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The Mental Health Security for America's Families in Education Act: Helping Colleges and Universities Balance Students' Privacy and Personal Safety

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I. INTRODUCTION

On February 11, 2002, Charles Mahoney, a student in his junior year at Allegheny College, took his own life by hanging himself at his fraternity house.[1] Mahoney, a successful athlete, above average student, and aspiring attorney, had struggled with depression since his arrival at Allegheny College in 1999 and had regularly attended counseling sessions with college staff.[2] Despite Mahoney's deteriorating mental condition just prior to his suicide, his parents were never notified of their son's struggles because of college confidentiality procedures and federal privacy laws.[3] A year following his death, Mahoney's parents filed a lawsuit against Al-

1. Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).
2. *Mahoney*, No. AD 892-2003 at 1.
3. *Id.*

legheny College and various staff members, alleging that they were liable for the death of their son.[4]

Mahoney's story is not an insolated incident: rather it is the latest in a tragic trend of college student suicides and lawsuits alleging the schools' liability for failing to prevent them. According to recent statistics, 1,100 college students commit suicide each year, resulting in a loss of approximately three students per day.[5] Suicide now ranks as the second leading cause of death among American college students.[6]

The rise in student suicides has resulted in a dramatic increase in wrongful death lawsuits directed at colleges and universities alleging liability for failing to prevent a student's suicide.[7] Universities are now concerned about potential liability when students appear suicidal. Unfortunately, universities have only confusing case law and complicated statutes to serve as guidance in this area of liability.

It was the tragic death of Charles Mahoney and deaths at Virginia Tech in April of 2007 that inspired Pennsylvania Congressman Tim Murphy to introduce the Mental Health Security for America's Families in Education Act (SAFE) in May of 2007.[8] Murphy hopes that this legislation, currently being reviewed by the House Subcommittee on Higher Education, Lifelong Learning and Competitiveness, will give guidance in a confusing legal area, encourage colleges to release information to parents when students present a risk of suicide, and ultimately save lives.[9]

After introducing the history of college and university liability for student suicide, this comment will explore the complex and seemingly option-less situation colleges and universities currently face in dealing with suicidal students while still avoiding liability. Finally, this comment will analyze Tim's Murphy's proposed legislation and determine whether it should be adopted as the remedy

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4. *Id.*

5. *See* THE JED FOUNDATION, SUICIDE AND AMERICA'S YOUTH, *available at* http://www.jedfoundation.org/articles/SuicideStatistics.pdf.

6. *Id.*

7. Heather E. Moore, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 424 (2007). "Five years ago college lawyers discussed among themselves perhaps one or two pending suicide cases at any given moment. Today the cases total about 10 nationwide, with the prospect that many more suicides could, over time, move into the courts." *Id.* at 424-25.

8. Tim Murphy is a Republican representative from Allegheny County, Pennsylvania. Murphy is the only child psychologist in Congress and serves as Co-Chair of the Congressional Mental Health Caucus. *Biography*, http://murphy.house.gov/Biography/.

9. *See* Elizabeth Bernstein, *Colleges' Culture of Privacy Often Overshadow Safety*, WALL ST. J., April 27, 2007.

to the current legal dilemma surrounding how schools deal with suicidal students.

II. SUICIDE LIABILITY LAW

A. *Suicide Liability Generally*

Imposing liability on a third party for an individual's suicide is a relatively modern concept.[10] Tort law has traditionally refused to impose liability on individuals or institutions for failing to prevent suicide or self-inflicted injury.[11] Courts usually deny liability because at the causation stage it is found that suicide is an intervening proximate cause that precludes liability of a third party.[12] Other policy reasons for denying third-party liability in suicide cases include: (1) the suicide victim was a wrongdoer entitled to no relief; (2) suicide is extremely difficult to prevent; (3) preventing suicide requires an affirmative duty which the common law traditionally limits; and (4) foreseeing suicide requires special knowledge and training.[13]

Despite the general principle that a third party will not be liable when another inflicts self-harm, two significant exceptions to the rule have developed in recent years.[14] A third party can be held liable for another's suicide if it is found that the he or she caused the suicide, or that the third party had a duty to prevent the suicide from happening.[15] The first exception, actual causation, occurs when physical abuse or torture prompts the decedent to commit suicide.[16] The second, and more common exception, occurs when the third party has a special relationship with an individual, creating a duty to prevent suicide.[17] The second exception typically involves custodial situations, such as hospitals and jails, where one party has the full responsibility for the care of an-

10. Moore, *supra* note 7, at 427.

11. Valerie Kravets Cohen, *Keeping Students Alive: Mandating On-Campus Counseling Saves College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081, 3086 (2007).

12. *Id.* The individual who commits suicide is thought to be the sole proximate cause: therefore, other entities should not be held responsible. Nancy Tribbensee, *The Emerging Crises of College Student Suicide: Law and Policy Responses To Serious Forms Of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 126 (2002).

13. John S. Gearan, *When Is It Ok To Tattle: The Need To Amend the Family Education Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1029 (2006).

14. *Id.*

15. Moore, *supra* note 7, at 427.

16. *Id.* at 427-28.

17. *Id.* at 428.

other.[18] In analyzing these two exceptions, the court usually finds the suicide to be reasonably foreseeable. Thus, the suicide is no longer an intervening act that breaks the chain of liability.[19]

B. Universities and Suicide Liability

Consistent with the above-stated principles, student suicide cases in the college and university context have traditionally held that a school and its administrators are not liable for failure to prevent a student's suicide.[20] If a college or university were to be found liable for a student's suicide, it would be because the court found the formation of a special relationship between the school and the student, giving rise to a duty to prevent that student's suicide. Traditionally, courts have narrowly applied the concept of special relationship to colleges and universities.[21]

An example of this traditional approach is found in *Jain v. Iowa*,[22] a 2000 case decided by the Supreme Court of Iowa. The *Jain* court held that the University of Iowa had no duty to notify the parents or prevent the suicide of freshman student Sanjay Jain, and dismissed the case.[23] Jain's mental problems began during his first semester of school when, after a fight with a girlfriend, he attempted suicide for the first time.[24] Jain did not consent to having his parents notified about the incident, and they were not informed about their son's suicide attempt.[25] After Jain eventually took his own life in his dorm room, his parents filed a wrongful death action against the university alleging that their son's death was the result of the school's negligence.[26] The court found that the school had offered the student help and encouragement and ultimately managed the situation appropriately.[27] Finding no special relationship between Jain and the school, the

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18. *Id.*
19. *Id.*
20. Cohen, *supra* note 11, at 3089. In *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960), the first college suicide case, the court found no liability because of lack of foreseeability that the student would commit suicide. *Bogust*, 102 N.W.2d at 232. This case served as strong precedent for colleges defending suicide liability cases. Cohen, *supra* note 11, at 3090. *See also* White v. Univ. of Wyo., 954 P.2d 983 (Wyo. 1998).
21. Moore, *supra* note 7, at 428.
22. 617 N.W.2d 293 (Iowa 2000).
23. *Jain*, 617 N.W.2d at 300.
24. *Id.* at 295.
25. *Id.* at 295-96.
26. *Id.* at 296.
27. *Id.* at 299.

court determined that the university had no duty to prevent his death.[28]

The rationale of *Jain* was also applied in the 2005 decision *Mahoney v. Allegheny College.*[29] On a motion for summary judgment, the judge concluded that two Allegheny College deans had no duty to prevent Mahoney's suicide.[30] The court, relying on *Jain*, held that there was no special relationship or reasonably foreseeable events that would justify creating a duty to prevent Mahoney's suicide or to notify his parents of the possible danger.[31] Mahoney, while expressing depressed thoughts, had not engaged in or threatened any specific acts of self-harm prior to his suicide.[32] While the suit against the Allegheny College deans was dismissed, the case against the college itself and Mahoney's specific counselor continued to trial.[33] In August of 2006, a jury decided that the college and the counselor were also not liable for Mahoney's death.[34]

While these cases demonstrate that the traditional "no-duty" argument is still a viable defense for colleges and universities in student suicide cases, other recent decisions appear to change the legal landscape and turn the tide toward college and university liability in student suicide suits. A number of decisions have imposed a duty upon colleges and universities to prevent a student's suicide, or at least notify parents under certain circumstances. Courts have found a special relationship, and consequently, imposed a duty, when the particular facts of a case made the student's suicide foreseeable. Institutions of higher education must now be mindful of the situations that create these special relationships, including when a student is placed in the custody of campus police, is admitted into a university hospital or care facility, or is under the care of a trained mental health professional.[35]

In *Schieszler v. Ferrum College,*[36] for example, a U.S. district court in Virginia denied a motion to dismiss a wrongful death suit brought against the college as a result of the suicide of Michael Frentzel, a freshman at Ferrum College. The court found that the

28. *Jain*, 617 N.W.2d at 300.
29. No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).
30. *Mahoney*, No. AD 892-2003 at 25.
31. *Id.* at 22.
32. *Id.*
33. Cohen, *supra* note 11, at 3094-95.
34. *Id.*
35. Tribbensee, *supra* note 12, at 135.
36. 236 F. Supp. 2d 602 (W.D. Va. 2002).

college and one of its deans did have a duty to prevent Frentzel's suicide because of the formation of a special relationship when the school intervened in Frentzel's first suicide attempt.[37] The special relationship was also established because of the foreseeability that Frentzel would harm himself.[38] Prior to his suicide, Frentzel had been found by campus officials with self-inflicted bruises on his head.[39] Despite the risk of self-injury, college officials proceeded to leave him alone in his dorm room.[40] Because the college had notice of the imminent probability of harm, the court found a special relationship between the parties and determined the school did have a duty to prevent Frentzel's suicide.[41] The case eventually settled out of court for an undisclosed amount with the college admitting some responsibility for Frentzel's death.[42]

A similar analysis was applied in the highly publicized case of *Shin v. Massachusetts Institute of Technology*.[43] While the Massachusetts Superior Court cleared the school of wrongdoing, it denied summary judgment to the individual MIT professionals who treated the suicidal Elizabeth Shin.[44] The court found that a special relationship existed between the professionals and Shin, giving rise to a duty to prevent her suicide.[45] In this case, like *Schieszler*, the defendants were well aware of the risk and could foresee that Shin would attempt suicide.[46] Prior to ending her life by setting herself on fire in her MIT dormitory, Shin had displayed suicidal behavior, had attempted to hurt herself, and had been hospitalized for mental problems.[47] Because it was foreseeable that Shin would again attempt suicide, the court decided that the school had a duty and could be held liable for failing to prevent her suicide.[48] The case was eventually settled out of court.

Instead of an outright duty to prevent a student's suicide, at least one court has imposed a lesser duty on educational institutions to notify parents or guardians when a student expresses sui-

37. *Schieszler*, 236 F. Supp. 2d at 609.
38. *Id.*
39. *Id.* at 604.
40. *Id.* at 609.
41. *Id.*
42. Cohen, *supra* note 11, at 3097. This demonstrates the recent trend for colleges to settle suicide cases before trial. *Id.* at 3100.
43. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).
44. *Shin*, 2005 WL 1869101, at *13.
45. *Id.*
46. *Id.*
47. *Id.* at *5.
48. *Id.* at *13.

cidal intentions. In *Eisel v. Board of Education of Montgomery County*,[49] the Maryland Court of Special Appeals explained this duty of notification in the context of a minor child.[50] In *Eisel*, a thirteen year old student took her own life one week after telling friends and school counselors about her plan to commit suicide.[51] Since the student later denied making the threat, the school counselors never contacted her parents.[52] In the lawsuit that followed, the court held that the school had breached its duty to notify, stating that "when the risk of death to a child is balanced against the burden sought to be imposed on the counselors, the scales tip overwhelmingly in favor of duty."[53] It has yet to be seen whether courts will apply a similar duty to notify on colleges and universities.

As is illustrated in the preceding cases, it remains unclear whether there is a duty on the part of colleges and universities to prevent a student's suicide, or at least notify parents of the risk. With case law providing such little guidance, institutions of higher education remain unsure about the policies that should be used in order to assist a suicidal student and also avoid liability.

III. PICK YOUR LAWSUIT: THE PRECARIOUS POSITION IN WHICH THE CURRENT LAW PLACES SCHOOLS IN DEALING WITH SUICIDAL STUDENTS

A. The Family Educational Rights and Privacy Act of 1974

In considering how to help suicidal students and avoid litigation, colleges and universities must pay special attention to the Family Educational Rights and Privacy Act of 1974 (FERPA).[54] FERPA is a federal law that protects the privacy of student educational records. The law protects students' privacy by making federal funding contingent upon colleges and universities keeping student files confidential.[55] According to FERPA, a student's records may not be released to anyone, including a parent or guard-

49. 597 A.2d 447 (Md. Ct. Spec. App. 1990).
50. *Eisel*, 597 A.2d at 447.
51. *Id.* at 449.
52. *Id.* at 449-50.
53. *Id.* at 455.
54. 20 U.S.C. § 1232(g) (2000).
55. *Id.* § 1232g(b)(1) (prohibiting the funding of "any educational agency or institution which has a policy or practice of permitting the release of educational records"). *Id.*

ian, without the student's consent.[56] Included among these protected educational records is documentation of counseling.[57]

FERPA does, however, provide an exception allowing for disclosure of student records to parents or other appropriate persons in the event of a health or safety emergency.[58] What constitutes an actual emergency implicating FERPA's exception is an extremely ambiguous concept. Currently it is left to the discretion of the college or university to determine whether a situation constitutes an emergency that would permit disclosure.[59] Complicating the matter further is a regulation accompanying the statute that requires a strict construction of the exception.[60]

Because of the ambiguous definition and fear of losing valuable federal funding, most colleges and universities err on the side of non-disclosure, even if the circumstances may actually fall within the FERPA emergency exception.[61] Consequently, FERPA often inhibits communication among suicidal students, their school, and their parents. The legislation is often cited when college and universities are criticized for not notifying parents prior to a student's suicide.[62]

B. The Americans with Disabilities Act

Fearing litigation and FERPA violations, many colleges and universities have instituted policies requiring students to leave school at the first sign of a mental problem. This dismissal approach has also put schools at risk for litigation.

Dismissing students at the first sign of mental illness implicates the Americans with Disabilities Act (ADA),[63] which prohibits discrimination against disabled individuals.[64] A number of students who have been forced to leave school after displaying suicidal tendencies have brought ADA claims against their institution. At

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56. *Id.* § 1232g(d).

57. *Id.* § 1232g(a)(4)(A).

58. *Id.* § 1232g(b)(1)(I). It is important to note that this exception allows, but does not require, disclosure. *Id.*

59. Gearan, *supra* note 13, at 1024-25.

60. 34 C.F.R. § 99.36(c) (1994).

61. Gearan, *supra* note 13, at 1025.

62. In the *Mahoney* case, for example, Mahoney's parents argued that Allegheny College should have notified them of their son's condition, but their son did not consent to this disclosure and therefore notifying them would have violated his privacy rights under FERPA. Cohen, *supra* note 11, at 3014.

63. 42 U.S.C. § 12101-12213 (2000).

64. *Id.* § 12132.

least one of these cases has been successfully settled outside of court.[65]

C. *Pick Your Lawsuit*

As reflected from the above analysis of case law and legislation, there are few options open to colleges or universities dealing with a potentially suicidal student. Schools are in a difficult position, forced to choose between liabilities. If a school violates a student's confidentiality, it will violate FERPA and possibly lose federal funds.[66] If a school dismisses a suicidal student to avoid a potential wrongful death suit, the school subjects itself to possible ADA litigation.[67] Alternatively, the school could choose to do nothing and possibly be found liable for failing to prevent a student's suicide.[68]

Currently, colleges and universities are forced to pick their lawsuit and proceed. America's institutions of higher learning have a crisis on their hands and no way to remedy it without facing liability. The result is that schools are more concerned over potential litigation rather than the safety, well being, and survival of their student body.

IV. THE MENTAL HEALTH SECURITY FOR AMERICA'S FAMILIES IN EDUCATION ACT: THE REMEDY

It is clear that something must be done so that colleges and universities can avoid liability and help suicidal students. Congress must adopt the Mental Health Security for America's Families in Education Act (SAFE) proposed by Congressman Tim Murphy in May of 2007. Murphy, who was inspired by the tragic story of Charles Mahoney at Allegheny College and moved to action by the recent massacre at Virginia Tech,[69] proposed this legislation hoping that it would help to avoid similar tragedies in the future.

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65. Cohen, *supra* note 11, at 3115. A student at Hunter College sued the school on an ADA claim after she was evicted from her dorm for attempting suicide. *Id.* The suit settled out of court for $65,000, and the eviction policy was abandoned. *Id.* A similar suit was settled by George Washington University as well. *Id.* at 3116.

66. *See* 20 U.S.C. § 1232(g) (2000).

67. *See* 42 U.S.C. § 12132 (2000).

68. *See Schieszler*, 236 F. Supp. 2d 602; *Shin*, No. 020403, 2005 WL 1869101.

69. In April of 2007, Virginia Tech student Cho Seung-Hui killed himself after taking the lives of thirty-two fellow students and faculty. Christine Hauser and Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, April 16, 2007, *available at* http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?_r=1&oref=slogin.

A. The Statute

SAFE, which has twenty cosponsors and bipartisan support, would amend FERPA to allow an institution of higher learning to disclose certain information to parents of students who may pose a significant risk to their own safety or well-being, or the safety or well-being of others.[70] More specifically, SAFE allows disclosure if a student poses a "significant risk of harm to himself or herself, or to others, including a significant risk of suicide, homicide or assault."[71] Prior to this disclosure, the legislation requires that the student consult with a mental health professional who must provide written certification that the student poses a significant risk of harm.[72] If this procedure is followed, SAFE provides that the educational institution will not be liable to any person for the disclosure.[73]

Murphy, and those who support his legislation, believe that FERPA has inadvertently created a communication barrier, causing delays in informing families when students pose a serious risk to themselves or others.[74] Rather than hinder this flow of information, Murphy hopes SAFE can work to facilitate communication and ultimately aid in the treatment of mentally ill students. According to Congressman Murphy, who is also a child psychologist, parents are oftentimes in the best position to help their children by offering emotional support, providing medical history, and ensuring that long-term care continues beyond school years.[75] Murphy wants to be sure federal law does not get in the way of this help. By requiring consultation and written certification by a mental health professional prior to disclosure, SAFE no longer forces college administrators to make the difficult determination of whether a student is at risk. Rather, such a determination is now in the hands of those educated and trained to recognize at-risk individuals.

By absolving schools of liability for disclosures made according to SAFE procedures, Murphy has given schools an option for deal-

70. H.R. 2220, 110th Cong. (2007).

71. *Id.* § 3(1).

72. *Id.* § (2).

73. *Id.* The rise in student suicides has resulted in a dramatic increase in wrongful death lawsuits directed at colleges and universities alleging liability for failing to prevent a student's suicide. *Id.* § 4.

74. *Id.*

75. *Murphy Unveils Legislation Encouraging Parental Involvement with Students at Risk of Mental Illness*, April 25, 2007, http://murphy.house.gov/News/DocumentSingle.aspx?DocumentID=63677.

ing with and assisting suicidal students, something schools currently do not have. Murphy recognized that most schools are hesitant to notify parents because of fear of litigation, and he hopes that SAFE will allow schools to "make a decision based on what's best for the student, not what their lawyers said."[76]

B. Criticism

Like all proposed legislation, SAFE has not avoided criticism. Some critics claim that the amendment is unnecessary since FERPA already includes a health and safety emergency exception.[77] But, as mentioned above, FERPA's exception is ambiguous and often underutilized. Others argue that breaching a student's confidentiality will scare other troubled students from seeking help altogether, stifling the school's attempts to reach suicidal students.[78] Some critics claim that family issues may be the cause of a student's suicidal problems, and contacting parents could just complicate, rather than cure.[79] Finally, institutions of higher education pride themselves on treating their students as adults, giving them the freedom and opportunity to grow. Some believe the implementation of SAFE would hinder this development and negatively change the atmosphere at colleges and universities.

C. Suggested Modifications to Improve SAFE

Despite these criticisms, SAFE should be supported as the first step to reaching a remedy to the college student suicide problem. While the legislation should be adopted, certain changes could be considered that may make SAFE even more effective in reaching its goals.

While SAFE allows colleges and universities to disclose information to parents of "at risk" students without liability, the statute only *permits* disclosure and does not *require* it. Since SAFE is only permissive, the legislation creates no real incentive for schools to notify parents.[80] Congress should consider imposing an affirmative duty on schools to notify parents when a student poses

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76. Dustin Pangonis, *New Bill May Help 'At Risk' Students*, THE DAILY COLLEGIAN, July 13, 2007, http://www.collegian.psu.edu/archive/2007/07/13/new_bill_may_help_at_risk_stud.aspx.

77. Michele Herrmann, *Right to Privacy Versus The Right To Know*, U. BUS., June 2007, http://www2.universitybusiness.com/viewarticle.aspx?articleid=805&p=2.

78. Bernstein, *supra* note 9.

79. *Id.*

80. Gearan, *supra* note 13, at 1042.

a significant risk of harm. Without the imposition of such a statutory obligation to notify, educational institutions are likely to continue their trend of nondisclosure or student dismissal when students appear mentally troubled.[81]

Another issue that Congress should consider in passing SAFE is requiring schools to instate a program to manage student's mental health. Allowing disclosure is important, but without a management program, schools will never discover the "at risk" students considered within the amendment.[82] SAFE should couple its obligation to notify with a requirement that schools establish campus programs to deal with mental health issues, thus preventing the schools from claiming ignorance when students pose significant risks.[83]

Finally, much of the criticism of FERPA stems from the ambiguous definition of "emergency" used in its disclosure exception. Congress should be sure that the "significant risk" exception embodied in SAFE is well defined so school administrators and mental health professionals will not question whether a student is covered by this term. By clearly defining what constitutes a "significant risk," colleges and universities will not fear violating SAFE and will be more willing to disclose information to parents. With a precise definition of "significant risk" Congress can avoid the ambiguity and guesswork that has plagued FERPA and ensure that SAFE is fully utilized.

While SAFE is a step in the right direction, it is only the first step in remedying this dilemma. Suicide on college campuses requires action from not only legislators and lawyers, but also psychologists, college administrators, students, and parents so as to reach a comprehensive and effective solution.

V. CONCLUSION

Following the suicidal massacre at Virginia Tech last spring, more people are beginning to question whether our desire to protect student privacy has gone too far, trumping student safety in the meantime. While there must be a careful balance between safety and privacy, if SAFE is adopted it will help to positively tip the scales in favor of safety for all students. While it is too late to help Charles Mahoney, his memory can be used as an inspiration

81. *Id.* at 1046.
82. *Id.* at 1044.
83. *Id.* at 1045-46.

to do everything possible to prevent tragedies like his from happening in the future. No longer are lawmakers asking what could have been done to prevent these tragedies after they have occurred. Led by Tim Murphy, Congress is now taking proactive steps to create a remedy in the legal realm that will allow colleges and universities to focus solely on what matters most—saving student lives.

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