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Reevaluating Privacy and Disability Laws in the Wake of the Virginia Tech Tragedy: Considerations for Administrators and Lawmakers

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INTRODUCTION

On April 16, 2007, Seung Hui Cho ("Cho"), a senior at Virginia Tech, shot and killed thirty-two fellow students and faculty members and injured seventeen more before killing himself on the Blacksburg, Virginia campus.[1] At approximately 7:15 that morning, Cho entered West Ambler Johnston dormitory on campus and shot two students.[2] He then returned to his dorm room, changed his bloody clothes, logged onto his computer, and walked to the post office to mail a package of writings and video recordings to NBC News.[3] About two

1. *See* VIRGINIA TECH REVIEW PANEL, REPORT OF THE REVIEW PANEL: MASS SHOOTINGS AT VIRGINIA TECH 25 (2007), http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf [hereinafter VIRGINIA TECH REPORT]. The school's official name is Virginia Polytechnic Institute and State University; it will be referred to as "Virginia Tech" throughout this Comment.

2. *See id.* at 1.

3. *See id.* at 25–26; *see also* Michael E. Ruane & Chris L. Jenkins, *Gunman Sent Video During Lull in Slaughter: Menacing Poses and Bitter Words in Mailing to NBC*, WASH. POST, Apr. 19, 2007, at A1 (noting that Cho took time, after killing two students,

hours after the initial shooting, Cho walked to Norris Hall carrying a backpack full of chains, locks, a hammer, a knife, two guns, and almost 400 rounds of ammunition.[4] After chaining the three main entrances to Norris Hall from the inside, Cho proceeded to classroom after classroom, opening fire on the students and teachers.[5] The shooting continued for over ten minutes before police finally gained entrance to Norris Hall.[6] Just as police reached the second floor, Cho shot himself in the head.[7]

Along with the grief and outrage have come questions as to what, if anything, could have been done to prevent Cho from taking so many lives. Some have leveled charges of negligence against Virginia Tech, claiming that the university ignored obvious warning signs[8] and should be held liable for failing to protect the campus from a deeply disturbed and violent student. These individuals point to events that, in hindsight, appear to be red flags, such as Cho's documented mental illness and alarming behavior,[9] but such criticisms tend to ignore a more complex reality.[10] For instance, how does a university provide help to a student, like Cho, who does not request or accept it?[11]

In the aftermath of this brutal campus shooting, the deadliest in U.S. history,[12] the short answer to whether Virginia Tech could have prevented the tragedy is that, under the current state of confidentiality and disability laws, perhaps nothing else could have been done.[13] And perhaps no one, besides Cho himself, is to blame.

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to mail a multi-media package of materials designed to explain his actions to NBC News in New York City).

4. *See* VIRGINIA TECH REPORT, *supra* note 1, at 89.

5. *See id.* at 26.

6. *See id.* at 27.

7. *See id.* at 27–28.

8. The Virginia Tech Report states that "[d]uring Cho's junior year at Virginia Tech, numerous incidents occurred that were clear warnings of mental instability.... No one knew all the information and no one connected all the dots." *Id.* at 2. For example, some students in Cho's poetry class were so afraid and spooked by him that they refused to show up for class, and the English professor feared for Cho's safety and her own. *See id.* at 42–43.

9. *See infra* notes 244–57 and accompanying text.

10. *See infra* Part III.B.

11. *See infra* note 271 and accompanying text.

12. *See* Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1. There have been several deadlier shootings in U.S. history but not by a single gunman and not on a school campus. *Id.*

13. Life experience tells us that no combination of laws and regulations designed to protect college students from harm can *guarantee* that a similar tragedy will not happen again. *See* John Silber, *To Shield All Tragedy an Impossible Quest*, BOSTON GLOBE, Apr.

Notwithstanding, this Comment argues that a series of legal and policy proposals could reduce the likelihood of a reoccurrence of such events. These proposals attempt to realign the risks and responsibilities that institutions of higher education ("IHE") face vis-à-vis their students. As it stands, the current legal landscape frequently places IHEs in a "damned if you do, damned if you don't" position when responding to students with mental health problems.

The campus mental health crisis is a complex societal problem that universities have been actively struggling with for over a decade. The Virginia Tech massacre has brought this issue, among others,[14] to the fore. Because of this increased focus on mental health in IHEs, both administrators and lawmakers have the unprecedented opportunity to re-examine the way that laws and policies affect and deal with students suffering from mental illness. As it stands, IHEs are unclear as to when they will be held liable and what sorts of precautions might fulfill any duty they have to prevent harm to their students.[15] This Comment focuses on how proposals designed to more clearly define the scope of an IHE's responsibility and liability with regard to students with mental illness will enable administrators to more effectively support and protect individuals on campus.

Part I of this piece discusses the fact that IHEs are faced with an increasing number of people with mental health problems and are struggling to develop appropriate measures to help troubled students. Part II presents the vast and often confusing legal landscape of institutional liability in regard to harm suffered by students on campus at the hands of their mentally-ill classmates. While commentators insist that colleges have been relieved of supervisory responsibility for their students,[16] there has been a "duty-imposing trend" in recent years which suggests that colleges still bear a substantial legal burden. Part III outlines the current state of information privacy and disability laws and suggests that if universities are ultimately held responsible for student harms, they

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24, 2007, at A7 (stating that risks and contingencies will always be present in life, and despite popular American belief, there is not always a solution for every problem).

14. The other issues include such things as the adequacy and effectiveness of gun control policy, campus security, emergency notification/evacuation plans on campus, and student criminal background checks. *See generally* VIRGINIA TECH REPORT, *supra* note 1 (discussing the Virginia Tech massacre and some of the campus safety issues that need to be addressed in the wake of that tragedy).

15. *See infra* notes 172–84 and accompanying text.

16. *See* Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post* In Loco Parentis *College*, 37 IDAHO L. REV. 531, 532–33 (2001).

must be afforded the necessary tools and flexibility within those privacy and disability laws to protect students from harm and themselves from liability. These suggestions include encouraging university administrators and staff to communicate more freely regarding the mental health status of students, allowing institutions to know more about their students' mental health history *before* the students arrive on campus, permitting institutions to mandate counseling, and even removing from campus those students deemed a serious threat to themselves or others. In summary, this Comment will address how changes in federal privacy and disability law, together with new institutional procedures, can help universities prevent the conditions that set the Virginia Tech tragedy in motion.

I. CAMPUS MENTAL HEALTH CRISIS

The April 2007 shooting at Virginia Tech brought mental illness to the fore—it is an issue that deserves national attention because the stakes are so high. Mental illness has become much more prevalent among college students in recent years, and administrators have expressed concern with how to effectively support and invest in an "undergraduate population that requires both more coddling and more actual mental health care than ever before."[17] In 2005, ninety percent of college counseling directors reported steady increases in the number of students with mental health problems, including severe depression, bipolar disorder, and psychotic breakdowns.[18] This Comment argues that students with a history of mental illness should be identified as early as possible in order to avoid reactionary

17. Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES, Apr. 28, 2002, § 6 (Magazine), at 58 (stating 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").

18. *See* ROBERT P. GALLAGHER, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 4 (2005), *available at* http://www.education.pitt.edu/survey/nsccd/archive/2005/monograph.pdf (reporting that ninety-five percent of student counseling directors have noticed an increase in students coming to counseling who are already on psychiatric medication); *see also* Joan Arehart-Treichel, *Mental Illness on Rise on College Campuses*, PSYCHIATRIC NEWS, Mar. 15, 2002, at 6, *available at* http://pn.psychiatryonline.org/cgi/content/full/37/6/6 (quoting Morton Silverman, M.D., director of student mental health at the University of Chicago, as stating that "[m]ore individuals with a history of mental health problems are attending colleges. So they are coming to us with their problems; it is not that they are developing them when they are here."); Eleanor Yang Su, *Colleges Weigh Privacy, Liability as Demand Rises for Counseling*, SAN DIEGO UNION-TRIB., Apr. 20, 2007, *available at* http://www.signonsandiego.com/news/education/20070420-9999-1n20counsel.html (quoting Reina Juarez, director of counseling services at the University of California San Diego, as stating that "[w]e see more students with bipolar disorders and depression .... We are seeing more psychotic breakdowns.").

measures and disagreeable choices. It also recognizes the reality that schools will inevitably have to react to situations as well—and in those moments, they should be afforded the necessary tools to help keep the troubled student in school and receiving treatment and counseling while at the same time maintaining a safe environment for others on campus.

According to counselors and mental health experts, one reason for the increase in student mental illness is the advancement in medical treatment and medications for mental illnesses.[19] Before modern-day medical advances were available, many students with diagnosed mental illnesses were prevented from pursuing a college-level education because their illnesses made it difficult, if not impossible, to thrive in a college setting.[20] Now, with the help of medication and counseling, many of them are staying in school and getting into college.[21] In addition to recent medical advances, other explanations for the rise in mental illness on campus include a society more accepting of counseling, an expansion in mental health services at IHEs, an often crippling combination of stressors such as enormous college loan burdens and global competition for jobs, and a more sheltered upbringing for the current generation of students, making their transition to independent life on campus all the more challenging.[22]

One upsetting manifestation of the increase in mental illness on campus is suicide. More than 1,100 suicides occur on college campuses every year, making it the third leading cause of death among college-aged individuals.[23] Yet, suicide is not the only sign of

19. *See* Ann Pollinger Haas et al., *Suicide in College Students*, 46 AM. BEHAV. SCIENTIST 1224, 1229 (2003).

20. *See* Kate Kelly, *Lost on the Campus*, TIME, Jan. 15, 2001, at 51, 52. In her interview with *Time Magazine*, Johns Hopkins psychologist Kay Redfield Jamison explained that "[t]he very effectiveness of modern treatment means that a lot of people who never would have made it into college are stable enough to go to universities .... [Colleges] are dealing with a lot of kids who are very sick." *Id.*

21. *See* Su, *supra* note 18.

22. *Id.* (quoting Robert Gallagher, who directed the University of Pittsburgh counseling center for twenty-five years, as saying that a "number of people believe that the last generation of students has been treated with kid gloves[,] ... [has been] overprotected by family," and, when faced with the real world, "can't deal with the stresses they encounter").

23. The majority of those students are not receiving medical treatment at the time of death. *See* THE JED FOUNDATION, STATISTICS ON DEPRESSION AND SUICIDE AMONG COLLEGE ADOLESCENTS OF COLLEGE AGE, http://www.jedfoundation.org/libraryNews_facts.php (last visited Nov. 10, 2008); *see also* Lisa C. Barrios et al., *Suicide Ideation Among U.S. College Students: Associations with Other Injury Risk Behaviors*, 48 J. AM. C. HEALTH 229, 229 (2000) (noting that other leading causes of death among college aged students, including homicide and unintentional injury, are sometimes linked

student mental health problems on campus. Mental illness manifests itself in other self-destructive behavior as well. For example, one study published in the Journal of American College Health found that suicidal ideation frequently correlates with unhealthy and reckless conduct such as risky sexual behavior, drinking and driving, and engaging in criminal behavior that would provoke law enforcement officers to discharge weapons.[24]

Moreover, according to studies performed by the National Institute of Mental Health, suicide attempts and suicide deaths may involve serious violence against others.[25] In fact, criminal violence on campus perpetrated by mentally-ill students, whether suicidal or otherwise, is a disturbing reality that IHEs have been dealing with for years. Cho's was not the first murderous rampage whereby individuals on campus lost their lives at the hands of a mentally-ill student. Five years before the Virginia Tech shooting, a deeply disturbed graduate student diagnosed with paranoid schizophrenia went on a shooting spree at the Appalachian School of Law, killing three and wounding three more.[26] In 2002, a failing student at the University of Arizona Nursing College walked into an instructor's office and fatally shot her.[27] He then proceeded to a classroom where he shot and killed two more of his instructors before fatally shooting himself.[28] In 1992, while defending his thesis, graduate engineering student Frederick Davidson shot and killed three of his San Diego State University professors.[29] Three years later, Wendell Williamson, a third-year law student at the University of North Carolina, opened fire near campus, killing two individuals.[30] And on February 15, 2008,

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to suicide ideation); Paul Joffe, *An Empirically Supported Program to Prevent Suicide in a College Student Population*, 38 SUICIDE & LIFE-THREATENING BEHAV. 87, 87 (2008) ("[F]rom the 14.9 million students enrolled in 2001, approximately 1100 young adults kill themselves in the nation's colleges and universities every year.").

24. *See* Barrios et al., *supra* note 23, at 229.

25. *See id.*

26. *See* Francis X. Clines, *3 Slain at Law School: Student Is Held*, N.Y. TIMES, Jan. 17, 2002, at A18. Graduate student Peter Odighizuwa had been recently dismissed from school because of failing grades. *Id.*

27. *See* John M. Broder, *Arizona Gunman Chose Victims in Advance*, N.Y. TIMES, Oct. 30, 2002, at A20.

28. *See id.*

29. *See* Dennis Overbye, *When Student-Adviser Tensions Erupt, the Results Can Be Fatal*, N.Y. TIMES, Mar. 27, 2007, at F3. The gunman is now serving three life sentences. *Id.*

30. *See N. Carolina Law Student Kills 2 With Rifle*, N.Y. TIMES, Jan. 27, 1995, at A19. Williamson had been diagnosed as "paranoid schizophrenic" by Dr. Myron Liptzin, a college psychiatrist, prior to the incident. *Id.* He was later found not guilty by reason of insanity and is currently confined to state mental hospitals. *Id.*

less than one year after the Virginia Tech massacre, Stephen Kazmierczak, a former graduate student at the University of Northern Illinois, opened fire on an auditorium full of students, "spray[ing] more than fifty rounds of buckshot and bullets at panicked students before turning one of his weapons on himself."[31] Six people, including the killer, died that day and sixteen were wounded.[32]

Along with the increasing incidence of mental illness and related crimes on campus comes the increasing threat of liability for IHEs when students to whom the universities owe a duty of protection become the victims of these violent outbreaks. Universities have become a frequent target for a variety of legal claims in recent years.[33] One factor contributing to the increase in university-related lawsuits is a general perception of universities as wealthy organizations with virtually unlimited resources. This perception is only partly correct.[34] Many universities actually operate on relatively small endowments.[35] Moreover, society has grown more litigious in general and more cynical towards charitable organizations specifically.[36]

Consequently, IHEs have struggled to develop appropriate measures to simultaneously help troubled students and protect themselves from institutional liability. School responses to the Virginia Tech tragedy and this most recent shooting in Northern Illinois have ranged from high-tech emergency notification systems to stricter security measures to increased resources devoted to

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31. *See* Kari Lydersen & Theresa Vargas, *Illinois College Applied Lessons from Massacre at Virginia Tech*, WASH. POST, Feb. 16, 2008, at A1.

32. *See id.*

33. *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). One example is student suicide litigation. Whereas only one or two suicide cases used to be all that was pending at any given time, "[t]oday the cases total about 10 nationwide, with the prospect that many more suicides could, over time, move into the courts." Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, CHRON. HIGHER EDUC., June 25, 2004, at B18.

34. Large, prestigious private institutions like Harvard University and Yale boast of $35 billion and $22.5 billion endowments, respectively. *See* Alan Finder, *Yale Plans to Increase Spending from Its Endowment, with Financial Aid to Benefit*, N.Y. TIMES, Jan. 8, 2008, at A12.

35. In relation to their private school counterparts, public institution endowments are much smaller (many large public universities have endowments of $2 billion or less). *See* Goldie Blumenstyk, *Endowments Savor Big Gains but Lower Their Sights*, CHRON. OF HIGHER EDUC., Feb. 1, 2008, at A1.

36. *See* Evans & Evans, *supra* note 33, at 1108 ("Given the 'deep pocket' nature of many private colleges, our litigious society, and public cynicism about all charitable institutions, claims against private institutions and their managers will continue to rise.").

counseling and mental health services.[37] These measures, though well-intentioned and certainly helpful,[38] are largely reactionary and may be too late to prevent harm to faculty, staff, and students on campus.[39] Moreover, measures taken in response to troubling student behavior often require the school to make "the difficult choice of taking on the role of mental health care provider or dismissing the student from campus altogether."[40] Neither of these is an agreeable choice for the school or the student.[41]

II. THE COLLEGE—STUDENT RELATIONSHIP: THEORIES OF INSTITUTIONAL LIABILITY

This section reviews the legal analyses which courts undertake in responding to claims that IHEs should be responsible for protecting their students and employees from harm on campus. No bright, definitive lines are discernable—only a suggested trend towards expanded liability for IHEs.[42]

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37. For example, on its university website, Sacramento State announces: "In light of university emergencies such as the tragedy at Virginia Tech, as well as a mandate from the California State University Chancellor's Office, Sacramento State will debut its Emergency Notification System that automates delivery of urgent announcements." *See* SACRAMENTO STATE UNIVERSITY, EMERGENCY NOTIFICATION SYSTEM, http://www.csus.edu/ens/ (last visited Nov. 10, 2008); *see also* Nancy Shute, *A Wake-Up Call on Campus: Virginia Tech Has Inspired Counseling Services to Reassess*, U.S. NEWS & WORLD REP., Sept. 13, 2007, http://health.usnews.com/articles/health/2007/09/13/a-wake-up-call-on-campus.html ("Galvanized by the April tragedy at Virginia Tech ... colleges and universities around the country are urgently taking stock of the reach and effectiveness of their mental-health services.").

38. This was demonstrated in the effective and timely response of campus police to the recent shooting at Northern Illinois University. Police arrived on the scene only thirty seconds after the shooter opened fire. *See* Lydersen & Vargas, *supra* note 31.

39. "By the time a school learns about a troubled student ... the student is often already in crisis." *See* Posting of Bob Smith & Dana Fleming to NKMS blog, *Lessons Learned from Virginia Tech*, http://www.nkms.com/collegeblog/index.php?p=278 (Aug. 24, 2007, 3:12 EST).

40. *See id.*

41. This Comment argues that the goal should be to identify and begin counseling students as early as possible in order to keep them enrolled and on campus. A student who suffers from a debilitating mental illness, one so advanced that it renders her incapable of attending class and living on campus, clearly needs quality healthcare. But if the student is dismissed from school, she frequently loses the student healthcare benefits so desperately needed. Moreover, sending a student home might very well be sending her into the hands of individuals who substantially contribute to that student's illness.

42. *But see* GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 7 (2006) (asserting that "[s]uggestions of a 'trend' toward expansion of duty in college student suicide cases may prove true in the end, but seem premature at present").

Courts generally refuse to hold a third party liable for the costs of damages to the victim of a crime.[43] The same goes for third-party responsibility for another's suicide.[44] Nonetheless, a plaintiff may succeed in a claim of liability against the university upon proof of the existence of very specific circumstances: 1) the university owed a duty to prevent harm to the plaintiff; 2) the university breached that duty; 3) the plaintiff was injured; and 4) if the university had not acted or failed to act as it did, the plaintiff would not have been injured (i.e., causation).[45] This analysis focuses on the first and fourth prongs of this liability test because these two prongs are generally the most difficult to prove.

A. The Source of Duty

The analysis begins by determining whether the university owes an affirmative duty to prevent harm to the student.[46] Under § 314A of the Restatement (Second) of Torts ("Restatement"),[47] an affirmative duty to protect another from the criminal or wrongful acts of third persons will only arise under unusual circumstances, such as when a "special relationship" exists between the parties. Examples of such a special relationship include "common carrier-passenger, business proprietor-invitee, and innkeeper-guest."[48]

The existence of an affirmative duty stems from the way the courts frame the relationship between the university and the student.[49] There are four primary theories by which courts attempt to

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43. *See* 57A AM. JUR. 2D *Negligence* § 96 (2008) ("Generally and in the absence of statute or of special relationship or circumstances, an individual has no duty to protect another from a criminal assault or willful act of violence of a third person.").

44. *See infra* notes 96–100 and accompanying text.

45. 38 AM. JUR. 2D *Negligence* § 2 (2008).

46. The scope of this paper is designed to focus on the relationship and resulting duty between university and student.

47. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

48. *See* Klingbeil Mgmt. Group Co. v. Vito, 357 S.E.2d 200, 201 (Va. 1987).

49. Courts generally look to either a set of facts establishing a duty under tort law or to a contract creating the duty. *See* Brian Jackson, *The Lingering Legacy of* In Loco Parentis: *An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1148–49 (1991); Theodore C. Stamatakos, *The Doctrine of* In Loco Parentis, *Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 476–78 (1990). This paper focuses on the duties arising under tort law, as there is much overlap with contract law, particularly in the duty-imposing theories of landowner-invitee and landlord-tenant. The theory of duty-imposed-by-contract focuses on the student as consumer.

> As American society has developed, new demands have been placed upon colleges and universities by their primary constituency, the student, for less paternalism and more accountability for services rendered. This dynamic relationship can be characterized by a judicial evolution from a time in which the university stood *in*

define the relationship between a university and its students and to identify the duty, if any, arising from that relationship.[50] The first theory is the *in loco parentis* doctrine, whereby IHEs are treated as standing in the place of the parent.[51] The second theory analogizes the college-student relationship to that of a landowner-invitee and the third, to that of a landlord-tenant. These three relationships have been established as "special relationships" as a matter of law.[52] The fourth theory focuses on whether a relationship is "special" based on a specific set of circumstances resulting in an affirmative duty owed by the defendant where no such duty would otherwise exist.[53]

i. The *In Loco Parentis* Doctrine

Traditionally, IHEs were thought to stand *in loco parentis* to students. This meant that educational institutions owed to their students the duty of a parent to a child. Courts not only viewed IHEs as educators but also as guardians and champions of students' health, welfare, safety, and morals.[54] Standing in for the parent, university authorities were free to make any rule regarding their students that a parent could make for the same purpose, and the courts were loathe to second-guess administrators' discretion unless the rules were "unlawful or against public policy."[55]

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loco parentis, or in the place of the parent, to the current contractual perspective, in which the student represents a consumer and the university the provider.

K.B. Melear, *From* In Loco Parentis *to Consumerism: A Legal Analysis of the Contractual Relationship Between Institution and Student*, 40 NASPA J. 124, 125 (2003), *available at* http://publications.naspa.org/naspajournal/aimsandscoe.html.

50. Other analytical models include contract-imposed duties (both express and implied) and fiduciary duties. *See* Stamatakos, *supra* note 49, at 476–79.

51. Literally, "in the place of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

52. RESTATEMENT (SECOND) OF TORTS § 314A.

53. *See infra* Part I.A.iv.

54. *See, e.g.* Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) (upholding a school's discretionary right to prohibit student attendance at local bars because college authorities "stand in loco parentis concerning the physical and moral welfare and mental training of the pupils"); *see also* People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186, 187 (1886) ("A discretionary power has been given, . . . [and] we have no more authority to interfere than we have to control the domestic discipline of a father in his family."); Woods v. Simpson, 126 A. 882, 883 (Md. 1924) (stating that college officers "must, of necessity, be left untrammeled in handling the problems which arise, as their judgment and discretion may dictate").

55. *See Berea Coll.*, 161 S.W. at 206. The doctrine of *in loco parentis* justified the courts' nonintervention in claims brought by students seeking legal remedies for school disputes. *See* Jackson, *supra* note 49, at 1144 (explaining that, under the *in loco parentis* doctrine, "[j]ust as children usually cannot sue their parents, the courts ordinarily deprived students of redress in disputes with their colleges").

The doctrine of *in loco parentis* was firmly entrenched in American jurisprudence into the 1960s and 1970s until the Vietnam War protests, the Civil Rights Movement, and the passage of the Twenty-Sixth Amendment (which lowered the age of majority from twenty-one to eighteen) transformed America's perception of college students.[56] Students demanded that they be viewed as adults in their own right, as opposed to children under the care of their parents or college authorities. This widespread social change led to the gradual abandonment of the *in loco parentis* doctrine. In 1979, the Third Circuit Court of Appeals recognized the dawn of a new legal era for colleges and students in *Bradshaw v. Rawlings*.[57] Holding that Delaware Valley College did not owe a duty of custodial care to the student, the court explained that "the modern American college is not an insurer of the safety of its students," and the "authoritarian role of today's college administration[] has been notably diluted in recent decades."[58] Shortly thereafter, *Baldwin v. Zoradi*[59] emphasized

56. *See* Joey Johnson, *Premature Emancipation? Disempowering College Parents Under FERPA*, 55 DRAKE L. REV. 1057, 1073 (2007) ("Unfortunately, the newly empowered student body was no more accountable, as a growing number of students unapologetically approached college as a pleasant interlude between the end of adolescence and the assumption of adult responsibilities.") (internal quotations omitted).

57. 612 F.2d 135 (3d Cir. 1979).

> There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country.

Id. at 139.

58. *Id.* at 138.

59. 176 Cal. Rptr. 809 (Cal. Ct. App. 5th 1981). A student brought a negligence action against the college after suffering injuries that occurred while the student was a passenger in a car that crashed during a speeding contest. *Id.* at 811–12. The court stated that the proper role of postsecondary education was the maturation of the students, and it concluded that students are responsible for their own decisions. *Id.* at 818. Similarly, in *Beach v. University of Utah*, a student sued the college for injuries sustained on a school-sponsored trip. *See* 726 P.2d 413, 413 (Utah 1986). The student was intoxicated at the time of injury. *See id.* at 413. The court held there was no duty because the college does not take the place of the parent, and the university does not regulate the lives of its students. *Id.* at 419 n.5. The *Beach* court qualified its ruling:

> [A]n institution might ... choose to require of students certain standards of behavior in their personal lives and subject them to discipline for failing to meet those standards. However, the fact that a student might accept those conditions

the court's policy behind its abandonment of the *in loco parentis* doctrine.[60] The *Baldwin* court believed preservation of the doctrine would have an adverse effect on student education and emotional development because "[o]nly by giving them responsibilities can students grow into responsible adulthood."[61]

After abandoning the *in loco parentis* doctrine, courts have been reluctant to find a special relationship between IHEs and students and have hesitated to impose liability on universities for harms caused by their students, to themselves or to other individuals on campus. Whereas courts have still recognized a special relationship between a school and a student at the secondary school level, where schools still stand *in loco parentis*,[62] they have only narrowly applied the concept of a special relationship to universities where *in loco parentis* has been abandoned.[63] The remaining theories represent the other means by which courts may find a special relationship.

ii. Landowner-Invitee

Some courts have compared the college-student relationship to that of landowner-invitee.[64] Advocates of this theory suggest that IHEs might be liable to their students by reference to § 314A(3) of the Restatement[65] which provides that a possessor of land who holds it open to the public is under a duty to protect its invitees against any unreasonable risk of physical harm.[66] Under the landowner-invitee

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> on attendance at the institution would not change the character of their relationship; the student would still be an adult and responsible for his or her behavior. Neither attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker.

Id.

60. *Baldwin*, 176 Cal. Rptr. at 818.

61. *Id.* (defending its abandonment of *in loco parentis* by explaining that "[t]he transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education—the maturation of the students.... Although the alleged lack of supervision had a disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest.").

62. *See, e.g.*, 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, 132 (2002).

63. *See id.*

64. *See, e.g.*, Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1198 (Cal. 1984) (noting that a student's status as invitee and the college's status as landowner created a special relationship to impose a duty on the college to protect the students).

65. *See* RESTATEMENT (SECOND) OF TORTS § 314A(d) (1965).

66. *See, e.g.*, Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196, 1198 (Ind. Ct. App. 1983) ("Notre Dame is under a duty to take reasonable precautions to protect those who attend its football games from injury caused by the acts of third persons.").

theory, however, owners or occupiers of land generally have no duty to protect invitees on their property from the *criminal* acts of third parties.[67] The policy driving this rule is that the social and economic consequences of placing a duty on an individual or entity would be too great considering that the foreseeability of the risk of harm is usually slight and difficult to prove.[68]

Under this theory, liability arises when the landowner unreasonably creates or increases the risk of injury or should have known from past experience that the visitor's safety would be compromised.[69] Such an inquiry generally relies on an owner having witnessed past acts of the third party that are similar in nature to the one that resulted in injury to the invitee in question. The California case *Peterson v. San Francisco Community College District*[70] provides a clear example of the application of this theory.[71] While climbing a stairway from a campus parking lot to her dorm, Kathleen Peterson, a San Francisco Community College student, was assaulted.[72] Not only was the stairway overgrown with untrimmed foliage, but the college knew of similar assaults in the area and had failed to warn students or take other precautions to prevent further attacks.[73] Because the college knew of prior incidents but neglected to trim back the foliage or warn students of the risk, the *Peterson* court held the college liable for the assault.[74] In justifying its position, the court emphasized the role of a student's *expectation* that the university would at least not

67. *See* 62 AM. JUR. 2D *Premises Liability* § 409 (2008).

68. *See, e.g.*, McDaniel v. Lawless, 570 S.E.2d 631, 633 (Ga. Ct. App. 2002) (holding that a premises owner's knowledge that the neighbor was "mean" when he had been drinking did not put the owner on notice that the neighbor was prone to deadly violence with a handgun, and the owner was therefore not held liable for the death of a social guest who was shot and killed by the neighbor). The *McDaniel* court explained that "the duty to exercise ordinary care to guard against injury caused by dangerous characters" only extended to "those criminal acts that were foreseeable." *Id.* "Any prior event that is relied upon to establish foreseeability must be substantially similar, but not identical, to the subsequent criminal act." *Id.* (internal citations omitted); *see also Peterson*, 685 P.2d at 1196 (listing "the extent of the burden to the defendant and consequences to the community" as one factor to be weighed in determining whether a duty to exercise care existed).

69. *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (stating that the landowner is "under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. . . . If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, . . . he many be under a duty to take precautions against it.").

70. 685 P.2d 1193 (Cal. 1984).

71. *See id.* at 1200–01.

72. *See id.* at 1195.

73. *See id.*

74. *See id.* at 1200–01.

contribute to or increase the risk of crime. "In the closed environment of a school campus where students ... spend a significant portion of their time and may in fact live, they can reasonably expect that ... school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime."[75]

Some scholars suggest that Virginia Tech may have had a duty to its invitees, arising from its position as landowner.[76] However, one might argue that the requisite foreseeability was missing in Virginia Tech's case. Unlike in *Peterson*, where the university was aware of past incidents and put on notice, Virginia Tech had no prior knowledge of similar attacks—that is, it had no knowledge that Cho was ever outwardly hostile or violent before the day of the attack, though his writings and behavior might have suggested his capability of performing such criminal acts.[77] Moreover, during Cho's overnight stay at the Carilion St. Albans Behavioral Health Center, a professional evaluated Cho and determined he was not an immediate threat to himself or society.[78] Regardless of whether this landowner-invitee model applies to the specific facts of the Virginia Tech tragedy, student victims and their parents have the option to bring a claim against an IHE under the landowner-invitee theory, provided the facts indicate that the school had contributed to or knowingly ignored a substantial risk of harm. This theory of liability should be approached with caution because of the court's strict foreseeability requirement. Even if a plaintiff is unsuccessful in arguing the IHE, as landowner, owed the student a special duty as an "invitee" on its campus, the plaintiff might still prevail under another liability theory, such as that of landlord-tenant.

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75. *See id.* at 1201.

76. *See, e.g.*, Anthony Sebok, *Could Virginia Tech Be Held Liable for Cho Seung Hui's Shootings, If an Investigation Were to Reveal It Had Been Negligent?*, FINDLAW.COM, Apr. 24, 2007, http://writ.news.findlaw.com/sebok/20070424.html. Sebok, a law professor at Brooklyn Law School, makes the argument that Virginia Tech, as landowner, might have had certain duties to its invitees, including the duty to protect its students from criminal conduct by Cho. *Id.* He uses as an example the case of *Thompson v. Skate America*, 540 S.E.2d 123 (Va. 2001), whereby the Supreme Court of Virginia held that a skating rink operator in the state of Virginia could be held liable for an assault by one patron on another if the attacker "was known to [the skating rink] to be violent and to have committed assaults on other invitees on its property in the recent past." *Id.* at 128.

77. *See* VIRGINIA TECH REPORT, *supra* note 1, at 49–52.

78. *Id.* at 47.

iii. Landlord-Tenant

Because students often live on campus in university-owned housing, the landlord-tenant theory of liability might provide an alternative basis for establishing a duty-imposing relationship between the university and its students. Not surprisingly, courts choose this analogy most often when dealing with injuries occurring in the dormitory. One of the earliest decisions to find enhanced liability on the part of the university as landlord was *Miller v. State.*[79] A nineteen-year-old student raped in her dormitory room brought a claim against the State University of New York ("SUNY"), and the New York Court of Appeals, overturning the lower court decision, found SUNY liable for not doing more to protect its "tenant" students in the dormitory.[80] At about 6:00 a.m., while in the laundry room of her dormitory, the victim in *Miller* was approached by a man "wielding a large butcher knife."[81] After blindfolding the student, the man led her out of the laundry room and through an unlocked outer door, back in through another unlocked entrance to the residence hall, and up the stairs into a dormitory room.[82] There, she was "raped twice at knifepoint."[83] Many students, including the claimant, had complained previously to the dormitory manager and campus security about nonresidents, especially men, loitering in the dormitory lounges, hallways, and women's bathrooms.[84] Despite these complaints and stories published in the school newspaper reporting crimes in the dormitories such as armed robbery and a rape by a non-student, the doors of all ten entrances to the dormitory building were purposefully kept unlocked at all hours.[85] The lower court therefore found that, "by failing to lock the outer doors of the dormitory, the State [] breached its duty to protect its tenants from reasonably foreseeable criminal assaults by outsiders . . . [and the] failure to lock the outer doors was . . . a proximate cause of the rape."[86]

Notwithstanding the ruling in *Miller*, "[g]enerally, the landlord-tenant relationship in and of itself does not create a duty on the part of a landlord to protect its tenants from harm caused by intentional or

79. 467 N.E.2d 493 (N.Y. 1984).

80. *Id.* at 497 ("A landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants.").

81. *Id.* at 494.

82. *Id.*

83. *Id.*

84. *Id.* at 495.

85. *Id.*

86. *Id.* Moreover, the lower court refused to hold the claimant, who was "in the laundry room after sunrise on a Sunday morning," contributorily negligent. *Id.*

criminal acts of third persons."[87] A landlord may voluntarily assume certain duties, however, by holding himself out as a provider or insurer of safety.[88] What constitutes a "voluntary assumption" of these duties is less clear. For example, in *Rabel v. Illinois Wesleyan University*,[89] the court found that the fact that the university outfitted its building with security devices such as alarms and employed security personnel such as doormen and night-guards "did *not* rise to the level of a contractual obligation on the part of the university" to provide protection against the type of injury incurred by the plaintiff.[90] The plaintiff's complaint averred that she suffered physical injuries by another student ("Wilk") when the plaintiff, who was in her dormitory room, was called by Wilk to come to the dormitory lobby; when she arrived, she was "forcibly grabbed and thr[own]" over Wilk's shoulder.[91] Wilk "was to run through a gauntlet of [fraternity] members," with the plaintiff on his shoulders, while his fraternity brothers would "strike him with bones as he passed."[92] As Wilk ran, he stumbled and fell, "crushing the skull, head and body of [the plaintiff] on the sidewalk."[93]

Under the landlord-tenant liability theory articulated in *Miller v. State* and qualified by *Rabel v. Illinois Wesleyan University*, Virginia Tech would likely fair well, assuming that Virginia courts would even recognize an expanded duty of care for universities towards their tenant students. Under the landlord-tenant theory, the families of the two students killed by Cho in West Ambler Johnston dormitory could bring a claim against the university asserting that, as landlord, Virginia Tech owed a heightened duty of care to its tenant students to protect them from third-party criminal conduct. In response, Virginia Tech could argue that, unlike in *Miller*, where the university left the dormitory building doors unlocked, it kept West Ambler Johnson

87. Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 561 (Ill. App. Ct. 1987).

88. *Id.* at 562 (explaining that a landlord who performs this voluntarily-acquired duty negligently might be held liable for the intentional or criminal acts of third persons).

89. 514 N.E.2d 552 (Ill. App. Ct. 1987).

90. *Id.* at 562 (emphasis added).

> In determining whether the law imposes a duty, foreseeability of possible harm alone is not the test, for in retrospect almost every occurrence may appear to be foreseeable. The likelihood of injury from the existence of a condition, the magnitude of guarding against it, and consequences of placing the burden upon the defendant must be taken into account.

Id. at 557 (quoting Barnes v. Washington, 305 N.E.2d 535, 539 (Ill. 1973)).

91. *Id.* at 554.

92. *Id.* (alteration in original) (quoting plaintiff's complaint).

93. *Id.* (internal quotations omitted) (alteration in original) (quoting plaintiff's complaint).

dormitory and other on-campus residence halls locked, requiring key card access between the hours of 10:00 p.m. and 10:00 a.m. The Virginia Tech Review Panel observed that "[t]his level of security is quite typical of many campuses across the nation in rural areas with low crime rates."[94] Virginia Tech could further argue that such precautionary measures, according to the court in *Rabel*, do not "rise to the level of a contractual obligation" on Virginia Tech to provide protection against the type of injury incurred by the victim, that is, an armed assault on residents by a mentally-ill student.[95]

Because the landlord-tenant theory of liability is so limited, and because several jurisdictions fail to even recognize it, many plaintiffs alternatively claim that a special relationship has been established between an IHE and student, giving rise to liability. This fourth and final theory of liability is discussed in greater detail below.

iv. Case-by-Case Determined Special Relationships

In recent years, courts have demonstrated that they are willing to find a basis for liability arising out of a "special relationship" between an IHE and its student.[96] This relationship is based on the particular,

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94. *See* VIRGINIA TECH REPORT, *supra* note 1, at 13.

95. Virginia Tech would likely argue sovereign immunity as well, though not all state-supported universities enjoy this same privilege. In cases involving actions against public institutions such as a state-funded university, governmental immunity doctrines may bar recovery irrespective of the defendant's behavior. *See* Pentecost v. Old Dominion Univ., 61 Va. Cir. 270, 273 (Cir. Ct. 2003) ("The doctrine of sovereign immunity is 'alive and well' in Virginia."). Many Virginia courts have found state-supported universities to be immune from suit. *See, e.g.*, Halberstam v. Commonwealth, 467 S.E.2d 783, 784 (Va. 1996) (noting that the trial court applied the sovereign immunity doctrine to George Mason University, finding it immune from suit); Messina v. Burden, 321 S.E.2d 657, 660 (Va. 1984) (applying the sovereign immunity doctrine to the Frederick Campus of Tidewater Community College). *But see* James v. Jane, 282 S.E.2d 864, 870 (Va. 1980) (refusing to apply the doctrine of sovereign immunity to licensed physicians who were medical school faculty members at the University of Virginia).

96. *See* Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081, 3087 (2007); *see also* Lake, *supra* note 16, at 535 ("The courts appear to be saying there is no *general* special relationship, but students do have specific duty-creating relationships with IHE's, some of which are legally 'special.' "). Plaintiffs alleging that a "special relationship" exists between an IHE and student usually bring suit against individuals employed by the university, such as psychologists, school counselors, or the Dean of Students. For example, in *Bogust v. Iverson*, Jeannie Bogust obtained mental health treatment and committed suicide at Stout State College. *See* 102 N.W.2d 228, 229 (Wis. 1960). Jeannie's parents sued Ralph Iverson, Director of Student Personnel Services and Professor of Education with a Ph.D. degree, for "fail[ing] to secure or attempt to secure emergency psychiatric treatment" for Jeannie, failing to advise Jeannie's parents "concerning the true mental and emotional state of their said daughter," and suggesting that Jeannie terminate her counseling six weeks prior to her suicide. *Id.* at 229 (quoting plaintiff's complaint). In a much more recent case, a Massachusetts Superior Court

unique facts of the situation instead of on a pre-defined relationship like landowner-invitee or landlord-tenant.[97] Peter Lake, a professor at Stetson University College of Law, highlights the murkiness of such a doctrine:

> [C]ourts continue to hold that adult college students are not in a special relationship with an IHE, except when they are. The courts appear to be saying there is no general special relationship, but students do have specific duty-creating relationships with IHEs, some of which are legally "special"... giving rise to a duty of reasonable care.[98]

This special, case-specific relationship is most often seen in suicide-related cases, whereby plaintiffs allege that an IHE either failed to recognize suicide warning signs or recognized but failed to respond appropriately to the warning signs.[99] Although a third party generally is not held liable for another's suicide, damages may be awarded (1) where "the defendant is somehow found to have actually *caused* the suicide" or (2) where "the defendant is found to have had a *duty to prevent* the suicide from occurring" because of a special relationship it formed with the student.[100]

The first exception, where a defendant is found to have caused the suicide, is rarely established.[101] If a defendant intentionally inflicts severe physical, mental, or emotional injury, which in turn leads the injured individual to a state of mental illness that ends in suicide, the

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allowed the deceased student's parents to sue two non-clinician administrators for failure to prevent their daughter's suicide. *See* Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *13 (Mass. June 27, 2005); *see also infra* notes 116–22 and accompanying text.

97. *See* Thompson *ex. rel.* Thompson v. Skate Am., Inc., 540 S.E.2d 123, 127 (Va. 2001) (" '[S]pecial relationships' may exist between particular plaintiffs and defendants, either as a matter of law or because of the particular factual circumstances in a given case.").

98. *See* Lake, *supra* note 16, at 535.

99. *See* Cohen, *supra* note 96, at 3086–3101. For many years, the law categorically refused to recognize third-party liability arising out of a failure to prevent suicide. *See* Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 217–18 (1971); *see also* Margot O. Knuth, Comment, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A. L. REV. 967, 967–68 (1979). Suicide was considered an illegal, intentional act and the sole "proximate cause" of death; therefore, other entities were not responsible for the suicide. *See* McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983). In the twentieth century, however, laws and the public perception regarding suicide changed as medical studies revealed that suicide was more often the manifestation of a mental illness than a deliberate, criminal act. *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).

100. *See McLaughlin*, 461 A.2d at 124.

101. *See* Lake & Tribbensee, *supra* note 62, at 130.

individual who caused the injury may be held liable.[102] Additionally, liability may result for an individual or entity that provides the defendant with illegal substances or proscribes legal substances in a negligent way. For example, in *Wallace v. Broyles*,[103] the athletics director and other school employees at the University of Arkansas were sued for causing a football player's suicide.[104] The parents alleged that the school provided their child with a strong pain killer called Darvocet, a drug which can have mind-altering, addictive, and depressant effects, without a proper prescription or warnings of the side effects.[105] At the time that he shot and killed himself, the student athlete was "undergoing extensive physical therapy treatments" and taking the drug to cope with the pain of a severe shoulder injury.[106] For purposes of ruling on summary judgment, the court found sufficient evidence to allow the claim to proceed, indicating that under unusual circumstances,[107] a defendant *may* potentially be held liable for the suicidal ideations and death of another.

More common, however, are lawsuits alleging not that the defendant caused the suicide, but rather, that the defendant had a duty to prevent the suicide.[108] Even though these lawsuits are more common, courts have still been reluctant to find the requisite special relationship which would impose such a duty.[109] For example, in *Jain v. State*,[110] Sanjay Jain poisoned himself with carbon monoxide by running his moped engine in his closed dorm room.[111] He did this after revealing to a roommate precisely how he intended to carry out his plan.[112] Numerous IHE officials knew of Jain's suicidal behavior and encouraged him to seek counseling.[113] The Supreme Court of Iowa concluded that a special relationship did not exist between Jain and the IHE, and consequently, the IHE had no obligation to prevent

102. *See, e.g.*, *McLaughlin*, 461 A.2d at 124 (describing the exception as one "where a tortious act is found to have caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse to commit suicide, or prevented the decedent from realizing the nature of his act").

103. 961 S.W.2d 712 (Ark. 1998).

104. *See id.* at 713.

105. *See id.* at 713, 717.

106. *See id.* at 713.

107. *See id.* at 718–19.

108. *See* Lake & Tribbensee, *supra* note 62, at 130.

109. *See, e.g.*, Bogust v. Iverson, 102 N.W.2d 228, 232–33 (Wis. 1960) (finding no liability because the victim's parent failed to establish special relationship and failed to show foreseeability of student suicide).

110. 617 N.W.2d 293 (Iowa 2000) (en banc).

111. *See id.* at 296.

112. *See id.*

113. *See id.* at 295–96.

the suicide.[114] It held that, if a duty is to be found, it will most likely be imposed on "institutions such as jails, hospitals and reform schools, having actual physical custody of and control over persons."[115]

Despite such strong language indicating that there would be no special IHE administrator liability for injuries to its students, two recent cases have alerted officials to the fact that the tides may be changing. Whereas a special relationship with a student was once limited to "a narrow class of persons including mental health clinicians or those entrusted with the custodial care" of a student,[116] now a non-clinician administrator may be held liable. Such was the case in *Shin v. Massachusetts Institute of Technology*,[117] where MIT student Elizabeth Shin committed suicide just two days after the campus police and the health center were notified of her threats to do so and after over a year of MIT's awareness of her psychiatric problems.[118] A Massachusetts Superior Court justice denied a motion for summary judgment and allowed Shin's parents to sue two non-clinician IHE administrators for $27.7 million for failure to prevent Shin's harm.[119] The court determined that two MIT administrators had a special relationship with Shin as a result of their dealings with her, "imposing a duty on [them both] to exercise reasonable care to protect [her] from harm."[120] Not only did the court find a special relationship, but it also determined that the administrators had notice of Shin's condition and should have reasonably foreseen that she would harm herself.[121] Although the *Shin* case ultimately settled outside of court,[122] the decision to *allow* the adjudication of this type of lawsuit suggests a broadening scope of liability for IHE administrators.

In the case of *Schieszler v. Ferrum College*,[123] a 2002 decision by the United States District Court for the Western District of Virginia,

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114. *See id.* at 300.

115. *See* McLaughlin v. Sullivan, 461 A.2d 123, 125 (N.H. 1983).

116. Heather Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 423 (2007); *see also* Cohen, *supra* note 96, at 3087 ("In cases where a defendant has been found liable for another's suicide, the special relationship has primarily existed in the therapeutic and custodial contexts of hospitals and prisons.") (footnote omitted).

117. No. 020403, 2005 WL 1869101 (Mass. June 27, 2005).

118. *Id.* at *1–5.

119. *Id.* at *13–14; *see also* Robert B. Smith & Dana L. Fleming, *Student Suicide and Colleges' Liability*, CHRON. OF HIGHER EDUC., Apr. 20, 2007, at B24.

120. *Shin*, No. 020403, 2005 WL 1869101, at *13.

121. *Id.*

122. *See* Smith & Fleming, *supra* note 119.

123. 236 F. Supp. 2d 602 (W.D. Va. 2002) (mem.).

the court found that college officials had a special relationship with full-time student, Michael Frentzel.[124] While at Ferrum College, Frentzel had emotional problems and, as a result of some "undisclosed disciplinary issues," was forced to unenroll and comply with certain conditions before returning to school.[125] One condition was enrollment in anger management counseling.[126] After complying with these conditions, Frentzel returned to school.[127] Shortly thereafter, campus police found him alone in his room and noticed bruises on his head.[128] When questioned about the bruises, Frentzel claimed they were self-inflicted.[129] The Dean of Student Affairs, aware of this incident, required Frentzel to sign a statement that he would not hurt himself but the dean took no other action to ensure Frentzel's well-being.[130] Three days later, Frentzel hung himself with his belt in his dorm room.[131] The federal district court judge found that the plaintiff had alleged sufficient facts to prove "a special relationship existed between Frentzel and [the] defendants giving rise to a duty to protect Frentzel."[132] The *Schieszler* case "highlights what may be an avenue of expanded duty of care for potential litigants: knowledge of a past suicide attempt coupled with inadequate emergency responses that may have discouraged the student from seeking professional help."[133]

Courts have found that a special relationship (and correlative duty) exists between IHE and student in non-suicide cases as well. These decisions usually base their argument upon one or more of the following factors: societal expectations,[134] university policies that imply a voluntary assumption of responsibility,[135] and the recognition that the IHE is in a better position to bear the risk than the student.[136]

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124. *Id.* at 609.
125. *Id.* at 605 (internal quotations omitted).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 609.
133. *See* PAVELA, *supra* note 42, at 5.
134. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983) ("Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.").
135. *Id.* at 336 ("Colleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties.").
136. *Id.* at 335.

One such case, *Mullins v. Pine Manor College*,[137] involved a young woman who was abducted from her campus dorm and raped in another building on campus.[138] The court in this case found a specific duty of care to the victim based in part on "existing social values and customs,"[139] a rationale strikingly similar to the abandoned doctrine of *in loco parentis*.[140] The *Pine Manor* court identified the relationship as one that flowed from "the nature of the situation" and believed the IHE was in the best position to implement safety measures.[141] Because "[n]o student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors," the IHE must take on the responsibility itself.[142]

Similarly, in *Furek v. University of Delaware*,[143] a student was injured in a fraternity hazing incident and sued the university for negligence in failing to control the fraternity and its activities.[144] The university asserted that the student had voluntarily assumed the risk of injury by engaging in hazing and that no special relationship existed between the university and its student body.[145] Because the doctrine of *in loco parentis* no longer describes the relationship between the university and its students, the two parties now "operate at arms-length, with the student responsible for dealing with other students or student groups."[146]

The *Furek* court, while agreeing that the university's duty "is a limited one," was "not persuaded that none exists."[147] Based on Restatement § 323, the court reasoned that "if one takes charge and control of [a] situation, he is regarded as entering into a relation

137. 449 N.E.2d 331 (Mass. 1983).

138. *Id.* at 334.

139. *See id.* at 335 (quoting Schofield v. Merrill, 435 N.E.2d 339, 341 (Mass. 1982)).

140. *Id.*

141. *See id.*

142. *See id.* (footnotes omitted); *see also* Miller v. State, 467 N.E.2d 493, 497 (N.Y. 1984) (holding the college liable for the rape of a student occurring in a dorm room); Brown v. N.C. Wesleyan Coll., 65 N.C. App. 578, 583, 309 S.E.2d 701, 703 (1983) (noting that colleges can be liable for criminal assault by a third party upon a student under certain circumstances).

143. 594 A.2d 506 (Del. 1991).

144. *Id.* at 510–11.

145. *Id.* at 511, 517.

146. *See id.* at 517.

147. *See id.* at 522 ("The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. That duty extends to the negligent or intentional activities of third persons.").

which is attenuated with responsibility."[148] Evidence suggested that the university not only was knowledgeable of the practice of fraternity hazing on campus but had repeatedly communicated to students its policy against hazing, thereby assuming the duty to protect students from hazing as part of its declared commitment to provide overall security on campus.[149] The court focused its opinion on the interconnectedness of the college-student relationship. It asserted that, despite the recognition of student adulthood, IHEs continue to regulate and assert control over various aspects of student life, including the provision of food, housing, security, and various extracurricular activities.[150] The court concluded that although this attempt at control is "directed toward a group whose members are adults in the contemplation of law and thus free agents in many aspects of their lives . . . universities continue . . . to regulate student life" and must therefore be held liable in situations such as these.[151]

Just as the *Furek* court emphasized the fact that the university had taken control of a situation on campus as reason to imply a voluntary assumption of responsibility on the university, so too might a Virginia Tech victim's family member argue that the university had attempted, unsuccessfully, to take charge of Cho's situation before the shooting. Specifically, through the course of his college career, Cho became known by fellow students and teachers at Virginia Tech for his "hostile, even violent writings along with threatening behavior."[152] In fact, some Virginia Tech students were so troubled by Cho's behavior that they stopped coming to class, and one of his English professors even insisted that Cho be transferred out of her

148. *Id.* at 520 (citing W. PROSSER, HANDBOOK OF TORTS 56 (2nd ed. 1972)); *see also* RESTATEMENT (SECOND) OF TORTS § 323 (1965) ("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.").

149. *See Furek*, 594 A.2d at 520.

150. *See id.* at 516.

151. *Id.*

152. *See* VIRGINIA TECH REPORT, *supra* note 1, at 41. For example, in an assignment for his upper level poetry class, Cho wrote about his classmates:

> You low-life barbarians make me sick to the stomach that I wanna barf over my new shoes. If you despicable human beings who are all disgraces to [the] human race keep this up, before you know it you will turn into cannibals—eating little babies, your friends[]. I hope y'all burn in hell for mass murdering and eating all those little animals.

Id. at 42.

class or she would resign.[153] Several other English professors also expressed their concerns to the head of the English Department.[154] The faculty's concerns about Cho were ultimately brought before the university's Care Team, "comprised of the dean of Student Affairs, the director of Residence Life, the head of Judicial Affairs, Student Health, and legal counsel."[155] Yet, the Care Team was not informed when Cho's roommates and suitemates reported aberrant behavior to residence staff at different periods of his stay on campus. Nor was the Care Team alerted when three female residents reported unwanted attentions from Cho to the Virginia Tech Police Department ("VTPD") in the fall of 2005.[156]

In addition to being on notice of Cho's aberrant behavior, the university took actions that may imply a voluntary assumption of responsibility. Specifically, when one of Cho's professors contacted the head of the English Department, Dr. Roy, requesting that Cho be transferred from her class, the professor was "offered security, but declined saying she did not want him back in class, period."[157] Dr. Roy contacted the Dean of Student Affairs about Cho's condition, and the Dean had one of Cho's poem's evaluated by a counselor.[158] Ultimately, Dr. Roy ended up tutoring Cho one-on-one, though it appears he never stopped being "worried" about Cho; Dr. Roy continually encouraged Cho to seek counseling.[159] Virginia Tech took

153. *See id.* at 42–43. One of Cho's professors, Dr. Giovanni, noticed that class attendance was down, and when she asked another student what was going on, he answered, "It's the boy . . . everyone's afraid of him." *See id.* at 43.

154. *See* Alex Johnson, *College Gunman Disturbed Teachers, Classmates: President Comforts Virginia Tech After Student Kills 32 and Himself*, MSNBC NEWS, Apr. 17, 2007, http://www.msnbc.msn.com/id/18148802.

155. VIRGINIA TECH REPORT, *supra* note 1, at 43.

156. *See id.* at 43–45 ("There were no referrals to the Care Team . . . when Residence Life, and later, VTPD became aware of Cho's unwanted communications to female students and threatening behavior.").

157. *Id.* at 43.

158. *Id.* (stating that the Dean followed up by sending an e-mail message to the Head of the English Department stating "I talked with a counselor . . . and shared the content of the 'poem' . . . and she did not pick up on a specific threat. She suggested a referral to Cook during your meeting. I also spoke with Frances Keene, Judicial Affairs director and she agrees with your plan.") (internal quotations omitted).

159. *Id.* Dr. Roy wrote to Associate Dean Mary Ann Lewis, Liberal Arts & Human Sciences, about his encounters with Cho:

> He is now meeting regularly with me. . . . This has gone reasonably well, though all of his submissions so far have been about shooting or harming people because he's angered by their authority or by their behavior. We're hoping he'll be able to write inside a different kind of narrative in the future, and we're encouraging him to do so . . . I have to admit that I'm still very worried about this student. He still insists on wearing highly reflective sunglasses and some responses take several

various actions that, under the *Furek* court's reasoning, could be perceived as a voluntary assumption of risk and responsibility for Cho, especially considering the security it offered to Cho's English professor and the special accommodations the English Department made for Cho to remain enrolled in classes. In light of these facts, the extent of Virginia Tech's exposure to liability under the "special relationship" liability theory is unclear but probably greater than under any of the previously discussed theories.

In summary, unusual circumstances which establish a special relationship between an IHE and its students are required in order to establish that the IHE has an affirmative duty to protect its students from the criminal or wrongful acts of third parties. Although courts traditionally have been reluctant to impose liability on IHEs for any harm to their students, the current law is unclear and in flux. Suicide liability litigation against colleges continues to grow, and the *Schieszler* and *Shin* decisions suggest that, based on the *particular* facts alleged in those cases, a new avenue for an expanded duty of care is developing.[160] But, IHEs do not face heightened risk of liability *in general*; rather, they face the *specific* possibility that "ignor[ing] or mishand[ling] known suicide threats or attempts" will lead to liability.[161] Moreover, courts have demonstrated increased willingness to find a duty-imposing "special relationship" in non-suicide cases, such as in the *Pine Manor* dormitory rape case and the *Furek* fraternity-hazing case. Specifically, courts are more willing to find that a special relationship exists between the IHE and student when societal expectations promote such a relationship, when university policies imply a voluntary assumption of responsibility, or when the IHE is clearly in a better position to bear the risk than the student.[162]

B. Foreseeability & Causation

The foregoing analysis discussed the various theories courts use to find that an IHE owed a duty to prevent harm to the plaintiff—the

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minutes to elicit. (I'm learning patience!) But I am also impressed by his writing skills, and by what he knows about poetry when he opens up a little. I know he is very angry, however, and I am encouraging him to see a counselor—something he's resisted so far. Please let me and Fred know if you see a problem with this approach.

Id. at 45.

160. *See* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (D. Va. 2002); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *13 (Mass. June 27, 2005).

161. *See* PAVELA, *supra* note 42, at 8.

162. *See supra* notes 123–42 and accompanying text.

first prong of the liability test. The second and third prongs of the test—that the IHE breached its duty and that the plaintiff was injured—are not as difficult to establish. However, the fourth prong, which is the focus of this section, requires the plaintiff to prove that, had the university not acted or failed to act as it did, the plaintiff would not have been injured. This causation element is often the most difficult to demonstrate. Courts have noted that "even where a duty is established, the likelihood of imposing liability on a college for a student's death is remote because causation is a difficult hurdle to overcome."[163] Nevertheless, the *Shin* and *Schieszler* opinions demonstrate that, for suicide cases, the likelihood is not so remote as to be impossible. Nor is institutional liability unheard of for non-suicide, criminal conduct on campus.[164]

When analyzing the causation element of a student's claim against an IHE for failing to prevent harm, a court looks to the reasonable foreseeability of the risk of injury.[165] If the specific risk is not foreseeable, it would be wholly unjust for the institution to be held liable for not taking steps to prevent it. Of course, deliberate ignorance is not acceptable either; schools cannot turn a blind eye to dangerous risks on their campuses. Nor should they be held accountable for general risks. Rather, the risk, and the corresponding foreseeability, must be specific.

The court's opinion in *Schieszler* outlines the typical analysis.[166] It recognized the existence of a "special relationship" between the

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163. *See* Cohen, *supra* note 96, at 3095 (citing Mahoney v. Allegheny Coll., No. AD 892-2003, slip op. at 25 (Pa. Ct. Com. Pl. Dec. 22, 2005) ("In our view, the likelihood of a liability determination (even where a duty is established) is remote, when the issue of proximate causation . . . is considered.")).

164. *See, e.g.*, Jesik v. Maricopa County Cmty. Coll. Dist., 611 P.2d 547, 548 (Ariz. 1980) (holding the college liable for the murder of a student killed while registering for classes). The Supreme Court of Arizona pointed to the fact that the student had identified his assailant to a security guard and had requested, but was refused, protection. *Id.* The institution, via the security guard, thus had specific notice of both the actor and the specific type of harm likely to occur. *Id.*

165. *See* MICHAEL C. SMITH, COPING WITH CRIME ON CAMPUS 86 (1988) (stating that the foreseeability doctrine has become "firmly implanted in American college and university law"); *see also* Michael C. Griffaton, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 540 (1993) ("Foreseeability, one way to demonstrate the existence and breach of a duty, is the criterion against which colleges and universities are judged in determining whether they should be held liable when their students fall victim to campus crime."); Smith & Fleming, *supra* note 119 ("The courts' willingness to find colleges liable for damages hinges on the apparent 'foreseeability' of the suicide. Courts ask, 'Was the institution somehow put on notice that this was going to happen?' ").

166. *See supra* text accompanying notes 123–42.

university and student but cautioned that the existence of a special relationship would not, "standing alone, give rise to a duty; the harm must be foreseeable."[167] The court refused to dismiss the plaintiff's action, holding that Frentzel's suicide was arguably foreseeable because there was an "imminent probability" of harm, and the IHE had "notice of this specific harm."[168] It appears that the same facts which compelled the judge to find a special relationship in this situation also established a strong case that the harm was foreseeable.[169] This holding suggests there will be a *stronger* indication that the relationship has created a duty if the student continuously communicated suicidal contemplations to IHE officials, thereby giving the IHE knowledge of imminent danger and notice of the student's intentions.[170] Robert Smith and Dana Fleming, higher education lawyers in the Boston area, point out that the foreseeability analysis puts IHEs in a "double bind":

> On the one hand, if [IHEs] adopt risk-management measures to avoid dealing with potentially suicidal students, that attitude will discourage students from revealing their depression and seeking help, making them more likely to commit suicide. On the other hand, if an institution reaches out to help a troubled student, the more contact the student has with campus counseling services, the more antidepressants the college's psychiatrist prescribes, and the closer watch administrators keep, the more likely the institution is to be held liable if that student takes his or her life.[171]

As Smith and Fleming point out, IHEs are in a difficult position. First, they struggle to identify which facts in a case might lead a court

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167. *See* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (D. Va. 2002) (pointing out that in *Wright v. Webb*, the court held that the duty to protect or assist does not arise without "an imminent probability of harm," and that the defendant must have notice of a "specific," not general, danger) (citing Wright v. Webb, 362 S.E.2d 919, 922 (Va. 1987)).

168. *See Schieszler*, 236 F. Supp. 2d at 609.

169. *See id.* (citing as persuasive the facts that Frentzel was a full-time student living on-campus, that he had been required to seek anger management counseling, that administrators knew of a message he had sent to his girlfriend communicating suicidal ideations, and that he had sent other similar communications to his girlfriend and another friend before).

170. The *Schieszler* court also considered whether defendants could have reasonably foreseen that they would be expected to take affirmative action to protect and assist Frentzel. *See id.* at 609–10. The court noted that, even though colleges are not insurers of student safety, "parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm." *Id.* at 610 (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983)).

171. Smith & Fleming, *supra* note 119.

to hold that the university has a special relationship with its student and a consequent duty to prevent *foreseeable* harm.[172] Second, assuming that a duty to prevent a foreseeable harm is found, IHEs are uncertain what is expected of them in order to fulfill that duty.[173] IHEs may escape liability if courts conclude that the institution satisfied its duty by taking appropriate measures to reduce the risk of harm.[174] Appropriate measures might include implementing sufficient security procedures, providing students with campus crime statistics as required under the Campus Security Act,[175] and increasing the amount of resources devoted to mental health care and support on campus.[176] But the highly fact-specific nature of each case leaves IHEs uncertain as they ask themselves at what point they can be assured that they have taken sufficient reasonable care. An administrator may assume that, by referring a troubled student to a mental health professional, she has fulfilled her responsibility and absolved herself of liability. The *Shin* and *Schieszler* cases indicate, however, that an administrator might be woefully mistaken in making such an assumption. An IHE needs to know when it can be relatively certain that it has fulfilled its duty to prevent harm to its students if a special relationship is determined to exist.

In relation to the Virginia Tech tragedy, the *Shin* and *Schieszler* rulings suggest that even though Dr. Roy, the head of the English Department who met one-on-one with Cho, continually encouraged Cho to seek counseling,[177] that might not have been enough to shield the university from liability. In fact, the counseling referral may even increase the institution's risk of liability because it means Dr. Roy *foresaw* the potential harm Cho could do to himself or others. In an email to the Dean of Student Affairs, Dr. Roy wrote, "I have to admit that I'm still very worried about this student.... I know he is very angry."[178] More damning, perhaps, is the information that various parties at Virginia Tech had about Cho that was never communicated to the Care Team, the party ultimately responsible for determining

172. *Id.*

173. *Id.*

174. For a discussion of affirmative duties—such as the duty to notify and to share information—that courts may impose on an IHE vis-à-vis a suicidal student and the measures it may take to fulfill those duties, see Lake & Tribbensee, *supra* note 62, at 137–53.

175. *See* Griffaton, *supra* note 165, at 536 (citing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2000), *amended by* Pub. L. No. 110-315, 122 Stat. 3078 (2008)).

176. *See* Smith & Fleming, *supra* note 119.

177. VIRGINIA TECH REPORT, *supra* note 1, at 45.

178. *Id.*

whether Cho remained enrolled and on campus. For example, "Residence Life knew through their staff (two resident advisors and their supervisor) that there were multiple reports and concerns expressed over Cho's behavior in the dorm, but this was not brought before the Care Team."[179] Moreover, three female residents "reported problems with unwanted attention from Cho (instant messages, text messages, Facebook postings, and erase board messages)," and one of Cho's suitemates "combined many of these instances of concern into a report shared with the residence staff."[180] Although the residence advisors shared this information with the hall director and the Residence Life administrator, who in turn communicated with the assistant director of Judicial Affairs, these matters were never brought before the Care Team either.[181]

As the foregoing analysis illustrates, there is a confusing maze of possible rationales for determining when a college might be required to pay for a loss suffered by a suicide or related crime on campus. Unfortunately, the case law does little in the way of providing coherent analysis or bright-line rules. The *Schieszler* and *Shin* cases increased IHEs' liability while doing nothing to minimize confusion as to how to avoid it. While many commentators "continue to insist that *in loco parentis* is dead in higher education law,"[182] thus relieving colleges of supervisory responsibility for their students, the "duty-imposing trend" in recent years suggests that colleges still bear the primary legal burden of student oversight.[183] This is an ironic trend: in the 1960s, IHEs began relinquishing control over the personal affairs of students only to have their exposure to liability steadily increase.[184]

In sum, Part II demonstrates how an increasing number of legal doctrines are employed in attempts to lay blame at the door of IHEs and how the theories supporting a duty of care remain tenuous. In addition to shaky legal theories attempting to impose a duty of care on IHEs, federal privacy and disability laws are also muddying the waters and making it more difficult for IHEs to gain access to the information they need in order to effectively support and protect their student populations while limiting their own liability. If IHEs face potential liability regarding harm caused by mentally-ill students,

179. *Id.* at 52.
180. *Id.* at 53.
181. *Id.*
182. *See* Lake, *supra* note 16, at 532–33.
183. *See* Johnson, *supra* note 56, at 1075.
184. *See id.*

they should be provided the tools to effectively shield themselves from that liability. The next section identifies three areas where current federal laws and campus policies should be revised to help IHEs take the appropriate steps to both protect students and shield themselves from liability.

III. LAW AND POLICY PROPOSALS

A. Federal Privacy Law and the "Health & Emergency Exception"

The information privacy laws governing the records of college students are designed to strike a balance between protecting adult student privacy on the one hand, and allowing information sharing that is necessary to ensure the health and safety of the student population on the other.[185] This is a very difficult balance to strike, and the Virginia Tech tragedy illustrated a common misperception held by IHE faculty and administrators, namely, that the scales heavily tip toward the interest of privacy over safety. In reality, the scales are meant to be more equally balanced between privacy and safety interests.[186]

Federal and state privacy laws protect the privacy of student records and health records.[187] Specifically, the Family Educational Rights and Privacy Act of 1974 ("FERPA")[188] and its regulations[189] govern the privacy of student educational records, which are broadly

185. *See* VIRGINIA TECH REPORT, *supra* note 1, at 63 ("Information privacy laws are intended to strike a balance between protecting privacy and allowing information sharing that is necessary or desirable. Because of this difficult balance, the laws are often complex and hard to understand."). *See generally Balancing Student Privacy and School Safety: A Guide to the* Family Educational Rights and Privacy Act *for Elementary and Secondary Schools*, U.S. DEP'T OF EDUC. (Oct. 2007), http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf (explaining a number of FERPA regulations and their application).

186. *See* VIRGINIA TECH REPORT, *supra* note 1, at 63.

187. In addition, the legal and ethical obligations of confidentiality that characterize certain professional relationships, such as between a patient and a counselor, psychologist, psychiatrist, or physician, frequently preclude disclosure of information to any outside party, including the parent, unless authorized by the patient. "Professional rules of ethics place extreme importance on the confidentiality between the therapist or physician and the individual client or patient." Lake & Tribbensee, *supra* note 62, at 115; *see, e.g.*, AM. COUNSELING ASSN., ACA CODE OF ETHICS & STANDS. OF PRAC. (2005), *available at* http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx; AM. MED. ASSN., AMA CODE MED. ETHICS 5.05 (2000), *available at* http://www.ama-assn.org/ama/pub/category/2498.html.

188. 20 U.S.C. § 1232g (2000) (formerly the "Buckley Amendment"); *see* 5 JAMES A. RAPP, EDUCATION LAW § 13.04(2)(a) (2008).

189. *See* 34 C.F.R. § 99 (2007).

defined, with certain exceptions,[190] to include "those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution."[191] FERPA applies to all public and private educational institutions that receive federal funding,[192] which translates to nearly all postsecondary institutions.[193] FERPA threatens to withhold federal funds from any educational institutions that "have a policy or practice" of violating its provisions.[194]

Before students turn eighteen years old, information from their educational records cannot be shared unless authorized by law or with the consent of a parent.[195] FERPA also grants parents the right to request an amendment to their child's records if they believe them to be inaccurate or misleading.[196] When a student turns eighteen

190. Some exceptions are records within the sole possession of the maker thereof not revealed to another person, records of law enforcement units of educational agencies, employment records of educational institution personnel who are not students, and records kept by an educational institution's physician, psychiatrist, or other treating personnel of the school. 20 U.S.C. § 1232g(a)(4)(B).

191. § 1232g(a)(4)(A); *see also* 34 C.F.R. § 99.3(a)(13)–(14) (defining "education records"). Student disciplinary records are also protected as education records under FERPA, but certain circumstances allow disclosure of such records without the student's consent. *See* 20 U.S.C. § 1232g(h). For example, a postsecondary institution may disclose to an alleged victim of any crime of violence or non-forcible sex offense the results of disciplinary proceedings carried out by the institution, regardless of the outcome of the proceedings. Moreover, the institution may disclose to anyone the final results of the disciplinary proceeding wherein the student was an alleged perpetrator of a crime of violence or a non-forcible sex offense *and* found to have committed a violation of the institution's rules or policies. *See* § 1232g(b)(6)(B).

192. *See* § 1232g(a)(3). FERPA defines "educational agency or institution" as "any public or private agency or institution which is the recipient of funds under any applicable program." *Id.*

193. Because the vast majority of higher education institutions receive federal funding, nearly all higher education institutions are subject to FERPA's requirements. *See* RAPP, *supra* note 188, § 13.04(2)(b) (detailing the applicability of FERPA).

194. *See* § 1232g(a)–(b). Courts interpreting FERPA provisions generally have found that individual instances of violations do not rise to the level of "policy or practice" necessary to have a violation of the Act. *See, e.g.*, Weixel v. Bd. of Educ., 287 F.3d 138, 151 (2d Cir. 2002) (holding that contacting a student's doctor, home instructor, and lawyer to provide inaccurate information about the student does not constitute a systemic policy of violating FERPA); Daniel S. v. Bd. of Educ., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (holding that "individual incidents involving one teacher" are not the equivalent of a "policy or practice" of violating FERPA); Achman v. Chisago Lakes Indep. Sch. Dist., 45 F. Supp. 2d 664, 674 (D. Minn. 1999) (stating that "a solitary violation is insufficient to support a finding that the District has violated FERPA as a matter of policy or practice").

195. *See* § 1232g(b)(1).

196. *See* § 1232g(a)(2) (stating that funds will not be made available to an educational institution that does not provide an opportunity for the student or parent to challenge the content of his educational records).

years old, or enrolls in a postsecondary institution at any age, all rights afforded to the parent under FERPA transfer to the student,[197] and educational records cannot be shared with the student's parent without the student's consent.[198]

Notwithstanding the consent requirement, FERPA provides four primary exceptions that authorize, *but do not require*, a university to release information in a college student's record. First, FERPA authorizes disclosure of information in a student's educational record to other school officials so long as the official is determined to have a legitimate educational interest in receiving the information.[199] Unfortunately, there has been little to no guidance from the courts or from FERPA regulations to define what constitutes a "legitimate educational interest" and who qualifies as a "university official."[200] Second, FERPA authorizes disclosure to parents when the student has violated alcohol or drug laws and is under the age of twenty-one.[201] School authorities may also disclose a student's educational records to a parent who claims an adult student as a dependent for tax purposes.[202] Third, a school official may generally share personal observations, impressions, or knowledge of the student with the parent[203] because education records do not include written records "that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person."[204] Finally, schools may disclose a student's educational records to school officials or parents in the event of a health or safety emergency.[205]

Many parents and even administrators are unclear as to the exceptions listed above and are unaware of the vast amount of

197. *See* § 1232g(d); *see also Parents' Guide to FERPA: Rights Regarding Children's Education Records*, U.S. DEP'T OF EDUC. (Oct. 2007), http://www.ed.gov/print/policy/gen/guid/fpco/brochures/parents.html [hereinafter *Parents' Guide to FERPA*] (providing parents with information about FERPA).

198. *See* § 1232g(d).

199. *See* § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1) (2007).

200. *See* § 99.31(a)(1) (establishing that an IHE "may disclose personally identifiable information from an education record of a student without the consent" if the disclosure is "to other school officials, including teachers ... [who] have legitimate educational interests"). The terms "school official" and "legitimate educational interest" are not defined in this section of the C.F.R.

201. *See* 20 U.S.C. § 1232g(i).

202. *See* § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8).

203. *See Parents' Guide to FERPA*, *supra* note 197.

204. 34 C.F.R. § 99.3.

205. *See* 20 U.S.C. § 1232g(b)(1)(I) (authorizing disclosure to "appropriate persons if knowledge of such information is necessary to protect the health or safety of the student or other persons").

information that falls outside FERPA and may be freely shared.[206] Such were the findings published in the commissioned reports detailing the events of and legal issues surrounding the Virginia Tech tragedy.[207] For example, as mentioned above, FERPA does not preclude the sharing of personal knowledge or observations such as information gained from a conversation with a student.[208] Hence, teachers or administrators who witness a student acting strangely or inappropriately are not prohibited from sharing that observation with others. Nor are teachers' informal notes, kept in their sole possession, considered educational records under FERPA; those notes may be used as a reference when sharing observations.[209]

In addition to personal observations, records created and maintained by university campus law enforcement fall outside FERPA.[210] In Cho's case, the VTPD received complaints from female students in the fall of 2005 about Cho's behavior, including threatening instant messages, emails, and phone calls.[211] The VTPD created a record for investigative purposes. After campus police told Cho to stop contacting one of the females, Cho told one of his roommates "I might as well kill myself now."[212] This comment triggered a psychiatric evaluation and overnight stay at Carilion St. Albans Behavioral Health Center.[213] FERPA rules would not have precluded the VTPD from sharing its records with Virginia Tech administrators or Cho's parents to inform them that Cho was under a temporary detention order and had been transported by the VTPD to Carilion St. Albans Behavioral Health Center for an overnight stay. Even though the information *could* have been shared, however, no federal law imposes a duty upon the VTPD to inform the parties, nor does it impose a duty upon administrators to request the information. In Cho's case, neither the female students' complaints nor the

206. *See* § 1232g(a)(4)(B).

207. *See* VIRGINIA TECH REPORT, *supra* note 1, at 63.

208. "Nothing in FERPA prohibits a school official from sharing with parents information that is based on that official's personal knowledge or observation and that is not based on information contained in an education record." *Disclosure of Information from Education Records to Parents of Postsecondary Students*, U.S. DEP'T OF EDUC., June 7, 2007, http://www.ed.gov/print/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html.

209. *See supra* note 191 and accompanying text.

210. *See* § 1232g(a)(4)(B)(ii). If campus law enforcement shares the record with the school, that school copy becomes subject to FERPA rules. However, the copy retained by the law enforcement agency would not be subject to FERPA rules. *See id.*

211. *See* VIRGINIA TECH REPORT, *supra* note 1, at 22–23.

212. *See id.* at 23.

213. *Id.* at 47. Unfortunately, this stay was not effective because a professional evaluated Cho and determined he was not an immediate threat to himself or society. *Id.*

overnight detention were reported by the VTPD to Virginia Tech administrators or Cho's parents.[214]

In light of the information that may be shared under the FERPA exceptions, and in response to the finding that many parents and school administrators are unclear about the scope of these exceptions, an essential predicate for avoiding another attack like Virginia Tech will be a robust system which allows for comprehensive, efficient communication of information between professors, administrators, residence staff, law enforcement, parents, and any other related parties. This is not an area where the law needs to be changed. It is simply up to the university to dedicate the time and resources to determine what communications system will be most effective for its campus community. Certainly no one communications system will fit all campuses—they must be tailored to the specific needs of each community but must include, at a minimum, an effective gatekeeper.

Another exception to the general rule of nondisclosure of educational records is that an IHE is not allowed to disclose information about a student in order to avoid harm to the student or others. FERPA provides an express exception for disclosures related to a "health or safety emergency."[215] Nevertheless, what constitutes an "emergency" is left to the discretion of education officials. This discretion has been granted to a population of administrators and staff that suffers from "widespread confusion" as to what degree of disclosure is permitted under federal and state privacy laws.[216] They find it difficult to discern what circumstances satisfy the requirement that "knowledge of the information is necessary to protect the health or safety of the student or other individuals."[217] Exacerbating the

214. *Id.* at 52, 63. In Cho's case, his professors, his suitemates, fellow students, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center "all had dealings with [Cho] that raised questions about his mental stability." *Id.* Yet, there is no evidence that Cho's parents, his suitemates, or his suitemates' parents were ever informed that Cho had been detained by the VTPD, that he had been involuntarily admitted to Carilion St. Albans Behavioral Health Center for psychiatric evaluation, or that he had been found to be dangerous himself. *Id.*

215. *See* § 1232g(b)(1)(I).

216. "There is widespread confusion about what federal and state privacy laws allow .... The system failed for lack of resources, incorrect interpretation of privacy laws, and passivity." VIRGINIA TECH REPORT, *supra* note 1, at 2. This confusion and breakdown of communication were not only present at Virginia Tech in regard to Cho's case—these problems were discovered nationwide. *See* REPORT TO THE PRESIDENT: ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (June 13, 2007), http://www.hhs.gov/vtreport.pdf [hereinafter REPORT TO THE PRESIDENT] (reporting " 'information silos' within educational institutions and among educational staff, mental health providers, and public safety officials that impede appropriate information sharing").

217. *See* 34 C.F.R. § 99.36(a) (2007).

problem is the fact that FERPA regulations state that this emergency exception is to be "strictly construed,"[218] a requirement that is unnecessary and only reinforces the misperception that nondisclosure is the "safest" route, at least in terms of protecting the IHE from liability. Ultimately, Virginia Tech officials "default[ed] to the nondisclosure option—even when laws permit[ted] the option to disclose."[219]

The unsettling irony here is that either decision, whether disclosure or nondisclosure, could expose the institution to potential liability. A student's psychological disorder alone may not be enough to constitute a health or safety emergency worthy of disclosure to law enforcement officials or other administrators on campus. But nondisclosure of such information, as we have seen, can sometimes lead to tragic incidents and invite negligence lawsuits against the institution for failure to prevent a foreseeable harm.[220]

A federal report commissioned by the President of the United States found "confusion and differing interpretations" as to when teachers or administrators may share information concerning students they believe pose a health or safety risk to themselves or others.[221] Specifically, campus officials and teachers are uncertain about the liability they might face if they are later found to have violated FERPA by sharing protected information.[222] In response to the scrutiny with which federal privacy laws have been examined in the wake of the Virginia Tech tragedy, the Department of Education has proposed several new regulations to govern FERPA.[223] Foremost among the proposed changes and clarifications to the law is an attempt to grant educational administrators more latitude under the "health or safety" emergency exception to share information about a

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218. *See* § 99.35(c).

219. *See* VIRGINIA TECH REPORT, *supra* note 1, at 63. The panel observed that

> [s]ometimes this is done out of ignorance of the law, and sometimes intentionally because it serves the purposes of the individual or organization to hide behind the privacy law. A narrow interpretation of the law is the least risky course, notwithstanding the harm that may be done to others if information is not shared.

Id.

220. For example, in order to avoid potential lawsuits, Virginia crafted an eleven million dollar state settlement agreement with the families of most of the victims in the Virginia Tech shooting. *See Virginia: Settlement in Virginia Tech Shootings*, N.Y. TIMES, June 18, 2008, at A15. Families of twenty-four of the thirty-two victims killed by Cho participated in the settlement and will receive $100,000 apiece under the settlement. *Id.*

221. *See* REPORT TO THE PRESIDENT, *supra* note 216, at 7.

222. *Id.*

223. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 15,574, 15,574 (proposed Mar. 24, 2008) (to be codified at 34 C.F.R. pt. 99).

student.[224] Even though legal experts and officials at the Department of Education have argued in the past that privacy laws are sufficiently clear and flexible in their application as they currently stand,[225] the Report to the President—identifying a widespread misconception among IHE officials that "nondisclosure is always a safer choice"—indicates otherwise.[226]

The Department of Education's proposed regulations would provide a "new standard" for when campus officials could release FERPA-protected information under the "health and emergency" exception.[227] The proposed change requires that "considering the totality of the circumstances, there must be an articulable and significant threat to the health or safety of a student or other individuals, and that the disclosure be to any person whose knowledge of the information is necessary to protect against the threat."[228] In addition to clarifying this new legal standard, one that requires an "articulable and significant threat" to the health and safety of individuals, the proposed regulations provide a sort of "safe harbor" to administrators, assuring them that they need only demonstrate a "rational basis" for their original decision.

> [T]he Secretary has determined that greater flexibility and deference should be afforded to administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals. To provide for appropriate flexibility and deference, the Secretary has determined that if, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.[229]

Section 99.36(c) of the proposed regulations has been received with general approval by many education law practitioners, mental health experts, and IHE officials.[230] Congress should adopt the

224. *See id.* at 15589.

225. Doug Lederman, *U.S. Proposes New Rules on Student Privacy*, INSIDEHIGHERED.COM, Mar. 24, 2008, http://www.insidehighered.com/news/2008/03/24/ferpa.

226. *See* VIRGINIA TECH REPORT, *supra* note 1, at 69.

227. Family Educational Rights and Privacy, 73 Fed. Reg. at 15,589.

228. *Id.*

229. *Id.*

230. For example, the American Psychological Association ("APA"), along with dozens of other interested parties, submitted comments to the Education Department on the proposed FERPA regulations. *See APA Submits Comments to the U.S. Department of Education on Proposed Regulations of the Family Education Rights and Privacy Act*, AM.

"health and emergency" exception as it is defined in section 99.36(c) of the proposed regulations. Such provisions would insulate any person or entity from liability (and, in this case, from loss of federal funding) for making a disclosure in the good faith belief that doing so could protect a student or others in the community from a health or safety emergency. Administrators and health professionals should not be put in the position of having to choose between risking losing their professional license or job and doing the right thing by the student. Without a clearer definition of the emergency exception coupled with a safe harbor provision like the one the Department of Education is currently proposing, school officials who have observed first-hand, or received reports of, troubling student behavior are more likely to opt for nondisclosure.[231] "Privacy laws that do not allow the responsible sharing of the mental health data of individuals who pose dangers to themselves or others" are unacceptable because they sacrifice the safety of the remaining student population on campus.[232]

PSYCHOL. ASS'N, May 8, 2008, *available at* http://www.apa.org/ppo/education/ferpa0508.html. The APA supported the Department's proposal to do away with "the language requiring strict construction of the emergency exception" and to institute a provision that indicated the Department would not substitute its judgment for that of the institution, because it believes such provisions "will provide greater clarity and flexibility for colleges and universities when facing an emergency." *Id.* Several education law practitioners look favorably on the proposed FERPA regulations as well. For example, one practitioner applauded the Education Department for making it clear that IHE officials are not likely " 'to get in trouble for a good faith decision made in the heat of the moment before all facts are known.' " *See* Lederman, *supra* note 225. A lawyer for the Washington firm of Dow Lohnes believes the new proposed regulations " 'provide[] a significant safety net for college administrators who have been inappropriately concerned about a narrow interpretation of emergency conditions' " and will help IHE administrators " 'understand that at the end of the day, the welfare of the student and the student body and the community is what is paramount.' " *Id.* Finally, the President of the University of North Carolina "commend[ed] the Secretary on the proposed changes," viewing them as "an enormous improvement over the current language." Letter from Erskine Bowles, President, Univ. of N.C., to LeRoy S. Rooker, U.S. Dep't of Educ. (Apr. 28, 2008), *available at* http://www.regulations.gov (enter "optional Step 2," click first Docket ID, click ED-2008-OPEPD-0002, select option ending in -0010).

231. The Report to the President, which summarized the findings of meetings with administrators and mental health practitioners around the country, highlighted a "consistent theme and broad perception" nationwide, namely that people were concerned and confused about "the potential liability of teachers, administrators, or institutions that could arise from sharing information, or from not sharing information, under privacy laws." *See* REPORT TO THE PRESIDENT, *supra* note 216, at 7. The report observed that "these fears and misunderstandings likely limit the transfer of information in more significant ways than is required by law." *Id.* Participants in the study routinely reported circumstances in which they incorrectly believed that privacy laws precluded them from sharing certain information. *Id.*

232. *See* James G. Hodge, *Protecting the Public's Health Following the Virginia Tech Tragedy: Issues of Law and Policy*, 1 DISASTER MED. AND PUB. HEALTH PREPAREDNESS S43, S45 (2007), *available at* http://www.dmphp.org/cgi/reprint/1/

Therefore, as demonstrated by the Department of Education in the March 24, 2008 proposed regulations, the health and safety emergency exception must be clearly defined, providing flexibility in its application and a safe harbor for those who make a good faith disclosure of information protected under FERPA.

B. Post-Admission, Pre-Enrollment Screening

In addition to dealing with confusing and unclear privacy information laws, administrators are also hamstringed by the current federal disability law. Section 504 of the Rehabilitation Act of 1973 ("Section 504"), as amended, and Title II of the Americans with Disabilities Act ("ADA") of 1990 both prohibit discrimination on the basis of disability. Both have similar requirements and, like federal privacy laws, apply to nearly every college and university in the United States (i.e., those institutions that receive federal funding).

When a student applies to an institution of postsecondary education, the institution is not permitted to make what is known as a "preadmission inquiry" into the student's disability status.[233] That is because no student may be denied admission simply because he or she has a disability.[234] An institution may, however, require an applicant to meet essential technical or academic standards for admission in order to be able to effectively participate in the program applied for.[235] For example, if an essential requirement for a degree program in physical therapy is physical lifting, an institution may ask: "With or without reasonable accommodation, can you lift 25 pounds?"[236]

Moreover, whereas high schools have an obligation to identify students within their jurisdiction who have a disability, IHEs are only responsible for providing services to students who self-identify and request an academic adjustment.[237] An academic adjustment, as defined by the Section 504 regulations, is any modification necessary to ensure that academic requirements do not have the effect of

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233. *See* 34 C.F.R. § 104.42(b) (2007).

234. *See* §§ 104.4, 104.42.

235. *See* § 104.44(a).

236. *Transition of Students with Disabilities to Postsecondary Education: A Guide for High School Educators*, U.S. DEP'T OF EDUC. (Mar. 2007), http://www.ed.gov/about/offices/list/ocr/ transitionguide.html [hereinafter *Transition of Students with Disabilities*].

237. *See id.*

discriminating against an applicant or student with a disability.[238] Academic adjustments may include "changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."[239]

A student's disclosure of a disability to the IHE is always voluntary. She may choose not to disclose her disability if she determines she does not require special services. Consequently, mentally-ill students may easily arrive on campus as a freshman without anyone in the admissions office, student affairs office, or counseling center ever knowing that the student has a long-standing history of mental illness—such was the case with Cho.[240]

In response to the Virginia Tech shooting, Virginia Governor Tim Kaine commissioned an independent panel of experts to conduct a review of the events leading up to the tragedy, including a detailed investigation of Cho's mental health history, in order "to make recommendations regarding improvements to the Commonwealth's laws, policies, procedures, systems and institutions."[241] Similarly, President George W. Bush directed the heads of the Departments of Education, Justice, and Health and Human Services[242] to meet with educators, mental health experts, and state and local officials nationwide to learn how the federal government can help prevent such catastrophes in the future.[243]

It was not long before investigators commissioned by the Governor and the President discovered that Cho had a long history of mental instability. From as early as age three, Cho suffered emotional trauma and was considered "medically frail."[244] Through

238. 34 C.F.R. § 104.44(a).

239. *Id.*

240. "Cho did not seek any accommodations from Virginia Tech." VIRGINIA TECH REPORT, *supra* note 1, at 39.

241. *See id.* at 5 ("This inquiry should include the response taken by Virginia Tech and others to note psychological and behavioral issues, Seung Hui Cho's interaction with the mental health delivery system, including ... communication between the mental health services system and Virginia Tech.").

242. These included U.S. Secretaries Michael Leavitt (Dep't of Health and Human Servs.) and Margaret Spellings (Dep't of Educ.) and then U.S. Attorney General Alberto Gonzales.

243. *See* REPORT TO THE PRESIDENT, *supra* note 216, at 1.

244. *See* VIRGINIA TECH REPORT, *supra* note 1, at 32. Chapter 4 of the report outlines Cho's mental health history at length. *Id.; see also* Vicki Smith, *Cho's Problems Date to Early Childhood: Virginia Tech Gunman Began Having Violent Thoughts Early in His Life, Report Finds*, ABC NEWS, Aug. 30, 2007, http://abcnews.go.com/US/wireStory?id=3540871.

the combined efforts of his parents, therapists, doctors, and public school educators, however, Cho seemed to manage his mental health problems relatively well until enrolling at Virginia Tech and moving away from his support network.[245] In middle school, Cho worked with a therapist doing art therapy because Cho "would not converse and uttered only a couple words in response to questions."[246] While in middle school, Cho was diagnosed with severe "social anxiety disorder," and, in eighth grade, he started showing signs of depression.[247] At one point, Cho began drawing tunnels and caves, images that concerned his art therapist so much that she asked him whether he had any suicidal or homicidal thoughts.[248] Although Cho denied having them, his therapist drew up a contract making him promise that he would not harm himself or others and that he would communicate with his parents or someone at school if he did experience any ideas about violence.[249] After the murders at Columbine High School in Colorado, Cho wrote a paper saying he wanted to repeat the attacks, and his middle school responded by contacting the family and encouraging a psychiatric evaluation.[250] Cho was evaluated in June 1999, two months after the Columbine shooting, and was diagnosed by the psychiatrist with "selective mutism" and "major depression: single episode."[251] The doctor prescribed the antidepressant Paraxetine, which Cho took for a year, after which the doctor stopped the medication because of Cho's improvement.[252]

In high school, Cho's "selective mutism" and concerning behavior resurfaced. One teacher noted that "he was not verbally interactive at all and was shy and shut down."[253] Despite being on time for class and diligent with his homework, Cho had practically no communication with teachers or peers.[254] When guidance counselors

245. *See* Smith, *supra* note 244; *see also* VIRGINIA TECH REPORT, *supra* note 1, at 39–40 ("The [high] school that Cho attended played an important part in reducing the possibility of severe regression in his functioning. The school worked closely with Cho's parents and sister. There was coordination between the school and the therapist and the psychiatrist who were treating Cho. These positive influences ended when Cho graduated from high school. His multifaceted support system then disappeared leaving a huge void.").

246. *See* VIRGINIA TECH REPORT, *supra* note 1, at 34.

247. *See id.* at 34–35.

248. *See id.* at 35.

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.* ("[H]e seemed to be in a good mood, looked brighter, and smiled more.").

253. *Id.* at 36.

254. *See id.*

asked Cho whether he had ever received mental health or special education assistance in middle school, he reportedly answered no (untruthfully).[255] After a core evaluation administered by Cho's high school, he was provided with an Individualized Education Plan ("IEP") as mandated by federal law, and provisions were made for special services and accommodations to meet Cho's needs, notably, "modification for oral presentations, as needed, and modified grading scale for oral or group participation."[256] "With this arrangement, Cho's grades were excellent."[257]

When applying to Virginia Tech, Cho was not required to write an essay (it was optional) or to procure letters of recommendation from teachers or counselors for his admissions application.[258] Evaluation was based primarily on grades and SAT scores,[259] so "[w]hat the admissions staff at Virginia Tech did not see were the special accommodations that propped up Cho and his grades," including private sessions with teachers that spared him public speaking.[260] Although the university, either through letters of recommendation, a personal interview, or reports from Cho's secondary institution, could have been made aware of his pre-existing conditions, it never was.[261] In other words, the Virginia Tech admissions application could have lawfully requested more information from its applicants, information that, in Cho's case, might very well have alerted the admissions committee to the fact that special academic accommodations had been made for Cho. Nonetheless, as mentioned above, federal disability law prohibited Virginia Tech from making a "preadmission inquiry" about Cho's disability status. So, because Cho did not request academic adjustment or accommodation, the university had no way of identifying him as a student with a documented disability.[262]

These facts paint an astonishing picture. Cho's mental illness was long-standing and well-documented before arriving at Virginia Tech. His multifaceted support networks in middle and high school, networks that had seemingly succeeded in keeping Cho on a constructive path, were not only kept hidden from university officials, they virtually dissolved upon his arrival on campus. This left a huge

255. *See id.*
256. *See id.*
257. *Id.* at 37.
258. *See id.*
259. *Id.* at 38.
260. *See id.*
261. *See id.*
262. *See Transition of Students with Disabilities*, *supra* note 236.

void in Cho's life as well as in his college record. Virginia Tech had no knowledge of Cho's mental health history—all record of his past practically disappeared.

Whereas some might argue that students should be afforded a fresh start in college, surely, in hindsight, one can understand how information like the kind that Cho's middle and high schools had is "critical to public safety and should not stay behind as a person moves from school to school."[263] Students and schools should be required to submit records of a student's emotional or mental disturbance *after* the student has been admitted to the IHE but *before* enrolling in the institution. This would avoid the type of discrimination that the ADA is designed to prevent while still putting universities on notice as to those students who have special needs. Such disclosure would afford the student and IHE officials the time to meet and discuss a counseling and academic plan, much like the IEP required by federal law in primary and secondary education. Such a plan might, at a minimum, assign a mentor to that student—someone who would make it a priority to follow the mental, emotional, and academic well-being of that student and ensure he does not "fall through the cracks."

This information should not be used to single the student out or restrict him from regular college activities. Rather, it should be used to provide him with more meaningful counseling and support. This proposal recognizes the reality that individuals suffering from mental illness are frequently the least qualified to evaluate their own situation and determine whether they need to ask for "academic adjustment" or some other university service. For example, Cho's high school guidance counselor and others who knew his situation urged him to choose a small college close to home, but he was determined to attend Virginia Tech.[264] Though offered the name of a person to call if he had trouble adjusting, Cho never called.[265]

This proposal also recognizes that traditional, college-aged students arrive on campus in a " 'middle' stage of development, somewhere between adolescence and full adulthood" and need more development opportunities and support than many colleges are currently providing.[266] Prominent author and psychiatrist Willard Gaylin voiced this perspective:

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263. *See* VIRGINIA TECH REPORT, *supra* note 1, at 39.

264. *See id.* at 37.

265. *See id.* at 38.

266. *See* GARY PAVELA, THE POWER OF ASSOCIATION: DEFINING OUR RELATIONSHIP WITH STUDENTS IN THE 21ST CENTURY 2 (1995).

> Our society is creating dependent children well into their twenties, if not their thirties. Yet more and more we're treating them as though they are autonomous adults. We are taking children and throwing them into a particularly cold and detached environment at major universities.... There is, I think, an extraordinary avoidance of the fact that you're dealing with essentially a not-yet fully-mature population. Universities need to come to grips with the fact that, in this autonomous time, paternalism may be unattractive, but necessary.[267]

Colleges and universities are dealing with young people, most of whom have just reached the age of majority, but many of whom still need supervision and even intervention. Many of these traditional-aged students are arriving on campus with more diagnosed mental illnesses than ever before, and a growing number of those who have not been diagnosed with depression or some form of mental illness are reporting increased suicidal ideations.[268] Post-admission, pre-enrollment screening of these students would avoid violating Title II of the ADA[269] because it would not deny education access to anyone with a mental disability. At the same time, that screening would identify those students with diagnosed mental illnesses who have relied upon a variety of different support services and networks to function and thrive in this society. If IHEs are going to be held responsible for the safety and the physical and emotional well-being of their students, they should be given the information they need in order to "help students learn how to adapt to stress—turning failures and frailties into the capacity for self-insight, human connection, creativity, and productive work."[270]

C. *Mandated On-Campus Counseling Conditioned on Forced Withdrawal*

Along with privacy laws that are unclear and poorly communicated, and disability laws that allow important health history to fall through the cracks, the third difficulty facing IHEs is how to

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267. Willard Gaylin, *Mental Illness and Personal Accountability*, 1 SYNTHESIS: L. & POL'Y IN HIGHER EDUC. 52, 53 (1989).

268. *See* Anne McGrath, *Curing Campus Blues*, U.S. NEWS & WORLD REP., Nov. 1, 2004, at 63 (explaining that one of the reasons more students have mental illness and/or suicidal ideations on campus is that students are encountering increased pressures and stress, such as burdensome student loans and seemingly insurmountable societal expectations).

269. Title II of the ADA forbids discrimination against the disabled in several contexts, including higher education; a denial of access to education by the disabled is prohibited. *See* 42 U.S.C. § 12101(a)(3), (b) (2000).

270. PAVELA, *supra* note 42, at 16 (citation omitted).

develop an effective on-campus policy to support those students with mental illness—one that simultaneously saves lives, enriches the students' college experience, and wards off potential litigation for the institution. Colleges find themselves in a Catch 22 with practically any policy choice available to them. The American Council on Education explained the dilemma:

> If administrators are required to prevent suicide when they become aware of a student's problems, some reluctantly will avoid involvement with at-risk students. And some will feel they have no choice but to take the most extreme approaches to at-risk students—trying to have them hospitalized or forcing them to withdraw from the university or notifying their parents—even when the mental-health experts determine these steps are not in the students' best interest.[271]

One of the primary difficulties in choosing an appropriate campus program designed to help students with mental illness is discerning which policies save the most lives but pose the least amount of privacy concerns.

IHEs tend to go with one of three main approaches. The first is a voluntary counseling program. This program requires colleges to wait for students to seek out counseling on their own, either by self-initiative or by suggestion from friends or faculty. Such a policy protects colleges from running the risk of violating FERPA privacy laws, and it also protects colleges from lawsuits alleging a violation of the ADA, which prohibits discrimination on the basis of disability.[272] In the context of mental illness on college campuses, cases alleging a violation of the ADA are often brought in response to a university policy that dismisses a student for a threatened or attempted suicide.[273] Despite the fact that a voluntary counseling policy protects institutions from alleged FERPA and ADA violations, universities still run the risk of a negligence suit if the student ultimately harms himself or others. Moreover, this type of program relies on students to "self-identify" or to follow the suggestion of friends and family but,

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271. *See ACE Submits Amicus Brief in Support of MIT in Case of Student Death*, AM. COUNCIL OF EDUC., Feb. 27, 2006, http://www.acenet.edu/AM/Template.cfm?Section=Search& template=/CM/HTMLDisplay.cfm&ContentID=14632.

272. *See supra* note 269.

273. *See* Julie Rawe & Kathleen Kingsbury, *When Colleges Go on Suicide Watch*, TIME, May 14, 2006, at 62. A successful plaintiff's claim must prove: (1) that he has a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities; and (3) that such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. *See* Darian v. Univ. of Mass., 980 F. Supp. 77, 84 (D. Mass. 1997).

as we saw in Cho's case, even though his high school counselors encouraged him to seek counseling, he never sought help.[274] Mentally-ill students are not always the best judge of when and how they need to seek help.

In contrast to voluntary counseling programs are IHE policies that require students to withdraw from school for threatening or attempting to commit suicide or other criminal acts. These policies arguably have a greater chance of saving lives. But when universities adopt mandatory-leave policies for *any* student who expresses suicidal ideations to commit suicide, they create a number of problems. IHEs not only come across as shockingly insensitive, but they also run the risk that emotionally distressed students will be less willing to come forward and get the professional help they need. Moreover, IHEs risk lawsuits from students who claim under the ADA that they have been unfairly discriminated against for being mentally unstable. For example, in October 2004, Jordan Nott checked himself into a psychiatric ward where, within thirty-six hours, he received a letter from George Washington University informing the sophomore that he had been suspended for being a danger to himself and others and that if he returned to campus, he would be arrested.[275] Nott switched schools and sued the university for compensatory damages.[276] The college ended up settling with him in 2006.[277] Similarly, a female student at Hunter College of the City University of New York reached a $65,000 settlement agreement with the school after she sued it under federal antidiscrimination laws for expelling her from her dorm room when she overdosed on Tylenol.[278]

With forced withdrawal, IHEs also risk violating FERPA if they disclose privileged health and student records to university officials and parents when the decision is made to send the student home.[279] Granted, a student's recourse under FERPA is very limited. In the

274. *See* VIRGINIA TECH REPORT, *supra* note 1, at 38.

275. *Counseling Crisis*, INSIDEHIGHERED.COM, Mar. 13, 2006, http://www.insidehighered.com/news/2006/03/13/counseling.

276. *See id.* (reporting that the twenty-one-year-old Notts alleged that, after seeking help for depression at the campus counseling center, George Washington University "disciplined him, threatened him with criminal prosecution and ultimately ended his college career at the school of his choice").

277. *See* Su, *supra* note 18; Tamar Lewin, *Laws Limit Colleges' Options when a Student is Mentally Ill*, N.Y. TIMES, Apr. 19, 2007, at A1 (reporting that the settlement amount was to remain confidential).

278. *See* David B. Caruso, *Suicidal Students Challenge Dorm Evictions*, CHI. TRIB., Sept. 7, 2006, at 4 (reporting the student's eviction from her dorm because, according to the school, she had violated her housing contract by attempting suicide).

279. *See* Cohen, *supra* note 96, at 3102.

event that a school improperly discloses a student's records, the student has no private right of action under FERPA[280] and must wait for the Department of Education to advance his cause. However, an IHE still runs the risk of losing federal funding for violating FERPA.[281] Moreover, individuals do have a private right of action under the ADA through the incorporation of the Rehabilitation Act of 1973,[282] which authorizes private citizens to bring suits for money damages.[283] The Department of Education in 2005 warned a handful of schools whose policy of forced withdrawal crossed the line, and the Department's Office for Civil Rights began informing schools that a person should be considered a direct threat worthy of dismissal only when there is "a high probability of substantial harm and not just a slightly increased, speculative or remote risk."[284] This means there needs to be a detailed evaluation of the student as well as an opportunity for the student to be heard and to make her case.

An alternative to voluntary counseling and forced withdrawal programs is mandatory evaluation conditioned on forced withdrawal.[285] Under Cohen's proposed program, a mandatory evaluation program would "require a student who makes a suicide threat or attempt, to attend a specified number of counseling sessions."[286] If the student refuses, she would be required to withdraw from the school.[287] Though admittedly imperfect, this option gets closer to striking a healthy balance between privacy (and autonomy) and safety.

Although Cohen's suggestion is meant to apply to suicidal students, the idea should be expanded to include all students who demonstrate disturbing, aberrant, or violent behavior, not just suicidal ideations. Of course, the difficulty with expanding the policy to include students demonstrating disturbing or aberrant behavior is that what constitutes such behavior is highly subjective, and the policy runs the risk of being both overinclusive and underinclusive.

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280. *See* Gonzaga v. Doe, 536 U.S. 273, 290 (2002) (holding that Congress allows the Secretary of Education, and not private citizens, to enforce FERPA's provision).

281. *See id.* at 278 (noting that Congress directed the Secretary of Education to withhold federal funds from any public or private educational institution that fails to comply with FERPA).

282. 29 U.S.C. § 794 (2006).

283. *See* 42 U.S.C. § 12133 (2000).

284. *See* Rawe & Kingsbury, *supra* note 273, at 62–63.

285. *See generally* Cohen, *supra* note 96, at 3120 (proposing and discussing a mandatory evaluation program).

286. *See id.* at 3120.

287. *Id.*

Mandatory evaluation conditioned on forced withdrawal can be overinclusive because what one individual might identify as disturbing or aberrant might not qualify as such to another individual. One way to guard against overinclusiveness, Cohen suggests, is the incorporation of an appeals process.[288] That way, if a suicide threat or disturbing behavior was taken out of context or misconstrued, the student could make her case and potentially avoid an unnecessary evaluation. Another check on overinclusiveness is clearly defining what sort of behavior qualifies a student for the counseling program.

There is much to be learned from colleges that have attempted to implement such programs and to define behavioral thresholds that would trigger an assessment. Many schools are trying to emulate the mandatory assessment program developed at the University of Illinois at Urbana-Champaign.[289] In the 1980s, Paul Joffe, Director of the Suicide Prevention Program at the university, instituted a "mandated assessment" program that required students with suicidal ideations to either attend four sessions of professional assessment or withdraw from school.[290] The program strived for structured and consistent application of its behavioral threshold, that is, the point at which someone was deemed to have demonstrated suicidal behavior.[291] University administrators, faculty, and staff were trained to identify the actions that required the filing of a suicide incident report, thereby triggering the mandated assessment program.[292] Actions included "preparation of means (e.g., purchasing pills), practicing of means (e.g., holding a knife over one's wrist), public statements, and attempts."[293] Over 1,800 students have completed the program—none have committed suicide, and only one was forced to leave.[294]

A program like Joffe's could be established and expanded to support students who not only express or demonstrate suicidal tendencies but disturbing and/or aberrant behavior as well. Like the University of Illinois program, the proposed program would need a

288. *See id.* at 3125; *see also* Joffe, *supra* note 23, at 92. The University of Illinois, for instance, provided an appeals process which allowed students to challenge the accuracy of their suicide incident reports and the necessity of an evaluation. *Id.*

289. *See id.* at 3123.

290. *Id.* at 3120.

291. *Id.* at 3122.

292. *Id.*

293. *Id.* at 3122; *see also* Joffe, *supra* note 23, at 91 (noting that, for example, the same report and resulting "mandate applies to a student taking three Tylenol (with the intent of dying), a student taking 100 Tylenol, or the student who buys 100 Tylenol for the purposes of killing himself or herself" but did not actually take them).

294. *See* Rawe & Kingsbury, *supra* note 273, at 63.

similar enumeration of actions that would qualify as disturbing or aberrant, such as violent or bizarre writing and erratic or "antisocial" behavior. The challenge in establishing such a system will be separating the wheat from the chaff, that is, the "loners" from those who actually pose a potentially real threat to themselves or others.[295] The IHE can minimize overinclusiveness by relying on mental health professionals (usually psychologists or psychiatrists) to separate the students who are truly a threat from those who are not.

Joffe's mandated assessment program discovered that students usually resisted participation in the program and asserted that they had the right to decide whether they live or die, without interference from the university.[296] In response, a member of the assessment team would shift the focus of the conversation to the student's university attendance, reminding the student that attendance was a privilege, not an inalienable right, conditioned upon the student meeting certain standards of conduct.[297] These standards of conduct required a student not only to maintain a certain grade point average but also to restrain from violence, to respect the rights of others, and to "adhere to a standard of self-welfare or self-care."[298] The team explained that a recent suicide threat or attempt was evidence of a breach of that standard of self-welfare or self-care.[299] Perhaps a threatening comment to a fellow student, a violent writing assignment submitted to an English professor, or withdrawn or antisocial behavior would be evidence of a breach of the standard of non-violence and respecting others' rights. This sort of behavior would simply need to be defined in the university's student code of conduct.

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295. *See* Brett A. Sokolow, *How Not to Respond to Virginia Tech—II*, INSIDEHIGHERED.COM, May 1, 2007, http://www.insidehighered.com/views/2007/05/01/sokolow.

> Many students are loners, isolated, withdrawn, pierced, tattooed, dyed, Wiccan, skate rats, fantasy gamers or otherwise outside the "mainstream." This variety enlivens the richness of college campuses, and offers layers of culture that quilt the fabric of diverse communities. Their preferences and differences cannot and should not be cause for fearing them or suspecting them. But, when any member of the community starts a downward spiral along the continuum of violence, begins to lose contact with reality, goes off their medication regimen, threatens, disrupts, or otherwise gains our attention with unhealthy or dangerous patterns, we can't be bystanders any longer. Our willingness to intervene can make all the difference.

Id.

296. *See* Joffe, *supra* note 23, at 92.

297. *Id.*

298. *See id.*

299. *See id.*

In addition to being overinclusive, the mandatory evaluation policy is also underinclusive because some individuals demonstrate outward signs of general well-being and "normalcy" while experiencing disturbed, depressed, suicidal, or homicidal ideations. Such was the case with Sanjay Jain, a freshman at the University of Iowa who attempted suicide in his dorm room.[300] In spite of his deep depression, Jain's "frequent phone conversations with his parents were reportedly upbeat. [Jain], in his father's words, described everything about college as 'awesome.' "[301] Some individuals suffering from mental illness are able to conceal it well, even from those who love and know them best. Although Jain's parents were not alerted to his suicide attempt,[302]—an issue that is also of concern but outside the scope of this Comment—what is important to realize is that the university *was* made aware of this attempt, and, under a mandatory assessment program, Jain would have been required to attend the sessions or else withdraw from school.

Despite the obvious disadvantages of over and underinclusiveness, mandatory evaluation conditioned on forced withdrawal is the policy which gets closest to any policy of identifying at-risk students and protecting the campus community while still preserving students' privacy rights. The program places a premium on trying to keep the student enrolled—working with a team of professionals instead of mandating a medical leave or suspension. Rather than notify parents of a child's suicidal or aberrant behavior and run the risk of violating FERPA, the University of Illinois urges "colleges and universities to adopt their own rigorous internal standard of administrative response."[303] This also becomes a situation where clarifying and expanding the definition of a FERPA health and safety emergency would protect a college. Where a college using the mandatory assessment policy forces the withdrawal of a student either because it deems the student an extreme risk to himself or others or because the student fails to comply with the minimum number of assessment sessions, the FERPA emergency exception would protect the college. Another benefit to mandatory assessment conditioned on withdrawal is that a plaintiff would have more difficulty bringing a negligence claim against the university.

There is really no policy which could ensure that every single student suffering from undiagnosed mental illness is identified,

300. Jain v. Iowa, 617 N.W. 2d 293, 294 (Iowa 2000) (en banc).
301. *Id.* at 295.
302. *Id.* at 294–95.
303. *See* Joffe, *supra* note 23, at 99.

assessed, treated and/or expelled. Nor would we want to develop a policy which instilled a sort of "academic solitary confinement" whereby students were encouraged to keep to themselves and be hyper-cautious regarding everyone around them.

> [S]uch over-protectionism would utterly destroy our universities, which expect almost as much education to come from informal discourse among students as from lectures and papers. Only by conceding that colleges and universities cannot protect every student every minute of the day, and that some kinds of violence are simply unforeseeable, can universities continue to provide the education they were established to offer.[304]

Notwithstanding, mandatory evaluation conditioned on forced withdrawal boasts of consistency, inclusiveness, and privacy protection—qualities that other alternatives do not provide.

CONCLUSION

In the wake of the Virginia Tech tragedy, lawmakers and university administrators are struggling to strike a balance between security, liberty, and privacy for student populations on campus. With the death of *in loco parentis*, IHEs have lost much of their ability to regulate student behavior while yet, ironically, their exposure to liability has increased. Developments in recent case law suggest that courts might be more willing than in the past to find a special relationship between the student and IHE and, with it, a duty for IHEs to prevent harm to its students. As it stands, universities are unclear as to when they might be held liable and what sorts of precautions might fulfill their duty of care. IHEs risk costly litigation by developing supportive mental-health policies, but they risk students' lives if they do not develop such policies. Assuming universities do owe a duty of care to their students and failure to fulfill that duty will result in monetary damages or the loss of federal funding, IHEs must be afforded the tools to simultaneously protect their students from harm and themselves from liability.

This Comment suggests ways that law and policy should be changed to help IHEs minimize their exposure to liability and more effectively deal with the complex societal problem of mental illness and related violence on campus. Currently, federal privacy laws such as FERPA are complicated and frequently misunderstood. Once the

304. *See* PHILIP BURLING, CRIME ON CAMPUS: ANALYZING AND MANAGING THE INCREASING RISK OF INSTITUTIONAL LIABILITY 18 (1991).

student has enrolled at an IHE and the school is confronted with the possibility that the student may be at risk for suicide or serious harm to others, the IHE must artfully balance the desire to include other parties, such as parents or an entity outside of the institution, with the student's privacy interests. While designed to place an absolute premium on the privacy of students and the ethical obligations of professionals, FERPA *does* provide exceptions to the general rule of nondisclosure, particularly the health and safety emergency exception. Investigatory reports published in the wake of the Virginia Tech tragedy discovered widespread confusion in regard to these FERPA exceptions and a general misperception that nondisclosure is the safest route. In response, the Department of Education has proposed regulations that would provide a new standard for the FERPA health and emergency exception and a safe harbor for those who make a good faith disclosure of FERPA-protected information. Congress should adopt these proposed regulations, thereby encouraging the type of information exchange so regretfully missing in the Virginia Tech tragedy.

Moreover, federal disability law has created a sort of "no man's land" for students with diagnosed mental illness who, like Cho, are provided personal, individualized adjustments and academic plans through high school but are left to voluntarily self-identify once they go off to college. IHEs are left to fill in the gaps where they can and provide "reactive" care to the student instead of proactive, specialized attention like the student was previously accustomed to receiving. Some might argue that students reaching majority age should be afforded a "clean slate" and that their rights of privacy and autonomy preclude such pre-enrollment inquiries. However, while "[p]rotecting the privacy of people seeking mental health services is an important societal goal . . . . [i]ndividual privacy must consistently be balanced with community needs,"[305] such as the safety concerns of other students on campus.

More important than any legal or policy proposal is the attitude and philosophy with which IHEs approach their students. Gary Pavela, a noted educational scholar, warns against approaching student suicide and, for the purposes of this paper, student mental illness, from a risk-management perspective instead of an educator's perspective.[306] "As educators, we have to take some risks. That means working harder to keep students . . . enrolled, working with

305. *See* Hodge, *supra* note 232, at S45.

306. Eric Hoover, *Giving Them the Help They Need*, CHRON. OF HIGHER EDUC., May 19, 2006, at A39) (recording an interview with Gary Pavela).

them, giving them the help they need, and not finding faster and more creative ways to remove them."[307] Moreover, Pavela encourages IHEs to err on the side of overreaction when students exhibit troubling behavior—not by sending them home, but rather, by getting them help.[308]

> We, as college administrators, have erred on the side of underreaction, in terms of notifying parents, in terms of hospitalization, in terms of therapeutic resources. . . . What the cases would point to is that you must react promptly and appropriately to a student who is manifesting signs of imminent risk of suicide.[309]

Parents and fellow students must also play a role in reacting appropriately to troubled students. Parents must educate themselves about school policies (e.g., whether their child's IHE has a FERPA waiver) and help direct their children to make wise decisions and to choose a school whose size, culture, environment, and resources best match that child's needs. Fellow students must reflect upon what friendship means—friends do not stay quiet when their friends seem troubled, and they do not let them handle their problems alone.

It may very well be impossible to ensure that a tragedy like the one suffered on Virginia Tech's campus will not be repeated, but the proposals in this Comment attempt to avoid similar tragedies by affording IHEs the tools they need to focus on student well-being and continued enrollment while simultaneously limiting their exposure to liability.

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307. *Id.*
308. *Id.*
309. *Id.* at 40.

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