threat to campus safety, and there is no additional information indicating that a decision to admit should be modified, the applicant may be admitted or a previous decision to admit may stand.

B. If there are discrepancies, or if there is information indicating that admission decision should be further examined, the constituent institution must provide the applicant an opportunity either to demonstrate that the report of criminal, disciplinary or other relevant history was erroneous (e.g., wrong person) or to explain the discrepancy.

C. If the report is determined to be accurate and there is a discrepancy between the reported information and the application or supporting material the applicant submitted, or there is additional information that amplifies the application information or otherwise indicates that the admission should be examined further:

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* UNIV. OF N.C., THE UNC POLICY MANUAL: 700.5.1[R], REGULATION ON STUDENT APPLICATION BACKGROUND CHECKS (2006), *available at* http://www.northcarolina.edu/content.php/legal/policymanual/uncpolicymanual_700_5_1_r.htm.

(i) The presumption is that the admission will be denied or withdrawn if the applicant has failed accurately to disclose relevant information in response to a question on the application. The burden is on the applicant to demonstrate that the omission or misinformation was the result of an honest mistake, that it was not intended to mislead, and that the applicant should be admitted in spite of the failure to disclose;

(ii) If the failure to disclose accurate information does not result in the denial of or withdrawal of the offer of admission, but there is information that draws the decision to admit into question, before the student may matriculate, the constituent institution must make an individual determination as to whether the nature of any crime committed or other behavior disclosed, together with other available information, suggests that the applicant will pose a significant threat to campus safety. If the constituent institution determines that there is a significant threat, the admission must be denied or withdrawn. If not, the student may be admitted in accordance with the normal admission process.

Appendix B: UNC Wilmington Application for Undergraduate Admission**

Campus Safety Questions – All Applicants Must Complete

Your "yes" answer to one or more of the following questions will not necessarily preclude your being admitted. *However*, your failure to provide complete, accurate, and truthful information will be grounds to deny or withdraw your admission, or to dismiss you after enrollment.

For the purpose of the following six questions, "crime" or "criminal charge" refers to any crime other than a traffic-related misdemeanor or infraction. You must, however, include alcohol or drug offenses whether or not they are traffic-related.

1. Have you been convicted of a crime?
2. Have you entered a plea of guilty, a plea of no contest, a plea of nolo contendere, or an Alford plea, or have you received a deferred prosecution or prayer for judgment continued, to a criminal charge?
3. Have you otherwise accepted responsibility for the commission of a crime?
4. Do you have any criminal charges pending against you?
5. Have you ever been expelled, dismissed, suspended, placed on probation, or otherwise subject to any disciplinary sanction by any school, college, or university?
6. If you have ever served in the military, did you receive any type of discharge other than an honorable discharge?

** UNIV. OF N.C. WILMINGTON, ADMISSIONS, APPLY, (2007), *available at* http://www.uncwil.edu/admissions/documents/AdmiApp2007-2008.pdf.

Appendix C: SUNY Admissions Policy***

New York State Corrections Law [Sections 750, 752 and 753] forbids discrimination against individuals previously convicted of criminal offenses. However, University counsel advises that the law allows an institution to deny admission to an applicant based on prior criminal convictions where such admission would involve an unreasonable risk to property or would pose a risk to the safety or welfare of specific individuals or the public. Campus policy should include procuring appropriate information related to previous criminal and incarceration records and obtaining recommendations from corrections officials and, at times, current employment or educational supervisors. Campuses must utilize a standing committee to review applicants who affirm that they have either been convicted of a felony or been dismissed from a college for disciplinary reasons.

The purpose of the campus committee is to review appropriate information and decide whether an applicant with a felony conviction or disciplinary dismissal from an institution of higher education should be admitted. If admitted, the conditions of admissibility must also be decided; for example, eligibility for on-campus housing and counseling services. The committee may request the applicant to provide the following:

1. The specifics of the felony conviction or disciplinary dismissal such as background, charges filed and date of occurrence. Appropriate releases may have to be executed by the applicant for receipt of criminal history information or educational disciplinary records;

2. For applicants with felony convictions, references must be provided from the Department of Correctional Services, Division of Parole, including the name and addresses of parole officers. For those currently in parole status, the committee should obtain the conditions of parole and determine if the campus environment affords compliance. The committee should also review whether specific services will be needed for the ex-offender. Parole officials should be questioned as to whether the applicant would pose a threat to the safety of the campus community;

3. A personal interview to either clarify or verify information will be necessary.

After review of all available information, the committee must decide whether to deny admission, admit the applicant or admit the applicant with certain conditions. To clarify the lines of communication, the president of each campus should designate a campus official to act as the liaison person with the Division of Parole of the Department of Correctional Services and the local parole office

*** State Univ. of N.Y., Admission of Persons with Prior Felony Convictions or Disciplinary Dismissals, *available at* http://www.suny.edu/sunypp/documents.cfm?doc_id=342 (last visited Feb. 27, 2008).

Appendix D: George Mason University School of Law Admissions FAQ[****]

Must I disclose information about prior or pending criminal, disciplinary, or academic problems in my application?

Yes. It is extremely important that you describe details of any criminal, disciplinary and/or academic actions in response to questions 18, 19, 20 or 21 of our application. Failure to disclose this information can result in serious problems, both in relation to your law school application (we have revoked acceptances in the past in cases in which we learned of the applicant's failure to disclose information) and in applying for admission to the bar in any state. State boards of bar examiners will conduct character and fitness investigations to determine if you are fit for admission to the bar. Those investigations typically include criminal background checks, as well as review of your law school application, undergraduate record and law school record. It is critically important that your disclosures of the type of information requested in our questions 18, 19, 20 and 21 be complete, truthful and consistent in your law school and bar applications.

I did some stupid things in high school and college—alcohol violations, fraternity pranks, etc. Will these past indiscretions prevent me from being admitted to law school?

Many law school applicants—and many practicing attorneys—do not have spotless pasts. We see many applicants each year who have been written up for underage drinking on campus or for silly pranks. We also see a fair number of applicants who have been arrested for driving under the influence of alcohol.

First and most important: Disclose everything about events that resulted in criminal or disciplinary actions.

Second: The fact that you were a teenager and college student who did not use perfect judgment at all times will not necessarily bar you from admission to law school or from admission to one or more state bars. In terms of admission to law school, we will consider everything in your application. If you have a DUI in your record, or if you got caught spreading toilet paper on campus, etc., it is still possible to gain admission to law school. There are individuals currently in law school who have such activities in their records.

If you have a pattern of criminal activity, or have shown a pattern of very poor judgment, that may pose a problem in gaining admission to law school and/or to the bar. If you have been convicted of one or more felonies, or have abused positions of trust in which you have been placed, you could have a problem gaining admission to law school and/or to the bar. In the past, we have contacted applicants to make them aware of problems that may lie ahead in terms of gaining bar admission, and to urge them to contact the board of bar examiners in the state in which they ultimately wish to practice. If you have serious criminal convictions in your record, and if you are an applicant we would like to admit, we may contact you to discuss your particular situation.

**** George Mason Univ. Sch. of Law, Admissions, Frequently Asked Questions, http://www.law.gmu.edu/admissions/faq (last visited Feb. 27, 2008).

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The Journal of College and University Law
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

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Postage paid at Washington, D.C., and at additional mailing offices.

Cite as — J.C. & U.L. —
Library of Congress Catalog No. 74-642623

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