

STUDYING IS DANGEROUS? POSSIBLE FEDERAL REMEDIES FOR STUDY ABROAD LIABILITY

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INTRODUCCION

On the evening of March 27, 1996, four American college and university students, along with three other individuals, lost their lives in a bus accident on a road between New Delhi and Agra, India.¹ The students were taking part in a study abroad program called the Semester at Sea sponsored by the University of Pittsburgh, where participants sail on a cruise ship throughout the world and visit various countries.² While on the ship, and during visitations of the countries, the Semester at Sea program participants take regular college and university courses.³ Participants in Semester at Sea also take part in “field programs,” which consist largely of guided tours and visits to historical and cultural landmarks within various countries.⁴ On March 27, 1996, the four students who lost their lives were on such a field program in India.⁵ The driver of their bus was allegedly in an intoxicated condition and had worked for more than 24 consecutive hours.⁶

In 2005, the University of Pittsburgh ceased its relationship with the Institute for Shipboard Education, the nonprofit entity that operates the Semester at Sea program, citing safety concerns.⁷ The University of Virginia has sponsored the program since 2006 and since that time at least three college and university students have died while studying abroad,

1. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (2000) (statement of John G. Amato) [hereinafter Amato].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* Ron French, *As college programs grow, so do the risks*, DETROIT NEWS (Aug. 27, 2000), <http://www.detnews.com/specialreports/2000/costarica/sunofflead/sunofflead.htm> [hereinafter French].

7. *See* Associated Press, *After rough trip, school cuts ties with Semester at Sea*, USA TODAY (June 7, 2005), http://usatoday30.usatoday.com/news/education/2005-06-07-semester-sea_x.htm.

including an incident in December 2012 in Dominica in which a student in the program died following a boating accident.⁸

And tragic incidents such as those described above are not limited to the Semester at Sea program – physical injuries and even deaths of students have occurred in other programs sponsored by nonprofit programs at colleges and universities.⁹ In February 2014, a college student and student-athlete who attended Bates College died in mysterious circumstances in Rome, Italy while enrolled in a study abroad program.¹⁰ While not an injury incurred by a college or university student, a student (who was a minor at the time of the incident) at the Hotchkiss boarding school in Connecticut contracted encephalitis from a tick while on a school-sponsored overseas trip to China during the summer of 2007, which caused severe brain damage.¹¹ The student and her family sued the Hotchkiss School, alleging the school failed to take adequate safety precautions to protect the students from the risk of encephalitis, and a jury awarded them \$41.7 million in March 2013.¹² The verdict is currently on appeal.¹³ All of these incidents have brought renewed attention to the possible risks of studying abroad.

Every year, thousands of college and university students seek to study abroad to not only gain the cultural experience of “seeing the world,” but also to enrich their academic studies. According to NAFSA: Association of International Educators, during the 2011–2012 academic year, approximately 283,332 students sought academic credit while studying abroad.¹⁴ The majority of students who studied abroad during the 2011–2012 year enrolled in short term summer programs, or programs that last eight weeks or less.¹⁵ During that same time frame, approximately twenty–

8. See Catherine Valentine, *Legal proceedings begin over Casey Schulman's death*, CAVALIER DAILY (Oct. 30, 2013), <http://www.cavalierdaily.com/article/2013/10/lawsuit-filed-in-casey-schulman-death> [hereinafter Valentine].

9. See French, *supra* note 6.

10. See Laura Petrecca, *Missing U.S. student in Italy found dead*, USA TODAY (Feb. 22, 2014), <http://www.usatoday.com/story/news/2014/02/22/missing-student-italy/5726619/>.

11. See Ben Waldron, *Woman Who Contracted Encephalitis on School Trip Awarded \$41.7 Million*, ABC NEWS (Mar. 29, 2013), <http://abcnews.go.com/US/woman-contracted-encephalitis-school-trip-awarded-417m/story?id=18840034>.

12. *Id.*

13. See Kaitlin Mulhere, *Higher ed groups caution court decision could discourage study abroad*, INSIDE HIGHER ED (Oct. 24, 2014), <https://www.insidehighered.com/news/2014/10/24/higher-ed-groups-caution-court-decision-could-discourage-study-abroad>.

14. See *Trends in U.S. Study Abroad*, NAFSA, http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Trends_in_U_S_Study_Abroad/ (last visited Mar. 3 2015).

15. See “Fast Facts”: *International Students in the U.S.*, INST. OF INT’L. EDUC.

one million college and university students were enrolled in degree-granting institutions in the United States.¹⁶ In total, the study abroad industry is approximately a \$20 billion dollar per year industry today.¹⁷

Study abroad programs are heralded not only for allowing college and university students to obtain a new cultural and academic experience, but also advocates of the programs emphasize the diplomatic and economic benefits received by all participants involved. With these positive benefits in mind, the United States Congress, as well as state legislatures throughout the country, have generally supported the overall aims, goals, and missions of study abroad programs.

Despite the positive benefits of study abroad programs, the programs are not without the potential for risk. Overall, the number of reported cases involving study abroad liability issues is very small compared to the number of students who have studied abroad in the past two decades. However, as discussed earlier, in one incident four students were killed in a bus accident in India. In another, two female students were abducted and killed in Costa Rica.¹⁸ In yet another, five female students were raped by a group of bandits while studying abroad in Guatemala.¹⁹ Despite the presence of these risks, very few cases have made it to the appellate stage of review, and the standards of liability concerning study abroad liability nationwide remain quite murky.

The nature of the risks involved with study abroad programs has spurred a literature discussing such issues not only in law review articles,²⁰ but

(2013), available at <http://www.iie.org/Research-and-Publications/Open-Doors/Data/Fast-Facts>.

16. See Chapter 3: *Postsecondary Statistics*, NAT'L. CTR. FOR EDUC. STATISTICS (2014), available at http://nces.ed.gov/programs/digest/d12/ch_3.asp.

The figure of approximately 283,332 students studying abroad in 2011–2012 can be compared with the number of international students who seek a degree in the United States annually. In 2012–2013, according to the Institute of International Education approximately 250,920 international students were enrolled in United States higher education institutions. See “Fast Facts”, *supra* note 15, at tbl. A.

17. See Maury Glover, *Mother whose son died abroad wants other parents to prepare*, KMSP-TV (Nov. 19, 2012), <http://www.myfoxtwincities.com/story/19610080/mother-whos-son-died-abroad-warms-of>.

18. See French, *supra* note 6.

19. *Id.*

20. See, e.g., Robert J. Aalberts, Kenneth D. Ostrand, & Kenneth G. Fonte, *The University, the Law, and International Study Programs*, 50 CONTINUUM 153 (1986) (discussing possible theories of liability against universities that sponsor overseas study abroad programs); Robert J. Aalberts & Kenneth D. Ostrand, *Negligence, Liability and the International Education Administrator*, 7 J. ASS'N INT'L EDUC. ADMIN. 59 (1987) (analyzing potential situations in which an international education administrator may incur liability in cases where it directs a study abroad program); Robert J. Aalberts & Richard B. Evans, *The International Education Experience: Managing The Legal*

among other academic sources as well.²¹ While much of this literature has discussed issues concerning the types of risks present in programs, as well as methods and ways to mitigate risks, largely absent is any discussion of potential remedies at the federal level which can be implemented in order to promote safety and compensate those who are injured, or even killed, due to the negligent acts or omissions of an educational institution or nongovernmental institution that sponsors or assists in sponsoring a study abroad program. This Article contributes to the scholarly literature concerning study abroad liability in proposing several remedies that may be implemented at a federal level in order to promote safety and protect all participants of collegiate study abroad programs.

Part I of this Article generally provides a brief overview of the different types of study abroad programs sponsored by educational and

Risks, 13 J. LEGAL STUD. EDUC. 29 (1995) (noting there are three ways in which a university may limit liability for risks incurred in overseas study abroad programs but yet also protect the principle of fairness for students – first, choice of forum clauses; second, through a choice of law clause; and third, through an arbitration clause); William P. Hoye, Comment, *The Legal Liability Risks Associated with International Study Abroad Programs*, 131 EDUC. L. R. 7 (1999) (highlighting the risks of sexual harassment, transportation issues, and terrorism associated with study abroad programs and highlighting a “Risk Assessment Audit” for universities to minimize risk) [hereinafter Hoye I]; William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151 (2000) (mentioning ways in which colleges and universities and organizations sponsoring study abroad programs can minimize risks) [hereinafter Hoye & Rhodes I]; Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 518–519 (2003) (proposing an “educational mission” paradigm to apply in cases of tort liability of colleges and universities to students and noting under this paradigm “a college owes a duty when it has clear responsibilities stemming from its educational mission”); J. Wes Kiplinger, Comment, *Defining Off-Campus Misconduct that “Impacts the Mission”: A New Approach*, 4 U. ST. THOMAS L.J. 87 (2006) (proposing a multi-factor analysis to determine whether the off-campus conduct of a student impacts the educational mission of a college or university); Vincent R. Johnson, *Americans Abroad: International Education Programs and Tort Liability*, 32 J.C. & U.L. 309, 359 (2006) (contending that the standard study abroad programs must meet with regard to liability is “reasonably prudent conduct”); Kathleen M. Burch, *Going Global: Managing Liability in International Externship Programs – A Case Study*, 36 J.C. & U.L. 455 (2010) (analyzing the potential liability risks faced by international externship programs).

21. See, e.g., ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999) (discussing trends in the law regarding college and university liability from the era of *In Loco Parentis* to the current era); Gregory F. Malveaux, *Risks and Liabilities Associated with Study Abroad Programs in Education: A Case Study of Maryland* (Dec. 2008) (unpublished Ph.D. dissertation, Morgan State University) (on file with author) (analyzing components of waivers utilized by colleges and universities in the State of Maryland by a content analysis); EUGENE L. ZDZIARSKI II, ET AL., *CAMPUS CRISIS MANAGEMENT: A COMPREHENSIVE GUIDE TO PLANNING, PREVENTION, RESPONSE, AND RECOVERY* (2007) (discussing the issues colleges and universities face concerning emergency preparedness plans as well as contemporary issues in crisis management).

nongovernmental institutions, as well as the purported benefits of such programs. In Part II, the Article summarizes the involvement of the federal and state governments in study abroad programs. Through the Commission on the Abraham Lincoln Study Abroad Fellowship Program, the Senator Paul Simon Study Abroad Foundation Act, State Department initiatives, and legislation at the state level, both the federal and state governments have generally followed a policy of promoting the benefits of studying abroad.

Part III comprehensively addresses the various liability risks involved with study abroad programs, as well as responses of the study abroad industry to these risks. In addition, Part III of the Article discusses the governmental and nongovernmental responses to these risks, as well as reported cases to date which have addressed liability issues of study abroad programs.

Given the contemporary risks faced by participants in study abroad programs throughout the world, the Article proposes three possible remedies at the federal level in Part IV. One such remedy would be the implementation of a national standard of liability for cases involving study abroad programs, similar to the Federal Employers' Liability Act ("FELA").²² The Article also analyzes a possible remedy of a federal cause of action for wrongful death, similar to the Death on the High Seas Act ("DOHSA"),²³ which would apply in cases resulting in the wrongful death

22. Employers' Liability Act, 45 U.S.C. § 51 (2014) [hereinafter Federal Employers Liability Act], states the following:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

In essence, "FELA . . . allows railroad employees to sue their employer for any injury 'resulting in whole or in part from the negligence' of the railroad." Kyle W. Ubl, Note, *The (Un)foreseen Effects of Abrogating Proximate Causation in CSX Transportation, Inc. v. McBride: The New Role of Foreseeability Under FELA and the Jones Act*, 87 NOTRE DAME L. REV. 2261, 2263-64 (2012).

23. Death on the High Seas Act, 46 U.S.C. § 30302 (2014), states the following:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the

of a participant enrolled in a study abroad program. Finally, the Article analyzes the possibility of creating a federal entity charged with oversight of study abroad programs. With these possible remedies at the federal level, policymakers can examine these solutions to better protect all participants in study abroad programs and provide federal remedies in cases where those who participate in a study abroad program are harmed.

I. STUDY ABROAD PROGRAMS IN THE TWENTY-FIRST CENTURY

As the world and the global economy have become more interconnected, studying abroad has become more appealing to college and university students. And the number of students studying abroad has increased dramatically in the past twenty-five years. From 1991–1992 to 2003–2004,²⁴ the number of college and university students who studied abroad nearly tripled.²⁵ In addition, from the 2003–2004 academic year to the 2011–2012 academic year, the number of students studying abroad rose over 65 percent.²⁶

With the growth in the number of students studying abroad, different types of study abroad programs have developed, and advocates of studying abroad have articulated educational, economic, cultural, foreign policy and national security arguments to support the industry.

A. Types of Study Abroad Programs

There are several different types of study abroad programs which universities and colleges sponsor. In one type of program, a student participates in a program sponsored by a U.S. educational institution.²⁷ Some programs are led by a faculty member or member(s) from that student's own educational institution.²⁸ Other programs may be directly

United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

24. Approximately 191,321 students in 2003-2004 studied abroad. Burton Bollag, *Panel Supports Grants for Study Abroad*, CHRON. HIGHER EDUC. (Nov. 25, 2005), <http://chronicle.com/article/Panel-Supports-Grants-for/30966> [hereinafter Bollag].

25. *See id.*

26. *See Trends in U.S. Study Abroad*, *supra* note 14.

27. *See* Nicholas Trott Long, *Managing Safety and Liability in Study Abroad Programs*, for 21ST ANNUAL LEGAL ISSUES IN HIGHER EDUCATION CONFERENCE (2011), http://learn.uvm.edu/wordpress_3_4b/wp-content/uploads/2011-09-15-Managing-Safety-and-Liability-in-Study-Abroad-Programs.pdf (discussing the operation of branch campuses abroad by American educational institutions); *see also* David Keitges, *The Portfolio Model of Institutional Study Abroad Programming*, NAFSA (2000), available at http://www.nafsa.org/uploadedFiles/the_portfolio_model_of.pdf?n=7334.

28. *See* Keitges, *supra* note 27.

sponsored by another American institution.²⁹

Faculty-led programs may incur a higher risk than other programs sponsored by educational and private institutions.³⁰ As several experts note, faculty-led programs on occasion may lack local institutional affiliations for access to resources and offer less supervision to participants.³¹ Thus, the lack of institutional resources and circumstances of the program may leave a faculty sponsor or sponsors less equipped and prepared to handle the emergencies and risks that may arise on the trip.³²

In some situations, colleges and universities may directly exchange students in their programs with students from a foreign institution. These programs are often referred to as “exchange programs.”³³ In other programs, a student may leave a U.S. institution and enroll in a foreign institution directly. These “direct programs” typically involve a student making tuition and housing arrangements directly with the foreign institution.³⁴

Finally, there are a number of private entities that offer study abroad programs. Some are not-for-profits and others are for-profits.³⁵ These private entities, often referred to as “third-party providers,”³⁶ typically will administer many of the logistical aspects of studying abroad.³⁷ Sometimes these programs will offer courses directly, and in other cases the programs essentially work as an intermediary for a foreign institution.³⁸

B. Arguments for Study Abroad

A number of arguments in support of studying abroad have been articulated by organizations supporting the study abroad industry. NAFSA

29. *Id.*

30. See Julie Friend, Barbara Lindeman, & Patricia Martin, *Best Practices for Addressing Legal and Risk Management Issues in Education Abroad*, NAFSA, slide 5 (May 31, 2011) (PowerPoint Presentation), http://studyabroad.isp.msu.edu/research/documents/Friend_Legal_Risk_Intro_NAFSA_BC_2011.pdf

31. *Id.*

32. *Id.*

33. See Long, *supra* note 27; see also *Program Types*, UNIV. OF TENN. AT KNOXVILLE (2014), available at https://studyabroad.utk.edu/index.cfm?FuseAction=Abroad.ViewLink&Parent_ID=E2EC1174-19B9-C0B3-C751A77AFAE78FE1&Link_ID=46EC6EE6-19B9-C0B3-C790B5633E3F5421.

34. See UNIV. OF TENN., *supra* note 33.

35. See Long, *supra* note 27; see also *Review Third Party Program Providers*, KAN. STATE UNIV., http://www.k-state.edu/studyabroad/faculty-advisors/fac_led/providers.html (last visited Mar. 14, 2015).

36. See KAN. STATE UNIV., *supra* note 35.

37. See Elizabeth Redden, *The Middlemen of Study Abroad*, INSIDE HIGHER ED (Aug. 20, 2007), <http://www.insidehighered.com/news/2007/08/20/abroad#sthash.ruOgC9Yb.dpbs>.

38. *Id.*

is the most prominent nonprofit organization involved in public policy efforts in support of the industry. Several benefits to students have been cited by NAFSA, including that studying abroad helps in developing leadership skills, assists students in creating career options, aids in personal growth and maturity, and improves both academic learning and global awareness.³⁹

Outside of benefits to participants in the programs, advocates of study abroad programs also cite the foreign policy, national security, and economic advantages gained by increasing the number of students abroad. NAFSA has emphasized that studying abroad promotes United States foreign policy and diplomacy by promoting greater international understanding, and that it also advances the image of the United States abroad.⁴⁰ NAFSA has also emphasized that studying abroad helps the national security goals of the United States by better preparing potential State Department employees with foreign language abilities and improves “the cultural and communication skills vital to our national security.”⁴¹ It has been argued that studying abroad helps the United States’ position in the global economy⁴² and, lastly, that studying abroad helps students stand out to potential employers.⁴³ With all of these articulated benefits, legislative bodies at both the state and federal levels have examined ways to promote studying abroad.

II. STATE AND FEDERAL INVOLVEMENT IN STUDY ABROAD PROGRAMS

With many articulated benefits to studying abroad, the federal and state governments have considered legislation that largely encourages growth of the study abroad industry. In 2005, President Bush and the United States Congress appointed a seventeen-member group known as the Commission on the Abraham Lincoln Study Abroad Fellowship Program to examine ways in which to promote studying abroad by collegiate students.⁴⁴ In addition, legislation such as the Paul Simon Study Abroad Act has been introduced in Congress to provide more federal monetary support for educational institutions that sponsor study abroad programs through

39. See *Advocating for Education Abroad: Benefits to Students*, NAFSA, <https://www.nafsa.org/findresources/Default.aspx?id=8361> (last visited Mar. 14, 2015).

40. See *Public Policy Benefits of Study Abroad*, NAFSA, http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Public_Policy_Benefits_of_Study_Abroad/ (last visited Mar. 14, 2015).

41. *Id.*

42. *Id.*

43. See Carolyn Bigda, *Studying abroad can help you stand out from peers*, CHI. TRIB. (Oct. 18, 2013), http://articles.chicagotribune.com/2013-10-18/business/sc-cons-1017-started-20131018_1_college-students-double-majors-study-abroad.

44. See Bollag, *supra* note 24.

grants.⁴⁵ The support does not stop at the legislative branch at the federal level; the State Department also has supported the aims of study abroad through initiatives such as the 100,000 Strong in China,⁴⁶ 100,000 Strong in the Americas,⁴⁷ and the Passport to India⁴⁸ programs. Finally, many state legislatures have also enacted legislation openly supporting the expansion of study abroad programs. Each of these initiatives and pieces of legislation, discussed further in the next several sections, have contributed to an overall governmental climate supportive of study abroad programs within the past decade.

While policymakers have historically focused on funding to bolster enrollment in study abroad programs, there are other challenges to boosting enrollment in study abroad programs beyond funding. A number of high school graduates who have taken several years of a foreign language in high school do not graduate high school with a fluent proficiency in a foreign language⁴⁹ and a number of study abroad programs require proficiency.⁵⁰ In addition, transfer credits sometimes create a hurdle for increasing the number of participants. Colleges and universities often will require participants in study abroad programs to obtain administrative approvals to transfer credits from other institutions.⁵¹ Finally, an academic study by Dr. James Lucas has indicated that general advertising of the study abroad industry did not generally connect with males at colleges or universities in the Midwest, since the advertising focused on aspects of the study abroad experience that were not as directly linked with individual personal interests.⁵² In addition, this same study indicated that the “males

45. See *Senator Paul Simon Study Abroad Act*, NAFSA, http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Simon_Senator_Paul_Simon_Study_Abroad_Act/ (last visited Mar. 14, 2015).

46. See *100,000 Strong Educational Exchange Initiatives*, U.S. DEP'T OF STATE, <http://www.state.gov/100k/> (last visited Mar. 14, 2015).

47. *Id.*

48. See *Passport to India*, U.S. DEP'T OF STATE, http://www.state.gov/p/sca/ci/in/passport_to_india/ (last visited Mar. 14, 2015).

49. See Stephen J. Pytak, *Foreign language educators encourage fluency, but students say it's a challenge*, POTTSVILLE REPUBLICAN HERALD, Dec. 18, 2011, <http://republicanherald.com/news/foreign-language-educators-encourage-fluency-but-students-say-it-s-a-challenge-1.1246439>.

50. See *Study Abroad or Study Away*, BROWN UNIV., <http://brown.edu/campus-life/support/families/about/study-abroad-or-study-away> (last visited Mar. 14, 2015).

51. *See id.*

52. See James M. Lucas, *Where Are All the males? A Mixed Methods Inquiry into Male Study Abroad Participation* 226 (2009) (unpublished Ph.D dissertation, Michigan State University) (on file with author).

The dissertation stated the following:

Males did not respond well to study abroad marketing messages and found them lacking in depth related to academics and the experiential aspects that most interest them. They sensed that the messages about study abroad promoted it as fun or that it was a cultural immersion, and based on their

wanted an experience that could help them achieve their academic and/or career goals” and that the fun and cultural learning aspects of the study abroad experience “were not important enough reasons to study abroad given other constraints, which included time away from home, family and friends; lost wages and opportunities to work.”⁵³

A. Commission on the Abraham Lincoln Study Abroad Fellowship Program

Federal involvement in the area of study abroad began to accelerate approximately one decade ago in 2004. During the fiscal year 2004, the FY 2004 Consolidated Appropriations Act appropriated \$500,000 in federal funding to create a Commission on the Abraham Lincoln Study Abroad Program.⁵⁴ The Commission’s purpose was to examine the establishment of a “program to greatly expand the opportunity for students at institutions of higher education in the United States to study abroad, with a special emphasis on studying in developing nations.”⁵⁵ It should be noted that approximately 53.3% of participants in study abroad programs during the 2011–2012 academic year studied in Europe.⁵⁶

The seventeen members of the bipartisan Commission included current and former public officials, experts in international education issues, as well as college and university presidents.⁵⁷ In its November 2005 report, the Commission confidently proposed a bold goal of having one million U.S. college and university students study abroad annually by the 2016–2017 academic year.⁵⁸ The Commission also noted that the goal of one million students was in the “national interest” of the United States.⁵⁹

The Commission cited a number of reasons, several of which have also been cited by other advocates of study abroad programs, why one million U.S. students studying abroad is within the United States’ national interests. First, the Commission noted that studying abroad helps the United States retain its economic competitiveness in the global marketplace

personal interests and situations, this impression led them either to seek more information or to feel disinterest. *Id.*

53. *Id.* at 225.

54. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

55. *See* S. REP. NO. 110-272, at 2 (2008).

56. *See* “Fast Facts”, *supra* note 15, at tbl. L.

57. *See* Commission on the Abraham Lincoln Study Abroad Fellowship Program, *Global Competence & National Needs: One Million Americans Studying Abroad* (Nov. 2005), available at <http://www.aplu.org/document.doc?id=190>.

58. *Id.* at vii.

59. *Id.* at v.

and assists in the development of students' employment skills.⁶⁰ In addition, the Commission also remarked that increasing the number of students studying abroad has a direct role in promoting United States foreign policy interests, specifically, bolstering the United States' leadership role in the world,⁶¹ fostering the development of foreign language skills,⁶² and fostering cultural understanding among the nations of the world.⁶³ Finally, the Commission also stated that studying abroad has a positive educational value for students.⁶⁴

To meet the goal of sending one million college and university students abroad to study, the Commission proposed the establishment of Lincoln fellowships and scholarships.⁶⁵ It envisioned that some of the awards would be available directly to students and others through individual educational consortia and institutions, as well as nonprofit organizations, but that at least 88 percent of all funding for the Lincoln program goes directly to students.⁶⁶ Scholarships under the program would be available both as need-blind and merit-based awards for study abroad experiences in which a student earns more than three academic credit hours but less than twelve hours.⁶⁷ In contrast, fellowships would be limited for students who study abroad for more than twelve academic credit hours and would be awarded on the basis of merit.⁶⁸ In addition, the Commission expressed its intention that a "substantial" number of the awardees should be those who are studying abroad in nontraditional countries⁶⁹ and that foreign language

60. *Id.* at vi ("Increasingly, business leaders recognize that they must be able to draw on people with global skills if their corporations are to succeed in a world in which one American job in six is tied to international trade").

61. *Id.* at vi ("The United States leads by necessity and default, but it is not as well equipped to exercise its leadership role as it could be. This is not an issue of the left or the right, of Democrats or Republicans. It is an issue of how we as a society prepare this and future generations for the leadership that will be required for the American democratic experiment's ongoing success in the world").

62. *Id.* ("In today's world, study abroad is simply essential to the nation's security. More than 65 federal agencies, ranging from the Central Intelligence Agency to the Peace Corps, need to fill 34,000 positions requiring foreign language skills annually – a requirement that is often unmet or filled only through outside contractors").

63. *Id.* at vii ("Wise stewardship also involves encouraging foreign students to come to the United States for study. Maintaining access to the American campus for the students of the world remains a significant foreign policy tool. Student exchange provides benefits to host and sending nations").

64. *Id.* at vi–vii.

65. *Id.* at 25.

66. *Id.* at 27.

67. *Id.* at xi.

68. *Id.*

69. *Id.* at 27.

study would be “strongly encouraged.”⁷⁰ Finally, the Commission acknowledged there were several possibilities for the administration of the program. One possibility expressed was that the Lincoln program could be a part of either the Department of State or Department of Education, with a recommendation that a policy advisory council assist in its implementation.⁷¹ Another idea mentioned by the Commission was that the Lincoln program could justify the need for an independent Lincoln Commission on Study Abroad, which could be organized similar to the structure of the Millennium Challenge Corporation.⁷²

Several months after the release of the report, one of the Commission’s members, Senator Richard Durbin of Illinois, introduced legislation along with Senator Norm Coleman of Minnesota in an effort to put the recommendation of establishing a Lincoln study abroad program into reality. The legislation, entitled the Abraham Lincoln Study Abroad Act of 2006, sought to establish Lincoln Fellowships for undergraduates to study abroad, which would be awarded by the United States Secretary of State.⁷³ While the legislation did not explicitly outline many proposed rules concerning the fellowship, the bill delineated two rules – that the fellowships awarded “reflect the demographics of the United States undergraduate population” and that there be an annual increase in the number of fellowship recipients studying abroad in nontraditional locations.⁷⁴ Despite having forty-five cosponsors, the bill never made it out of the Senate committee stage.⁷⁵

B. Senator Paul Simon Study Abroad Foundation Act

In the following Congress, another bipartisan effort emerged to create a study abroad foundation with the intention of turning the Lincoln Commission’s recommendations into reality. Within the first three months of the 110th Congress, Democratic Representative Tom Lantos and Republican Representative Ileana Ros-Lehtinen introduced H.R. 1469, the Senator Paul Simon Study Abroad Foundation Act of 2007.⁷⁶

70. *Id.* at 28.

71. *Id.* at 30.

72. *Id.* For more information on the Millennium Challenge Corporation, which is an independent federal agency that promotes international development, see Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004) (discussing generally the Millennium Challenge Account and Millennium Challenge Corporation and how it contributes to the “right to development” of international law).

73. Abraham Lincoln Study Abroad Act of 2006, S. 3744, 109th Cong. (2006) [hereinafter Abraham Lincoln Study Abroad Act of 2006].

74. *Id.* at § 4(b).

75. *Id.*

76. Senator Paul Simon Study Abroad Foundation Act of 2007, H.R. 1469, 110th

Approximately fifteen days following its introduction in the United States House of Representatives, a bipartisan companion measure in the United States Senate was introduced by Democratic Senator Dick Durbin and Republican Senator Norm Coleman.⁷⁷ The legislation sought to create a “Senator Paul Simon Study Abroad Foundation” which would be a government corporation housed by the executive branch.⁷⁸ Governance of the foundation would be conducted by a Board of Directors, and chaired by either the United States Secretary of State or a designee of the Secretary.⁷⁹

In accordance with the recommendations of the Lincoln Commission on Study Abroad, the Senator Paul Simon Study Abroad Foundation Act’s purpose was to award grants to United States students to pursue study abroad opportunities.⁸⁰ Similar to the goals of the Abraham Lincoln Study Abroad Act of 2006, the Senator Paul Simon Study Abroad Foundation Act also included an objective that a significant number of grants awarded to students should be given to students studying in nontraditional countries as well as developing nations.⁸¹ The legislation also authorized an initial appropriation of \$80 million in the fiscal year 2008 to establish the foundation,⁸² and included provisions to allow the proposed foundation to solicit private donations and engage in fundraising in order to raise money for study abroad grants.⁸³

Within three months of the introduction of the legislation, the Senator Paul Simon Study Abroad Foundation Act of 2007 passed the United States House of Representatives by a voice vote.⁸⁴ It also sailed through the United States Senate Committee on Foreign Relations with a voice vote.⁸⁵ Despite widespread support for the legislation, it did not advance for a vote in the full Senate in the 110th Congress and did not become law.⁸⁶ In the 111th Congress, the legislation made it through the United States House of Representatives⁸⁷ as part of the Foreign Relations Authorization Act for the

Cong. (2007) [hereinafter Senator Paul Simon Study Abroad Foundation Act of 2007].

77. *See id.*

78. *See id.*

79. *Id.* at § 5(a)(2).

80. *Id.* at § 6(a)(2)(A).

81. *Id.* at § 6(b)(3).

82. *Id.* at § 10(a).

83. *Id.* at § 5(b)(4).

84. *See* S. Rep. No. 110-272 (2008).

85. *Id.* at 2.

86. *See Background on the Senator Paul Simon Study Abroad Foundation*, NAFSA,

http://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/Study_Abroad/Simon/Background_on_the_Senator_Paul_Simon_Study_Abroad_Foundation/ (last visited Jan. 19, 2015).

87. *See House Passes Simon Study Abroad Bill in Major Step Forward for International Education*, NAFSA (June 11, 2009), <http://blog.nafsa.org/2009/06/11/>.

Fiscal Years 2010 and 2011,⁸⁸ but it once again failed to make it through the Senate. To date, despite strong bipartisan congressional support, the legislation has failed to make it fully through the legislative process.

Although the Abraham Lincoln Study Abroad Act and the Senator Paul Simon Abroad Foundation Act have not been implemented into law as of this time, the legislative branch has been generally supportive of the goals of increasing participation among college and university students in study abroad programs. A significant amount of support has also been present at the executive branch level through the public pronouncements of individuals associated with the Obama administration, as well as through initiatives of the State Department.

C. Public Pronouncements and State Department Initiatives (100,000 strong in China; 100,000 strong in the Americas; Passport to India)

In recent years, the administration of President Barack Obama has largely given a strong rhetorical endorsement of the goal to increase the number of students studying abroad. Within President Obama's first several months in office, at a student roundtable in Turkey, the President strongly endorsed studying abroad, stating that "simple exchanges can break down walls between us, for when people come together and speak to one another and share a common experience, then their common humanity is revealed."⁸⁹ In addition, in a January 19, 2011 speech at Howard University, First Lady Michelle Obama referred to studying abroad as a "key component" of the foreign policy agenda of the Obama administration.⁹⁰ Finally, within the past year the First Lady has also remarked in an interview that "the benefits of studying abroad are almost endless."⁹¹

The Obama administration has not only expressed support for study abroad programs through rhetorical means; it has also taken concrete steps at the executive branch level through initiatives to increase the number of American students abroad. Within the first year of his first term in office,

88. See Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, H.R. 2410, 111th Cong. (2009).

89. See President Barack Obama, *Remarks of President Barack Obama at Student Roundtable*, WHITE HOUSE (Apr. 7, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-Of-President-Barack-Obama-At-Student-Roundtable-In-Istanbul.

90. See Office of the First Lady, *Remarks by the First Lady at her "100K strong" State Visit Event*, WHITE HOUSE (Jan. 19, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/19/remarks-first-lady-her-100k-strong-state-visit-event>.

91. See Jareen Imam, *Studying abroad could give you an edge in the job market*, CNN (Apr. 4, 2014), <http://www.cnn.com/2014/03/25/travel/irpt-study-abroad/index.html>.

in November 2009 President Obama formally unveiled a proposed “100,000 Strong” initiative to drastically increase the number of American students studying in China.⁹² In his remarks before an audience that included young Chinese leaders, President Obama stressed the significance of “sustaining an open dialogue”⁹³ to provide for both the prosperity and security⁹⁴ of both the United States and China. In addition, President Obama cited the historical relationship between the United States and China in stating that a cooperative relationship between the two countries traditionally has “accompanied a period of positive change.”⁹⁵ Increasing the number of students studying abroad would constitute, at the very least, a part of encouraging that cooperative relationship.

Initiatives by the Obama administration to bolster study abroad have not only included efforts to increase study abroad to China, but also to other developing parts of the world as well. Less than two years after unveiling the “100,000 Strong” initiative with China, in early 2011 the Obama administration announced the “100,000 Strong in the Americas” initiative to drastically increase the number of students studying abroad in the Caribbean as well as Latin America.⁹⁶ The “100,000 Strong in the Americas” initiative not only has a goal of placing 100,000 American students in study abroad placements in Latin America and the Caribbean by 2020, but also that 100,000 students from Latin America and the Caribbean study in placements within the United States.⁹⁷ Finally, the United States Department of State also manages the “Passport to India” initiative, an initiative which began in early 2012 with a goal of increasing the number of American students not only studying abroad in India, but also gaining internship experience in the country as well.⁹⁸

While all of these general study abroad initiatives have received strong rhetorical backing from policymakers at the federal government level, the main question is where the financial backing for all of these efforts will come from. The Paul Simon Study Abroad Act has failed to make it through both houses of Congress in recent Congresses, thus significant funding has yet to be appropriated by Congress for all of the initiatives.

92. See President Barack Obama, *Remarks by President Barack Obama at Town Hall Meeting with Future Chinese Leaders*, WHITE HOUSE (Nov. 16, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-town-hall-meeting-with-future-chinese-leaders>.

93. *Id.*

94. *Id.* (“Indeed, because of our cooperation, both the United States and China are more prosperous and more secure”).

95. *Id.*

96. See *100,000 Strong Educational Exchange Initiatives*, *supra* note 46.

97. See *100,000 Strong in the Americas*, U.S. DEP’T OF STATE, <http://www.state.gov/p/wha/rt/100k/index.htm> (last visited Mar. 14, 2015).

98. See *Passport to India*, *supra* note 48.

Moving forward in the future, in a time where congressional gridlock is not too uncommon with debates over the federal budget⁹⁹ and budgetary requests are viewed under a careful congressional lens, it appears that such funding for study abroad initiatives will come from private sources.¹⁰⁰

Each of the Obama administration's study abroad initiatives within the past several years (100,000 Strong, 100,000 Strong in the Americas, and Passport to India) are being funded through private sources. The 100,000 Strong initiative, which seeks to increase the number of American students studying abroad in China, is no longer managed directly by the United States Department of State and instead is managed through an independent 100,000 Strong Foundation.¹⁰¹ A number of private companies and organizations are members of the Founder's Circle, including the Ford Foundation, Florence Fang Family Foundation, Citi, Coca-Cola, Laureate International Universities, Caterpillar, Wanxiang Group, and World Strides.¹⁰² The 100,000 Strong in the Americas initiative now primarily depends upon public-private partnerships for financially supporting the initiative's goals¹⁰³ and the Passport to India program fully relies on private sector support.¹⁰⁴

Despite questions as to whether the source of the future funding to promote study abroad will come primarily from private sources or from the federal government, rhetorically both the legislative and executive branches

99. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) ("Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary inaction. From tax cuts and the budget deficit, to immigration policy, to taking up key executive and judicial nominations, gridlock prevents Congress from acting on matters that undoubtedly rest within the proper realm of the federal government").

100. See Karin Fischer, *As White House Pushes Study Abroad in China*, CHRON. HIGHER EDUC. (Jan. 19, 2011), available at <http://chronicle.com/article/As-White-House-Pushes-Study/125999/>.

101. See *About Us*, 100,000 STRONG FOUNDATION, <http://100kstrong.org/about-us/> (last visited Jan. 19, 2015).

102. *Supporters*, 100,000 STRONG FOUNDATION, available at <http://100kstrong.org/about-us/supporters/> (last visited Jan. 19, 2015).

103. See *100,000 Strong in the Americas*, *supra* note 97 ("To implement the President's vision, the Department of State established a public-private partnership with *NAFSA: Association of International Educators*, the world's largest nonprofit association dedicated to international education, and *Partners of the Americas*, a leading voluntary and development agency with over 45 years of experience in the Americas. Our matching grant program leverages private and corporate giving so that universities and colleges can expand study abroad programs and make international study more broadly available. This unique public-private partnership will educate and prepare tomorrow's leaders through today's investment by corporations, schools, and governments who understand the value of connecting the hemisphere through its young people").

104. See *Passport to India*, *supra* note 48.

have been supportive of promoting study abroad programs and major policymakers have not seemed to emphasize any potential risks.

D. State Legislation Encouraging Study Abroad Programs

In addition to the legislation and initiatives introduced at the federal level, a number of states have had legislatures pass international education resolutions that encourage an increase in the number of American students studying abroad. According to NAFSA, at least twenty-three states have had at least one state legislative body pass a resolution recognizing the importance of international education programs.¹⁰⁵ Some of the resolutions encourage state higher education institutions not only to promote opportunities for students to study abroad, but to develop more courses in foreign languages and courses in the studies of foreign nations. For example, Nevada's Senate Concurrent Resolution No. 38, enacted in 2005, not only specifically promoted the development of study abroad opportunities for students, but also for the state's colleges and universities to "develop courses of studies in as many fields as possible to increase students' understanding of global issues and cultural differences."¹⁰⁶ In addition, the resolution also specifically called for the development of more courses in the study of foreign languages.¹⁰⁷

While many of these resolutions are largely hortative and do not provide funding earmarked for the development and expansion of study abroad programs specifically, they are indicative of a general trend among many states (as well as the legislative and executive branches of the federal government) that, in principle, studying abroad is a positive experience with many economic, cultural and social benefits. Despite the many claimed benefits of studying abroad, studying abroad is not an experience completely free from risk by any of the participants, nor are all educational and other nongovernmental entities who sponsor study abroad programs completely insulated from any and all potential liability for incidents that may occur overseas. In certain cases, particularly in some developing nations, the risks might very well be significant.

III. RISKS IN STUDY ABROAD PROGRAMS

A large percentage of American college and university students who study abroad generally report having positive experiences abroad. Two

105. See *State-level International Education Resolutions*, NAFSA, https://www.nafsa.org/Explore_International_Education/Advocacy_And_Public_Policy/State_Level_Initiatives/State-level_International_Education_Resolutions/#Florida (last visited Jan. 19, 2015).

106. See S. Con. Res. 38, 73rd Sess. (Nev. 2005), available at https://www.nafsa.org/_/File/_/nevada_resolution.pdf.

107. *Id.*

researchers with the Institute for the International Education of Students published the results of a landmark survey of approximately 17,000 former study abroad alumni in 2009 in the *Journal of Studies in International Education*.¹⁰⁸ The survey involved participants who studied abroad through programs associated with the Institute for the International Education of Students from 1950 to 1999.¹⁰⁹ The results of the survey indicated that a number of the respondents apparently experienced positive results for future career options following participation in study abroad programs. For example, 84% of global-career respondents and 69% of nonglobal-career respondents indicated that studying abroad “Allowed me to acquire a skill set that influenced my career path.”¹¹⁰ The authors concluded that “studying abroad truly does change one’s life” and that the results indicated “a sequence that students make, beginning with the resolution to study abroad that correlates with the lasting effect of developing a career with a global focus.”¹¹¹

There likely are other positive results that are not captured in the Institute for the International Education of Students survey, such as the possibility that lifelong intercultural friendships may be formed and the immeasurable experience of living in a foreign country. But amidst all of these positive aspects of studying abroad lie risks of various types. The risks of physical injury, sexual assault, abduction, extortion and kidnapping exist throughout the world. By studying abroad, a participant may also take the possible risk that medical care may not be as accessible as it is in one’s home institution. And in several cases, some of which have occurred in the last few years, students have died abroad while participating in study abroad programs. A wide variety of risks are present with overseas study abroad programs.¹¹²

Study abroad liability, however, has thus far remained a fairly amorphous area of doctrine in American jurisprudence as there are few

108. See Emily Mohajeri Norris & Joan Gillespie, INSTITUTE FOR THE INTERNATIONAL EDUCATION OF STUDENTS, *How Study Abroad Shapes Global Careers: Evidence From the United States*, 13 JOURNAL OF STUD. IN INT’L EDUC. 382 (2009).

109. *Id.* at 382.

110. *Id.* at 390.

111. *Id.* at 395.

112. See *Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workforce*, 106th Con. (Oct. 4, 2000) (statement of Mr. Brett Laquercia, Director, Business Development, Security Services, Kroll Risk Consulting Services, Inc.).

Mr. Laquercia stated the following in his testimony: “What are the risks that study abroad programs ought to anticipate and be prepared to mitigate and respond to? Simply stated, these risks include natural disasters; unsafe road and rail transit; terrorist acts; petty crime; carjacking; kidnapping; rape; homicide; civil unrest; coups d’état; extortion; official corruption; health hazards, and other threatening or disruptive situations.”

reported cases dealing with such liability. Yet, these risks have not gone without some type of response. Best practices have developed within the study abroad industry to attempt to minimize risks overseas. Educational and nongovernmental institutions have also adopted other risk management techniques, including expanding insurance options and implementing various safety standards for participants. Congress has investigated issues of safety in study abroad programs,¹¹³ and organizations such as the Clear Cause Foundation are calling for increased transparency concerning the risks involved in study abroad programs.¹¹⁴ The risks may present themselves in several different forms.

A. Major Types of Risks Potentially Involved

1. Physical Injuries

The risk of general physical injury is an ever-present one for American students studying abroad. A general physical injury potentially can occur during sponsored program activities, or an injury might result allegedly due to the actions of others in a program. One of the early reported cases addressing liability in an overseas program, *Furrh v. Arizona Board of Regents*, involved allegations by a participant of assault by fellow participants during an ecology field trip in Mexico.¹¹⁵ In *Furrh*, a university professor took students on a university-sponsored ecology field trip to Baja California, Mexico.¹¹⁶ The crux of the plaintiff's allegations in *Furrh* involved assertions that the professor and another employee of the university assaulted him and unlawfully restrained him during the trip.¹¹⁷ The trial court found for the defendants on the basis that the plaintiff created a potentially serious harm to others on the trip due to an apparent chronic mental and emotional disorder,¹¹⁸ and that the defendants' actions in restraining the plaintiff until his father arrived were protective measures for others in the group.¹¹⁹ On appeal, the Arizona Court of Appeals upheld the trial verdict for the defendants, holding "that where a person is a danger to himself or others because of his mental condition, that it is lawful to restrain him so long as necessary until other lawful measures can be followed."¹²⁰ Of particular note, the incidents alleged in *Furrh* occurred in a remote desert area of Baja California and that testimony revealed that the

113. *See generally id.*

114. *See About Us*, CLEAR CAUSE FOUND., <http://clearcausefoundation.org/about-us/> (last visited Jan. 19, 2015).

115. *See Furrh v. Ariz. Bd. of Regents*, 676 P.2d 1141 (Ariz. Ct. App. 1983).

116. *Id.* at 1142.

117. *Id.*

118. *Id.*

119. *Id.* at 1144.

120. *Id.* at 1146.

dangers of cholla cactus and rattlesnakes were around the group.¹²¹

General physical injuries may result from hazardous conditions in the region where the participant is studying. Some of these may result in the loss of life. The 1996 incident where four American students lost their lives studying abroad in India took place on a bus, which was allegedly traveling on treacherous roads.¹²² In a 1997 incident, an Ohio State University student died following altitude sickness after an expedition in the Himalayas apparently run by a university professor.¹²³ In late 2012, as mentioned earlier, a University of Virginia student died while in a boating accident in the Caribbean.¹²⁴

2. Sexual Harassment and Sexual Assaults

It has been reported that approximately one in four women will have experienced a sexual assault while attending a college or university.¹²⁵ The problem of sexual assault is not one that only occurs on college and university campuses within the United States; incidents have reportedly occurred abroad as well. In one tragic 1998 case, five female students from St. Mary's College of Maryland were raped in a remote area of Guatemala after their bus was stopped by a group of bandits.¹²⁶ Incidents of sexual harassment and sexual assaults abroad, just like the risk that participants incur other physical injuries, can increase a college or university's exposure to potential liability through an overseas study abroad program.

Reported cases including allegations of negligence against colleges or universities following reported sexual harassment and sexual assault abroad have concluded with varying liability outcomes. In the case of state colleges or universities, sovereign immunity may apply. Traditionally, states enjoyed the broad protection of sovereign immunity.¹²⁷ Today, each of the fifty states has a statute, which at least partially waives a state's sovereign immunity in certain cases.¹²⁸ A number of individual states confer immunity to states or state entities in cases of a state or state entity exercising "discretionary" functions, as opposed to cases where a state

121. *Id.* at 1142.

122. *See* Amato, *supra* note 1.

123. *See* French, *supra* note 6.

124. *See* Valentine, *supra* note 8.

125. *See* Justin Neidig, Note, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179 (2009).

126. *See* French, *supra* note 6.

127. *See* Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 44 (2006).

128. *See* Cassandra R. Cole & Chad G. Marzen, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, 32 J.OF INS. REG. 44, 48 (2012).

government or state entity's actions are "ministerial" or "operational" in character.¹²⁹

The case of *Bloss v. University of Minnesota Board of Regents* involved application of the state of Minnesota's sovereign immunity statute following allegations by a student of a sexual assault while participating in a university-sponsored study abroad program.¹³⁰ In *Bloss*, a student who was participating in a study abroad program in Cuernavaca, Mexico through the University of Minnesota was reportedly raped by a taxi driver on the way from a social event to the home of her host family.¹³¹ The student claimed the university was negligent in several ways concerning the study abroad program, including allegedly failing to secure a host family closer to the study abroad campus, failing to provide transportation, failing to warn, and failing to protect participants from foreseeable injuries.¹³² While the student had signed an exculpatory clause prior to participation and the university raised the release as a defense at the trial level, the Minnesota Court of Appeals focused on the defense of sovereign immunity in its analysis after the trial court held the release was overbroad and that sovereign immunity did not apply as it held the university's conduct at issue was "ministerial" in nature.¹³³

On appeal, the Minnesota Court of Appeals held Minnesota's sovereign immunity statute applied to bar plaintiff's claims against the university.¹³⁴ Minnesota is one of the states that distinguishes between discretionary duties of state officials and agents, which are "planning level" activities, versus "operational level" activities.¹³⁵ If an activity is a "planning level" activity, immunity is conferred; however, immunity does not apply to "operational level" activities.¹³⁶

As to the plaintiff's allegations concerning the proximity of student housing, the Court found that housing decisions of the university were "planning" and involve "cost balancing, housing market considerations, and social and educational consequences."¹³⁷ The Minnesota Court of Appeals also held that transportation decisions were "planning" and involve similar policy considerations, and that the university generally is

129. See *State Sovereign Immunity and Tort Liability*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 8, 2010), http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx#Note_1.

130. See *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999).

131. *Id.* at 662–63.

132. *Id.* at 663.

133. *Id.*

134. *Id.* at 667.

135. *Id.* at 664; see also generally MINN. STAT. § 3.736 (2013).

136. *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661, 664 (Minn. Ct. App. 1999).

137. *Id.* at 665.

“protected from litigation that seeks to interfere with its discretionary functions in designing and constructing an academic program.”¹³⁸ Finally, the Court noted that the university provided information concerning safety at an orientation session, and for the Court “[t]o rebalance the extent of the warnings would represent judicial interference with executive policy-making. . . .”¹³⁹ Thus, the Minnesota Court of Appeals reversed the trial court’s denial of sovereign immunity and in essence protected the university from liability in the case.¹⁴⁰

Outside of potential general negligence liability a private or public college or university might incur concerning a study abroad program, with regard to the risk of sexual harassment and sexual assaults, a college or university receiving federal financial assistance may incur liability under Title IX. Despite the presence of a potential Title IX liability risk, the contours and application of such liability are unsettled. Under 20 U.S.C. § 1681, “No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”.¹⁴¹ It is an unsettled question of law as to whether Title IX has extraterritorial application to campuses abroad that host study abroad programs.

In perhaps the first reported case on the question of the application of Title IX to a study abroad program overseas, the United States District Court for the Eastern District of Michigan held Title IX applied to a college or university-sponsored study abroad program in South Africa in *King v. Board of Control of Eastern Michigan University*.¹⁴² In the *King* case, several female students sued a state university after they alleged several students on the same five-week study abroad program in South Africa sexually harassed them.¹⁴³ The female students alleging the harassment also claimed the university professor on the trip and the university in general did not take appropriate actions to address the harassment.¹⁴⁴ In holding that Title IX applied to the allegations in the case, the *King* court focused on the textual language of 20 U.S.C. § 1681, holding that it applies to “any education program or activity.”¹⁴⁵ In addressing the university’s argument, which focused on the textual language “no person in the United States,” the Court reasoned that “study abroad programs are operations of

138. *Id.* at 665–66.

139. *Id.* at 666.

140. *Id.* at 667.

141. 20 U.S.C. § 1681 (2014).

142. *See King v. Bd. of Control of Eastern Mich. Univ.*, 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002).

143. *Id.* at 784.

144. *Id.* at 785–86.

145. *Id.* at 788.

the University which are explicitly covered by Title IX and which *necessarily* require students to leave U.S. territory in order to pursue their education.”¹⁴⁶

While the court in *King* extended Title IX liability to cover allegations of sexual harassment which occur in a college or university-sponsored study abroad program, it is important to note that the allegations in *King* involved sexual harassment by participants in a study abroad program against other participants in the same program. That leaves a question as to whether Title IX applies extraterritorially in a situation where a third party, unaffiliated with the study abroad program, sexually harasses or sexually assaults a participant(s) of a study abroad program overseas.

The United States Western District of Kentucky answered this question in the negative in *Mattingly v. University of Louisville*.¹⁴⁷ In *Mattingly*, a female student and participant in a university-sponsored study abroad program claimed she was raped by a Portuguese man unaffiliated with the university or the study abroad program.¹⁴⁸ Interpreting a series of Title IX decisions, the *Mattingly* court noted the university could only be held liable for harassment or assault by a third party if it has actual notice of the harassment or assault and then acts with “deliberate indifference” in responding to the notice.¹⁴⁹ Examining the facts of *Mattingly*, the Western District of Kentucky noted that the case before it appeared to be the first case involving a sexual assault by a third party¹⁵⁰ in that particular university program,¹⁵¹ and that no evidence was presented to the court which indicated a “clearly unreasonable” response by the university.¹⁵² However, the *Mattingly* court left open the possibility that if a university or college “knows of repeated incidents of harassment,” liability under Title IX could occur.¹⁵³ Just over one year following the *Mattingly* court’s

146. *Id.*

147. *See Mattingly v. Univ. of Louisville*, No. 3:05CV-393-H, 2006 WL 2178032, at *5 (W.D. Ky. July 28, 2006).

148. *Id.* at *1.

149. *Id.* at *4.

150. For a more extensive discussion concerning the issue of sexual harassment by third-parties, *see* Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 451 (1994) (comprehensively addressing the issue of sexual harassment by third-parties and proposing a policy “for preventing and handling this type of employee sexual harassment.”).

151. *See Mattingly*, 2006 WL 2178032, at *5.

152. *Id.* at *4.

153. *Id.* at *5 (“The situation could be different if a third-party harasser like [name of alleged harasser] assaulted U of L students on more than one occasion. In that situation, a college or university would have considerably more control over the

decision, the United States District Court for the Eastern District of New York also held that Title IX did not apply extraterritorially.¹⁵⁴

The split in caselaw concerning Title IX liability leaves many future questions of a college or university's study abroad liability for sexual harassment or assaults. The *King* case opens the door for Title IX claims when the alleged sexual harassment or assault is committed by participants in a study abroad program against other participants. As *Mattingly* seems to indicate, if a college or university knows of multiple instances of sexual harassment or assault of participant(s) in a study abroad program, then Title IX liability may result from acts of unaffiliated third parties. In cases involving state colleges or universities, sovereign immunity may apply to—in effect—bar negligence or Title IX claims for discretionary decisions of a college or university concerning a study abroad program.

3. Medical Care

Another potential risk of liability colleges or universities may face is that of securing and ensuring adequate medical care is available for participants in a study abroad program. In some locations, this may be difficult to do. However, at least one court¹⁵⁵ has juxtaposed allegations of a failure to supervise medical care for a participant to the *in loco parentis* doctrine.¹⁵⁶ The case of *McNeil v. Wagner College* involved a student who slipped and fell on ice during an overseas program in Austria arranged by her college.¹⁵⁷ The plaintiff apparently suffered nerve damage following the incident and alleged the college negligently supervised medical care for her in Austria.¹⁵⁸ In upholding a trial court's summary judgment for the college, an appellate court in New York noted that New York previously rejected the *in loco parentis* doctrine for college and university students and that a duty of the overseas program to supervise the plaintiff's health

context in which the alleged harassment occurs. Where a college or university knows of repeated instances of harassment, it has the ability and the duty to take added safety precautions and to assert strict control over the behavior of its own students in order to prevent further abuse in the future. The Court expresses no opinion about a college or university's liability in that situation.”).

154. See *Phillips v. St. George's Univ.*, No. 07-CV-1555, 2007 WL 3407728, at *4 (E.D.N.Y. Nov. 15, 2007).

155. See *McNeil v. Wagner College*, 667 N.Y.S.2d 397, 398 (App. Div. 1998).

156. See John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 713 (2013) (“*In loco parentis* literally means ‘in the place of a parent.’ The doctrine, according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.”).

157. See *McNeil*, 667 N.Y.S.2d at 398.

158. *Id.*

care did not exist because of the rejection of the doctrine.¹⁵⁹

4. Abduction and Kidnapping

In many developing and least developed nations, foreign travelers, tourists and students may be at risk for abduction, extortion or kidnapping. While accurate worldwide statistics on kidnappings and abductions are difficult to compile, as most victims do not report the crime, in 2012 the *New York Times* reported that kidnappings worldwide are on the rise.¹⁶⁰ Nearly seventy-five percent of all kidnappings occur in Latin America,¹⁶¹ and many drug cartels and other criminal gangs in Latin America have moved from the business of drugs into kidnappings for ransom.¹⁶² While a vast majority of kidnappings do not involve study abroad participants, the “express kidnapping” phenomenon is a potential risk.¹⁶³ In an “express kidnapping,” a person is typically abducted, held up over a threat of violence and forced to pay a quick ransom.¹⁶⁴

The emerging market of kidnapping and ransom insurance policies offer one response to the potential threat of kidnappings and abduction abroad.¹⁶⁵ The key benefit of a kidnapping and ransom insurance policy is that it can secure reimbursement of costs of a ransom amount,¹⁶⁶ among other

159. *Id.*

160. See David Wallis, *The Business of Dealing with Kidnapping Abroad*, N.Y. TIMES, May 2, 2012, http://www.nytimes.com/2012/05/03/business/kidnapping-becomes-a-growing-travel-risk.html?pagewanted=all&_r=0.

161. See Caroline Gray McGlamry, Note, *Kidnappers Without Borders: An Epidemic in Need of Global Solutions*, 40 GA. J. INT'L & COMP. L. 807, 809 (2012) (“Among the areas of the world where this practice has become most prevalent, Latin America stands out as the most dangerous for kidnappings. Although Latin America constitutes only about 8% of the world’s population, almost 75% of all kidnappings take place there, including 80% of kidnappings-for-ransom.”).

162. See Darren Prum & Chad G. Marzen, *Set Up for Abduction and Extortion by the IRS: Does the Reporting of Interest Paid on U.S. Bank Deposits Undermine the Government’s Obligation to Avoid Instigating Terrorism by Foreign Criminal Gangs and Drug Cartels?*, 20 TEX. HISP. J.L. & POL’Y 1, 22 (2014).

163. See *What is the Crisis Response Benefit?*, HCC MEDICAL INSURANCE SERV., <https://www.hccmis.com/what-is-the-crisis-response-benefit/index.html> (last visited Mar. 4 2015).

164. *Id.*

HCC Medical Insurance Services notes that “The University of California warns students in its study abroad program of the growing frequency of express kidnappings. This could occur when a seemingly trustworthy native temporarily abducts and forces an unsuspecting student to surrender an easily-accessible ransom in exchange for release.” *Id.*

165. See Wallis, *supra* note 160 (reporting that “insurance companies say business [in kidnapping and ransom insurance] is brisk.”).

166. See Samantha Kenney, Comment, *Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America*, 14 CONN. INS. L.J. 557, 559 (2008).

kidnapping and abduction-related expenses that may be incurred by the family and/or loved ones of an individual kidnapped or abducted.¹⁶⁷ A number of colleges and universities are also procuring kidnapping and ransom insurance policies to cover participants in study abroad programs. A 2007 article in the *Chronicle of Higher Education* noted the purchases of kidnapping and ransom insurance coverage by colleges and universities to cover study abroad programs generally have increased,¹⁶⁸ recognizing a salient risk for study abroad program participants.

5. Accommodation of Disabilities

Another area where a college or university may incur liability concerning the operations of a study abroad program is through inadequate accommodation of participants with disabilities. Such liability may occur through the Rehabilitation Act, Americans with Disabilities Act, or through state law claims typically sounding in negligence or through a breach of duty. The case of *Bird v. Lewis & Clark College* illustrates the potential liability a college or university may incur through federal and state law.¹⁶⁹ In the *Bird* case, a paraplegic student alleged that her college violated the Rehabilitation Act, Americans with Disabilities Act, and breached its fiduciary duties in failing to reasonably accommodate disabilities during an overseas study abroad program in Australia.¹⁷⁰ The student had become paraplegic following an automobile accident that occurred while she was enrolled in college.¹⁷¹ While on campus, the college had made accommodations for her, including installing ramps in her dormitory building and changing the biology lab where she worked to be paraplegic accessible.¹⁷²

The *Bird* case is perhaps the most notable study abroad case illustrating

167. *Id.* at 561–62 (“These four reimbursement components are as follows: (1) reimbursement of any ransom paid; (2) reimbursement for expenses related to securing the release of a kidnap victim or resolution of extortion threat; (3) reimbursement of expenses relating to securing the release of a detained or hijacked victim; and (4) reimbursement of money lost when being delivered as ransom. The fifth, non-reimbursement component of a K & R policy is access to security consultants for preventative measures as well as access to individuals experienced in hostage negotiation, risk management and crisis response in the event of an abduction.”) *See also* Meadow Clendenin, Comment, “No Concessions” with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy, 56 EMORY L.J. 741, 751–52 (2006) (discussing various policy coverage).

168. *See* Martin Van Der Werf, *A Wide World of Risk*, CHRON. OF HIGHER EDUC. (Mar. 30, 2007), <http://chronicle.com/article/A-Wide-World-of-Risk/28323>.

169. *See* *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002).

170. *Id.* at 1017.

171. *Id.*

172. *Id.*

potential liability under both the Rehabilitation Act as well as the Americans with Disabilities Act. Pursuant to 29 U.S.C. § 794(a), the Rehabilitation Act prohibits disability discrimination by entities receiving federal funds.¹⁷³ The Rehabilitation Act states that no person 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” by any entity which receives federal funds.¹⁷⁴ Similarly, Title III of the Americans with Disabilities Act prohibits disability discrimination in public accommodations and requires “reasonable modifications” to policies and practices to accommodate those with disabilities.¹⁷⁵

The student enrolled in her college’s spring overseas program and was apparently told by the director of the overseas program that the program would be able to accommodate her disability.¹⁷⁶ The underlying facts of the case indicated that the college made at least some efforts to accommodate her disability by hiring two students enrolled in the program to be helpers, provided the student with alternative transportation, and provided a special shower head and sleeping cot according to her requirements.¹⁷⁷ While the student was able to take part in a number of outdoor activities,¹⁷⁸ she was unable to participate in all activities.¹⁷⁹ In what appears to be a response to being unable to participate in all of the activities, the student filed a disability discrimination suit against the college.¹⁸⁰ At the trial court level, a jury in Oregon found for the college on the plaintiff’s Rehabilitation Act and Americans with Disabilities Act claims, but for the plaintiff on a breach of fiduciary duty claim.¹⁸¹

Examining the plaintiff’s Rehabilitation Act and Americans with Disabilities Act claims, on appeal the United States Court of Appeals for the Ninth Circuit held that the college met its duty to reasonably

173. 29 U.S.C. § 794(a) (2014).

174. *Id.*

175. 42 U.S.C. § 12182(a) (2014). The statute states: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.*

176. *See* *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1017 (9th Cir. 2002).

177. *Id.* at 1018.

178. *Id.* at 1018–1019 (“[The plaintiff] otherwise participated in a number of class activities. She toured the Sydney Harbor, visited an archeological site near the Harbor, and was able to access the classrooms at the University of Sydney. [The plaintiff] traveled to an aboriginal community at Jervis Bay, and went on excursions at Heron Island, Stradbroke Island, and Carnarvon Gorge National Park.”).

179. *Id.* at 1017 (“Not every aspect of the program conformed to her requirements. At some 22 locations, [the plaintiff] did not have full wheel-chair access.”).

180. *Id.* at 1019.

181. *Bird*, 303 F.3d at 1019.

accommodate the plaintiff and it “did not necessarily fail to make reasonable modifications simply because some aspects of the program did not conform to [the plaintiff’s] expectations.”¹⁸² However, the Ninth Circuit Court of Appeals upheld the district court’s finding that a “special relationship” existed between the plaintiff and the college and thus the jury could find for the plaintiff on a breach of fiduciary duty claim.¹⁸³ The Ninth Circuit focused on the fact that apparently on a number of occasions the college assured the plaintiff accommodations for the disability would be made, particularly for most of the outdoor trips.¹⁸⁴

The major implication of the *Bird* case is that university or college study abroad programs may be held liable on breach of fiduciary duty claims by students, and these claims may not only necessarily arise out of representations concerning accommodations during a program. Take the hypothetical situation of a faculty member who has the responsibility to administer a college or university study abroad program and makes specific assurances or representations to a participant as to general program safety abroad, and the participant suffers an injury abroad. Is there a breach of a fiduciary duty if that student participant had taken that faculty member in one or two prior classes, and the faculty member was a general mentor for the student? As one commentator has noted, despite general rejection of the *in loco parentis* doctrine in many states, courts are trending toward finding fiduciary relationships between college and university faculty and students¹⁸⁵ in cases where the elements of a fiduciary relationship have been met.¹⁸⁶ Depending upon the circumstances of each individual case involving an injury of a participant in a college or university study abroad

182. *Id.* at 1021.

183. *Id.* at 1023–1024.

184. *Id.* at 1023.

185. See Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 158 (2002) (“In the last five years, courts have begun to find more legitimacy in fiduciary duty claims against universities and colleges. With more fact-specific claims, student plaintiffs are becoming more successful at establishing the elements necessary to show the existence of these relationships. There are numerous cases in which courts reject the notion of fiduciary duty. But in these cases, plaintiffs lost because they were not able to prove the necessary elements of a fiduciary duty (such as the creation of a special trust relationship), or because the defendant university or college affirmatively proved the absence of the necessary elements.”).

186. *Id.* at 154–55 (“Certain basic elements are necessary to establish a fiduciary relationship: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.”).

program, breach of fiduciary duty claims may be viable. Even if a court does not find a fiduciary relationship in such a situation, a college or university study abroad program might still be found liable under a simple breach of contract claim.

B. The Response to Risks

All of the foregoing risks have brought attention to the quality and safety in study abroad programs. In 2000, a congressional committee held a hearing on safety and risk in foreign study abroad programs. The study abroad industry has also formulated industry standards and best practices for college/university study abroad programs. Finally, many colleges and universities have increased insurance coverage for study abroad programs and have implemented other risk management techniques to minimize liability risk.

1. October 4, 2000 Hearing on Safety in Study Abroad Programs

Responding to news reports of accidents and safety issues in study abroad programs, Congressman Peter Hoekstra called a hearing on October 4, 2000 before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Education and the Workforce with a focus on the topic of safety in study abroad programs. The Subcommittee heard testimony from a diverse group of individuals, which included Mr. John Amato, an attorney whose daughter was one of the participants killed in the tragic 1996 Semester at Sea incident in India; Mr. Peter McPherson, the President of Michigan State University; and Dr. David Larsen, the Director of the Center for Education Abroad of Beaver College, among others.¹⁸⁷

Mr. Amato's testimony covered not only the facts of his daughter's death in the 1996 Semester at Sea program, but also the response of the Semester at Sea Program and the university that sponsored the program.¹⁸⁸ Mr. Amato contended that the "university did not have in place a system ensuring that all critical life safety issues were addressed by real safety experts" and remarked that "study-abroad programs suffer a problem of systemic proportions within an industry where responsibility for life safety has been treated as a secondary rather than the most important,

187. See *Study Abroad Programs: Hearing on Safety in Study Abroad Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (Oct. 4, 2000).

188. See Amato, *supra* note 1, at 6.

fundamental issue underlying the entire study-abroad system.”¹⁸⁹ Mr. Amato also called for Congress to enact a uniform standard of liability enforceable in federal court to apply in cases of study abroad liability and for additional safety regulations.¹⁹⁰

In contrast to Mr. Amato’s critique of study abroad programs, Mr. McPherson of Michigan State University testified that in the prior five years Michigan State University had approximately 7,800 students study abroad and none incurred serious injuries or accidents.¹⁹¹ He opined that he believed colleges and universities were generally following emerging national voluntary community standards with regards to study abroad programs.¹⁹² Mr. Larsen not only testified that he believed the discussion over safety issues in study abroad programs should continue, but he also expressed the belief that education concerning safety issues was of more importance than the passage of specific legislation.¹⁹³

Since the hearing in 2000, Congress has seemingly adopted Dr. Larsen’s view as to specific legislation and Congress has not passed any specific legislation implementing additional federal regulations concerning safety in study abroad programs or implementing any federal standard of liability. In fact, Congressman Hoekstra, who called the hearing in 2000, expressed a concern in his opening remarks “that there may be a sizable gap between the best and the worst run study abroad programs.”¹⁹⁴ Despite these concerns, Congressman Hoekstra has also noted the implementation of a federal standard of liability would cripple overseas programs.¹⁹⁵

2. Current Industry Standards

The study abroad industry has also made efforts to respond to the risks posed in overseas study abroad programs. In November 2002, NAFSA: Association of International Educators published a report entitled

189. *Id.* at 54.

190. *Id.* at 56.

191. *See Study Abroad Programs: Hearing on Safety in Study Abroad Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. (Oct. 4, 2000) (statement of Peter McPherson) [hereinafter McPherson].

192. *Id.* at 10.

193. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. 11–14 (Oct. 4, 2000) (statement of David Larsen).

194. *See Safety in Study Abroad Programs: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Education and the Workplace*, 106th Cong. 2–3 (Oct. 4, 2000) (statement of Rep. Peter Hoekstra).

195. *See* Mary Beth Marklein, *Students studying abroad face dangers with little oversight*, USA TODAY (May 28, 2009), http://usatoday30.usatoday.com/news/education/2009-05-27-study-abroad-main_N.htm.

“Responsible Study Abroad: Good Practices for Health and Safety.”¹⁹⁶ The report, drafted by the Interorganizational Task Force on Safety & Responsibility in Study Abroad (comprised of representatives from study abroad providers and professional organizations), outlined a number of “aspirational” guidelines colleges, universities and study abroad providers can implement to better ensure the health and safety of participants in programs.¹⁹⁷

One of the report’s key recommendations included not only disclosing adequate health and safety information for potential participants in order to make informed decisions on overseas programs, but also for colleges, universities and program sponsors to conduct orientation sessions for participants to discuss and disclose potential risks with regards to “safety, health, legal, environmental, political, cultural and religious conditions” in the country(ies) where the participants will study abroad.¹⁹⁸ In addition, the report called upon colleges, universities and program sponsors to properly investigate and hire reputable program vendors and contractors overseas, conduct periodic audits on all overseas study abroad programs in the areas of health and safety, and also to develop and maintain crisis management and response plans in the event emergency situations arise.¹⁹⁹ Finally, the report advised that all participants in overseas programs be insured, including being covered by health and travel accident insurance.²⁰⁰ To date the standards are only voluntary and aspirational, and are not in any way legally binding to any overseas study abroad programs.

3. Insurance and Other Risk Management Techniques

One common risk management technique many colleges, universities and sponsors of overseas study abroad programs utilize is requiring participants to sign waiver and release agreements in which a participant acknowledges they comprehend and understand the risks involved.²⁰¹ Despite their utilization, waivers and releases of tort liability are typically viewed with scrutiny by the courts. As two commentators note, if a release fails to be clear and unequivocal, attempts to release gross/willful

196. See *Responsible Study Abroad: Good Practices for Health and Safety*, NAFSA (Nov. 2002), available at http://www.nafsa.org/uploadedfiles/responsible_study_abroad.pdf [hereinafter NAFSA I].

197. *Id.*

198. *Id.*

199. *Id.* See also Long, *supra* note 27 (contending that educational institutions should always “address the immediate needs of program participants” in disaster situations and discussing specific items that educational institutions should complete to minimize risk).

200. *Id.* See also NAFSA I, *supra* note 196.

201. See Hoye & Rhodes I, *supra* note 20, at 158 (discussing the utilization of waivers as a risk management tool for a college or university).

negligence or intentional conduct, results from a vast disparity in bargaining power, or adversely affects the public interest, then courts tend to refuse to enforce the agreement.²⁰²

In the specific context of releases in study abroad agreements, the *Fay v. Thiel College*²⁰³ case illustrates the scrutiny courts place on such contracts. In the *Fay* case, the student participant took part in a study abroad trip to Peru.²⁰⁴ During the trip, the student reportedly fell ill and a Peruvian doctor allegedly unnecessarily removed her appendix in an operation.²⁰⁵ After the appendectomy, the student also was allegedly sexually assaulted at the Peruvian medical clinic where the operation took place by the doctor and an anesthesiologist.²⁰⁶ The plaintiff filed suit against the college following the alleged incidents.

The college filed for summary judgment, contending a waiver released any claims against it relating to the study abroad trip.²⁰⁷ The waiver stated the following language:

As a condition of my participation in the study or project, I understand and agree I am hereby waiving any and all claims arising out of or in connection with my travel to and from and/or my participation in this project or study that I, my family, my heirs or my assigns may otherwise have against Thiel College and/or its personnel.²⁰⁸

Examining Pennsylvania law, a Pennsylvania trial court noted that one of the requirements of upholding the validity of a waiver is that both of the parties have bargaining authority.²⁰⁹ In declining to uphold the validity of the waiver, the trial court noted that the plaintiff had no power to alter the terms of the form.²¹⁰ Furthermore, similar to the *Bird* case, the court also

202. See Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 580–581 (2003) (“When a release is used in conjunction with an activity that is of great importance to the public, that cannot be obtained elsewhere and that involves a significant disparity in the bargaining ability of the parties, courts will seldom enforce the release. Using a number of legal theories to reach this result, courts will not enforce a release if the agreement: (A) affects the public interest; (B) results from a significant disparity of bargaining power; (C) seeks to avoid liability for willful or grossly negligent acts or intentional torts; or (D) expresses the exculpatory intent in ambiguous and inconspicuous language.”).

203. *Fay v. Thiel Coll.*, 55 Pa. D. & C. 4th 353 (Pa. Ct. C.P. Dec. 31, 2001).

204. *Id.* at 355.

205. *Id.* at 356.

206. *Id.*

207. *Id.* at 357.

208. *Fay*, 55 Pa. D. & C. 4th, at 357–58.

209. *Id.* at 358.

210. *Id.* at 360–61 (“The terms of the waiver of liability form were not bargained for by plaintiff and, in fact, plaintiff had no choice in the terms and provisions. Plaintiff

found a “special duty” of care existed between the college and the student.²¹¹ Thus, while a waiver or release might be one step to take for a college or university to exercise risk management covering study abroad program, it is not always that effective.

Other steps may be more effective. A number of colleges, universities and overseas program sponsors have taken a proactive approach in attempting to reduce risk by implementing orientation requirements for participants.²¹² These orientation requirements can include discussion of potential risks in the programs and also to prepare students for the adjustment in cultural norms overseas.²¹³ Orientations are not only completed now through mandatory meetings; with the growth of technology a number of colleges and universities offer online orientation videos and some have mandatory Prezis on course management systems such as Blackboard.²¹⁴ College and universities can also require students to sign college or university codes of conduct prior to overseas travel to better regulate risky behavior overseas that may be the result of a participant’s own actions.²¹⁵ All of these requirements can be continuously monitored and reviewed by college and university task forces and committees.²¹⁶

Some colleges and universities require individuals to carry health insurance while studying abroad.²¹⁷ For example, in his congressional testimony in 2000, President Peter McPherson of Michigan State University testified that every student at Michigan State University is required to obtain medical insurance before studying abroad and that MEDEVAC facilities are made available to students in countries where

simply executed the waiver of liability form, which she was powerless to alter, because she was told that she had to sign that form in order to go on the study abroad trip to Peru. Because rejecting the transaction entirely was plaintiff’s only option other than accepting the contract with the exculpatory clause, this court finds that the subject waiver of liability form is a contract of adhesion.”).

211. *Id.* at 363 (“After carefully reviewing all of the evidence of record, this court concludes as a matter of law that [the college] did owe plaintiff a special duty of care as a result of the special relationship that arose between [the college] and plaintiff pursuant to the consent form that she was required to execute prior to participating in the [college]-sponsored trip to Peru. Pursuant to the consent form, and in the event that plaintiff became sick or injured, the faculty supervisors had a duty to “secure whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.”).

212. *See* Van Der Werf, *supra* note 168.

213. *See* NAFSA I, *supra* note 196.

214. *See Pre-Departure Requirements*, NORTHWESTERN UNIV. STUDY ABROAD, <http://www.northwestern.edu/studyabroad/outbound-students/pre-departure-requirements/> (last visited Jan. 25, 2015).

215. *See* NAFSA I, *supra* note 196.

216. *See* McPherson, *supra* note 191.

217. *See* Hoye I, *supra* note 20; Long, *supra* note 27 (discussing various types of insurance coverage as a risk management tool for educational institutions).

traditional medical care is difficult to obtain.²¹⁸ As noted earlier, kidnapping-and-extortion insurance coverage is also becoming more popular for universities and colleges to obtain for all participants as well.²¹⁹ Also, some colleges and universities have gone even further and have obtained special insurance coverage for emergency evacuations, which may apply in the event of calamitous natural disasters, political instability, or following terrorist attacks or the outbreak of political violence and/or armed conflict.²²⁰

An increasing number of colleges and universities are also hiring full-time health and safety analysts or international risk managers who specialize specifically in safety and compliance issues for international programs.²²¹ In 2007, three universities had such administrative positions; a 2013 *Inside Higher Education* article interviewed an expert who noted there may be 100 such positions throughout the United States.²²² This same article noted that at many smaller colleges and universities someone on staff or a group of staff members may carry responsibility for emergency response incidents overseas, such as Director or Assistant Director in a study abroad office.²²³

Finally, the stated goal of many policymakers and education professionals to promote overseas study in developing countries lies in tension with the safety risks some of these nations may present. The United States Department of State issues travel alerts to notify travelers of “short-term” events in specific countries, such as health outbreaks or the threat of political strikes or terrorist attacks.²²⁴ The State Department also issues travel warnings in cases when the department wants an individual to consider “very carefully” whether to even proceed with travel due to the

218. See McPherson, *supra* note 191, at 10.

219. See Van Der Werf, *supra* note 168.

220. *Id.*

221. See Elizabeth Redden, *Increasing number of universities are creating international health, safety and security-related positions*, *INSIDE HIGHER ED* (July 24, 2013), <https://www.insidehighered.com/news/2013/07/24/increasing-number-universities-are-creating-international-health-safety-and-security>.

222. *Id.*

223. *Id.*

224. See *Alerts and Warnings*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/content/passports/english/alertswarnings.html> (last visited Jan 25, 2015).

The State Department describes a “Travel Alert” as follows:

We issue a Travel Alert for short-term events we think you should know about when planning travel to a country. Examples of reasons for issuing a Travel Alert might include an election season that is bound to have many strikes, demonstrations, or disturbances; a health alert like an outbreak of H1N1; or evidence of an elevated risk of terrorist attacks. When these short-term events are over, we cancel the Travel Alert.

possibility of an “unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks,” in essence giving official notice to all travelers of significant potential dangers in a nation.²²⁵ A number of colleges, universities and other program sponsors monitor these alerts and warnings, and some colleges and universities do not sponsor or allow participation in nations that have received a travel warning from the State Department.²²⁶ A growing number of colleges and universities do not completely bar student participation in programs in countries which are under a travel warning today, but rather typically require a “travel permission” to be received from the college or university risk assessment committee following a review of all the risk issues before proceeding to study.²²⁷

Despite all of these risk management efforts, the state of study abroad liability remains very nebulous, depending upon jurisdiction, with no firm national standards in place.

IV. POSSIBLE FEDERAL REMEDIES FOR STUDY ABROAD LIABILITY

The current landscape of liability of a sponsor or organizer of a study abroad program varies from jurisdiction to jurisdiction. Some jurisdictions may view exculpatory agreements/waivers with more scrutiny than other jurisdictions. In some states, sovereign immunity statutes may operate to immunize the discretionary functions of a public college or university, but such statutes do not apply to private colleges or universities or other entities. With a lack of reported cases on the subject of study abroad liability, varied liability outcomes may be a future norm. Many of the reported cases are decided largely on state law claims, including negligence.

The issue of state versus federal regulation is a contentious one in a number of legal areas. The issue of immigration to the United States is an

225. *Id.*

The State Department describes a “Travel Warning” as follows:

We issue a Travel Warning when we want you to consider very carefully whether you should go to a country at all. Examples of reasons for issuing a Travel Warning might include unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks. We want you to know the risks of traveling to these places and to strongly consider not going to them at all. Travel Warnings remain in place until the situation changes; some have been in effect for years.

226. See Adrian Beaulieu, *Sample Institutional Practices for Using State Department Travel Warnings*, NAFSA (Oct. 20, 2006) (on file with author).

227. See NAFSA Health and Safety in Education Abroad Subcommittee, *Travel Warning Policy Survey Results*, NAFSA (Spring 2011), available at https://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Networks/AREA1/Travel%20Warning%20Survey%20Report.pdf.

issue that certainly touches on international concerns.²²⁸ There is much debate over the proper role of federal regulation as opposed to state regulation,²²⁹ and the recent 2012 decision of the United States Supreme Court in *Arizona v. United States* on the validity of Arizona's S.B. 1070²³⁰ has left open questions of preemption of federal law over state law in the immigration context.²³¹ Outside of immigration law and policy, the area of foreign affairs in the United States has been held by courts in the United States to be largely an area of federal concern.²³²

The issue of study abroad liability arguably touches upon international affairs and advocates of study abroad programs have cited the diplomatic, cultural, social and foreign policy benefits of expanding opportunities for American students to study abroad. At the federal level, policymakers have various options of addressing liability issues of study abroad programs. Policymakers can explore the creation of oversight at the federal level for study abroad programs, examine the adoption of a national, federal standard on study abroad liability, or potentially create a federal cause of action in cases of wrongful death by a participant in a study abroad program.

A. Proposal – Federal Standard for Study Abroad Liability

In an effort to resolve the murkiness in case law at the state level concerning study abroad liability, one possible solution is for legislators at the federal level to create a federal cause of action in cases where an educational institution or a nongovernmental institution commits negligence that proximately causes the injury of a participant enrolled in a study abroad program overseas. Mr. John Amato, who lost his daughter in the 1996 Semester at Sea incident, testified at the 2000 congressional hearing on safety in study abroad programs and invited lawmakers to look

228. See Ernesto Hernández-Lopez, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAN. J. TRANSNAT'L L. 1345, 1348 (2007) (stating that “contemporary developments in the norm of non-intervention in Mexican foreign relations law and other developments in the plenary power doctrine of U.S. immigration law suggest that states may apply sovereignty-based legal doctrines regarding migration in less absolute and traditional manners. . .”).

229. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

230. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

231. See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013) (generally discussing the issues concerning state and local regulation of immigration).

232. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 363 (2000) (striking down as unconstitutional the Massachusetts Burma Law, “which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma (Myanmar).”).

at enacting a federal standard of liability to hold colleges, universities and overseas study abroad programs accountable for injuries incurred by participants caused by the negligence of a college, university or overseas study abroad program sponsor.²³³ In his testimony, Mr. Amato noted that federal standards are already in existence “to protect shareholders, seamen, [and] railroad workers.”²³⁴

One federal law that imposes a federal standard of liability is FELA.²³⁵ FELA provides a federal remedy for railroad workers who are injured in the course and scope of their employment for physical injuries incurred due to the negligence of their employer.²³⁶ In the late eighteenth century, thousands of railroad workers suffered work-related injuries while working for railroads and in a number of cases common-law rules such as the fellow-servant doctrine²³⁷ barred their claims against employers.²³⁸ Congress passed FELA with the purpose of promoting safety for railroad workers and to provide those injured and their family members’ recovery for physical injuries.²³⁹ One noted commentator, Professor Jerry Phillips, has contended that fault-based FELA provides “a real and present safety incentive” in a hazardous railroad industry.²⁴⁰

It can be argued that a federal standard in study abroad liability cases may encourage greater safety standards to be implemented by colleges, universities and sponsors of study abroad programs.²⁴¹ In addition, such legislation would be consistent with federal involvement in other policy areas that implicate international affairs, such as immigration.²⁴²

A proposed federal statute on study abroad liability may look something like this:

233. See Amato, *supra* note 1.

234. *Id.*

235. See Federal Employers Liability Act, *supra* note 22.

236. See *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 421 (Mont. 2002).

237. See Thomas C. Galligan, Jr., *The Dreadful Remnants of The Osceola’s Fourth Point*, 34 RUTGERS L.J. 729, 732 (2003) (“Under the common law fellow servant doctrine, a master was *not* vicariously liable to a plaintiff servant if the plaintiff servant’s injuries had been caused by another servant or employee.”).

238. See *Rogers v. Consol. Rail Corp.*, 948 F.2d 858, 861 (2nd Cir. 1991).

239. See *Reidelbach*, 60 P.3d at 423 (“As a consequence of the provisions of the FELA, injured workers, or the families of deceased workers, could obtain compensatory relief for the worker’s injury or death, and the railroads were encouraged to provide their employees with a safe working environment as a means of avoiding liability.”).

240. See Jerry J. Phillips, *An Evaluation of the Federal Employers’ Liability Act*, 25 SAN DIEGO L. REV. 49, 52–54 (1988).

241. See Amato, *supra* note 1 (contending a federal standard of liability can serve to improve safety in study abroad programs).

242. *Id.* (stating that “life safety in study-abroad programs is a federal issue since participants in these programs are drawn from universities all over the nation to travel all over the world.”).

When the physical injury of an individual enrolled in a study abroad program is caused by a wrongful act, neglect, or default by a public educational institution and/or its agents or representatives of a private institution and/or its agents and representatives, the individual injured may bring a civil action in tort in federal district court against the entity(ies) or individual(s) responsible.

Such legislation would appear to face an uphill climb in Congress today. In a 2009 article, Congressman Peter Hoekstra, who called for the 2000 congressional hearings on safety in study abroad programs, was reported as stating that such legislation would “kill overseas programs.”²⁴³ No legislation has been introduced in recent Congresses to implement such a standard.

In the event a federal standard is implemented, a federal cause of action for study abroad liability would likely raise preemption questions. Such issues may arise on supplemental claims. In the case of FELA, the text of the statute does not contain an express preemption clause.²⁴⁴ A proposed statute on study abroad liability could be written in such a manner to expressly preempt state law claims. But even in the event express preemption does not apply, implied preemption could occur with a federal study abroad liability statute if it were interpreted to imply federal “occupation in the field.”²⁴⁵ Finally, conflict preemption could occur if a federal study abroad liability statute conflicted with state law and either creates an impossibility to comply with both federal and state law or if state laws block the purposes and objectives of Congress.²⁴⁶

A case that could provide some guidance for preemption issues in the federal study abroad context is the case of *Reidelbach v. Burlington Northern and Santa Fe Railway Co.*, a FELA case decided by the Montana Supreme Court in 2002.²⁴⁷ In *Reidelbach*, an injured plaintiff brought forth not only a FELA claim, but separate state law claims of “unfair, dilatory and fraudulent claims practices” against the defendant employer.²⁴⁸ In holding that the plaintiff’s claims concerning claims handling were not preempted by FELA, the Montana Supreme Court stated that the duties of the defendant railroad to provide a safe working environment under FELA as well as engage in fair claims handling practices after an employee is

243. See Marklein, *supra* note 195.

244. See *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 424 (Mont. 2002).

245. *Id.* at 424–25.

246. *Id.* at 425.

247. See generally *id.*

248. *Id.* at 421.

injured “are not mutually exclusive.”²⁴⁹ Thus, ancillary claims associated with a federal liability statute may not necessarily be preempted.

Another potential issue that may arise in the event of a national standard of liability for study abroad cases is the application of the collateral source rule.²⁵⁰ The collateral source rule, present in many jurisdictions, bars a defendant from mitigating a plaintiff’s damages award at trial by introducing evidence of a plaintiff’s receipt of benefits from collateral sources and from obtaining a reduction of a verdict by collateral source evidence.²⁵¹ For example, a participant in a study abroad program may suffer an injury overseas allegedly caused by the negligence of the overseas program sponsor. If the participant is treated overseas and receives payments from his or her health insurer, such evidence in many jurisdictions may not be admissible in the event that a case against the overseas program sponsor goes to trial.

One other possibly related solution policymakers may consider is a proposal of establishing an injury compensation claims fund at the federal level to apply in study abroad liability cases. Such a claims fund could be modeled after the claims procedures implemented in several states covering tort claims against a state government. In several states, instead of directly suing the state or state agency in a trial court, plaintiffs with claims against a state or its agencies must file a claim with a claims court or a claims commission.²⁵² All of these courts vary in structure but share the characteristic that an administrative entity resolves tort claims.²⁵³

In the case of study abroad liability, a claims fund could be created at the federal government level and be housed within the United States

249. *Reidelbach*, 60 P.3d at 430 (“Compliance with the state laws upon which [the plaintiff] bases his state claims and compliance with the FELA are not mutually exclusive. The railroad can easily satisfy both its duty and obligation to provide a safe working environment for its employees under the FELA, and its state-imposed obligation to engage in fair, good faith claims practices once an employee has been injured. In fact, in a perfect world, the manner in which an individual railroad employer handles the claim of an injured worker would theoretically be uniform – every such claim would be handled honestly, promptly and in good faith.”).

250. The authors would like to thank Professor Will Mawer, Professor at Southeast Oklahoma State University, for encouraging the authors to include a discussion of the collateral source rule in this article.

251. Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNSEL J. 346, 348 (2008) (“The rule dictates that a defendant may not introduce evidence of collateral sources in order to mitigate a potential damage award, nor may a plaintiff’s damage award be reduced by benefits collateral to the tort action. Under the collateral source rule, evidence of collateral benefits is inadmissible at trial. Likewise, an award cannot be reduced by financial benefits paid to the plaintiff from third-party sources, such as first-party insurance or unemployment benefits.”).

252. *See* Cole & Marzen, *supra* note 128, at 50–52.

253. *Id.* at 50.

Department of Education. Individuals adjudicating claims in the claims fund could be comprised of senior officials of the Department of Education, senior officials of other federal agencies, and perhaps individuals outside of the federal government who are active in industry. If a claims fund is created, a likely issue will arise with the funding of claims awards. Other than congressional appropriation, such funding may potentially come from assessments levied on colleges and universities who send students to overseas study abroad programs by the department which houses the claims fund. Although assessments may be easier to implement with regard to colleges and universities, they will likely be more difficult to impose upon private overseas program sponsors, who are subject to minimal federal oversight and regulation today.

B. Proposal – Federal Cause of Action for Wrongful Death for Study Abroad Liability

An alternative approach legislators at the federal level can take concerning a federal cause of action in study abroad liability cases is not to enact a statute covering all cases of alleged negligence of an educational institutional or a nongovernmental institution, but to enact a statute which covers only cases of wrongful death. A wrongful death statute would likely face the same issues with preemption of state law remedies and the collateral source rule as a proposed general federal negligence standard. A more limited wrongful death remedy may be intended to cover only the most tragic cases that involve an individual's loss of life and not cover other general negligence cases, which may be left to state law to determine as to liability.

One area in which Congress has created a wrongful death remedy is the case of the Death on the High Seas Act ("DOHSA"), which creates a cause of action for a wrongful death that occurs on the high seas.²⁵⁴ A key part of the rationale behind the passage of DOHSA in 1920²⁵⁵ was to provide a uniform wrongful death remedy for cases outside of the jurisdiction of individual states.²⁵⁶ Only pecuniary damages are allowed in DOHSA

254. The DOHSA "provides a remedy for the wrongful death of any person that occurs on the high seas." Moris Davidovitz, *Aviation Deaths on the Seas: The Flight into Maritime Law*, 10 HASTINGS INT'L & COMP. L. REV. 57, 58 (1986).

255. See James W. Clement, Note, *Breaking Waves: The Ninth Circuit Returns to the Text to Decide DOHSA's Applicability in Helman v. Alcoa Global Fasteners, Inc.*, 36 TUL. MAR. L.J. 339, 340 (2011).

256. See Jad J. Stepp & Michael J. AuBuchon, *Flying Over Troubled Waters: The Collapse of DOHSA's Historic Application to Litigation Arising From High Seas Commercial Airline Accidents*, 65 J. AIR L. & COM. 805, 810 (2000) ("In the years leading up to DOHSA's enactment, the Maritime Law Association and various admiralty scholars had been attempting to pass a bill that would provide for an admiralty right of action for deaths occurring on the high seas. The advantages of such

actions²⁵⁷ and after the United State Supreme Court's decision in *Offshore Logistics, Inc. v. Tallentire*,²⁵⁸ DOHSA cases can be filed in either state or federal court.²⁵⁹

With these considerations in mind, to provide for the possible recovery of both pecuniary and nonpecuniary damages, a federal wrongful death statute in study abroad liability cases might state:

When the wrongful death of an individual enrolled in a study abroad program is caused by a wrongful act, neglect, or default by a public educational institution and/or its agents or representatives of a private institution and/or its agents or representatives, the personal representative of the decedent may bring a civil action in tort in federal district court against the entity(ies) or individual(s) responsible.”

However, just as in the case of a general negligence federal liability standard in study abroad cases, no legislation has been introduced in Congress to create a federal cause of action in cases of wrongful death.

C. Proposal – Oversight Entity at Federal Level for Study Abroad Programs

A final approach legislators at the federal level can pursue is to enact legislation requiring colleges, universities, and overseas study abroad program sponsors to provide for greater transparency in their study abroad programs as well as mandate disclosure of certain data and risks. There are currently no federal laws or regulations that directly require colleges, universities, and private study abroad program sponsors to disclose data on prior injuries, accidents, the number of participants who contracted illnesses and general risks to potential participants in study abroad programs.

One organization which is active in calling for greater oversight of the study abroad industry at the state and federal level is the Clear Cause Foundation.²⁶⁰ The vision of the foundation is not only to ensure every participant in an overseas study abroad program is protected by federal

a bill, according to these scholars, would be to provide these remedies on the high seas, where such remedies did not exist because the high seas were outside of the territorial limits and jurisdiction of the individual states.”).

257. See Kathryn A. Meyers, Note, *Does a Claim Exist for Decedents' Pre-Death Pain and Suffering in Actions Arising Out of Aviation Disasters Governed by the Warsaw Convention and the Death on the High Seas Act?: The Need for Legislative Reform*, 75 WASH. U. L. Q. 1335, 1343 (1997).

258. 477 U.S. 207 (1986).

259. See generally Barbara A. Clark, *Removability of High Seas Death Claims Filed in State Court After Tallentire*, 12 TUL. MAR. L.J. 317 (1988).

260. See *Mission & Vision*, CLEAR CAUSE FOUND., <http://www.clearcausefoundation.org/#!our-mission-vision/c1w2> (last visited Jan. 30, 2015).

guidelines,²⁶¹ but it also provides safety resources for potential participants, participants, and sponsors of study abroad programs.²⁶²

At the federal level, a number of laws protect consumers that require financial institutions and creditors to make certain disclosures. One of the key laws in this area is the Truth in Lending Act, which requires creditors to disclose in a clear manner²⁶³ the annual percentage rate (“APR”) of a loan.²⁶⁴ The Consumer Financial Protection Bureau (“CFPB”) now has the authority to regulate a number of consumer financial products,²⁶⁵ and there is discussion regarding the extent of the CFPB’s authority.²⁶⁶ For example, the CFPB has taken an increased interest in some of the practices of the private student loan industry.²⁶⁷ The extent of student loan debt in the United States²⁶⁸ is now a growing concern among policymakers²⁶⁹ and academics.²⁷⁰ The CFPB has already begun investigating practices of the

261. *Id.*

262. *Id.*

263. *See* 15 U.S.C. § 1637(c)(4)(D)(ii) (2010).

264. *See* Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 189–90 (2008) (“TILA disclosures have been remarkably effective in educating consumers to pay attention to the APR as a key measure of the cost of credit. Most consumers report looking for and using TILA’s standardized disclosures when shopping. In credit markets where APRs are disclosed, more competition and lower credit prices result.”).

265. *See* Thomas P. Brown, *Disclosure – An Unappreciated Tool in the CFPB’s Arsenal*, 8 BERKELEY BUS. L.J. 209, 210–11 (2011).

266. *See, e.g.*, Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25 (2012) (discussing the CFPB’s shared enforcement authority with other state and federal regulatory bodies); *see also* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321 (2013) (providing a general background of the CFPB and its authority).

267. *See* Alan Zibel, Katy Stech & Annamaria Andriotis, *CFPB Criticizes Student-Loan Lenders for ‘Auto Defaults’*, WALL ST. J. (Apr. 22, 2014), <http://online.wsj.com/news/articles/SB10001424052702304049904579516152092960502> (discussing that the CFPB is investigating the practices of private student loan companies concerning “auto default” clauses in student loan contracts, which require a borrower to pay a loan in full upon the death or bankruptcy of a co-signer).

268. *See* Sharon Epperson, *Debt stress and anxiety: how to get out from under*, CNBC (Apr. 16, 2014), <http://www.cnbc.com/id/101586286> (reporting that the total amount of student loan debt in the United States has surpassed \$1 trillion).

269. *See, e.g.*, Joseph Lawler, *Janet Yellen warns student debt may be holding back housing recovery*, WASH. EXAMINER (May 8, 2014), <http://washingtonexaminer.com/janet-yellen-warns-student-debt-may-be-holding-back-housing-recovery/article/2548237>.

270. *See, e.g.*, Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215 (2014) (providing a comprehensive overview of the student loan default process); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329 (2013) (proposing an amendment to the United States Bankruptcy Code to allow students to modify student loans to their fair market value and also

private student loan industry,²⁷¹ and with a growing number of student loan defaults,²⁷² increased regulation of private company practices in the student loan industry might occur in the near future, possibly including the adoption of additional mandates concerning disclosures to potential student borrowers.

One of the hallmarks of contract law is that it posits that individuals and entities are able to freely enter into contracts.²⁷³ As noted above, in dealings with financial institutions, consumers are given the benefit of disclosures mandated by law and regulation as to the financial risks of the contract to be had. Students borrowing money for student loans receive increased protections today, and it is feasible that more protections may be forthcoming through the CFPB. As a policy matter, it can be argued that if a student borrowing money for a student loan receives disclosures as to the loan amount and the interest risk associated with the loan, then a student should also receive the benefit of federal regulation requiring colleges and universities to disclose the number of deaths, injuries and participants who contracted illnesses in study abroad programs.

A major step toward requiring disclosures on study abroad program safety has taken place at the state level in the past year. In 2014, the Minnesota Legislature enacted a sweeping study abroad program disclosure bill into law. The law applies to study abroad programs “offered or approved for credit by a postsecondary institution in which program participants travel outside of the United States in connection with an educational experience.”²⁷⁴ It covers students who are enrolled at any Minnesota college or university.²⁷⁵

The law requires all Minnesota colleges and universities to report information on the deaths of participants in programs as well as “accidents and illnesses that occurred during program participation as a result of

permit dischargeability of the student loan debt after the adjustment to fair market value); Amanda Harmon Cooley, *Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens*, 46 CONN. L. REV. 119 (2013) (proposing revisions to the Higher Education Act to improve credit counseling for students).

271. See Zibel, Stech & Andriotis, *supra* note 267.

272. See Floyd Norris, *The Hefty Yoke of Student Loan Debt*, N.Y. TIMES, Feb. 21, 2014, http://www.nytimes.com/2014/02/20/business/economy/the-hefty-yoke-of-student-loan-debt.html?_r=0.

273. See Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883, 885 (2006) (“The common law of contracts rests on two fundamental principles. The first principle, the bargain principle, holds that a contract freely entered into should be strictly enforced. The courts have a negative obligation not to judge the fairness of the terms in such contracts.”).

274. MINN. STAT § 5.41(1)(c) (2014). See also *The Implications of New Legislation in the State of Minnesota*, FORUM ON EDUC. ABROAD (Oct. 15, 2014), available at <http://www.forumea.org/wp-content/uploads/2014/10/Minnesota-Legislation-Oct-13.pdf> [hereinafter Forum on Educ. Abroad].

275. See Forum on Educ. Abroad, *supra* note 274.

program participation and that required hospitalization.”²⁷⁶ The Minnesota Secretary of State is required to publish information concerning program safety on its web site.²⁷⁷ The legislation also requires Minnesota colleges and universities to include a link to the Secretary of State’s website in its material provided to potential program participants and also that study abroad program information relating to health and safety is available at the website.²⁷⁸ Finally, it also mandates that Minnesota colleges and universities report as to whether their study abroad programs comply “with health and safety standards set by the Forum on Education Abroad or a similar study abroad program standard setting agency.”²⁷⁹

The Minnesota legislation is the first of its kind at the state level and a major step toward providing consumers access to study abroad program safety information. As a follow-up on the passage of the new Minnesota law, Democratic Congressman Sean Patrick Maloney introduced the Ravi Thackurdeen Safe Students Study Abroad Act in September 2014 to push for increased disclosure requirements under federal law.²⁸⁰ The legislation would require higher education institutions to include statistical reporting on crimes that occur while a student is participating in a study abroad program, irrespective of whether or not the higher education institution owns the property where the crime(s) occur.²⁸¹ It would also require higher

276. MINN. STAT. § 5.41(2)(a) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

277. MINN. STAT. § 5.41(3) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

278. MINN. STAT. § 5.41(5) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

279. MINN. STAT. § 5.41(2)(b) (2014). *See also* Forum on Educ. Abroad, *supra* note 274.

280. *See* Ravi Thackurdeen Safe Students Study Abroad Act, H.R. 5485, 113th Cong. (2014) [hereinafter Ravi Thackurdeen Safe Students Study Abroad Act].

281. *See id.* at § 2(a)(3).

It should be noted that in 2011 the United States Department of Education issued The Handbook for Campus Safety and Security Reporting, which includes requirements for educational institutions to report overseas crimes pursuant to the Clery Act.

It is now generally considered that overseas crimes are reportable under the Clery Act if they occur:

In space that the institution owns or controls overseas or at a distance, which is used to support the institution’s mission and are frequently used by students; On an overseas study trip which includes overnight trips and either:

The same hotel/hostel is used on a regular basis (the institution has a long-term agreement with the hotel or housing company to utilize its space or has a practice of using the same hotel or housing company); or More than one night is spent in a particular hotel/hostel.

Joseph Storch, *The Clery Act and Overseas/Distance Study: New Developments and*

education institutions to complete a biennial review of study abroad programs and to compile statistics in a report on the number of deaths, accidents and illnesses that required hospitalization, sexual assaults, and incidents that resulted in police involvement or a police report of program participants that have occurred in the previous ten years.²⁸² While the Minnesota legislation required compilation of data on study abroad incidents, not only does the proposed federal legislation require compilation of data, but also, going beyond the Minnesota law, it requires higher education institutions to take affirmative steps in furnishing the data on incidents to study abroad program participants in required pre-trip orientation meetings.²⁸³

Safety in study abroad programs is also receiving increasing attention from other policymakers. On October 23, 2014 United States Senators Kirsten Gillibrand, Al Franken, and Robert Casey sent a letter to Arne Duncan, the United States Secretary of Education, expressing concerns about safety in study abroad programs.²⁸⁴ One of the key recommendations of Senators Gillibrand, Franken and Casey was for the Department of Education to develop guidelines to ensure that K-12 and higher education institutions only affiliate with or accept credits from programs that either follow or have implemented more stringent safety guidelines than those programs sponsored by the State Department.²⁸⁵ These developments make legislation action concerning study abroad safety a possibility in the 114th Congress.

More oversight of study abroad programs at the federal level can take place within the United States Department of State, but a federal agency similar to the CFPB could be created to monitor study abroad programs. Federal oversight of study abroad programs might not only include reporting on statistics and data and making that information available to all members of the public, but may also involve requiring that study abroad programs have certain minimum standards for programs in place. Such standards might include requiring that every participant in a study abroad program be covered by a minimum level of insurance and that colleges, universities and private sponsors have crisis management plans in place to

Compliance Guidance, 10 NACUANOTES 5, 4 (Feb. 29, 2012), available at <http://apps.forumea.org/documents/TheCleryActandOverseasDistanceStudyNewDevelopmentsandComplianceGuidanceNACUA.pdf>.

For a comprehensive discussion of issues arising under the Clery Act, see Bonnie S. Fisher, et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2002).

282. See Ravi Thackurdeen Safe Students Study Abroad Act, *supra* note 280, at §§ 2(b)(2)(18)(A)(i)(II)(aa)–(dd).

283. See *id.* at §§ 2(b)(2)(18)(B)(i)(I)–(III).

284. Letter from Kirsten Gillibrand, Al Franken & Robert Casey, U.S. Senators, to Arne Duncan, U.S. Secretary of Education (Oct. 23, 2014) (on file with author).

285. *Id.*

respond to emergency situations. To benefit potential participants in programs, the federal entity charged with oversight may develop a rating system to rate colleges, universities and private program sponsors on safety issues on a periodic basis.

With the examples of legislation and regulation at the federal level requiring greater transparency and disclosure in the areas of consumer lending and student loans, as well as the recently introduced Ravi Thackurdeen Safe Students Study Abroad Act, it appears that legislation that would require colleges, universities and overseas study abroad programs to fully disclose statistics as to injuries and potential risks abroad would have the greatest chance of success in the near term compared to legislation concerning the implementation of a federal standard of liability in study abroad cases.

CONCLUSION

For many students, studying abroad is a hallmark in the collegiate experience. While studying abroad provides many a valuable experience with benefits that last a lifetime, the experience is not free from risk. Concrete steps can be taken by participants in study abroad programs and the administrators of study abroad programs to provide for a greater chance of a safe experience abroad.

Study abroad legislation likely faces a tough road ahead in this Congress as well as future Congresses, but may be a much more feasible option if further tragedies occur. Study abroad legislation does come with tradeoffs. On the one hand, more stringent requirements may dramatically improve safety precautions. On the other hand, legislation may have an effect of increasing expenses necessary to comply with the rules. The costs of the rules may be passed on to participants in study abroad programs, and such costs might have an effect of making studying abroad a less financially accessible experience.

Overall, the very idea of proposing federal safety legislation in the study abroad area could in itself have a positive effect even if legislation is not enacted. Discussion of potential legislation in the public square may also serve to focus more resources and attention on safety and study abroad programs may self-regulate more in these areas. Awareness of potential risks overall and increased vigilance in study abroad programs will help study abroad programs deliver the experience meant to be delivered – a culturally, socially, and educationally enriching experience for students that lasts a lifetime.

