

LIABILITY FOR COLLEGE-STUDENT WELFARE:
A LEGAL-HISTORICAL ANALYSIS AND INSTITUTIONAL POLICY STUDY

by

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(Under the Direction of J. Douglas Toma)

ABSTRACT

Universities increasingly are being held responsible for ensuring student safety. Though courts currently recognize that a “duty of care” does exist in certain situations, the notion that this has signaled a return to *in loco parentis* (“in place of the parent”)—and that universities should shy away from attempting to control student behavior as a means to avoid liability— is unfounded. As there appears to be a disconnect among court decisions, legal scholarship, and university policies—and as *in loco parentis* is a term often misused in the literature of education law—I will present supporting case law and legal commentary that *in loco parentis* is not reemerging as a liability threat. Further, I explore whether a fear of liability has handcuffed universities in enacting policies that soundly respond to the problems facing college students today, namely alcohol abuse and mental illness.

I conducted a legal-historical analysis of institutional liability, tracing court decisions from the fall of *in loco parentis* and the “bystander” era to the current era of a reasonable duty of care. As alcohol and mental health-related litigation has become particularly troublesome to universities, I focus on those two areas of institutional liability

while also exploring the corollary issues of privacy laws, information sharing, and disability law (particularly as it relates to students with mental illness). Further, I present three case studies that examine how the law is being interpreted on college campuses today as well as the new role student affairs practitioners and other university administrators have assumed in formulating policies that attempt to mitigate student welfare-related liability.

Based on the legal-historical analysis and qualitative case studies, I found that courts today are more likely to rule against institutions that fail to act upon widely known problems, such as alcohol abuse and mental illness. University administrators can best mitigate liability for student welfare by expanding their knowledge of current case law and relevant student development theory, implementing effective information sharing networks, maximizing personnel resources, improving student services, reevaluating policies in light of current law, and, most of all, practicing sound professional judgment when dealing with students in crisis.

INDEX WORDS: Colleges and universities, Liability, Alcohol, Mental health, Parental notification, Legal issues, Students, Education, University policy, FERPA

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CHAPTER 1

INTRODUCTION

Universities increasingly are being held responsible for ensuring student safety.¹ Though courts currently recognize that a “duty of care” does exist in certain situations, the notion that this has signaled a return to *in loco parentis*² (“in place of the parent”)—and that universities should shy away from attempting to control student behavior as a means to avoid liability— is unfounded. Enacting disciplinary regulations has not been equated to assuming a duty of care.³ Administrators should not fear that, by becoming too involved in the lives of students, a reemergence of *in loco parentis* will heighten exposure to liability.

In loco parentis has never been a theory by which courts have held universities liable for student behavior. Actually, *in loco parentis* served as immunity from liability, as courts in the early 1900s deferred to universities to decide what was best in caring for students.⁴ Courts have not always opined, however, that universities should take an

¹ See generally ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (Carolina Academic Press 1999).

² The term *in loco parentis* generally is credited to Sir William Blackstone, describing the schoolmaster-pupil relationship in which a father delegates authority to the tutor. See Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of ‘In Loco Parentis’ and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 263 (1994). No British case law seems to pre-date Blackstone’s use of the term. See Douglas R. Pearson, *Negligent Liability in United States Colleges and Universities: A Legal-Historical Analysis*, at 14 (1998) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University).

³ See *Booker v. Lehigh U.*, 800 F.Supp. 234 (D. Pa. 1992).

⁴ See Bickel & Lake, *supra* note 1 and Theodore C. Stamatakos, *The Doctrine of ‘In Loco Parentis’, Tort Liability and the Student-College Relationship*, 65 IND. L. J. 471 (1990).

active role in the lives of students. The “bystander” era⁵ cases of the 1970s and 1980s were decisions that seemingly declared that universities should not get too involved in student safety or else risk assuming a duty of care. During that era, the roles of student affairs administrators and campus police arguably were minimized.⁶

Courts today generally have taken a centrist stance toward institutional liability and do recognize contributory negligence⁷ and the role that individual actions play in student safety-related cases. Conversely, some legal scholarship would hearken a “doom and gloom” era of impending and costly litigation.⁸ As there appears to be a disconnect among court decisions, legal scholarship, and university policies—and as *in loco parentis* is a term often misused in the literature of education law—I will present in this dissertation supporting case law and legal commentary that *in loco parentis* is not reemerging as a liability threat. Further, I explore whether a fear of liability has handcuffed universities in enacting policies that soundly respond to the changing and pressing problems facing college students today, namely alcohol abuse and mental illness.

I have conducted a legal-historical analysis of *in loco parentis* and institutional liability, tracing court decisions from the fall of *in loco parentis* and the “bystander” era to the current era of a reasonable duty of care. This dissertation is not concerned with all tort-related institutional liability, however. While some studies are broad and examine litigation from injuries due to falls and facility-related issues,⁹ this study focuses more narrowly on two issues at the fore of institutional concern—alcohol abuse and mental

⁵ This is the name Bickel and Lake gave to the era by which courts allowed universities to adopt laissez-faire attitudes toward student behavior. See generally Bickel and Lake, *supra* note 1.

⁶ *Id.* at 12.

⁷ Contributory negligence is “the principle that completely bars a plaintiff’s recovery if the damage suffered is partly the plaintiff’s own fault.” BLACK’S LAW DICTIONARY 353 (8th ed. 2004).

⁸ See, e.g., Bickel & Lake, *supra* note 1, at 64.

⁹ See generally Pearson, *supra* note 2.

health—as well as the corollary liability surrounding the Family Educational Rights and Privacy Act¹⁰ and Americans with Disabilities Act.¹¹

This dissertation asks how universities currently are interpreting the law regarding student welfare and safety, namely as it relates to issues of student privacy, alcohol abuse, and mental illness. Regarding university policy, Professors Robert Bickel and Peter Lake, the most noted scholars on the topic of institutional liability, have commented,

A college or university is better advised to avoid liability by demonstrating that it exercised reasonable care under the circumstances than to assert that it had no duty to a student regarding her safety on campus¹² . . . How many students have been injured because common sense gave way to disengagement brought on by legal uncertainty?¹³

I will explore via a qualitative case study of three institutions the new role student affairs practitioners and other university administrators have assumed in light of current case law.¹⁴ The story of each institution is framed by a legal analysis, particularly as it relates to alcohol-related tort cases, mental health and suicide liability, and the legal and ethical concerns regarding safety, privacy, and disability law.

¹⁰ Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1836 (codified as amended at 20 U.S.C. § 1232g).

¹¹ Pub. L. No. 101-336, 104 Stat. 327, (codified at 42 U.S.C. § 12101).

¹² See Bickel and Lake, *supra* note 1, at 218. Courts recognize that the burden would be too big if institutions were required to stop all students' alcohol abuse. *Id* at 205.

¹³ *Id.* at 15.

¹⁴ Legal scholarship traditionally has been confined to the analysis and court-sanctioned application of legal theory, with little attention to practical applications or qualitative studies that explore the impact of university policies. See *generally* Kerry Brian Melear, *The Evolution of the Contract Theory of Institution-Student Relations in Higher Learning: A Legal-Historical Analysis* (2001) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University) (calling for qualitative studies of the law of higher education).

In the scope of this dissertation, I studied “Tech,” “State,” and “Private”. Tech is a large coeducational state university situated in a rural area and considered one of the more conservative public institutions in the country, as tradition greatly affects campus life and culture. State is a public land-grant university that consistently ranks among the top “party schools,” with a strong tradition of athletics and tailgating and an active bar adjacent to the campus. Private is a mid-size private institution and has a reputation for having politically and financially connected alumni and, among students, is known for its networking opportunities, particularly from within the Greek system. The campus is located in a large metropolitan area that offers many entertainment and cultural opportunities but also easy access to alcohol and recreational drugs.

The three institutions included in this study were selected because each campus faced a major problem or tragedy that indelibly shaped policies regarding student welfare. (A more detailed description of each case is included in Chapters 2 and 3, and the methodology of the study is explained in Appendix A.) I purposefully selected one private institution and two public state universities. This was done so as to observe the application of the law in both institutional types, as there are different legal standards applicable in both settings.¹⁵ Also, organizational structures and campus cultures differ greatly between the institutional types.

The research questions underpinning this study are

1. Considering recent court decisions, what is the state of the law regarding institutional liability for the care of students? Specifically, what are the courts saying is a reasonable standard of care for students and is there a return to ‘in loco parentis’?

2. How are institutions interpreting their role to ensure student safety in an attempt to adapt to current legal standards and does this view match the law?

¹⁵ E.g., Constitutional law does not apply the same at private universities as it does in the public sector. Also, tort law varies state to state and, because of sovereign immunity, sometimes between institutional types.

3. *How do institutional and organizational factors apart from legal standards influence policy formation vis à vis liability and risk management?*

4. *What might institutions do to formulate disciplinary policies that are consistent with the state of the law? And can such policies reconcile inter-organizational conflict within universities, financial and resource constraints, and common-sense practice?*

Though the legal-historical analysis and practical recommendations stemming from this study are of use to both scholars and university administrators, there are some inherent limitations. First, the legal-historical component of this study encompasses a brief history of American university-related liability, beginning in the 1800s and continuing with particular emphasis on legal decisions issued in the past two decades specifically pertaining to alcohol and mental-health related university litigation. Because many of these cases never went beyond the district court or appellate level, any prognostication as to what universities should do in regard to student welfare is contingent upon the opinions issued in their respective judicial circuits.¹⁶

Similarly, the campuses included in this study are not representative of the myriad institutional types in American higher education today: small liberal arts colleges, comprehensive institutions, commuter satellite campuses, and community colleges. The issues discussed are unique and present different challenges. Smaller private colleges tend to have more oversight of student behavior and often have more traditional student bodies. Comprehensive and commuter institutions have seen a rise in non-traditional students, part-time students, first-generation students, and students of varying minority backgrounds.¹⁷ Community colleges often are not able to offer the services available at

¹⁶ See, e.g., *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005). Because that case never reached the appellate level, “[t]he preliminary ruling in *Shin* will be cited with caution, if at all, by lawyers and judges alike,” according to Gary Pavela, a judicial affairs officer at the University of Maryland, College Park.

¹⁷ See *generally* NANCY J. EVANS ET AL., *STUDENT DEVELOPMENT IN COLLEGE: THEORY, RESEARCH, AND PRACTICE* (Jossey-Bass Publishers 1998) (referring to the student development theories related to these and other student groups and demographics).

larger institutions, such as student activities, alternative night programming, residential life, alcohol awareness and education, and other student-related amenities. Also, though student-related phenomena are similar nationally, another limitation of the study was that it was restricted geographically because of convenience and financial factors

The three case studies presented in this dissertation, instead, represent a cross-segment of major research universities: a large state school in a metropolitan area with a culture of drinking; a well-funded private institution with influential alumni that exert control over campus policies and with students who have the access and means to easily acquire drugs and alcohol; and a state school in a rural area that is steeped in tradition but its students are facing new problems—particularly as it relates to mental health and alcohol—but without the medical facilities of a big city to treat them.

All three institutions have many differences yet also many similarities—including major campus incidents that brought local, regional, and even national attention and ignited the impetus to change policy and practice regarding student behavior and safety. Each campus has its own culture, its own issues, and its own organizational structures by which policies are formed. However, these three cases arguably can be utilized by scholars and administrators from many institutional types—as many of the legal, organizational, cultural, and policy issues today can be generalized among nearly all colleges and universities. Alcohol abuse and mental health issues are pandemic in American higher education.

CHAPTER 2
LIABILITY AND CAMPUS CULTURE: THE APPLICATION OF A
NEW STANDARD IN THE CARE OF STUDENTS

Though university administrators should not fear that a false reemergence of *in loco parentis* will increase institutions' liability for student welfare, the current standard of a reasonable duty of care exhorts colleges and universities to institute sound policies that address the growing dangers inherent in college life today, particularly alcohol abuse and mental illness. This chapter traces the legal evolution of *in loco parentis* and how it has been replaced by the legal theories of tort law, as well as provides a thorough legal-historical analysis of institutional liability for alcohol-related injuries to students. Additionally two case studies will be introduced, which examine the role tradition and tragedy have in shaping institutional policy. Alcohol-related policies, in particular, can have a polarizing effect on campuses when competing constituencies have different agendas.

I. The Application of Tort Theory to Education

A. Brief Introduction to Tort Theory¹

Prior to 1960, during the era of *in loco parentis*, institutions rarely were held liable for student injury, regardless of the cause.² *In loco parentis*, as recognized by the courts, gave discretion to institutions to decide what was in the best interests of

¹ A tort is defined as "a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages" or as "a breach of a duty that the law imposes on persons who stand in a particular relation to one another." BLACK'S LAW DICTIONARY 1526 (8th ed. 2004).

² See ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 23 (Carolina Academic Press 1999).

students.³ Though some campus administrators continue to fear that by becoming involved in the lives of students the institution increases its exposure to liability, it is important to remember that the doctrine of *in loco parentis* was interpreted as a power colleges and universities had to discipline students and never was utilized as a basis for tort negligence.⁴ (The idea that *in loco parentis* created a duty of care came later in K-12 case law.⁵ Though the relationship there is not purely custodial, courts do recognize the impressionability and vulnerability of students during their formative years.)

In loco parentis no longer is applied to higher education litigation.⁶ The majority of liability cases including alcohol and mental health-related cases are determined by tort theory. The main areas of tort are negligence, intentional torts, and strict liability, and most suits fall under negligence.⁷ Though the application of tort theory is amorphous (as tort law varies from state to state), certain tests, or prongs, must be met to bring forth a negligence claim. For a tort claim to be successful, a plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) injury, and (4) that the defendant's negligence and breach of duty was the proximate cause of injury.⁸ Duty is the first

³ See Douglas R. Pearson, *Negligent Liability in United States Colleges and Universities: A Legal-Historical Analysis*, at 34 (1998) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University). *In loco parentis* first was recognized in American higher education in *Gott v. Berea College*, 161 S.W. 204 (Ky. 1913), in which the court held that the College could dictate where students could visit within the town. The court found that the College was indeed acting in the place of the parent and was responsible for the academic, mental, and physical well-being of students.

⁴ See Theodore C. Stamatakos, *The Doctrine of 'In Loco Parentis', Tort Liability and the Student-College Relationship*, 65 IND. L. J. 471, 482, 484 (1990).

⁵ *Id.* at 484.

⁶ Courts recognize that, unlike the K-12 education system, universities are not in a custodial relationship over students and that college-aged students do not require as much care. See Joy Blanchard, *University Tort Liability and Student Suicide: Case Review and Implications for Practice*, 36 J. OF LAW AND EDUC. 464 (2007).

⁷ Institutions also can be liable for employees' actions through vicarious liability, which is akin to strict liability. See Bickel & Lake, *supra* note 2, at 66.

⁸ Another issue is "cause-in-fact," which determines whether "negligence was a substantial factor in causing harm." See *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 879 (Wis. Ct. App. 1999).

element in a prima facie⁹ case of negligence. Without duty, the question of negligence is moot.¹⁰

Today courts consider social policy issues¹¹ at the duty prima facie phase of negligence litigation.¹² Generally, the student-university relationship is not recognized as a special relationship in which a duty of care is owed—only those situations where a party is in custodial care is such a strict measure imposed.¹³ The most commonly-used defenses by universities are contributory negligence or assumption of risk.¹⁴ Courts continue to consider the actions of individuals when weighing institutional liability.

However, until the 1970s most courts ruled charitable organizations, including private universities, as immune from private civil lawsuits.¹⁵ Public universities were immune via governmental immunity.¹⁶ This theory of immunity was based on (a) that

⁹Prima facie is “sufficient to establish a fact or raise a presumption unless disproved or rebutted.” BLACK’S LAW DICTIONARY, *supra* note 1, at 1228.

¹⁰See Bickel & Lake, *supra* note 2, at 69.

¹¹Tort comes from common law, of which courts must constantly examine to reflect society and common practice. *Id.* at 70.

¹²*Id.* In *Baldwin v. Zoradi*, (discussed later in this chapter) the court stated that “student injury cases are ‘on the cutting edge of tort law’”, *Id.* at 70, *citing* 176 Cal Rptr. 809, 821 (Cal. Ct. App. 1981). A duty of care may stem from either a “special relationship” between the plaintiff and defendant or from knowledge that injury to the plaintiff was foreseeable.

¹³Courts generally construe the relationship between prisons and mental hospitals as a custodial one. See, e.g., *Hickey v. Zezulka and Michigan State Univ.*, 443 N.W.2d 180 (Mich. Ct. App. 1988) (a case involving the suicide of a student held in a University-run jail).

¹⁴See Bickel & Lake, *supra* note 2, at 75. Contributory negligence is “the principle that completely bars a plaintiff’s recovery if the damage suffered is partly the plaintiff’s own fault.” BLACK’S LAW DICTIONARY, *supra* note 1, at 353. Assumption of risk is “the act or an instance of a prospective plaintiff’s taking on the risk of loss, injury, or damage.” *Id.* at 134.

¹⁵See *Mullins v. Pine Manor C.*, 449 N.E.2d 331 (Mass. 1983) (for the first time put higher education law under general business liability law). See Peter Lake, *Higher Education Called to Account: Colleges and the Law after Virginia Tech*, CHRON. HIGHER EDUC., June 29, 2007, available at <http://chronicle.com>. See also Bickel & Lake, *supra* note 2, at 24. In that era, unlike today, children did not sue parents for neglect nor did parents sue the church for sexual abuse, for example. *Id.* at 30.

¹⁶See Bickel & Lake, *supra* note 2, at 25.

“funds were being held in trust”; (b) *respondeat superior*¹⁷ did not apply to institutions that benefited humanity (*citing Hamburger v. Cornell University*)¹⁸; (c) that money should not be diverted from works of public good; and (d) that an implied agreement existed that those accepting such “charitable benefits” would not hold institutions liable for injuries while administering these services.¹⁹ Today both public and private institutions are susceptible to liability under current law: courts no longer view charities as immune from suit,²⁰ and the federal government and most states have relinquished governmental immunity from liability for torts.²¹

B. The Evolution and Fall of *In Loco Parentis*

Before the current era of a duty of reasonable care, the legal theory of *in loco parentis* was used by American courts in deciding issues of institutional liability for the care of students. The term *in loco parentis* generally is credited to Sir William Blackstone, describing the schoolmaster-pupil relationship in which a father delegates authority²² to the tutor.²³ An early example of such authority was in *Stevens v. Fassett*, a decision which recognized the common law right of the parent to control children and the right, in turn, to delegate that authority to a tutor or schoolmaster.²⁴

¹⁷ *Respondeat superior* is Latin for “let the superior make answer.” In tort law it is “the doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” BLACK’S LAW DICTIONARY, *supra* note 1, at 1338.

¹⁸ 148 N.E. 539 (N.Y. 1925).

¹⁹ See Pearson, *supra* note 3, at 74.

²⁰ In *Nova Southeastern U. v. Gross*, 758 So. 2d 86 (Fla. 2000) (a case dealing with the off-campus safety issues of a student in an internship), colleges were said to be no longer considered different than any other business. See Lake, *supra* note 15.

²¹ See Wendy Louise Andberg, Trends in Tort Liability of Trustees for Student Injuries in Private Institutions of Higher Education at 94 (1980) (unpublished Ph.D. dissertation, University of Minnesota) (on file with Wilson Library, University of Minnesota).

²² “[T]he father’s *de facto* legal right to discipline and even abuse and neglect a child was one of the broadest immunities from tort responsibility that the common law ever carved out of tort law.” See Bickel & Lake, *supra* note 2, at 30.

²³ See Pearson, *supra* note 3, at 263. No case British case law seems to pre-date Blackstone’s use of the term.

²⁴ 281 F. Supp. 747 (Me. 1847), *cited by* Kristina I. Hannum, The Evolution of the Doctrine of *In Loco Parentis* in Defining the Student-Institution Relationship in Higher

The doctrine of *in loco parentis* was first recognized in American higher education law in *Gott v. Berea College*.²⁵ Bickel and Lake cite three sources of institutional authority employed during the era of *Gott*: (1) under *in loco parentis* institutions could “discipline, control, and regulate,” (2) institutional power was parental (or *parens patriae*), and (3) the institution—via the state or private trustees—had contractual authority over students who were considered not “contracting parties” but instead governed by the contract.²⁶ At the time of *Gott*, in the early 1900s, because courts recognized the heightened duty of care²⁷ established by the institution-student fiduciary relationship, universities had the latitude to decide what was in the “best interest” of students.²⁸

Education in the 1980s and early 1990s, at vii (1994) (unpublished Ph.D. dissertation, University of Florida) (on file with Education Library, University of Florida).

²⁵ 161 S.W. 204 (Ky. 1913) (holding that the College could forbid students to visit certain off-campus locations because the College is responsible, in place of the parent, for not only the academic but the mental and physical-well being of students). *State v. Pendergrass*, 19 N.C. 348 (1837) (a case involving corporal punishment where the court held that the power of the school master was analogous to the parent) was the first case in K-12 education law whereby courts recognized the principle of *in loco parentis*, cited in Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of ‘In Loco Parentis’ and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 264 (1994).

²⁶ See Bickel & Lake, *supra* note 25.

²⁷ *Gott* focused on right to control, not an obligation to control. See Hannum, *supra* note 24, at 57.

²⁸ See Pearson, *supra* note 3, at 34. This matter of discipline was fitting in colonial times, as administrators oversaw all aspects of students’ lives. *Id.* at 14.

During the early part of this century, the contract approach became the dominant theory under which student-university cases were litigated.

Other concepts of the relationship were occasionally used to supplement implied contract law. One such theory was that the student was granted the privilege of attendance by the university, allowing courts to uphold any university action since students had no rights under such a relationship.

Another theory used to sustain institutional judgment was that the student was the beneficiary in a trust relationship.

Id. at 20-1. “Historically, the most notorious way to read these contracts favorably to university power would be to determine that parent/student had somehow waived rights or had never been given them in the first place.” See Bickel & Lake, *supra* note 2, at 43-44.

However, when *in loco parentis* essentially ended in 1960,²⁹ the immunity institutions had come to enjoy as guardians of student safety also ended. Bickel and Lake classify the evolution of higher education's role in controlling student behavior into three eras: *in loco parentis*, the "bystander" era (or the duty/no duty era), and the contemporary era of duty.³⁰

Section III of this chapter focuses on cases from the "bystander" era, particularly as it relates to alcohol-related student injuries, and how courts have transitioned to now requiring institutions to set policies that reasonably and adequately address the continuing problem of underage alcohol abuse on college campuses. Section IV examines how one university in particular has used a past tragedy to counter what has become a social more of underage binge drinking among its students and explores how organizational change, privacy issues, and limited resources have shaped policies and practices there, including alcohol and mental health-related services for students.

But, first, Section II tells the story of a university that has used a campus tragedy and a strong campus culture to address liability and to, at the same time, empower and teach students how to make wise decisions. Administrators at "Tech" have instituted policies to address the growing problems surrounding alcohol abuse and mental illness among students. However, that campus is like many other institutions nationally that deal with limited resources, fears of litigation and liability, and changing student demographics as well as changing student needs.

²⁹ The seminal case *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (a case that held university students had a 14th Amendment due process right to their education) is considered by many as the "death knell" of *in loco parentis* in higher education. The freedoms won through *Dixon*, the Serviceman's Readjustment Act, the civil rights and women's movement, the decreased age of majority, and the student activism of the 1960s and 1970s also changed the student-institution relationship. See, e.g., Kerry Brian Melear, *The Evolution of the Contract Theory of Institution-Student Relations in Higher Learning: A Legal-Historical Analysis*, at 15 (2001) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University). See also Pearson, *supra* note 3 and Bickel & Lake, *supra* note 2, at 36.

³⁰ See Bickel & Lake, *supra* note 2.

II. Tech: The Facilitator Model of Risk Management

In the contemporary era of duty, to what degree should universities exert control over student behavior? Though alcohol-related injuries and the mental health of students are at the fore of conversations in the media and on campuses today—as well as the main focus of this dissertation—university liability encompasses many aspects of students' lives: travel abroad, safe residence halls, facility management and upkeep,³¹ off-campus visitors, sexual harassment, and student-athlete misconduct,³² for example. Conversations surrounding university liability often balance risk management while attempting to not excessively limit venerated traditions of student life. What are universities willing to allow—or should allow—in order to not encroach upon the social development of college students?

“Tech,” one of the three universities visited during the course of this study, has become a model for Bickel and Lake’s facilitator model for balancing student development with risk management. According to Bickel and Lake, a facilitator university recognizes that a student’s maturation process is not yet complete during college but strives to provide a safe educational environment by which students can make sound personal decisions, keeping in mind not only the personal consequences but the consequences for others affected by their actions.³³ Unlike the *in loco parentis* model, these institutions do “not presume to choose for students but empower[s] students to choose for themselves within a structured environment.”³⁴ Facilitator universities are “proactive, not reactive,” and seek to foster positive living environments,

³¹ See generally Pearson, *supra* note 3.

³² See generally Joy Blanchard, Institutional Liability for the Sexual Crimes of Student-Athletes, 1 J. FOR THE STUDY OF SPORTS AND ATHLETES IN EDUC., 221 (2007).

³³ See Bickel & Lake, *supra* note 2, at 159-214.

³⁴ See Darby Dickerson, *Legal Issues for Campus Administrators, Faculty and Staff*, in COLLEGE STUDENT MENTAL HEALTH: EFFECTIVE SERVICES AND STRATEGIES ACROSS CAMPUS 37 (Sherry A. Benton & Stephen L. Benton eds., 2006).

facilitate decision-making, and train staff members to assist in student development.³⁵

“The facilitator model is a model of an environment of shared values, risks, and responsibilities. The facilitator does not accept autocracy or abdication.”³⁶

Also, a facilitator campus identifies risks, establishes policies that share responsibilities with students, educates students about the judicial process, and empowers staff members to make wise decisions without fear of legal repercussions.³⁷ This includes exercising discretion in parental notification.³⁸ According to the model, facilitator administrators also should explain why certain policies have been enacted and connect them to students’ roles as responsible campus citizens.³⁹ Tech has adopted many of these ideals in formulating student-related policies.

Tech is a large coeducational state university situated in a rural area. Considered one of the more conservative public institutions in the country, campus tradition and the venerated Tech ideals of integrity and honor are at the core of the institution. (The mantra that students at Tech “don’t lie, cheat, or steal” repeatedly is recited.) Many staff members that I interviewed constantly referred to the Tech students, staff, and alumni as “family” and the lifelong pride that is felt among those associated with Tech. A decade ago, Tech was thrust into the national media after a major campus tragedy killed several students. As a result, many policies and practices were revamped and continue to affect the way in which the campus, namely the division of student life, is run.

³⁵ *Id.* at 39.

³⁶ See Bickel & Lake, *supra* note 2, at 14.

³⁷ See Dickerson, *supra* note 34, at 39.

³⁸ *Id.* at 79.

³⁹ *Id.* at 66. The University of Illinois in 1984 required suicidal students to attend four counseling sessions. As a result, the campus suicide rate fell 58 %. That policy follows a Facilitator Model-like construct of shared responsibility. Students are dismissed only if they refuse to participate. *Id.* at 86. See also GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE (College Administration Publications 2006).

One might assume that after a tragedy some campuses may begin to exert more control over student activities. Tech has taken measures to mitigate risks, but, more importantly, it has created opportunities to teach students about the risks of college life and has empowered them in the decision-making process. Following the tragedy, the campus began a task force to look at various policies. The then-vice president of student affairs created an intra-divisional task force to examine policy and practice and how the existing campus culture surrounding the nearly 800 student organizations could fit into the new model of risk management.⁴⁰

The new model is structured by a tier system and the risk levels associated to the University, according to a risk management officer. The smallest group, which requires the most oversight and risk management education, comprises university-sponsored organizations. “When someone looks at them, they see them as the University.” This includes campus cheerleaders and the student government. University-affiliated organizations comprise approximately 200 groups and are the next tier in the risk management model. This includes groups such as the residence hall association and Greek-letter organizations.⁴¹ And, finally, approximately 500 organizations such as honor societies and professional organizations comprise university-recognized groups.

The whole model is based on shared responsibility. Students are responsible for knowing the rules. “We look at risk management as positive and an enabling tool.” One risk management official explained that the risk management office attempts “to get students to look at why they should not do certain things as a smart decision versus a risk management hurdle.” Additionally, the risk management training allows that office to “help them understand responsibility. It’s a great opportunity to partner with students.”

⁴⁰ The division of student affairs created a student-run task force of campus organization representatives to solicit buy-in.

⁴¹ Per state law, all Greek members must complete risk management training. This measure came from a state senator who knew someone that died in a fraternity incident.

When formulating the current model, the student affairs division looked at other risk management models currently utilized in business, universities, and scholarly research. Tech's model is a modified version of the military model of risk management—a matrix that weighs the probability of risk with potential outcomes—blended with Bickel and Lake's facilitator model. The use of military models in student affairs decisions is important to note, as the presence and culture of ROTC have largely shaped campus life and culture. (The cadets even have their own judicial system separate from the rest of the student body.)

Like the military, decision making at Tech is “top-down” but lower-level professionals did express satisfaction with their involvement in the division of student affairs' policy making processes. When the current risk management model was formulated, professionals at the coordinator level or above were consulted and recommendations were then given to the vice president of student affairs. At that time, some areas within student services also took the initiative to create their own risk management office, such as in residence life. All new employees within residence life receive training on crisis management, confidentiality of records, and other risks specific to their job title. There also is a risk management office specifically for student activities with several full-time staff members to oversee the training and education of all student organization leaders.

Tech's risk management model, according to a risk management officer, “really works with our culture.” Student organizations have traditionally been a large part of campus life at Tech and students were integrally involved in formulating the risk management model. Those who work in student activities have seen the benefits of this approach. “We teach them if they engage in particularly life threatening behavior, these are the consequences. We create policy, procedures, and paperwork to try to get students to think about what they do.”

Additionally, the resources available at a large institution such as Tech make other unique student-centered programs possible. There is a crisis management office that notifies parents in emergencies, provides emergency services to students in need, serves as advocates for students, and even provides temporary housing to parents when a student is in a local hospital. However, Tech, like most campuses, continues to struggle with issues of alcohol and mental health.

The alcohol education office recently merged with judicial affairs because of the overlap alcohol violations had with violence, hazing, and theft. Administrators noticed that alcohol was involved in approximately 80 percent of the cases they adjudicated. Campus geography, according to a judicial officer, plays a role in alcohol abuse on campus. Tech is in a rural area with fewer entertainment options than a large city. There is a concentrated bar area across the street from the main campus. Also, campus culture and tradition serve to perpetuate accepted alcohol use among underage students. Many parents of students grew up during a time when 18 was the legal drinking age. According to one campus administrator, when a student is charged with underage drinking, often the parents' response is, "Why did you get caught?" Instead of 'You violated federal law'."

Tech uses a social norming approach⁴² and educates students who violate alcohol policy about how their actions affect not only themselves but the campus community. Tech employs parental notification upon the first offense for anyone under the legal drinking age. However, Tech has no cooperative relationship with the surrounding community police agencies and only adjudicates those incidents that occur on campus or that come to the attention of the judicial office via the district attorney's

⁴² The theory of social norming is based on the premise that one's actions are influenced by peers and are affected by her view of what is the norm. The theory also "predicts that correcting misperceptions of the norm is likely to result in decreased problem behavior and an increase in healthy behavior." See Wellness Resource Center, <http://web.missouri.edu/~umcoslwrc/norming.html> (last visited June 28, 2008).

office (typically egregious cases in which other crimes are involved). As one judicial officer explained, the city surrounding the campus has had three police chiefs within the past five years and a cooperative agreement between campus judiciary has yet to be formed with the local police because of the turnover in that department.

In regard to mental health parental notification policy, that policy is less fixed at Tech than the alcohol parental notification policy. One administrator said the amendments to FERPA regarding contacting parents in the case of “life threatening” situations can be broadly interpreted to allow contact with parents more often.⁴³ “We believe parents can be good advocates.” However, for example, residence life does not notify parents after suicide attempts out of what one residence life official refers to as “FERPA fear.” Housing officials share information with the campus police department, mental health services, and the crisis management office. From there, the decision to allow a student to remain in campus housing hinges on the threat the student poses and the severity of the situation. According to one administrator, referring to the case-by-case decisions for parental notification, “How much are you entitled to be mentally ill and still be here?”

Residence life will mandate a mental health assessment for a suicidal student but the decision of whether a student can return to campus comes from the mental health office. Follow-up can be difficult, according to one residence life professional: if a student is transported off-campus, because of privacy regulations for physicians and counselors not affiliated with the University, little information is shared and often administrators do not know when a student has returned to campus. There is no mental health facility in the community to which students can be outsourced; the nearest mental health facility is 90 miles away. If a student leaves the surrounding community to receive treatment, Tech residence life officials have no way of becoming aware.

⁴³ Those amendments will be discussed in depth in Chapter 3.

Also, though Tech has more resources than most institutions in that state, the strain of limited funding affects student services and is particularly evident within residence life. Tech has nearly 8,000 residential students and a 1:75 resident assistant-resident ratio. According to one administrator, ideally it would be 1:30, particularly as hall counselors are forced to deal with more complex issues. Noise complaints are no longer the number one issue. "Those days are over," according to the residence life official in charge of staff training. Hall counselors, instead, must now know how to recognize students at risk of suicide and counsel residents about eating disorders. One semester more than 30 suicide ideations occurred on campus. A residence hall director had to chase a resident who was trying to jump from the top of the football stadium.

Also, the increasing diversity in the student body at Tech is a challenge, particularly for those in residence life. One administrator commented that helicopter parents, millennial students, and suburban kids can be difficult to deal with. Many students are not accustomed to sharing a room or living with people from different backgrounds. International students often are not welcome, and recently there was a rash of assaults off campus.

Regardless of the struggles and challenges, Tech does appear to have committed professionals and a wealth of services for its students. "The talent here is amazing." However, because Tech recruits student affairs professionals nationally, high attrition within the division of student affairs has become an issue, particularly for departmental consistency and institutional memory. Despite the major changes in the past few years, Tech has not waived in "the commitment to the student experience outside of the classroom and the resources to become well-rounded citizens," according to the director of Greek life. For example, Greek life at Tech has been in existence only a couple of decades. After recognizing the growing influence Greek members were having on the Tech campus and the future influence Greek alumni would have, the student affairs division has increased that office's staffing and made it its own

department that reports directly to the associate vice president. This, according to its director, legitimized its presence and bargaining power within the administration. The department has strong ties with other student services offices, which includes a memorandum of understanding with the campus judiciary to outline which department adjudicates cases involving Greek-letter organizations and their members.

Evolving threats and the memory of the tragedy at Tech have caused the administration to be constantly proactive in its policy formation and review. Administrative decisions continue to adjust with evolving threats (e.g., the Virginia Tech tragedy). One administrator commented that they try to learn from colleagues at other institutions and try not to make the same mistakes. “A tragedy happened here of national attention. All of us working in student affairs need to think about what we’re doing.” In regard to liability and risk management, universities, according to one administrator, should “speak of the floor—not the ceiling. What is the minimum we should do? The law may impose certain standards for reasonable care but that by no means imposes a limit on student care.”

III. Institutional Liability for Alcohol-Related Cases

As was illustrated in the case of Tech, campus traditions and culture greatly influence institutional policy. Underage alcohol consumption and binge drinking are rampant on campuses today and have been for decades. As is the philosophy at Tech, risk management policies should not only be instituted to mitigate liability risks but also to educate students on how to make wise decisions. One administrator at Tech said that there should not be a “ceiling” that limits the role institutions play in regulating student behavior and protecting students. A fear of litigation should not deter institutions from instituting sound, proactive policies that mitigate liability risks, educate students, and effectively adjudicate rule violations—particularly as it relates to alcohol. “The mere fact that a university regulates alcohol use has not created a specific duty to particular

individuals. While alcohol dangers are generally foreseeable, specific foreseeable danger will be necessary to attach liability for a particular student/victim.”⁴⁴

This section traces the legal history of alcohol-related institutional liability. Though courts today do hold institutions to a reasonable duty of care, during the “bystander” era, courts were reluctant to hold universities liable for the actions of students. The seminal case of the “bystander” era, an era in which courts sent the message that universities should not get involved in the lives of students or else run the risk of assuming a duty of care,⁴⁵ was *Bradshaw v. Rawlings*.⁴⁶

In *Bradshaw*, a student sued Delaware Valley College when he became a quadriplegic as a result of an automobile accident that occurred after a school-sponsored picnic. The sophomore class picnic was an annual tradition in which large amounts of beer and liquor were served. Being that the students were underage, a faculty advisor approved the purchase of the alcohol.

Utilizing a two-prong interpretation of *in loco parentis*, the court rejected the notion that the University had a right to regulate and discipline student behavior—hence implying that the other prong, duty to protect, also did not apply.⁴⁷ Holding that the University was not liable for the student’s injury and recognizing that *in loco parentis* was no longer applicable because students were considered adults,⁴⁸ the court said:

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today’s college administrators has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding

⁴⁴ See Bickel & Lake, *supra* note 2, at 155-56.

⁴⁵ *Id.* at 12.

⁴⁶ 612 F.2d 135 (3d Cir. 1979).

⁴⁷ 612 F.2d at 139-140, *cited in* Bickel & Lake, *supra* note 25, at 274.

⁴⁸ By that time, laws regarding military service, voting, and minimum drinking age had changed the role of young adults in society.

rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrators have been transferred to students.⁴⁹

The court also held that though the University had a formal policy against underage possession and consumption of alcohol—which already was prohibited behavior under state statute—and that the University had not assumed a custodial relationship by implementing such a policy.⁵⁰ According to Bickel & Lake,

Bradshaw linked the right to discipline or regulate to the duty to provide a safe learning environment by means of correlative doctrines of *in loco parentis*, and then concluded that the rejection of the doctrine in its one aspect (the right to regulate and discipline) implied the rejection of its other aspects (the duty to protect).⁵¹

The language of the *Bradshaw* court, in some commentators' opinion, over extended its view of the College's relationship with its students and misperceived both the student-rights cases and traditional tort-law concepts.⁵²

Furthering the reasoning commonly held at that time by the courts, a California court in *Baldwin v. Zoradi* found that attempts to control drinking on college campuses were futile.⁵³ An underage student sued after she became a quadriplegic following an accident in which intoxicated friends in the vehicle in which she was riding engaged in

⁴⁹ 612 F.2d at 138.

⁵⁰ *Id.* at 141. Courts post-*Bradshaw* debated whether the “no duty” principle applied when the institution had knowledge of student conduct to the extent that foreseeable risk existed regarding a class (e.g. Greeks) or individual student. See Bickel & Lake, *supra* note 25, at 279. Bickel and Lake also argued that *Bradshaw*, instead, could have been interpreted as a negative breach of duty creating a foreseeable risk to students (hypothesizing what a court would have held had the University provided cars for the students to drive after supplying liquor) *Id.* at 287.

⁵¹ *Id.*

⁵² See Pearson, *supra* note 3, at 203, *citing* 612 F.2d at 135.

⁵³ 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981).

an off-campus speed race. Contrary to campus policies, residence hall staff knowingly allowed the students to consume alcohol in the residence hall prior to the off-campus accident.⁵⁴ The court rejected the student's negligence claim, stating that no duty existed to protect her from off-campus incidents:

The 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. Only by giving them responsibilities can students grow into responsible adulthood.

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.⁵⁵

Similarly, in *Beach v. University of Utah*, no duty was imposed on universities that attempted to regulate behavior when students' personal actions violated campus codes.⁵⁶ In *Beach*, a student sued the University after she became a quadriplegic as a result of a fall she suffered from a cliff during a class field trip. On the trip, the instructor provided supervision and instruction but allowed the students to pursue "personal interests" during free time, at which point she became intoxicated.⁵⁷ Citing *Bradshaw* and *Baldwin*,⁵⁸ the court ruled that there was no special relationship⁵⁹ and, hence, no duty to protect Beach

⁵⁴ *Id.* at 812.

⁵⁵ *Id.* at 818.

⁵⁶ 726 P.2d 413, 414 (Utah 1986).

⁵⁷ During a previous class trip that semester, Beach had become intoxicated after drinking wine and was found asleep alone in some bushes. *Id.*

⁵⁸ *Id.* at 418.

⁵⁹ The court held that Beach's intoxication from a previous trip was not dispositive in determining whether a special relationship existed. Beach testified that her behavior before the accident was normal and would not have signaled anyone that she was intoxicated. *Id.* at 416.

from the consequences of her “voluntary intoxication,”⁶⁰ even though the University had a policy against underage alcohol consumption.⁶¹

Like in other “bystander” cases, in *Rabel v. Illinois Wesleyan University*, a court held that the collegiate environment does not create a “custodial” relationship but rather an “educational” one.⁶² The court held that it was unrealistic to protect and prevent students from the harm caused by fraternity drinking and pranks. In this case, an intoxicated fraternity pledge abducted a female friend from the lobby of her dormitory and injured her when, while carrying her over his shoulder, he dropped her on the pavement.⁶³ Furthering the decisions reached in *Baldwin* and *Bradshaw*,⁶⁴ the court did not find that University regulations against fraternity hazing and underage alcohol consumption put the University in a custodial role over students.⁶⁵ The court also found that the University did not owe a duty vis à vis the tenant-landowner theory to protect the student from injuries caused by a third party.⁶⁶

Courts continued throughout the 1980s to be reluctant to hold universities liable for the individual actions of students. In *University of Denver v. Whitlock*,⁶⁷ the Supreme Court of Colorado reversed an earlier decision and ruled that a student, who was injured while jumping on a trampoline intoxicated, had no special relationship with the

⁶⁰ That same year, in *Campbell v. Wabash College*, 495 N.E.2d 227 (Ind. Ct. App. 1986), a court found no special relationship and corollary duty to protect existed when a visiting female student was injured when a male student, after voluntarily getting intoxicated in his fraternity house, injured her in an automobile accident. A year later, in *Allen v. Rutgers*, 523 A.2d 262 (Sup. Ct. N.J. 1987), a court found that, despite University regulations against alcohol consumption in its stadium, no duty was owed when an intoxicated student was injured by vaulting over a 30-foot wall during a fraternity prank.

⁶¹ 726 P.2d at 418. See *contra* Bickel & Lake, *supra* note 2, at 95 (contending, however, that the universities in these cases were not “helpless bystanders” but had some involvement in these incidents).

⁶² 514 N.E.2d 552, 561-62 (Ill. App. Ct. 1987), *cited in* Bickel & Lake, *supra* note 2, at 63.

⁶³ 514 N.E.2d at 561-62.

⁶⁴ *Id.* at 560.

⁶⁵ *Id.*

⁶⁶ *Id.* at 561-62.

⁶⁷ 744 P.2d 54 (Colo. 1987).

University by which to extend a duty of care caused by nonfeasance.⁶⁸ Such an imposition would “directly contravene the competing social policy of fostering an educational environment of student autonomy and independence.”⁶⁹

Bickel and Lake view these decisions as essentially ruling that (a) college represents a “luxurious lifestyle” in terms of personal autonomy; (b) “society is better off letting some students drink, crash, and burn because the overall population of students will then get what they want from college and will be better citizens because of lessons learned”; (c) universities are a major force in societal change but powerless to educate students outside of the classroom; (d) “safety and education are fundamentally inversely related”; and (e) college underage drinking is inevitable.⁷⁰

However, as the conclusion of the “bystander” era neared, and as charitable and governmental immunity defenses were no longer acceptable under *in loco parentis*,⁷¹ duty became the test of institutional liability.⁷² In *Furek v. University of Delaware*,⁷³ a case which effectively ended the “bystander” era, the court set forth a test not of strict liability but of reasonable care.⁷⁴ The court held the University 93 percent responsible following an incident in which a fraternity pledge suffered serious burns when a lye-based cleaner was poured on his neck and back during a hazing ritual.⁷⁵

⁶⁸ *Id.* at 58. The court found that, although the University knew of prior incidents in which students were injured on trampolines, the student was aware of the risk he assumed. *Id.* at 61.

⁶⁹ *Id.* at 62.

⁷⁰ See Bickel & Lake, *supra* note 2, at 64.

⁷¹ Institutions can be held liable, because of state sovereign immunity, only up to the point in which state law allows. See, e.g., Pearson, *supra* note 3, at 30.

⁷² See Bickel & Lake, *supra* note 2, at 10.

⁷³ 594 A.2d 506 (Del. 1991).

⁷⁴ See Bickel & Lake, *supra* note 2, at 130.

⁷⁵ 594 A.2d at 509-510. See also Peter F. Lake, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L.REV. 611, 632 n. 36 (2000) (distinguishing that though *Furek* does not deal with alcohol *per se*, it involves hazing, which often is associated with high levels of drinking).

Furek questioned the reasoning in *Bradshaw* and *Beach* that, because college students were adults, the University should not intervene in inappropriate cases of alcohol-use.⁷⁶ The *Furek* court sent “an unmistakable message that a university cannot make rules and policies against hazing (etc.) and then do nothing to enforce them beyond verbal threats and admonition or fail to give campus police the authority and guidelines to enforce them through intervention.”⁷⁷

As a result of *Furek*, some universities posited that if campus administration does not get involved in student life, they would not be held liable by exposing themselves to a duty that does not already exist.⁷⁸ This stance seems unfounded, as Bickel and Lake argue that the mere fact that a university regulates alcohol can not equate to a duty to foresee incidents on an individual basis.⁷⁹ Courts are reluctant to hold universities liable when an intoxicated student's actions can be construed as contributory negligence⁸⁰ or as individual actions unforeseeable by the university.⁸¹

In another hazing case, *Knoll v. Board of Regents of the University of Nebraska*,⁸² the Supreme Court of Nebraska found that a duty was owed to protect a

⁷⁶ See Bickel & Lake, *supra* note 25, at 285.

⁷⁷ See Bickel & Lake, *supra* note 2, at 130. *Furek* later was distinguished by *Lloyd v. Alpha Phi Alpha Fraternity*, 1999 U.S. Dist. LEXIS 906, at *8 (D.N.Y. 1999) (holding that Cornell University could not be liable for injuries sustained during a hazing incident because no duty existed, as there was no history of such activity to which the University could have been aware and responsible to control).

⁷⁸ See Bickel & Lake, *supra* note 2, at 133 (arguing against the professional logic and ethics behind such a stance). See also Bickel & Lake, *supra* note 25, at 272 (reasoning that such a supposition is wrongly assuming that there is a “resurrection of the doctrine of *in loco parentis* in the collegiate setting”).

⁷⁹ See Bickel & Lake, *supra* note 2, at 155.

⁸⁰ *E.g.*, *Albano v. Colby C.*, 822 F.Supp. 840 (D. Me. 1993) (an underage member of the tennis team was hurt during a trip to Puerto Rico because of his excessive drinking).

⁸¹ *E.g.*, *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo.1987). See also *Campbell v. Bd. of Trs.*, 495 N.E.2d 227 (Ind. Ct. App. 1986) (holding that no special relationship existed when an intoxicated fraternity member injured another student in an automobile accident), *cited in Pearson*, *supra* note 3, at 126 (explaining that court dicta infers that imposing a duty on universities for alcohol-related incidents is a “step backwards”).

⁸² 610 N.W.2d 757 (Neb. 1999).

student from the foreseeable harm caused by a hazing incident.⁸³ Knoll was injured when, after being kidnapped, handcuffed, and forced to consume inordinate amounts of alcohol, he broke free and injured himself while attempting to escape from a third-floor restroom.⁸⁴ Though the fraternity had not filed a required form disclosing a “pledge sneak event,” the University had prior knowledge of hazing incidents involving other fraternities and criminal activity by members of the fraternity in question.⁸⁵

Courts continued throughout the 1990s to extend the duty of reasonable care established by *Furek*. In *Houck v. University of Washington*, a student sued the University after he was injured when he and other intoxicated students stopped a residence hall elevator and he attempted to jump in between floors.⁸⁶ An appeals court reversed a previous finding for the University and instead found an issue of fact existed whether the University was negligent, in its duties as a common carrier, in failing to act on knowledge that it was common for intoxicated residence hall students to stop the elevators between floors.⁸⁷

In another case, the precedent was established that, even though the student-institution relationship does not inherently create a special relationship, universities that choose to regulate student behavior must take reasonable steps to maintain student safety. In *Coghlan v. University of Idaho*,⁸⁸ a freshman sorority pledge sued the University, her sorority, and three fraternities after she became intoxicated after visiting several fraternity parties and subsequently fell out of the window of her sorority house, where a member had placed her to “sleep off” the alcohol.⁸⁹ Though the court found

⁸³ In determining the issue of duty, the court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of harm, and (6) policy interests. *Id.* at 761. The duty here was found under the landowner-invitee theory. *Id.* at 765.

⁸⁴ *Id.* at 760.

⁸⁵ *Id.*

⁸⁶ 803 P.2d 47 (Wash. Ct. App. 1991).

⁸⁷ *Id.*

⁸⁸ 987 P.2d 300 (Idaho 1999).

⁸⁹ *Id.* at 305.

that no duty of care existed from a special relationship, it ruled that summary judgment⁹⁰ was premature in deciding the issue of an assumed duty, which it posited the University may have created when campus administrators were present at the fraternity parties yet did not take steps to ensure that underage students did not consume alcohol.⁹¹

However, in *Booker v. Lehigh University*,⁹² a court did not find that an institution's "Guide to Social Policy" created a special relationship by which the University assumed a duty of care. In this case, a freshman sorority pledge sued when she sustained injuries from falling down an unlit student-made pathway after becoming intoxicated at several fraternity parties. The court in that case found that

To require Lehigh to supervise its thousands of students would render null and void the freedom won by adult students and place Lehigh *in loco parentis*. The Social Policy was not an assumption of such duty but rather a policy statement that supposedly responsible adult students should be aware of their own behavior.⁹³

Another post-*Furek* case did not hold an institution liable for a student's voluntary intoxication. In *Albano v. Colby College*,⁹⁴ a collegiate tennis player sued the institution after he was found unconscious during a team trip to Puerto Rico. The court did not find the College negligent because the student, though underage in the United

⁹⁰ Summary judgment is a "judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law." BLACK'S LAW DICTIONARY, *supra* note 1, at 1476. This procedure allows for the speedy resolution of legal issues without trial.

⁹¹ 987 P.2d at 311-12.

⁹² 800 F.Supp. 234 (D. Pa. 1992).

⁹³ *Id.* at 241. Similarly, in *Rothbard v. Colgate U.*, 235 A.D.2d 675 (N.Y. App. Div. 1997) a court did not hold the institution liable when an intoxicated student was injured when he fell from the window of his fraternity house. The student claimed that the University was negligent in failing to enforce its student handbook provisions against underage drinking and should have known fraternity members routinely violated the code. The court did, however, remand for trial the issue of negligence against the landlord, which was the alumni chapter of the fraternity.

⁹⁴ 822 F. Supp. 840 (D. Me. 1993).

States, could legally drink in Puerto Rico. Though the student had been warned not to do so, he ignored those warnings. The court did not impose a duty on the College or the coach to prevent his injury, as the events did not occur on campus nor was the student supplied the alcohol.⁹⁵

More recently, in early 2007, a Massachusetts court ruled that the parents of a deceased student could not sue Clark University after the student died of a heroin overdose. The student had admitted to a campus administrator that she had tried heroin, and the University contacted her parents promising to address the campus drug problem.⁹⁶ However, the court cited no legal duty to protect the student from illegal drug use and ruled that it was unforeseeable that the student would overdose.

Even though universities increasingly are held to a duty of reasonable care, some cases still use reasoning from the “bystander” era.⁹⁷ For example, in *Tanja H. v. Regents of the University of California*, a female student sued after being raped by four members of the football team in her residence hall following a party.⁹⁸ The court held that the University was not the insurer of student safety, analogizing the student-institution residential situation to that of an innkeeper.⁹⁹ Reverting to its previous “bystander” era ruling in *Baldwin v. Zoradi*,¹⁰⁰ the California court found that it would be against public policy and impractical to require universities to closely monitor, and subsequently be held liable for, the behavior of adult students.¹⁰¹ The court’s decision focused on the student’s illegal consumption of alcohol.¹⁰² In this case, the female

⁹⁵ *Id.*

⁹⁶ See Eric Hoover, *4 Clark U. Officials Not Liable in Student’s Death from Apparent Overdose, Judge Rules*, CHRON. HIGHER EDUC., March 2, 2007, available at <http://chronicle.com>.

⁹⁷ See Blanchard, *supra* note 32.

⁹⁸ 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

⁹⁹ *Id.* at 919, 921.

¹⁰⁰ 176 Cal. Rptr. 809 (Cal Ct. App. 1981).

¹⁰¹ 278 Cal Rptr. at 920.

¹⁰² See Bickel & Lake, *supra* note 2, at 148. Bickel and Lake regard that ruling as bad social policy.

student had become intoxicated at her own volition, contrary to campus housing policy.¹⁰³

In a similar case, *L.W. v. Western Gulf Association*, a female student was raped by a male student when, after becoming intoxicated at a party, he brought her back to the residence hall. The court did not find that a duty to protect against foreseeable risk existed. “A university has a duty not to ‘facilitate criminal acts’ but a rape is not foreseeable simply because it is foreseeable that some students consume alcohol and have consensual sex.”¹⁰⁴

IV. State: Responding to Tragedy by Shaping Culture

Though institutions can not possibly be held accountable for the individual actions of all students,¹⁰⁵ universities would be derelict in not instituting policies regarding the possession and consumption of alcohol on campus. Unlike other liability risks that allow for discretion in policy making, underage alcohol consumption is illegal. However, such statutory backing has not made the job easier for universities: students continue to consume alcohol, even in violation of the law, and constituent groups such as alumni and local business owners make formidable opponents in curbing activities deemed as fun and traditional to college life, such as drinking at athletic events. In the case of “State,” the University faced such foes when it tried to address the cultural acceptance underage drinking has long enjoyed in the community and among its students. And like Tech and many other institutions today, State also faces other issues such as the growing problem of mental health issues among students, limited resources, staff turnover, privacy concerns, and information-sharing gaps.

¹⁰³ 278 Cal. Rptr. at 919.

¹⁰⁴ See Bickel & Lake, *supra* note 2, at 146, *citing* 675 N.E.2d 760 (Ind. Ct. App. 1997).

¹⁰⁵ Contributory negligence is the defense used in those instances.

State is a large public land-grant university in the South. There is no residential requirement for students, and many students live in nearby off-campus housing.¹⁰⁶ State perennially is ranked among top “party schools,” with a strong tradition of athletics and tailgating and an active bar scene that borders the campus both to the north and to the east. Alcohol and underage drinking are accepted in the community’s culture, and the state was among the last to change the drinking law from 18 to 21. State recognizes nearly 40 Greek-letter organizations, and that system faced local and national scrutiny when, in the mid-1990s, a fraternity pledged died in an alcohol-related hazing incident. As expected, after interviewing several administrators, many reflected on that incident as having a huge impact on student welfare-related policies.

Following the hazing death, the Greek life office instituted a Greek assessment process. According to one administrator, the University was concerned that no real standards existed for the chapters and expectations were not clear regarding acceptable behavior and the Greeks’ role in the university community. Today, the assessment process includes benchmarks and minimum standards common to all university organizations. As the administrator explained, Greeks are inextricably linked to the outside community through their social and philanthropic events and needed to be held accountable.

Soon thereafter, State was awarded a national grant as one of ten universities involved in an environmental management approach to curb underage and binge drinking.¹⁰⁷ To begin its work to change campus and municipal alcohol-related policy, the administrators of the grant formed a coalition that included state-level agencies and campus partners such as Greek life, residence life, student affairs, campus police, and student activities. The coalition worked to develop a plan that all entities were

¹⁰⁶ In 2005, 75 percent of students lived off campus.

¹⁰⁷ See Henry Wechsler et al., *Perception and Reality: A National Evaluation of Social Norms Marketing Interventions to Reduce College Students’ Heavy Alcohol Use*, J. of STUDIES ON ALCOHOL, July 2003, 484.

comfortable with and were “knowledgeable and committed.” The grant administrator described that the early progress of the coalition was to “work on small successes.” The coalition worked to educate students about local and state alcohol laws, to institute mandatory alcohol education for students,¹⁰⁸ to increase late night social activities on campus, to create a late-night transportation system, and to reduce incidents of underage and binge drinking.

Initially, campus departments were challenged to look at university policies that needed change and to modify existing ones. The grant administrator explained that the initial efforts of the coalition were well received because it worked on issues “not perceived as threatening to them [campus units or city partners] personally.” During the last four years of the ten-year grant, more complex policy initiatives were started: to eliminate alcohol and drugs on the street that borders the campus to the north, to institute alcohol-free family zones for campus events open to the public, to get more police to monitor football games, to install cameras in the student section of the stadium, and to amend the local ordinance governing drink specials at bars and restaurants.

As the coalition grew more ambitious in its policy efforts, the administrators of the grant faced opposition from former partners. The most notable example was when the coalition lobbied to change local drink special ordinances. Naturally, the coalition faced opposition from the business community. However, the measure also drew ire from the campus newspaper, which is self-governing and publishes advertisements from local bars, and the student government, which passed a resolution withdrawing its support of the coalition and grant project in response to the proposed ordinance.¹⁰⁹

¹⁰⁸ All freshmen must complete the online course “mystudentbody.com”.

¹⁰⁹ Language from the resolution included that the coalition “should focus more on this issue as opposed to lobbying for the suspension of rights and privileges because these policies affect all students, especially those of legal age” and the student government “publicly oppose and denounce the . . . initiative to ban drink specials.”

According to the grant administrator, “In their minds it would take away their fun and be more expensive to drink at bars. They weren’t understanding that bar owners make a lot of money off of them after they got drunk at their bars.”¹¹⁰

Even the university president at times has been resistant to several of the initiatives.¹¹¹ As the grant administrator explained, the state alcohol laws were not in line with other states. “The changes we were suggesting were not radical. They had already been done in other places.”¹¹² The grant administrator indicated a desire to have an office free from oversight by the university president but maintain strong ties with the president’s office in order to foster campus-community partnerships. The work of the coalition has been made more difficult because State has undergone major administrative changes during the last decade of the grant project: three university presidents, five provosts, and seven deans of students. According to the grant administrator, some top-level administrators were not comfortable with the environmental management model in place and were worried how the coalition’s initiatives would affect State’s image. The grant administrator admittedly has had to “mildly confront administration” which is an “uncomfortable place to be as a university employee. The only thing that saved us was that we were part of a grant.”

The alcohol coalition has had a bigger effect on alcohol-related issues through law and policy changes than through education, according to one student affairs professional, citing the strong culture of drinking and pro-alcohol lobby present in the state. “Education does not change behavior. It tells attorneys you’ve done what you’re

¹¹⁰ No representative from student government was present at the meetings, though invited, to discuss the formulation of the ordinance.

¹¹¹ Another initiative to reduce drinking on campus that faced opposition from top administrators was the issue of alcohol in skyboxes. According to the grant administrator, it was an issue of classism. It did, however, endear the coalition to the students, who rallied to try to eliminate the perceived inequity that only wealthy donors could have alcohol in the football stadium.

¹¹² In the opinion of a Greek life advisor, state regulations were not stringent enough on offenders and “only changed behavior short-term.”

supposed to be doing.” Several campus practices perpetuate the culture of drinking: campus advertisements to “drink responsibly” (which one staff member described as a relative term) and night football games that foster a drinking culture by widening the window for pre-game tailgating. “It perpetuates behavior if grandmas are passing out jello shots.”

Though the coalition has had success in changing the culture of alcohol at State, the issue remains troublesome within the Greek community. According to surveys conducted by the coalition within the past decade, Greeks indicated that they were provided alcohol at a significantly higher rate than those students who live off campus. Twenty-seven percent of students who live in Greek housing report that they have at some time considered themselves to have a drinking problem, compared to 12 percent of off-campus students and seven percent of residential students. However, binge drinking could be considered high among all students: 85 percent of Greek residents surveyed indicated that they got drunk at least once in a 30-day period; 73 percent of off-campus and 69 percent of residential students indicated the same.

According to an advisor, Greeks are able to drink more often and in greater quantities; they are more social, more organized, and collectively have more money. In 2007, there were four alcohol-related hospital transports in four weeks among first-semester Greek women. However, this problem is not unique to the Greek system. According to a campus judicial officer, last year hospital emergencies caused by abnormally high blood-alcohol levels increased overall.

Greek life administrators are acutely aware of the liability risks inherent in monitoring the active social lives of the campus chapters. As a Greek life advisor explained, per university policy and insurance, no legal defense is available if free alcohol is offered at a Greek social. In response, chapters have recused Greek affairs from liability by assuming responsibility for oversight of these events. Though

approximately 90 percent of lawsuits are filed by members,¹¹³ chapters continue to take the risk because they do not want to be the only Greek organization on campus to not allow alcohol, as it would hurt recruitment.

Greek members also have become savvy in identifying loopholes in alcohol-related policies. Greeks at State have adopted a policy whereby Panhellenic chapters will not attend events at a fraternity house if alcohol is present. However, as a result, mixers have been moved off-campus—which are not monitored by Greek affairs. It has evolved into a situation, according to a Greek life administrator, whereby fraternities have begun to pay for an open bar to entice sorority participation.

Liability insurance does not cover Greek chapters when in violation of state law and national chapter regulations (e.g., underage drinking). The risk of legal liability rises when alumni advisors have knowledge of policy and law infractions yet do not take action. The Greek advisor at State would like to see more intervention nationally from university presidents, citing a case whereby a president at a peer institution waived a sanction against a chapter involved in a hazing death. The Greek administrator described it as a “Catch-22”: if a university or national organization says the chapter is guilty, they, in essence, admit to the crime and expose themselves to litigation.

The hazing death that occurred in the 1990s is not the only major incident to affect policy within Greek affairs and the campus at-large. The Greek life administrator shared how a natural disaster within the past five years altered the way by which many student programs are run. “No one will ever know the journey.” From residential life to Greek life, administrators commented that students suddenly were more focused on their families and survival than on partying and rule-breaking. Likewise, campus resources were stretched thin and policy and practice shifted, as “lives were upside down.”

¹¹³ This statistic was provided by the Greek life advisor at State.

In the wake of that disaster, the Greek life office changed the method in which hazing and other infractions were investigated. During this time, the office hired a new judicial officer who helped introduce a self-reporting system. The office examined the policies and practices of peer institutions and has been pleased with the process. Prior to that, the office employed what was described as a “non-user friendly” approach in which Greek members were called out of class and the Greek life office was solely in charge of fact finding in judicial cases.

Now, when the office receives information about a Greek-related incident, that information is shared in cooperation with the main campus judicial office. Much like member institutions of the NCAA that self report and propose sanctions, Greek chapters are allowed to propose appropriate sanctions. If the infraction is egregious, however, the University has the option of notifying the national chapter office. A due process policy is in place if the two parties (i.e. the University and the chapter in question) do not agree on the sanction or facts of the case. So far, only one Inter Fraternity Council (IFC) chapter has denied the facts of a case brought before the office. “Our biggest fear was trust,” but according to the director of Greek life this new system has worked well.

The judicial process also has undergone change within the dean of students’ office and residence life. Because approximately 5,000 of the nearly 30,000 students enrolled at State live on campus, there is a separate judicial affairs officer that is allowed to adjudicate lower-level infractions (e.g., noise offenses and first-time alcohol offenses) that occur within the residence halls.¹¹⁴ In housing, the judicial officer has seen an overall drop in cases, attributing it to “smarter kids.” For example, some supply incorrect home addresses to avoid parental notification letters reaching their parents. However, the reduced number in cases may be because the majority of off-campus

¹¹⁴ The sanction for a typical lower-level alcohol infraction is two-semester warning probation, a reflective essay, and sometimes five hours community service. Upper-level infractions (e.g., drugs or a keg in a residence hall room) involve a conversation between the housing judicial office and the judicial officer in the dean of students’ office.

incidents never get reported to the campus judiciary.¹¹⁵ There is no cooperative agreement between State and the local police. Judicial officers only are made aware of off-campus incidents, such as DUI, when they appear in the local newspaper.

According to the housing judicial affairs office, parental notification is utilized in approximately one-third of first offense alcohol violations (and usually some other infraction is involved). A second offense carries mandatory parental notification, warning or disciplinary probation, a mental wellness referral, and sometimes ten hours of community service and/or an ethical decision making class. Students tend to be accepting of sanctions—which, according to the residence life judicial officer, could possibly be attributable to the fact that many students come from private high schools and, thus, are more accepting of authority or, also, because incoming students overall tend to be of a higher caliber than in the past. Parents do sometimes call for more information after receiving a parental notification letter but, overall, are supportive of the decisions from the housing office and campus judiciary.

Parental notification was one of several policies to be changed after a new dean of students and other upper-level student affairs administrators recently were hired. The main campus judicial officer indicated that, prior to this, implementation of the parental notification policy was not consistent and was sporadic, usually not enforced until a second offense. However, the implementation of the parental notification policy still does not seem to be uniform at State. According to the residence life judicial officer, parental notification is used in approximately one-third of first-time cases yet the chief judicial officer in the dean of students office indicated that all first-time infractions—whether adjudicated through his office or through residence life—result in parental notification.¹¹⁶ The disconnect between policy and practice can be attributed to, in some

¹¹⁵ According to the main judicial affairs officer, that office hears nearly 1,000 cases a year.

¹¹⁶ That administrator does not believe students' fear of parental-notification has deterred first offenses.

degree, staff turnover—which also affects organizational culture by diminishing institutional memory. (For example, according to State’s chief judicial officer, the binge drinking case from the 1990s that sparked so many policy changes and was central in garnering the national grant to reduce underage drinking was an “outlier” that no longer affects policy decisions. However, other campus officials did indicate that that event continues to affect many policy decisions.)

According to the chief judicial officer, State is very decentralized in authority and some resistance occurred when the dean of students’ office recently tried to change policies. However, the residence life judicial officer indicated that the new administration in student affairs has fostered more collaboration between residence life and the judicial affairs office, and now residence life is empowered to interact more with affiliated faculty (e.g., through residential colleges). Before, according to the residence life judicial coordinator, the system was an “old boys” network: those at the coordinator level or below were not consulted on policy formation and decision making. Collaboration and “buy-in” are important when instituting new policies. In Greek life, for example, that office sought chapters’ input of the assessment process before and after it was implemented.¹¹⁷ “If you give them the why, they understand it.”

Though there is a parental notification policy in place regarding underage alcohol abuse, parental notification for mental health issues is done on a case-by-case basis. Residence life does not have a parental notification policy regarding mental health emergencies, but the dean of students’ office collaborates with the campus mental health office to refer students and to consult on students known to be at risk. Regarding the decision to intervene, the residence life judicial officer said the standard is to “go by gut” but more policies are needed to outline what to do. When deciding whether parents should be called, it is a balance between parental need-to-know over “touchy feely.” The

¹¹⁷ However, Greek life does have oversight. “If there is one weak link, then the whole community will suffer.”

residence life office does not remove a student for a suicide attempt unless another major policy was broken (e.g., threatening other students, weapons, or drugs).

Student affairs administrators indicated there was some confusion regarding privacy law when the student health center was involved, but, as the chief judicial officer explained, State “doesn’t want someone to die in our hands.” State has seen an influx in counseling referrals and some students, though strong academically, are not suited for an environment such as the one at State, according to one student affairs professional.

Every Monday administrators from mental health, the dean of students’ office, judicial affairs, and the police department meet to discuss students at risk, but there is a balancing act for mental health practitioners to protect the privacy of students.¹¹⁸ The mental health unit of student health services includes education and counseling services and has a staff of three social workers, four clinical psychologists, and one psychiatrist, along with three pre-doctoral interns and six master’s-level social work interns. All full-time students pay a fee that entitles them to unlimited counseling sessions. The office normally reaches capacity mid-term and prioritizes walk-in emergencies and outsources new clients.

Education is key in diffusing confusion and fear surrounding privacy laws, as different privacy laws and professional standards exist for mental health practitioners than student affairs administrators. According to a mental health professional at State, faculty there lack knowledge about the referral process and student privacy—as many fear liability and often do not share information about students in crisis.

In regard to parental notification, the mental health office attempts to protect student confidentiality but, if a student exhibits high-risk behavior, the counselor will work to gain permission to call parents—a practice that was in place before the recent modifications to FERPA. According to a mental health administrator, younger mental

¹¹⁸ Campus mental health counselors will not divulge if a student is a client nor reveal privileged information. They do accept referrals as part of judicial sanctions.

health professionals view parental notification as “black and white” because of confidentiality concerns, and many are reluctant to share information or contact parents.

At State, policy is not static and practice changes in light of current issues. One administrator likened it to a “live and learn” mentality—certain policies did not exist prior to pivotal events because no one had anticipated their necessity.¹¹⁹ One administrator commented that universities always had a duty to prevent harm at a reasonable standard, but now courts hold students to that standard as they interact within the community and their actions impact others. The onus is for the University to teach students to “go out untethered.” At State, the dean of students does not regulate behavior off campus unless students are acting in an official capacity representing the institution. However, some administrators think universities will be tested if they know about underage drinking and drugs in student-predominant neighborhoods within the surrounding community. Regardless of the liability risks, most administrators see their role in student affairs under a different lens than a risk management-centered view. A Greek life administrator commented that students can be encouraged to make good decisions but “you can’t control 3,000 students.”

¹¹⁹ Gary Pavela uses the Virginia Tech tragedy as an example in which no one could have anticipated such a catastrophic event. See Gary Pavela, Address at the 38th Annual Conference on Higher Education and the Law (Aug. 8, 2007).

CHAPTER 3
MENTAL HEALTH LIABILITY, PRIVACY CONCERNS,
AND THE APPLICATION OF PARENTAL NOTIFICATION

Though the formulation of institutional policy regarding alcohol is made easier because underage alcohol possession and consumption is illegal (and the majority of college students do not reach majority age until their senior year), policy decisions regarding other aspects of student welfare become more difficult. For example, in regard to mental health, privacy issues are of a concern to many administrators and have affected policies regarding the sharing of information about mentally ill students. However, Congress has modified privacy laws to allow for universities to contact parents in certain situations.¹ Universities often are restricted in how much support they are able to offer troubled students because of limited resources. Many schools do not offer psychiatric services except for outsourced referrals. Funding is a primary issue, as many colleges and universities do not charge students for services rendered but instead rely on student fees.²

Sections I and II of this chapter will expand the previous legal discussion regarding alcohol-related student injuries and death and will explore the liability institutions can incur for the care of students with mental illness and also will explore the efficacy of parental notification policies that have been enacted since Congressional modifications to privacy laws—both for underage alcohol violations and mental health

¹ However, no legal case has deemed institutions are required to do so.

² See Stephanie Bishop Ives, *The University of Pennsylvania's Response to the Changing Needs of Students for Psychological Services: An Analysis of Decision Making, Institutional Liability, and Resource Allocation* at 6, 13 (2005) (unpublished Ed.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania).

emergencies. Many universities have decided to institute such policies but to varying degrees. At State and Tech, for example, parents are notified on the first or second offense, respectively, of alcohol policies. However, neither school has a definitive policy regarding mental health emergencies. At Tech, a critical response team handles these situations. Many schools deal with such issues on a case-by-case basis, normally determined by a senior student affairs administrator. In the *Jain* case, to be discussed later in this chapter, the University of Iowa had a parental notification policy regarding suicide attempts but did not invoke it when a student threatened to kill himself.³

Section III of this chapter introduces two cases. First, prior to conducting my three-institution qualitative case study, I piloted part of this dissertation study at the University of Georgia by examining what were the key considerations when the university's alcohol parental notification policy was first instituted. (That policy later was modified following the tragic alcohol and drug-related death of a freshman student.) Next I discuss "Private," the third university included in the case study, which is a private institution with a large endowment and influential alumni. I examined how constituents influence policy making there and how privacy concerns, organizational structures, and legal issues affect who decides what information is shared and with whom.

I. Institutional Liability for Mental Health and Suicide

Institutions are enrolling students with mental health issues at a higher rate than ever before.⁴ Until recently, courts have not held universities liable for a student's death, even when the actions of administrators and counselors could be viewed as negligent,⁵

³ *Jain v. State*, 617 N.W.2d 293 (Iowa 2000).

⁴ See Darby Dickerson, *Legal Issues for Campus Administrators, Faculty and Staff*, in COLLEGE STUDENT MENTAL HEALTH: EFFECTIVE SERVICES AND STRATEGIES ACROSS CAMPUS 35 (Sherry A. Benton & Stephen L. Benton eds., 2006).

⁵ In *McMahon v. St. Croix Falls School District*, 596 N.W.2d 875 (Wis. Ct. App. 1999), the court stated that "a court can deny recovery if it concludes . . . the injury is too remote from the negligence." Conversely, in *Hoeffner v. The Citadel*, 429 S.E.2d 190 (S.C. 1993), where a medical professional was found negligent in a student's care, even though the student committed suicide, the Supreme Court of South Carolina overturned

because suicide historically has been considered an “intervening act”⁶ that could not be foreseen or predicted.⁷ However, because of the custodial nature of K-12 schools and the age of students involved, courts have, in instances, held school districts to a higher standard of care.

In *Eisel v. Board of Education of Montgomery County*,⁸ the Maryland Supreme Court was the first to hold a school district liable⁹ for a student’s suicide because employees could reasonably have foreseen that she might attempt suicide yet did not contact her parents nor take appropriate preventative measures.¹⁰ In that case, a 13-year-old student made suicidal remarks to classmates who, in turn, reported it to a school counselor.¹¹ Allegedly, the counselors questioned the student about these statements yet she denied them.¹² Not long after, she was killed by another student in an apparent suicide-murder pact.¹³

Basing its decision on the premise that the district owed the student a duty of care to attempt to prevent her suicide, the court imposed a standard that previously had been reserved for mental health practitioners.¹⁴ In its determination of liability, the *Eisel* court examined six factors: (1) foreseeability, (2) public policy of preventing harm, (3) the

the trial court’s finding that the student assumed a risk when he sought treatment from the doctor and instead found that the doctor could be held personally liable for the student’s suicide.

⁶ See, e.g., *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960) (holding that a non-medical campus official could not have foreseen a student’s death).

⁷ See, e.g., *Jain v. State*, 617 N.W.2d 293 (holding that an institution was not liable for failing to enforce a University policy regarding parental notification of a student’s suicidal tendencies).

⁸ 597 A.2d 447 (Md. 1991).

⁹ See Richard Fossey & Perry A. Zirkel, *Liability for Student Suicide in the Wake of Eisel*, 10 TEX. WESLEYAN L. REV. 403, 407 (2004).

¹⁰ *Id.* at 456.

¹¹ 597 A.2d at 449.

¹² *Id.* at 449-50.

¹³ *Id.* The school counselors denied ever speaking to the decedent about her suicidal thoughts. See *Id.* at 449 n. 2, cited in Fossey & Zirkel, *supra* note 9, at 408.

¹⁴ See Fossey & Zirkel, *supra* note 9, at 407.

nexus of the defendants' conduct and the injury, (4) moral blame, (5) burden on the defendant, and (6) insurability.¹⁵ The controlling factor the *Eisel* court used was the foreseeability that the student would injure herself, as the school had "actual knowledge of Nicole's intent to end her life."¹⁶ Also, Maryland had enacted a "Suicide Prevention School Programs Act," and the school had a policy that encouraged students to share any knowledge they had of a student's intention to harm herself with someone of authority.¹⁷

Additionally, the court rejected the school district's defense that the student's suicide was "a deliberate, intentional and intervening act which precludes a finding that a given defendant is responsible for the harm."¹⁸ The *Eisel* decision was amorphous, however, as it did not delineate whether the ruling only applied to school counselors or to other school personnel, nor did the decision define what constitutes "reasonable means" to protect student safety, such as parental notification or more drastic measures like securing psychological treatment.¹⁹

A similar ruling followed *Eisel* in *Wyke v. Polk County School Board*,²⁰ in which the Eleventh Circuit applied Florida tort law to uphold a jury trial's finding that a school district was negligently liable for a student's suicide. The student twice attempted to commit suicide on school grounds, and school officials failed to notify his parents. Later, the 13-year-old student hung himself at home.²¹

¹⁵ *Id.* at 408, *citing Eisel*, 597 A.2d at 450-52.

¹⁶ See Fossey & Zirkel, *supra* note 9, at 408.

¹⁷ *Id.* at 409.

¹⁸ *Id.* at 409, *citing Eisel*, 597 A.2d at 454. By this time, courts had begun to reject the argument held in the early higher education case *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960) that suicides were criminal acts by the decedent and, thus, insulated institutions from liability.

¹⁹ See Fossey & Zirkel, *supra* note 9, at 410.

²⁰ 129 F.3d 560 (11th Cir. 1997).

²¹ *Id.* at 564-65.

Despite the rulings in *Eisel*²² and *Wyke*,²³ school district liability regarding a duty of care predicated on parental notification generally is not recognized in other jurisdictions.²⁴ Actually, the defense that suicide is an “intervening and superseding cause”²⁵ continues to be applied. In the *McMahon v. St. Croix Falls School District*, for example, a school district escaped liability following the suicide of a high school freshman who was experiencing academic and personal problems.²⁶ A friend, concerned about the decedent’s depressed state, had contacted a school counselor, indicating that the decedent planned to skip school that day and should be checked on. The counselor did not contact anyone and the friend later found the student dead from self-inflicted burns.²⁷ The court did not consider whether a duty existed and if the student’s suicide was foreseeable.²⁸ It instead deferred to its 1960 ruling in *Bogust v. Iverson*,²⁹ a higher education case in which suicide was considered to be an intervening act that precluded any liability from being imposed on the institution.

Though courts in the 1960s recognized *in loco parentis* as a form of legal immunity, today’s legal reasoning has shifted. Applying tort theory, foreseeability and duty of care have been the standards by which parents of decedents have brought

²² 597 A.2d 447 (Md. 1991).

²³ 129 F.3d 560.

²⁴ *E.g.*, in *Grant v. Board of Trustees of Valley View School District*, 676 N.E.2d 705 (Ill. App. Ct. 1997), the court failed to hold the school district liable in light of a state statute, 105 Ill. Comp. Stat. 5/10-22.39, that conferred the power of *in loco parentis* and immunity. A mother sued the school after the school called and asked her to take her son to a hospital following a drug overdose but failed to mention his suicidal ideations. One day later he jumped to his death from a highway overpass. See also Fossey & Zirkel, *supra* note 9, for an analysis of recent cases regarding K-12 school district liability and student suicide.

²⁵ See, e.g., *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875 (Wis. Ct. App. 1999).

²⁶ *Id.* at 877.

²⁷ *Id.* Despite a school policy to call parents when a student is absent, the school did not do so that day.

²⁸ *Id.* at 882.

²⁹ 102 N.W.2d 228 (Wis. 1960).

negligence suits against universities and their employees. However, until the test of foreseeability and duty of care was established, suicide generally was viewed as a criminal act.

In 1960, in *Bogust*,³⁰ the Supreme Court of Wisconsin held that a student's suicide was an intentional act and, thus, rejected the argument that a duty was breached by the negligent care of a college administrator.³¹ The decedent had undergone counseling and personality tests with the defendant, who was the director of the University's counseling center. Six weeks prior to her suicide, that counseling relationship ended.³² The court found that because the defendant was not a medical doctor³³ and was not an "insurer of health,"³⁴ he could not reasonably have foreseen the need for her to receive further psychiatric help³⁵ or to contact her parents³⁶ nor was his negligence a cause of her death.³⁷

However, as *in loco parentis* defenses are no longer recognized and courts now impose a duty of reasonable care on institutions,³⁸ universities increasingly are being held liable for student suicides. In *Wallace v. Broyles*³⁹ the Supreme Court of Arkansas reversed earlier summary judgments and remanded for trial the issue of negligence by the Arkansas State University athletic director and head athletic trainer following the suicide of a football player who had been given Darvocet, a prescription

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 229, 232.

³³ He did, however, have a Ph.D. and served as a full-time director in student personnel services. *Id.* at 229.

³⁴ *Id.* at 230.

³⁵ *Id.* at 231.

³⁶ *Id.*

³⁷ *Id.* at 232. Also, the court also considered that the student perhaps had mental problems prior to seeking help from the defendant. *Id.* at 140.

³⁸ See ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 23 (Carolina Academic Press 1999).

³⁹ 961 S.W.2d 712 (Ark. 1998).

pain killer, without proper prescription from a medical doctor. The court found that, for the negligence claim to continue, the plaintiffs need not prove that the actions of the athletic staff were the direct cause of the suicide but that the athletic department staff was negligent in foreseeing the potential for injury and failing to act accordingly.⁴⁰ Citing the ease by which the decedent claimed he could obtain the drugs,⁴¹ the court found several factors created an issue of fact that the two employees acted with “such conscious indifference to the consequences that malice may be inferred,”⁴² including that the athletic department knew trainers were not qualified to dispense such drugs and that the department knew the decedent had suicidal tendencies and issues with alcohol.⁴³

Based on similar rationales, in *Schieszler v. Ferrum College*,⁴⁴ summary judgment was denied to the University and dean of students when the court concluded that a jury could find that it was foreseeable that the student would hurt himself yet university employees failed to take appropriate action.⁴⁵ Michael Frentzel, the decedent, had a history of disciplinary issues during his first semester. He began to express suicidal thoughts when he started to experience problems with his girlfriend. After she notified campus authorities, a residence hall assistant and campus policeman went to his room to find that he had self-inflicted wounds. As a result, the dean of students required that Frentzel sign a pledge to not hurt himself again. However, the dean did not take further steps to supervise him nor refer him to counseling. Within the next three

⁴⁰ *Id.* at 715. Though there were no traces of Darvocet in the decedent’s system at the time of his suicide, testimony showed that the depressive effects caused by the drug could continue a month after use. *Id.* at 718.

⁴¹ *Id.* at 718.

⁴² *Id.*

⁴³ *Id.* at 719.

⁴⁴ 236 F. Supp.2d 602 (D. Va. 2002).

⁴⁵ *Id.* at 615. Summary judgment was granted to the resident hall assistant that assisted Frentzel because she did all in her power per University policy to seek help.

days, Frentzel wrote two more suicidal notes to his girlfriend. University officials failed to respond to the first note; after the second note, they found him hanging in his room.⁴⁶

Lacking state judicial precedent to support a claim that a duty was owed solely from a “special relationship” between a university and its students,⁴⁷ the court did find that a negligence suit could continue because Virginia law had recognized a duty to protect others from foreseeable harm in other contexts.⁴⁸ Noting that most Virginia law pertaining to an affirmative duty to protect dealt with injury as a result of third-party action—and not self-inflicted injury such as suicide⁴⁹—the court found that the specific facts of the case⁵⁰ could be construed as initiating a duty to protect the student from foreseeable harm and that the University’s inaction could be found as a proximate cause of the student’s death.⁵¹ The case cited *Mullins v. Pine Manor College*⁵² in ruling that Ferrum College did not technically stand *in loco parentis* but, nonetheless, “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.”⁵³ Frentzel’s parents later settled the case with the University, admitting “shared responsibility.”⁵⁴

⁴⁶ *Id.* at 605.

⁴⁷ *Id.* at 608. Interestingly, the court did cite case law in which a special relationship existed between an innkeeper and guests and landowners and invitees; however, the plaintiffs did not bring forth a claim that there was a special relationship by virtue of the university-resident relationship. *Id.* at 606.

⁴⁸ *Id.* at 608-9, *citing* *Thompson v. Skate America, Inc.*, 540 S.E.2d 123 (Va. 2001) (a case involving a landowner and his invitees and foreseeable harm by a third party).

⁴⁹ 236 F. Supp.2d at 610.

⁵⁰ E.g., the fact that the dean of students required Frentzel sign a pledge to not hurt himself further.

⁵¹ 236 F. Supp.2d at 609, 612.

⁵² 449 N.E.2d 331 (Mass.1983) (a case that was not about suicide but also struck down the theory that a university stood *in loco parentis*).

⁵³ *Id.*, *cited by*, GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 6 (College Administration Publications 2006).

⁵⁴ See Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, CHRON. HIGHER EDUC., August 12, 2005, at A2.

Another recent suicide case received much attention in higher education discourse. MIT has been widely known for an alarmingly high number of student suicides on its campus.⁵⁵ The case of Elizabeth Shin was vastly monitored and forecasted as being pivotal in establishing the right to regain damages from individual campus administrators, as a ruling from a Massachusetts trial judge allowed the individual negligence suits against MIT student affairs staff and psychiatrists to go forth.⁵⁶ However, in April 2006 Shin's parents settled the case with MIT for an undisclosed sum.⁵⁷

Beginning during her second semester at MIT, Shin was hospitalized several times and treated by various campus psychiatrists and counselors for adjustment problems. On the day of Shin's suicide, prompted by credible threats reported by her friends that Shin would try to kill herself, her residence hall director and another MIT student affairs administrator (both of whom had been involved with her case and knew of her deteriorating mental state) met with the on-campus psychiatric staff (four of whom had treated Shin at varying times within the previous two years). Shin was notified via voice mail that she had an appointment at a treatment facility the next day. However, at

⁵⁵ There were 11 suicides at MIT in 11 years. See, e.g., Elizabeth F. Farrell, *A Suicide and its Aftermath*, CHRON. HIGHER EDUC., May 24, 2002. MIT faced another lawsuit recently in the case of *Carpenter v. MIT*, 19 Mass. L. Rep. 339 (Super. Ct. Mass. 2005) (where plagued by the stalking of a fellow resident, Julia Carpenter killed herself after she learned that the stalker would be allowed to remain in her residence hall. Evidence was introduced that the mother of Carpenter's friend sent an email to MIT president and dean, expressing her concern for Carpenter's mental health).

⁵⁶ *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005).

⁵⁷ Because the case was settled and never reached the appellate level, "[t]he preliminary ruling in *Shin* will be cited with caution, if at all, by lawyers and judges alike," according to Gary Pavela, a judicial affairs officer at the University of Maryland, College Park. See Eric Hoover, *Settlement in MIT Case May Give Colleges 'Breathing Room' in Developing Policies for Depressed Students*, CHRON. HIGHER EDUC., April 5, 2006, available at www.chronicle.com.

9pm, MIT police responded to a fire alarm in Shin's residence hall. She had set herself on fire and died four days later from the resulting injuries.⁵⁸

Prior to the settlement, the trial judge had denied the campus psychiatrists summary judgment regarding gross negligence because they had failed to enact a plan when they learned, on the morning of Shin's suicide attempt, that she had expressed her plan to kill herself.⁵⁹ One psychiatrist, who although had not treated Shin for a year, also was not granted summary judgment because she knew of Shin's previous condition and was present at the meeting the day of Shin's suicide yet failed to act in protecting Shin from foreseeable harm.⁶⁰ Additionally, despite the fact that they were not medical personnel,⁶¹ the student affairs professionals were not immune from liability, and the court allowed charges to continue against them for negligence and wrongful death. Citing *Schieszler*,⁶² the judge rejected the administrators' assertion that the absence of a custodial relationship barred them from personal liability⁶³ and, instead, considered the imminent probability of harm Shin would cause herself, the knowledge the administrators had regarding Shin's condition, and their failure to act to protect Shin—particularly on the day of her suicide.⁶⁴

Despite these rulings, the court did not recognize the parents' claim that MIT violated an implied contract: Though there were general statements in the MIT handbook and brochures offering counseling and other student services, these did not give rise to specific promises.⁶⁵ Even the promise the residence hall director made to the Shins that she would keep them abreast of their daughter's problems did not

⁵⁸ *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005) at 2-10.

⁵⁹ *Id.* at 16.

⁶⁰ *Id.* at 20.

⁶¹ See *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960) (where the court did not hold non-medical professionals to a standard of preventative care).

⁶² 236 F. Supp.2d 602 (D. Va. 2002).

⁶³ *Shin*, No. 02-0403 (Mass. Super. Ct. June 27, 2005) at 20.

⁶⁴ *Id.* at 23.

⁶⁵ *Id.* at 11-13.

constitute promissory estoppel.⁶⁶ It is important to note, just as in the *Schieszler* case,⁶⁷ the court in *Shin* did not rule that the University must notify parents of their child's psychological problems but instead administrators must exercise a duty of care when imminent danger is foreseeable.⁶⁸

Since the end of *in loco parentis*, courts often utilize contract theory to interpret the student-institution relationship.⁶⁹ Though it seldom has been recognized, some plaintiffs assert that a contractual relationship exists between a university and its on-campus residents. In cases unrelated to student suicides, courts have held universities liable for a duty of care assumed through the campus housing contract vis à vis the landlord-tenant relationship.⁷⁰ However, Baker argues that, unless expressly created through the housing contract, the student-institution residential situation does not create a special relationship.⁷¹ This is because a university housing situation is not completely

⁶⁶ *Id.* at 14. *Promissory estoppel* is a principle in which when a false promise is made, and the person doing so is cognizant that the receiving party relies on that promise, the terms may be enforced if it is to the detriment of the receiving party. BLACK'S LAW DICTIONARY 591 (8th ed. 1999).

⁶⁷ 236 F. Supp.2d at 602.

⁶⁸ See Thomas R. Baker, *Notifying Parents Following a College Student Suicide Attempt: A Review of Case Law and FERPA, and Recommendations for Practice*, 42 NASPA J. 513, 515 (2005).

⁶⁹ See generally Kerry Brian Melear, *The Evolution of the Contract Theory of Institution-Student Relations in Higher Learning: A Legal-Historical Analysis* (2001) (unpublished Ph.D. dissertation, The Florida State University).

⁷⁰ *E.g.*, *Nero v. Kan. State U.*, 861 P.2d 768 (Kan. 1993) (holding a university liable for failing to notify a student of the foreseeable danger created when an accused rapist was assigned to her coed residence hall and he later assaulted her); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983) (rejecting *in loco parentis* immunity claims, the court held that the institution was negligent in failing to provide security when a resident was abducted by an intruder). See generally Douglas R. Pearson & Joseph C. Beckham, *Negligent Liability Issues Involving Colleges and Students: Balancing the Risks and Benefits of Expanded Programs and Heightened Supervision*, 42 NASPA J. 460, 461 (2005) for a review of institutional negligence liability.

⁷¹ See Baker, *supra* note 68, at 520. In regard to suicides, normally special relationships (i.e. landlord-tenant relationships) are not considered as giving rise to a duty of protection. However, Iowa—the state in which *Jain v. State*, 617 N.W.2d 293 (Iowa 2000) was decided—exempts campus housing in its landlord-tenant law. That state's courts have yet to rule if this precludes liability from negligence in campus residential

analogous to the *in loco parentis* situation created in the K-12 setting, as students are recognized as adults and have more personal freedom, thus releasing the institution from a heightened duty of care.⁷² Also, it is not analogous to a custodial situation, created in prisons or mental facilities.⁷³ However, some speculate that parents soon may claim that universities have a fiduciary duty to assist students through the transitional period of college adjustment.⁷⁴

II. The Role of FERPA in Ensuring Student Safety

The Family Educational Rights and Privacy Act (FERPA)⁷⁵ provides strict regulations for protecting student records but also has been amended to allow for certain information to be shared with parents and professionals in time of student crisis. This section explains some of the regulations under FERPA, reviews relevant case law, explores the modifications that have been made—specifically as they relate to alcohol and mental-health related issues, and discusses the unfortunate confusion that continues among administrators and lawmakers alike as to what information is permissible to share in times of crisis.

relationships. See Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, n.121 (2002).

⁷² One potential claim arising from the residential relationship could be in negligent facility design. Plaintiffs could argue foreseeable risk if barriers atop high-rise complexes are not present so as to not allow an avenue for students to injure themselves. See Baker, *supra* note 68, at 522.

⁷³ See, e.g., Hickey v. Zezulka, 443 N.W.2d 180 (Mich. Ct. App. 1989) (where the University was held liable for the care of a student who committed suicide while being detained in a campus jail).

⁷⁴ See Lake & Tribbensee, *supra* note 71, at 146, *citing* Stanton v. U. of Me. Sys., 773 A.2d 1045, 1045 (Me. 2001) (a case holding that no implied contract existed but that a school could be held liable for breach of duty and failure to act on the foreseeable danger that an underage student, staying in campus housing during a summer camp, could be sexually assaulted and had not been properly warned to take precautions).

⁷⁵ 20 U.S.C. § 1232g (2000).

A. Defining student records

FERPA,⁷⁶ adopted in 1974, was promulgated to prevent the “abuse of student records across the nation,” while continuing to allow for parental and student access.⁷⁷ Because scant legislative history exists regarding FERPA’s intent,⁷⁸ courts have been divided over whether it is designed to prevent violations by institutions or to protect individual rights.⁷⁹ Adopted without public hearing or committee reports, FERPA was, according to its sponsor U.S. Senator James L. Buckley of New York, intended to protect student privacy while continuing to allow parental and student access.⁸⁰ However, debate divided courts over whether FERPA’s intent was to prevent systematic violations by institutions or to protect individual rights.

Though the language of FERPA does not specifically address the issue, no court has held that there is a private right of action under the Civil Rights Act (which allows an individual to seek damages for the deprivation of a Constitutionally protected right by a state actor).⁸¹ Because FERPA violations are not privately actionable, the only penalty

⁷⁶ *Id.* The act commonly is referred to as the Buckley Amendment, named for its sponsor

⁷⁷ See Sandra L. Macklin, *Students’ Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1325 (1999).

⁷⁸ See Ethan M. Rosenzweig, Comment, *Please Don’t Tell: The Question of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 465 (2002).

⁷⁹ See, e.g., *Bauer v. Kincaid*, 759 F. Supp. 575, 589-90 (W.D. Mo. 1991) (holding that the purpose is not to protect student privacy); *United States v. Miami U.*, 91 F. Supp.2d 1132, 1152 (S.D. Ohio 2000) (holding that FERPA does protect disciplinary records); *Doe V. Red & Black Publ’g Co.*, 437 S.E.2d 474, 474 (Ga. 1993) (holding that disciplinary files are not part of the educational record protected by FERPA regulations).

⁸⁰ See Macklin, *supra* note 77, at 1325. Because of the scant legislative record as to the act’s intent, Congress allowed Buckley to provide a narrative clarification of FERPA. See Rosenzweig, *supra* note 78, at 465 (citing 120 Cong. Rec. 39,863 (Dec. 13, 1974)). The “Joint Statement in Explanation of Buckley/Pell Amendment” states that the Act intended to broadly define educational records, as opposed to the narrow list of protected information in the original legislation. See 20 U.S.C. § 1232g(a)(1) (2000) (amending 20 U.S.C. § 1232 (1974)).

⁸¹ 42 U.S.C. § 1983 (2000). See also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding that FERPA contains no language providing for § 1983 claims after the

for non-compliance or infractions is through reduction in federal education funding.⁸²

The Department of Education has yet to discontinue an educational institution's funding for violating FERPA—causing some to call the regulations “toothless.”⁸³

Under FERPA, student records have been defined as “those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution.”⁸⁴ Several cases that predated the 1998 amendments to the Higher Education Reauthorization Act (HERA)⁸⁵ questioned—and with varying answers—whether disciplinary records can be considered as part of an educational record.⁸⁶

In *Red & Black Publishing Co, Inc. v. Board of Regents*,⁸⁷ administrators at the University of Georgia denied the student-run newspaper access to records and disciplinary proceedings of the student-run Organization Court. The newspaper sued, claiming that such proceedings were subject to Georgia's Open Records Act.⁸⁸ In line

University revealed damaging information to the state teacher certification board); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989) (holding that a § 1983 claim was not permissible when the University denied a student access to his letters of recommendation for graduate school). However, in certain instances, § 1983 claims are permissible for statutory violations. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (pertaining to the miscalculation of welfare funds).

⁸² 20 U.S.C. § 1232g(a) (2000).

⁸³ See, e.g., Rosenzweig, *supra* note 78, at 454.

⁸⁴ 20 U.S.C. § 1232g(a)(4)(A). Records maintained by the institution's law enforcement agency are not protected, however.

⁸⁵ See Section 952 of the Higher Education Reauthorization Act of 1998.

⁸⁶ E.g., *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (holding that law enforcement records are not educational records and that such records pertain only to individual academic performance); *Norwood v. Slammons*, 788 F. Supp. 1020, 1027-28 (W.D. Ark. 1991) (holding contrary to *Bauer* that disciplinary records are protected by FERPA); *DTH Publ'g Corp. v. U. of N.C. at Chapel Hill*, 496 S.E.2d 8, 12-13 (N.C. Ct. App. 1998) (disciplinary proceedings are part of the educational record and do not need to be released to the public or press).

⁸⁷ 427 S.E.2d 257 (Ga. 1993).

⁸⁸ See O.C.G.A. § 50-18-70 (2003).

with the reasoning of *Bauer v. Kincaid*,⁸⁹ a previous decision that held that the purpose of FERPA is not to protect student privacy, the court reasoned that, because the UGA Office of Judicial Programs maintained the records of the Organization Court in lieu of the registrar (who maintained “educational records”), the proceedings were not protected by FERPA.⁹⁰ Soon after, a student filed a lawsuit to enjoin the campus newspaper from printing information from his campus disciplinary hearing. The Georgia Supreme Court ruled that a student’s disciplinary file is no different than the disciplinary proceedings of a campus organization—and is not an “educational record” protected by FERPA.⁹¹

However, a similar case decided four years later in another jurisdiction yielded a different result. A student editor of the Miami University of Ohio newspaper sued after she filed a request under the Ohio Public Records Act⁹² to obtain information from the university disciplinary board—minus any personally identifiable information—and was denied by University officials on grounds of FERPA regulations.⁹³ Drawing reasoning from the *Red & Black* case, the initial court ruling held that FERPA did not supersede state open records law, as disciplinary records do not contain information pertaining to academics or financial aid—which were considered to be protected information defined

⁸⁹ 759 F.Supp. at 589-90.

⁹⁰ See *Red & Black*, 427 S.E.2d at 261. Because the proceedings of the Organization Court concerned organizations (in this case fraternities and hazing) and not individuals, university officials did not interpret the *Red & Black* decision to have any effect on the way in which individual records were maintained and protected. See Rosenzweig, *supra* note 78, at 459, (citing Final Regulations, Family Educational Rights and Privacy, 60 Fed. Reg. 3,464, 3,465 (Jan. 17, 1995)).

⁹¹ See *Doe v. Red & Black Publ’g Co.*, 437 S.E.2d 474, 474 (Ga. 1993). Michele Goldfarb argued to Congress that if student privacy could not be guaranteed in school disciplinary hearings, “parties would have all the public intrusion involved in a criminal proceeding without the attendant protections.” See Rosenzweig, *supra* note 78, 449 n. 195.

⁹² Ohio Rev. Code Ann. § 194.43 (West 2005).

⁹³ See *Miami Student v. Miami U.*, 680 N.E.2d 956 (Ohio 1997).

as “educational records.”⁹⁴ Also, because the student had filed the open records request in an effort to maintain a database on trends in campus crime, the court felt that denying the press such access would compromise student safety.⁹⁵

Following that decision, other media outlets (e.g., *The Chronicle of Education*) filed similar requests to access student files.⁹⁶ The Department of Education advised the University that complying with these open records requests, despite the court’s ruling, would violate FERPA.⁹⁷

Subsequently, a federal district court later ruled that FERPA, indeed, does protect disciplinary records⁹⁸ and that nothing in the legislative history appeared to indicate that Congress intended to exempt such information from protection.⁹⁹ The court rejected the argument that FERPA limited First Amendment rights and that the student body would suffer if disciplinary records were not released, stating that data from the Campus Security Policy and Campus Crime Statistics Act (commonly referred to as the Clery Act, which requires educational institutions to make public statistics pertaining to certain violent crimes reported on campus)¹⁰⁰ was sufficient.¹⁰¹ (It should be noted that,

⁹⁴ *Id.* at 959.

⁹⁵ *Id.*

⁹⁶ See Rosenzweig, *supra* note 78, 464 n. 127.

⁹⁷ *Id.* n.128.

⁹⁸ See *United States v. Miami U.*, 91 F. Supp.2d 1132, 1152 (S.D. Ohio 2000). The Department of Education maintains the same stance. See Final Regulation: Family Educational Rights and Privacy, 60 Fed. Reg. 3,464 (Jan. 17, 1995) (codified at 34 C.F.R. § 99).

⁹⁹ See 91 F. Supp.2d at 1152.

¹⁰⁰ 20 U.S.C. § 1092(f) (2000). A loophole continues between FERPA and the Clery Act, where campuses may hide student-on-student crime, namely hazing, by adjudicating the violations through campus judicial procedures instead of reporting them to civil authorities. See Jamie Ball, *This Will Go down on Your Permanent Record (But We’ll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 Sw. U. L. REV. 477, 478-9 (2004).

¹⁰¹ See 91 F. Supp.2d at 1154, 1156, 1160. Though the Clery Act requires that campuses report on-campus arrests and disciplinary actions for liquor-law and drug-related incidents, it does not require that the statistics include public drunkenness, underage drinking, or driving under the influence. See Dennis E. Gregory & Steven M.

in efforts to alleviate previous conflicts with the Clery Act,¹⁰² FERPA since has been amended to allow victims of violent crimes to know of the discipline imposed on accused perpetrators during campus disciplinary hearings.¹⁰³)

B. Underage Alcohol Abuse and Parental Notification

The Higher Education Reauthorization Act of 1998 (HERA)¹⁰⁴ amended FERPA¹⁰⁵ so as to allow higher education institutions to disclose “information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student’s education records . . . “¹⁰⁶ so long as the student is not 21 years of age.

This legislation was significant as it took a sharp turn from the previously highly regulatory nature of FERPA.¹⁰⁷ In addition to the enabling provisions within HERA 1998,

Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—the Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 35 (2002).

¹⁰² See Clery Act § 1092(f). However, studies find that the Clery Act has been ineffective in reducing campus crime and changing attitudes about crime. See, e.g., Steven M. Janosik & Dennis E. Gregory, *The Clery Acts and Its Influence on Campus Law Enforcement Practices*, 41 NASPA J. 182 (2003) (finding that students do not use crime statistics in making personal safety decisions and that 90 percent of 371 campus law enforcement officials said Clery can not be credited in any change in crime rates).

¹⁰³ 20 U.S.C. § 1232g(b)(6). However, HERA 1998 further amended FERPA by allowing only the name of the accused, the offense, the disciplinary sanction, and the name of the victim or witness (with consent) to be disclosed in instances of violent crime and non-forcible sex offenses. See 20 U.S.C. § 1232g(b)(6)(B), (C).

¹⁰⁴ Section 952 of the Higher Education Reauthorization Act of 1998.

¹⁰⁵ 20 U.S.C. § 1232g (2000).

¹⁰⁶ *Id.* § 1232g(h)(i)(1). Interestingly, section 2 stipulates that the amendment shall not “supersede any provision of State law that prohibits an institution of higher education from making the disclosure . . .” In 2001, Missouri House Bill 424 and Senate Bill 456 proposed that institutions be prohibited from notifying parents of students older than 18, unless the student otherwise consented. See Lynne Hedgpeth, *U. Missouri Students Fight Parental Notification*, MANEATER, February 20, 2001, www.lexis-nexis.com.

¹⁰⁷ See generally 20 U.S.C. § 1232g (2000). The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 [HIPAA] (dealing with patient privacy) also does not preclude university administrators from contacting parents in cases of emergency, including alcohol poisoning. See Kevin Lees, *Privacy Law Has*

Congress has enacted legislation requiring educational institutions to take affirmative steps to educate students about drug and alcohol abuse.¹⁰⁸ One such measure is the Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption.¹⁰⁹ This statute outlines methods by which college and universities should address the issue: a task force of faculty and students, alcohol-free residential communities and social programming, and a “town/gown” alliance.¹¹⁰ The statute also suggests that institutions should adopt a “zero tolerance” approach to underage alcohol consumption on campus.¹¹¹

Unfortunately, a decade after Congressional action allowed universities to implement parental notification policies,¹¹² binge drinking continues to be pandemic on American campuses.¹¹³ Beginning in the late 1990s and continuing into this decade, American colleges and universities implemented policies in which parents could be notified of students’ violations of underage alcohol regulations¹¹⁴—all with varying

Little Effect on Duke’s Notification Policy, CHRON. HIGHER EDUC., January 8, 2003, available at www.chronicle.com. See also See Linda P. Rowe, *What Judicial Officers Need to Know About the HIPAA Privacy Rule*, 42 NASPA J. 498 (2005) (offering guidelines for student affairs practitioners as to which campus entities are exempt from privacy regulations, per 45 C.F.R. § 160.103 (2004)).

¹⁰⁸ *E.g.*, 20 U.S.C. § 1011i (2000) (requiring that institutions that receive federal funding implement programs for the prevention of alcohol and drug abuse, as well as provide students with written information regarding alcohol policies, the risks of consumption, state law, and the availability of counseling).

¹⁰⁹ 20 U.S.C. § 1011h (2000).

¹¹⁰ *Id.* § 1011h(b)(1),(2),(5),(6).

¹¹¹ *Id.* § 1011h(b)(3).

¹¹² Higher Education Reauthorization Act of 1998, Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1836 (codified as amended at 20 U.S.C. § 1232g) (allows higher education institutions to notify parents of students under the age of 21 that the student violated a school disciplinary policy relating to the possession or consumption of alcohol).

¹¹³ See generally The U.S. Department of Education’s Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, www.edc.org/hec (last visited November 20, 2005) (provides links to media stories pertaining to campus drinking, links to state-supported anti-drinking initiatives, advice on how campuses may start such programs, and research on the social norm approach to curb drinking).

¹¹⁴ See, e.g., Laura Adkins, *Ball State U. to Notify Parents about Drug, Alcohol Infringements*, DAILY NEWS, June 13, 2002, available at www.lexis-nexis.com (search

provisions and punishments.¹¹⁵ Many universities have not instituted alcohol parental notification policies. The arguments most commonly used against such policies—limitations imposed by FERPA, liability, and ethical concerns regarding student development—are unfounded and should not preclude universities from examining student conduct codes and instituting some form of parental notification.

Nonetheless, statistics indicate that underage alcohol abuse continues unabated.¹¹⁶ According to a report issued in 1994 by the Commission on Substance Abuse at Colleges and Universities, one-third of college students report that they drink to get drunk regularly and approximately 40 percent of women and more than 50

“Legal Research, Legal News” in Lexis Nexis Academic; then search “University News” for parental notification and alcohol.) [hereinafter articles in this footnote and note 115 retrieved similarly]; Tonya Carey, *Ohio U. Student Senate Passes Parental Notification Policy*, COLLEGIAN, October 19, 2000; Adam Foxman, *UC-Santa Barbara Uses Parental Notification to Curb College Drinking*, DAILY BRUIN, December 2, 2002; Anna Franklin, *Parental Notification Legal, Boston U. Says*, DAILY FREE PRESS, October 19, 2001; Ashley Hill, *U. Arkansas Students Object to Parental Notification*, ARK. TRAVELER, May 30, 2001; Jodie Kaufman, *Law Changes Allows Parental Notification*, MICH. DAILY, October 27, 2000; Sam Kean, *U. Minnesota Investigates Legality of Parental-Notification Alcohol Policy*, MINN. DAILY, September 19, 2000.

¹¹⁵ See, e.g., Cassie Cross, *Florida State U. to Curb Underage Drinking with Parental Notification*, FSVIEW & FLA. FLAMBEAU, September 21, 2000 (where students, on first offense, are required to write an essay reflecting on the incident and that letter, with a letter from the Dean of Students, would be sent to parents should there be a second offense); Diana Moskovitz, *U. Florida’s First Notification Letter Sent to Parents*, INDEP. FLA. ALLIGATOR, February 23, 2001 (describing that the University of Florida’s policy is more lenient than others in the state of Florida, where administrators notify parents only if a student is treated in the hospital for alcohol-related illness or if the student violates underage drinking policies twice in one semester or three times during an academic career); Tony Riederer, *Parental Notification Policies Vary Nationwide*, MANEATER, April 24, 2001 (citing the policy at the University of Delaware, the first nationwide and instituted before HERA 1998, where administrators notify parents after the first violation and students are fined \$50, second violations warrant a \$100 fine, and students are suspended for a semester for a third infraction).

¹¹⁶ See, e.g., Cross, *supra* note 115, at 2 (81 percent of underage students at Florida State consumed alcohol in 1999, the year before the University implemented a parental notification policy). Personal observations suggest that underage drinking declined, particularly as students became increasingly aware of the parental notification policy.

percent of men engage in binge drinking.¹¹⁷ Victims of most rapes and the majority of other violent crimes occurring on college campuses report that excessive alcohol consumption was involved.¹¹⁸ More current statistics still do not show promising changes.¹¹⁹ According to the Core Alcohol & Drug Survey of 2000, which surveyed 55,026 undergraduates at 132 colleges and universities, the average freshman drinks 5.56 drinks per week, while the average sophomore drinks 5.86 drinks per week.¹²⁰ According to the Center for Disease Control and Prevention, between 1993 and 2001 binge drinking increased, particularly among those students between the age of 18-20.¹²¹

¹¹⁷ Binge drinking is defined as the consumption of five or more drinks in one occasion. See, e.g., Alcohol Awareness Research Library, www.alcoholstats.com (last visited November 23, 2005).

¹¹⁸ See Edward A. Malloy, *Taking the High Road on Alcohol Abuse*, PRESIDENCY, Fall 1998, at 18.

¹¹⁹ A seminal study conducted by Henry Wechsler and the Harvard School of Public Health College Alcohol Study in 1993, 1997, and 2001 collected information from a random sample of 10,240 students at more than 120 institutions regarding students' use of alcohol and drugs; their reason for drinking—namely binge drinking, views regarding campus policy and social mores, alcohol use and casual sex/date rape, and repercussions of drinking (e.g. injury and arrests). See Harvard School of Public Health College Alcohol Study, 2001, www.icpsr.umich.edu/cgi-bin/bob/archive2?study'4291&path'ICPSR. Access to the data is restricted to members of the Inter-University Consortium for Political and Social Research; however, various peer-reviewed articles utilize this data. See, e.g., Henry Wechsler et al., *Changes in Binge Drinking and Related Problems Among American College Students Between 1993 and 1997*, J. AM. C. HEALTH, Sept. 1998, at 57-68 (in which data from the study is used).

¹²⁰ See generally Maureen Clouse McGuiness, *Perceptions of Parents of Postsecondary Education Students Concerning Parental Notification and Underage Alcohol Offenses* (2003) (unpublished Ed.D. dissertation, University of North Texas) (on file at University of North Texas Libraries, University of North Texas).

¹²¹ *Id.* However, the Alcohol Awareness Research Library, *supra* note 117 (sponsored by the Anheuser-Busch Foundation) reports conflicting data as to the severity of the problem.

Some would argue that social norms are at the heart of the problem.¹²² Some legal commentators predict that courts soon may expect universities to use science-based and social norm approaches, such as the environmental management model, to curb alcohol and other high-risk behavior.¹²³ However, little evidence seems to support that institutional policies or minimum drinking laws have reduced under-age alcohol consumption among college students.¹²⁴ Because most college students overestimate the prevalence of drinking on campus and perceptions of drinking norms—particularly on large campuses where the norm is not widely-known among students—researchers argue that ignorance influences under-age students to drink and to feel that their actions are socially acceptable.¹²⁵

Universities plagued with student-related alcohol problems (e.g. deaths, arrests, and disruption to the academic environment) actively are seeking a solution. Louisiana

¹²² At the University of Rhode Island, most under-age alcohol citations are issued in September (when freshmen first enter and Greek recruitment and football dominate the social scene) and a staggering 64 percent of alcohol citations are issued to freshmen. See Fran Cohen & David Rogers, *Effects of Alcohol Policy Change*, J. ALCOHOL DRUG EDUC., Winter 1997, at 76.

¹²³ See Dickerson, *supra* note 4, at 61, 63. The environmental management model has its roots in public health. This approach includes alternative programming, alcohol-free events, and campus-community coalitions. This approach is endorsed by the U.S. Department of Education's Higher Education Center. *Id.* at 65.

¹²⁴ See Todd F. Lewis & Dennis L. Thombs, *Perceived Risks and Normative Beliefs as Explanatory Models for College Student Alcohol Involvement: An Assessment of a Campus with Conventional Alcohol Control Policies and Enforcement Practices*, 42 NASPA J. 202, 204 (2005). A recent study found that college students arrested for drunk driving are more likely than those never arrested to be continue the practice. See Sara Lipka, *College Students who Drink and Drive Are Likely to Do It Again Despite Negative Consequences*, *Study Finds*, CHRON. HIGHER EDUC., November 17, 2005, available at www.chronicle.com.

¹²⁵ See Lewis & Thombs, *supra* note 124, at 205, 218. Some campuses ban alcohol advertisements in student newspapers so as to not perpetuate a culture of alcohol (e.g. Florida State University and Louisiana State University). Interestingly, U.S. Supreme Court Justice Samuel Alito Jr. ruled in a 1996 Pennsylvania case against such a policy, citing that little evidence supports that reducing alcohol advertisements reduces underage alcohol consumption. See Peter Schmidt, *Supreme Court Nominee Has Championed Free Campus Speech while Questioning Diversity Policies*, CHRON. HIGHER EDUC., Nov. 1, 2005, available at www.chronicle.com.

State University (LSU) was among ten universities¹²⁶ that participated in a grant project sponsored by the Robert Wood Johnson Foundation titled “A Matter of Degree: The National Effort to Reduce High-Risk Drinking Among College Students.”¹²⁷

Collaborating with local health and law enforcement agencies, the program at LSU monitors and educates students about drinking while it also initiates alternative programs through campus partners such as the student union and the student health center to provide alcohol-free entertainment.¹²⁸

In addition to attempts to change campus culture and student attitudes, some universities utilize alternative educationally-based judicial sanctions for those students found responsible of violating university alcohol policies.¹²⁹ A three-year longitudinal study conducted by Syracuse University into the efficacy of their environmental

¹²⁶ The other universities include Florida State University, Lehigh University, University of Colorado, University of Iowa, University of Vermont, Georgia Institute of Technology, University of Delaware, University of Nebraska, and University of Wisconsin. See *generally* Louisiana State University Campus-Community Coalition for Change [hereinafter LSU CCCC], <http://appl003.lsu.edu/cccc.nsf> (last visited Jan. 20, 2008).

¹²⁷ The University received the grant following an alcohol-related death of a fraternity member, Benjamin Wynne. Before Wynne’s death, the campus newspaper devoted more columnar inches to alcohol drink specials than almost any other student newspaper in the country. Now, because of the Wood Foundation grant, such advertisements are banned. See Karla Haworth, *A Bar near LSU Faces Criminal Charges and Civil Suits After a Student Dies*, CHRON. HIGHER EDUC., Nov. 6, 1998, at A59.

¹²⁸ See LSU CCCC, *supra* note 126. The website also provides links to campus alcohol policies (including those pertaining to athletic tailgating and residential living) as well as research and ways students can effect change through organizations and peer groups. See also Peter F. Lake, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L.REV. 611 (2000) (providing an overview of the environmental management approach to reducing campuses’ culture of alcohol).

¹²⁹ *E.g.*, At Florida State University in 2001 (which has a parental notification policy) a first offense carried a mandatory sanction of a \$50 fine, reflective essay, and participation in the counseling center’s “Smart Choices” program).

management plan, which involved education and counseling to deter and treat underage alcohol offenders, resulted in a 29 percent decrease in alcohol violations.¹³⁰

Nationally, however, violations of alcohol policies still comprise the majority of cases adjudicated by campus judicial officers.¹³¹ Seeking familial support and alternative solutions to the ever-present problem of underage drinking, some schools—mostly private institutions—had less formalized parental notification policies even before HERA 1998 legalized the practice.¹³² By 2001, the Inter-Association Task Force on Alcohol and Other Substance Abuse Issues: Parental Notification Task Force issued recommendations to institutions that were in the process of formulating parental notification policies. Among those recommendations were that policies and their goals should be clearly articulated within university communities before being implemented, that they be consistent with universities' missions, that notification should not occur until students have exhausted all appeals, and that, in the case of life-threatening situations, parents should be notified.¹³³

¹³⁰ See Dessa Bergen-Cico et al., *Longitudinal Assessment of the Effectiveness of Environmental Management and Enforcement Strategies on College Student Substance Abuse Behaviors*, 41 NASPA J. 235, 235-36 (2004). However, some administrators contend that these methods are ineffective, as students see institutionally-mandated counseling for alcohol violations as an unnecessary punishment instead of as an educational tool. See Mark S. Freeman, *Innovative Alcohol Education Program for College and University Judicial Sanctions*, 4 J. C. COUNSELING 179, 179 (2001).

¹³¹ See Freeman, *supra* note 129, at 179.

¹³² See Laura Ann Watts, *The Use of Parental Notification and Alcohol Policies of National Association of Student Personnel Administrator (NASPA) Member Institutions* (2003) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with University at Buffalo Libraries). Only 17 percent of the 189 institutions in Watts' study—mostly private—had policies before HERA. Also, before HERA 1998, a loophole in FERPA allowed for institutions to release information to parents of students who were financially dependent. See, e.g., Leo Reisberg, *2 Years After Colleges Started Calling Home, Administrators Say Alcohol Policy Works*, CHRON. HIGHER EDUC., January 19, 2001, at A34 (citing 34 C.F.R. § 99.31(8) (2005)).

¹³³ See generally Core Institute, www.siu.edu/departments/coreinst/public_hml (last visited November 25, 2005) (providing information and links for administrators concerning surveys, research, and programs aimed at deterring campus alcohol and drug abuse).

To gauge the early impact of HERA 1998 and the efficacy of parental notification policies, a group of researchers at Bowling Green State University in 2000 surveyed 189 higher education institutions.¹³⁴ On campuses included in the survey, 5,828 students were found responsible for violating alcohol policies in Fall 1999. Forty percent (2,359) of those cases resulted in parental notification.¹³⁵ Fifty-two percent of respondents at institutions with parental notification policies said that alcohol violations and recidivism have been reduced since such policies were enacted on their respective campuses.¹³⁶ The University of Delaware was one of the first universities nationwide to institute a parental notification policy.¹³⁷ Early indicators were that it was successful in reducing recidivism. The first year, more than half of the offenders had a second violation; that rate dropped to less than a quarter the following year.¹³⁸

By 2000, 44 percent of those institutions surveyed in the Bowling Green study had implemented a parental notification policy, while another 15 percent did not have a formal policy but did so in practice, and 25 percent were considering adopting a policy.¹³⁹ However, institutions have been slow to respond to HERA 1998 and the initial wave of parental notification policy implementation has waned. By 2002, in Bowling Green's follow up study,¹⁴⁰ only 46 percent of 349 responding institutions had

¹³⁴ See Carolyn J. Palmer et al., *Parental Notification: A New Strategy to Reduce Alcohol Abuse on Campus*, 38 NASPA J. 372, 372 (2001). The survey sample included only 23 percent of 815 institutional members of the Association for Student Judicial Affairs. *Id.* at 376. The authors in later interviews further stipulated that findings into the effectiveness of such policies are limited by sample size and the proximity in date between passage of HERA 1998 and the survey. See Reisberg, *supra* note 132, at A35.

¹³⁵ See Palmer et al., *supra* note 134, at 381.

¹³⁶ *Id.* at 382-83.

¹³⁷ See Leo Reisberg, *When a Student Drinks Illegally, Should Colleges Call Mom and Dad?*, CHRON. HIGHER EDUC., Dec. 4, 1998, at A40. (The University sent 1,414 letters to parents the first year the policy was implemented).

¹³⁸ *Id.*

¹³⁹ See Palmer et al., *supra* note 134, at 372.

¹⁴⁰ See John W. Lowery et al., *Policies and Practices of Parental Notification for Student Alcohol Violations*, 42 NASPA J. 415 (2005).

implemented parental notification policies, yet 22 percent continued to indicate plans to do so.¹⁴¹ Those not considering such policies stated that the reasons were either because of institutional philosophy, demographics (a large over-21 population), or state privacy laws.¹⁴²

The parameters of parental notification policies vary among institutions—as do the attitudes toward them. The University of Rhode Island has one of the tougher mandatory sanction policies in the country, where first and second offenses result in fines, probation, and educational programming and, upon a third offense, a student is suspended for two semesters.¹⁴³ Generally, parents support these policies, while younger students object.¹⁴⁴ A survey of 539 parents at the University of North Texas found that 85 percent of parents wanted to be notified after the first offense, nearly 94 percent wanted to be notified after two incidents, and 97 percent would want to be notified should their student be arrested for underage possession and consumption.¹⁴⁵ A limited study of 187 students' perceptions of Clemson University's parental notification policy found that age was the only significant factor affecting negative views toward the policy—i.e. younger students opposed the policy while upperclassmen indicated that they saw the benefits to such regulations.¹⁴⁶ The University of Wisconsin has a parental notification policy, which is used at the dean of student's discretion. Chancellor John D. Wiley stated “unambiguously, alcohol abuse is the number-one health and safety problem on every college campus.” He continued that, though campus culture supports

¹⁴¹ *Id.* at 421.

¹⁴² See Palmer et al., *supra* note 134, at 378-79.

¹⁴³ See Cohen & Rogers, *supra* note 122, at 69, 71.

¹⁴⁴ See Reisberg, *supra* note 137, at A39 (students rioted at Washington State University in 1998 in protest of alcohol rules).

¹⁴⁵ See *generally* McGuinness, *supra* note 120.

¹⁴⁶ See *generally* Ricardo David Hall, *An Analysis of Student Perceptions of Clemson University's Parental Notification Policy* (2003) (unpublished Ph.D. dissertation, Clemson University) (on file at Robert Muldrow Cooper Library, Clemson University).

drinking, the institution has had success decreasing the repeat offender rate after instituting a parental notification policy.¹⁴⁷

Opponents of parental notification policies contend that the educational value inherent in judicial proceedings, which are absent from criminal proceedings, is lost when parents are notified.¹⁴⁸ Others say it conflicts with the psychosocial and moral development of students.¹⁴⁹ While attempting to address this ever-present problem on campuses, administrators must balance the rights of students and the values of the collegiate environment with the responsibility of ensuring student safety.

C. Mental Health Concerns and Parental Notification

Student suicides are becoming increasingly prevalent on college campuses, with more than 1,000 suicides occurring on campuses yearly.¹⁵⁰ With the changing demographic of American higher education, certain populations require more care: non-traditional students (25 years old and older) have a higher risk of suicide than younger students¹⁵¹ and female graduate students are at a higher risk than female undergraduates.¹⁵² The use of psychiatric drugs also has become pervasive.¹⁵³ There has been a significant increase in depression rates among college students, as 10

¹⁴⁷ See Samuel G. Freedman, *Calling the Folks About Campus Drinking*, N.Y. TIMES, Sept. 12, 2007, available at www.nytimes.com.

¹⁴⁸ See Hall, *supra* note 146.

¹⁴⁹ See, e.g., NANCY J. EVANS ET AL., STUDENT DEVELOPMENT IN COLLEGE: THEORY, RESEARCH AND PRACTICE (Jossey-Bass 1998) (outlining psychosocial and moral development theories by researchers such as Arthur Chickering and Erik Erikson).

¹⁵⁰ See SPRC (Suicide Prevention Resource Center) Promoting Mental Health and Preventing Suicide in College and University Settings 5 (Oct. 21, 2004) (unpublished manuscript prepared for the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ In 2004, 8.3 percent of Penn State undergrads took psychiatric medicine and 1.6 percent had been hospitalized for psychiatric needs See Daniel McGinn, *After Virginia Tech*, NEWSWEEK, Aug. 20/27, 2007, at 70.

percent of undergraduates have seriously considered suicide.¹⁵⁴ According to a 2002 survey of college students, nearly 38 percent felt so depressed they could not function.¹⁵⁵ This may be because of the many pressures students place on themselves.¹⁵⁶

However, mental illness among youth is not confined to college students yet is pervasive among young people in general,¹⁵⁷ as more K-12 students are overmedicated for illnesses such as ADD, ADHD, depression, and social anxiety disorder.¹⁵⁸ These problems carry over into the college years¹⁵⁹ and make the challenge of assisting students with adjustments to college life and academics even more difficult.¹⁶⁰ Because suicide is so impulsive, there currently are no reliable predictive models to prevent it.¹⁶¹ However, 90 percent of adolescent suicide victims have had active psychiatric illness yet only 15 percent were receiving treatment at the time of death.¹⁶²

Suicide rates among college students are half that of peers not in college. This could be attributed to more involvement, parental support, and access to medication and counseling.¹⁶³ Generally administrators, student affairs practitioners, and campus

¹⁵⁴ See Pavela, *supra* note 53, at 1.

¹⁵⁵ See Sherry A. Benton & Stephen L. Benton, *Responding to the College Student Mental Health Problem*, in COLLEGE STUDENT MENTAL HEALTH: EFFECTIVE SERVICES AND STRATEGIES ACROSS CAMPUS 3 (Sherry A. Benton & Stephen L. Benton eds., 2006).

¹⁵⁶ *Id.* at 10.

¹⁵⁷ Fifty percent of students in college with mental issues had similar problems in high school. See Thomas R. Baker, *supra* note 68, at 515, *citing* Daniel Offer & Rhonda Pollack Spiro, *The Disturbed Adolescent Goes to College*, 35 J. AM. C. HEALTH 209 (1987).

¹⁵⁸ The percentage of students taking psychiatric medication rose from 9% to 22%. See RICHARD KADISON & THERESA FOY DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT (Jossey-Bass 2004).

¹⁵⁹ See Lake & Tribbensee, *supra* note 71, at 126.

¹⁶⁰ A study at Kansas Sate University found that within the past ten years, the proportion of students at risk of depression rose from 21% to 41% and those that were suicidal rose from 5% to 9%. See Kadison & DiGironimo, *supra* note 158.

¹⁶¹ See Pavela, *supra* note 53, at 2.

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 1.

counselors attempt to address the problem alone. However, parents now may be solicited as partners to help students cope with emotional problems. Congress amended FERPA¹⁶⁴ so as to allow for parental notification in cases of a health emergency, where “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”¹⁶⁵ Those amendments, though, are ambiguous, as it is unclear as to what constitutes an emergency and whether hospitalization is requisite before parents are notified.¹⁶⁶ However, campus administrators should not use ignorance or a fear of FERPA-related litigation¹⁶⁷ as an excuse not to act prudently when a credible threat exists that a student might commit suicide.¹⁶⁸ The court in *Mahoney v. Allegheny College* warned,

[F]ailure to create a duty is not an invitation to avoid action. We believe the University has a responsibility to adopt prevention programs and protocols regarding students’ self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective. . . . Rather than create an ill-defined duty of due care the University and mental health community have a more

¹⁶⁴ 20 U.S.C. § 1232g (2000). Those provisions further are set forth in 34 C.F.R. 99.36(a). There are also provisions in FERPA regulations to allow for the release of any information from a student’s record if the student continues to be financially dependent on his or her parents. See Baker, *supra* note 68, at 518, *citing* 99.31(a)(8).

¹⁶⁵ 34 C.F.R. 99.36(a). There is a bit of confusion surrounding this provision, as it is unclear whether a “health emergency” must involve hospitalization or a suicide attempt. See Baker, *supra* note 68, at 517. FERPA regulations apply to non-medical university staff. Records maintained by on-campus medical facilities, conversely, are regulated by state laws. *Id.* at 516.

¹⁶⁶ See Baker, *supra* note 68, at 530.

¹⁶⁷ Students do not have a private cause of action to bring FERPA-related suits; only the Department of Education can bring suit against an institution for such violations. See *Gonzaga U. v. Doe*, 122 S. Ct. 2268 (2002).

¹⁶⁸ See Farrell, *supra* note 55, at A40 (claiming that FERPA is the most often cited reason by campuses as to why parents are not notified of suicidal threats and, thus, thwarts legislative intent to allow for such exceptions).

realistic duty to make strides towards prevention. In that regard, the University must not do less than it ought, unless it does all that it can.¹⁶⁹

No court has yet to impose a requirement on universities to notify parents of a student's suicidal tendencies.¹⁷⁰ The Iowa Supreme Court in *Jain v. State*¹⁷¹ has been the only court to-date to address the issue of notification. In *Jain*, the decedent began to experiment with drugs during his first semester of college and had experienced academic and disciplinary problems. Following a disturbance between Jain and his girlfriend, the residence hall staff learned of his intention to kill himself by inhaling the exhaust from his moped. He assured the residence hall counselor that he would seek counseling.¹⁷² However, shortly thereafter, he executed his plan to kill himself.¹⁷³

In its decision, the court rejected the family's argument that the University was negligent by failing to enforce its policy regarding parental notification when Jain had threatened to harm himself.¹⁷⁴ Instead, the court found that no special relationship existed¹⁷⁵ and that no action by the University prevented the student from seeking the counseling to which he was referred.¹⁷⁶ Keeping in line with the 1960 decision in *Bogust v. Iverson*,¹⁷⁷ the court ruled the suicide as "a deliberate, intentional and intervening act."¹⁷⁸ According to Pavela, *Jain* shyed away from creating a precedent that would take

¹⁶⁹ Mahoney v. Allegheny Coll., No. 892-2003 at 25 (C.P. Crawford County December 22, 2005). Courts do not impose corollary K-12 *in loco parentis* standards in the university setting See Baker, *supra* note 68, at 524.

¹⁷⁰ See Baker, *supra* note 68, at 513. Schieszler v. Ferrum College, 236 F. Supp.2d 602 (D. Va. 2002), hinged on the issue of supervision, not notification.

¹⁷¹ 617 N.W.2d 293 (Iowa 2000).

¹⁷² *Id.* at 300.

¹⁷³ *Id.* at 296.

¹⁷⁴ *Id.* at 293. In fact, a campus counselor sought Jain's permission to contact his parents but he refused. *Id.* at 299.

¹⁷⁵ This was predicated on the fact that the residence hall staff acted with reasonable care to assist Jain. See Lake & Tribbensee, *supra* note 71, at 141, (arguing that this case could be construed as one in which a duty existed but was not breached).

¹⁷⁶ *Id.* Despite assuring the staff that he would, Jain did not seek counseling.

¹⁷⁷ 102 N.W.2d 228 (Wis. 1960).

¹⁷⁸ 617 N.W.2d at 300.

away adult responsibilities of students and promote trigger responses from administrators.¹⁷⁹

The appeals in *Jain* did not consider the issue of whether the school wrongfully withheld information “under the guise of the Buckley Amendment” (or FERPA) because that argument was not presented to nor decided by the lower court.¹⁸⁰ Per the institution’s parental notification policy, discretion as to whether to notify parents rested with the dean of students. However, in this instance no information had been shared with him regarding the student’s condition until after Jain’s death.¹⁸¹ The court here found that the limited intervention neither increased the student’s chance of suicide nor caused it, thus finding no duty owed from the University, per Restatement of Torts, Section 323.¹⁸²

Following the precedent set by *Jain*, a Pennsylvania court in December 2005 dismissed negligence claims against university administrators as well as contract violation claims against Allegheny College in a lawsuit filed by the family of a student who committed suicide.¹⁸³ The student, who hung himself at his fraternity house, had received on-campus counseling for three years.¹⁸⁴ The court found that no Pennsylvania law imposed a duty on non-mental health professionals to prevent suicide or to notify parents of a possible threat of suicide, even though FERPA allowed for this in the event of an emergency.¹⁸⁵ Further the court found that there was no custodial

¹⁷⁹ See Pavela, *supra* note 53, at 5.

¹⁸⁰ *Id.* at 78, citing 617 N.W.2d 293.

¹⁸¹ *Id.* at 77.

¹⁸² *Id.* at 80.

¹⁸³ Mahoney v. Allegheny Coll., No. 892-2003 at 25 (C.P. Crawford County December 22, 2005) (the contract claims were dismissed because no specific promises were made nor did the parents come to rely on any promises made through the generalized information provided to them by the University upon the student’s matriculation).

¹⁸⁴ The negligence charges against the counselor were deferred to a later date. *Id.* at 27.

¹⁸⁵ *Id.* at 18, citing 20 U.S.C. § 1232(g)(b)(1)(i) (2000).

relationship, even though the decedent lived on campus.¹⁸⁶ Rejecting any analogy to *Shin*¹⁸⁷ or *Schieszler*,¹⁸⁸ the court found that no special relationship existed between the student and the campus administrators (dean of students and associate dean) nor did the administrators have knowledge of a foreseeable risk.¹⁸⁹

Campus administrators need to be educated regarding FERPA regulations,¹⁹⁰ its modifications regarding mental illness,¹⁹¹ and institutional practices and policies regarding suicidal threats. Though the *Jain* decision¹⁹² failed to assert that failure to notify parents equated to proximate cause in student suicide,¹⁹³ changes in common law views of suicide have shifted from that of a criminal act to victim.¹⁹⁴ Having been granted Congressional latitude, institutions may be remiss in not considering instituting parental notification policies that pertain to the mental health of their students, as parents often know more about a student's medical history than campus staff.¹⁹⁵ As Lake and Tribbensee argue, "It may be appropriate . . . to risk the allegation of a FERPA

¹⁸⁶ *Id.* at 22.

¹⁸⁷ *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005).

¹⁸⁸ *Schieszler v. Ferrum C.*, 236 F. Supp.2d 602 (D. Va. 2002).

¹⁸⁹ *Mahoney v. Allegheny Coll.*, No. 892-2003 at 22, analogizing the case to *Jain v. State*, 617 N.W.2d 293 (Iowa, 2000). The court found that the administrators did not have specific knowledge of the gravity of the situation and relied on the professional deference of the student's personal counselor to assess the situation. *Id.* at 13.

¹⁹⁰ The argument that the institution is afraid of FERPA-related litigation is moot, in light of the modifications made for parental notification of mental health emergencies, in addition to underage alcohol violations (see Higher Education Reauthorization Act of 1998, Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1836 (codified as amended at 20 U.S.C. § 1232g)).

¹⁹¹ 34 C.F.R. 99.36(a). A federal report filed as a result of the April 2007 Virginia Tech tragedies called for clearer federal regulations regarding the dissemination of student information. See Ian Urbina, *Virginia Tech Report Cites Privacy Law Problems*, N.Y. TIMES, June 13, 2007, available at www.nytimes.com.

¹⁹² 617 N.W.2d 293.

¹⁹³ Also, the judge in *Schieszler* did not rule nonfeasance by the University as a proximate cause of his death. See Pavela, *supra* note 53, at 87.

¹⁹⁴ See Lake & Tribbensee, *supra* note 71, at 129-30.

¹⁹⁵ See Baker, *supra* note 68, at 526.

violation in a good-faith attempt to save the life of a student.”¹⁹⁶ They also point out that courts recently “have been more willing to impose a responsibility to share information in an affirmative-duty context.”¹⁹⁷ Parents potentially can be powerful partners in attempting to address students’ emotional needs.

Baker writes, however, that parents, once alerted, often do not intervene in a significant way to impact student suicide rates.¹⁹⁸ Some campus professionals see parents as a source of dysfunction in children.¹⁹⁹ Few studies have been conducted to examine parental response to the suicidal behavior of their children.²⁰⁰ Some earlier research cited that sometimes parents over-identify with their children or discourage them from seeking treatment so as to be able to graduate on time.²⁰¹ A more recent study examined a mental health-related parental notification policy at a research university. From 1995 to 2006, 89 parents received a letter regarding their children’s suicide attempts. According to the findings, most parents did not reply, even though they were invited to do so by the vice president of student affairs. Additionally, more than 75 percent of the parents did not intervene or ensure treatment.²⁰² Some did, however, call to dispute the description of events.²⁰³

¹⁹⁶ See Lake & Tribbensee, *supra* note 71, at 138. See also *Sanford v. Stiles*, 2004 U.S. Dist. LEXIS 22948 (D. Pa. 2004) (holding that a school counselor was not liable for a student’s suicide when, after being told by the student’s friend of his suicidal tendencies but warned not to confront him, the counselor spoke to the student regarding his threats).

¹⁹⁷ See Lake & Tribbensee, *supra* note 71, at 147, *citing* *Tarasoff v. U. of Calif.*, 551 P.2d 334 (Cal. 1976) (a case in which the court found that a psychotherapist owed a duty to warn a potential victim of foreseeable harm by a patient).

¹⁹⁸ See Thomas R. Baker, *Parents of Suicidal Students: What Deans, Judges, and Legislators Should Know About Campus Research Findings*, 43 *NASPA J.* 164 (2006).

¹⁹⁹ *Id.* at 165.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 167-68.

²⁰² *Id.* at 172.

²⁰³ *Id.* at 173.

D. Mental Health, Information Sharing, and Concerns Under ADA

Legal issues associated with mental health issues in the educational context include fair consideration during the admissions process, reasonable accommodations for disabilities, privacy, the impact of potentially dangerous behavior and suicide, and discipline.²⁰⁴ In regard to privacy concerns, according to FERPA, a university may disclose mental-health related information without a student's consent (a) to other school officials on a need-to-know basis; (b) to another institution to which the student seeks to enroll; (c) in connection with a "health or safety emergency"; and (d) in connection with a disciplinary hearing. Per FERPA, it does not prevent—but does not require—institutions from including information in a student's record regarding disciplinary action when the safety or welfare of self and others are compromised or from sharing such information with others possessing a legitimate interest.²⁰⁵

Particular legal concerns also arise in regard to admissions. The U.S. Office for Civil Rights (OCR), for example, has ruled that it was permissible for a community college in Nevada to deny admission to a prospective student who stated in an interview that he often thought about killing other people.²⁰⁶ However, OCR also has ruled that universities must consider the history and not the nature of the mental illness. Pennsylvania State University asked for medical records when a paranoid schizophrenic student behaved in a disruptive manner on a campus visit. The policy was ruled to be in violation of Section 504 of the Americans with Disabilities Act (ADA).²⁰⁷ Policies that allow for questions on admissions applications to inquire into the mental health history of a prospective student must be narrowly tailored and often run

²⁰⁴ See Dickerson, *supra* note 4, at 36.

²⁰⁵ *Id.* at 54-55.

²⁰⁶ *Id.* at 42.

²⁰⁷ *Id.* at 42-43.

afoul of OCR guidelines.²⁰⁸ If any information is part of a self-identification, the university must notify the student of the admissions process and ensure not only that the information will remain confidential but also that the student will not be penalized for such a disclosure.²⁰⁹

In regard to student conduct, universities can hold students responsible for violating codes of conduct that disrupt the order of the campus, even if they have a mental health disability. In one instance, a bipolar student was expelled when he threatened to bomb the legal writing department of a university.²¹⁰ However, in accordance with provisions under ADA, university procedures must involve due process and diligent care to weigh individual circumstances.²¹¹ “[N]on-traditional forums cannot deny the student with a disability the same opportunity as another student to challenge the truth and accuracy of the accusations concerning his/her conduct and its perceived dangerousness.”²¹²

OCR has cited some universities for violating ADA when sanctioning students with mental disabilities. The overarching sentiment in each ruling has been that the analysis of threat posed by the student must be highly individualized and contextual.²¹³ Bluffton University came under scrutiny by the OCR when it demanded that a student withdraw or else be suspended after an attempted suicide. The institution refused to reconsider its disciplinary decision after receiving information that the student had a disability (i.e. bipolar disorder).²¹⁴

According to the report issued by OCR, the Bluffton University administrator adjudicating the case did not speak to the student or treating physicians nor review

²⁰⁸ *Id.* at 45.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 93.

²¹¹ See Pavela, *supra* note 53, at 16.

²¹² *Id.* at 19.

²¹³ *Id.*

²¹⁴ *Id.* at 59-60.

medical and counseling records.²¹⁵ The student had previously been hospitalized, and doctors felt it would be beneficial for the student to return to school upon discharge.²¹⁶ Though there were no provisions in the institution's student handbook outlining emergency withdrawal procedures, the student code of conduct provided for a 72-hour notice of charge and hearing, in addition to an appeals process. The student was not, however, allowed to use this process to appeal the decision.²¹⁷ In regard to the institution's disciplinary sanction, the OCR ruled that:

To rise to the level of a direct threat, there must be a high probability of substantial harm and not just a slightly increased, speculative, or remote risk. In a direct threat situation, a college needs to make an individualized and objective assessment of the student's ability to safely participate in the college's program, based on a reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence. The assessment must determine: the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk.²¹⁸

The sanctions imposed by OCR included remedial provisions such as reimbursement to the student for residence hall fees, the designation of a university employee to coordinate Section 504 compliance, and the development of a written policy regarding the emergency removal of a student by which all members of the university community would be notified.²¹⁹

²¹⁵ *Id.* at 61.

²¹⁶ *Id.* at 60.

²¹⁷ *Id.* at 62.

²¹⁸ *Id.* at 64-65.

²¹⁹ *Id.* at 66-67.

In a similar case, Marietta College was sanctioned by OCR when a campus psychologist shared information regarding a student's depression and history of attempted suicide to a campus administrator. After determining the student was a threat to himself, the University dismissed that student.²²⁰ Marietta College contended that the dismissal was in accordance with policy and was not discriminatory because of the information learned by the staff psychologist.²²¹ Though the counselor had knowledge of several suicide attempts, OCR found that such information was not sufficient to deem as a high probability of substantial harm or direct threat. OCR's investigation uncovered that the staff psychologist had only met for two one-hour sessions with the student. The investigation also revealed that the institution did not have a grievance procedure for disability discrimination complaints nor a Section 504 coordinator, as required by 34 CFR 104.37.²²²

In regard to the due process issues presented in that case, the OCR set forth further recommendations for compliance:

In exceptional circumstances, such as situations where safety is of immediate concern, a college may take interim steps pending a final decision regarding an adverse action against a student as long as minimal due process, such as notice and an opportunity to address the evidence, is provided in the interim and full due process, including a hearing and the right to appeal, is offered later.²²³

Mandatory withdrawal policies for mental health issues also have reached litigation. A case involving George Washington University (GWU) was the first to

²²⁰ *Id.* at 68.

²²¹ *Id.* at 69.

²²² *Id.* at 72.

²²³ *Id.* at 70.

challenge the legality of mandatory leave policies.²²⁴ In that case, GWU reached a confidential settlement with Jordan Nott, a former student, and agreed to review its policies so as to allow administrator discretion over each case—instead of resorting to disciplinary procedures.²²⁵ Nott sued GWU, its president, dean of students, director of university counseling, and other administrators²²⁶ and, in his complaint, alleged the University violated ADA, the Rehabilitation Act, the Fair Housing Act in addition to charges of intentional infliction of emotional distress, invasion of privacy, and breach of confidentiality.²²⁷

Nott had checked himself into a University-run hospital when he began feeling depressed several months after a close friend jumped from a residence hall window while Nott and others frantically tried to open a locked door in an effort to save his life.²²⁸ Twelve hours after being admitted for psychiatric treatment, a university administrator delivered a letter to Nott outside of regular visiting hours that banned him from the residence hall. One day later, disciplinary charges were levied against him that demanded he withdraw or face suspension and/or criminal charges. Nott's hearing was scheduled to convene two days after he was released from the hospital.²²⁹

GWU had a "Psychological Distress" policy and, consistent with that, Nott was not allowed to return to the residence hall because of his emergency psychological intervention.²³⁰ The charge letter claimed that he had violated the student code of

²²⁴ See Eric Hoover, *Dismissed for Depression*, CHRON. OF HIGHER EDUC., March 24, 2006, available at www.chronicle.com.

²²⁵ See Eric Hoover, *George Washington U. Settles Lawsuit with Ex-Student It Suspended After He Sought Help for Depression*, CHRON. OF HIGHER EDUC., Nov. 1, 2006, available at www.chronicle.com.

²²⁶ *Nott v. The George Washington U.*, No. 05-8503 (Super. Ct. D.C.)

²²⁷ *Id.* at 3.

²²⁸ *Id.* at 4. Following the death of his friend, Nott had suggested that an orientation session for freshmen be included to discuss depression and suicide. *Id.* at 15.

²²⁹ *Id.* at 13. Nott emailed an administrator for an extension but received no response *Id.* at 16.

²³⁰ *Id.* at 5.

conduct by engaging in “endangering behavior” and, if he returned to campus, would be considered a trespasser and would be arrested.²³¹ Ironically, by receiving treatment at the GWU hospital, Nott technically was in violation of the trespassing order.²³² Additionally, several conditions were placed should he attempt to re-enroll, including undergoing medical assessment to determine if he could live independently and function in the University environment.²³³

In a similar case, CUNY Hunter College reached a settlement with a student who overdosed on Tylenol. She claimed that the institution violated ADA when, after being released from a local hospital and deemed not a threat to herself or others, she was locked out of her residence hall and not allowed to live on campus, per an existing policy regarding suicidal threats. The settlement was \$65,000.²³⁴

Though some commentators say that mandatory withdrawal policies force students to get the help they need,²³⁵ others contend it isolates students at a time of need.²³⁶ In his petition against GWU, Nott claimed that the University withdrew him from his support system during his medical crisis.²³⁷ Pavela argues it is “ethically indefensible, legally questionable, and educationally unsupportable to automatically withdraw students thought to be at risk of suicide.”²³⁸ He adds that, though

²³¹ *Id.* at 6.

²³² *Id.* at 15.

²³³ *Id.* at 13.

²³⁴ See Eric Hoover, *Hunter College Reaches Settlement with Depressed Student Who Was Barred from Dorm*, CHRON. OF HIGHER EDUC., Aug. 24, 2006, available at www.chronicle.com.

²³⁵ See Hoover, *supra* note 225.

²³⁶ *Id.* Gary Pavela commented that such policies may put students at greater harm by routinely enforcing these policies without special consideration for individual circumstances.

²³⁷ *Nott v. The George Washington U.*, No. 05-8503 (Super. Ct. D.C.) at 19. The University did not relent when he requested to visit friends. They responded that he was free to do so off campus. *Id.* at 22. “What they need is ongoing human connection, not prompt severance from what may be a vital channel of support.” See Pavela, *supra* note 53, at 20.

²³⁸ See Pavela, *supra* note 53, at 16.

“[h]ospitalization should not be undertaken primarily as a risk management strategy,” in certain instances, such as Elizabeth Shin at MIT, universities can be too reluctant to hospitalize suicidal students.²³⁹

E. Confusion over Privacy Regulations Post-Virginia Tech

Following the April 2007 shootings on the Virginia Tech campus in which Cho Seun-Hui fatally shot himself and 32 others, debate swirled over whether FERPA and other related laws clearly delineated what information was permissible to share among university administrators and law enforcement agencies. At the request of President Bush, Secretary Leavitt of the Department of Health and Human Services, Secretary Spellings of the Department of Education, and Attorney General Gonzales issued a national report that recommended certain changes to legal and educational policy.²⁴⁰ These recommendations were borne from many conversations and meetings with educators, mental health practitioners, law enforcement, and lawmakers from around the country.

Key findings from the report included (a) a need to alleviate confusion among educators, health practitioners, and law enforcement about what information can be shared; (b) a need to reform inconsistent state laws involving reporting protocol to the National Instant Criminal Background Check System;²⁴¹ (c) a need to educate people to recognize mental health warning signs; and (d) a need for improved mental health services to those in need.²⁴² The study found that administrators, law enforcement, and mental health practitioners mistakenly believed they could face liability from FERPA and HIPPA for sharing certain types of information about students in crisis.²⁴³

²³⁹ *Id.* at 55.

²⁴⁰ Report to the President on Issues Raised by the Virginia Tech Tragedy 10 (June 13, 2007) (unpublished manuscript).

²⁴¹ Only 28 states provide information to the systems on people disqualified because of mental health reasons, per federal law, from possessing firearms. *Id.*

²⁴² *Id.* at 2.

²⁴³ *Id.* at 7-8.

The report also recommended that initiatives be instituted to stop the culture of silence surrounding mental health and violence and encourage communities and schools to share critical information, including expanding the “Choose Respect” national initiative to prevent violence in schools.²⁴⁴ It also called for an expansion of primary health and community healthcare programs to include mental health²⁴⁵ and an improvement in emergency preparedness systems by providing grants at the federal level.²⁴⁶

Further recommendations to the President stressed the need to clarify privacy laws and regulations that outline how campus officials, police officers, and social services can share information.²⁴⁷ Congress responded with House Resolution 2220 that sought to amend FERPA to allow confidential information to be disclosed to parents when students pose a risk to self and others.²⁴⁸ However, some officials say the bill was not narrowly tailored and is repetitive of the already-existing amendments to FERPA that allow such information to be shared.²⁴⁹

An independent panel commissioned by the governor of Virginia received similar testimony—that FERPA and other privacy laws need to be clarified and that legal worries surrounding the balance of confidentiality rights and the welfare of students still plague administrators. The findings by that commission also were similar to the findings from Virginia Tech’s internal review, which called for more security measures on campus and clarity on policies regarding information sharing.²⁵⁰

²⁴⁴ *Id.* at 13.

²⁴⁵ *Id.* at 15.

²⁴⁶ *Id.* at 18.

²⁴⁷ See Karin Fischer, *Report on Virginia Tech Shootings Urges Clarification of Privacy Laws*, CHRON. OF HIGHER EDUC., June 22, 2007, at A30.

²⁴⁸ See JJ Hermes, *Congress Mulls Change in Student-Records Law to Help Prevent Violence*, CHRON. OF HIGHER EDUC., Sept. 27, 2007, available at www.chronicle.com.

²⁴⁹ *Id.*

²⁵⁰ Cho’s parents were never notified of his mental health-related problems. See Karin Fischer and Robin Wilson, *Review Panel’s Report Could Reverberate Beyond Virginia Tech and Virginia*, CHRON. OF HIGHER EDUC., Aug. 31, 2007, available at

Ironically, Virginia has been the lead state in dealing with issues surrounding information sharing, mental health, and student safety. In March 2007, one month before the Virginia Tech incident, the state legislature unanimously approved a bill to prevent public institutions from expelling or punishing students for expressing suicidal tendencies or for seeking treatment for suicidal thoughts—the first such measure in the nation.²⁵¹ Virginia also has enacted legislation requiring universities to submit personal information about applicants in order to screen sex offenders.²⁵²

After the tragic Virginia Tech shootings, legislators in at least 25 other states have attempted to pass new policies or laws regarding student safety, including gun-control measures. Louisiana has sought to toughen gun control, and Maine proposed giving information regarding involuntarily hospitalized people to the FBI in an effort to prevent them from obtaining guns.²⁵³ Other states sought to pass laws of a different sort: a measure in South Carolina that would have required students 21 and older to carry concealed weapons failed.

III. A Case for Parental Notification:

Who Should Make the Call?

As mental health and alcohol abuse have come to the fore as increasingly pressing and potentially litigious issues on campuses today, what should administrators consider when drafting parental notification policies? And, in light of the lessons learned from the Virginia Tech tragedy, how educated are campus administrators regarding privacy laws and is information being shared to those in a need-to-know situation?

www.chronicle.com and Robin Wilson, *Recommendations from the Report: Steps Colleges Can Take to Avoid a Tragedy, or Deal with One*, CHRON. OF HIGHER EDUC., Aug. 31, 2007, available at www.chronicle.com.

²⁵¹ See Josh Keller, *Virginia Legislature Votes to Bar Colleges from Dismissing Suicidal Students*, CHRON. OF HIGHER EDUC., March 9, 2007, at A41.

²⁵² See Dickerson, *supra* note 4, at 91.

²⁵³ See Lyndsey Lewis, *Campus Killings Spur States to Act to Protect Students*, CHRON. OF HIGHER EDUC., July 19, 2007, available at www.chronicle.com.

One goal of this study is to examine the controlling factors behind university policy relating to student safety. What are the campus political and organizational issues that factor into these decisions? Who is involved in the decision making? Are these policies typically enacted after a major crisis or widely publicized event? In 2005, the University of Georgia (UGA) first implemented an alcohol parental notification policy, and I interviewed Stephen Shewmaker, the director of UGA's legal affairs office, regarding the policy making process. The initial stipulations of the policy were that parents would be notified if: (1) the alcohol policy has been violated two or more times, (2) significant property damage had occurred, (3) medical treatment was required, (4) the safety of the student or others had been compromised, or (5) the student's behavior "negatively impacted the learning environment."²⁵⁴

However, in 2006, a freshman student died of an alcohol/drug overdose and that policy quickly was amended. A first violation warranted mandatory alcohol education, parental notification, and a six-month probation for possession and twelve-month for consumption of alcohol. Second-time offenders would be suspended.²⁵⁵ The University also issued a memorandum from the Vice President for Student Affairs as well as the Vice President for Instruction to faculty and staff, encouraging them to not hesitate to schedule exams on Friday, to not make light of drinking and alcohol-related issues with their students, and to refer students to the Center for Alcohol Awareness and Education in the University Health Center if they thought a student was in need.²⁵⁶

According to Shewmaker, the committee that drafted the initial policy, which comprised the university president's cabinet and staff from the Office of Legal Affairs

²⁵⁴ University of Georgia Parental Notification Policy, <http://www.uga.edu/judicialprograms/notification.htm> (approved February 3, 2005).

²⁵⁵ Red and Black, August 9, 2007 p. 2A. See also policy. The University changed policy to include giving special consideration to a student seeking medical treatment while under the influence.

²⁵⁶ Letter from Jere W. Morehead and Rodney D. Bennett to UGA faculty members, laboratory and teaching assistants (August 2007) (on file with author).

and the Division of Student Affairs,²⁵⁷ examined research on binge drinking and its potential effects on education and the institution. The committee debated several competing considerations—and the policy, according to Shewmaker, attempted to balance the learning experience of the student with the academic environment of the institution.²⁵⁸ The controlling question was how to keep students' failures from invariably affecting their lives, while still allowing the collegiate experience to be an education in social norms and responsible citizenship. The committee, according to Shewmaker, thought that UGA students, generally responsible and intelligent, would learn from those “out-of-the-ordinary” experiences and any negative consequences stemming from alcohol-related incidents.²⁵⁹ It could be assumed that after a second violation an intervention would be necessary, as the student had not learned a lesson.²⁶⁰

Another issue was implementation—should the decision be based on blood-alcohol level, alcohol and some additional issue (e.g. violence or arrest), or purely on the number of incidents? The 2005 policy delineated those instances when parental notification would be employed. Additionally, administrators put in place measures to educate incoming students about the policy so that they understood that it was part of matriculation—part of a contract.²⁶¹

²⁵⁷ Interview with Stephen Shewmaker, Executive Director, UGA Office of Legal Affairs, in Athens, Ga. (Nov. 17, 2005). A survey of institutional members of the National Association of Student Personnel Administrators (NASPA) indicated that, of those with a parental notification policy, student, staff, and the institution's president were the main constituents consulted during policy formulation; only 27 percent sought input from parents. Of the 229 respondents of a possible 1,175 NASPA-member institutions, 156 had a parental notification policy. See generally Watts, *supra* note 132.

²⁵⁸ See Shewmaker, *supra* note 257.

²⁵⁹ *Id.* Typically, the judicial affairs office adjudicates student cases if the incident occurred on campus or, if off-campus, involved student-on-student crime.

²⁶⁰ *Id.*

²⁶¹ *Id.*

To Shewmaker's knowledge, Georgia is the only state in the country where student discipline records are open to public inspection²⁶²—even parents can request a student's file under open record laws. Though this creates a unique situation, the University attempts to respect the privacy and maturation process of its students.²⁶³ Shewmaker stated that liability was not a controlling issue when the initial parental notification policy was implemented at UGA—"[i]f you have good intent it will serve you well."²⁶⁴

Much like UGA, the third case included in this study, "Private," recently faced tragedy when three students died in one year from alcohol and drug-related overdoses. (There had been none in the previous decade.) The campus reacted by forming task forces to examine policy and practice. These task forces asked whether Private should consider notifying parents if students excessively miss class? What programs are needed? Should alcohol be allowed on campus during tailgating? Should alcohol advertisements be allowed in the campus newspaper?

Private enrolls approximately 10,000 students (6,000 of which are undergraduates) and boasts a considerable endowment. Private widely is known for its prominent alumni involved in state and national politics and business. Private also is known for its networking opportunities, which primarily come from involvement in the Greek system. The campus is located in a large metropolitan area that offers many entertainment and cultural opportunities. However, administrators note that many students, instead, take advantage of the ample bar scene that is near the campus and within the surrounding urban community. "Campus shuts down after dark and on weekends." Private is situated in a high drug trafficking area, which has affected the campus: alcohol, marijuana, cocaine, and prescription drugs are easily available to

²⁶² See *Red & Black Publ'g Co., Inc. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993).

²⁶³ See Shewmaker, *supra* note 257.

²⁶⁴ *Id.*

students. Off-campus arrests are not adjudicated by Private's campus judiciary, but local police in the surrounding community do notify university officials of any major problems.

Alcohol is the main problem on Private's campus but parents typically are not notified on a first alcohol-related offense. Administrators commented that they do not see many second offenses.²⁶⁵ Students found responsible for first-offense alcohol violations must go to the alcohol awareness office, which also sees students who come at their own volition. Wellness classes are required for graduation, and more than 30 sections are offered each semester. Approximately ten percent of students will use the mental health and alcohol education services at some point during their time at Private. However, Private continues to have alcohol incidents involving dangerous blood-alcohol levels: in Fall 2007 there were three separate alcohol-related incidents within the first three weeks of school within one residence hall that required urgent hospital care.

In regard to mental health emergencies, such instances are handled on a case-by-case basis through the dean of students' office. As a judicial officer in residence life stated, it is a balance of whether to keep the student on campus or put residents through an ordeal. "Balance the rights of one with the safety of many." Administrators from Greek life, residence life, judicial, and other student services offices meet weekly to discuss at-risk students. In those meetings, administrators do not divulge names but instead look at trends in student behavior. Any parental notification decisions go through the dean of students' office. "If anyone will violate it [FERPA], it will be me." However, a residence life staff member said that in regard to privacy issues, "It's really hard to validate [to parents] why they can't know."

²⁶⁵ A first offense warrants mandatory alcohol education and \$100 fine, which increases in \$50 increments for each subsequent offense. A second offense includes, in addition to the fine, a four-hour class on Saturday morning, while a third offense sanctions a two-day off-campus state-run course where a fee is involved. A student is suspended after a fourth offense.

Mental health practitioners have different professional standards and guidelines than non-medical student affairs professionals. The mental health office at Private, like at State, does not divulge whether or not a student is a client but does accept disciplinary referrals from other campus offices. The student health center produces a brochure to help faculty recognize problems and educate them about FERPA and their role in referring students in need.

Private's legal affairs office also plays a significant role in advising staff regarding privacy issues. A campus attorney said, "Look at the facts in front of you at that time. It's a judgment call." This attorney commented that other attorneys anecdotally would say that they would prefer a FERPA-related suit any day over wrongful death.²⁶⁶ "Not only is it okay to share information but you almost have an obligation to do so." Commenting on recent campus tragedies, the attorney said media attention may not always be accurate and may be sensationalized but a university "would be a fool not to step up awareness." Legal counsel also consults student affairs to formulate policy and was intimately involved in the recent revision of the code of conduct. However, one residence life staff member described Private as a very bureaucratic, slow-changing, legal-centric campus. "I struggle with the legalistic way of thinking."

Students at Private are highly involved in policy formation. A student representative sits on many boards and the student code of conduct must be approved by the student senate before it is sent to legal affairs and the vice president of student affairs for final review. Because of the huge deference shown to students, Private has faced problems regarding student behavior. One administrator said, "Some students feel the University should look the other way when it comes to alcohol." A high-ranking

²⁶⁶ According to *Gonzaga U. v. Doe*, 536 U.S. 273 (2002), FERPA violations are not privately actionable and no university has lost federal funding because of FERPA violations.

administrator added that because the student body is so affluent, they have the resources to get into more trouble.

Excessive parental involvement also has posed problems. As the dean of students explained, because of the high cost of Private, parents naturally want to be involved and apprised of their students' actions, more so than at a state university. Millennial students demand amenities and, similarly, "helicopter" parents want to have easy access to information and possess a customer service-driven attitude. One campus judicial affairs officer noted that parental-notification almost is not a threat anymore, as parents are so involved already. "What is our carrot to help students understand personal responsibility?"²⁶⁷

Because many parents also are alumni of Private themselves and want their children to have a good experience, they overlook a lot, which, according to a campus judicial officer "doesn't usually translate into teaching students personal responsibility. Parents and students look for someone else to blame." Another commented, "It's unfortunate sometimes when students make bad choices, parents want to blame others beside the student." However, parents are not always so involved: one residence life staff member has witnessed incidents where parents were non-responsive to notification following mental health emergencies.

One area that has been handcuffed by the influence parents, students, and affluent alumni exert on campus life is Greek affairs. The office seems to have adopted a laissez-faire approach, as Greek-letter organizations are required to register functions only if they occur in houses or campus grounds. As one Greek advisor said, legal counsel has advised them, "If we register them, then we know." Campus police officers will allow drinking on the "down low" if a party does not get too rowdy, which according

²⁶⁷ Private recently was threatened with a lawsuit because a student's parents worried about the impact a disciplinary sanction on a student record would have on the student's involvement in a fraternity.

to the Greek advisor, sends a “mixed message.” In the past campus police did not want to anger Greeks because of the fear of retribution to themselves or the department and because of “significantly connected alums.” Private follows the policies national organizations have set regarding university chapter socials. However, many chapters host bus trip parties in the metropolitan area to circumvent campus policy and oversight.

The Greek office also noticed problems in the adjudication process of hazing and other infractions. The Inter Fraternity Council (IFC) had a presidents’ council that also served as the judicial board. It was described as a “wink, wink, nudge, nudge” system that did not hear a case for two years and soon lost credibility. None of the presidents wanted to hold other chapters responsible for fear of retribution if their chapter were to go before the board. That system has since been overhauled. Since then, five IFC chapters in three years have been charged with hazing, and in 2003 one chapter was expelled for water hazing. The Greek life advisor feels Private is still a “bystander.”²⁶⁸ “We don’t get to be educators and facilitators.” That advisor said Private needs to focus on policy versus culture. “If Greeks lived up to the ideals they espouse, we would not have hazing or other problems.”

However, the affluence of Private can be a boon. For a campus of its size, Private is relatively well staffed in regard to student health services: two alcohol educators and counselors, a health and eating disorders educator, several physicians, several counselors and social workers, and two staff psychiatrists—which is unusual at a school that size, according to one mental health professional. Also, Private has the staff resources to offer creative programming. For example, there is a group of all-male Greeks on deferred suspension that meet regularly with an alcohol educator to examine their behavior, talk about their struggles and progress, and hold each other accountable.

²⁶⁸ See generally Bickel and Lake, *supra* note 38 (providing a taxonomy of eras for institutional liability).

Similar programs have been piloted nationwide and early research indicates that peer groups and intervention programs can help troubled students stay enrolled and avoid further disciplinary consequences.²⁶⁹ At Private, there is no limit on the number of mental health sessions a student may receive. “We try to get them the help they need so that they can be safe,” according to an alcohol educator. The director of the mental health center said, “That’s the mission: to make students successful so that they can go into the outside world after these experimental years and not have too much baggage.”

²⁶⁹ See, e.g., Donald D. Gehring, Speech at 37th Annual Conference on Higher Education and the Law: Back on TRAC: Treatment, Responsibility, & Accountability on Campus (July 31, 2006).

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this dissertation was two-fold: to provide a legal-historical analysis of institutional liability and to execute a case study of current university policy and practice. The hallmark of a good study is its generalizability, transferability, and usefulness to practitioners and academics in the field.¹ This study did not serve to critique contemporary rulings but to synthesize institutional liability law and to examine its application in higher education today.² This study began with four research questions and, hopefully, can provide a practical guide for scholars and administrators.

1. Considering recent court decisions, what is the state of the law regarding institutional liability for the care of students? Specifically, what are the courts saying is a reasonable standard of care for students and is there a return to 'in loco parentis'?

There is no return to *in loco parentis*. The doctrine of *in loco parentis* was interpreted as a power that colleges and universities had to discipline students and never was utilized as a basis for tort negligence.³ Though courts do hold K-12 institutions to a higher standard of care (considering the near-custodial nature of the relationship and impressionability of younger children),⁴ the majority of higher education liability cases today are decided by state tort law—namely negligence. The main elements of any negligence claims are (1) duty, (2) breach of that duty, (3) injury, and

¹ See Yvonna S. Lincoln & Egon G. Guba, *Paradigmatic Controversies, Contradictions, and Confluences*, in *HANDBOOK OF QUALITATIVE RESEARCH* 168 (Norman K. Denzin & Yvonna S. Lincoln eds., 2000).

² See J. Douglas Toma, *Exploring a Typology for Classifying Inquirers and Inquiry into Paradigms*, 21 *REV. OF HIGHER EDUC.* 19 (1997) (referring to the interpretive approach to legal scholarship).

³ See Theodore C. Stamatakos, *The Doctrine of 'In Loco Parentis', Tort Liability and the Student-College Relationship*, 65 *IND. L. J.* 471, 482, 484 (1990).

⁴ *Id.* See also *Eisel v. Bd. of Educ. of Montgomery County*, 597 A.2d 447 (Md. 1991).

(4) that the defendant's negligence and breach of duty were the proximate cause of injury. However, the student-institution relationship generally is not recognized as a special relationship in which a duty of care is owed.⁵ The general standard currently applied is reasonable care.⁶

Courts are more likely to frown upon institutions that fail to act upon the widely known risks of alcohol abuse on campuses today. In *Furek v. University of Delaware*,⁷ the University was held liable for creating policies regarding alcohol and hazing yet failing to take appropriate action, even though the University had knowledge that such incidents were occurring.⁸ Courts do, though, still show favor toward a university if it can prove contributory negligence on the part of the student or an assumption of risk in partaking in a dangerous activity.⁹ The same standard of reasonable care also is utilized in student mental health cases. Both the *Schieszler*¹⁰ and *Shin*¹¹ cases weighed heavily on the fact that administrators had prior knowledge of the imminent danger the students posed to themselves yet failed to act appropriately and in a timely manner.¹²

2. How are institutions interpreting their role to ensure student safety in an attempt to adapt to current legal standards and does this view match the law?

⁵ Courts generally construe the relationship between prisons and mental hospitals as a custodial one. See, e.g., *Hickey v. Zezulka and Michigan State U.*, 443 N.W.2d 180 (Mich. Ct. App. 1988) (a case involving the suicide of a student held in a University-run jail).

⁶ See, e.g., *Furek v. U. of Del.*, 594 A.2d 506 (Del. 1991).

⁷ *Id.*

⁸ See ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 130 (Carolina Academic Press 1999).

⁹ See, e.g., *Albano v. Colby C.*, 822 F. Supp. 840 (D. Me. 1993) (case in which a student on an intercollegiate sport trip was injured from alcohol consumption but had been warned by the university coach against doing so).

¹⁰ *Schieszler v. Ferrum C.*, 236 F. Supp.2d 602 (D. Va. 2002).

¹¹ *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005).

¹² "Two lower court cases are not a legal tsunami." GARY PAVELA, *QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE* 367 (College Administration Publications 2006) (noting that these cases should not make universities overly nervous that courts are now holding institutions liable for students mental health).

The Family Educational Rights and Privacy Act (FERPA)¹³ has been amended so as to allow higher education institutions to disclose “information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student’s education records . . .”¹⁴ so long as the student is not 21 years of age. Congress also amended FERPA¹⁵ so as to allow for parental notification in cases of a health emergency, where “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”¹⁶

All three institutions in this case study currently utilize parental notification policies. In the instance of underage alcohol abuse, two schools invoke parental notification typically on the first offense while the other institution does so on a second offense. However, all three institutions do not attempt to regulate behavior off campus or adjudicate any alcohol-related infractions that do not occur on campus.

Whereas underage alcohol possession and consumption is an issue of fact, the judgment call as to what constitutes a “medical emergency” seems to be a bit more tenuous for university administrators. At all three schools, the decision to notify the

¹³ 20 U.S.C. § 1232g (2000).

¹⁴ *Id.* § 1232g(h)(i)(1). Interestingly, section 2 stipulates that the amendment shall not supersede any provision of State law that prohibits an institution of higher education from making the disclosure . . . “

¹⁵ 20 U.S.C. § 1232g (2000). Those provisions further are set forth in 34 C.F.R. 99.36(a). There are also provisions in FERPA regulations to allow for the release of any information from a student’s record if the student continues to be financially dependent on his or her parents. See Thomas R. Baker, *Notifying Parents Following a College Student Suicide Attempt: A Review of Case Law and FERPA, and Recommendations for Practice*, 42 NASPA J. 513, 518 (2005), *citing* 99.31(a)(8).

¹⁶ 34 C.F.R. 99.36(a). There is a bit of confusion surrounding this provision, as it is unclear whether a “health emergency” must involve hospitalization or a suicide attempt. See Baker, *supra* note 15, at 517. FERPA regulations apply to non-medical university staff. Records maintained by on-campus medical facilities, conversely, are regulated by state laws. *Id.* at 516.

parents of a student in a mental health crisis is done on a case-by-case basis and, typically, by a mental health professional or upper-level administrator. Though FERPA has been amended for parental notification in the event of a suicide attempt or serious mental health crisis, the three universities in this study seemed to be a bit more reluctant to notify parents. However, no court has yet to rule that a mental health parental notification policy invokes a duty to protect nor that it must be utilized in all instances.¹⁷

All three schools have taken advantage of the FERPA amendments to solicit parental support for students in need, and most campus administrators seem adequately educated regarding privacy issues and student liability. As a residence hall administrator at Tech mentioned, universities should not speak of the “ceiling” when it comes to student care but “the floor”—the law does not limit the role universities may take in student welfare but does prescribe a minimum: reasonably setting policies regarding known dangers and providing services to care for students when there is knowledge that such care is needed.

Some legal commentators fear that some universities may under-react out of fear of liability. “Our responses to students become defined by the lens of the law and not through our primary responsibility as educators.”¹⁸ Universities, instead, should utilize the current climate in institutional liability to protect students while also mitigating risks. According to Bickel and Lake, the anti-lawyer sentiment widely held in today’s society has created “stunted opportunities to reconceive the legal image of university/student

¹⁷ See *Jain v. State*, 617 N.W.2d 293 (Iowa 2000). The court here found that the limited intervention by the University neither increased the student’s chance of suicide nor caused it, thus finding no duty owed from the University, per Restatement of Torts, Section 323.

¹⁸ See Eric Hoover, ‘*Giving Them the Help They Need*,’ CHRON. OF HIGHER EDUC., May 19, 2006, at A39 (quoting Gary Pavela, director of judicial affairs at the University of Maryland).

relations and to envision the positive aspects of law and its potential to promote responsible modern university life.”¹⁹

3. How do institutional and organizational factors apart from legal standards influence policy formation vis à vis liability and risk management?

Though lower and mid-level administrators at all three schools in this study did indicate that they are consulted in policy decisions within their respective departments and divisions, policy mostly is instituted by department heads (e.g., student health or Greek affairs), deans of students, and vice presidents for student affairs. Interoffice relations also largely influence policy and practice. At Tech, the judicial affairs office and Greek affairs have a memorandum of understanding outlining which judicial infractions fall under whose jurisdiction. At State and Private, residence life and judicial affairs have a working relationship by which both offices adjudicate on-campus infractions.

Campus-community relations influence policy and practice as well. No school in this study adjudicates off-campus alcohol violations. This is partly because of limited resources but also because of a lack of a cooperative agreement between campus and community police. As one judicial officer explained at Tech, the city has had three police chiefs within the past five years and a cooperative agreement between campus judiciary has yet to be formed with the local police because of the upheaval in that department. Also, in regard to mental health, limited resources have required campuses to form partnerships with community mental health facilities to assist in the overflow of students, yet professional standards preclude outside mental health professionals from sharing information about students with campus administrators.

The three institutions in this study have several other issues in common. They struggle—like most of American higher education institutions today—with issues of liability, student safety, constituency demands, resource allocation, organizational

¹⁹ See Bickel and Lake, *supra* note 8, at 17.

change, campus culture, and community relations. All have experienced campus tragedy that has precipitated change. Administrators at all three institutions commented that, even though policy may not always be changing, their universities constantly are examining practices in light of current challenges (e.g., the call to protect campuses after the Virginia Tech tragedy). Like any organization, universities must adapt to the environment.²⁰ However, one professional interviewed in this study said, “You can’t predict everything.” The importance of planning for—not reacting to—crisis and change is not new.²¹

Limited resources—both financial and human resources— sometimes restrict how well or how quickly an institution may react to change. Though all three schools in this study are relatively well-funded, all three must outsource student mental health services—either because they can not handle certain illnesses or because the system becomes overloaded with students in need of counseling. This is an issue facing many institutions today. The University of Virginia, for example, must limit on-campus counseling to eight or nine sessions then refer students to off-campus treatment centers.²²

Limited staffing is another constraint prohibiting these campuses from adjudicating off-campus incidents involving students, particularly alcohol-related violations. A judicial officer at State commented that the office is looking at forming a cooperative relationship with community police to begin adjudicating off-campus student infractions. The major concern he expressed was, “Can we handle that?” Though the university would like to begin addressing the issues that student misconduct causes in

²⁰ See generally GARETH MORGAN, *IMAGES OF ORGANIZATIONS* (SAGE Publications 1997) (discussing contingency theory).

²¹ See generally GEORGE KELLER, *ACADEMIC STRATEGY* (The Johns Hopkins University Press and the American Association of Higher Education 1983).

²² See Daniel McGinn, *After Virginia Tech*, *NEWSWEEK*, Aug. 20/27, 2007, at 71.

the community at-large, the office of judicial affairs does not currently have the staff for such an initiative.

No school in this study has a cooperative agreement with local police to report off-campus student-related incidents.²³ Private does, however, cooperate with local police who will radio campus authorities if there is a student-related incident in the proximate location of the campus.²⁴ Though administrators at all three schools indicated that they are concerned about campus-community relations, none of the three universities monitor students' behavior off-campus, particularly Greek-related functions. This practice appears to hearken back to "bystander"²⁵ reasoning that, if an institution does not get involved or apprise itself of what occurs off-campus, it lessens the potential liability.

However, all three institutions seem to be instituting more "hands-on" approaches regarding the care of students. In line with recommendations from the government reports issued after the Virginia Tech tragedy,²⁶ all three institutions for some time have had information-sharing committees comprising top-level administrators who meet regularly to discuss campus trends and at-risk students. Still, lower-ranking administrators commented that there is a need for a centralized clearinghouse, particularly regarding student discipline. This is where the need-to-know issues surrounding FERPA become murky. Who can be allowed access to student records? How much should be shared? Does an institution risk violating FERPA in order to prevent potential tragedy? Professionals must answer these questions constantly.

²³ Some universities like Florida State University, for example, do adjudicate off-campus alcohol incidents and receive all police reports from Tallahassee police that involve FSU students.

²⁴ Private owns several apartment complexes in the adjoining jurisdiction.

²⁵ See Bickel and Lake, *supra* note 8.

²⁶ Report to the President on Issues Raised by the Virginia Tech Tragedy 10 (June 13, 2007) (unpublished manuscript).

In regard to privacy law, most professionals interviewed were familiar with the privacy laws related to student records and were comfortable with sharing information with colleagues. However, when it comes to parental notification, that policy tends to be centralized through the dean of students or some other high-level administrative office. It does not appear that lower-level professionals felt empowered to decide whether or not parents should be contacted in certain situations. As the dean of students at Private said, "If anyone will violate it [FERPA], it will be me." However, informants at all three schools did say that attempts are made to educate student affairs professionals as well as faculty members about FERPA, privacy issues, and their role in referring students in need. Ideally, policies should be clearly articulated and employees should be empowered to be "clear-minded and fast-acting."²⁷ Inaction can be more harmful sometimes than inept action.²⁸

Organizational structure is significant when deciding who is consulted during policy and practice formation and how much authority is delegated. All three institutions seemed bureaucratic: authority is delegated by the leader and there is reporting from subordinates.²⁹ At Tech, departmental directors are the ones consulted during policy formation. However, lower-level administrators did indicate that their opinion is solicited in the process and even students are consulted to vet out initiatives. This practice stands to increase buy-in for new policies.

Equally important to organizational structure is organizational culture,³⁰ which stands to institutionalize certain beliefs among members. Culture particularly comes into

²⁷ See MICHAEL USEEM, *THE LEADERSHIP MOMENT: NINE TRUE STORIES OF TRIUMPH AND DISASTER AND THEIR LESSONS FOR US ALL* 37 (Random House 1998).

²⁸ *Id.*

²⁹ See *generally* ROBERT BIRNBAUM, *HOW COLLEGES WORK: THE CYBERNETICS OF ACADEMIC ORGANIZATION AND LEADERSHIP* (Jossey-Bass 1988) (describing a taxonomy of university structures: collegial, bureaucratic, political, anarchical).

³⁰ "Culture is the set of important understandings (often unstated) that members of a community share in common." See *generally* LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* (Jossey-Bass 2003).

play in a field like student affairs, which is rife with employee turnover. Culture is a function of its members and it is important to train and teach organizational culture to members—especially new members—before crisis strikes.³¹ However, it is very important that culture not thwart progress and forward thinking.³² Culture often gets lost when employees leave, and culture often is not understood by new employees. For example, at State, where the hazing death of a student more than 10 years ago still resonates in departmental practice, the new head of campus judicial affairs indicated that he no longer considers that case important in policy and practice decisions. “It happened so long ago. It’s an outlier.”

Constituents also affect culture and, ultimately, policy decisions. Each constituency promotes its own agenda³³ and organizational values—derived from culture—are so important in maintaining the integrity of an institution’s mission. For example, students, parents, and alumni exert immense power over Greek affairs at Private. The president at State opposed several of the initiatives started by the anti-alcohol coalition. Culture comes from leaders but acceptance comes within the organization.³⁴ Institutions that involve more lower and mid-level administrators in decision making can increase buy-in. Soliciting buy-in from other constituents (e.g., parents and students) also can put an institution in good stead to transmit certain values. (For example, the residence life judicial officer at Private said that institutions should look at *‘in partner parentis,’* advocating that parents can make strong allies with student affairs professionals.) However, institutions should also be careful to not

³¹ See Useem, *supra* note 27.

³² See *generally* J. DOUGLAS TOMA ET AL., *THE USES OF INSTITUTIONAL CULTURE: STRENGTHENING IDENTIFICATION AND BUILDING BRAND EQUITY IN HIGHER EDUCATION* (Jossey-Bass 2005).

³³ See DAVID L. KIRP, *SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 4* (Harvard University Press 2003).

³⁴ See EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 19-21 (2d ed. Jossey-Bass 1992).

succumb to the outside pressures of constituents that are antithetical to the beliefs and mission of the university.

Just as parents can be strong allies, peer groups appear to be a powerful force in modifying risky student behavior. For example, at Private there is a group of all-male Greeks on deferred suspension that meet regularly with an alcohol educator to examine their behavior, talk about their struggles and progress, and hold each other accountable. Similar programs have been piloted nationwide and early research indicates that peer groups and intervention programs can help troubled students stay enrolled and avoid further disciplinary consequences.³⁵

Finally, education as a deterrent also seems to be under scrutiny at the institutions included in this study. As a Greek advisor at State said, education has not been as successful as policy and statutory changes have been in deterring underage alcohol use. However, all schools do continue to use education as a baseline tool (e.g., all freshmen at State must take the online course, mystudentbody.com, and all students at Private must complete a wellness course for graduation). In regard to student activities, particularly in Greek life, the advisors at all three institutions indicate that they start with education to mitigate risk—which includes mandatory officer training and mock disciplinary hearings for judiciary boards. Everyone seems to be trying to “push the envelope in alternative education,” said one Greek advisor at State. At Tech, the Greek affairs office relies on national chapters for alcohol education. “We don’t want to be redundant from what the university alcohol educator provides.”

4. What might institutions do to formulate disciplinary policies that are consistent with the state of the law? And can such policies reconcile inter-organizational conflict within universities, financial and resource constraints, and common-sense practice?

³⁵ See, e.g., Donald D. Gehring, Speech at 37th Annual Conference on Higher Education and the Law: Back on TRAC: Treatment, Responsibility, & Accountability on Campus (July 31, 2006).

Some administrators may view today's regulatory campus climate as a limited return to *in loco parentis* as universities increasingly implement policies to guard against hazing, campus crime, and alcohol abuse.³⁶ Yet, that may not accurately describe the trend—nor does it imply that by attempting to monitor student behavior do institutions expose themselves to liability.³⁷ Though no litigation yet has occurred to challenge the FERPA modifications which allow for parental notification for underage alcohol use, universities should not equate compassion and discipline with an assumption of duty and risk when they choose to notify parents of students' alcohol violations.³⁸ Though nonfeasance can not be claimed unless a special relationship exists,³⁹ administrators should not shy away from the threat of litigation to the detriment of professional ethics. "Purposely insulating oneself from knowledge will not absolve a campus administrator

³⁶ *Id.* But see Carolyn J. Palmer et al., *Parental Notification: A New Strategy to Reduce Alcohol Abuse on Campus*, 38 NASPA J. 372, 383 (2001) (arguing that "[i]nstitutions also may be responding to their legal duty to protect or warn business invitees (students) of foreseeable risks (consequences of underage alcohol consumption) and do not perceive parental notification as a 'return to *in loco parentis*'").

³⁷ See Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of 'In Loco Parentis' and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 263 n. 8 (stating that the "new" *in loco parentis* is both

wrong and problematic . . . [courts] resolving personal injury claims by students against colleges have uniformly assessed the relationship under traditional tort theories. Furthermore, the doctrine of *in loco parentis*, properly understood, never did serve as a basis for tort liability. Thus the mistaken claims of the coming of a 'new' *in loco parentis* may create confusion . . . and may induce colleges to draft and implement policies that spawn, rather than diminish institutional liability),

citing Stamatakos, *supra* note 3.

³⁸ To prove a negligence claim against a university, the defendant must prove that duty existed, that there was a breach of that duty, the university's breach was a proximate cause of the injury, and that damage occurred. Universities rarely are sued under intentional tort or strict liability theory because those claims are so difficult to prove. See Bickel & Lake, *supra* note 8, at 66.

³⁹ See Douglas R. Pearson, *Negligent Liability in United States Colleges and Universities: A Legal-Historical Analysis*, at 127 (1998) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University) (citing *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987)).

from liability.”⁴⁰ In regard to alcohol abuse within the Greek system, institutions often seek to absolve all responsibility by avoiding landlord-tenant situations with Greek-letter housing.⁴¹ “The fact that a college need not police the morals of its resident students . . . does not entitle it to abandon any effort to ensure their physical safety.”⁴² Bickel and Lake warn college administrators not to posit that no duty exists in the absence of a custodial relationship.⁴³

Additionally, some institutions may interpret the university-student relationship as a strictly contractual one, giving heed to “consumer” rights—and demands.⁴⁴ Instead, policy and practice should balance student growth and development with responsible collaboration with parents when a student’s behavior indicates that an alcohol problem exists.

In regard to mental health, though courts have not held *per se* that institutions must notify parents of students’ suicidal threats,⁴⁵ professional responsibility coupled with the modifications in FERPA regulations arguably should encourage institutions to consider adopting a student mental health policy. Though some administrators may fear that the university increases its liability by assuming responsibility to oversee student

⁴⁰ See Darby Dickerson, *Legal Issues for Campus Administrators, Faculty and Staff*, in COLLEGE STUDENT MENTAL HEALTH: EFFECTIVE SERVICES AND STRATEGIES ACROSS CAMPUS 80 (Sherry A. Benton & Stephen L. Benton eds., 2006).

⁴¹ See Leo Reisberg, *A Pledge Dies at the University of Iowa, and His Parents Blame the Fraternity*, CHRON. HIGHER EDUC., Nov. 6, 1998, at A61 (quoting an Iowa administrator who claimed to “have little control over what goes on in the alumni-owned houses”).

⁴² See *Mullins v. Pine Manor C.*, 449 N.E.2d 331 (Mass. 1983) (holding that the College had a duty to protect residents because of foreseeable risk and the College’s lack of care to protect against intruders), *cited in* Bickel & Lake, *supra* note 37, at 282.

⁴³ See Bickel & Lake, *supra* note 37, at 280.

⁴⁴ Higher education historically has been responsive to market trends. The Yale Report of 1828 served to defend the classical curriculum, which was being replaced by pragmatic education. See, e.g., Kirp, *supra* note 33 (providing case studies describing the ways in which higher education has become increasingly proprietary and market driven).

⁴⁵ See Baker, *supra* note 15, at 513.

health and behavior, universities today more likely are to be held liable for not taking any action to reasonably address mental issues among students. As university administrators, student affairs practitioners, and on-campus counselors increasingly become involved in the mental wellness of students, it is imperative that they not only educate themselves regarding pertinent federal regulations and student rights but also formulate a plan by which all parties involved in student cases effectively communicate in an effort to best meet student needs.⁴⁶

A fear of litigation should not overshadow professional ethics and student affairs ideals.⁴⁷ Schlossberg's "4S" approach can be useful to student affairs administrators in formulating strategies to address mental health issues: situation, self, support, and strategy.⁴⁸ Indeed, college students are in a huge state of transition—ranging from academic, social, sexual, and even home life situations. Schlossberg's theory focuses on the preoccupation that people in transition have with change—or situation. The sense of self normally is not highly developed among students this age, and support and strategy are paramount in addressing the issues confronted by these students.

Parents can play an integral role in formulating a coping strategy, so long as the parents' involvement does not complicate or hinder the counseling process.⁴⁹ Kadison and DiGeronimo, in their 10-step crisis action plan, place parents at the heart of healing to monitor a student's progress and follow-through.⁵⁰ However, when contacting

⁴⁶ For example, in *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005), the four psychiatrists that treated Shin at various times during her troubled two years at MIT did not communicate amongst each other when they learned of her increasing threats of suicide.

⁴⁷ See Joy Blanchard, *University Tort Liability and Student Suicide: Case Review and Implications for Practice*, 36 J. OF LAW AND EDUC. 461, 476 (2007).

⁴⁸ See NANCY J. EVANS ET AL., *STUDENT DEVELOPMENT IN COLLEGE: THEORY, RESEARCH, AND PRACTICE* 107-122 (Jossey-Bass 1998).

⁴⁹ See Baker, *supra* note 15, at 515.

⁵⁰ *Id.* at 515, *citing* Richard Kadison & Theresa Foy DiGeronimo, *COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT* (Jossey-Bass 2004).

parents, it is important that administrators refrain from making promises to the family that they will act in a way to prevent further suicide attempts.⁵¹

Additionally, institutions are neither precluded from instituting emergency withdrawal procedures⁵² when there exists a perceived threat to a student or to others.⁵³ This issue recently has been brought to the fore with the April 2007 shootings at Virginia Tech University in which the gunman, Cho Seung-Hui, had a history of mental problems and was referred to campus counseling for suicidal ideations. A judge, however, only recommended that he seek outpatient treatment—which he failed to do.⁵⁴

Universities must weigh difficult options when instituting mental health policies: some students may be reluctant to seek counseling if they are afraid of university-sanctioned repercussions. Yet, as in the case of Elizabeth Shin at MIT, the more contact university professionals have with a mentally ill student the more the institution may increase its exposure to liability.⁵⁵ Virginia, ironically, recently became the first

⁵¹ See Baker, *supra* note 15, at 521. See also Shin, No. 02-0403 (Mass. Super. Ct. June 27, 2005) (where the parents filed a breach of contract claim, stating that the residence hall director's promise to keep the family abreast of further emergencies constituted an implied contract).

⁵² However, a student filed suit against George Washington University, claiming that his civil rights were violated when he was dismissed after seeking on-campus treatment for depression and suicidal thoughts. See Eric Hoover, *Student Dismissed After Seeking Treatment for Depression Claims George Washington U. Violated His Rights*, CHRON. HIGHER EDUC., March 13, 2006. That case later was settled out of court. See also Robert B. Smith & Dana L. Fleming, *Student Suicide and Colleges' Liability*, CHRON. HIGHER EDUC., April 20, 2007, at B24.

⁵³ In *Mahoney v. Allegheny College*, No. 892-2003 at 25 (C.P. Crawford County December 22, 2005) the court failed to hold campus administrators liable for failing to involuntarily hospitalize the student (based on a non-mental health professional's lack of legal standing to do so) and for failing to require him to take a leave of absence (because the administrators had little knowledge of the student's situation and deferred to the judgment of the treating counselor).

⁵⁴ See Thomas Bartlett, *Sounding the Alarm*, CHRON. HIGHER EDUC., April 27, 2007, at A8. A commission examining mental health care in Virginia found that the state's program was underfunded to adequately treat patients in a timely manner and to conduct follow-up examinations. See also Ian Urbina, *Virginia Tech Report Cites Privacy Law Problems*, N.Y. TIMES, June 13, 2007, available at www.nytimes.com.

⁵⁵ See Smith and Fleming, *supra* note 52, at B24.

state to pass legislation regarding campus mental health policies. The bill prohibits public higher education institutions from sanctioning or expelling students “solely for attempting to commit suicide, or seeking mental-health treatment for suicidal thoughts or behaviors.”⁵⁶

As institutions obtain more and more information from matriculating and continuing students, administrators must ask themselves if mental health policies and practices increase their risk of liability, particularly if it is known that a student has existing mental illnesses. The key appears to be communication between intersecting departments. Parental notification not only can serve as a good-faith defense against liability but it also may serve as an effective tool in addressing student health needs.

Each institution, when implementing policies, considers different factors unique to its culture and organizational structure—and with each decision comes varying results. College administrators must be educated to make tough decisions that affect not only the educational setting but the lives of their students. When addressing the issue of alcohol abuse, mental health, or other factors affecting student discipline and safety, administrators must consider institutional prerogatives and objectives, as well as individual rights,⁵⁷ the campus environment, student demographics, values, traditions, and institutional mission.

The universities included in this study are well-funded, top-tier research institutions that do have more staff and more resources and serve a different clientele than a large cross-section of colleges and universities. However, they also can be

⁵⁶ *Id.* The authors suggest that further interpretation of this law may create a special duty of care between the student and institution.

⁵⁷ “What distinguishes the *in loco parentis* of [today] is that it is limited to protection of student safety. Missing is the once complementary power of colleges to police and control student’s morals—this having long been barred by constitutional and civil rights protection.” See Pearson, *supra* note 39, at 43 (citing James J. Szablewicz & Annette Gibbs, *Colleges’ Increasing Exposure to Liability: The New ‘In Loco Parentis,’* 16 J.L. & EDUC. 453, 465 (1987)).

representative of most higher education institutions today in that they face the same issues of student safety, mental health problems, underage drinking and alcohol abuse, campus-community tension, and inter organizational change. Based on a review of the literature and findings from the case study presented in this dissertation, below are some practical recommendations for student affairs practitioners and university administrators:

Improve education and information sharing

- Professionals should educate themselves on current theoretical models being used in policy making regarding student welfare. The facilitator model is unique, however, in that it factors in risk management and exposure to liability while also remaining centric to student development ideals. “A facilitator is sometimes a bystander—but a bystander who chooses to be in that role as a way to facilitate student education and student development. Control-dominated management is ultimately inconsistent with the objective of helping the free choices of young adults.”⁵⁸ “The facilitator model fosters lifelong smart decision making.”⁵⁹
- Employees should be educated regarding student privacy rights and the current amendments to FERPA. Also, parental notification policies need to be consistently enforced, particularly when judicial cases are adjudicated by multiple offices (e.g., judicial affairs, residence life, and Greek affairs).
- Jain and Shin were both international students and perhaps cultural differences/misunderstandings attributed to campus mental health professionals poorly treating their condition.⁶⁰ Campus professionals should take the initiative

⁵⁸ See Bickel and Lake, *supra* note 8, at 195. Benton & Benton advocate the “cube model” of intervention: (1) Target; (2) Purpose; and (3) Method. See Sherry A. Benton & Stephen L. Benton, *Responding to the College Student Mental Health Problem*, in COLLEGE STUDENT MENTAL HEALTH: EFFECTIVE SERVICES AND STRATEGIES ACROSS CAMPUS 19 (Sherry A. Benton & Stephen L. Benton eds., 2006).

⁵⁹ See Bickel and Lake, *supra* note 8, at 16.

⁶⁰ See Pavela, *supra* note 12, at 15.

to learn about the cultural nuances of their clients and consult with peers when in doubt of cultural mores.

- Information sharing is paramount. Though there are professional standards that restrict some information from being divulged (particularly among mental health professionals), campus police, residence life, judicial officers, and other student affairs professionals should meet regularly to discuss student needs and particular students at-risk. Quite often there is no centralized clearinghouse for such information and situations like the *Shin* case, where multiple psychologists and student affairs professionals dealt with her over the course of two years yet never collaborated on her treatment, can be avoided.
- Schools should send copies of parental notification policies annually to students and parents.⁶¹

Maximize personnel resources

- When considering a new policy or while examining existing ones, institutions should organize a planning team to discuss the viability of the plan and to obtain diverse views from different campus offices and stakeholders.⁶² This serves to increase buy-in.
- According to Bickel and Lake, “bystander” era cases disempowered campus police.⁶³ University policy should empower campus police to fully enforce rules regarding student behavior (e.g., alcohol). Also, administrators from student affairs and campus police should meet regularly to discuss campus trends and student behavior problems.

⁶¹ E.g., this can be done in mandatory Clery Act information notices. *Id.* at 14.

⁶² See Benton & Benton, *supra* note 58, at 19.

⁶³ See Bickel and Lake, *supra* note 8, at 14.

- Faculty and academic administrators tend to distance themselves from non-academic matters.⁶⁴ However, mental health issues can interfere with academic function.⁶⁵ Student affairs administrators should partner with academic affairs to educate faculty not only of the correlation between personal matters and academic performance but also the important role faculty can have in referring students in need to receive appropriate counseling.

Reevaluate policy in light of current case law

- The negative ruling in *Furek* was as a result of policy breakdown.⁶⁶ The institution had an anti-hazing policy but failed to enforce it. The University of Delaware is a model case: after that court ruling, the University responded by imposing tougher disciplinary sanctions, parental notification, and alternative programming.⁶⁷ Universities should be diligent to ensure that policy and practice coincide.
- Institutions that utilize “no harm” contracts in cases of mental health emergencies increase their exposure to liability.⁶⁸ “The suicide prevention contract, although frequently used, is of unproven clinical and legal usefulness during times of increased suicide risk and generally should be avoided.”⁶⁹ Institutions should, instead, formulate plans of action to ensure that a student receives the necessary mental evaluation or treatment.

⁶⁴ See Bickel and Lake, *supra* note 8, at 9. In a study conducted by Backels and Wheeler, 113 faculty at a public university identified 14 of 15 issues as veritable problems that can affect academic performance but only six of the 15 were consistently identified as problems for which the professors would allow flexibility in turning in assignments, grading, etc. See Benton & Benton, *supra* note 58, at 123.

⁶⁵ *Id.*

⁶⁶ See *Furek v. U. of Del.*, 594 A.2d 506 (Del. 1991).

⁶⁷ See Bickel and Lake, *supra* note 8, at 197.

⁶⁸ See Pavela, *supra* note 12, at 9.

⁶⁹ *Id.* at 11.

Improve campus services

- Campuses should increase the quality of alternative programming options for students, particularly on nights and weekends. Whether in a metropolitan area or small rural community, students at all three institutions did not partake in campus activities in favor of the local bar scene.
- The increased demand for mental health services has strained the organizational capacity of some campuses to meet the needs of students.⁷⁰ If a campus is unable to offer mental health services to its students, administrators should consider formulating agreements with local treatment facilities to provide mental health services for students.⁷¹ Also, student health insurance plans should have mental health coverage included.⁷²
- Institutions should form suicide intervention teams that have the authority and flexibility to respond quickly in crisis.⁷³
- Research indicates that students, as well as mental health patients in general, tend to sue less when they feel like they have been treated fairly.⁷⁴ Students with mental health issues should receive timely care and follow-up consultations from their counselors. Also, it is good practice to only outsource new clients. Existing clients should be allowed to continue treatment with the counselor with whom they have grown accustomed, unless a specialist is needed to treat a particular illness.

In addition to educating themselves regarding current law and enacting sound policies, the guiding recommendation for university administrators to mitigate liability is

⁷⁰ See Benton & Benton, *supra* note 58, at 152.

⁷¹ See Dickerson, *supra* note 40, at 80.

⁷² See Benton & Benton, *supra* note 58, at 204.

⁷³ See Pavela, *supra* note 12, at 23.

⁷⁴ *Id.* at 46.

to practice professional common-sense when making decisions regarding student safety. In the Shin-MIT case, the mental health professionals and student affairs administrators that were exposed to personal liability knew of the danger Shin posed to herself yet failed to act.⁷⁵ More recently, an appeals court has ruled that a trial may proceed to determine personal liability against administrators at Texas A&M University for the 1999 death of 12 students that died when a large bonfire, built as part of a traditional student activity, collapsed. The court ruled against the campus officials because of the foreseeable risk that such an accident might occur.⁷⁶ When campus officials know of a potential danger yet fail to act, that is when they are most susceptible to liability. As was previously mentioned, courts recognize the role personal actions and contributory negligence play in student welfare cases. However, unlike in the “bystander” era, courts no longer excuse universities for failing to enact professionally sound policies that address the imminent and potential harms posed to students.

⁷⁵ See *Shin v. Mass. Inst. of Tech.*, No. 02-0403 (Mass. Super. Ct. June 27, 2005).

⁷⁶ See Katherine Mangan, *Texas Court's Ruling in Bonfire Case Opens New Liability Worries for Campuses*, CHRON. OF HIGHER EDUC., June 2, 2008, available at www.chronicle.com.

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APPENDIX A

METHODOLOGY

This dissertation not only included a legal-historical analysis of institutional liability for student welfare but it also examined, via a qualitative case study, the organizational and cultural phenomena that impact institutional policies regarding college underage drinking and student mental health. First this study began with a comprehensive legal-historical analysis of the issue, involving both primary and secondary authority.¹ Secondary sources are particularly useful in beginning large legal projects or identifying large bodies of case law, and secondary sources can aid in generating search terms and locating seminal cases by which to triangulate data, such as additional case law and accompanying statutes and regulations.² Secondary sources are legal commentaries³ and include legal encyclopedias, annotations, restatements, treatises, and law reviews⁴ and sometimes influence courts' decisions. Once a court has adopted a rule proposed by secondary authority, it becomes primary authority (e.g., Restatement of Torts).⁵ It must be noted, however, that judicial decisions are only

¹ See generally AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES (2d ed., Aspen Publishers 2003).

² *Id.* at 26. The seminal work that served as a starting point for the legal analysis was ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (Carolina Academic Press 1999).

³ See Sloan, *supra* note 1, at 4.

⁴ See JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 14-15 (2nd ed. Fred B. Rothman Publications 1994).

⁵ *Id.* at 13.

binding in that jurisdiction and are only persuasive authority in other judicial jurisdictions.⁶

The legal-historical analysis in this dissertation provided the literature base by which the qualitative case study was framed. An exhaustive literature review can aid in identifying what is known about a particular topic or field⁷ and assists the researcher in both identifying questions that remain to be answered⁸ and synthesizing current research into a different perspective.⁹ During the review of the literature, a researcher should identify current methodologies being employed within the field¹⁰ as well as critically analyze those methodologies to propose how a new study can significantly add to the extant body of knowledge.¹¹ Education law research typically comprises legal-historical analysis and often lacks the in-depth analysis afforded by other methodologies,¹² and that is largely why I decided to include a qualitative case study in this dissertation.

Though rarely utilized, the social sciences have been significant in legal research, and several landmark decisions have hinged on evidence from such research.

⁶ *Id.* at 12.

⁷ See, e.g., David N. Boote & Penny Beile, *Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation*, EDUC. RESEARCHER Aug./Sept. 2005, at 4.

⁸ See, e.g., CATHERINE MARSHALL & GRETCHEN B. ROSSMAN, *DESIGNING QUALITATIVE RESEARCH* 43 (SAGE Publications 3d ed. 1999).

⁹ See Boote and Beile, *supra* note 7, at 4.

¹⁰ *Id.* This study revealed that few studies have been conducted regarding parental notification policies. See, e.g., John W. Lowery et al., *Policies and Practices of Parental Notification for Student Alcohol Violations*, 42 NASPA J. 415 (2005) and Carolyn J. Palmer et al., *Parental Notification: A New Strategy to Reduce Alcohol Abuse on Campus*, 38 NASPA J. 372 (2001).

¹¹ See Boote & Beile, *supra* note 7, at 5, 7.

¹² See generally STEVE PERMUTH, *RESEARCH METHODS FOR STUDYING LEGAL ISSUES IN EDUCATION* (Education Law Association 2006) (exploring how qualitative and quantitative analysis can be used in legal research).

The *Brown* desegregation case¹³ relied more heavily on social science than *stare decisis*.¹⁴ Also, the recent higher education admissions affirmative action cases, *Gratz*¹⁵ and *Grutter*,¹⁶ involved policy studies that affected the Court's rulings.¹⁷ One main purpose of social science research is to make knowledge functional and utilitarian,¹⁸ and legal scholars often utilize some of the same inquiry paradigms as scholars in the social sciences and humanities.¹⁹ However, there are inherent differences among the disciplines:

Within the emergence of alternative inquiry paradigms . . . , researchers . . . increasingly find themselves grounded within different intellectual traditions . . . Faculty working in the various paradigms view the purposes of their work differently, apply different evaluative standards, rely upon different methods and frameworks, and accept different types of values.²⁰

Using Lincoln and Guba's existing taxonomy of theoretical perspectives,²¹ Toma formulated a corollary framework to capture the uniqueness present in legal

¹³ 347 U.S. 483 (1954).

¹⁴ See Permuth, *supra* note 12. *Stare decisis* is "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

¹⁵ 539 U.S. 244 (2003).

¹⁶ 539 U.S. 306 (2003).

¹⁷ See Permuth, *supra* note 12.

¹⁸ See J. Douglas Toma, *Exploring a Typology for Classifying Inquirers and Inquiry into Paradigms*, 21 REV. OF HIGHER EDUC. 19, 20 (1997).

¹⁹ *Id.*

²⁰ *Id.* at 19.

²¹ See Yvonna S. Lincoln & Egon G. Guba, *Paradigmatic Controversies, Contradictions, and Confluences*, in HANDBOOK OF QUALITATIVE RESEARCH 168 (Norman K. Denzin & Yvonna S. Lincoln eds., 2000) (their taxonomy includes Positivism, Postpositivism, Critical, and Constructivism).

scholarship: formalists, realists, critical, and interpretive scholars.²² Interpretive scholars closely align with their constructivist counterparts in the humanities and social sciences by interpreting meaning and understanding on “multiple realities.”²³ Much like the constructivist approach utilized in the qualitative portion of this dissertation, this study examines case law via an interpretive lens—seeking the meaning judicial decisions have for administrators and how they interpret and apply them. According to Toma, interpretive scholars subscribe to the “postmodern concept that the world is increasingly complex, contextual, and local; understanding is, therefore, indeterminate and subjective, not universal and objective.”²⁴

The purpose of including a qualitative component within a legal dissertation was to examine the practical application of case law within universities and to provide policy recommendations for campus administrators. Qualitative work is inductive²⁵ and empirical, occurring in natural settings and centered on field work.²⁶ When conducting

²² Toma formulated this framework after interviewing 22 legal scholars at three institutions. While most social science is empirical, legal scholars engage in normative and empirical studies. Toma concedes that his typology addresses legal empirical work more straightforwardly but is broad enough to include normative legal scholarship as well, “if one considers only ontology and epistemology, recognizing that normative work does not have a methodology in the same way that an empirical study does.” See Toma, *supra* note 18, at 22.

²³ *Id.* at 23.

²⁴ *Id.* at 22.

²⁵ See JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 181-82 (2ded. SAGE Publications 2003).

²⁶ See *generally* ROBERT E. STAKE, MULTIPLE CASE STUDY ANALYSIS 4-16 (The Guilford Press 2006) and ANNE HAAS DYSON & CELIA GENISHI, ON THE CASE: APPROACHES TO LANGUAGE AND LITERACY RESEARCH 4-16 (Teachers College Press 2005). The researcher is the primary instrument for data collection and analysis. Marshall and Rossman identify eight aspects typical of a qualitative research plan: (1) the qualitative genre, (2) site and population selection, (3) the role of the researcher, (4) data collection, (5) data management, (6) data analysis, (7) trustworthiness, and (8) time line. See Marshall & Rossman, *supra* note 8, at 55.

case studies, the main criteria in selecting cases include relevance, diversity across contexts, and whether the cases illuminate the complexity and context by which the phenomena is being studied.²⁷ I purposefully selected the sites and interviewees included in this case study: one private institution and two public universities.²⁸ This was done so as to observe the application of the law in both institutional types, as there are different legal standards applicable in both settings.²⁹ Also, organizational structures and campus cultures differ greatly between the institutional types: private colleges typically are run as corporations headed by a board of directors, whereas public universities are subject to state law and state governing boards. Though student-related phenomena are similar nationally, one limitation of the study was that it was restricted geographically because of convenience and financial factors.³⁰

To gain access to the sites, I contacted the chief student affairs administrator at each campus and utilized a key informant to then identify potential interviewees. After reviewing organizational charts, I suggested a list of potential subjects to the chief student affairs officer and he or she would then request that the staff be available to my interview requests. The list of participants included deans of students, student health and counseling administrators, alcohol educators, critical incident responders, chief judicial affairs officers, Greek life advisors, residence hall directors, residence life

²⁷ See Stake, *supra* note 26, at 23.

²⁸ See Marshall & Rossman, *supra* note 8, at 78 (listing a taxonomy of sampling strategies).

²⁹ E.g., Constitutional law does not apply the same at private universities as it does in the public sector. Also, tort law varies state to state and, because of sovereign immunity, sometimes between institutional types.

³⁰ “The tension between the study of the unique and the need to generalize is necessary to reveal both the unique and the universal and the unity of that understanding.” See MICHAEL BASSEY, *DOING QUALITATIVE RESEARCH IN EDUCATIONAL SETTINGS* 36 (Open University Press 1999).

judicial officers, risk management specialists, and university legal counsel. Data for this study primarily was collected through interviews, though some document analysis is included in the report. Unlike other methods of qualitative inquiry (e.g., ethnographies), case studies “seek to answer focused questions by producing in-depth descriptions and interpretations over a relatively short period of time, perhaps a few weeks to a year.”³¹

The fieldwork for the qualitative component was conducted during a nine-day research trip, allowing for two days at each institution. I conducted twenty interviews, each lasting approximately 60-90 minutes.

Theoretical frameworks guide how an interview is designed and conducted,³² and, because I was interested in the personal construct each interviewee had regarding the application of university-related law and its role in institutional policy regarding student welfare, I designed my interviews to be open-ended and conversational.³³

Qualitative interviews can provide in-depth knowledge from participants, and the flexibility inherent in this methodology allows for probing (or follow-up) questions.³⁴

Interviewing also allows for access to large amounts of data quickly and immediate

³¹ See Patricia A. Hays, *Case Study Research*, in FOUNDATIONS FOR RESEARCH: METHODS OF INQUIRY IN EDUCATION AND THE SOCIAL SCIENCES, 218 (Kathleen deMarrais & Stephen D. Lapan, Eds., 2004).

³² See Kathleen deMarrais, *Qualitative Interview Studies: Learning Through Experience*, in FOUNDATIONS FOR RESEARCH: METHODS OF INQUIRY IN EDUCATION AND THE SOCIAL SCIENCES, 55 (Kathleen deMarrais & Stephen D. Lapan, Eds., 2004).

³³ See, e.g., *Id.* at 53 and Creswell, *supra* note 25, at 183 (on how interview protocol affects a study and final reporting).

³⁴ See, e.g., deMarrais, *supra* note 32, at 52; SHARAN B. MERRIAM, QUALITATIVE RESEARCH AND CASE STUDY APPLICATIONS IN EDUCATION 80 (Jossey-Bass 1998); HERBERT J. RUBIN & IRENE S. RUBIN, QUALITATIVE INTERVIEWING: THE ART OF HEARING DATA 43 (SAGE Publications 1995). An interview “is a process in which a researcher and participant engage in a conversation focused on questions that relate to a research study.” See deMarrais, *supra* note 32, at 54.

follow-up and clarification.³⁵ I started each interview by obtaining general information about the institution, the department in which the informant worked, and the general employment duties of the informant. I had a core list of possible questions³⁶ (see Appendix B) but also structured the interviews so as to allow the participants to guide me.³⁷ Informants often offered information that I had not thought to ask or provided information that provided insight into organizational or legal issues to which I had not been privy in other interviews. The direction of the study was slightly altered during the course of the site visits, as the informants provided rich unexpected anecdotes. I tested emerging themes by introducing probing questions to the next participant.³⁸

Data from interviews can be limited when informants may be tainted by bias, poor recall, misarticulation,³⁹ and even deceptiveness. Though most participants were very forthcoming and candid, a couple of interviewees were hesitant to share too much revealing information, probably because of their rank within campus administration or because of the sensitive nature of their profession. I reconciled that by speaking with colleagues within that department or cooperating departments and by asking those professionals the questions to which I previously had not received a satisfactorily candid response. Though my initial plan was to identify the institutions yet keep the name of the informants anonymous, I decided while in the field—because of the sensitive nature of

³⁵ See Marshall & Rossman, *supra* note 8, at 110.

³⁶ Research design should include an account of general types of questions to be asked in the field. See Toma, *supra* note 18.

³⁷ The research design should remain flexible and open to new emerging ideas. See Rubin & Rubin, *supra* note 34, at 45.

³⁸ Theoretical saturation occurs when more interviews add no more to the emergent themes already discovered during the study. *Id.* at 47.

³⁹ See Hays, *supra* note 31, at 229. See also Marshall & Rossman, *supra* note 8, at 110.

the information I was gathering and the concern some informants had regarding anonymity—to not reveal the identity of the informants nor the institutions. Participants were informed of that decision during the interviews.

A study also can be inhibited by a researcher's experiences in previous settings, which can influence expectations of what he or she will find.⁴⁰ I had never visited two of the three campuses but did work at the other for one year. However, my employment at that particular institution did not relate to the research topic, and I never met nor had any prior contact with the interviewees. I did not reveal to them during the interview that I had been employed there six years prior.

I also designed the case study with other ethical issues in mind. Prior to conducting site visits, participants each signed an informed consent form (see Appendix B), which included the purpose of the study, procedures, and the individual benefits from participation as well as overall benefits to the profession. Participation was voluntary,⁴¹ and no quotations were personally attributed.

The data from the interviews was managed via handwritten notes and audio taped recordings. I also obtained paper and electronic copies of pertinent documents (e.g., organizational charts, codes of student conduct, and institutional policies) to conduct my analysis. The data was then organized by generating categories and themes from the transcripts and notes.⁴² The report in this dissertation includes both cross-case and within-case analysis and was written following the Bluebook Uniform

⁴⁰ See CORRINE GLESNE & ALAN PESHKIN, *BECOMING QUALITATIVE RESEARCHERS: AN INTRODUCTION* 22 (Longman 1992).

⁴¹ See Creswell, *supra* note 25, at 184 (discussing ethical designs in qualitative interviews).

⁴² See Marshall & Rossman, *supra* note 8, at 152-157 (exploring methods of organizing and reporting findings from qualitative field study).

System of Citation (18th edition), which is the standard style manual used in legal writing.

APPENDIX B

SUPPLEMENTARY FORMS AND SAMPLE INTERVIEW QUESTIONS

Joy Blanchard, Ph.D. candidate
Institute of Higher Education, Meigs Hall

DRAFT—Solicitation letter for interview participants

Dear _____:

I am writing to solicit your assistance with my research regarding institutional policies concerning student behavior (namely alcohol and mental health issues) and the effects law/risk management play in formulating these policies. I am a doctoral student in the Institute of Higher Education at the University of Georgia and hope to conduct a site visit at (institution). Should you agree to participate, I will be in contact soon to select a date for the visit, schedule an interview with you, and discuss any other professionals that you believe would be helpful in conducting my study.

My research hopes to not only explain the legal climate on universities today but also to examine how recent court cases, student-related events, and institutional forces have helped shape policy. Because of the nature of my study, information gathered will be held personal and any comments/quotes in my dissertation will be attributed anonymously.

If you are willing to participate in the site visit, please contact me via my information below. Your participation in this study is completely voluntary but I believe that (institution) would be an excellent inclusion because (list reason for respective institution, as outlined in IRB proposal). You are welcome to withdraw your participation at any time during the completion of the site visit.

I appreciate your time and the work you do for higher education.

Sincerely,
Joy Blanchard
150 Westpark Dr. #418
Athens, GA 30606
joyb@uga.edu
337.380.3016

Joy Blanchard, Ph.D. candidate
 Institute of Higher Education, Meigs Hall

Consent Form

I, _____, agree to participate in a research study titled "Institutional Liability for Student Behavior: A Legal-Historical Analysis and Organizational Case Study" conducted by Joy Blanchard from the Institute of Higher Education at the University of Georgia (706-542-3464) under the direction of Dr. J. Douglas Toma, Institute of Higher Education, University of Georgia (706-542-3464). I understand that my participation is voluntary. I can refuse to participate or stop taking part without giving any reason, and without penalty. I can ask to have all of the information about me returned to me, removed from the research records, or destroyed.

The reason for this study is to examine university policy formation regarding student behavior, namely alcohol and mental health-related issues. If I volunteer to take part in this study, I will be asked to answer questions regarding policy formation, its efficacy, organizational structures, and other factors affecting institutional practice and policy. The private audio-taped interviews are expected to last one hour.

The personal benefits are that it will help reflect on university risk management and student development issues. The researcher also hopes to examine the organizational and political structures of universities and benefit other administrators and academics in recognizing good practice.

No risk is expected in the course of this research. Confidentiality will be preserved in all possible cases, as quotes will not be attributed individually. Audio tapes of interviews will be kept by the researcher and disposed of after the results have been reported.

No incentives will be offered for participation in this study.

No individually-identifiable information about me, or provided about me during the research, will be shared with others without my written permission, except if required by law.

The investigator will answer any further questions about the research, now or during the course of the project.

I agree that I am agreeing by my signature on this form to take part in this research project and understand that I will receive a signed copy of this consent form for my records.

 Name of Researcher

 Signature

 Date

Telephone: _____

Email: _____

Name of Participant

Signature

Date

Please sign both copies, keep one and return one to the researcher.

Additional questions or problems regarding your rights as a research participant should be addressed to The Chairperson, Institutional Review Board, University of Georgia, 612 Boyd Graduate Studies Research Center, Athens, Georgia 30602-7411; Telephone (706) 542-3199; E-Mail Address IRB@uga.edu

Joy Blanchard, Ph.D. candidate
Institute of Higher Education, Meigs Hall

Sample Interview Questions

1. What policies has the institution instituted regarding underage alcohol use? Any policies regarding mental issues, i.e. suicide threats, involuntary commitment? Are students required to withdraw from the residence halls if a suicide attempt is made? Any mandatory counseling? Is parental notification involved?
2. Who is involved in setting such policies—legal counsel, student affairs, academics, campus counselors? What role do lower level student affairs professionals have in setting policies?
3. How are students made aware of these policies?
4. What has been the success rate of these policies? Who is in charge of reporting such issues? Who adjudicates the infractions—residence hall staff or judicial affairs, or both?
5. Was there any major campus incident that precipitated the formation of these policies?
6. How much of a factor was potential legal liability in formulating these policies?
7. What has been the reaction of the campus community in response to these policies?
8. How much of an issue is underage drinking on your campus? Do you have a cooperative relationship with campus and city police to report underage alcohol incidents to judicial affairs? Are off campus infractions involving students reported to campus judicial affairs? What are the sanctions? How often is parental notification used and in what circumstances?
9. How many campus counselors do you employ? How many sessions can students receive for free? Or they then referred to off-campus counselors? What is the fee?

10. What role do you feel the university has in student development in regard to these two specific issues? (alcohol and mental health)

11. Do you believe that the university heightens its exposure to liability the more it gets involved?

12. In regard to Greek life, who monitors hazing and alcohol infractions? How are cases adjudicated? Is there self reporting among the chapters?