DEPRESSION DISCRIMINATION: ARE SUICIDAL COLLEGE STUDENTS PROTECTED BY THE AMERICANS WITH DISABILITIES ACT?

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INTRODUCTION

The mental health status of the college student population continues to concern administrators in higher education. The growing number of students with minor to severe mental health issues has been classified as a "crisis" and an "epidemic."[1] These labels, while dramatic, are not unwarranted. According to a survey of college students conducted by the American College Health Association, forty percent of male students and fifty percent of female students reported an episode of depression so severe that they had difficulty functioning.[2] Of the students reporting depressive episodes, nearly fifteen percent qualified as clinically depressed.[3] Clinical depression can lead to more serious issues such as self mutilation and suicide.[4] Although mental illness is a general concern, administrators are most focused on the identification and prevention of suicidal

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1. *See* Richard D. Kadison, *The Mental-Health Crisis: What College Must Do*, CHRON. OF HIGHER EDUC., Dec. 10, 2004, at 20; Rob Capriccioso, *Self-Injury Epidemic*, INSIDE HIGHER ED, June 5, 2006, http://www.insidehighered.com/news/2006/06/05/injury.

2. Healthy Minds, College Mental Health Statistics, http://healthyminds.org/collegestats.cfm (last visited Sept. 9, 2007).

3. *Id.*

4. Robin Wallace, *Colleges Struggle, Innovate to Meet Mental Health Needs of Students*, FOXNEWS.COM, Aug. 29, 2006, http://www.foxnews.com/story/0,2933,211084,00.html; Nat'l Mental Health Ass'n, Depression: What You Need to Know, http://www1.nmha.org/infoctr/factsheets/21.cfm (last visited Oct. 9, 2007).

behaviors.[5] Suicide is the third leading cause of death among people aged fifteen to twenty-four.[6] More alarmingly, suicide is the *second* leading cause of death among college students in the same age range.[7] The number of college students with mental health issues is expected to rise due to increases in substance abuse, academic pressure, and domestic issues.[8] Due to these rising statistics, university administrators must take steps to prepare and protect their communities.[9]

To respond to the changing needs of the student population, universities have adopted a variety of programs and services geared toward mental health awareness and suicide prevention.[10] A majority of campuses now operate student-oriented counseling centers staffed with highly trained and credentialed professionals. A 2000 survey reported that ninety-four percent of counseling center staff members have a doctorate in counseling or clinical psychology.[11] In addition to counseling centers, universities also provide educational programs on student safety to residence hall staff and faculty members.[12] Increased education programs are intended to raise awareness about serious mental health manifestations, particularly suicide,[13] and these programs are being utilized by the intended targets.[14] One campus counseling center reported a 300% increase over the previous year in the number of students presenting in crisis[15] at the counseling center. Only a small number of students need extensive treatment and attention; however, these are the students who cause administrators to worry. The high demand produces a predictable result: resources are spread thin.[16] Consequently, those with severe mental illness may not receive the level of care needed to maintain a physical and emotional balance.[17] University administrators must also achieve a balance between providing a needed service to the student body at large

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5. *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, 126–29 (2002).

6. Wallace, *supra* note 4.

7. *Id.* Accidental death is the leading cause of death among college students.

8. Gail Russell Chaddock, *Mental Health Woes on the Rise: Many Campuses Unprepared to Help Troubled Students*, CHI. SUN-TIMES, Mar. 5, 2002, at 14 ("[E]xperts cite many reasons for the growing mental health caseload: families that don't function, student drinking and substance abuse that exacerbate psychological problems, and intense academic pressure.").

9. *See id.*

10. Wallace, *supra* note 4.

11. Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 NAT'L ASS'N OF STUDENT PERSONNEL ADMINS. J. 167, 174 (Fall 2003), *available at* http://publications.naspa.org/naspajournal/vol41/iss1/art9.

12. Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, CHRON. OF HIGHER EDUC., June 25, 2004, at 18.

13. *Id.*

14. Wallace, *supra* note 4.

15. *Id.* "Presenting in crisis" refers to a student experiencing a current and severe psychological episode at the time help is sought from the campus counseling center. *See id.*

16. *Id.*

17. *See* Lake & Tribbensee, *supra* note 5, at 126, 153.

and limiting institutional liability in the event a student makes the drastic choice to commit suicide.

Educational institutions were traditionally insulated from liability in cases involving student suicide.[18] However, in recent years a small number of cases have recognized that universities may have a legal duty to protect mentally ill students from self-harm and suicide.[19] The potential for liability is resulting in drastic measures on some college campuses. Administrators are enacting removal clauses in student handbooks and codes of conduct to enable university officials to immediately suspend a student who exhibits suicidal behaviors.[20] While a removal clause shields the university from liability, such a clause also conflicts with student protections under the Americans with Disabilities Act ("ADA").[21] Removing protections for students with mental health disabilities is detrimental to both the student and the institution. Students with disabilities, including depression, are entitled to reasonable accommodation and the opportunity to complete their education with the same benefits and privileges as their peers.[22] If these students are removed due to their disabilities, the university may be exposed to liability, sanctions, or loss of funding under the ADA.[23] Further, this practice will adversely affect the student population by stigmatizing mental illness and risk a chilling effect on students who need to seek help.

To analyze this issue, this Note will begin by discussing traditional institutional liability and the current trends leading to policy changes at universities across the country. The next Section of the Note will discuss a university's power to suspend students and how this power is affected in light of the changes to a university's potential liability for student suicide or self-harm. Finally, this Note will provide an analysis of university removal policies under the protections of the ADA[24] and what may be anticipated as this issue moves to the forefront of higher education law.

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18. *Id.* at 126.

19. Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, CHRON. OF HIGHER EDUC., Aug. 12, 2005, at 1; *see also* Schieszler v. Ferrum College, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (court determined college had an affirmative duty to protect suicidal student from foreseeable harm); Shin v. MIT, No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005) (following a student suicide, parents were allowed to advance claim against university administrators).

20. *See* Eric Hoover, *'Giving Them the Help They Need,'* CHRON. OF HIGHER EDUC., May 19, 2006, at 39.

21. *See* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 & 47 U.S.C. § 225 (2006).

22. 28 C.F.R. § 35.130(b)(7) (2007).

23. *See* 42 U.S.C. §§ 12101–12213 & 47 U.S.C. § 225.

24. *Id.*

I. LIABILITY AND THE UNIVERSITY

A. Traditional views of third-party liability for suicide

Historically, American courts did not hold educational institutions liable for student self-harm or suicide when faced with third-party liability claims.[25] Until recently, mental health disorders such as clinical depression were not openly discussed or treated.[26] Seeking mental health treatment resulted in a social stigma.[27] As a result, many in the general population did not recognize depression as an illness.[28] The courts reflected this attitude, viewing suicide attempts and completions with the same contempt given criminal acts.[29]

Traditionally, the courts found no causal connection between an institution's acts and a student's death.[30] Courts held the student to be the sole proximate cause of the harm, thereby eliminating all other potentially liable entities.[31] Legal scholars cite numerous policy reasons for limiting third-party liability for suicide.[32] The leading argument is that the person who commits suicide is the wrongdoer and therefore not entitled to any relief.[33] The nature of suicide is also a factor in limiting liability, as suicide is seen as extremely difficult to prevent.[34] These factors led to a recognized institutional immunity for universities when a student committed suicide.[35]

B. Institutional immunity for third-party liability

Immunity from third-party liability claims is not reserved for educational institutions alone. As a general rule, tort law does not allow damages in actions seeking compensation for the suicide of another.[36] However, over the past two decades tort law has evolved to recognize two exceptions to this general rule.[37]

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25. *See, e.g.*, Jain v. Iowa, 617 N.W.2d 293 (Iowa 2000); Bogust v. Iverson, 102 N.W.2d 228 (Wis. 1960). For further discussion, see Part I.C.

26. *See* Mental Health America, Stigma: Building Awareness and Understanding, http://www.nmha.org/go/information/get-info/stigma (last visited Sept. 22, 2007).

27. *Id.*

28. *Id.*

29. Lake & Tribbensee, *supra* note 5, at 145–46.

30. *Id.* at 126, 129–30.

31. *Id.*

32. John S. Gearan, *When is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1029 (2006) (citing Lake & Tribbensee, *supra* note 5, at 146).

33. *Id.*

34. *Id.*

35. Lake & Tribbensee, *supra* note 5, at 143–45.

36. *See* McLaughlin v. Sullivan, 461 A.2d 123, 123–24 (N.H. 1983); RESTATEMENT (SECOND) OF TORTS §§ 314, 452 (1965); Patricia C. Kussmann, *Liability of Doctor, Psychiatrist, or Psychologist for Failure to Take Steps to Prevent Patient's Suicide*, 81 A.L.R. 5th 167, § 2 (2000).

37. *See* Wallace v. Broyles, 961 S.W.2d 712, 713, 719 (Ark. 1998) (administrators could be liable for student death after prescribing drugs that led to suicidal

Today, liability may be imposed in situations where the defendant is found to be the actual cause of the suicide or where the defendant is determined to have a legal duty to prevent the suicide.[38]

Rarely is a third-party defendant identified as the actual cause of a suicide.[39] That outcome will most likely result when a party makes available the instrument that caused or aided in the individual's death.[40] In *Wallace v. Broyles*, a University of Arkansas football player committed suicide by gunshot.[41] The student's family filed suit against the university alleging that a prescription pain killer provided to the student after a football injury provoked the suicide.[42] According to the family, the drug was prescribed in a heavy dose and the student was not informed of the potential dangers and side effects.[43] In particular, the student was not warned against the risks of addiction, depression, and the danger of combining the drug with other substances.[44] Evidence was presented to support the claim that improper use of the prescribed drug resulted in the suicide.[45] The Arkansas Supreme Court determined that sufficient evidence existed to support the family's action against certain university administrators.[46] The *Wallace* decision confirmed the idea that an individual can be liable for the suicide of another when prescribing controlled substances in a negligent manner.[47] In light of the *Wallace* decision, university administrators with the authority to prescribe psychotropic drugs to mentally ill students may be subject to liability if the dissemination of the drug is not properly controlled.[48]

It is more likely that a university will be liable for a student suicide under a theory of affirmative duty.[49] Typically, tort law does not hold individuals responsible for failing to prevent other people from harming themselves.[50] However, courts are expanding this rule to recognize a duty when a special relationship existed in which an individual assumed responsibility for the well-

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behaviors); Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992) (campus police office liable for suicide of student under custody).

38. *McLaughlin*, 461 A.2d at 123; RESTATEMENT (SECOND) OF TORTS § 452 cmt. d. (1965).

39. Lake & Tribbensee, *supra* note 5, at 130–31.

40. *Id.*

41. *Wallace*, 961 S.W.2d at 713.

42. *Id.*

43. *Id.*

44. *Id.* at 717.

45. *Id.* at 714.

46. *Id.* at 718–19.

47. *Id.*

48. Loosely, psychotropic medications are drugs that have effects on psychological function. World Health Org., Health Topics, http://www.who.int/topics/psychotropic_drugs/en/ (last visited Sept. 14, 2007).

49. *See infra* text accompanying notes 60–67.

50. Kussmann, *supra* note 36, § 2; *see also* RESTATEMENT (SECOND) OF TORTS §§ 314, 452 (1965).

being of another.[51] In a university setting, an affirmative duty may be undertaken if the institution assumes the care of a student.[52] The more notice university administrators have of the student's potential for suicide the more likely the courts are to find a special relationship.[53] Such a relationship was found when a student at Michigan State University hanged himself in a holding cell after being detained by the university police on suspicion of drunk driving.[54] As a result of that relationship, the court determined that a university employee might bear some responsibility for his death.[55] By failing to monitor a detained student, the campus police officer negligently created a stimulus for the student's suicide.[56] Certainly, custodial situations create a higher chance that liability will be imposed; however, this case demonstrates that all university administrators owe a heightened duty of care to a student within their care and control.

The New Hampshire Supreme Court recognized an alternate, non-custodial situation in which a duty to prevent suicide may be imposed.[57] Although exceptional, the court stated that there may be a duty to prevent suicide outside a custodial situation when the defendant is a trained medical or mental health professional.[58] The logic of extending a possible duty in this way is based on the court's assumption that the suicide of a patient is usually foreseeable to the treating health professional.[59] In a university setting, this theory can be applied to the administrators and health professionals at a campus counseling center who are informed or made aware of a student's suicidal behaviors.

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51. Gearan, *supra* note 32, at 1031; Lake & Tribbensee, *supra* note 5, at 132–33. (*i.e.* situations where someone has actual physical custody over the student such as jails, hospitals, or reform schools).

52. *See* Franke, *supra* note 12, at 18; Lake & Tribbensee, *supra* note 5, at 132–33.

53. *See generally* Schieszler v. Ferrum College, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002); Shin v. MIT, No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005).

54. Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992).

55. *Id.* at 122.

56. *Id.* at 119.

> Generally, where the defendant's negligence has created a stimulus for the plaintiff's act there is no break in the chain of events which would prevent the negligent defendant's liability. This is so because, if the acts of the plaintiff are within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence.

Id. (citations omitted).

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

58. *Id.* at 126; *see also* Klein v. Solomon, 713 A.2d 764 (R.I. 1998) (holding the university psychologist may be liable for negligent referral of suicidal student).

59. Lake & Tribbensee, *supra* note 5, at 133; *cf. McLaughlin*, 461 A.2d at 125–26 (recognizing that some commentators disagree with the extension of this duty because a mental health provider does not have "sufficient control" unless the individual is in physical custody such as a hospital).

C. The theory of affirmative duty

Parents and other parties who take action against universities for the suicide of a student typically rely on the theory of affirmative duty.[60] The most common claims for liability are based on an allegation that the university failed to recognize suicide warning signs or that the university recognized but failed to respond appropriately to the warning signs.[61] In each situation, the plaintiff must begin by proving that there was a special relationship between the student and the university and that the relationship created an affirmative duty.[62] There will be a stronger indication that the relationship has created a duty if the student continuously communicated suicidal ideation to the administration and the administration had clear notice of the student's intentions.[63] Even if the plaintiff is able to prove a special relationship and that the university administrator had adequate notice to potentially prevent the suicide, many courts remain reluctant to impose a duty.[64] Case law suggests that the special relationship is not between the institution and a student but rather between an individual administrator and a student.[65] Thus, it is necessary to name specific individuals who interacted with the student in order to identify the special relationship, the level of notice, and whether a duty should be imposed.[66] The plaintiff's inability to fully develop these factors combined with the court's strict limitations on liability for suicide prevents the vast majority of plaintiffs from succeeding in wrongful death claims against universities in cases of suicide.[67]

Although some lower courts take a broader view of affirmative duty, *Jain v. Iowa* sets forth the current precedent for third-party liability claims against universities.[68] Sanjay Jain was a college freshman at the University of Iowa when he began to exhibit suicidal ideations.[69] Following his initial attempt to kill himself, several people became aware of Sanjay's trouble.[70] Members of the

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60. Lake & Tribbensee, *supra* note 5, at 132.

61. Franke, *supra* note 12, at 18.

62. *Id.*

63. *See* Gearan, *supra* note 32, at 1025–30. "Suicidal ideation" is defined as "having thoughts of suicide or of taking action to end one's own life. Suicidal ideation includes all thoughts of suicide, both when the thoughts include a plan to commit suicide and when they do not include a plan." Nat'l Ctr for Health Statistics, Definitions, http://0-www.cdc.gov.mill1.sjlibrary.org/nchs/datawh/nchsdefs/suicidalideation.htm (last visited Aug. 22, 2007).

64. *Id.*

65. *See* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002); Shin v. MIT, No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005); Hickey v. Zezulka, 487 N.W.2d 106, 119–20 (Mich. 1992).

66. *See generally Schieszler*, 236 F. Supp. 2d at 602; *Shin*, 2005 WL 1869101, at *1; *Hickey*, 487 N.W.2d at 106.

67. *See, e.g.*, Jain v. State, 617 N.W.2d 293, 298–300 (Iowa 2000) (no liability because parent failed to establish special relationship); Bogust v. Iverson, 102 N.W.2d 228, 232–33 (Wis. 1960) (no liability because parent failed to show foreseeability of student suicide).

68. 617 N.W.2d 293.

69. *Id.* at 295.

70. *Id.*

university administration were notified that Sanjay had displayed suicidal behaviors.[71] Although Sanjay never sought counseling, his hall director consistently encouraged him to speak with someone about his depression.[72] He continued to be vocal about his plans to commit suicide and even revealed precisely how he would carry the plans out.[73] Sanjay eventually succeeded in his attempt: he poisoned himself with carbon monoxide by running his moped engine in his closed dorm room.[74]

Sanjay's father sued the University of Iowa in a wrongful death action claiming the university failed to exercise reasonable care and caution for Sanjay's safety.[75] Ultimately, the Iowa Supreme Court determined that no special relationship existed between the university and Sanjay.[76] The court further held that the absence of such a relationship meant that the administration did not have a duty of care to prevent his suicide.[77] The court's analysis turned on the issue of affirmative duty, specifically, the administration's duty to provide Sanjay with access to counseling services.[78] The court held there was no evidence of breach.[79] Although the court did not find that the university owed a duty to Sanjay, the case does not preclude the conclusion that there was a duty..[80] This interpretation follows from the court's finding that university and residence hall staff acted with reasonable care in handling Sanjay's situation; that is, because the court based its holding on the plaintiff's failure to show breach, the case is not precedent, either positive or negative, on the question of whether there was a duty.[81] Thus, while courts may concede that a duty exists, the burden of proving a breach of duty is difficult for the plaintiff.

D. Changes in applying the theory of affirmative duty to university administrators

Following *Jain v. Iowa*, universities were able to rest easy that their immunity from liability remained intact. Nevertheless, it was essential that administrators follow established policies for addressing issues with suicidal students in order to stave off lawsuits. However, the outcomes in two recent cases, *Schieszler v. Ferrum College*[82] and *Shin v. MIT*,[83] have alerted many university officials that the tide may be turning. Both cases illustrate changes in the duty that university administrators may have to prevent student suicide.[84] Consequently,

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71. *Id.*
72. *Id.*
73. *Id.* at 296.
74. *Id.*
75. *Id.* at 294.
76. *Id.* at 299.
77. *Id.*
78. *Id.*
79. *Id.*
80. Lake & Tribbensee, *supra* note 5, at 140–41.
81. *Jain*, 617 N.W.2d at 299–300; *see* Lake & Tribbensee, *supra* note 5, at 140.
82. 236 F. Supp. 2d 602, 605 (W.D. Va. 2002).
83. No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005).
84. *See generally Schieszler*, 236 F. Supp. 2d at 605; *Shin*, 2005 WL 1869101, at *1.

both cases serve as catalysts for the recent changes in university policies now affecting students with severe mental health problems.[85]

Michael Frentzel, the decedent in *Schieszler*, was a freshman at Ferrum College the year he took his life.[86] Michael was well known to the administration at the College due to discipline problems during his first semester, for which he was required to complete anger management counseling.[87] At the beginning of Michael's second semester, he began to indicate he was contemplating suicide.[88] He wrote a note to his girlfriend threatening to hang himself with a belt; she informed the campus police and his resident advisor of the threat.[89] Over the next few days, Michael continued to write suicidal notes.[90] The dean of student affairs responded by requiring him to sign a contract promising not to harm himself.[91] Unfortunately, Michael hanged himself in his dorm room three days after his initial suicide threat to his girlfriend.[92]

Michael's aunt, the representative of his estate, filed a wrongful death action against Ferrum College, the dean of students, and Michael's resident advisor.[93] She alleged that the defendants knew or should have known that Michael would likely hurt himself if left unsupervised.[94] Further, she alleged negligence, stating the administration should have taken "adequate precautions" to protect Michael from himself.[95] As in previous college student suicide cases, the College moved to dismiss the claims on the grounds that no duty was owed to Michael to protect him from suicide.[96] The court recognized that "absent unusual circumstances" there is typically no affirmative duty to protect another individual from self-harm.[97] However, in a surprising decision, the court found that Michael's suicide may have been foreseeable to administrators.[98] The court found foreseeability because the administration had specific notice that Michael intended to take his own life, and therefore there was an "imminent probability of harm."[99] The court identified an "unusual circumstance" in Michael's relationship with the individual defendants[100] given their awareness of Michael's intent to commit suicide.[101] The court found a special relationship that supported an affirmative duty by administrators, who were aware of Michael's threats, to protect him from self-

85. *See infra* text accompanying notes 129–130.
86. *Schieszler*, 236 F. Supp. 2d at 605.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 606.
98. *Id.* at 609–10.
99. *Id.* at 609.
100. *Id.* at 607, 610.
101. *Id.* at 612.

harm.[102] The court distinguished between an affirmative duty and an assumed duty by noting that the College did not assume a duty by voluntarily extending counseling to Michael during his first semester discipline issues.[103] Regardless, the significant interactions with Michael during his threats of suicide were such that the administration could have reasonably foreseen this tragic outcome.[104] The court noted a college is not wholly responsible for the safety of its students, yet "[p]arents, 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."[105] This imposition of duty on a university was the first of its kind. Shortly after this decision, Ferrum College settled with Michael's estate and admitted a "shared responsibility" for his death.[106] This was the first instance of an American college accepting any level of responsibility for a student suicide.[107]

Three years after the Virginia ruling in *Schieszler*, a Massachusetts judge ruled that the parents of a Massachusetts Institute of Technology ("MIT") student who committed suicide could advance a claim against the university administrators, whom the parents claimed had sufficient notice to prevent the suicide.[108] Elizabeth Shin was a nineteen-year-old freshman at MIT when she began to experience psychological problems.[109] The problems were severe enough that Elizabeth spent a week in the hospital to recover from an intentional overdose.[110] When she returned for her sophomore year, she was under the care of numerous campus psychiatrists.[111] That spring, Elizabeth confided in her roommates and her dorm supervisor that she intended to kill herself.[112] This information was passed on to MIT deans who met later that same day with campus psychiatrists to discuss the situation.[113] The deans decided to schedule an appointment for Elizabeth at a nearby psychiatric facility.[114] Sadly, that same day Elizabeth set herself on fire in her dorm room resulting in her death.[115]

Elizabeth's parents brought suit against MIT for breach of contract claiming the university had an "express and/or implied contract" with Elizabeth to

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102. *Id.* at 605.

103. Lake & Tribbensee, *supra* note 5, at 136 (an assumed duty arises out of a voluntary undertaking, such as offering counseling, whereas the duty in *Schieszler* arose out of a special relationship).

104. *Schieszler*, 236 F. Supp. 2d at 610.

105. *Id.* (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983) (holding that a university was responsible for the rape of a student on campus)).

106. Hoover, *supra* note 19, at 1.

107. *Id.*

108. Shin v. MIT, No. 020403, 2005 WL 1869101, at *1 (June 27, 2005); Hoover, *supra* note 19, at 1.

109. *Shin*, 2005 WL 1869101, at *1.

110. *Id.* at *2.

111. *Id.* at *2–4.

112. *Id.*

113. *Id.*

114. *Id.* at *4.

115. *Id.* at *5.

provide adequate medical care.[116] The Shins also brought claims against the individual administrators, whom they asserted knew of Elizabeth's mental health situation, alleging they were negligent in their failure to prevent Elizabeth's suicide.[117] Citing the holding in *Schieszler*, the court dismissed the claims against MIT but allowed the claims against individual administrators to go forward on a theory of affirmative duty.[118] The judge determined that the plaintiffs provided sufficient evidence to pursue their claim by showing that the administrators "failed to secure Elizabeth's short-term safety . . . by not formulating and enacting an immediate plan" when they learned of Elizabeth's suicide threats.[119] Following the court's ruling, MIT, on behalf of the administrators named in the suit, chose to settle with the Shins.[120] Under the terms of the agreement, both parties agreed that Elizabeth's death was a "tragic accident."[121]

The court in *Shin* limited its decision to situations in which a student confided immediate suicidal intentions to administrators.[122] Therefore, cases of students who alert friends and other parties to their suicidal plans would not fall within the scope of *Shin*. However, this limitation offers little respite to university officials. Colleges and universities strive to develop student services beyond academics.[123] In an effort to provide current and necessary services, interaction and confidences between administrators and students are encouraged.[124] University administrators want to know what students are thinking, what they are lacking, and what can be done to improve their experience. Students are given multiple outlets to confide in the administration. Residence hall directors, student health services, and various student centers on campus exist to assist students with myriad problems. Yet this view may change in light of cases such as *Schieszler* and *Shin*. What appears to be an open-door policy for student-administrator communication is now hindered by policies to deflect liability.[125]

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116. *Id.* at *6.

117. *Id.* at *7.

118. *Id.* at *13.

119. *Id.* at *9.

120. Eric Hoover, *MIT Settles With Family of Student Who Killed Herself*, CHRON. OF HIGHER EDUC., Sept. 15, 2006, at 39.

121. *Id.*

122. *Shin*, 2005 WL 1869101, at *13.

123. ROBERT L. ALBRIGHT ET AL., NAT'L ASS'N OF STUDENT PERS. ADM'RS, A PERSPECTIVE ON STUDENT AFFAIRS: A STATEMENT ISSUED ON THE 50TH ANNIVERSARY OF THE STUDENT PERSONNEL POINT OF VIEW 8 (1987).

124. *Id.*; *see also* GEORGE KUH ET AL., NAT'L ASS'N OF STUDENT PERS. ADM'RS, REASONABLE EXPECTATIONS: RENEWING THE EDUCATIONAL COMPACT BETWEEN INSTITUTIONS AND STUDENTS (1995), *available at* http://www.naspa.org/pubs/ReasExpectations_1995.pdf.

125. *See* Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED, Mar. 13, 2006, http://insidehighered.com/news/2006/03/13/counseling.

II. STUDENT REMOVAL POLICIES

A. Implementation of student removal policies

The *Schieszler* and *Shin* decisions give further weight to the idea that university administrators may need to create stronger protections for the institution and its employees against liability for student suicide. The outcome in each case received particular attention because, prior to these decisions, universities had generally not been held liable for a student's self-induced harm.[126] However, it is also important to note that *Schieszler* and *Shin* are decisions from lower level courts.[127] Although neither case has anything more than persuasive weight outside of Virginia and Massachusetts, respectively, both provide a strong indication that the legal responsibilities of universities toward suicidal students has expansive potential.[128] In fact, the holding in *Shin* serves as proof of this expansion. The *Shin* court looked to *Schieszler* for guidance in the decision to impose an affirmative duty on the MIT administrators who interacted with Elizabeth.[129] With 1,100 college student suicides predicted each academic year,[130] universities have reason to fear that further lawsuits will serve to expand the affirmative duty and special relationship theories across the country.

In response to a greater potential for liability, university administrators are taking what seem to be drastic steps to shield the institution and the administrators.[131] A significant number of colleges and universities will now strongly consider removing a student from campus if that student expresses suicidal ideations to an administrator.[132] Under this risk management approach, administrators consider whether a student is a serious threat to himself or the community.[133] If so, the administration will, at a minimum, remove the student from campus housing and often from the campus entirely.[134] Although not expressly stated, it can be presumed that administrators are removing potentially suicidal students in an effort to sever any affirmative duty or special relationship that could later be relied upon to establish liability.

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126. *See* Lake & Tribbensee, *supra* note 5, at 135; Hoover, *supra* note 19, at 1.

127. *Schieszler* was decided in federal court in the Western District of Virginia, *Shin* was decided in state court in Massachusetts Superior Court.

128. *See* Lake & Tribbensee, *supra* note 5, at 135; Hoover, *supra* note 19, at 1.

129. Shin v. MIT, No. 020403, 2005 WL 1869101, at *13 (Mass. Super. June 27, 2005).

130. The Jed Found., Suicide and America's Youth, http://www.jedfoundation.org/articles/SuicideStatistics.pdf (last visited Sept. 14, 2007).

131. Capriccioso, *supra* note 125.

132. Hoover, *supra* note 20, at 39 (citing a "significant resurgence" in universities adopting mandatory removal policies for risk-management reasons).

133. *Id.*

134. *See* Capriccioso, *supra* note 125; Hoover, *supra* note 20, at 39; Eric Hoover, *Hunter College Reaches Settlement With Depressed Student Who Was Barred From Dorm*, CHRON. OF HIGHER EDUC., Sept. 8, 2006, at 34; David B. Caruso, *Some Colleges Evicting Suicidal Students*, ASSOCIATED PRESS, Sept. 1, 2006, http://www.msnbc.msn.com/id/14626533/from/ET/.

B. Enforcement of student removal policies

A particularly severe, yet illustrative, instance of removal occurred at George Washington University in 2004.[135] Jordan Nott, a sophomore, was removed from student housing after seeking help from a psychiatric hospital.[136] Jordan's friend, a fellow George Washington student, committed suicide the previous year and Jordan was battling depression in response to the tragedy.[137] The night before his suspension he was feeling particularly depressed, and "[h]is thoughts began to frighten him."[138] Jordan was aware that his anti-depressant medication was correlated with suicide, and he thought it best to seek help.[139] Jordan was seeing a counselor at the campus counseling center;[140] however, it was the weekend and the counselor was unavailable.[141] Ultimately, he made the independent decision to spend the night at the university hospital.[142] While in the hospital, Jordan received a letter from the university administration "informing him that, under the university's policy on 'psychological distress,' he could not return to his dorm."[143] Jordan left the hospital shortly after that and was given another letter from the judicial services office.[144] This letter informed Jordan that he was temporarily suspended from George Washington for "engaging in 'endangering behavior.'"[145] The temporary suspension meant Jordan was barred from campus and could be arrested if he tried to return and that he was required to withdraw from school and seek psychological treatment.[146]

This risk-management reaction from a university is not uncommon. A student at Cornell University was told to seek treatment or leave the institution after confiding suicidal thoughts in a university counselor.[147] Only after she agreed to spend her winter break in a psychiatric hospital did the administration ease its threat to kick her out.[148] Hunter College exercised a similar policy over a student in 2004.[149] The student attempted suicide by swallowing handfuls of Tylenol but decided to call 911 and save her own life.[150] She was rushed to the hospital and ultimately survived the ordeal.[151] When she returned from the hospital, she found

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135. Eric Hoover, *Dismissed for Depression*, CHRON. OF HIGHER EDUC., Mar. 24, 2006, at 44.
136. Capriccioso, *supra* note 125.
137. Hoover, *supra* note 135, at 44.
138. *Id.*
139. Capriccioso, *supra* note 125.
140. Hoover, *supra* note 135, at 44.
141. Capriccioso, *supra* note 125.
142. *Id.*
143. Hoover, *supra* note 135, at 44.
144. *Id.*
145. *Id.*
146. *Id.*
147. Julie Rawe & Kathleen Kingsbury, *When Colleges Go On Suicide Watch*, TIME, May 22, 2006, at 62, http://www.time.com/time/magazine/printout/0,8816,1194020,00.html.
148. *Id.*
149. Caruso, *supra* note 134.
150. *Id.*
151. *Id.*

the locks had been changed on her dorm room.[152] Her suicide attempt was considered a violation of her housing contract, and the administration removed her from student housing.[153] Although removal may seem unfair and even discriminatory, the action was taken in accord with administrative policies.

Generally, removal results from the enforcement of a mandatory removal or "endangering behavior" policy in the university's student code of conduct.[154] A search through various codes of conduct at universities nationwide shows that the majority of institutions have some form of this policy.[155] The wording of the policies is broad and could easily serve as a catch-all for any student behavior that could be considered dangerous. For example, the endangering behavior clause at George Washington University warns that a student may be disciplined for "[b]ehavior of any kind that imperils or jeopardizes the health and safety of any person or persons . . . this includes actions that are endangering to self or others."[156] Such clauses are usually enforced through the Dean of Students office as it is responsible for student conduct violations.[157] Administrators at this office can learn of a student's endangering behavior through a variety of sources, although residence hall staff, faculty, and university counselors are in the best position to observe and report violations.[158] Sanctions for a violation are at the discretion of the administration but can range from mandatory counseling to suspension from housing or the university.[159]

University administrators are able to suspend and expel a student despite the fact that the student paid a sizeable amount to attend the institution.[160] Of course, university administrators cannot remove a student arbitrarily. While a

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152. Hoover, *supra* note 134.

153. *Id.*

154. Capriccioso, *supra* note 125; *see* Hoover, *supra* note 20, at 39.

155. *See, e.g.*, Ariz. Bd. of Regents, Student Code of Conduct, Policy Number 5-308 (2000), *available at* http://www.abor.asu.edu/1_the_regents/policymanual/chap5/5-308.pdf [hereinafter Ariz. Code of Conduct]; Bd. of Trs., Univ. of Mass., Code of Student Conduct, Trustee Document #T-95-095A, at art II, *available at* http://www.umass.edu/dean_students/code_conduct/stud_condct.htm#regs; OFFICE OF THE DEAN OF STUDENTS, VANDERBILT UNIV., STUDENT HANDBOOK 2007/2008, at ch. 1, Conduct Endangering Personal Health, http://www.vanderbilt.edu/student_handbook/chapter1.html (last visited Oct. 13, 2007) [hereinafter Vanderbilt Student Handbook].

156. ASS'T DEAN OF STUDENTS, THE GEORGE WASHINGTON UNIV., RESIDENTIAL COMMUNITY CONDUCT GUIDELINES AND ADMINISTRATIVE POLICIES (2007), *available at* http://gwired.gwu.edu/osjs/merlin-cgi/p/downloadFile/d/18366/n/off/other/1/name/RCCGs2007-2008-Finalpdf/ [hereinafter GWU RCCG].

157. *See supra* note 155.

158. Certainly, issues surrounding privacy and patient-counselor confidentiality are relevant to this discussion. There is a significant amount of research regarding this changing area of the law; however, the topic is too broad to address within the scope of this note.

159. *See* GWU RCCG, *supra* note 156, at 3, 12; *see also* Ariz. Code of Conduct, *supra* note 155.

160. *See, e.g.*, Lyon Coll. v. Gray, 999 S.W.2d 213 (Ark. Ct. App. 1999) (student properly dismissed for violation of the honor code); Goldberg v. Regents of the Univ. of Cal., 57 Cal. Rptr. 463 (Dist. Ct. App. 1967) (student properly dismissed for participating in rally).

student has a right to terminate his or her relationship with the school at any time, the institution cannot do the same.[161] When a student selects a university and pays tuition a contract is formed between the school and the student.[162] The resulting contract carries "two implied conditions: (1) that no student shall be arbitrarily expelled" from the university and "(2) that the student will submit himself to reasonable rules and regulations for the breach of which . . . he may be expelled."[163] Any violations of a university's student code of conduct can be construed as a breach of the implied contract and gives the administration the option to remove the student from the institution.[164] Judicial procedures at universities frequently allow the disciplined student to appeal to other authorities at the university as a function of due process.[165] Students may also take the more drastic approach of initiating a lawsuit against the university.

C. University authority to enact student removal policies

The power of the university administration to suspend and expel students, despite its limited nature, is a defining characteristic of the administration of educational institutions.[166] Courts have long recognized that higher education institutions must have expansive discretion in determining the appropriate punishment for violations of rules and regulations.[167] A court will not overturn a university's decision to suspend a student unless it is shown that the action taken by the university was not "an honest act of discretion."[168] If challenged, a university will be asked to show little more than adequate due process in their disciplinary procedures.[169] Of course, there is an exception to the deference given

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161. *See, e.g.*, *Lyon College*, 999 S.W.2d at 213; *Goldberg*, 57 Cal. Rptr. at 463.

162. 15A AM. JUR. 2d *Colleges and Universities* § 30 (2007).

163. *Id.*

164. *Id.*

165. Most universities outline their disciplinary process, including the appeal process, in a Student Code of Conduct. *See* Ariz. Code of Conduct, *supra* 155; The George Washington University, Office of Student Judicial Servs., University Hearing Board, http://gwired.gwu.edu/osjs/TheUniversityHearingBoard/ (last visited Jan. 8, 2006).

166. *See, e.g.*, Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971) (upholding state statute allowing university to exclude people from campus as long as due process afforded); Lyon Coll. v. Gray, 999 S.W.2d 213 (Ark. Ct. App. 1999) (college permitted to dismiss violators of honor code); Goldberg v. Regents of the Univ. of Cal., 57 Cal. Rptr. 463 (Dist. Ct. App. 1967) (school permitted to dismiss student who participated in demonstration).

167. *See* Andersen v. Regents of the Univ. of Cal., 99 Cal. Rptr. 531, 531 (Ct. App. 1972).

168. 14A C.J.S. *Colleges and Universities* § 39 (2007); *see also* Rossomando v. Bd. of Regents of Univ. of Neb., 2 F. Supp. 2d 1223 (D. Neb. 1998) (holding that a student challenging university action must show that there is no rational basis for the university's decision or that the decision was motivated by bad faith or ill will unrelated to academic performance).

169. Robert Firester, *Does 42 U.S.C. § 1983 Redress Arbitrary, Capricious, or Unfair Student Dismissals From State Colleges?*, 22 U. DAYTON L. REV. 209, 214 (1997) (citing Ross v. Pa. State Univ., 445 F. Supp. 147, 153 (M.D. Pa. 1978)).

to universities' decisions when the student can prove that the dismissal was discriminatory.[170]

A dismissed student may also attempt to challenge the university decision under a breach of contract theory. As previously noted, the act of admission and the payment of tuition create a contract between the student and the institution.[171] Students are rarely successful under this theory, even when the dismissal is based on the mental health condition of the student.[172] In *Aronson v. North Park College*, a typical case, administrators dismissed Lillian Aronson after a psychologist found her to have a mental condition which was a "serious detriment to herself and others."[173] When Lillian first applied and received admission to North Park she signed an admission form agreeing to submit to all school requirements.[174] One of the requirements was that students may be subject to counseling by request or by referral.[175] As part of the admissions process, Lillian was administered a mental health evaluation, the results of which were sent to the school counseling center.[176] Lillian's evaluation showed "a deviation from normal."[177] In order to remain at North Park, she was required to attend counseling sessions and submit to evaluation by the administration.[178] As a result of the evaluation, Lillian was found to lack "sufficiently strong mental health" and was dismissed from North Park College.[179]

Lillian brought a claim against the university to challenge her dismissal.[180] The court found that the actions of North Park College were not arbitrary, capricious, or unfair.[181] Because these specific types of actions were not found, Lillian could not successfully challenge the university's decision on the basis of discrimination.[182] Lillian proceeded with her claim under a breach of contract theory.[183] However, the court determined that Lillian was made aware of the procedures and willingly submitted to the initial evaluation; because the evaluative process was clear to all students from the start and Lillian submitted to this process, there was no breach of contract.[184]

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170. *See* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973) (student expulsion based on disapproved newspaper content was discriminatory); Tayyari v. N.M. State Univ., 495 F. Supp. 1365 (D.N.M. 1980) (expulsion of alien students with intent to subvert controversy was discriminatory).

171. 15A AM. JUR. 2d *Colleges and Universities* § 30 (2007).

172. Aronson v. N. Park Coll., 418 N.E.2d 776 (Ill. App. Ct. 1981).

173. *Id.* at 778.

174. *Id.* at 780.

175. *Id.* at 778.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 777.

181. *Id.* at 782.

182. *Id.*

183. *Id.* at 779.

184. *Id.* at 781–82.

In agreeing to pay tuition and attend an institution a student impliedly, if not explicitly, agrees to rules of conduct of that institution. Even when the criterion of the code of conduct becomes discriminatory, students will find little recourse under a breach of contract theory. Codes of conduct and university dismissal policies will ultimately be upheld so long as the university did not deviate from the stated policy.[185] Students who are dismissed in relation to a disability, such as mental illness, must proceed under the theory of discrimination, not breach of contract, in order to be successful.

III. THE REHABILITATION ACT AND THE ADA

A. Federal statutes addressing discrimination in higher education

Plaintiffs rely upon to two statutory provisions to prevent discriminatory practices at colleges and universities: Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[186] and Title II of the ADA.[187] Section 504 prohibits discrimination on the basis of mental or physical disability.[188] Specifically, it states: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[189] The Office of Civil Rights ("OCR"), a division within the Department of Education, is responsible for enforcing regulations that implement Section 504[190] and is given the power to do so in the Code of Federal Regulations.[191] Section 504 is directed at any program or activity that receives funding from the U.S. Department of Education.[192] This includes colleges, universities, and post-secondary or vocational schools.[193] The vast majority of schools are recipients of federal funding.[194] Even private institutions are subject to Section 504 if students attending the school are receiving federal financial assistance.[195]

Title II of the ADA is the second statutory provision protecting disabled students from discrimination at colleges and universities.[196] It serves to prohibit discrimination based on a disability in public entities, as opposed to Section 504's

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185. 15A AM. JUR. 2D *Colleges and Universities* § 26 (2007).
186. 29 U.S.C. § 794 (2006).
187. 42 U.S.C. §§ 12101–12213 & 47 U.S.C. § 225 (2006).
188. 29 U.S.C. § 794.
189. *Id.*
190. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DISABILITY DISCRIMINATION: OVERVIEW OF THE LAWS (2004), *available at* http://www.ed.gov/policy/rights/guid/ocr/disabilityoverview.html [hereinafter DISCRIMINATION OVERVIEW].
191. 34 C.F.R. § 104 (2000).
192. DISCRIMINATION OVERVIEW, *supra* note 190.
193. *Id.*
194. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON DISABILITY DISCRIMINATION UNDER SECTION 504 AND TITLE II (2005), *available at* http://www.ed.gov/about/offices/list/ocr/qa-disability.html [hereinafter Q&A ON DISCRIMINATION UNDER SECTION 504 AND TITLE II].
195. *Id.*
196. *Id.*; DISCRIMINATION OVERVIEW, *supra* note 190.

narrower application to recipients of federal funding.[197] The ADA incorporates Section 504 and extends it to state and local governments, to whom it is directed.[198] The OCR enforces the regulation against all public education entities[199] and is given the power to do so in the Code of Federal Regulations.[200]

The ADA and Section 504 are intended to achieve the same purpose—to prohibit discriminatory practices against disabled individuals.[201] The difference between the two statutes lies in what type of activity the statute regulates. Section 504 applies to recipients of grants from the Department of Education; the ADA applies to all public entities.[202] A college or university may receive a grant from the Department of Education and also be a public entity, subjecting the school to regulation under both statutes.[203] Some private institutions do not receive any federal educational grants. In those instances, the school is only subject to regulation under the ADA.[204]

To receive protections under the ADA or Section 504, a person must establish that he or she meets three criteria.[205] First, the individual must show that he or she is a "qualified individual" with a disability.[206] By definition, a "qualified individual" is a person with a disability who, with or without accommodation, "meets the essential eligibility requirements for services or participation in programs or activities provided by a public entity."[207] Second, the individual must show that he or she was denied the benefits of or excluded from participating in services, programs, or activities of the public entity.[208] Finally, the individual must show that denial of these benefits or of participation was the result of the individual's disability.[209]

When a student qualifies as disabled under the language of the statute, an institution is required to provide reasonable accommodation to ensure the student

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197. DISCRIMINATION OVERVIEW, *supra* note 190.

198. Ann K. Wooster, *When Does A Public Entity Discriminate Against Disabled Individuals in Provision of Services, Programs, or Activities Under the Americans With Disabilities Act, 42 U.S.C.A. § 12132*, 163 A.L.R. FED. 339 (2000) The ADA states:

> [N]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132 (2006).

199. DISCRIMINATION OVERVIEW, *supra* note 190.

200. 28 C.F.R. § 35 (2007).

201. Wooster, *supra* note 198.

202. Q&A ON DISCRIMINATION UNDER SECTION 504 AND TITLE II, *supra* note 194.

203. *Id.*

204. *Id.*

205. Wooster, *supra* note 198, at 339.

206. Tardie v. Rehab. Hosp. of R.I., 168 F.3d 538, 541 (1st Cir. 1999); Panzardi-Santiago v. Univ. of P.R., 200 F. Supp. 2d 1 (D.P.R. 2002).

207. 42 U.S.C.A. § 12131(2) (2006). For a discussion of the process for determining who is a qualified individual with a disability, see *infra* text accompanying notes 216–236.

208. *Tardie*, 168 F.3d at 541.

209. *See id.*

has comparable access to programs, services, or activities.[210] Accommodations include modifying rules and regulations, providing auxiliary services, or removing barriers that are preventing a qualified student from progressing.[211] Generally accommodation is made following a student request; however, institutions are expected to proactively make accommodation in order to avoid discrimination on the basis of disability.[212] A failure or refusal to provide a *reasonable* accommodation may lead to a claim of discrimination.[213] Courts have recognized that educational institutions are not required to make an accommodation that would create an undue hardship or that would fundamentally change the institution.[214] Specifically, colleges and universities are not required to lower or substantially alter their academic standards in order to provide an accommodation for a qualified disabled student.[215]

Qualifying disabilities under the ADA and Section 504 can be physical or mental, as long as the aforementioned criteria are satisfied.[216] Some disabilities are self-evident, meaning the disability is readily apparent to an observer.[217] When a disability is self-evident, extensive analysis and evaluation is not necessary because the individual is clearly eligible for accommodation.[218] Mental health issues, however, are much less likely to be self-evident because there are typically fewer physical manifestations. To determine whether an individual has a qualifying mental health disability, the three steps of the ADA analysis are applied.[219]

B. Determining whether a student has a qualifying disability under the ADA

The ADA analysis requires an initial determination that a mental impairment exists.[220] After concluding that the individual has a qualifying impairment, the next step is determining whether the impairment substantially limits one or more major life activities.[221] If all elements of the analysis are present, individuals are deemed to have a mental handicap, qualifying them to

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210. 28 C.F.R. § 35.130(b)(7) (2007) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

211. *See id.*

212. Richard E. Kaye, *What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Education Program or School Rules as Applied to Learning Disabled Student*, 166 A.L.R. FED. 503 § 2 (2000).

213. Wooster, *supra* note 198, at 339 § 2[a].

214. *Id.*

215. *Id.*

216. *Id.* § 149[a].

217. Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders Under the Americans With Disabilities Act*, 42 VILL. L. REV. 723, 724 (1997).

218. *Id.* at 725.

219. *Id.* at 726–32.

220. *Id.* at 726.

221. *Id.*

request reasonable accommodation and, if necessary, ADA protections.[222] The analysis, discussed in more detail below, should be used to evaluate each student whose mental disorder may rise to the level of impairment to ensure proper accommodation and ADA compliance.

ADA regulations define mental impairment to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."[223] Commonly recognized mental impairments include depression, bipolar disorder, and anxiety disorders.[224] Identifying these impairments is usually as straightforward as obtaining a doctor's diagnosis.[225] If a doctor's formal diagnosis cannot be obtained, statements from family or colleagues will suffice.[226] However, case law clarifies that character traits described must be associated with an identifiable condition; personality traits or normal emotional reactions do not qualify as mental impairments.[227]

After a mental impairment is identified, it must then be determined whether that impairment serves to affect one or more of the individual's major life activities.[228] In a university setting, major life activities may include eating, sleeping, learning, concentrating, thinking, or interacting with others.[229] No list of activities is all inclusive; the ADA requires a case-by-case examination of each disability to determine how an individual's life is affected.[230] Once it is apparent that a psychiatric disorder is affecting a major life activity, the ADA requires further analysis of the limiting effects of the disability.[231] Specifically, the impairment must "substantially limit" the individual's ability to perform the major life activity.[232] Limitation is measured by both severity and duration and is compared to the activity performance of an average person in the general population.[233] The duration element of the analysis will have a particular effect on evaluating mental impairments among college students. Depression among college students can likely be situational, temporary, and non-chronic and thus not considered substantially limiting;[234] however, impairment does not have to be permanent to meet the substantial limitation requirement.[235] A severe condition that is expected to last for a minimum of several months rises to the level of a

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222. *See id.* at 724.
223. *Id.* at 726–27.
224. *Id.* at 727.
225. *Id.* at 728–29.
226. *See id.*
227. *See id.* at 729; *see also* Daley v. Koch, 892 F.2d 212, 214 (2d Cir. 1989) (poor judgment and poor impulse control are not mental impairments, absent "any particular psychological disease or disorder"); Hindman v. GTE Data Servs., Inc., No. 93-1046, 1994 WL 371396, at *3 (M.D. Fla. June 24, 1994) ("commonplace" or "normal" personality traits are excluded from ADA protection).
228. Mastroianni & Miaskoff, *supra* note 217, at 730.
229. *See id.*
230. *Id.* at 731 n.33.
231. *See id.* at 732.
232. *Id.*
233. *Id.* at 732 n.37.
234. *See id.* at 732–33; Healthy Minds, *supra* note 2.
235. Mastroianni & Miaskoff, *supra* note 217, at 732–33.

disability under the ADA.[236] Mitigating measures such as the positive effects of medication and counseling treatments are not considered in the substantial limitation analysis.[237] Medication, however, should be considered for its negative effects.[238] Ultimately, if the restrictions experienced by the individual are significantly more severe than those experienced by the average person, then the impairment is considered substantially limiting to a major life activity.[239] Once all elements of the analysis are satisfied, a university must take the appropriate measures to reasonably accommodate the student should the student make the request.

C. Recognizing and reasonably accommodating students with mental impairments

Several cases recognize ADA protections for college students with diagnosed mental impairments.[240] For example, in *Smith v. University of the State of New York*, a clinically depressed student was allowed to proceed with his claim that the university failed to accommodate his disability.[241] When Dale Smith entered his program of study he was already diagnosed with clinical depression and consistently took medication for the disorder.[242] The university, including Smith's professors, was aware of his condition but refused to meet his accommodation requests for more than a year.[243] Smith's depression led to several class absences, resulting in a failing grade in a course and ultimately in the university requesting he withdraw for failure to meet academic standards.[244] The court held that Smith's mental impairment could be a qualifying disability and that the university's refusal to accommodate Smith may have resulted in a violation of the ADA.[245]

Once a student leaves the university for treatment of a qualified mental illness, the university cannot use the condition to bar readmission.[246] In *Carlin v. Trustees of Boston University*, a student voluntarily withdrew from school after her symptoms of depression became increasingly severe.[247] After a one year leave of absence, the student sought re-entry to her program of study.[248] The administration denied her application and terminated her from the university.[249] The court

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236. *Id.*
237. *Id.* at 733.
238. *Id.* at 733–34.
239. *See id.* at 735–36.
240. *See, e.g.*, Smith v. Univ. of the State of N.Y., No. 95-CV-0477E(H), 1997 WL 800882, at *1 (W.D.N.Y. Dec. 31, 1997); Carlin v. Trs. of Boston Univ., 907 F. Supp 509, 510 (D. Mass. 1995).
241. 1997 WL 800882, at *15.
242. *Id.*
243. *Id.* at *2–4. Smith requested a temporary teaching license and removal of a failing grade from his transcript.
244. *Id.* at *4.
245. *Id.* at *6.
246. Carlin v. Trs. of Boston Univ., 907 F. Supp 509, 510 (D. Mass. 1995).
247. *Id.*
248. *Id.*
249. *Id.*

recognized the student's depression as a qualifying disability and allowed the case against the university to go forward.[250]

Although some courts have recognized that depression may be a qualifying disability that allows college students ADA protection,[251] not all cases of college student depression rise to that level.[252] Depression is common among college students,[253] and not every instance will qualify a student for "reasonable accommodation" or, if necessary, the protections of the ADA and Section 504. Certainly, one can surmise that the majority of students facing a depressive episode will never evoke either protection. In the cases which discuss potential accommodation of students with mental impairments, the students only looked for accommodation once their student status was threatened.[254]

D. Repercussions of regarding a student as depressed

Administrators in these situations seem to be operating from the premise of "act first, apologize later." Ironically, the actions of these administrators may be paving the way for students to gain ADA protection. When a student has not declared him- or herself to be a qualified individual with a disability, the ADA will still apply if administrators perceive and treat the student as disabled.[255] For example, Jordan Nott was seeing a campus counselor but had not asked for any accommodation for his depression nor declared himself to be an individual with a disability.[256] When the university chose to remove Jordan from campus housing and ultimately suspend him it acted on the assumption that he was severely depressed and a danger to himself.[257] Under the ADA analysis, in regarding Jordan as disabled and then discriminating against him for that disability, the university triggered the protections of the ADA. The "regarded as" prong of the ADA is vital

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250. *Id.* at 511.

251. *See* Smith v. Univ. of the State of N.Y., No. 95-CV-0477E(H), 1997 WL 800882, at *6 (W.D.N.Y. Dec. 31, 1997); *Carlin*, 907 F. Supp at 511.

252. *See, e.g.*, Hash v. Univ. of Ky., 138 S.W.3d 123, 129 (Ky. Ct. App. 2004) (law student denied readmission after depressive episode did not qualify for protection); Dixon v. Regents of Univ. of N.M., 242 F.3d 388, 2000 WL 1637557, at *3 (10th Cir. 2000) (unpublished table decision) (expelled depressed student failed to show condition affected any major life activity or that "the University regarded her as having a disability").

253. *See* Wallace, *supra* note 4 (estimating that "as many as 20 percent of the general student population seeks counseling to help cope with psychological distress").

254. *See Carlin*, 907 F. Supp at 509–10 (student denied readmission and terminated from program of study after leave of absence for depression); Hoover, *supra* note 135, at 44 (student removed from housing and suspended after checking himself into hospital for suicidal thoughts); Caruso, *supra* note 134 (Hunter College student removed from housing after swallowing handfuls of Tylenol).

255. *See* Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 805 (N.D. Ind. 1996) (alleging disability under ADA because employer regarded plaintiff as having impairment substantially limiting major life activity); 29 C.F.R. § 1630.2(l) (1997) (stating that if individual has impairment that does not substantially limit major life activity, but is treated by a covered entity as such, then individual is regarded as having such impairment).

256. *See* Hoover, *supra* note 135, at 44.

257. *See id.*

to protecting those with psychiatric conditions from discrimination.[258] Depression and other disorders are still surrounded by a variety of myths, fears, and stereotypes as to their effect on the individual.[259] With depression statistics on the rise among college students, it is necessary to protect not only those students whose condition actually has a limiting effect, but also those students suffering from milder impairments.

The "regarded as" prong of the ADA places university administrators in a difficult position. If universities provide services to students with mental health problems, do they run the risk of prematurely regarding a student as disabled and triggering the ADA? Proactive measures, such as counseling centers, hotlines, and contracts not to harm oneself arguably give students ADA protection before the university has an opportunity to address solutions to a specific student's mental health problems. Faculty and staff are often trained to send students to a campus counselor at the slightest hint of a problem, no matter how simplistic.[260] The campus counseling center may be the only avenue administrators have to identify the minority of students that have severe depression and are a risk to themselves or others.[261] Once a counselor identifies that a student is at risk and needs extensive help, the student, without making any declaration, could assert ADA protections and request reasonable accommodation.[262] The university then must comply with the ADA and work with the student identified as suicidal. Administrators face just the situation they were trying to avoid: allowing a student with severe depression and suicidal tendencies to remain on campus.

E. The "direct threat" defense

In defense of what appears to be knee-jerk labeling of depressed students, university administrators often cite risk management as their reason for initiating the removal of a student who has the potential to harm himself or another student.[263] Under the ADA and Section 504 such a defense is available.[264] If the administration can show that the student is a "direct threat" to the health and safety of others, then removal may be justified.[265] However, before the "direct threat" defense is raised the administration must prove that the student could not be reasonably accommodated in a way that would eliminate the threat.[266] If the accommodation required is excessive, such as 24-hour surveillance or total

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258. Mastroianni & Miaskoff, *supra* note 217, at 737.

259. *Id.*

260. *See* Franke, *supra* note 12, at 18.

261. *See* GW RCGG, *supra* note 156, at 15.

262. *See* Mastroianni & Miaskoff, *supra* note 218, at 738.

263. *See* Hoover, *supra* note 135, at 44; Hoover, *supra* note 20, at 39; Rawe & Kingsbury, *supra* note 147.

264. *See* Randy J. Sutton, Annotation, *Construction and Application of Association Section of Americans with Disabilities Act of 1990, § 102(b)(4), 42 U.S.C.A. § 12112(b)(4)*, 7 A.L.R. FED. 2D 447, § 11 (2005).

265. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087, 1090–91 (10th Cir. 1997).

266. *See id.* at 1084–88. Arguably, part of reasonable accommodation is the evaluation process that determines whether an individual's threatening behavior can be addressed.

isolation from other students, then the university would be correct in its decision to discharge the student.[267] Yet many accommodations are feasible. A university can certainly provide a private room, access to medication, or weekly counseling services. Thus, a direct threat alone is not grounds for rightfully removing a student; the direct threat must be of such a type that the student cannot be reasonably accommodated and the threat sufficiently mitigated.[268]

F. Analysis of removal policies under the requirements of the ADA

In the wake of tragic student suicide cases,[269] it seems logical that university administrators act quickly to remove students from the campus community. Administrators plan for the extreme circumstances that lead to student suicide.[270] "Endangering behavior" or "mandatory removal" policies are the product of that planning.[271] If university administrators do not take the appropriate action to remove these students, then they are exposing their staff to liability and, in their view, putting the life of a student at risk.[272] However, the effect of these policies may be violating the civil rights of the student the administration aims to protect. It appears that colleges and universities are cornered: they can be sued no matter how they respond.[273]

It may be assumed that any university administrator would rank the lives and safety of the student population as more important than shielding the university from the risk of liability. However, mandatory removal policies do not convey that message.[274] Students often read the threat of removal as cold hearted and self-serving on the part of the administration.[275] Men and women who were removed under such a policy often report feeling more depressed because they were forced to leave their friends and a familiar environment.[276] In addition, suspension will not necessarily deter a student who is determined to take his or her own life.

University administrators cannot deny that removal policies serve as a shield against bad publicity and liability. Yet the policies can also be construed as

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267. *See id.* at 1087.

268. *See id.* at 1088.

269. *See* Schieszler v. Ferrum Coll., 233 F. Supp. 2d 796 (W.D. Va. 2002); Shin v. MIT, No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005); Elyse Ashburn et al., *Sounding the Alarm,* CHRON. OF HIGHER EDUC., Apr. 27, 2007, at 6 (describing the school shootings at Virginia Tech).

270. *See* Hoover, *supra* note 20, at 39.

271. *See id.*

272. *See* Hoover, *supra* note 20, at 39.

273. Rawe & Kingsbury, *supra* note 147.

274. *See* Capriccioso, *supra* note 125.

275. *Id.* (stating Jordan Nott believed that George Washington University's removal policy "indicates that administrators are overly concerned about protecting themselves").

276. *See* Hoover, *supra* note 134, at 34 ("It's very difficult to get kicked out of your home. Students feel like they've done something wrong."); Hoover, *supra* note 135, at 44 (stating Jordan Nott noted that suspension made him "feel even worse").

proactive and student-minded.[277] Suspension under these policies is usually temporary, allowing for readmittance when the student is "cleared" by a mental health professional.[278] In theory, removal serves as a catalyst for the student's recovery while protecting the university community.

Certainly, grieving parents will always look for someone to take responsibility for the death of their child. Universities that must respond to a student suicide should always be prepared for that eventuality. But universities are also able to protect themselves from allegations of breach of duty in the wake of a student suicide. For a court to find liability in such a case there must be a duty identified and a showing that the same duty was breached.[279] The courts in both *Schieszler v. Ferrum College*[280] and *Shin v. MIT*[281] noted that liability for student suicide can be avoided if the administrators involved follow existing policy.[282] The situation is reversed when considering removal policies. Arguably, universities cannot protect themselves from liability by following policies if it is those very policies that are exposing them to liability.

Although the Department of Education Office of Civil Rights directly warned several schools against suspending suicidal students,[283] the most publicized case involved The George Washington University.[284] Administrators at George Washington used a policy prohibiting "endangering behavior" as the basis for removing a suicidal student.[285] This conduct provision is not discriminatory on its face;[286] however, the way the administration chose to implement this provision may be discriminatory under the protections of the ADA and Section 504.[287] If the behaviors deemed "endangering" are in fact the negative manifestations of mental

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277. Capriccioso, *supra* note 125 ("Time away provides relief from the stress of campus and academic life in order for students to recover and learn to manage their symptoms and psychological concerns.").

278. *See* GWU RCCG, *supra* note 156, at 15; Ariz. Code of Conduct, *supra* note 155; *see also* Rawe & Kingsbury, *supra* note 147 (student required to spend winter break at psychiatric hospital); Press Release, Judge David L. Bazelon Ctr. for Mental Health Law, Student Punished For Getting Help (Mar. 10, 2006), http://www.bazelon.org/newsroom/2006/3-13-06-Nott.html (describing suspension process and readmittance plan for Jordan Nott).

279. Lake & Tribbensee, *supra* note 5, at 140–41.

280. 236 F. Supp. 2d 602, 610 (W.D. Va. 2002).

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

282. *See Schieszler*, 236 F. Supp. 2d at 612; *Shin*, 2005 WL 1869101, at *13.

283. Rawe & Kingsbury, *supra* note 147 ("Department of Education's Office for Civil Rights started informing schools that a person should be considered a direct threat only when there is 'a high probability of substantial harm and not just a slightly increased, speculative or remote risk.'").

284. *See* Hoover, *supra* note 135, at 44; Hoover, *supra* note 20, at 39; Rawe & Kingsbury, *supra* note 147; Capriccioso, *supra* note 125.

285. Hoover, *supra* note 135, at 44.

286. GWU RCCG, *supra* note 156, at 9 ("Behavior of any kind that imperils or jeopardizes the health or safety of any person or persons is prohibited. This includes any actions that are endangering to self or to others.").

287. The George Washington University is subject to provisions of the ADA and Section 504 because the school receives federal financial assistance from the Department of Education.

impairment, the university cannot use the policy to discipline that student. Applying the ADA analysis previously discussed to the George Washington case illustrates this point.[288]

The student involved, Jordan Nott, suffered from depression for which he sought counseling and took psychotropic medication.[289] Depression is a diagnosable mental disorder, clearly satisfying the mental impairment prong of the analysis.[290] The second prong, requiring proof that a major life activity is affected by the condition, can also be satisfied.[291] Jordan's depression was not unusual in that it affected his ability to sleep and concentrate, both of which are recognized as major life activities.[292] The final prong, substantial limitation, can be satisfied if the duration of Jordan's depression is considered.[293] Non-chronic or temporary conditions usually do not rise to the level of a substantial limitation, but mental health problems do not have to be permanent to trigger ADA protection.[294] There is not an established length of time at which a mental health condition becomes a disability.[295] An impairment that has an indefinite or unknowable duration, which was arguably the case with Jordan's depressive episode, qualifies as a disability.[296] Even if Jordan's depression did not rise to the level of a "qualifying disability," it seems enough facts were present to give an administrator pause.[297] If the administration had reacted to the disability instead of the behavior, a reasonable accommodation for Jordan may have provided a more favorable solution than suspension. Using the resources available through their own campus counseling center, counselors could have worked with Jordan on a treatment plan. The administration could have given Jordan the option to voluntarily remove himself, to commit to a treatment plan on campus, or to work with outside professionals to ensure he was well enough to continue living on campus.

The university decision to suspend Jordan was likely based on the assumption that he was a direct threat to himself or other students. While this may have been true, the administration should have taken the additional step to evaluate Jordan and determine if he could be accommodated to reduce the threat. In this situation, similar to the facts in other student removal cases, the administration had time to take action.[298] Jordan spent the night in the hospital; it was plausible for the administration to request he receive a psychiatric evaluation. At the very least an

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288. *See supra* text accompanying notes 135–146.
289. *See* Hoover, *supra* note 135, at 44.
290. Mastroianni & Miaskoff, *supra* note 217, at 727.
291. *See id.* at 726.
292. *Id.* at 730.
293. *Id.* at 732.
294. *Id.*
295. *See id.*
296. *Id.* at 732–33; Capriccioso, *supra* note 125 (Jordan is no longer experiencing depression two years after his suspension from GW but admits his depression could return in the future).
297. *See supra* text accompanying notes 135–146.
298. *See* Hoover, *supra* note 135, at 44 (stating that Jordan spent the night in the hospital and was notified of his suspension while still in the hospital); Hoover, *supra* note 134, at 34 (noting that student was locked out of her room before administration took any accommodating steps).

evaluation would have initiated dialogue about accommodation. By not attempting to evaluate and/or accommodate Jordan, administrators at George Washington effectively removed him on the basis of an assumption. This clearly falls into the "regarded as" provisions of the ADA.[299] By treating Jordan as mentally impaired and then removing him on grounds of that impairment the situation resulted in discrimination.[300]

Clearly, applying an "endangering behavior" policy in this manner is a violation of the ADA. Perhaps conceding this, George Washington ultimately settled Jordan's claim against the university and has since revised its student removal policy with regard to involuntary medical withdrawals.[301] The state of Virginia also recognized the potentially discriminatory nature of removal policies. In February 2007, the Virginia legislature enacted a law prohibiting universities from removing students "solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behaviors."[302] Despite these recent developments, many universities will likely keep their removal policies in place, particularly in light of the April 2007 tragedy at Virginia Tech.[303]

G. Effect of removal policies on the student population

Beyond the argument that dismissal of depressed students is a violation of the mandates of the ADA and Section 504, removal policies are creating a residual problem. Students are getting the message that some mental health problems have no place on a college campus.[304] This message directly conflicts with the service-oriented image portrayed through campus counseling centers, awareness campaigns, and residence hall programs encouraging troubled students to seek help.[305] As a result, students who are already facing personal problems are dealing with an additional conflict: seek the help that is extended and risk suspension or act healthy and potentially allow the problem to compound.[306] This chilling effect on the student body may create additional liabilities for the administration.

Consider the following scenario: A student with a mental health history is moderately depressed and knows that counseling or medication could alleviate the problem. Yet the student does not seek help out of fear of suspension. As a result, his mental health state rises to the level of suicidal. This is just the type of behavior

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299. *See* Mastroianni & Miaskoff, *supra* note 217, at 737.

300. *See id.*

301. Robert B. Smith & Dana L. Fleming, *Student Suicide and Colleges' Liability*, CHRON. OF HIGHER EDUC., Apr. 20, 2007, at 24.

302. VA. CODE ANN. § 23-9.2:8 (West 2007).

303. Ashburn, *supra* note 269, at 6 (describing school shooting in which student gunman killed thirty-two people before killing himself).

304. *See* Ashburn, *supra* note 269, at 3 (suspended student Jordan Nott encouraging students to seek help at an off-campus facility); Capriccioso, *supra* note 125, at 1 ("[S]tudents say that there is in fact good reason to be afraid—afraid that the very counseling they are encouraged to have could get them expelled."); Rawe & Kingsbury, *supra* note 147 ("I felt like I had to hide how I was doing from my doctor, my counselor, my nutritionist, so that I could stay.").

305. *See* Franke, *supra* note 12, at 18.

306. *See supra* note 304.

the administration was attempting to identify and remove, but now the student is taking steps to evade the administration. The student commits suicide on campus, and his parents seek damages against the administration. Based on precedent, the university and its administrators are likely protected because they were not on notice of the student's condition and therefore could not have undertaken a duty to protect him.[307] What if liability still arises because it was the very policy of the university that prevented the student from seeking the help that he needed? The university arrives in the same position it hoped to avoid through its removal policy. Perhaps liability in this situation is a stretch, but ten years ago, few university administrators anticipated that the legal system would identify a duty to prevent student suicide.[308] The entire university community will be more successful if students with mental health issues are able to openly receive the help that is offered them.

CONCLUSION

There is a strong argument that suspending a depressed student with suicidal tendencies is a violation of the ADA and Section 504. Unless university administrators can show that the student's condition creates a direct threat that cannot be accommodated or mitigated, the student will remain among the student body. It is incumbent upon administrators to approach this issue from a new direction.

Recent legal trends and the desire to protect universities from liability has played a role in the decision to require mandatory removal of potentially suicidal students. However, these removals are also initiated with the goal of protecting the students and encouraging them to seek treatment. Now, both of these objectives will need to be met while keeping students on campus. Universities cannot insulate themselves from students with mental impairments. There is always the possibility of students committing suicide while attending the university. The best defense is a set of firm policies and an educated staff.

It is paramount that there are policies in place to protect and assist students with severe depression; these policies will serve to protect the university as well. Campus counseling centers must remain a safe space: students should not have to worry that seeking help for suicidal thoughts could result in suspension. Faculty and staff must be trained to address severe depression in a timely fashion and to direct affected students to the proper services. If these services fail and a student cannot be stable in the university environment then removal may be an appropriate next step. Removing a student, however, must be the final step within a process; it cannot be the initial solution.

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307. *See* Franke, *supra* note 12, at 18; *see also* Schieszler v. Ferrum Coll., 233 F. Supp. 2d 796, 803–04 (W.D. Va. 2002); Shin v. MIT, No. 020403, 2005 WL 1869101 (Mass. Super. June 27, 2005); Hickey v. Zezulka, 487 N.W.2d 106, 115 (Mich. 1992).

308. *See* Lake & Tribbensee, *supra* note 5, at 129 (citing Margot O. Knuth, Note, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A. L. REV. 967, 967–68 (1978)); Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 217–18 (1971).