The Duty Paradox: Getting it Right After a Decade of Litigation Involving the Risk of Student Suicide

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Introduction

The question whether or under what circumstances college and university administrators can be subject to liability for failing to prevent a student’s suicide has been the subject of several notable court decisions—and a great many more articles and conference presentations—in recent years. The prospect of such liability is a powerful force. If educational institutions and their administrators1 can be found liable for the failure to

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1. I use the term "administrator" in this Article to mean all college or university employees—including primarily deans and residential life staff but also including other staff
prevent a student’s suicide, they will respond in ways that are calculated to minimize that risk. Indeed, as further discussed below, we have observed this force at work in recent years. The problem—the duty paradox—is that imposing upon college and university administrators a legal duty to prevent student suicides ultimately makes students less safe because it deters administrators from becoming involved with students who may be at risk of self-harm. Consider the following, unfortunately common, scenario:

John, a college sophomore, goes to see one of the associate deans in the office of student affairs. John tells the dean that he is deeply concerned about Mary, a freshman who lives in his residence hall. John believes Mary is depressed. She always seems sad and withdrawn. She rarely leaves her room. She is falling badly behind in her classes and is skipping them much of the time. She appears to be eating little or nothing. Several of Mary’s friends say that she is cutting herself. John has heard a rumor that Mary attempted suicide the previous semester by taking an overdose of pills. Mary has told several students that she is seeing a psychologist at the college health center; however, some friends believe that she stopped going once the psychologist suggested that she needed medication. John also has heard that Mary is desperately afraid of her parents finding out that she is struggling at school and has sought mental health treatment. Mary has many friends, who are trying their best to support and watch out for her. John thinks that these friends are trying to do too much by themselves, and that instead they should be encouraging Mary to get more help from the college. John has come to the dean because last night he heard that Mary was very upset and was describing her situation as hopeless.

How do we think the associate dean should respond? What would we think if the associate dean said to John the following?

I realize this is upsetting, but I’m not in a position to do anything about this. I don’t know Mary. I don’t have any first-hand knowledge of her situation. Most of what you have told me is hearsay and rumor. And assuming Mary is depressed, as you think she might be, then she has a mental health problem that I am not qualified to address. I am a dean, not a psychiatrist. It also sounds like Mary has been, and may still be, in treatment with one of our clinicians. You should encourage her to go to the health center. They have the expertise to deal with these things, and I don’t.

and faculty—who are not medical or mental health professionals. The legal duty analysis with respect to clinicians is entirely different from that relating to nonclinical employees. It is well settled that a clinician owes a duty of reasonable care to his or her patient or client.
Is that how we think the associate dean should respond—by essentially refusing to become involved? Don’t we instead want the dean to actively address Mary’s situation, and to do so with a sense of urgency? Shouldn’t the dean immediately be thinking about such steps as calling Mary to see if she will come in to meet with him? Reaching out to Mary’s resident assistant or other residential life staff who might be knowledgeable about the situation? Reaching out to Mary’s professors to determine whether in fact she is skipping classes and falling behind, and whether her professors are concerned about her?

It is self-evident that the latter approach is better than the former. We want college administrators to engage with and use their best efforts to assist, not avoid, students who may be at risk of suicide or otherwise suffering from a serious mental health issue. A more difficult question is whether we need a new set of legal rules to encourage or require college administrators to engage in this way, or whether existing rules—which generally will result in a finding of no legal duty to prevent suicide—in fact are more likely to produce the best results.

A leading proponent of the need for new legal rules is Peter F. Lake, a professor at Stetson University College of Law, whose work often addresses the question of what legal duties colleges and universities have, or ought to have, to protect their students from foreseeable risks of harm. In Professor Lake’s view, "colleges and universities desperately need more legal guidance on the parameters of managing student suicide danger." He believes that a "student suicide crisis" is "in full swing," and that colleges

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4. Id.

The first wave of litigation [involving student suicide] has served to bring student suicide and student wellness issues out of the closet, but we need more than a smattering of cases with inconsistent results. Everywhere in America, in every type of institution of higher education, administrators make life and death decisions with imprecise and incomplete guidance from the law. . . . There is a cost when neither courts nor legislatures articulate the ways in which general legal principles apply in the college and university context and fail to consider the impact upon administrators of partial, incomplete, or inconsistent legal commands. At this time, the law is failing colleges and universities with respect to the mental health crisis.

Id.
and universities have not responded to this "crisis" adequately, at least in part because college administrators engage in too much "balkanization, information siloing, and self-help," rather than effectively sharing information and coordinating their efforts. The solution to this problem, in Professor Lake's view, should be in the form of new, specific "legal commands" that come from appellate courts or state legislatures.

Ann MacLean Massie, a professor at Washington and Lee University School of Law, shares Professor Lake's view and goes even further by proposing specifically what that "legal command" should be. Professor Massie proposes adopting as a "rule of law" that when a college or university administrator "has actual knowledge" that an undergraduate student has made a suicide attempt or is "seriously suicidal," the administrator has an affirmative duty to take reasonable steps to protect the student from self-harm—a duty that would include, but not be limited to, notifying the student's parents or reporting the information to some other college administrator who has authority to notify the parents.

5. See id. at 256. Professor Lake asserts more generally that "higher education's organizational models tend to work against the very needs that arise in critical incident response and prevention... Competition among departments, fear of responsibility, a desire to blame others, and often false hopes that ignoring a program will make it go away while in a specific department—all contribute to an overall environment in which rapid [and coordinated] response to critical incidents is not encouraged." Id. at 280.

6. Id. at 254.

7. Id. at 255–56. "[H]igher education is still waiting for the legal system to catch up to the [student mental health] crisis... In many states, and with respect to many issues, colleges and universities, students, parents, and others must still wait to receive necessary, basic governing rules... This article serves as a call to action for courts and legislatures to move quickly in assisting higher education." Id. at 255–56. "The law is drifting, and seems to have no particular course. Most disturbing is the fact that lawmakers have shown no sense of urgency in, at least, offering basic governing principles to most or all institutions." Id. at 256.

8. Ann MacLean Massie, Suicide on Campus: The Appropriate Legal Responsibility of College Personnel, 91 MARQUETTE L. REV. 625, 679 (2008). Professor Massie's proposed rule, in full, is as follows:

When an administrator at an institution of higher education (including faculty) has actual knowledge of a suicide attempt on the part of an enrolled undergraduate student, or of other circumstances indicating that the student is seriously suicidal, that administrator has a duty to take reasonable steps to protect the student from self-harm, including, but not limited to, notifying the student's parents or guardian or reporting the information to an administrator who has authority to make such notification. This duty may extend to other reasonable steps to protect the student's safety, such as contacting campus counselors or campus security officers, who might have the authority to take custody of a student presenting a danger to self or others. It may also include other actions, depending upon what is reasonable under the circumstances.
Such calls for the articulation of new legal duties on the part of college and university administrators are well meaning, but are flawed in several respects. First, they are mistaken to the extent they portray the current state of the law as being woefully incomplete or confusing—consisting, as Professor Lake puts it, of "a smattering of cases with inconsistent results," which has delivered only "partial, incomplete or inconsistent legal commands." To the contrary, the case law generally presents a consistent, principled, and well-reasoned approach to the legal duties of college and university administrators, which, with rare exceptions, results in a finding that administrators have no legal duty to prevent student suicide. While there are two trial court decisions that found that administrators could have a duty to prevent suicide, these two decisions are not well-reasoned and have not been followed in subsequent cases. Thus, they stand as isolated exceptions to what has remained the strong general view: that colleges and their administrators have no legal duty to protect students from even foreseeable risks of harm, as long as the risk was not one that the college itself created or one as to which the student was uniquely dependent on the college for protection—neither of which usually is true in a case involving student suicide.

Second, calls for the imposition of new legal duties rest on the mistaken view that new duty rules are needed in order for college administrators to "do the right thing." They assume that the reported facts of a very small number of student suicide cases are indicative of how situations involving at-risk students typically are handled; that there has been little if any change in the way that colleges and their administrators respond to at-risk students in recent years; and that college and university administrators need "more legal guidance" from judges or legislators about how to do their job. These assumptions are not well-founded.

Finally, and most importantly, the imposition of new legal duties—in particular any duty resembling the one that Professor Massie proposes—are unworkable and would have the opposite of their intended effect. Such duties would make students less safe, because they would incentivize college administrators not to become involved with at-risk students. Under Professor Massie’s proposed "rule of law," whether an administrator has a legal duty depends upon whether the administrator has "actual knowledge" that a student may be at risk of suicide. But if the administrator’s "actual

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10. See Massie, supra note 8, at 679.
knowledge” of that risk will determine whether the administrator has a legal duty—i.e., whether he faces exposure to personal liability—then the administrator will have every incentive not to acquire such knowledge. Instead, his incentive will be to respond in just the way that we do not want the associate dean to respond in the scenario described above: by declaring his lack of expertise in addressing mental health issues, declaring his lack of first-hand knowledge about the student at issue, and determining firmly not to acquire such knowledge or otherwise become involved.

I. The Legal Landscape After a Decade of Cases Involving Suicide and Disability Discrimination Claims

A. Many Students with Significant Mental Health Issues, but Few Lawsuits Arising from Student Suicides

It has been well documented that colleges and universities have large and increasing numbers of students with serious mental health issues, and that the seriousness of those issues is increasing as well. Some of these students present a very real risk of harm to themselves or others or both. The commonly cited estimate of the rate of suicide among college undergraduates in the United States is 7.5 per 100,000 students, which means that on average about 1,100 undergraduates in the U.S. commit suicide each year. That is a considerable number, to be sure. But it is also

11. For example, a 2003 survey of nearly twenty thousand American college students revealed that approximately forty-five percent reported feeling "so depressed it was difficult to function" at least once during the 2002–2003 school year; thirty percent reported suffering from an anxiety disorder or depression; and more than ten percent reported having seriously considered attempting suicide. Michael Haines et al., American College Health Association & National College Health Assessment: Reference Group Executive Summary 13–14 (2003), available at http://www.achancha.org/docs/ACHA-NCHA_Reference_Group_ExecutiveSummary_Spring2003.pdf. See also Sherry A. Benton et al., Changes in Counseling Center Client Problems Across 13 Years, 34 Prof. Psychol.: Res. & Pract. 66, 66–71 (2003) (citing several studies that describe perceived increases in levels of psychopathology and symptom severity among counseling center clients, and noting that at the authors’ university the number of students with depression had doubled and the number of suicidal students had tripled between 1989 and 2001); Massie, supra note 8, at 635, 636 & n.52 (noting that "campus counseling centers have seen dramatic increases in their caseloads over just the past few years" and that "the students they are seeing are reportedly sicker and more often in need of hospitalization than used to be the case") (citing, inter alia, Robert P. Gallagher, National Survey of Counseling Center Directors (2004), available at http://iacsinc.org/2004%20Survey%20final-1.pdf).

12. See Massie, supra note 8, at 633–34 (citing, inter alia, Morton M. Silverman et al.,
true that the average incidence of suicide among college and university students is significantly less than the average incidence for that age group generally.13 These statistics suggest not only that some frequency of suicides on college and university campuses is simply unavoidable, notwithstanding the best efforts of administrators and clinicians,14 but also that there are some preventive effects associated with the college and university environment,15 and perhaps even that colleges and universities are actually getting some things right in their efforts to address the risk of suicide.16

The Big Ten Suicide Study: A 10-Year Study of Suicides on Midwestern University Campuses, 27 SUICIDE & LIFE-THREATENING BEHAV. 285 (1997)).

13. Silverman et al., supra note 12, at 299.

14. Even psychiatrists and other mental health professionals rarely are held liable for failing to prevent suicide, both because it is virtually impossible to predict suicide in an individual patient, and because how best to respond to a patient’s suicidal ideation often involves difficult clinical judgments. Suicide is so unpredictable that the law rarely imposes liability on even a psychiatrist or other caregiver when the suicidal patient is not in the caregiver’s physical custody. See GARY PAVELA, THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS 34 (1985) (asserting that "even for institutions such as hospitals, courts have recognized ‘the difficulty of preventing suicide’ and are ‘reluctant to impose ... liability in all but the most egregious circumstances,’” and that educational institutions have "distinctly" less capability than mental hospitals "to effectively supervise and control a resident population"); Douglas G. Jacobs et al., Suicide Assessment: An Overview and Recommended Protocol, in THE HARVARD MEDICAL SCHOOL GUIDE TO SUICIDE ASSESSMENT AND INTERVENTION 3 (Douglas G. Jacobs ed., 1999) (stating that suicide is difficult to predict, and suicidal behavior is difficult to treat, in large part because suicide is quite rare, even among those who engage in suicidal ideation or otherwise are deemed to be most at risk); id. at 20 (even for trained mental health professionals, "reliable prediction of individual suicide at a specific time is impossible"); 23 AM. PSYCHIATRIC ASS’N, PRACTICE GUIDELINE FOR THE ASSESSMENT AND TREATMENT OF PATIENTS WITH SUICIDAL BEHAVIORS, Nov. 2003, at 12, available at http://www.psych.org/psych_pract/treat/gp/prac_guide.cfm (stating that the rarity of suicide, even in groups known to be at a higher risk than the general population, makes it impossible to predict) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Michael F. Heiman, The Suicidal Patient: Principles of Assessment, Treatment, and Case Management, 155 Am. J. Psychiatry 1621, 1621 (1998) (recognizing "that the mental health profession does not currently possess the technology for accurate prediction or prevention of [suicide]," and the "inescapable fact that the power to commit suicide or engage in suicidal behavior is finally and completely in the hands of [the] patient" (quoting JOHN A. CHILES M.D. & KIRK D. STROHSAL, THE SUICIDAL PATIENT: PRINCIPLES OF ASSESSMENT, TREATMENT, AND CASE MANAGEMENT 282 (1995)));

15. The college environment is naturally rich with opportunities for students to find social support—from fellow students, faculty members, and administrators—and "[m]any studies conclude that social support is protective against depression and suicide. See Jacobs et al., supra note 14, at 31. See also Massie, supra note 8, at 673 (recognizing that "students may well not have access at home to the resources available at the college or university").

16. See Massie, supra note 8, at 634–35 (stating that many colleges and universities in
It also should be noted that while a substantial number of suicides occur on college campuses each year, only a very small fraction of those tragedies result in litigation. (Indeed, there are vastly more articles and papers concerning the legal duty of college administrators with respect to student suicide than there are actual lawsuits.) That fact alone calls into serious question Professor Lake’s assertion that "colleges and universities desperately need more legal guidance on the parameters of managing student suicide danger." If the risk of litigation arising from a student suicide is remote, that only further confirms what should be self-evident: that college and university administrators should be looking to mental health experts—not judges and legislators—for guidance in how best to address the risks of student suicide.

Why so few student suicides result in litigation is an interesting question, to which there are undoubtedly multiple answers. Some suicides occur entirely without warning to university administrators, in which case there obviously is no basis for seeking to hold them accountable for failing to prevent it. In other cases, where administrators did have some knowledge of a risk of suicide, the family will recognize that the administrators acted reasonably under the circumstances, and that the suicide simply was not avoidable. In many cases the parents also will have been aware of the student’s problems—sometimes to a greater degree than college officials—and if the parents were unable to prevent the suicide, they reasonably will not expect that college or university administrators should have been able to do so. For all these reasons, it is a rare case in which parents believe not only that campus administrators were negligent in their response to a foreseeable risk of suicide, but also that a different response by those administrators ultimately in fact would have prevented the suicide. And even then, parents may be deterred from filing a lawsuit by the daunting prospect that litigation presents—a long and costly process that will lay bare the most highly personal information about their child, and often about the parents themselves, and which will be deeply painful for the parents, other family members, and friends.

Moreover, if the parents are well advised by legal counsel, they will understand that the prospects for establishing liability on the part of a college or its administrators are usually slim. Contrary to Professor Lake’s

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17. Lake, supra note 3, at 254.
assertion that there is a "desperate need for more legal guidance" in this area, there is in fact a well-developed body of law that addresses the question of when a college or its administrators may have a duty to protect students from a foreseeable risk of harm, including a risk of self-harm. Courts across a wide range of cases, including those involving student suicides, hold with rare exception that no such legal duty exists.

B. Jain v. Iowa

The leading case on liability for a college student’s suicide—and the only recent appellate decision—is the Iowa Supreme Court’s 2000 decision in Jain v. Iowa. The court held that the University of Iowa had no duty to prevent the suicide of a student, Sanjay Jain, in his dormitory room even though university officials knew Sanjay was at risk and recently had attempted suicide, and even though university officials failed to follow a university policy of notifying parents if a student engages in self-injurious behavior. The plaintiff in Jain, Sanjay’s father, conceded "that the law generally imposes no duty upon an individual to protect another person from self-inflicted harm in the absence of a ‘special relationship,’ [which is] usually custodial in nature," and that a university’s relationship with its students is not a custodial one. He claimed instead "that the university’s knowledge of the student’s mental condition or emotional state requiring medical care created a special relationship giving rise to an affirmative duty of care toward him." Specifically, he argued that a duty arose under Restatement (Second) of Torts, section 323, which provides that one who voluntarily undertakes to aid another is subject to liability if he fails to exercise reasonable care in that undertaking and that failure affirmatively increases the risk of harm or the harm is suffered because of the other person’s reliance on that undertaking. In this case university employees had undertaken to aid Sanjay, including by recommending that he seek

18. Id.
20. Id. at 297–300. In the only other appellate decision to address the issue, the Supreme Court of Wisconsin similarly held that a counseling dean who had terminated his counseling relationship with a student had no duty to prevent student’s suicide. Bogust v. Iverson, 102 N.W.2d 228, 233 (Wis. 1960).
21. Jain, 617 N.W.2d at 297.
22. Id.
23. Id. at 297–99.
counseling and by seeking his permission to contact his parents (which Sanjay refused). However, the Court found no duty existed because nothing the university did affirmatively increased Sanjay’s risk of self-harm and there was no evidence that Sanjay relied to his detriment on any of the efforts that university administrators made to assist him.

The decision in Jain is well-reasoned. It is entirely consistent with general tort principles, including not only the general principles as to when a duty of care can arise by virtue of a "voluntary undertaking," but also the specific principles courts have applied with respect to the prevention of suicide. Courts consistently have held that persons who are not treating clinicians have a duty to prevent suicide only in two very limited circumstances: (1) if they actually caused the decedent’s suicidal condition, or (2) if they had the decedent in their physical custody (e.g., a mental hospital or prison), such that the decedent was dependent on them for protection, and they had knowledge of the decedent’s risk of suicide.

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24. *Id.* at 299.

25. *Id.*

26. *Id.* at 297–99.

27. See, e.g., Wallace v. Broyles, 961 S.W.2d 712, 719 (Ark. 1998) (finding that the evidence raised issues of fact when a university allegedly caused student’s suicidal condition where university supplied student, an injured football player, with heavy dosages of a strong pain killer that came with warnings of potentially addictive and depressive effects, including suicidal ideation or attempts); see also McGrath v. Dominican Coll., 672 F. Supp. 2d 477, 486 (S.D.N.Y. 2009) (finding that a student committed suicide after her college allegedly exhibited gross indifference in response to her report that she had been raped at a party on campus by three men, including two students of the college).

28. Ordinarily tort law addresses the question whether a person who has been harmed by someone else—either the defendant or some third person—has a right to recover damages from the defendant for that harm. Claims for failure to prevent a suicide are fundamentally different, as they involve harm that was intentionally self-inflicted. Whether the harm occurs or not is ultimately in the hands of the plaintiff’s decedent. Courts have recognized this unique quality of claims involving a failure to prevent suicide and accordingly hold as a general rule that someone other than a treating clinician has no duty to prevent suicide as a matter of law unless the defendant caused the suicidal condition or had physical custody of the decedent. See McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983) ("As a general rule, negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act which precludes a finding that a given defendant, in fact, is responsible for the harm.") (collecting authorities); Nelson v. Mass. Port Auth., 771 N.E.2d 209, 212 (Mass. App. Ct. 2002) (finding that the port authority had no duty to prevent a person from committing suicide by jumping from a bridge owned by the port authority, even though such suicides occurred there on average once per month, because the authority neither caused the decedent’s suicidal condition nor had custody of him along with knowledge of his suicidal ideation); see also Hickey v. Zezulka, 487 N.W.2d 106, 119 (Mich. 1992) (finding that a campus police officer owed duty of care to an arrestee she placed in a university holding cell and could be found liable for
The decision in *Jain* also fits squarely with the general approach that courts have taken in cases involving other, more common risks of harm to college and university students, such as the risk of harm arising from alcohol or drug use or from an assault. Since the 1970s, with the decline of the doctrine of *in loco parentis*, courts consistently have recognized that college students are adults who are fundamentally responsible for their own well-being. Thus, "the general rule is that no special relationship exists between a college and its . . . students," and that colleges have no legal duty to protect their students from harm, even when the harm is entirely foreseeable and even when the harm arises in the context of conduct that is unlawful or in violation of college policies or both. The cases in which a college or university has been held to owe a student a duty of care have generally been limited to the narrow circumstances in which (1) the student’s harm was not self-inflicted, and (2) the student was uniquely dependent on the university for protection from a third party or was injured in the course of activity that the university encouraged or that was undertaken on the university’s behalf.


30. See, e.g., Guest v. Hansen, 603 F.3d 15, 22 (2d Cir. 2010) (holding that a college owed no duty to protect its students and their guests from harm arising from drinking and snowmobiling on a frozen lake immediately adjacent to campus, even though the harm was foreseeable and college officials had taken some steps to intervene); Bradshaw v. Rawlings, 612 F.2d 135, 141–42 (3d Cir. 1979) (finding that the college owed no duty to a student injured in a car accident where driver became intoxicated at a class picnic, even though college was aware of and arguably facilitated the underage drinking); Robertson v. State of La., 747 So. 2d 1276, 1281 (La. Ct. App. 1999) (university owed no duty to intoxicated student who fell from roof of university building even though university knew inebriated students previously were injured in the same way); Tanja H. v. Regents of Univ. of Cal., 278 Cal. Rptr. 918, 921–22 (Cal. Ct. App. 1991) (finding that the university had no duty to prevent sexual assault that followed heavy drinking in violation of school rules).

31. See, e.g., Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336–38 (Mass. 1983) (finding that the college owed a duty to resident students to take reasonable measures to secure dormitories against intruders); Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991) (holding that the university owed student injured in hazing incident duty with respect to risk of foreseeable assault occurring on its property); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 761–63 (Neb. 1999) (finding that a university could owe duty to a student if the risk posed to the student in a hazing incident was foreseeable).

32. See, e.g., Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1367 (3d Cir. 1993) (concluding that a college that actively recruited a student-athlete for its own benefit had a duty to be reasonably prepared for medical emergencies that might arise during student’s participation in scheduled practice sponsored and supervised by college); McClure v. Fairfield Univ., No. CV000159028, 2003 WL 21524786, at *8 (Conn. Super. Ct. June 19, 2003) (finding that the university owed a duty to student struck by car while walking to off-
C. Schieszler v. Ferrum College and Shin v. MIT

Notwithstanding the strength of the Iowa Supreme Court’s reasoning in Jain, and the firm foundation of precedent on which it was based, the case was followed in relatively short order by a pair of trial court decisions—Schieszler v. Ferrum College and Shin v. Massachusetts Institute of Technology—which found that college administrators could have a duty of care with respect to a student’s risk of suicide, at least in circumstances where the administrators had actual knowledge of an "imminent probability" of harm if they failed to act. However, as discussed below, these two decisions are narrowly limited to their particular facts; they were not reviewed on appeal (both cases settled before any trial); and—because they are not well-reasoned—they have not been followed in subsequent cases, which have returned to the principles that guided the court in Jain.

In Schieszler, the student who ultimately committed suicide, Michael Frentzel, sent his girlfriend a note indicating that he intended to hang himself. The girlfriend reported the threat to her resident assistant, who called the campus police. The resident assistant and campus police went to Michael’s room, where they found him with self-inflicted bruises on his head. The campus police referred Michael to the dean of students, who required Michael to sign a statement promising that he would not hurt himself. Michael subsequently sent his girlfriend another note, which evidenced further suicidal ideation. The girlfriend reported this as well but the college’s administrators took no action except to forbid the girlfriend from visiting Michael’s dormitory. When Michael sent his girlfriend yet another troubling note campus officials went to his dormitory room where they found that he had hanged himself.

34. Schieszler, 236 F. Supp. 2d at 605.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
Michael’s aunt and guardian sued the college, the dean of students, and the resident assistant in the United States District Court for the Western District of Virginia, claiming that the defendants knew or should have known that Michael was likely to attempt to hurt himself if not properly supervised and that they took no steps to do so.\footnote{Id.} The college and its administrators moved to dismiss the complaint, arguing among other things that they had no duty to prevent Michael’s suicide as a matter of law.\footnote{Id. at 605–06.} The court denied the motion.\footnote{Id. at 614.} Applying Virginia law, the court determined that "[w]hile it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exists on the particular facts alleged in this case," i.e., based upon the defendants’ awareness of "an imminent probability" that Michael would try to hurt himself if they failed to act.\footnote{Id. at 609.}

The decision in Schieszler is flawed in several significant respects. First, the court found that a duty to prevent suicide may arise outside the limited circumstances in which a defendant has caused the decedent’s suicidal condition or had the decedent in physical custody, contrary to the well-settled principles that long have governed liability claims for failure to prevent suicide.

Second, the court ostensibly based its finding of a "special relationship" on the principles set forth in the Restatement (Second) of Torts, sections 314A and 315(b), but the court’s reasoning in fact is contrary to the principles laid out in the Restatement. The court found that the defendants could have a duty of care because of the sheer foreseeability of harm if they failed to act.\footnote{In light of the evidence that the defendants were aware of Michael’s "emotional problems," his self-inflicted bruises, and the notes "suggesting that he intended to kill himself, a trier of fact could conclude that there was an imminent probability that [Michael] would try to hurt himself... and that the defendants had notice of this specific harm. Thus, [the Court finds] the plaintiff has alleged sufficient facts to support her claim that a special relationship existed between [Michael] and defendants giving rise to a duty to protect [Michael] from the foreseeable danger that he would hurt himself." Id.} However, finding a duty on the basis of foreseeability alone blatantly ignores the core principle of Restatement section 314: "The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or
protection does not impose upon him a special duty to take such action.\textsuperscript{46}

Third, the \textit{Schieszler} court erroneously relied on \textit{Mullins v. Pine Manor College},\textsuperscript{47} a case frequently—and mistakenly—cited for the proposition that colleges generally have a duty of care to protect their resident students from foreseeable harm. The holding and rationale of \textit{Mullins} in fact is much narrower. The court in that case found that, under Restatement (Second) of Torts section 323, a college had a duty to take reasonable steps to protect freshman students from assault by an intruder in a residence hall where (1) the student was required to live in the residence hall, (2) the college had undertaken a number of measures to address the risk of assault by intruders, and (3) there was evidence from which the jury could infer that the plaintiff relied on the adequacy of those precautions in deciding which college to attend.\textsuperscript{48} This rationale in \textit{Mullins} has no application to cases involving students at risk of harm from their own mental health issues. Students are not required to obtain mental health services from their colleges and in any event there rarely if ever will be any evidence that the student chose to attend a particular school in reliance upon the mental health services the student expected to receive there. Moreover, the risk of self-harm, which ultimately is within the student’s exclusive control, is distinctly different from the risk of assault by a third party, which the school can be in the best position to prevent.

The \textit{Schieszler} decision also lacks persuasive value because it fails to address the holding and reasoning of \textit{Jain} and the earlier case of \textit{Bogust v. Iverson},\textsuperscript{49} which are the only two appellate court decisions

\begin{itemize}
\item \textsuperscript{46} \textsc{Restatement (Second) of Torts} § 314A.
\item \textsuperscript{48} \textit{Id.} at 336–37. The court in \textit{Mullins} also found that a duty to protect college freshmen from assault by an intruder in their dormitory could be grounded in "societal expectations" because: the risk of harm had been created by the college setting itself (on the theory that concentrations of young women attract assailants); the college required freshmen to live in the dormitory; and only the college was in a position to provide the necessary security measures as the students were in no position to hire security guards or install their own door locks. \textit{Id.} at 335–36. No such "societal expectations" exist with respect to the duty to prevent suicide. Colleges do not create that risk, and in any event students are not dependent on the college for help in addressing that risk. To the contrary, as the court in \textit{Jain} recognized, students are free to obtain assistance with their mental health issues off-campus. \textit{Jain v. State}, 617 N.W.2d 293, 299 (Iowa 2000).
\item \textsuperscript{49} \textit{Bogust v. Iverson}, 102 N.W.2d 228, 233 (Wis. 1960) (affirming the trial court’s ruling that a counseling dean had no duty to prevent a student’s suicide).
\end{itemize}
to address the question whether college or university officials can have a legal duty to prevent student suicide. The court did so because the plaintiff at oral argument abandoned her contention that a duty should be found under the "voluntary undertaking" principles of Restatement section 323, on which the decisions in Jain and Bogust were based.50

Notwithstanding its many flaws, the decision in Schieszler was followed three years later by a Massachusetts trial court judge in Shin v. Massachusetts Institute of Technology.51 That case involved a student at MIT, Elizabeth Shin, who died in a fire in her dormitory room.52 Elizabeth’s parents, who initially believed that her death was a suicide, sued MIT along with a number of MIT administrators and several psychiatrists at the MIT Health Center where Elizabeth had been in treatment.53 The administrators were generally aware of Elizabeth’s ongoing mental health problems and had heard that she had threatened to commit suicide on the day that the fire occurred.54 The administrators believed that some intervention by mental health professionals was necessary; they conveyed their concerns to the psychiatrists at MIT; and they believed that the psychiatrists would take steps to contact Elizabeth and assess her that day.55 However, the administrators did not take any steps to check on Elizabeth during the day themselves or to confirm that the psychiatrists had seen her.56 As it turned out, the psychiatrists called Elizabeth and left her a phone message in which they confirmed the availability of an intake appointment for her the following day at an intensive outpatient treatment center that Elizabeth recently had agreed to attend, and in which they confirmed their availability to her in the meantime; but they never actually saw her that day.57

Elizabeth’s parents claimed that the administrators and clinicians were negligent in failing to take reasonable steps to address the risk that Elizabeth would harm herself.58 The administrators moved for

50. Schieszler, 236 F. Supp. 2d. at 608.
52. Id. at *5–6.
53. Id. at *6–8.
54. Id. at *5.
55. Id.
56. Id.
57. Id. at *2–5.
58. Id. at *9.
summary judgment, arguing among other things that they had no duty to prevent Elizabeth’s alleged suicide as a matter of law.\textsuperscript{59} The trial court denied the motion.\textsuperscript{60} Following the decision in \textit{Schieszler}, the court found that a duty based on a "special relationship" could exist because the MIT administrators "could reasonably foresee that Elizabeth would hurt herself without proper supervision."\textsuperscript{61}

The decision in \textit{Shin}, like the \textit{Schieszler} decision it followed, was flawed in several respects: in finding that a "special relationship" effectively could be based on the foreseeability of harm alone; in misreading \textit{Mullins} as holding that colleges and their administrators broadly owe "a duty to exercise care to protect the well-being of their resident students"; and in ignoring the well-established principle that no duty to prevent suicide exists on the part of a nonclinician who neither caused the decedent’s suicidal condition nor had the decedent in physical custody with knowledge of the decedent’s suicidal condition.\textsuperscript{62} Also like \textit{Schieszler}, the \textit{Shin} case settled before trial, with the result that the court’s holding and rationale never were reviewed on appeal.\textsuperscript{63}

\textsuperscript{59} Id. at *11.
\textsuperscript{60} Id. at *14.
\textsuperscript{61} Id. at *13.
\textsuperscript{62} The court in \textit{Shin} noted the administrators’ argument that persons who are not treating clinicians can have no duty to prevent suicide under Massachusetts law except in these two situations, and went on to state, "[The administrators] correctly assert that neither of these two situations occurred in this case and therefore, they owed no duty to prevent Elizabeth’s suicide." Id. at *11. However, the court went on to find that the administrators, on the basis of a "special relationship," nevertheless could be found to have "a duty . . . to exercise reasonable care to protect Elizabeth from harm." Id. at *3. It plainly makes no sense to find that the administrators had a duty "to protect Elizabeth from harm," while at the same time finding that, under established Massachusetts law, the administrators had no duty to prevent the specific type of harm that allegedly had occurred. See Lake, \textit{supra} note 3, at 274 (noting that the \textit{Shin} court’s "decision is, to say the least, somewhat confusing"); Massie, \textit{supra} note 8, at 670 (agreeing that the decision in \textit{Shin}, by finding a duty based upon the foreseeability of harm, departs from the "special relationship" principles articulated in Restatement (Second) of Torts section 314, is "too open-ended" and "point[s] the way to a standardless and indeterminate duty").

\textsuperscript{63} See Agreement Reached by MIT and the Shin Family, MITNEWS, Apr. 3, 2006, available at http://web.mit.edu/newsoffice/2006/lawsuit-statement.html (announcing the settlement and including a statement by Elizabeth’s parents in which they revealed that over the course of the litigation they had "come to understand that [Elizabeth’s] death was likely a tragic accident" rather than a suicide) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).
D. The Reaction and Counter-Reaction to Schieszler and Shin

The decisions in Schieszler and especially Shin, which garnered tremendous publicity, had a profound impact on college and university administrators, at least in the short term. Administrators understandably were alarmed by the prospect that they could be exposed to liability for failing to prevent a student’s suicide even if the student was in treatment with campus psychiatrists, and even if administrators had conveyed to those psychiatrists their concerns about the student’s well-being and were relying on the psychiatrists to assess the student’s actual risk of suicide and the proper course in light of that assessment.

In response to this alarming prospect, and faced with ever-increasing numbers of students with significant mental health issues, many schools adopted aggressive approaches to managing the risk of student suicides. These new approaches typically had two salient features: first, schools began promptly informing parents about students’ suicidal ideation and other significant mental health issues, regardless of the student’s desires or the potential impact of such disclosures on the student’s treatment. Second, schools began removing these students from campus, either by placing them on an involuntary medical leave of absence or by suspending them on disciplinary grounds for violating the school’s code of conduct. For example, a student who engaged in self-cutting behavior might be disciplined for violating rules that prohibit the possession of weapons; a student who expressed thoughts of suicide or engaged in disturbing behavior might be disciplined for being disruptive to the residence hall or other living group; and a student who expressed thoughts of suicide might be disciplined for violating rules that prohibit threatening harm to any person—in this case, the student himself.

64. See Massie, supra note 8, at 627, 628 & n.7 (listing a sampling of the newspaper and television coverage).

65. See id. at 629 (describing the surprise of academia when the court denied the motions for summary judgment that were filed on behalf of the MIT administrators who had dealt with Ms. Shin).

These aggressive risk-management approaches may have reduced certain risks, most notably the risk that a student would commit suicide at school, thereby exposing the school and its administrators to liability, and the risk that parents would assert claims that a student suicide could have been prevented if only they had been more fully informed. However, these risk-management responses were deeply problematic in other respects.

First, with respect to parental notification—a primary focus of Professor Massie’s proposed "rule of law"—aggressive disclosure of students’ information may make students less safe, rather than more so, by deterring students from seeking or accepting help. Students who are at risk of self-harm often are determined not to have their parents or others informed about the nature or extent of their problems or their need for treatment. If college and university administrators disclose information about at-risk students to their parents or others without the student’s consent, this can deter students from being completely forthcoming with administrators or others about the nature or extent of their problems or from seeking help at all. Disclosure without a student’s consent also can exacerbate the underlying problem where, as sometimes is the case, the parents are a central part of it. Even those who tout the benefits of notifying parents when a student may be at risk—including Professor Lake—recognize "the very real possibility that . . . notification may worsen the problem rather than make it better" in cases where "the parent . . . may be a major factor in the student’s depression or suicidal ideation." Even those who tout the benefits of notifying parents when a student may be at risk—including Professor Lake—recognize "the very real possibility that . . . notification may worsen the problem rather than make it better" in cases where "the parent . . . may be a major factor in the student’s depression or suicidal ideation."69

The aggressive separation of at-risk students from school also can have obviously detrimental effects not only for the particular student but also for others on campus who may be at risk. If the student is in treatment with mental health clinicians on campus, requiring the student to withdraw from school almost invariably will mean an end to that treatment relationship and an end to the clinician’s ability to monitor and assess the student’s risk of harm to self or others. Many students with access to mental health services on campus do not have the insurance or private ability to pay for

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67. See Massie, supra note 8, at 679 (proposing a rule in which parental notification is "a virtually automatic response" to an administrator’s knowledge of a student’s seriously suicidal situation).

68. See id. at 680 ("Students suffering mental health problems often do not wish their families to be contacted, and, if asked, will request that they not be.").

69. See Lake & Tribbensee, supra note 2, at 150.

70. See Massie, supra note 8, at 673 (noting that many students lack available mental health treatment apart from on-campus services).
the same care away from school. Requiring at-risk students to withdraw from student housing or from school completely can return them to what may be a destructive family environment and can "isolate them from their peers, ‘thus intensifying rather than alleviating their distress.’" In addition, an aggressive policy of removing at-risk students from school plainly will deter other students from coming forward and seeking assistance. When students understand that they risk prompt removal from campus if they disclose any suicidal ideation, they will be more likely to suffer alone and in silence, rather than seeking the help they need. The aggressive removal of at-risk students also will have a chilling effect on campus mental health providers and counselors with whom such students are seeking assistance. Clinicians and counselors who are seeking to develop or maintain a relationship of trust with the student, and who may believe that the student’s removal from school would make the student less safe, will be loath to coordinate with administrators who otherwise might be called upon to obtain academic or other accommodations that would be helpful to the student.

The aggressive removal of students seen to be at risk of suicide also may violate a student’s rights under disability discrimination laws. Just as it did not take long for the publicity around the Shin case to lead to many abrupt removals of at-risk students from campus, it did not take long for those removals to result in private lawsuits and administrative complaints by students claiming disability discrimination. In response to these

71. See, e.g., Kaplan, supra note 66 (quoting a college graduate who took time off to cope with his depression as stating, "[t]here are issues about what environment you are going back to, and what access you are going to have to health care there.").

72. PAVELA, supra note 14, at 57 (quoting M.L. Bernard & J.L. Bernard, Institutional Responses to the Suicidal Student: Ethical and Legal Considerations, 21 J.C. STUDENT PERSONNEL 109, 111 (1980)).

73. See generally Gary Pavela, Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus, 9 J.C. & U.L. 101, 104–14 (1982–83). At the federal level, these disability laws include Section 504 of the Rehabilitation Act of 1973, which applies to all colleges and universities that receive federal funding, 29 U.S.C. § 794(b)(2)(A) (2010); Title II of the Americans with Disabilities Act [hereinafter ADA], which applies to public services including those provided by public colleges and universities; and Title III of the ADA, which applies to places of "public accommodation," which include most private colleges and universities. 42 U.S.C. §§ 12131–34, 12182–89 (2010). Most colleges and universities also will be covered by one or more state or local disability discrimination laws.

74. Notable among the lawsuits is the case of Jordan Nott, a student at George Washington University who was summarily dismissed from campus for "endangering behavior" in violation of the university’s Code of Conduct after he sought psychiatric help at the university health center for depressive thoughts relating to suicide and his use of antidepressants, although Nott claimed he was not suicidal at any time. Nott sued the
complaints, the Department of Education’s Office for Civil Rights has made clear that where a student’s actual or threatened behavior is the product of mental health issues that qualify as a legal disability—but the student remains able to meet the academic and other requirements of college life—disability discrimination laws prohibit the school from requiring the student to withdraw unless the student presents a "direct threat" to herself or others. Moreover, this "direct threat" standard requires a "high probability of substantial harm," which must be "based on a reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence," and the student must be afforded an opportunity to challenge the school’s "direct threat" determination, even in cases of "immediate concern."75

E. The Post-Shin Cases

For institutions of higher education and their administrators—caught between their exposure to liability if a "foreseeable" suicide occurred and their desire to act in the ways that ultimately would be most helpful to both individual students of immediate concern and the greater population of students with serious mental health issues—the Schieszler and Shin cases posed a critical question: Did these decisions signify a dramatic shift in courts’ views about the duty of college and university administrators to protect students from the risks of foreseeable harm? In other words, was the pendulum swinging back from the general "no duty" view that had come to dominate that case law beginning in the 1970s toward something that more closely resembled the doctrine of in loco parentis or a general

75. See Letter from Sheralyn Goldbecker, U.S. Dep’t of Educ., Office for Civil Rights [hereinafter OCR], to Kent Chabotar, President, Guilford Coll., 26 NAT’L DISABILITY L. RPTR. 113 (March 6, 2003); Letter from Rhonda Bowman, OCR, to Lee Snyder, President, Bluffton Univ., Complaint No. 15-04-2042 (Dec. 22, 2004); Letter from Michael E. Gallagher, OCR, to Jean Scott, President, Marietta Coll., 31 NAT’L DISABILITY L. RPTR. 23 (July 26, 2005). For an excellent overview of the key OCR decisions and other issues pertaining to students with significant mental health issues, see Barbara A. Lee & Gail E. Abbey, College and University Students with Mental Disabilities: Legal and Policy Issues, 34 J.C. & U.L. 349 (2008).
duty to protect students from the risks of foreseeable harm? Or were Scheiszler and Shin more in the nature of aberrations—isolated decisions that were narrowly limited to the facts of those cases, never were tested on appeal, and were lacking in precedential or persuasive effect?

Cases decided in the last few years—including cases in the same jurisdiction as Shin—suggest that the latter view is the correct one. Scheiszler and Shin did not herald any fundamental change in courts’ views about the obligation of schools and their administrators to protect students from harm, but instead have been revealed as isolated exceptions to what has remained the strong general view: that colleges and their administrators have no legal duty to protect students from even foreseeable risks of harm, provided the risk was not one that the college itself created or one as to which the student was uniquely dependent upon the college for protection.

Six months after the decision in Shin, in Mahoney v. Allegheny College, a trial court in Pennsylvania granted summary judgment in favor of two college administrators in a case arising from the suicide of a student, Charles Mahoney, in his off-campus fraternity. Charles had a history of depression and was receiving counseling from a licensed clinician who was the head of the college’s counseling center. Among other defendants, including Charles’s counselor, his parents sued the college’s Dean of Students and Assistant Dean of Students, both of whom had some awareness of Charles’s problems. The court held that these administrators had no duty to prevent Charles’s suicide as a matter of law. In doing so, the court not only adhered to the well-reasoned legal analysis in Jain but also validated the important policy arguments that had been advanced, but ignored by the court, in Shin.

The court in Mahoney noted that in general a defendant can have a duty to prevent suicide only if the defendant "has actual, physical custody of, and substantial control" over the decedent or the defendant "is a

76. Professor Lake, at least for a time, suggested this might be the case, and further that such a trend was a positive one. See BICKEL & LAKE, supra note 2 and accompanying text; Lake, supra note 2 and accompanying text.


78. Id. at *24.

79. Id. at *3–11.

80. Id. at *11–13.

81. Id. at *25.

82. See id. at *22 (asserting that "the Jain case is factually and legally persuasive that there was no ‘special relationship’ nor ‘reasonably foreseeable’ events that would justify creating a duty to prevent suicide or notify Mahoney’s parents of any impending danger").
specially trained medical or mental health professional, who has the precise
duty and the control necessary for the physical and mental well-being of a
patient . . . .”83 The court noted that the most recent appellate decision to
address the duty to prevent suicide in a college or university setting was the
Jain case, which the court found to be "factually and legally persuasive."84
The court declined to follow the "special relationship" approach to duty in
Shin because finding a "special relationship" outside the context of actual
custody or control over an individual is "an elevation of form over
substance that could lend itself to reactive . . . results [by judges which are]
steeped in ‘hindsight,’ as compared to a careful and precise legal analysis
required [to properly find] a duty of care."85 The "special relationship"
analysis in Shin, the court concluded, "is in effect an attenuated and
unarticulated form of 'in loco parentis.'"86 The court also noted that
imposing a duty of care would raise "legal and ethical" dilemmas involving
student privacy rights as well as the rights of students with mental health
disabilities.87

The court in Mahoney also ruled that the administrators did not have
even a "duty to notify . . . of impending danger," which the court
recognized is "arguably less burdensome than the ‘duty to prevent
suicide.’"88 The court recognized that "nonprofessional lay persons" lack
the ability to assess the risk of suicide; that requiring them to notify parents
or others can disrupt the student’s confidential clinical relationship; and that
other negative consequences can flow from violating a "student’s right to
privacy and expressed wishes involving notification."89 The court
specifically recognized that requiring administrators to notify parents or

83. Id. at *20.
84. Id. at *21–22.
85. Id. at *23.
86. Id. While the court in Mahoney was openly critical of the duty analysis in Shin, it
ultimately declined to follow Shin by distinguishing it on the facts. The court found that the
"special relationship" duty in Shin was based on the MIT administrators’ lengthy and
extensive involvement with the student and their awareness of a specific, imminent risk of
suicide. Id. at *17–18. In contrast, the administrators at Allegheny College had a very
limited involvement with Charles over a period of just several days, and they were unaware
of any imminent risk of suicide. Id. at *23. To the extent the holding in Mahoney turns on
the extent of the administrators’ specific awareness of the risk that Charles would commit
suicide—i.e., to the extent that a duty turns on foreseeability—the case only further
dramatizes the dangerous implications of decisions like Scheiszler and Shin, in which
 foreseeability determines whether a special relationship duty can be found.
87. Id. at *18–19, *22–23.
88. Id. at *23.
89. Id.
others of a student’s risk of suicide "may make matters worse and increase the pressure on the student to commit the act." 90

Other courts similarly have declined to follow the rationale of Scheiszler and Shin. Notably, these include several cases in Massachusetts, the jurisdiction not only of Shin but also of the earlier, seminal decision in Mullins, on which the Shin and Scheiszler courts mistakenly relied. While these later Massachusetts cases are not suicide cases, they are closely analogous in that they involve the deaths of students who were known to have significant mental health issues and to present a foreseeable risk of harm to themselves or others.

Bash v. Clark University 91 arose from the death of Michele Bash, a freshman at Clark University, from an overdose of heroin in her dormitory room. 92 The university required all freshmen to live on campus. 93 It prohibited students under twenty-one years of age from possessing or consuming alcohol on campus and prohibited the possession, sale or use of illegal drugs. 94 The university was located in a city that was known to have a problem with illegal narcotics, including overdoses of heroin, and the university had over twenty drug-related violations in each of the three years preceding Michele’s death. 95 Moreover, university officials were aware that Michele had been experiencing personal problems; that she had been engaged in underage drinking; that her parents were concerned that she might be using drugs; and that in fact she had used heroin at least once. 96 After Michele died from an overdose of heroin, which she obtained from another freshman at Clark, 97 Michele’s father sued the university and several of its administrators, claiming that they were negligent in failing to take steps necessary to protect Michele and in "misrepresenting to [him] that she would be provided with a safe and healthy environment while at Clark." 98

90. Id. at *25.
92. Id. at *1.
93. Id.
94. Id. at *2.
95. Id.
96. Id.
97. Id. at *1–2.
98. Id.
In a pair of decisions the trial court ruled that the administrators had no duty as a matter of law.\textsuperscript{99} Noting that "[t]he doctrine of in loco parentis has no application to the relationship between a modern university and its students," the court held that the administrators owed no duty to protect Michele from the heroin overdose in her dormitory room—even though the administrators were aware of her drug use and had recommended that she seek treatment from the university’s counseling and health centers—because recognizing such a duty "would impose on university officials... an unreasonable burden that would be at odds with contemporary social values."\textsuperscript{100}

The court distinguished \textit{Shin} on the basis that the administrators at Clark were not specifically aware of an imminent risk of harm to the student.\textsuperscript{101} In so doing, however, the court also implicitly criticized the rationale of \textit{Shin} to the extent \textit{Shin} endorsed the view that a "special relationship" properly could be based on the foreseeability of harm alone. The court recognized that while foreseeability is an important factor in determining whether a "special relationship" duty exists, foreseeability alone does not create a special relationship or otherwise give rise to a duty of care.\textsuperscript{102} Rather, the foreseeability of harm must be weighed against existing social values and customs, taking into account the burden the defendant would have to undertake if a duty were found.\textsuperscript{103} The court recognized that universities and their staff simply are not equipped to serve as omnipresent monitors of their students’ potentially self-injurious behavior, and that a duty cannot properly be based on "unrealistic expectation" about the ability of university officials to do so.\textsuperscript{104} A university, the court recognized, could not prevent student deaths resulting

\textsuperscript{99} In the first decision, the court allowed a motion to dismiss the complaint as to four of the individual administrators at Clark: the President, the Associate Dean of Students, the Assistant Dean of Students/Wellness Outreach Coordinator, and Michele’s academic probation advisor. Bash v. Clark Univ., No. 2006-745A, 2006 WL 4114297, at *1. In the second decision, the Court allowed a motion for summary judgment as to the university and the remaining four individually named defendants—the Dean of Students, the Director of Residential Life, the residential life area coordinator for Michele’s dormitory, and the Chief of Campus Police. \textit{Id.} at *4.

\textsuperscript{100} \textit{Id.} at *4.

\textsuperscript{101} See \textit{id.} at *6 ("The level of involvement the Clark administrators had with Ms. Bash was significantly different from the involvement of the MIT administrators with Shin.").

\textsuperscript{102} See \textit{id.} at *4 ("[T]he foreseeability of physical harm is not the linchpin for determining the existence of a common-law duty under Massachusetts tort law.").

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at *5.
from substance abuse "except possibly by posting guards in each dorm room on a 24-hour, 365-day per year basis." Moreover, such draconian monitoring of students simply could not be reconciled with the substantial privacy rights of students, which "society has come to regard as the norm."

The decision in *Bash* also is notable for its close reading of the Massachusetts Supreme Judicial Court’s earlier decision in *Mullins*, which the courts in *Scheiszler* and *Shin* mistakenly read as establishing a broad duty on the part of colleges and universities to protect their resident students from foreseeable harms. The court in *Bash* correctly noted that *Mullins* established only a limited duty on the part of colleges to take reasonable steps to protect resident students from the risk of criminal assault by an intruder, as distinct from a general duty to police the "moral well-being" of students, and concluded that the burden of protecting students against the risks of substance abuse is "far more like" the latter, for which students and parents, but not the college, are responsible.

More recently another Massachusetts trial court, in *Carman v. Shafter*, held that administrators at Tufts University had no duty as a matter of law to protect a student with a known history of mental health and drinking issues, who died in an off-campus fire that her parents claimed was caused by her inadequately treated depression. Wendy Carman entered Tufts as a freshman in September 2000. During the summer after her freshman year, while she was living at home, she was diagnosed with

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105. *Id.* (citing *Crow v. State of California*, 271 Cal. Rptr. 349, 360 (1990)). Such an unrealistic strategy of course would not work in any event, as students who found their rooms posted with security guards would merely take their drug use, drinking, cutting, and other potentially self-injurious behavior elsewhere.

106. *Id.*


110. *Id.* at *21.

111. *Id.* at *2.
depression for which she began taking medication.\footnote{112} When she returned to Tufts for her sophomore year, she began attending counseling sessions at the Tufts counseling center and was given prescriptions for anti-depressant medication from a psychiatrist at the Tufts health service.\footnote{113} In March of her sophomore year, Wendy terminated her counseling at Tufts, although her counselor believed that Wendy needed further counseling and made several attempts to contact her to set up a further appointment.\footnote{114}

In the fall of her junior year, two Tufts students who lived with Wendy in an off-campus apartment met with one of the deans in the office of student affairs.\footnote{115} The students expressed concern that Wendy seemed depressed.\footnote{116} She was spending considerable time alone in her room, was drinking excessively, and was smoking in her room, which the students felt was dangerous.\footnote{117} The dean called Wendy in to meet first with the dean and then with the university’s alcohol counselor.\footnote{118} In these meetings Wendy did not appear to be in any imminent danger, but she admitted that she had a drinking problem and agreed that she should resume counseling.\footnote{119} She indicated that she would be seeing a counselor at home over the winter break, which would begin soon.\footnote{120} She also indicated that she was on medication for her depression.\footnote{121} The dean planned to contact Wendy promptly following the winter break to arrange for Wendy to meet with a new alcohol counselor (the current one was leaving for a new job at the winter break), and the new counselor could help refer Wendy for any additional counseling she might need.\footnote{122} Neither the dean nor the current alcohol counselor referred Wendy for a psychiatric evaluation or contacted the counseling center to see whether Wendy currently was receiving any counseling at Tufts.\footnote{123}
Wendy spent the winter break at home with her parents, who thought she was doing fine.\textsuperscript{124} Two days after her return to Tufts, she died in a fire in her apartment, which apparently was caused when she fell asleep after she had been drinking and smoking in bed.\textsuperscript{125} Wendy’s father sued the university and several university officials including the dean and the alcohol counselor, claiming that Wendy’s death could have been avoided if they had disciplined Wendy for underage drinking in violation of Tufts’s policy, notified the family of Wendy’s problems and her roommates’ concerns, and made an effort to determine whether Wendy actually was receiving any mental health counseling or treatment.\textsuperscript{126}

The court held that Tufts and its administrators had no duty to prevent Wendy’s death as a matter of law.\textsuperscript{127} The court first determined that no duty could be based upon any “voluntary undertaking” by the administrators under the principles of Restatement section 323.\textsuperscript{128} As was the case in \textit{Jain}, nothing the administrators did put Wendy in a worse position than she would have been in if they had not undertaken to assist her and the administrators did not prevent Wendy from seeking help elsewhere.\textsuperscript{129} The court also determined that no duty could be established on the basis of a “special relationship” because the university-student relationship itself is not a “special relationship”; Tufts was not otherwise in a position of “control” over Wendy; and, unlike the situation in \textit{Shin}, the administrators in Tufts were not presented with any immediate risk of harm to Wendy if they failed to act.\textsuperscript{130} The court in \textit{Carman}, like the court in \textit{Bash}, also found that it would be “unfair” as a matter of public policy to find a duty to prevent Wendy’s death on the part of Tufts’s administrators where Wendy’s mother, as a result of her close relationship with Wendy,\

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.} at *8.
  \item \textsuperscript{125} \textit{Id}.
  \item \textsuperscript{126} \textit{Id.} at *11–15.
  \item \textsuperscript{127} \textit{Id}.
  \item \textsuperscript{128} \textit{See Carman v. Shaffer, No. 2003–05154, at *11 (stating that “[t]he mere fact that Tufts University offered drug and alcohol counseling services is not enough to impose a duty”).}
  \item \textsuperscript{129} \textit{Id.} at *15–21. The court declined to grant summary judgment to the alcohol counselor, because he was a "mental health professional" whose "relationship [with his] patient . . . gives rise to a duty of care." \textit{Id.} at *16. In doing so, the court noted that on the facts presented in the summary judgment record, the plaintiff faced "an uphill battle" to persuade the trier of fact that any alleged negligence on the part of the alcohol counselor—who met with Wendy on a single occasion more than six weeks before the fire—proximately caused Wendy’s death. \textit{Id}.
  \item \textsuperscript{130} \textit{Id.} at *19.
\end{itemize}
was aware not only of Wendy’s depression and treatment, but also that Wendy was engaged in underage drinking, that her housemates had expressed concerns about Wendy’s drinking and smoking to an alcohol counselor and a dean at Tufts, and that Wendy had been required to meet with the alcohol counselor and dean as a result of those concerns.131

II. Moving Forward: Courts Should Continue to Resist Calls for the Imposition of New Duties to Prevent Student Suicide.

The decisions in Mahoney, Bash, and Carman, as noted above, indicate that Scheiszler and Shin did not herald any fundamental change in courts’ views about the obligation of schools and their administrators to protect students from harm. Rather, Scheiszler and Shin stand as isolated exceptions to what has remained the strong general view: that colleges and their administrators have no legal duty to protect students from even foreseeable risks of harm, provided the risk was not one that the college itself created or one as to which the student was uniquely dependent upon the college for protection. Colleges and universities do not "desperately need more legal guidance on the parameters of managing student suicide danger,"132 as Professor Lake would have it, but instead have all the "legal guidance" they need in a well-developed and well-reasoned body of cases that hold that colleges and their administrators rarely have a duty to protect students, including potentially suicidal ones, from harm. The calls for the imposition of new legal duties on the part of college and university administrators, such as those advanced by Professor Lake and Professor Massie, are misguided in several respects.

First, they are based on the mistaken view that new duty rules are needed in order for college administrators to "do the right thing," Professor Lake, for example, asserts that college administrators engage in too much "information siloing" and turf management, rather than effectively sharing information and coordinating their efforts.133 He offers little support for this assertion, however.134 It also is counter-intuitive that administrators in today’s environment—steeped in countless articles and conference

131. Id. at *20–21.
132. Lake, supra note 3, at 256.
133. Id.
134. Id. at 278 (mentioning a report that "emphasizes frequent reports of ‘information silos’ and expresses concern regarding the ways in which the interpretations of federal and state privacy laws may block the flow of critical information").
presentations about lawsuits like the *Shin* case—would be inclined to hunker down in an administrative silo or engage in turf battles over students at risk of suicide. If Professor Lake’s portrayal of such administrative behavior ever was correct, it certainly is no longer. Colleges and universities today have widely adopted interdisciplinary, "at-risk student" or "case management" teams, which comprise student affairs, mental health, campus police, and other professionals, the very purpose of which is to engage in a coordinated effort to share information, expertise, resources and perspectives with respect to students who are perceived to be at risk of harming themselves or others.135

Commentators who call for the imposition of greater legal duties also err in assuming that the reported facts of a very small number of student suicide cases are indicative of how situations involving at-risk students typically are handled. This problem is particularly acute if one relies upon trial court decisions—such as *Scheiszler* and *Shin*—because of the procedural posture in which those cases are decided. These decisions typically involve the resolution of a motion to dismiss one or more counts of the plaintiff’s complaint or a motion for summary judgment. Neither posture involves a complete factual record, as would be developed at trial. Moreover, in the case of a motion to dismiss, the court’s recitation of the "facts" will reflect the court’s obligation to accept the plaintiff’s allegations of fact as true.136 The hazards of reading too much into the reported facts of such trial court decisions is amply demonstrated by the *Shin* case, where the parents ultimately revealed, upon settling the case, that they had come to

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135. See, e.g., John H. Dunkle, Zachary B. Silverstein & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585 (2008); Scott L. Warner, 50th Annual Conference of the National Association of College and University Attorneys: Accommodating Student Psychiatric Disabilities in a Post-Virginia Tech World: Model Solutions that Address Student Behavioral Concerns (June 27–30, 2010) ("Whether referred to as a case management team, threat assessment team, behavioral intervention team, or some other name . . . , these interdisciplinary teams are designed to protect the health and safety of the campus community while also being mindful of the rights of students who engage in concerning behavior."). Such at-risk committees are a product not only of highly publicized cases such as *Shin* and tragedies such as the April 2007 shootings at Virginia Tech, but also the disability discrimination cases and related OCR guidance, discussed above, which effectively requires student affairs professionals to consult with mental health professionals in many contexts involving at-risk students.

136. See *Schiezler v. Ferrum Coll.*, 236 F. Supp. 2d. 602, 606 (stating that the court "must presume that all factual allegations in [the complaint] are true" and "all reasonable inferences must be made in favor of the non-moving party, in this case, the plaintiff").
believe their daughter’s death was not a suicide at all, but rather a tragic accident. 137

Finally, and most importantly, the imposition of new duties to prevent student suicide would make students less safe, rather than more so, because they would incentivize college administrators not to become involved with students who might be at risk. Massie’s proposed “rule of law”—like the holdings in the few cases that have found that a college administrator can have a duty to act when presented with an “imminent probability” of student suicide—depends on the depth of the administrator’s awareness of the risk. But if the administrator’s awareness of the risk of harm will determine whether the administrator has a legal duty—i.e., whether he faces exposure to personal liability—then the administrator will have every incentive not to acquire such awareness. Instead, his incentive will be to respond in just the way that we do not want the associate dean to respond in the scenario described at the beginning of this article: by declaring his lack of expertise in addressing mental health issues, declaring his lack of first-hand knowledge about the student at issue, and determining firmly not to acquire such knowledge or otherwise become involved.

The central paradox in cases involving at-risk students is that imposing greater tort duties on the part of college administrators would not enhance student safety, but would undermine it. Courts generally have held, and will continue to hold, that college administrators have no legal duty to protect students from the risk of self-harm. That approach is sound not only as a matter of fundamental tort law but also as a matter of pure policy. With rare exceptions college administrators do act reasonably in response to information that a student may be at-risk. They should be insulated from the imposition of additional legal duties—not so that they can avoid helping such students but so that they will continue to have every incentive to do so.

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137. See MITNEWS, supra note 63. Professor Massie, whose article was inspired by and begins with the early news coverage of the Shin case, notes the Shins’ subsequent statement about the likely cause of their daughters’ death, but quickly brushes it aside because it gets in the way of her argument. Thus, for purposes of her article, notwithstanding what the Shins themselves have said about their daughters’ death, Professor Massie assumes it was a suicide. Massie, supra note 8, at 630 & n.20.