

UNIVERSITY LIABILITY WHEN STUDENTS COMMIT SUICIDE: EXPANDING THE SCOPE OF THE SPECIAL RELATIONSHIP

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INTRODUCTION

In recent years there has been a significant increase in the number of suicides occurring on college campuses. Statistics reveal that more than one thousand suicides occur on campus every year,¹ and media reports indicate that no institution is exempt.² As depression and suicide become more prevalent on college campuses, it is expected that suicide will replace binge drinking as the “number-one student risk factor in the minds of most college administrators.”³

The legal significance of the issue is evidenced by the dramatic rise in lawsuits directed at universities.⁴ As universities have become more vulnerable to liability in general, student suicide liability is one of the areas that universities have watched closely.⁵ Recent decisions have further created uncertainty regarding the legal responsibility of universities and have compounded the concern regarding suicide liability.⁶

Although a special relationship between two parties may establish a duty to prevent the other from committing suicide, until recently, a finding of a special relationship has been limited to a narrow class of persons including mental health clinicians or those entrusted with the custodial care of another. In *Shin v. Massachusetts Institute of Technology*, the court expanded these limitations and identified a special relationship between non-clinician university administrators

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1. Health and Human Development Programs, *New Report Offers Blueprint for Suicide Prevention on Campuses*, HHD STORIES, Oct. 2004, http://hhd.org/hhdnews/hhdstories/fs_10_2004b.asp.

2. See, e.g., Eric Lipton, *Second Suicide Leap Leaves New York University Shaken*, N.Y. TIMES, Oct. 12, 2003 (reporting a recent suicide at New York University); see also Ted Ross & Jesse Rogers, *After Suicide, Campus Reaches Out*, THE DAILY PENNSYLVANIAN, Oct. 14, 2005 (discussing a Wharton student’s suicide).

3. See Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-inflicted Injury*, 32 STETSON L. REV. 125, 125 (2002).

4. See Eileen M. Evans & William D. Evans, Jr., “No Good Deed Goes Unpunished”: *Personal Liability of Trustees and Administrators of Private Colleges and Universities*, 33 TORT & INS. L.J. 1107, 1107 (1998).

5. See Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, 51 CHRON. OF HIGHER EDUC. 49, Aug. 12, 2005, at A1 (commenting that the recent *Shin* case is “stirring concerns among some college officials that the case heralds a storm of wrongful-death litigation”); see also Marcella Bombardieri, *Lawsuit Allowed in MIT Suicide*, BOSTON GLOBE, July 30, 2005, at B1.

6. See Hoover, *supra* note 5.

and a student who committed suicide on campus. The court held that the parents could proceed with their lawsuit against the administrators which alleged negligence in the failure to prevent their daughter's suicide.⁷ *Shin* remains a decision of a trial court that was ultimately settled out of court in April 2006,⁸ prior to a definitive holding on appeal. However, it nonetheless "does suggest that the legal landscape has changed" and that universities and non-clinician administrators are entering an era where potential liability is more expansive.⁹ Prior to the lower court's decision, one MIT administrator was quoted: "If we don't [win], it has implications for every university in this country."¹⁰

This Note will analyze the impact of finding that universities and university administrators have a special relationship with students that establishes a duty to prevent them from committing suicide. Part I discusses the significance of this issue in light of the prevalence of suicide on campus and the increasing litigation involving universities. Part II traces the development of suicide liability, discussing the trend of expanding university liability away from the immunity they have historically benefited from. Part III explores the particular circumstances which may give rise to a special relationship between universities and students in light of relevant case law. Part IV offers suicide prevention strategies and protocols to avoid suicide liability. Finally, Part V examines three specific legal issues that universities will encounter as they develop plans for suicide prevention. This Note concludes that as this area of law remains uncertain, universities need to proactively shield themselves and their staff from liability by developing plans and strategies that effectively address suicide prevention on campus.

I. RELEVANCE OF SUICIDE LIABILITY TO COLLEGES AND UNIVERSITIES

A. *Increasing Litigation Involving Universities*

Recently universities have become "an inviting target for a wide variety of legal claims."¹¹ More specifically, the number of lawsuits involving student suicide has also increased. It has been noted that "[f]ive years ago college lawyers discussed among themselves perhaps one or two pending suicide cases at any given moment. Today the cases total about 10 nationwide, with the

7. *Shin v. Mass. Inst. of Tech.*, No. 02-0403, 2005 Mass. Super. LEXIS 333, at *36-37 (June 27, 2005).

8. See Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, BOSTON GLOBE, Apr. 4, 2006, at B1. (The parents and the university "now agree that the young woman's death probably was an accident, not a suicide.")

9. DAMON SIMS, LEGAL ISSUES IN STUDENT AFFAIRS 2005 5 (Indiana Student Affairs Assoc., Indiana University—Bloomington, Oct. 19, 2005).

10. Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES MAGAZINE, Apr. 28, 2002, at 57.

11. Evans & Evans, *supra* note 4, at 1107.

prospect that many more suicides could, over time, move into the courts.”¹²

Contributing to the increasing amount of university-related litigation is the public’s perception of universities as wealthy organizations with infinite resources. Several private universities now have large endowments and assets in the billions.¹³ Plaintiffs in search of “solvent defendants,” will not hesitate to sue universities.¹⁴ It has been speculated that the “deep pocket[s]” of universities combined with a “litigious society, and public cynicism about all charitable institutions” will result in rising claims against institutions of higher education and administrators in the years to come.¹⁵

Further adding to the increasing number of lawsuits involving universities is the demise of the doctrine of charitable immunity, opening the door to lawsuits involving non-profit institutions. For a significant portion of the twentieth century, colleges and universities enjoyed broad protection from lawsuits under the doctrine of charitable immunity.¹⁶ The doctrine of charitable immunity stems from dicta found within two English cases.¹⁷ While the English courts ultimately overruled the dicta and held the charitable organizations liable, Maryland¹⁸ and Massachusetts¹⁹ adopted the dicta and thus created a broad doctrine of charitable immunity.²⁰ As of 1938, forty states had adopted the doctrine of charitable immunity, which protected institutions including universities.²¹ However, after harsh criticism of the doctrine in 1942 “state courts moved rapidly away from immunity.”²² By 1986, thirty three of the original forty subscribers to the doctrine of charitable immunity had abandoned it in whole or in part.²³ Although there are still several jurisdictions that recognize the doctrine in some form,²⁴ the doctrine has generally been abandoned. Consequently, parties are not prohibited from suing non-profit institutions.

B. Prevalence of Suicide on Campus

Alarming statistics reveal that suicide is now “likely the second leading cause

12. Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, 50 CHRON. HIGHER EDUC. 42, June 25, 2004, at B18.

13. Evans & Evans, *supra* note 4, at 1107.

14. *Id.* at 1121.

15. *Id.* at 1108.

16. *See id.* at 1108 (noting that the doctrine was in effect from the late 1800s until the mid 1900s).

17. *Id.* at 1109.

18. *See Perry v. House of Refuge*, 63 Md. 20, 20-26 (1885).

19. *See McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876).

20. Evans & Evans, *supra* note 4, at 1109.

21. *Id.*

22. *Id.* (citing Rutledge’s opinion in *Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942)).

23. *Id.*

24. *Id.*

of death” among college students.²⁵ It is estimated that 1088 students commit suicide on college campuses each year.²⁶ Furthermore, suicide rates have been increasing “steadily among the young and nearly tripled between 1952 and 1995.”²⁷ Despite these concerning statistics, the number of students successfully committing suicide is only a mere fraction of the number of students attempting and considering suicide.²⁸ The National College Health Risk Behavior Survey determined that 10.3% of surveyed college students “had seriously considered ending their own lives during the preceding 12 months.”²⁹ Additionally, 6.7% of the surveyed students had developed suicide plans.³⁰

C. *Students with Mental Illness on Campus*

Beyond suicide, university administrators are also struggling to address an “undergraduate population that requires both more coddling and more actual mental health care than ever before.”³¹ Medical advances specifically in the form of enhanced medication and psychotherapy have allowed many students suffering from mental illnesses, including severe depression, schizophrenia, and bipolar disorder to attend college.³² Before the advent of such medications many of these students were prevented from pursuing higher education.³³ While most of these students are able to adapt to college life, it has been asserted that “there is still a segment of this population that may be particularly vulnerable to the stressors inherent in college.”³⁴

Recent reports from counseling centers also confirm increasing numbers of psychological illness on campus. Among the 274 counseling center directors surveyed in the National Survey of Counseling Center Directors in 2001, eighty five percent noted that they had experienced “an increase in severe psychological problems among students” in recent years.³⁵ These same counselors also reported

25. SUICIDE PREVENTION RES. CTR., PROMOTING MENTAL HEALTH AND PREVENTING SUICIDE IN COLLEGE AND UNIVERSITY SETTINGS 5 (Oct. 21, 2004) (Prepared for the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services).

26. *Id.*

27. Elizabeth Fried Ellen, *Suicide Prevention on Campus*, XIX PSYCHIATRIC TIMES 10, Oct. 2002, available at <http://www.psychiatrictimes.com/p021001a.html> (citing an undated published report of the CDC).

28. *Id.*

29. *Id.*

30. *Id.*

31. See Sontag, *supra* note 10. Sontag notes that administrators are “scrambling to redefine their relationship with parents and their role in the nonacademic lives of students who are adults by many yardsticks, and yet not quite.” *Id.*

32. See Ellen, *supra* note 27.

33. *Id.*

34. *Id.*

35. *Id.* at 2.

that they had experienced increased incidents of self-injury among college students within the last five years.³⁶ As the number of students attending college with histories of mental illness continues to rise, it should be expected that incidents of depression and other mental illness will only make suicide more prevalent on campus.

II. SUICIDE LIABILITY

A. *The Common Law Approach*

Third party responsibility for another's suicide is a modern concept.³⁷ At common law, suicide was viewed as an act of the individual and therefore courts declined to impose liability upon third parties for failure to intervene.³⁸ Traditionally, American courts "categorically refused to find civil liability arising out of a failure to prevent suicide."³⁹ "Suicide was considered an illegal, deliberate, and intentional act" that was itself the sole proximate cause therefore precluding the liability of third parties.⁴⁰ In the twentieth century, public perception regarding suicide changed as medical advances revealed that suicide was often the culmination of severe mental illness, rather than a deliberate and criminal act.⁴¹ As those committing suicide came to be viewed as victims of mental illness, the liability regarding suicide softened as well. Situations were identified where someone in close contact with the decedent could be found liable for failing to prevent the suicide.

B. *Modern Approach*

The general rule remains that third parties are not liable when another inflicts self-harm, but there are now two significant exceptions to the rule.⁴² Today, a defendant can be held liable for the suicide of another if either of the following two conditions is met: 1) if it is found that the defendant caused the suicide; or 2) if it is found that the defendant had a duty to prevent the suicide from happening.⁴³ The first exception, actual causation, is very limited, found only in

36. *Id.*

37. See Daniel W. Berglund, Case Note, *Recent Decisions of the Minnesota Supreme Court: Torts: Taking the "I" Out of Suicide: The Minnesota Supreme Court's Alarming Extension of Duty in "Exceptional Relationships"—Sandborg v. Blue Earth County*, 28 WM. MITCHELL L. REV. 1307, 1309 (2002).

38. *Id.*

39. Lake & Tribbensee, *supra* note 3, at 129.

40. *Id.* at 129-30.

41. See Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 933 (1987) (stating that the "most cogent explanation of decriminalization lay in the belief that most suicides were caused by mental illness").

42. See Lake & Tribbensee, *supra* note 3, at 130.

43. *Id.*

rare circumstances generally involving physical abuse or torture that prompt the decedent to commit suicide without actual consideration of his or her actions.⁴⁴

The second exception is more common. It “arises when the defendant has a legally recognized special relationship with a suicidal individual sufficient to create a duty to prevent suicide.”⁴⁵ Mere knowledge that the decedent was in danger has traditionally not been enough to impose a special relationship, and subsequently a duty, to prevent the suicide.⁴⁶ The special relationship has typically been reserved for custodial situations such as hospitals, jails, and reform schools, where one party has full responsibility for the care of another.⁴⁷ Additionally, courts have identified special relationships between mental health professionals and their patients because of their extensive training in mental health care.⁴⁸

C. Universities and the Special Relationship

Universities and university employees and administrators have generally avoided suicide liability because they have not been found to fall within either of the exceptions to the general rule of no duty to prevent suicide.⁴⁹ Most significantly, courts have narrowly applied the concept of the special relationship to universities.⁵⁰ Although a special relationship between a school and student has been identified on the secondary school level where schools stand *in locus parentis*,⁵¹ the independent nature of college students on campus makes them distinguishable.⁵² Institutions of higher education often pride themselves on treating their students as adults, emphasizing the freedoms that the university and administrators allow students to enjoy. Because college students are thought to be self-sufficient, courts have not identified special relationships between them and their respective institutions that would impose a duty to prevent suicide. Professors Lake and Tribbensee discuss the protection that universities have received:

44. *Id.*

45. *Id.* at 132.

46. *See id.*

47. *See id.* at 132-33.

48. *Id.* at 133.

49. *See id.* at 135.

50. *See Hoover, supra* note 5 (noting that “colleges and their employees generally have not been held liable for student suicides”).

51. In *Eisel v. Board of Education of Montgomery County*, the court held that “[middle] school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student’s suicidal intent.” *Eisel v. Bd. of Educ. of Montgomery County*, 597 A.2d 447, 456 (Md. 1991).

52. In *Schieszler v. Ferrum College*, the court discussing the doctrine of *in locus parentis* as it related to Ferrum College said, “[t]he instant case does not involve a minor, and therefore, strictly speaking, no duty arises from an *in loco parentis* relationship.” *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 608 (W.D. Va. 2002).

The limited exceptions to the no-duty-to-prevent-suicide rule have protected universities from liability for a student suicide in a broad range of cases. Thus, for example, the mere fact that a student is depressed, isolated or lonely, receives bad grades, is socially ostracized, or engages in high-risk alcohol use does not itself impose a responsibility upon the university to intervene to prevent suicide. Students are expected to shoulder the stresses and burdens of the transition into the college environment, even if those burdens are very high.⁵³

*Jain v. Iowa*⁵⁴ illustrates the traditional approach that courts have taken towards universities regarding the special relationship. In *Jain*, the plaintiff's son, Sanjay, committed suicide in his dorm room during his freshman year at the University of Iowa. The plaintiff brought a wrongful death action against the university claiming that his son's death "proximately resulted from university employees' negligent failure to exercise care and caution for his safety."⁵⁵ The plaintiff specifically claimed that the suicide might have been prevented had the university followed its established policy of parental notification when students exhibit self-destructive behavior.⁵⁶

Throughout his first semester Sanjay struggled academically and personally.⁵⁷ He faced disciplinary measures from the university for participating in a prank and for smoking marijuana in his dorm room. Prior to Thanksgiving, resident assistants were called to his dorm room where his girlfriend alleged that Sanjay was planning to commit suicide by inhaling exhaust fumes from the motorized cycle he had taken to his room. Sanjay admitted to making such preparations and agreed to see a counselor.⁵⁸ Sanjay saw the counselor, Merritt, the next day and he agreed to call her if he felt suicidal again. However, he declined to give her permission to call his parents, and his parents were not notified of the incident.⁵⁹ Merritt reported to her supervisor that he appeared to be suffering from "tiredness on his part [rather] than hopelessness or despair."⁶⁰ Subsequently, Sanjay went home for Thanksgiving but exhibited no abnormal behavior and made no mention of his struggles at school. He returned to school, but on December 4, was found dead in his apartment from "self-inflicted carbon monoxide poisoning."⁶¹

The district court held that there was not a special relationship between the university and the student that created a duty to prevent Sanjay from committing suicide.⁶² On appeal the plaintiff claimed that the university's awareness of

53. Lake & Tribbensee, *supra* note 3, at 135.

54. 617 N.W.2d 293 (Iowa 2000).

55. *Id.* at 296.

56. *Id.* at 294.

57. *Id.* at 295.

58. *Id.*

59. *Id.* at 296.

60. *Id.*

61. *Id.*

62. *Id.* at 296-97.

Sanjay's condition and need for medical treatment "created a special relationship giving rise to an affirmative duty of care toward him."⁶³ Specifically, the plaintiff relied on Restatement (Second) of Torts section 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.⁶⁴

The Supreme Court of Iowa found that under section 323, "the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance."⁶⁵ Ultimately, the court held, "no action by university personnel prevented Sanjay from taking advantage of the help and encouragement being offered, nor did they do anything to prevent him from seeking help on his own accord."⁶⁶ The court affirmed the district court and concluded that there was not a special relationship between Sanjay and the university that obligated the university to prevent the suicide.⁶⁷

D. Expansion of the Special Relationship

Although the *Jain* decision is often still cited⁶⁸ and is arguably "the most viable precedent"⁶⁹ regarding university liability when students commit suicide, more recent case law indicates that the notion of "limited exceptions" may now be "eroding" and that a special relationship could be identified in a broader set of circumstances.⁷⁰ Since the *Jain* decision in 2000, the following two cases have attempted to place greater responsibility on the university and administrators to prevent student suicide and adopted a more inclusive framework for determining when a special relationship exists.

In *Schieszler v. Ferrum College*⁷¹ the tide first turned regarding suicide liability and universities. In *Schieszler*, a 2002 decision of the United States District Court for the Western District of Virginia, the court found that university officials had a special relationship with a student that created a duty to prevent the

63. *Id.* at 297.

64. RESTATEMENT (SECOND) OF TORTS § 323 (2005).

65. *Jain*, 617 N.W.2d at 299.

66. *Id.* at 299.

67. *Id.* at 299-30.

68. See Hoover, *supra* note 5 (mentioning *Jain* while noting that not all "wrongful-death lawsuits decided recently have . . . increased colleges' legal responsibilities").

69. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, Apr. 4, 2006, <http://insidehighered.com/layout/set/print/news/2006/04/04/shin>.

70. Lake & Tribbensee, *supra* note 3, at 135.

71. 236 F. Supp. 2d 602 (W.D. Va. 2002).

student from committing suicide.⁷² Frentzel was a freshman at Ferrum College when he began exhibiting suicidal tendencies.⁷³ He wrote suicidal notes to his girlfriend who consequently informed university officials including his Resident Assistant, Holley, and the Dean of Student Affairs, Newcombe, of his behavior. Holley and Newcombe persuaded Frentzel to sign a document promising that he would not hurt himself and told his girlfriend that she could not go to his room, but they took no further action.⁷⁴ Three days later Frentzel was found dead in his room having hung himself. Frentzel's guardian filed a wrongful death suit against Ferrum College, Newcombe, and Holley, alleging that the defendants "'knew or personally should have known that Frentzel was likely to attempt to hurt himself if not properly supervised,' [and] that they were 'negligent by failing to take adequate precautions to insure that Frentzel did not hurt himself.'"⁷⁵

The district court acknowledged that under typical circumstances an individual does not have an affirmative duty to act or intervene on another's behalf unless such a duty arises from a special relationship between the parties.⁷⁶ The court relied on section 314A of the Restatement (Second) of Torts which lists several recognized special relationships, "including the relationship between a common carrier and its passengers, an innkeeper and his guests, a possessor of land and his invitees, and one who takes custody of another thereby depriving him of other assistance."⁷⁷ The court emphasized that the list was not exhaustive and that additional special relationships may exist.⁷⁸ The court analyzed Virginia law regarding special relationships in other contexts and determined that there must be "foreseeability of the harm" to establish a special relationship.⁷⁹ Under the facts of the case, the court found that Frentzel's self-inflicted harm was foreseeable based on his communications and actions which Newcombe, Holley, and the college were aware of.⁸⁰

The court determined that it was unlikely that Virginia would find that a "special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exists on the *particular facts* alleged in this case."⁸¹ The court allowed the suit to proceed against Newcombe and Ferrum because they "could have breached their duty to render assistance to Frentzel," but said that Holley could not have taken any additional steps to prevent Frentzel's suicide.⁸²

72. *Id.* at 611.

73. *Id.* at 605.

74. *Id.*

75. *Id.*

76. *See id.* at 606.

77. *Id.*

78. *Id.* at 607.

79. *Id.* at 609.

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.* at 610.

Although the case was eventually settled out of court,⁸³ the *Schieszler* decision was the first signal to universities that the liability related to suicide may be changing. It was noted that this was an area of law potentially in flux and that if the *Schieszler* decision was followed in subsequent cases that suicide liability could be changing drastically.⁸⁴ In fact, three years later in *Shin v. Massachusetts Institute of Technology*, the most recent case to address the issue, the trial court drew strong comparisons to the facts of *Schieszler* and ultimately relied on its holding to reach a similar conclusion.⁸⁵

Elizabeth Shin began exhibiting suicidal tendencies during her freshman year at Massachusetts Institute of Technology (“MIT”).⁸⁶ In her second semester, Elizabeth was admitted to the hospital for an overdose on Tylenol with codeine. At that point, she consented to parental notification, and following her discharge, was taken by her father to meet with MIT’s Mental Health Services Department.⁸⁷ Elizabeth’s Residence Hall Director, Davis-Mills, and the Dean of Counseling and Support Services (“CSS”), Henderson, were made aware of her fragile condition and she saw numerous psychiatrists who were a part of the MIT mental health team throughout the rest of the year.⁸⁸ She returned home for her summer break.

In her sophomore year, her mental health condition declined as numerous suicide threats were reported by faculty and students to Davis-Mills and Elizabeth’s team of psychiatrists.⁸⁹ Just prior to spring break, she was ordered to remain in MIT’s infirmary overnight for observation, and with permission her parents were contacted. Her father picked her up and brought her home to New Jersey.⁹⁰ When she returned from spring break, she began seeing a new psychiatrist, who did not review Elizabeth’s record or history prior to meeting with her. Shortly thereafter, Davis-Mills was told on numerous occasions by students and faculty that Elizabeth’s mental health was “deteriorating.”⁹¹ Elizabeth continued to regularly meet with a variety of mental health care professionals at the school, and it was suggested by one that it might be best for Elizabeth to be admitted to the hospital, but no specific plans were made.⁹²

83. See Bombardieri, *supra* note 5 (noting “that case was ultimately settled out of court”).

84. See Lake & Tribbensee, *supra* note 3, at 136. In response to the *Schieszler* decision, Lake and Tribbensee asserted that: “This case will be closely watched and could, if it stands, rewrite college-suicide law.” *Id.*

85. *Shin v. Mass. Inst. of Tech.*, No. 02-0403, 2005 Mass. Super. LEXIS 333, at *35 (June 27, 2005). “More recently, in *Schieszler v. Ferrum College*, a similar case to the instant case . . .” *Id.*; Hoover, *supra* note 5 (noting that “[t]he judge based her conclusion [in *Shin*] on *Shieszler v. Ferrum College*”).

86. *Shin*, 2005 Mass. Super. LEXIS 333, at *2.

87. *Id.* at *2.

88. *Id.* at *3-5.

89. *Id.* at *6-8.

90. *Id.* at *7.

91. *Id.* at *8.

92. *Id.* at *10.

Subsequently, two days before her death, Elizabeth made suicidal comments to students who in turn reported them to campus police. The on-call psychiatrist spoke with her briefly over the phone, but allowed her to remain in the dorm and did not pursue any additional means for monitoring her condition.⁹³

Elizabeth's parents briefly visited their daughter on April 9 at school.⁹⁴ They commented that, "[h]er eyes did look tired and puffy" but they thought that was typical of a student under stress at MIT.⁹⁵ Elizabeth made no mention to them of her deteriorating condition, and they claim they did not know that a psychiatrist had considered hospitalization.⁹⁶ On April 10, a joint meeting of the deans and psychiatrists was held at which time the severity of Elizabeth's condition was discussed.⁹⁷ Although a specific plan was not identified, following the meeting a psychiatrist called Elizabeth and left a message that she had an appointment at an outside facility the next day. However, that evening Elizabeth was found in her room "engulfed in flames" and was subsequently pronounced dead from "self-inflicted thermal burns."⁹⁸

Elizabeth's parents filed suit against MIT, MIT Medical Professionals, MIT Administrators and MIT Campus Police.⁹⁹ In total, the Shins complaint alleged twenty-five counts on various grounds. In June 2005, the court addressed numerous motions to dismiss. This Note will focus on two of the plaintiff's claims specific to the university administrators and their corresponding motions to dismiss.

MIT administrators Henderson and Davis-Mills moved for summary judgment regarding the counts brought against them, arguing that they did not have a duty to prevent Elizabeth from committing suicide.¹⁰⁰ To support their argument they relied on the following Massachusetts law: "[P]ersons who are not treating clinicians have a duty to prevent suicide only if (1) they caused the decedent's uncontrollable suicidal condition, or (2) they had the decedent in their physical custody, such as a mental hospital or prison, and had knowledge of the decedent's risk of suicide."¹⁰¹ Henderson and Davis-Mills asserted that as non-treating clinicians neither of the above conditions had been met and therefore they did not have a duty.¹⁰² However, as in *Schieszler*, the court relied upon Section 314(a) of the Restatement (Second) of Torts, which dictates that a special relationship between the parties may also give rise to a duty where one does not

93. *Id.* at *11-12.

94. Sontag, *supra* note 10.

95. *Id.*

96. *Id.*

97. *Shin*, 2005 Mass. Super. LEXIS 333, at *13.

98. *Id.* at *15 (quoting medical examiner's report). Despite the medical examiner's report, following the settlement between the parties, both the parents and the university now believe that Elizabeth's death was accidental and not suicide. Bombardieri, *supra* note 8.

99. *Shin*, 2005 Mass. Super. LEXIS 333, at *1.

100. *Id.* at *31.

101. *Id.* at *32 (citing *Nelson v. Mass. Port Auth.*, 771 N.E.2d 209 (Mass. App. Ct. 2002)).

102. *Id.*

already exist.¹⁰³ The court looked to a variety of university cases and determined that in other types of cases courts had found a special relationship between administrators and students. Specifically, the court cited *Mullins v. Pine Manor College*, where the court found that a college and an administrator had a special relationship with students and therefore a duty to protect students against criminal acts.¹⁰⁴ The court also relied upon *Schieszler v. Ferrum College* for the premise that the university did have a special relationship with a student and therefore a duty to protect the student.¹⁰⁵

Ultimately, in *Shin*, the court determined that Henderson and Davis-Mills had notice of Elizabeth's condition and could have reasonably foreseen that Elizabeth would harm herself.¹⁰⁶ Consequently, the court determined that "there was a 'special relationship' between the MIT Administrators, Henderson and Davis-Mills, and Elizabeth imposing a duty on Henderson and Davis-Mills to exercise reasonable care to protect Elizabeth from harm."¹⁰⁷ Subsequently, the administrator's motion to dismiss for gross negligence was denied. The plaintiffs had asserted gross negligence on behalf of the treatment team because they failed to enact a treatment strategy to combat Elizabeth's numerous suicide threats. The court found that Henderson and Davis-Mills were a part of Elizabeth's treatment team and the plaintiffs had "sufficient evidence of a genuine issue of material fact as to whether the MIT Administrators were grossly negligent in their treatment of Elizabeth."¹⁰⁸ Additionally, the court allowed the plaintiffs' claims to proceed regarding negligence and wrongful death because the plaintiffs had "sufficient evidence to raise a genuine issue of material fact as to whether MIT administrators breached their duty and proximately caused Elizabeth's death."¹⁰⁹

In the wake of the *Shin* decision, the media noted that, "legal uncertainty [following *Shin*] is causing a furor among college officials."¹¹⁰ Gary Pavela, the Director of Student Judicial Programs at the University of Maryland at College Park, commented that the *Shin* and *Schieszler* decisions together have "national implications" for universities.¹¹¹ Pavela even cautioned that in response to these decisions it may be best for universities to "err on the side of overreaction" in

103. RESTATEMENT (SECOND) OF TORTS §314A (2005).

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

105. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 606 (W.D. Va. 2002).

106. *Shin*, 2005 Mass. Super. LEXIS 333, at *36-37.

107. *Id.* at *38.

108. *Id.* While not addressed in this Note, the court also denied the motion of the medical professionals on a similar claim of gross negligence. The plaintiffs asserted that the medical professionals had failed to develop a coordinated treatment plan to ensure Elizabeth's well-being, and the court found that the plaintiffs had sufficient evidence to proceed in that claim. *Id.* at *25.

109. *Id.* at *39.

110. Bombardieri, *supra* note 5.

111. Barbara Lauren, *MIT Student Suicide Case Cleared to Go to Trial; FERPA Health and Safety Exception May Be Involved* (AACRAO Transcript), Aug. 3, 2005, www.aacrao.org/transcript/index.cfm?fuseaction=show_print&doc_id=2791. Pavela has also commented that the *Shin* decision is "very new ground" for universities. Bombardieri, *supra* note 5.

dealing with potentially suicidal students.¹¹² Sheldon Steinbach, vice president and general counsel at the American Council on Education, also expressed fears that *Shin* “increases the scope of liability, the expansion of the blame game, and the potential for suits solely designed for settlement.”¹¹³ However, universities hoping for clarification and a final determination on appeal were left to question when the case was settled out of court. The questions surrounding the expansion of the special relationship are still unsettled and yet to be determined in “almost certainly, another lawsuit.”¹¹⁴

III. WHAT PARTICULAR FACTS WILL GIVE RISE TO A SPECIAL RELATIONSHIP?

Despite their limited precedential value, *Schieszler* and *Shin* offer valuable insight that can be used to assist universities in avoiding future liability or large settlements in the future. In reaching their individual conclusions, both courts emphasized that the suicide was foreseeable and therefore that the administrators did have a special relationship with the student and consequently a duty to prevent the suicide. In *Schieszler*, the court was careful to say that Virginia law would probably not find that a special relationship exists *in general* between a student and a university, but rather the “*particular facts*” of the case warranted a finding of a special relationship.¹¹⁵ Although neither decision identified the facts that gave rise to a special relationship, use of the phrase “particular facts” implies that the special relationship will only be found in unusual cases where the foreseeability of the impending suicide should have been apparent to university administrators.¹¹⁶ Below is an analysis of the factual similarities between *Schieszler* and *Shin* that may serve as predictors of fact patterns that would create liability in future cases.

A. Reports of Suicide Threats Were Made to Administrators

In both *Schieszler* and *Shin*, administrators received several reports from third parties of the decedent’s intention to commit suicide. In *Schieszler*, administrator Newcombe was made aware of at least three separate notes addressed to Frentzel’s former girlfriend indicating that Frentzel was contemplating suicide.¹¹⁷ Upon discovery of one such note, the police had entered his dorm room to find him with self-inflicted bruises on his head.¹¹⁸

In *Shin*, on numerous occasions reports had been made to Davis-Mills and

112. Lauren, *supra* note 111.

113. Hoover, *supra* note 5.

114. Capriccioso, *supra* note 69.

115. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (emphasis added).

116. *Id.* After the *Shin* decision, David DeLuca, counsel for the Shins, commented that the decision will not affect university administrators to the degree that has been feared. He said, “[t]here’s no sense from this decision that a university administrator has an absolute duty to ensure the safety of all students under all circumstances.” Hoover, *supra* note 5.

117. *Schieszler*, 236 F. Supp. 2d at 605.

118. *Id.*

Henderson regarding Elizabeth's condition. In Elizabeth's freshman year, Davis-Mills was contacted when Elizabeth was hospitalized for a Tylenol overdose.¹¹⁹ In Elizabeth's sophomore year, Henderson received an e-mail in which one of Elizabeth's professors reported that Elizabeth had told a teaching assistant of plans to take sleeping pills.¹²⁰ Davis-Mills was subsequently made aware of the e-mail. Later that year, a student informed Davis-Mills that Elizabeth was "cutting herself and extremely upset."¹²¹ Just two days later, another student reported to Davis-Mills that Elizabeth did not seem well, and in the coming weeks numerous students and tutors made similar comments to Davis-Mills.¹²² Davis-Mills expressed her concern regarding Elizabeth to Henderson. The day that Elizabeth died, students had warned Davis-Mills that Elizabeth had plans to commit suicide. Again, Davis-Mills had reported the incident to Henderson.¹²³

B. Administrators Had Conversations with the Student Regarding Suicidal Thoughts

In addition to reports from third parties, in both cases administrators were in direct contact with the student. In *Schieszler*, in response to the first suicidal note Newcombe spoke directly to Frentzel and asked him to sign a document which promised that he would not harm himself.¹²⁴ In *Shin*, Davis-Mills and Henderson both had numerous conversations with Elizabeth regarding her condition. On several occasions, following reports from students, Davis-Mills had made contact with Elizabeth. Henderson had also regularly been in contact with Elizabeth. Elizabeth had informed Henderson of her cutting habit, and just weeks before she died, Elizabeth had contacted Henderson to request help in obtaining extensions on class assignments because of her mental condition.¹²⁵

C. Administrators Required the Student to Receive Counseling

Finally, in both situations concern regarding the student's behavior had warranted administrators to refer the student on to a counselor, psychiatrist or mental health specialist. In *Schieszler*, following "disciplinary issues," Frentzel was required to enroll in anger management counseling prior to returning for his second semester.¹²⁶ In *Shin*, administrators repeatedly requested and required Elizabeth to visit mental health professionals. Following her overdose freshman year, Elizabeth was seen by a psychiatrist from MIT's Mental Health Services Department. In her sophomore year, Henderson had scheduled an immediate

119. *Shin v. Mass. Inst. of Tech.*, No. 02-040, 2005 Mass. Super. LEXIS 333, at *2 (June 27, 2005).

120. *Id.* at *6.

121. *Id.*

122. *Id.* at *8.

123. *Id.* at *12.

124. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 605 (W.D. Va. 2002).

125. *Shin*, 2005 Mass. Super. LEXIS 333, at *7.

126. *Schieszler*, 236 F. Supp. 2d at 605.

session for Elizabeth upon discovery of her cutting habit.¹²⁷ Davis-Mills also convinced Elizabeth to go to MIT Mental Health upon receiving student reports that Elizabeth was harming herself.¹²⁸ Additionally, on numerous occasions, Elizabeth visited MIT Mental Health at the prompting of others, at her own discretion, and for regularly scheduled appointments with her treating psychiatrists.

D. Conclusions

In both cases, it is apparent from third party reports, direct interactions with the student, and the referral to the counseling center or mental health professional that the administrators were at least aware of the student's fragile condition. The repeated notifications from third parties regarding suicidal tendencies indicate that it should have been foreseeable in the minds of administrators that the student was considering suicide. Additionally, in both cases administrators were aware that the student had been seen or was currently under the care of mental health professionals. Although an administrator may assume that by referring the student to a mental health professional that they have absolved themselves of liability, these decisions indicate that is not the case. Even if the student is under the care of a professional, if the student's suicide is foreseeable, the administrator may still have a duty to prevent that student from committing suicide.

The good news for universities is that a court is unlikely to find a suicide is foreseeable if the student does not give any warning or make public threats. Because both courts (*Sheiszler* and *Shin*) stressed the foreseeability of the harm as a significant factor in identifying a special relationship, it would be unlikely that without any warning signals a court would find that a special relationship exists between the parties. To this end, the attorney representing the Shins, David DeLuca commented that it is the specific facts of the *Shin* case, and more particularly the acts of the administrators, that he believes gave rise to their liability.¹²⁹ DeLuca said, "a case in which a student kills himself without alerting anyone about his immediate intentions would differ from a case in which a student had told others of his plans."¹³⁰ University administrators should not readily fear liability in situations where they are unable to foresee the student's actions.

IV. HOW SHOULD UNIVERSITIES PROCEED?

With the knowledge that foreseeable harm may lead a court to identify a special relationship and subsequent liability, how should universities respond in an effort to shield themselves and their staff? "Since the *Shin* case was first filed, MIT has made a number of enhancements to the mental health services it

127. *Shin*, 2005 Mass. Super. LEXIS 333, at *6.

128. *Id.*

129. Hoover, *supra* note 5.

130. *Id.*

provides to students.”¹³¹ All institutions of higher education should take note of the lessons learned in *Shin* and capitalize on the experience of MIT by enhancing their own mental health departments. Perhaps most importantly, universities need an established suicide prevention plan that serves as a resource to everyone on campus regarding the proper protocol to follow when suicide threats are reported.¹³²

A. Consistent Communication

Treating clinicians are clearly in the best position to assess and make decisions regarding the well-being of students exhibiting signs of depression and suicidal tendencies. In *Shin*, the court emphasized the lack of coordinated effort among university personnel to address Elizabeth’s short-term needs and to develop an effective treatment program for her.¹³³ The lack of communication among the handful of clinicians who saw her and the university administrators was apparent even on the morning of her death at the weekly meeting of the deans and psychiatrists when a definitive plan was not made to address Elizabeth’s deteriorating condition.¹³⁴ Unaware of the number of threats she had made previously or the severity of her condition, any clinician treating Elizabeth would have been unable to reach an educated decision regarding both short-term and long-term care options.

To avoid this inconsistency and subsequent lack of effective treatment, on-campus counseling centers should strive for constant communication among clinicians. Although the size and nature of the counseling center will vary by institution, communication regarding particularly volatile students among clinicians within the center should happen at least once a week. As an additional means of maintaining a coordinated effort, one clinician should be assigned to each student who visits the center, and this person should have the primary responsibility for monitoring the student’s condition. Because it is unlikely that a student will be able to be seen by the same clinician on every visit, especially in emergency situations, there should be a primary treating clinician who receives

131. Capriccioso, *supra* note 69.

132. In 2004, the Suicide Prevention Resource Center prepared a report with funding from the U.S. Department of Health and Human Services, “Promoting Mental Health and Preventing Suicide in College and University Settings.” This excellent resource, commonly referred to as the “White Paper,” offers statistics regarding suicide on campus, factors that may help identify volatile students, and strategies for suicide prevention on campus. The document stresses the importance of a “comprehensive approach to suicide prevention.” SUICIDE PREVENTION RES. CTR., *supra* note 25, at 17. Specifically it asserts that a “comprehensive approach will be more effective when it includes consistent and coordinated activities in all the social spheres in which the target audience (in this case, college students) live, study, work and play.” *Id.*

133. The court said, “As a ‘treatment team,’ the professionals failed to secure Elizabeth’s short-term safety in response to Elizabeth’s suicide plan in the morning hours of April 10.” *Shin v. Mass. Inst. of Tech.*, No. 02-0403, 2005 Mass. Super. LEXIS 333, at *24 (June 27, 2005).

134. *Id.* at *13.

all updates and information related to that student. Furthermore, one record should be maintained for each student and stored in a central file cabinet for the center.¹³⁵ This will allow any clinician who treats a student in an emergency or unexpected situation to contact the primary treating clinician with questions or to take note of the previous treatment program and make an informed decision regarding future treatment options.

There should also be regularly scheduled meetings between the deans and the psychiatrists or other representatives of the counseling center.¹³⁶ At these meetings, students of particular concern can be discussed as well as the available treatment options. Administrators who may have more contact with faculty and students will be able to report to the counseling center anything they have heard regarding the student. Together the administration and the clinicians can discuss treatment options, including decisions regarding the need for reduced class loads, a change in residential housing, or more involved supervision. For students such as Elizabeth who have made numerous visits to the counseling center as well as several suicide threats to peers and professors, it is imperative that the counseling center and administrators together reach a definitive strategy to assist the student.

B. Training

Universities need to invest in the development of suicide prevention training programs for residence life staff, administrators, faculty and others who are in close contact with students.¹³⁷ Training programs strive to alleviate ineffective responses to foreseeable harm. Such programs should focus on symptoms of suicidal students, when action is necessary, and the proper course of action when a suicidal student is identified or a threat is made.¹³⁸ As evidenced in the *Shin* case, residential life staff can be susceptible to liability because of their constant interaction with students in the dormitories.¹³⁹ Prior to the beginning of the school year, all residence life staff should undergo at least one segment of training dedicated to suicide awareness and prevention. Because they are in the

135. See ANN FRANKE ET AL., DEALING WITH DISTRESSED AND SUICIDAL STUDENTS: LEGAL POLICY ISSUES, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS, Virtual Seminar, 32 (Oct. 14, 2005) (noting that universities should “[e]ncourage counselors to maintain client files with bad outcomes in mind”).

136. *Id.* at 15 (noting that the *Shin* decision (where there were meetings of the deans and psychiatrists) does not “justify abandonment” of these types of meetings).

137. See Bloch, *supra* note 41, at 944-45 (discussing the importance of training people to recognize “screams” for help); see also Lake & Tribbensee, *supra* note 3, at 154-55.

138. Several organizations offer live training programs, as well as electronic training programs. Suicide TALK is one of the examples of electronic training programs available. See Living Works Education, Inc., Suicide Talk: An Exploration in Suicide Awareness, <http://www.livingworks.net/ST.php> (last visited Jan. 8, 2007).

139. Davis-Mills was the housemaster of Elizabeth’s dormitory. *Shin*, 2005 Mass. Super. LEXIS 333, at *3. She often received reports from students regarding suicidal comments that Elizabeth had made. *Id.*

best position to observe the daily habits of students, they should be aware of signs of suicidal students as well as the appropriate response when students express concern regarding another student.

Faculty should also be trained in suicide prevention.¹⁴⁰ In both *Jain* and *Shin*, the suicide appeared to be prompted in part because of the pressures inherent in college life, including academic hardship.¹⁴¹ In *Shin*, Elizabeth felt she was struggling in her coursework and had requested extensions on her assignments. She also told at least one teaching assistant that she had intended to kill herself.¹⁴² Because faculty are often aware of a student who is falling behind or performing poorly, they have an opportunity to interact with such students who may be suffering from depression and consequently contemplating suicide. An effective option for training faculty is the electronic suicide prevention programs.¹⁴³ These programs are often completed at the convenience of the professor within a designated period of time and offer the suicidal signs professors should be looking for and the appropriate means to address them. In addition, accompanying any university-sponsored training program should be a concise document tailored to the individual institution that details the appropriate response to a suicide threat.

C. A Variety of On-Campus Resources

The coordinated plan should involve several resources for students to turn to when they or their friends experience symptoms of depression or suicidal tendencies. The majority of colleges and universities do house an on-campus counseling or mental health facility, and often the services are free to students as the costs are incorporated into tuition and other fees.¹⁴⁴ Despite the presence of such centers, students may be unaware of the scope of the work of the counseling center or fear a stigma attached with making a visit. Students may think their issue or concern does not warrant an appointment. Therefore, universities and counseling centers should seek to enhance the visibility of counseling centers on campus and encourage students to take advantage of the programs and services

140. See Lake & Tribbensee, *supra* note 3, at 154-55 (emphasizing the importance of training the “academic staff” at a university).

141. In *Jain*, Sanjay was reported to be suffering both personally and academically. *Jain v. Iowa*, 617 N.W.2d 293, 295 (Iowa 2000). In *Shin*, Elizabeth had requested numerous extensions on work and examinations, and she told one clinician that she was “considering transferring from MIT due to her marginal performance in some of her classes.” *Shin*, 2005 Mass. Super. LEXIS 333, at *4.

142. *Shin*, 2005 Mass. Super. LEXIS 333, at *6.

143. See, e.g., *supra* note 138.

144. See SUICIDE PREVENTION RES. CTR., *supra* note 25, at 21 (discussing the fact that many such counseling centers are not currently staffed or open twenty four hours per day and recommending that counseling centers develop procedures for incidents that occur on the weekends or other off hours).

offered.¹⁴⁵

Acknowledgment of the counseling center should begin at freshman orientation.¹⁴⁶ As evidenced in all three of the above cases, often depression and suicidal tendencies strike early in a student's college career, as they adjust to living on their own and the pressures of college life.¹⁴⁷ As one of the required seminars at freshman orientation, students should hear briefly about the work of the counseling center and be encouraged to visit for any variety of issues.

In addition to counseling centers, universities should have web-sites (often these are coordinated through the counseling center) that provide information regarding signs of depression and suicide and what to do when they themselves or someone they are close to are experiencing such symptoms or emotions. As the internet is now a prevalent source of information for college students, this provides an anonymous means for students to research depression and suicide.¹⁴⁸

Residential campuses generally offer a variety of educational programs throughout the year targeting hot-button issues on campus, either through individual dormitories or other small groups. Such events should be planned to specifically address depression and suicide awareness. A speaker from the counseling center might speak to the issue followed by an open forum for discussion of individual student experiences or questions relating to how to approach or encourage friends they know suffering from similar symptoms.

D. Consistent Response to All Suicide Threats

University and college administrations need to develop a consistent plan¹⁴⁹ that is well-documented and perhaps even posted on the university's (or counseling center's) web-site, to detail the standard procedure to follow when suicide threats occur or when suicidal students are identified.¹⁵⁰ Often, as

145. See FRANKE ET AL., *supra* note 135, at 32.

146. Craig Miller, M.D., assistant professor of psychiatry at Harvard Medical School and Editor-in-Chief of the Harvard Mental Health Letter, has commented: "I think there is that pressure, especially in the freshman year, when there's initial anxiety that's going to settle out. . . . They need help with the transition and once they make it, it's quite successful." Ellen, *supra* note 27. Lisa Cohen Barrios, Dr. P.H., has also commented "a freshman survey on a health center intake form 'would be a perfect place to ask these questions.'" *Id.*

147. In all three of the above cases, the students first exhibited suicidal tendencies in their freshman year. In both *Jain* and *Schieszler*, the student actually committed suicide in his freshman year. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 605 (W.D. Va. 2002); *Jain v. Iowa*, 617 N.W.2d 293, 295 (Iowa 2000).

148. See FRANKE ET AL., *supra* note 135, at 32 (suggesting the use of counseling center web-sites). Numerous universities already have comprehensive web-sites that discuss depression and suicide. The University of Michigan offers a good example of comprehensive web-site. See, e.g., <http://www.umich.edu/~caps/>.

149. See Lake & Tribbensee, *supra* note 3, at 153 (emphasizing the importance of consistently following the established policy as a means to reduce liability).

150. See FRANKE ET AL., *supra* note 135, at 29-32 (suggesting that universities develop a plan

evidenced in the *Shin* and *Schieszler* cases, students will make suicide threats to their peers and faculty prior to committing suicide. At training sessions discussed above, both students, faculty and residence life staff should be made aware of the plan to be followed when a student makes a suicide threat. Any threat that is either made or reported to anyone on campus should be relayed to a specific designated administrator, most likely the dean of students or similar position.¹⁵¹ This dean will bear the responsibility of contacting the student immediately to ensure the short-term safety of the student and to make arrangements for an appointment in the counseling center in addition to documenting the threat and contacting the primary treating clinician for that student (assuming the student has been to the counseling center before). After making a suicide threat, the student should be seen by a clinician as soon as possible for an evaluation of the severity of the threat and analysis of the appropriate response. The clinician should then report back to the administrator to offer an assessment and recommendation regarding treatment.

If, after meeting with the student, the clinician does not fear for the immediate well-being of the student, the counselor may develop an appropriate treatment response including regular appointments in the counseling center. However, if the clinician is afraid for the student's well-being, the student should not be left unattended,¹⁵² and the clinician should contact the dean regarding decisions related to the student's studies, residence life, and immediate plans for ensuring the student's safety.

If a student makes more than one reported suicide threat, the dean and counseling center should schedule a meeting for the sole purpose of discussing the well-being of the student and the need for immediate intervention. In both *Schieszler* and *Shin*, the student made more than one reported threat, but the administrators and counselors failed to develop appropriate means for preventing the student's death.¹⁵³ When a student has made more than one suicide threat and the student's condition does not show signs of improvement, the treating team should consider contacting the parents and/or the possibility of sending the student home for the duration of the semester. Involving the parents or guardians at this stage makes them aware of their child's condition and allows the parent to

to address suicidal students and make it readily available). The Suicide Prevention Resource Center offers several ideas to implement such a plan. *See generally* SUICIDE PREVENTION RES. CTR., *supra* note 25.

151. *See* FRANKE ET AL., *supra* note 135 (recommending universities to "designate a specified person" to communicate with the student).

152. *See* Lake & Tribbensee, *supra* note 3, at 156 (asserting that often "suicides can be prevented by an effective, appropriate and timely intervention"). Perhaps the suicide in *Shin* could have been prevented. Although the physicians left Elizabeth a message that they planned to admit her to a program the following day, they did nothing to ensure her immediate safety. *Shin v. Mass. Inst. of Tech.*, No. 02-0403, 2005 Mass. Super. LEXIS 333, at *13 (June 27, 2005).

153. In *Schieszler*, Frentzel wrote at least three notes expressing his intent. *Schieszler v. Ferrum Coll.*, 236 F. Supp.2d 602, 605 (W.D. Va. 2002). In *Shin*, Elizabeth made several threats that were reported to administrators. *Shin*, 2005 Mass. Super. LEXIS 333, at *4-11.

be involved in the decision to keep the child in school or send him home until his condition has improved. However, universities need to be mindful that contacting the parents and sending students home may conflict with patient confidentiality and other federal regulations discussed in Part IV.¹⁵⁴ Regardless, when students have made repeated suicide threats, have been under constant care with little or no improvement, and can not be trusted not to harm themselves, it is likely in the best interest of both the university and the student to send them home.

E. Identify Students Pre-disposed to Commit Suicide

Entrance surveys as a part of freshman or transfer orientation (after students are admitted) or surveys for students who visit the health center have been suggested as a means of identifying potentially volatile students and students who might need to be monitored throughout their tenure.¹⁵⁵ This may prove to be a fruitful means of identifying suicidal students and those suffering from depression, but universities need to be cautious that they do not violate student confidentiality.

F. Removing Foreseeable Hazards

As part of a comprehensive approach to alleviate foreseeable harm on campus, universities should remove any hazards that have the potential to serve as a “means of suicide.”¹⁵⁶ This may include the elimination of “access to handguns, drugs, and other common means of suicide.”¹⁵⁷ Additionally universities may consider “restricting access to high places on or near campuses.”¹⁵⁸

G. Stay Current

Until recently, universities were hard pressed to find resources and effective strategies for suicide prevention.¹⁵⁹ Increasing concern for the well-being of

154. See, e.g., Bombardieri, *supra* note 5 (noting that sending students home may conflict with the Americans with Disabilities Act).

155. See SUICIDE PREVENTION RES. CTR., *supra* note 25, at 18, 20 (“A screening instrument might be administered at colleges and universities as part of the first year orientation and the collection of health-related information about students.”); see also Ross & Rogers, *supra* note 2 (noting that, “[S]creening students for depression as they enter the University [can] also help to minimize suicide on campus.”).

156. SUICIDE PREVENTION RES. CTR., *supra* note 25, at 23; see also Lake & Tribbensee, *supra* note 3, at 154.

157. SUICIDE PREVENTION RES. CTR., *supra* note 25, at 23.

158. *Id.*

159. See Lake & Tribbensee, *supra* note 3, at 153. Lake and Tribbensee note that in the past the development of suicide prevention programs was impaired because there was not a consistent model to follow. *Id.* However, as discussed above, recent federal funding in this area has produced

college students has recently prompted discussion, research, and funding to address the best means of preventing college suicide.¹⁶⁰ It is important for universities to take advantage of the numerous opportunities and resources available to them and to stay abreast of research developments. One opportunity is a grant program established by the federal government through the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Division.¹⁶¹ This grant, the Campus Suicide Prevention Grant, will award \$3 million through individual grants of \$75,000 to private and public colleges and universities “to assist colleges and universities in their efforts to prevent suicide and attempted suicide, and to enhance services for students with mental health problems such as depression and substance abuse that put them at risk for suicide or suicide attempts.”¹⁶² Grant recipients can use these funds to assist in enhancing or creating training programs, suicide prevention hot-lines, and literature for distribution.¹⁶³

There are also several programs and conferences that specifically address suicide prevention. University student services staff and the residence life staff should consider attending suicide prevention conferences where the latest research will be presented and where they will have the opportunity to discuss prevention strategies with other university employees.¹⁶⁴ Universities should use these events to regularly re-evaluate their suicide prevention plans.

models such as those offered in the Suicide Prevention Resource Center’s report. *See supra* note 132.

160. The Jed Foundation is a driving force in developing and researching campus suicide prevention programs. The foundation was established in 2000 by Phil and Donna Satow in response to the suicide of their son who was a college student. “The Jed Foundation was established in order to prevent suicide on college campuses and focus on the underlying causes of suicide.” The Jed Foundation, Welcome to The Jed Foundation, <http://www.jedfoundation.org> (last visited Jan. 8, 2007). The Foundation collaborates with university administrators, government players, clinicians, and scientists to “design effective prevention programs that reflect the best in current thinking.” *Id.* Its web-site offers a variety of services and information designed to assist universities and individual students in suicide prevention: <http://www.jedfoundation.org>.

161. *See* Substance Abuse and Mental Health Services Administration, Campus Suicide Prevention Grants, http://www.samhsa.gov/grants/2005/nofa/sm05015_campus.aspx (last visited Jan. 8, 2007).

162. Dep’t of Health and Human Serv., Substance Abuse and Mental Health Services Administration, *Campus Suicide Prevention Grants*, (Initial Announcement), RFA SM-05-015, Catalogue of Federal Domestic Assistance (CFDA) No.: 93.243, page 5, *available at* http://www.samhsa.gov/Grants/2005/nofa/sm05015_campus_suicide.doc (last visited Jan. 8, 2007).

163. *Id.*

164. The University of Virginia sponsored a conference on Suicide, Violence, and Disruptive Behavior on University Campuses” on June 12-13, 2005. *University of Virginia Sponsors June 12-13 Conference on Suicide and Related Issues on University Campuses*, UNIV. OF VA. NEWS, June 9, 2003, <http://www.virginia.edu/topnews/releases2003/suicide-june-9-2003.html>. Over 300 clinicians and student affairs personnel registered. *Id.*

V. LEGAL CONSIDERATIONS

As universities implement and alter existing suicide prevention plans, they are likely to encounter three specific legal issues discussed below. These issues will force universities to navigate a fine line between protecting the well being of students (and shielding themselves from liability) and respecting the rights and interests of students as adult members of the educational institution.

A. *Sending Students Home*

Following the *Shin* decision, concerns have been voiced that universities fearing liability will now require students to take a medical leave and return home at the first sign of mental illness or depression.¹⁶⁵ Pavela has noted such a trend on college campuses, and has cautioned against it: “If administrators overreact to these cases by routinely removing students, then they are jumping out of the frying pan and into the fire[.]”¹⁶⁶ Pavela is referencing the legal trouble universities may encounter if they violate the requirements of the Americans with Disabilities Act (“ADA”),¹⁶⁷ which mandates that schools intensely review an individual’s record prior to sending a student home.¹⁶⁸ Universities could open the door to an entirely different set of problems and potential litigation if they do not thoroughly review a student’s situation prior to dismissing a student.

The ADA mandates that qualified persons (including faculty, staff and students) will not be discriminated against “on the basis of their disability.”¹⁶⁹ The ADA defines persons with disabilities as “those with ‘physical or mental impairments which substantially limit one or more . . . major life activities, [those with] a record of such an impairment, or [those who are] regarded as having such an impairment.’”¹⁷⁰ There are only a limited number of cases which address whether mental illness qualifies as a disability as it relates to higher education.¹⁷¹ However, the majority of these cases suggest that where a psychiatric condition is the cause of “misconduct or deficiencies” the university is not obligated to make related accommodations.¹⁷²

Nonetheless, to insulate against controversial decisions, universities should provide the student with due process including “notice of pending withdrawal”

165. See Hoover, *supra* note 5.

166. Bombardieri, *supra* note 5.

167. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

168. See Bombardieri, *supra* note 5.

169. Laura F. Rothstein, *The American with Disabilities Act: A Ten-year Retrospective: Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 245 (2000).

170. *Id.* at 247 (quoting 29 U.S.C. § 705(20)(B) (2000); 42 U.S.C. § 12102(2) (2000)) (alterations in original).

171. *Id.* at 259.

172. *Id.* For example, a court held that “it was not reasonable to accommodate a masters degree candidate with a panic disorder by waiving class attendance and allowing him to attend classes by phone.” *Id.* (citing *Maczaczyj v. New York*, 956 F. Supp. 403, 409 (W.D.N.Y. 1997)).

and an “opportunity to be heard on the matter.”¹⁷³ Additionally, prior to sending students home, administrators should secure evidence that the student is a direct threat, defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”¹⁷⁴ A direct threat is comprised of four requirements: 1) a “[h]igh probability of substantial harm”; 2) an “[i]ndividualized and objective assessment of student’s ability to safely participate in school’s program”; and 3) an “[a]ssessment must be based on reasonable medical judgment relying on most current medical knowledge or best available objective evidence.”¹⁷⁵

Beyond ADA and other regulations, there is also an argument that public policy reasons support retaining suicidal students at the university. As one commentator has suggested: “[s]tudents are not well served by . . . automatic medical leaves [that] return them stigmatized into families that may be chaotically disorganized. . . a supportive campus setting enables them to continue their studies while receiving treatment.”¹⁷⁶

In each of the above cases, the university could have avoided the risk of liability if the students been removed from school. Consequently, there will be times when it is in the best interest of both the student and the university for the student to take a leave from school (or alternatively be withdrawn in the event that they do not leave voluntarily). However, such a decision should not be approached lightly. The administrator should be sure that all of the necessary elements of a direct threat have been adequately documented and that there is sufficient evidence to support his/her decision in the event that either the parents or the student contest the decision of the administrator. Furthermore, it should be apparent that the student’s best interest will be served by sending the student home.

B. Student Confidentiality

In all three of the above cases the student exhibited suicidal tendencies while on campus, and in all three cases the parents or guardians were not contacted when the student’s deteriorating condition became apparent.¹⁷⁷ In both *Jain* and *Shin*, the parents asserted that the outcome may had been different had they been contacted regarding their child’s behavior and given the opportunity to

173. FRANKE ET AL., *supra* note 135, at 25. “Emergency interim withdrawal is permitted without process *provided* that process is provided after withdrawal.” *Id.*

174. 29 C.F.R. § 1630.2(r) (2000).

175. FRANKE ET AL., *supra* note 135, at 23.

176. Alan Lipschitz, *College Student Suicide*, <http://www.afsp.org/research/articles/lipsch2.html> (last visited Jan. 8, 2007).

177. Elizabeth’s parents were contacted on two occasions with Elizabeth’s consent, but they claim when they visited her the day before her death that they were unaware of her deteriorating condition despite the numerous threats she had made recently to administrators. Sontag, *supra* note 10. In *Jain*, the court said, “Sanjay’s parents and family were unaware of [his] difficulties.” *Jain v. Iowa*, 617 N.W.2d 293, 295 (Iowa 2000).

intervene.¹⁷⁸ However, universities are hesitant to violate student confidentiality and are often prohibited from releasing pertinent information by federal regulation, local law, or campus policy.

Universities are bound to protect student confidentiality by the requirements of what was formerly called the Buckley Amendment,¹⁷⁹ now entitled the Family Education Rights and Privacy Act of 1974 (“FERPA”).¹⁸⁰ FERPA is applicable to all public and private educational institutions that receive federal funding.¹⁸¹ Because the vast majority of higher education institutions receive federal funding, nearly all higher education institutions are subject to its requirements.¹⁸² Under FERPA, these institutions must ensure “compliance with certain privacy-related practices. Parents (and students [if] over the age of 18) must be given the right to inspect and review the education records of their children (or themselves).”¹⁸³ Additionally, FERPA serves to protect one’s right to privacy by restricting the disclosure of information to third parties without consent.¹⁸⁴ Furthermore, a record must be maintained that details all outside parties that have “requested or obtained a student’s education records.”¹⁸⁵

Among the education records that parents are allowed to access are “records, files, documents and other materials that contain information directly related to a student and maintained by a covered institution or its agent.”¹⁸⁶ Types of records, however, are excluded from the educational record and subsequently from automatic access to parents including “records maintained by the law enforcement unit of an institution, employee records and certain *medical related records*.”¹⁸⁷ Specifically, the statute excludes from the educational record all records:

which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity,

178. In *Jain*, “the only specification of negligence seriously advanced by plaintiff was his claim that Sanjay’s death resulted from the university’s failure to notify his parents of his earlier suicide attempt.” *Jain*, 617 N.W.2d at 296. The Shins stated: “How we wish, more to the point, that we had been told.” Sontag, *supra* note 10.

179. *Disclosure of Student Records: A Comprehensive Checklist*, 3 CAL. SPECIAL EDUC. ALERT (May 1997); see also MATTHEW BENDER & COMPANY, INC., 5-13 EDUC. L. § 13.04, 3(a) (2005) (detailing the history of FERPA).

180. 20 U.S.C. § 1232g (2000).

181. Gary Saidman, *Overview of Key Federal Privacy and Information Security Statutes*, 4 E-COMMERCE L. REP. 2, 6 (2002).

182. MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 3(b)(i).

183. Saidman, *supra* note 181, at 6.

184. See *id.*; see also MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 3(a).

185. Saidman, *supra* note 181, at 6.

186. *Id.*; see also MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 4(b)(i) (noting that “most records related to a student will be included”).

187. Saidman, *supra* note 181, at 6 (emphasis added).

and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.¹⁸⁸

The Act "does not consider treatment records education records for the purposes of FERPA if they are not available to anyone other than persons providing treatment."¹⁸⁹ However, if the treatment record is disclosed, for any purpose (including a student's requested access to treatment records), then it will become a part of the educational record and be subject to the Act's provisions.¹⁹⁰ Because treatment records are not automatically included in the educational record, parents are not guaranteed access to them. Additionally, under FERPA, non-recorded information, including all verbal communications, is not an educational record and therefore not readily available for parental access.¹⁹¹

Therefore, individual state law will control university or clinician policies regarding the release of student treatment information or verbal communication to parents and third parties.¹⁹² Local law differs by jurisdiction, but in many jurisdictions conversations between a student and a physician, or mental health professional are privileged and therefore cannot be revealed to parents or other third parties requesting access without the express permission of the patient.¹⁹³

FERPA also includes an exception for drug and alcohol disclosures, which may not be included in the educational record because they are criminal records. The Act does not:

prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records,¹⁹⁴

assuming the student is not yet twenty one years of age and the institution has determined that the student "committed a disciplinary violation with respect to such use or possession."¹⁹⁵ Therefore, if a student has violated a law relating to alcohol or a controlled substance, the school may contact the parents even if the information is not contained in the education record. This provision may prove important if it is established that a student with mental illness or suicidal

188. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2000).

189. MATTHEW BENDER & COMPANY, INC., *supra* note 179, § 4(b)(vi).

190. *Id.*

191. FRANKE ET AL., *supra* note 135, at 18.

192. *Id.*

193. *Id.*

194. 20 U.S.C. § 1232g(i)(1) (2000).

195. *Id.* § 1232g(i)(1)(A)-(B).

tendencies has abused medications or other controlled substances.

FERPA contains an important provision regarding the release of information that is contained in the educational record. Under FERPA, if the student's conduct "posed a significant risk to the safety or well-being of that student, other students, or members of the school community," the institution is permitted to disclose the relevant information to "teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student."¹⁹⁶ If a student has exhibited troubling behavior including a threat to themselves (or their classmates), the university should inform faculty and staff of the behavior so they can assist the school in monitoring the student.

In the future, universities are going to have to choose between violating the confidentiality of students and responding to the potential harm, including legal liability that could result by not informing parents or guardians of the student's condition.¹⁹⁷ In developing protocols for contacting parents, universities should "balance [the] risk of privilege violation against potential harm to students."¹⁹⁸ It is apparent that there will be circumstances where the risk of violating confidentiality will be trumped by the student's well being.

C. In Locus Parentis

Traditionally, courts "found the college stood *in loco parenti*—literally in the place of the parent. . . [a]s the guardian of the students' health, welfare, safety and morals."¹⁹⁹ But the Vietnam era and the campus revolutions of the 1960s prompted a change in America's perception of college students.²⁰⁰ Students came to be viewed as adults in their own right, rather than children under the care of their parents.²⁰¹ "The passage of the 26th Amendment to the U.S. Constitution lowering the voting age to 18 added to this feeling of student responsibility."²⁰²

Identifying students as adults prompted changes in the courts' perception as well, and therefore in recent decades, the university has not been regarded as standing *in locus parentis*.²⁰³ This view was personified in *Schieszler v. Ferrum*,

196. *Id.* § 1232g(h)(1)-(2).

197. Lake and Tribbensee offer a valuable discussion of the case law regarding parental notification and policy considerations. Lake & Tribbensee, *supra* note 3, at 137-53. Specifically, they comment that "administrators in a university setting must consult with appropriate professional staff to assess whether notification is in the best interest of the student and whether such notification is expected to protect the student from suicide or suicidal ideation." *Id.* at 150.

198. FRANKE ET AL., *supra* note 135, at 18.

199. Robert A. Clifford, *Clearing the Haze Around College Hazing*, CHI.LAW., Sept. 8, 1996, at 8.

200. *Id.*

201. *Id.*

202. *Id.*

203. See Jennifer L. Spaziano, *It's All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 226

where the court specifically said, “[t]he instant case does not involve a minor, and therefore, strictly speaking, no duty arises from an *in loco parentis* relationship.”²⁰⁴ However, it has been noted that recent cases have caused “commentators to consider the re-emergence of the *in loco parentis* doctrine.”²⁰⁵ It has also been argued that “[m]ore and more students are looking to higher educational institutions for help with other parental [] aspects of their lives—tuition assistance, job hunting and establishing their careers.”²⁰⁶ As students become more dependent on their institution to serve as pseudo-parents in many respects, “should the institutions that house and educate these teenagers and young adults ultimately be responsible for the student’s negligent actions?”²⁰⁷ If universities have a duty to reduce and regulate “dangerous activities peculiar to the college environment[,]” then that likely “means greater supervision of the students, [and] perhaps we’ve just come full circle” in re-assuming the role of *in locus parentis*.²⁰⁸

As the issue pertains to suicidal students, what is the proper role of the university? The university needs to consider the implications of assuming a parental role in the lives of students. The more constant supervision and care the university provides suicidal students and students suffering from mental illness, the closer they have become to assuming the role of *in locus parentis* and opening a new door to liability.²⁰⁹ However, the alternative is not very appealing—to remain detached from the students in the most need of care. Perhaps it is best for universities to play an active role in lives of needy students but with a firm and consistent suicide prevention policy to safeguard against liability.

CONCLUSION

Although the issue of suicide liability remains both uncertain and concerning for universities, universities should capitalize on the lessons that can be learned

(1994) (noting that the doctrine of *in locus parentis* was abandoned after *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), where the appellate court held that the college did not owe a duty of custodial care to the student).

204. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 608 (W.D. Va. 2002).

205. Spaziano, *supra* note 203, at 227.

206. Clifford, *supra* note 199, at 8.

207. *Id.*

208. *Id.*

209. *See generally* Spaziano, *supra* note 203. Spaziano addresses the tension that universities face between direct control and a hands off approach related to on-campus student organizations and liability. She asserts that there are two ways that a university can avoid liability with student organizations: 1) “by denying any relationship between itself and its student organizations, or choosing to maintain control over its organizations but [limiting] liability through implementation of carefully conceived regulations.” *Id.* at 244. She concludes that it is in the best interest of the university to assume a direct control approach. She determines that this is the “more definite approach and the university, the organization, the student, and the courts know exactly where the university stands in relation to the organization.” *Id.* at 245.

from the *Shin* case. Universities have notice that in future cases a special relationship may be found between a university or university administrators and a student where the student's death is foreseeable. To avoid such liability, universities need to be proactive in establishing a "multi-faceted and comprehensive approach to suicide prevention" that will be consistently followed by all members of the university community.²¹⁰ Institutions should make communication, planning, and training pivotal parts of the suicide prevention plan. In designing suicide prevention plans, universities must take into consideration the legal issues related to sending students home, student confidentiality, and the doctrine of *in locus parentis*. Finally, because the issue of campus suicide is attracting attention from a variety of fields, universities should stay abreast of the latest research, relevant cases, and other developments to ensure that their programs are the most effective means of suicide prevention.

210. Health and Human Development Programs, *supra* note 1 (quoting Dr. Lloyd Potter, Director of the Suicide Prevention Resource Center).

