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# **NOT MY PROBLEM . . . OR IS IT?: AN EXAMINATION OF CHANGING LIABILITY FOR MENTAL HEALTH**

## **INTRODUCTION**

The standard of care imposed on individuals and businesses is the core at which negligence suits stand. Having a comprehensive understanding of what the law requires within that standard and having consistent application of it across entities of the same legal standing is crucial to ensuring the fair and predictable application of the law. From the beginning of tort and contract law, courts have wrestled with the development of the tort of negligence and how and to whom it should be applied. The U.S. court system has gone through phases throughout the most recent decades of how the tort of negligence is applied to institutions of higher education, particularly within the realm of the mental health of their students.

Courts have often legally equated educational institutions to those of a regular business or corporation. However, within the last 20 years, courts have created a different standard of care for universities to their students, deviating from the traditional standard of care imposed on all businesses. Because of the rapidly changing social and political climate, courts are following suit by holding defendants accountable for harm as a result of the actions of independent parties. As a result, universities are caught in a difficult situation trying to protect its students while also keeping distance so as not to become liable for the students' misconduct.

This maturing outlook on the social and legal responsibility of universities is penetrating the corporate world as well. Where businesses once experienced full immunity to negligence actions, they must now be conscious of their relationships with employees and patrons so as not to subject themselves to civil liability. Public expectation of the responsibility of universities and all businesses for their patrons plays a major role in the federal and state regulation of these businesses as to their accountability of mental health.

This Paper will ultimately point out courts' flawed application of the standard of care for universities; impress upon the public that universities are, at their core, businesses in the field of providing educational services and should not, to an extent, be held liable for the mental health of their students; and forewarn the public about the negative ramifications that the requirement of mental health services and the oversight of state judicial and legislative authorities have on the internal operations of not only universities, but all

businesses.

## I. THE RISE AND FALL OF IN LOCO PARENTIS

*In loco parentis* is the legal doctrine that equates a relationship to that of a parent-child relationship.<sup>1</sup> In a school-pupil relationship, parents delegate certain supervisory and disciplinary power to the school.<sup>2</sup> Until the mid-1960s, universities and other higher educational institutions experienced a degree of legal insularity in which they were often not held liable nor responsible for the safety and discipline of their students.<sup>3</sup> During this time, colleges enjoyed the immunity shared by families, charities, and the government which was a broad protection against tort claims.<sup>4</sup> For example, in the early 1960s, a third-party actor that deliberately caused harm to a student was solely liable for that student's damages, even if the school was negligent in maintaining a safe and secure campus.<sup>5</sup>

Along with the *in loco parentis* doctrine comes absolute immunity for parents against lawsuits by their children related to regulation and discipline.<sup>6</sup> Reformation of this law was well founded due to the arbitrary and capricious nature of discipline the doctrine allowed for.<sup>7</sup> Universities had the freedom to regulate conduct, the type of organizations students could associate with, and grade and expel at will all without the possibility of legal repercussions.<sup>8</sup>

Universities' unlimited discretion in regulating students' conduct began to change between the 1960s and early 1970s, known as the "civil rights phase," when courts broke some of the walls of universities' protection and required that they provide students with basic constitutional rights, including procedural due process.<sup>9</sup> *Dixon v. Alabama* was the leading case in change for universities' power over students, spelling the end for the *in loco parentis* doctrine. In *Dixon*, several African American students were expelled without explanation from Alabama State College; it was presumed it was in response to the students'

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<sup>1</sup> THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/in+loco+parentis> (last visited Feb. 16, 2019).

<sup>2</sup> Peter F. Lake, *Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, *The*, 64 Mo. L. Rev. 1, 4 (1999), <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3399&context=mlr>.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 9.

involvement in civil rights demonstrations.<sup>10</sup> The Fifth Circuit established that colleges do not have the power to deny basic constitutional rights to students, including both procedural due process procedures, as well as substantive due process rights such as freedom of speech, freedom of association, and rights against unreasonable searches and seizures.<sup>11</sup> This case led the way for state courts to follow suit and rule that not only do public universities owe students basic constitutional rights, but private schools do as well.<sup>12</sup> While these cases may have only applied to the disciplinarily actions schools employ, it was a significant deviation from the historical application of the *in loco parentis* doctrine, and possibly a contributing factor to the fall of the doctrine as applied to tort liability.

Perhaps the most prominent era in the application of tort law to universities, which traditionally gave universities immunity from civil liability for physical injury, was the 1970s to 1980s.<sup>13</sup> Courts relaxed the rules of proximate cause, one of the key elements in proving negligence, and began imposing a duty to protect against the foreseeable misconduct of third parties.<sup>14</sup> Courts held that schools had an actionable duty to provide safe premises, curricular and residential safety, and a duty to protect against foreseeable harm from dangerous persons.<sup>15</sup> For example, in 1983, a female first-year student at Pine Manor College was abducted from her dormitory room and raped.<sup>16</sup> The court found that the university had a duty to protect its students against criminal acts of third parties based on “existing social values and customs.”<sup>17</sup> Furthermore, the university impliedly recognized its obligation to protect its students by taking precautionary security measures and establishing standards for those precautions, including employing security guards, locking doors at night, and installing a security system.<sup>18</sup> By taking on these precautionary measures, the court held that the university voluntarily assumed a duty of care.<sup>19</sup>

Not only did courts find a duty to ensure a safe premises and safety from dangerous third-parties, they also found universities responsible for the conduct

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<sup>10</sup> Dixon v. Alabama State Bd. of Ed., 294 F.2d 150, 151 (1961).

<sup>11</sup> *Id.* at 156.

<sup>12</sup> Lake, *supra* note 2, at 10.

<sup>13</sup> *See generally, id.* at 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 12.

<sup>16</sup> Mullins v. Pine Manor College, 389 Mass. 47, 49 (Mass. 1983).

<sup>17</sup> *Id.* at 51.

<sup>18</sup> *Id.* at 53

<sup>19</sup> *Id.*

of students off-campus during school-related activities.<sup>20</sup> In 1966, students from the State University College took an overnight canoeing trip, sponsored by the university's chapter of the Intercollegiate Outing Clubs of America.<sup>21</sup> While the students were canoeing at night, a dangerous storm hit the lake they were on, resulting in the death of two students.<sup>22</sup> The court found that the university did have a responsibility to the students due to the event being an extracurricular activity. However, the court ultimately dismissed the claims against the university and held that the university took precautions to ensure safety, such as a motorboat escort and lights equipped on the canoes, and that they were not negligent in failing to protect against an unforeseeable storm.<sup>23</sup>

Still, there were many discrepancies in court decisions.<sup>24</sup> Some courts imposed new responsibilities onto universities, equating them to a business that owes some duties to their patrons.<sup>25</sup> At the same time, others held schools to be “bystanders” when it came to student misconduct, and held that educational institutions were not accountable for protecting their students’ safety, particularly in relation to alcohol and drug abuse.<sup>26</sup> As far as school-pupil relationships went, courts held that there was not a special relationship, and schools were not responsible for alcohol or drug-induced conduct.<sup>27</sup> Furthermore, one court mentioned how it was inappropriate at the time to impose an *in loco parentis* duty upon a university in this situation.<sup>28</sup> In 1983, an eighteen-year-old man attended a fraternity party at Bucknell University where he consumed alcohol.<sup>29</sup> He left the party to attend another fraternity party where he accidentally caused a fire to the house.<sup>30</sup> The fraternity subsequently sued the university, alleging that the school should have been supervising the event in which case they would have known that alcohol was being served and negligently failing to do so proximately caused the fire.<sup>31</sup> The Supreme Court of Pennsylvania pointed out that “the authoritarian role of [the university] has been notably diluted” and “is not an insurer of the safety to its students.”<sup>32</sup> The court

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<sup>20</sup> Lake, *supra* note 2, at 12.

<sup>21</sup> *Mintz v. State*, 362 N.Y.S.2d 619, 620 (App. Div. 1975).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Lake, *supra* note 2, at 12.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Alumni Ass’n v. Sullivan*, 524 Pa. 356, 364 (Pa. 1990).

<sup>29</sup> *Id.* at 358.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 360.

<sup>32</sup> *Id.* at 365.

concluded by stating that imposing a heightened standard is at odds with the modern perception of the relationship between a university and its students.<sup>33</sup>

One of the most influential cases in the duty of care doctrine imposed on schools with regard to students' mental health and protecting students against dangerous persons was decided in 1976, *Tarasoff v. Regents of the University of California*. In *Tarasoff*, a student expressed to a University of California psychotherapist that he had violent intentions against another person who was not a student of the university.<sup>34</sup> The California Supreme Court held that the psychotherapist had a duty to warn the non-student of the potential and foreseeable danger.<sup>35</sup> The court in *Tarasoff* established that a psychotherapist has a duty to warn a third party if they believe that a patient poses a serious and imminent risk of violence or harm upon a reasonably identifiable victim.<sup>36</sup> The *Tarasoff* rule is now the majority rule in America.<sup>37</sup>

In the 1990s, courts shifted away from the bystander era and began to reject the notion that schools can be deemed bystanders. Today, courts equate universities to businesses with respect to traditional business responsibilities similar to customer safety. Yet, the doctrine that once reduced universities' liability now exposes educational institutions to civil liability.<sup>38</sup> While courts have strayed from the *in loco parentis* doctrine that dominated the 1960s, the idea of the universities stepping in a parental role for the students is still prevalent today. Today, the doctrine has evolved to represent universities stepping into the role of the parents as being responsible for providing safety for students and protection from all foreseeable danger, even if it is conduct that involves a student harming his own self.<sup>39</sup>

## II. FORESEEABILITY

Foreseeability is met when the defendant should have reasonably foreseen the consequences that resulted from his conduct.<sup>40</sup> The foreseeability test takes into account the type of harm that resulted and the manner in which the harm occurred.<sup>41</sup> If the specific type of harm does not foreseeably flow from the

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<sup>33</sup> *Id.* at 366.

<sup>34</sup> *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 444 (1976).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 431.

<sup>37</sup> Lake, *supra* note 2, at 14.

<sup>38</sup> *See id.* at 3.

<sup>39</sup> *See id.* at 14.

<sup>40</sup> *Supra* note 34.

<sup>41</sup> Amir Tikriti, *Foreseeability and Proximate Cause in an Injury Case*, ALL LAW,

defendant's conduct, then the defendant will not be held liable.<sup>42</sup> Similarly, if an unforeseeable event supersedes the defendant's negligent conduct that results in injury, the defendant will not be held liable.<sup>43</sup> Generally, criminal acts of third persons and intentional torts of third persons are considered a superseding cause that breaks the chain of liability to the defendant's conduct.<sup>44</sup>

While the general rule is that there is not a sufficient special relationship between schools and students to hold schools liable for student self-inflicted harm, courts often carve out an exception to allow for liability when the harm is foreseeable.<sup>45</sup> The Massachusetts Supreme Court in *Irwin v. Town of Ware* pointed out that courts are changing their application of what is considered a "special relationship" because of "expectations of a maturing society."<sup>46</sup> It stated that "foreseeability can be based on reasonable reliance by the plaintiff" and "whether the defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff."<sup>47</sup> This is a deviation from common tort law and creates unpredictability and uncertainty with respect to how courts will rule on foreseeability and a defendant's failure to perform their duty of care. The more exceptions that are carved out for special relationships, the more negligence liability will be imposed on schools for failing to act in such circumstances that give rise to a duty to protect others from harm.<sup>48</sup>

### III. STANDARD OF CARE AND "SPECIAL RELATIONSHIPS"

It has been long established by traditional tort law that generally no one has a duty to protect others from harm caused by independent third-parties.<sup>49</sup> However, since the 1990s, courts have found that certain "special relationships" between the victim of a crime and the defendant can give rise to a duty to protect that victim from criminal activity by an independent party.<sup>50</sup> Special relationship can be created by statute, by contract, or by detrimental reliance on someone's

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<https://www.alllaw.com/articles/nolo/personal-injury/foreseeability-proximate-cause.html> (last visited May, 10, 2019).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 209–10.

<sup>46</sup> *Irwin v. Town of Ware*, 392 Mass. 745, 756 (1984).

<sup>47</sup> *Id.* at 756–57.

<sup>48</sup> *See id.* at 456–57.

<sup>49</sup> *See Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 383 (1988).

<sup>50</sup> Bradford S. Purcell, *Liability for Criminal Acts of Third Parties: Targets, Liability Theories and Defenses*, PURCELL & WARDROPE CHTD., [http://www.wdc-online.org/application/files/4014/8027/4536/Purcell\\_Outline.pdf](http://www.wdc-online.org/application/files/4014/8027/4536/Purcell_Outline.pdf).

actions, words or promises.<sup>51</sup>

A business invitor-invitee is one such relationship that could give rise to a duty under certain circumstances. A proprietor of a place of business who holds their establishment out to the public for entry is subject to liability for bodily harm caused to the public by a third-party actor if i) the criminal acts were reasonably foreseeable by the proprietor and ii) the proprietor could have protected the public by controlling the third-party or warning the patrons of the potential harm.<sup>52</sup> To succeed in a negligence suit, the plaintiff must prove, among other things, that a special relationship exists between the plaintiff and the defendant and then prove proximate causation.<sup>53</sup> The leading test of proximate cause is whether the harm was reasonably foreseeable to the defendant.<sup>54</sup>

Another special relationship that gives rise to a duty of care is the custodian-protectee relationship.<sup>55</sup> The Restatement (Second) of Torts classifies the custodian relationship as a situation in which “one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection.”<sup>56</sup> However, the custodian-protectee relationship is usually invoked in the context of children and their caregivers or a hospital and its patients.<sup>57</sup> The business-invitee and custodian-protectee relationships have been established by law rather than by contract or detrimental reliance.

#### IV. STANDARD OF CARE FOR BUSINESSES

While generally no one has a duty to protect another from harm by a third-party absent a special relationship,<sup>58</sup> businesses might be held under a stricter scrutiny for negligence as the debate of whether a business is obligated to protect their patrons from third-party harm ensues. Generally, if a business knows, or should know, about a high likelihood of crime occurring, then that business must

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<sup>51</sup> Robert Ross, *Negligence in “Special Relationship” Cases*, ROSS LAW INC. (Nov. 30, 2016), <http://www.rosslawinc.com/negligence-in-special-relationship-cases/>.

<sup>52</sup> *Weihert v. Piccione*, 273 Wis. 448, 456 (1956).

<sup>53</sup> *Id.*

<sup>54</sup> *What is Foreseeability and Proximate Cause in an Injury Case?*, KAUFMAN LAW, P.C. (2018), <https://www.kaufmanlawfirm.com/what-is-foreseeability-and-proximate-cause-in-an-injury-case/> (last visited May, 10, 2019).

<sup>55</sup> Purcell, *supra* note 30.

<sup>56</sup> RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965).

<sup>57</sup> Purcell, *supra* note 30.

<sup>58</sup> RESTATEMENT (SECOND) OF TORTS §315 (AM. LAW INST. 1965).



take steps to prevent such crime or harm from occurring.<sup>59</sup> This is a very broad and ambiguous standard. A common example of this is when a business owner knows about a loose floorboard or spilled milk on the floor and they do nothing to either eliminate the potential harm or warn their patrons of the existence of it. This is the law of premises liability. However, the law is more ambiguous when it involves crime by a third party or violence of one customer against another because it depends on the particular circumstances of the case.

## V. WHICH SPECIAL RELATIONSHIPS SHOULD APPLY TO HIGHER EDUCATIONAL INSTITUTIONS

Some jurisdictions have found a school-pupil special relationship between schools and their students as a form of custodian relationship.<sup>60</sup> Students' mental health has fallen under the umbrella of the custodian-protectee relationship. One of the most recent cases where a court discusses the special school-pupil relationship is *Dzung Duy Nguyen v. Massachusetts Institute of Technology*.<sup>61</sup> In *Dzung*, a student at Massachusetts Institute of Technology ("MIT") with an extensive mental health history committed suicide after seeking treatments from several mental health professionals.<sup>62</sup> The court identifies the custodian-protectee relationship as an established basis that imposes affirmative duties in regard to suicide prevention.<sup>63</sup> It goes on to assert that the school-pupil relationship extends beyond the traditional scope of the custodian relationship and is deemed its own special relationship.<sup>64</sup> Essentially, the court is trying to establish a special relationship as an extension of a statute-based relationship.

Within the educational realm, many researchers attribute a rise in the demand for mental health services to a variety of different reasons. Many people experience symptoms of psychological disorders in young adulthood, which is exacerbated by a new environment, being away from home for the first time, and having to make more lifestyle choices on their own.<sup>65</sup> However, this is not a new phenomenon. College has always presented such an environment. Instead, cultural forces specific to today's society are driving the rapidly increasing

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<sup>59</sup> *Negligence in Business*, LUMEN, <https://courses.lumenlearning.com/workwithinthelaw/chapter/negligence/> (last visited May, 10, 2019).

<sup>60</sup> Purcell, *supra* note 30.

<sup>61</sup> See generally *Dzung Duy Nguyen v. Mass. Inst. of Tech.*, 479 Mass. 436 (Mass. 2018).

<sup>62</sup> *Id.* at 441.

<sup>63</sup> *Id.* at 449.

<sup>64</sup> *Id.*

<sup>65</sup> Leslie Berger, *The Therapy Generation*, N.Y. TIMES (Jan. 13, 2002), <https://www.nytimes.com/2002/01/13/education/the-therapy-generation.html>.

demand for psychological help. One student at Columbia University stated that “this is a generation of psychological kids...[who] were really brought up with the idea that you go and get help and talk out your ideas.”<sup>66</sup> This is a mild statement compared to what author and research psychologist Dr. Martin E. P. Seligman stated, deeming today’s youth as an “emotionally fragile generation, including a self-centered society and victimology.”<sup>67</sup> A great change has been made in the 21<sup>st</sup> century where attitudes have shifted toward encouraging self-expression, diminishing stigmas on psychological disorders, and allowing everyone’s voice to be heard no matter the issue. However, along with these empowering reforms comes the emotional fragility that Dr. Seligman speaks of. With this “self-esteem movement”,<sup>68</sup> children are raised to expect constant praise and often develop an entitled attitude. This new outlook that people have on themselves and others gives way to people’s belief that “when bad things happen, [I] played no role, it was done to [me].”<sup>69</sup> Not only do students feel that someone else should take responsibility for the danger they encounter, but students’ parents are the driving force for holding universities responsible for taking on a parental role over their children. Parents and advocates of children who commit self-harm or violence against others due to psychological disorders are pressuring universities to own up to more responsibility over their students and pressuring schools to implement stricter safety standards. A staff member at the Office for Academic Affairs for the University of Alabama mentioned that every time an incident involving the university’s student, even incidents that occur off of campus and do not relate to any university related activities, parents first contact the university and ask what they will do to address the situation.<sup>70</sup> The expectations of parents are extremely demanding, especially where the university has insufficient resources to control conduct outside their premises.

Because the custodian-protectee relationship is primarily used to protect young children who cannot protect themselves, it seems unlikely that this avenue of finding a special relationship would apply to higher educational institutions where the majority of their students are legally independent adults. While young adults may be more emotionally vulnerable today under the pressures of a new environment, especially one so competitive, this cannot be an argument for these

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Dr. Martin E. P. Seligman is a research psychologist at Univ of Pennsylvania where he teaches young college students how to purge themselves of pessimistic thoughts to fight depression.

<sup>68</sup> *Id.* (noting that Dr. Seligman seems to attribute the younger generation’s attitude of blamelessness to modern cultural beliefs that foster a “learned helplessness;”) *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Telephone Interview with Kevin Whitaker, Executive Vice President and Provost, Univ. of Alabama (Apr. 7, 2019).

students' inability to care for or protect themselves. As mentioned earlier, the school-pupil relationship is a subset of the custodian-protectee relationship for which courts have found a stricter duty of care. Yet these relationships rest on the notion that the protectee or pupil cannot protect themselves from harm or do not have the opportunity to protect themselves.<sup>71</sup> This is not the case in higher education.

In 2015, almost half of for-profit institution enrollees are over the age of 30, and one in five students at a four-year undergraduate institution are over 30 years old.<sup>72</sup> Students younger than 18 years of age make up around 5% of enrollees at four-year public and private nonprofit institutions and make up only around 1% of for-profit institutions.<sup>73</sup> Although it slightly varies from state to state, the typical age of majority<sup>74</sup>—the age at which a person has the legal rights and responsibilities of an adult—is 18.<sup>75</sup> Thus, it is unwarranted that an institution of higher learning for young adults should step into any type of parental role for them, much less have a court find them in a custodian-protectee relationship. The Supreme Court of New York in *Mintz* attested to the idea that college students should not be considered mere children that must be closely supervised.<sup>76</sup> Instead, students are cognizant of their surroundings and are “able to care for themselves.”<sup>77</sup>

Neither age nor emotional sensitivity is a well-founded basis for finding that the student-pupil relationship is as a subsidiary of the custodian-protectee relationship with respect to students of higher education. Courts have tried to attribute the school-pupil relationship as an extension of the custodian-protectee relationship; however, based on the reasoning of the courts, it actually seems that they are using a form of detrimental reliance as the basis for the relationship rather than established law. Since an educational institution is legally considered a business entity, schools and their students should be found encompassed in the business invitor-invitee relationship. Consequently, courts should administer a more consistent application of the standard of care for businesses across all

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<sup>71</sup> See Purcell, *supra* note 30.

<sup>72</sup> *Age Distribution of Undergraduate Students, by Type of Institution*, THE HAMILTON PROJECT, [http://www.hamiltonproject.org/charts/age\\_distribution\\_of\\_undergraduate\\_students\\_by\\_type\\_of\\_institution](http://www.hamiltonproject.org/charts/age_distribution_of_undergraduate_students_by_type_of_institution) (last visited Feb. 15, 2019).

<sup>73</sup> *Id.*

<sup>74</sup> 47 of the 50 U.S. states designate the age of 18 as the age of majority; two states set the age at 19 and only one state set the age at 21; Sheri Stritof, *When Do You Reach the Age of Majority*, LIVE ABOUT (2018), <https://www.liveabout.com/age-of-majority-chart-2300968>.

<sup>75</sup> *Id.*

<sup>76</sup> *Mintz v. State*, 362 N.Y.S.2d at 620

<sup>77</sup> *Id.*

business entities.

## VI. ENOUGH IS NEVER ENOUGH

While special relationships are still technically deemed the exception, it appears to be turning into the majority rule. In 2002, in *Schieszler v. Ferrum College*, a U.S. district court held that university administrators owed a duty to protect a student who committed suicide because the defendants had notice that there was imminent probability that the student would try to harm himself.<sup>78</sup> The campus police visited the suicidal student after he wrote a note to his girlfriend indicating his intentions to commit self-harm, obtained a signed statement that he would not hurt himself, and rushed to his dorm room when notified of a second suicide note a few days later.<sup>79</sup> Despite these preventative measures, the court held that Ferrum College did not exercise reasonable care in protecting the student because they did not take more action to ensure that the victim was supervised.<sup>80</sup> A similar decision followed in Massachusetts where a student had history of psychiatric trouble. MIT's dean met with the student several times to discuss her mental health, referred the student to a mental health center, had meetings with her therapists, and had a treatment team set up appointments at a medical center.<sup>81</sup> However, despite all of the precautions and attempted help the university offered, the Massachusetts Superior Court in *Shin v. Massachusetts Institute of Technology* held that because the school administrators and psychiatrists often discussed her problems, that established a "special relationship" between them.<sup>82</sup> Because the court in *Shin* found that because the student and school administrators had a special relationship, they were negligent by failing to exercise reasonable care to protect the student from harming herself when the harm was foreseeable.<sup>83</sup> This non-traditional reasoning is similar to that of the Massachusetts Supreme Court in *Irwin*.<sup>84</sup> This approach seems to conflate the two separate elements - duty arising out of a relationship and foreseeability of the injury - necessary in a negligence suit. Essentially, the court reasoned that because the educational institution tried to help the student and was involved in treating the student's mental illness, it was foreseeable that the student would try to harm herself and, because that was foreseeable to the administrators, they therefore had a duty to protect the student. This reasoning

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<sup>78</sup> *Schieszler v. Ferrum College*, 236 F.Supp.2d 602, 609 (2002).

<sup>79</sup> *Id.* at 605.

<sup>80</sup> *Id.* at 612.

<sup>81</sup> *Shin v. Mass. Inst. of Tech.*, 19 Mass.L.Rptr. 570, 571 (2005).

<sup>82</sup> *Id.* at 583.

<sup>83</sup> *Id.* at 584.

<sup>84</sup> See discussion *supra* Section III.

demonstrates how educational institutions are pushed into a cycle of trying to protect students to comply with societal expectations, failing and being held liable, increasing preventative and security measures, failing again, and so on.

According to the court in *Shin*, an exercise of reasonable care would have involved formulating and enacting an immediate plan to respond to the student's suicidal threats.<sup>85</sup> However, it is hard to imagine what else the school should have or could have done in those circumstances. They provided counseling every week, employed a treatment team to monitor her progress, offered to send her to an off-campus mental health facility, took note of her threats and reacted by treating her to more counseling. The court here imposed an impossibly high standard as to the action the school should have taken to further prevent or stop the suicide from occurring. The court in *Dzung* solidified what would constitute reasonable measures to satisfy their duty, including implementing a suicide prevention protocol.<sup>86</sup> In the absence of such a protocol, contacting officials or medical care professionals to assist the student in receiving medical care once the university has actual knowledge of a student's suicide plan or attempt would satisfy their duty.<sup>87</sup> However, these preventative and actionable measures are exactly what the university in *Shin* employed yet it was still not enough. To achieve some uniformity in what are considered reasonable measures that a university must implement to achieve protection, courts should follow the guidelines set forth in *Dzung* and deem the thoughtful implementation and active enforcement of a suicide prevention protocol satisfactory.

## VII. OBSTACLES TO EMPLOYING EFFECTIVE PREVENTATIVE MEASURES

Schools and psychiatric facilities must be careful about what information they disclose about an at-risk student and to whom. The Family Educational Rights and Privacy Act ("FERPA") is a federal law that governs what information in a student's record may be disclosed, when, and to whom to protect the privacy of parents and students.<sup>88</sup> Parents of children who are either under the age of 18 or who have not yet attended school beyond high school have the right to access and review the student's education records by the school in which they attend.<sup>89</sup> Once the student reaches 18 years of age or attends school beyond high school, those rights are transferred to the student alone and the school must obtain written consent by the privileged party to release

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<sup>85</sup> *Id.*

<sup>86</sup> *Dzung Duy Nguyen v. Mass. Inst. of Tech.*, 479 Mass. at 456.

<sup>87</sup> *Id.*

<sup>88</sup> 20 U.S.C. § 1232g (2018).

<sup>89</sup> *Id.*

information.<sup>90</sup> Essentially, whenever a student does exhibit potentially harmful behavior, makes threats, discusses issues with counselors, or does anything else that would be transcribed on the student's education or medical records, that information cannot be released without the permission of the student. FERPA poses one obstacle for schools to take preventative measures because it is particularly difficult for school administrators and counselors to get the student the help they need without disclosing the student's condition to his parents or any authority figure who can help in the absence of the student's permission.

The Americans with Disabilities Act ("ADA") is another statute that restricts the scope of, not only universities' policies in handling at-risk students, but any public entity, such as public corporations with respect to their patrons and employees. The ADA provides that "no qualified individual with a disability shall, by reason of such 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 such entity."<sup>91</sup> A "qualified individual with a disability" includes students with mental disabilities. Section 504 of the Rehabilitation Act also contains similar language.<sup>92</sup> Because students with mental disabilities must be treated the same way as other students, universities must be careful not to require students in need of extra attention to mandatory counseling sessions or force them to seek special care.<sup>93</sup> Simultaneously, they cannot implement policies that ban students with mental disabilities from attending class or participating in school-related activities to prevent the student's potentially harmful conduct.<sup>94</sup> In the corporate world, the ADA and the Equal Employment Opportunities Commission ("EEOC") prohibit businesses with at least fifteen employees from treating people with mental disabilities differently from other employees during hiring, firing, advancement, compensation, job training, and other employment matters.<sup>95</sup> Because of these prohibitions, employers cannot require employees to receive help for their mental conditions nor purposely refuse to hire a qualified individual because of their disability.<sup>96</sup> With employers' hands tied when it comes to monitoring certain employees at their workplace, they cannot always effectively prevent

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<sup>90</sup> *Id.*; For further specifications on FERPA, the Act may be viewed at <https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=34:1.1.1.1.33>.

<sup>91</sup> 42 U.S.C §12132 (2000).

<sup>92</sup> McAnaney, *supra* note 67, at 218.

<sup>93</sup> *Id.* at 222.

<sup>94</sup> *Id.*

<sup>95</sup> *Employing People with Mental Health Disabilities*, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <https://www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/mental-health-disabilities.aspx> (last visited Apr. 13, 2019).

<sup>96</sup> *Id.*

unpredictable harmful conduct from employees. All public entities must walk a fine-line between administering programs and policies that will assist their students or employees in seeking help, yet not treat them differently than others.

### VIII. BETWEEN A ROCK AND A HARD PLACE

Because courts are deviating from traditional tort law that established special relationships and are creating new ways to find a special relationship between a plaintiff and defendant, universities must identify a fine line between trying to help students and not being too involved so as to know too much that could impose more responsibility. To err on the side of caution and avoid the possibility of being penalized for trying to offer students help addressing their mental health issues, one solution some universities have attempted includes turning away such students and deterring them from seeking help through the school altogether.<sup>97</sup> For example, in response to *Shin* and *Schieszler*, Cornell University implemented a policy that, in the case where a student exhibits behavior that poses harm to themselves or others, the student will be forced to leave the university and its premises.<sup>98</sup> The policy stated that if a student refuses to leave voluntarily, the university may expel the student when deemed necessary to protect the safety of that student or preserve the integrity of the learning environment.<sup>99</sup> Situations that would invoke the policy include repeated suicide threats.<sup>100</sup> Other universities followed suit by creating their own policies for similar situations where the university could unilaterally revoke housing privileges, suspend or expel them from the school, or revoke certain privileges or ability to participate in activities.<sup>101</sup> While these policies may have been implemented as a preventative measure to protect other students from potential harm, it also acts as a tactic to dispel the presumption that the university knew of the danger a student might cause to himself or others and failed to act on such knowledge. Unilaterally removing the student from the school rids the university of potential civil liability. However, the ADA, as well as some state laws, prohibit such discrimination<sup>102</sup> and the ADA ultimately deemed Cornell and other universities' similar policies to be a violation of the law.<sup>103</sup>

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<sup>97</sup> See *infra* notes 86–89.

<sup>98</sup> Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, 94 VALR 197, 217 (2008).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

As discussed above, the ADA precludes university policies from excluding individuals with disabilities from the services and programs available to all other students.<sup>104</sup> The Office of Civil Rights (“OCR”) has found in several cases that blanket mandatory withdrawal policies violate the ADA and the Rehabilitation Act because they constitute discrimination against students with mental disabilities.<sup>105</sup> The OCR requires that universities evaluate a student’s condition and the proper remedies on a case by case basis.<sup>106</sup>

The majority of universities have taken the opposite approach and have implemented even more stringent programs to monitor the mental health of student. The University of Illinois implemented a suicide prevention program which required students who threatened or attempted suicide to attend at least four meetings with a counselor.<sup>107</sup> It also required that Student Affairs personnel submit a Suicide Incident Report Form when they receive information that a student has threatened or attempted suicide.<sup>108</sup> The National Suicide Prevention Lifeline has partnered with several universities across the U.S. to offer services on campuses, including Emory University, Montana State University, Harvard University, and more.

However, implementing more programs seems to expose universities to even more risk of liability. With these procedures in place, a court will most certainly find that a school has sufficient knowledge of a student’s violent intentions or tendencies, creating a greater chance that the court will find negligence in preventing such violence. As evidenced by the decisions in *Shin v. MIT* and *Schiesler v. Ferrum College*<sup>109</sup>, meetings with counselors and even sending students to therapy is not always enough to satisfy their duty of protection from harm. Furthermore, since federal and state statutes prohibit expelling or suspending students away from the school so that they may receive therapy and counseling, it seems the universities are lodged between knowing too much, and therefore acquiring a duty of care, and knowing too little which can be considered purposeful disregard of potential danger.

Even though courts are facing conflicting public policy issues, including protecting patient privilege, abiding by FERPA laws,<sup>110</sup> warning others of foreseeable danger, and protecting students from self-harm and harm by

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<sup>104</sup> 42 U.S.C §12132 (2000).

<sup>105</sup> McAnaney, *supra* note 67, at 222.

<sup>106</sup> *Id.* at 224.

<sup>107</sup> *Id.* at 230.

<sup>108</sup> *Id.*

<sup>109</sup> See discussion *supra* Section VI.

<sup>110</sup> See discussion *supra* Section VIII.



others,<sup>111</sup> courts sway in favor of imposing duties on universities to provide mental health care services in response to public expectation and demand for these services.

A. *Contractual Relationship Giving Rise to Duty*

Another downfall to the implementation of mental health programs is the possibility of courts finding a contractual duty to monitor and protect students. This alternative avenue of finding a special relationship has already been demonstrated in the corporate world. In *Garza v. Northwest Airlines, Inc.*, Northwest Airlines adopted a mandatory program that when a minor travels unaccompanied, the child must pay additional costs in exchange for the Airline's additional services to "ensure a safe, comfortable and fun trip" for the child.<sup>112</sup> Here, a child was sexually molested by another passenger sitting next to her.<sup>113</sup> The flight attendants left the child unsupervised, failed to place her in a designated zone for unaccompanied minors, and failed to detect and stop the abuse.<sup>114</sup> Here, the court found the Airline liable for negligence in failure to protect the child against the criminal acts of third parties.<sup>115</sup> The court chose not rely on the foreseeability test and rejected the idea of premises liability which involves the degree of control the airline exercised over their environment in which the crime occurred.<sup>116</sup> Instead, the court held that the contractual relationship the plaintiff and defendant entered into was grounds for finding a special relationship which required a heightened standard of care to be imposed on the airline.<sup>117</sup> By the airline company choosing to adopt this program, it exposed itself to a duty to protect the child from third-party danger, even though the aggressor's conduct was not foreseeable. On the other hand, the airline was following typical social policy in offering a program to supervise unaccompanied children. The airline subjected itself to the *in loco parentis* doctrine and was subsequently found guilty despite the doctrine of *in loco parentis* traditionally representing immunity rather than a gateway for liability of negligence.

Similar to *Garza*, schools that implement counseling and mental health programs could be found to have entered into a contractual relationship where

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<sup>111</sup> Mahoney v. Allegheny College, No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).

<sup>112</sup> *Garza v. Nw. Airlines, Inc.*, 305 F.Supp.2d 777, 783 (2004).

<sup>113</sup> *Id.* at 779.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 783.

<sup>117</sup> *Id.* at 785.

they promise to provide care and counseling to students.<sup>118</sup> In *Shin*, the court stated that statements in handbooks, brochures, or even promotional materials for the services the school offers can form the basis for a valid contract.<sup>119</sup> The contractual relationship found in *Garza* is what led to the failure of Northwest Airlines in the negligence suit against them, and is what could also lead to the failure of schools in the future negligence suits against them as well. With the new mandatory requirements on schools to employ mental health services and counseling programs, this is offering plaintiffs another route to pinning liability on school administrators and psychologists by pointing to a contractual relationship that gives rise to a duty of care.

## IX. POSSIBLE SOLUTION

Karin McAnaney, in *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, suggests that universities just need to spend the time adjusting their policies to strike the right balance between treating students, abiding by FERPA laws, and protecting themselves from liability.<sup>120</sup> However, per the reasons discussed, finding the right balance is nearly impossible with how capriciously courts can find a special duty of care. Helping students yet not getting too close to make them knowledgeable enough to take on a duty to protect is an approach that no one has yet mastered. Universities should consider outsourcing their mental health services to third-party professional counselors. Theoretically, this would satisfy universities' duty to recognize and respond to potentially dangerous behavior, but also shift liability to a third-party if harm does occur and the treatment specialists failed to prevent such harm from occurring. If a student commits harmful conduct despite receiving help, universities would likely be able to claim plausible deniability because they would be one-step removed from special knowledge of a student's condition.<sup>121</sup> Additionally, all states receive federal support via Mental Health Block Grants and can also partially rely on funding through Medicaid.<sup>122</sup> States' financial resources designated for mental health are distributed on more local

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<sup>118</sup> See *id.* at 783. In *Garza*, the plaintiff and defendant participated in defendant's Unaccompanied Minor program where the defendant promised to protect and supervise unaccompanied children in exchange for an additional fee. The court found that entering in this contractual program created a special relationship between the child and the airline and, therefore, the airline had a heightened standard of care to protect the child from third-party criminal acts. *Id.* at 785.

<sup>119</sup> *Shin v. Mass. Inst. of Tech.*, 19 Mass.L.Rptr. at 575.

<sup>120</sup> McAnaney, *supra* note 67, at 236.

<sup>121</sup> Telephone Interview with Kevin Whitaker, Executive Vice President and Provost, Univ. of Alabama (Apr. 7, 2019).

<sup>122</sup> *The Federal and State Role in Mental Health*, MENTAL HEALTH AMERICA (last visited Apr. 12, 2019), <http://www.mentalhealthamerica.net/issues/federal-and-state-role-mental-health>.

levels so that each county or city can build facilities to offer mental health services.<sup>123</sup> Because third-party providers receive some subsidization for the cost of their services, this might ease the financial burden on the benefactors responsible for the cost of those services. This outsourcing approach has already been used by several universities in England such as Hull, Wolverhampton, and Essex.<sup>124</sup>

However, how this shift would affect a school's financial burden is undeterminable. On one hand, it could reduce the financial burden because a schools' limited resources would not have to be allocated toward offering counseling services and other like programs. Alternatively, most organizations, including universities, that outsource their services usually have a contractual obligation to indemnify the third-party provider for liability or damages resulting from the services they provide, at least to an extent.<sup>125</sup> Universities' financial resources primarily come from state grants, students' tuition, and private fundraising.<sup>126</sup> State grants and fundraising are generally invariable and outside the control of universities, schools must can only manipulate the tuition they charge.<sup>127</sup> Therefore, if schools are subject to indemnifying third-party providers, that added expense will translate to increased tuition.<sup>128</sup> Universities must balance the risk and cost of indemnification with the benefit of outsourcing to determine whether this is a proper solution.

## X. RAMIFICATIONS FOR OTHER BUSINESSES

*Garza* is a prime example of how changes in the application of standard of care and the *in loco parentis* doctrine is translating to the way businesses operate. Businesses must be cautious not to expose themselves to liability by taking on more responsibility, yet they must employ some procedures in accepting responsibility to comply with current public policy. If businesses try to step into the role of a parent or supervisor for patrons or their employees, businesses inherently subject themselves to a higher standard of care where they could likely be held liable for otherwise unforeseeable third-party harm.

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<sup>123</sup> *Id.*

<sup>124</sup> Liz Lightfoot, *Universities Outsource Mental Health Services Despite Soaring Demand*, THE GUARDIAN (Jul. 17, 2018), <https://www.theguardian.com/education/2018/jul/17/universities-outsource-mental-health-services-despite-soaring-demand>.

<sup>125</sup> See *Contractual Liability & Indemnity*, OFFICE OF UNIVERSITY COUNSEL, UNIVERSITY OF ILLINOIS SYSTEM, <http://www.legal.uillinois.edu/contractual-liability-indemnity> (last visited Apr. 13, 2019).

<sup>126</sup> Telephone Interview with Kevin Whitaker, Executive Vice President and Provost, Univ. of Alabama (Apr. 7, 2019).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

One major concern is some courts' conflation of the necessary elements of negligence and the capricious finding of special relationships, as demonstrated by the *Shin* case. In *Shin*, because the school administrators knew of her tendencies, the harm was deemed foreseeable which, in hindsight, imposed a duty on the school to take more preventative actions. If courts can find that a special relationship exists from knowing someone closely enough to recognize their tendencies and feel obligated to protect others from that person's actions, then this can be applied to any employer-employee relationship. If an employer has knowledge of an employee's mental disability, then a duty of care can be imposed beyond the traditional standard. For example, if an employer knows of an employee's struggle with depression and that employee one day decides to commit suicide at work, by reasoning of the courts in *Shin* and *Schieszler*, the employer could be liable in a wrongful death suit for failing to implement procedures that would prevent or stop the employee from committing such an act. With the overall shift in the way courts are holding universities accountable for the mental health and dangerous acts of their students, it is not unlikely that the public along with federal and state governments may shift more accountability onto regular businesses.

#### A. Regulation by Federal Agencies

Public universities receive a portion of their budget, about 10% of their operating costs, as grants from the U.S. Department of Education ("DOE")<sup>129</sup> The DOE prescribes guidelines that universities must follow, such as complying with the No Child Left Behind Act and other federal statutes, in order for universities to receive federal funding.<sup>130</sup> The DOE, like many federal and state agencies that provide funding to public organizations, take a backdoor approach to controlling the operations of their beneficiaries.<sup>131</sup> There are few statutes that require universities to offer certain programs or services because the DOE can achieve the regulatory effect of a statute without the lengthy process of passing a law simply by imposing conditions on schools' receipt of necessary funding.<sup>132</sup> Instead, the DOE can simply refuse federal funding for a university if a university chooses to not comply with any guidelines, regulations, or federal

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<sup>129</sup> *How Are The Local, State, and Federal Governments Involved In Education? Is This Involvement Just?*, THE CENTER FOR PUBLIC JUSTICE, [https://www.cpjustice.org/public/page/content/cie\\_faq\\_levels\\_of\\_government](https://www.cpjustice.org/public/page/content/cie_faq_levels_of_government) (last visited Apr. 13, 2019).

<sup>130</sup> *Id.*

<sup>131</sup> Telephone Interview with Kevin Whitaker, Executive Vice President and Provost, Univ. of Alabama (Apr. 7, 2019).

<sup>132</sup> *Id.*

statutes the DOE enforces.<sup>133</sup> For example, the Office for Civil Rights (“OCR”) under the DOE enforces the federal Rehabilitation Act and the DOE can refuse government aid for a universities found in violation of such Act.<sup>134</sup>

Similar to the DOE, the U.S. Department of Labor (“DOL”) prescribes statutes and regulations that govern all businesses and employees regarding issues such as wages, hours, safety and health standards, workplace standards, equal employment opportunities, and more.<sup>135</sup> The Employment Nondiscrimination and Equal Opportunity for Qualified Individuals with Disabilities, §503 of the Rehabilitation Act of 1973,<sup>136</sup> states that “employers with federal contracts or subcontracts must take affirmative steps to employ and advance in employment qualified individuals with disabilities.”<sup>137</sup> If a company or employer is found to be in violation of this rule, the Office of Federal Contract Compliance Programs (“OFCCP”), who administers the Rehabilitation Act, can, depending on the circumstances, cancel, suspend, or terminate federal contracts with that company.<sup>138</sup> Similar to the way the DOE tugs the strings of a universities’ operations by putting conditions on grants, the DOL can influence the operations and success of companies by conditioning them to employ people with disabilities, including mental disabilities.

Another way for the federal government to influence the internal operations of businesses using their financial power is by offering tax incentives for businesses that implement health and wellness programs.<sup>139</sup> The Affordable Care Act (“ACA”) provides a Workforce Wellness Grant in which \$200 million is allocated for companies with fewer than 100 employees to implement wellness programs in the workplace.<sup>140</sup> The wellness programs include health

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<sup>133</sup> See Ibbby Caputo and Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, THE ATLANTIC (Jul. 7, 2016), <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> (religious colleges forgo federal funding because of their refusal to comply with Title IX requirements).

<sup>134</sup> Letter from Robert E. Scott, Team Leader, Office for Civil Rights, U.S. Dep’t of Education, to Kenneth Nielsen, President, Woodbury Univ. (Jun. 29, 2001).

<sup>135</sup> All statutes and regulations prescribed by the U.S. Department of Labor can be found in the agency’s Employment Law Guide. Office of the Assistant Secretary for Policy, *Employment Law Guide: Laws, Regulations, and Technical Assistance Services*, DEP’T OF LABOR (Dec. 2016), <https://webapps.dol.gov/elaws/elg/index.htm>.

<sup>136</sup> *Id.*

<sup>137</sup> Office of the Assistant Secretary for Policy, *Federal Contracts-Equal Opportunity in Employment: Employment Nondiscrimination and Equal Opportunity for Qualified Individuals with Disabilities*, DEP’T OF LABOR (Dec. 2016), <https://webapps.dol.gov/elaws/elg/503.htm>.

<sup>138</sup> *Id.*

<sup>139</sup> *Financial Incentives for Promoting Wellness in the Workplace*, HEALTH LAW GUIDE FOR BUSINESS, <https://www.healthlawguideforbusiness.org/financial-incentives> (last visited Apr. 14, 2019).

<sup>140</sup> *Id.*

awareness initiatives, preventative screenings, policies to encourage improved mental health, counseling, etc.<sup>141</sup> While the U.S. Secretary of Health and Human Services cannot restrict funding to businesses like the DOE, they exercise some influence over the programs that a business must offer to obtain funding.<sup>142</sup>

The issue of companies providing further services, whether it be in response to tax incentives or to comply with the Rehabilitation Act, is particularly relevant for large companies with a large number of employees and that have a community in and of itself, such as Google. Google has what they label “campuses” at their headquarters across the world.<sup>143</sup> Google’s employees work, eat, exercise, do laundry, and even sleep on their campus, similar to a campus of a higher educational institution.<sup>144</sup> Additionally, because this type of large corporate environment is parallel to the environment of educational institutions, the public expectation of business’ responsibility to their employees should be comparable to the expectation the public and the courts have for the accountability of universities. Therefore, it is likely that courts could find that these corporations have a special relationship with their employees and that they would have special knowledge of employees’ mental health conditions and, therefore, hold these corporations to the heightened standard of care like those of universities. However, as discussed earlier, this would be an erroneous application of the standard of care<sup>145</sup> because neither universities nor businesses should be held legally accountable for the mental health of their students or employees. With corporations offering mental health services as an additional workplace amenity, like universities, they could potentially expose themselves to more legal liability for the health of their employees.<sup>146</sup>

Some view stricter regulatory oversight as a positive for businesses. As of 2016, depression alone was estimated to cost the U.S. roughly \$210 billion per year, half of which are workplace costs including missed days and reduced productivity.<sup>147</sup> Of this \$210 billion, an estimated \$44 billion per year is the cost

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<sup>141</sup> *Id.*

<sup>142</sup> *See generally id.*

<sup>143</sup> *See* Alyson Shontell, *Google’s Perks Are So Amazing That Employees Have Found Ways to Secretly Live on Campus and Avoid Paying Rent*, BUSINESS INSIDER (Sep. 8, 2014), <https://www.businessinsider.com/employees-who-live-at-google-2014-9>; *see* Barbara Farfan, *Google’s World Headquarters and Offices Around the World*, THE BALANCE SMALL BUSINESS (Dec. 24, 2018), <https://www.thebalancesmb.com/google-headquarters-offices-2892790> (listing some of the amenities offered on campus).

<sup>144</sup> *Id.*

<sup>145</sup> *See* discussion *supra* Section VI.

<sup>146</sup> *See* discussion *supra* Section IX.

<sup>147</sup> Jessica Leber, *Fixing Mental Health in the Workplace Requires a Lot More Than a Yoga Room*, FAST COMPANY (2016), <https://www.fastcompany.com/3057303/fixing-mental-health-in-the-workplace-requires-a-lot-more-than-a-yoga-room>.

to employers.<sup>148</sup> Based on studies of work-related mental health impairment, it seems as though the forced implementation of mental health programs in the workplace could decrease a significant percentage of work-related impairment and thus reduce costs in the form of missed work days.<sup>149</sup> There is little debate as to whether mental health programs can reduce the symptoms experienced by people with mental illness and perhaps ultimately reduce business costs in the form of productivity and health insurance. However, the issue is how employers will be deemed to take on more accountability for the actions of their employees and have a heightened duty to patrons if these programs are implemented. Increased accountability exposes businesses to civil liability when they ordinarily should not be.

Furthermore, there is now even more potential for the unification of the federal laws that govern universities and those that govern businesses. In June 2018, the White House announced a proposal to merge the DOE and the DOL into a single agency.<sup>150</sup> This consolidation would create four sub-agencies, one of which is the American Workforce and Higher Education Administration that would focus on workforce development programs, higher education programs, and rehabilitation.<sup>151</sup> Another sub-agency would enforce worker protections and civil rights laws.<sup>152</sup> If this merger comes to fruition, it could result in the presumption of dual applicability of federal laws to both universities and businesses.

### *B. Regulation by State Agencies*

Because there is no constitutional right to an education, most university oversight comes from state and local authorities.<sup>153</sup> The federal government does

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<sup>148</sup> Rebecca Greenberg, *Depression Calculator Tallies Business Costs of Employees' Mental Illness*, AMERICAN PSYCHIATRIC ASSOCIATION (2018), <https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2018.8a7>.

<sup>149</sup> Matthew Jones, *How Mental Health Can Save Businesses \$225 billion Each Year*, INC. (2016), <https://www.inc.com/matthew-jones/how-mental-health-can-save-businesses-225-billion-each-year.html> (describing a study by the Center for Workplace Mental Health that showed that the number of employees suffering from a diagnosable mental illness decreased by 50% over three weeks of mental health treatment, and 75% over four months).

<sup>150</sup> Clare Lombardo and Alexis Arnold, *White House Proposes Merging Education and Labor Departments*, NPR (Jun. 21, 2018), <https://www.npr.org/sections/ed/2018/06/21/622189097/white-house-proposes-merging-education-and-labor-departments>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of... Um, What?*, ED. (2017), <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what>.

their part to protect the rights of individuals with mental health issues by passing laws targeting discrimination and treatment of people with disabilities, as well as controlling the purse strings of federal funding, but the states are primarily responsible for regulating universities and all businesses within the state because they have better resources and capabilities to monitor and enforce those regulations.<sup>154</sup> Each state has the power to expand their state laws and regulations beyond the mental health safety standards imposed by the federal government which can include requiring an offering of mental health services and raising standards to determining duty-to-warn laws.<sup>155</sup> This authority encompasses discretion over schools, workplaces, and treatment facilities.<sup>156</sup> State laws governing mental health services vary greatly across the U.S. and, therefore, it is difficult to generalize states' roles in the governance of mental health programs within universities and businesses.<sup>157</sup> However, it seems that, theoretically, state government agencies can administer policies that require certain non-privately-run businesses to implement mental health monitoring systems because they have the authority to pass their own legislation beyond what the federal government requires.<sup>158</sup>

### *C. Current Mental Health Laws Applied to Businesses*

#### *1. Laura's Law and Kendra's Law*

One example of significant changes states have taken in the health and safety of their citizens that can potentially have a major effect on the duty of care of not only universities, but all business establishments, is a California law that allows for court-ordered involuntary assisted outpatient treatment (“Laura’s Law”).<sup>159</sup> Laura’s Law enables counties to adopt an assisted outpatient treatment (“AOT”) program through local health treatment centers<sup>160</sup> for individuals who suffer from a mental illness and are unlikely to survive without supervision and who either have a history of repeated hospitalization related to their mental

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *The Federal and State Role in Mental Health*, MENTAL HEALTH AMERICA, <http://www.mentalhealthamerica.net/issues/federal-and-state-role-mental-health> (last visited Mar. 13, 2019).

<sup>158</sup> *See generally Id.*

<sup>159</sup> Matt Rexroad, *Laura's Law is helping save people with severe mental illness*, THE SACRAMENTO BEE (Jul. 15, 2017), <https://www.sacbee.com/opinion/op-ed/article161261298.html>.

<sup>160</sup> *See generally Laura's Law: Assisted Outpatient Treatment Demonstration Project Act of 2002*, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, <https://www.dhcs.ca.gov/formsandpubs/Documents/Legislative%20Reports/Lauras-Law-FY2012-13andFY2013-14.pdf> (last visited Apr. 13, 2019).



illness or have history of self-harm or harm to others.<sup>161</sup> The director of an organization, agency, or home providing mental health services to the person or in whose institution the person resides, or a treating or supervising licensed mental health treatment provider, among others may request an investigation by the county health department to determine whether a person qualifies for the program.<sup>162</sup> Based on this criteria, universities and any business organizations that provide mental health services, including hospitals, health clinics, and counseling service providers, fall within the definition of whom can petition for AOT. Once the county mental health director finds that the individual satisfies the requirements for the program, the director may file a petition with the superior court in the county.<sup>163</sup> The court will then hold hearings on the evidence and either dismiss the petition or find that the person meets the criteria and order the person to receive AOT for up to six months.<sup>164</sup> Laura's Law is based off of a 1999 New York law "Kendra's Law"<sup>165</sup> that also provides for court-ordered AOT for people with a history of mental illness and who are unlikely to survive in the community without supervision.<sup>166</sup> The purpose and procedural process of Kendra's Law is nearly identical to that of Laura's Law.<sup>167</sup>

## 2. *Implications for Businesses*

Kendra's Law, Laura's Law and the like may have significant positive and negative implications for universities or businesses that fall within the parameters of whom may petition for an investigation. While this law is helpful in offering a way for close family members, caretakers, supervisors and generally people who are close to individuals with severe mental illness to get help for those individuals, the law can also lead down a slippery slope of imposing more duty on the people and leaders of institutions who can petition for AOT if the scope of the law is expanded.

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<sup>161</sup> *Frequently Asked Questions on Laura's Law*, TREATMENT ADVOCACY CENTER, <https://www.treatmentadvocacycenter.org/component/content/article/2651> (last visited Apr. 13, 2019). The Treatment Advocacy Center identifies additional criteria in evaluating the eligibility of an individual for the program which can be found at [https://www.treatmentadvocacycenter.org/storage/documents/ab\\_1421\\_-\\_final\\_updated\\_booklet-\\_sept\\_2009.pdf](https://www.treatmentadvocacycenter.org/storage/documents/ab_1421_-_final_updated_booklet-_sept_2009.pdf).

<sup>162</sup> *A Guide to Laura's Law*, THE CALIFORNIA TREATMENT ADVOCACY COALITION & THE TREATMENT ADVOCACY CENTER (Sept. 2009), [https://www.treatmentadvocacycenter.org/storage/documents/ab\\_1421\\_-\\_final\\_updated\\_booklet-\\_sept\\_2009.pdf](https://www.treatmentadvocacycenter.org/storage/documents/ab_1421_-_final_updated_booklet-_sept_2009.pdf).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *AOT Procedural Questions about Investigation Process*, NEW YORK STATE OFFICE OF MENTAL HEALTH, [https://www.omh.ny.gov/omhweb/kendra\\_web/kqinvest.htm](https://www.omh.ny.gov/omhweb/kendra_web/kqinvest.htm) (last visited Apr. 13, 2019).

<sup>167</sup> *See generally id.*

One helpful aspect to this law is that it offers universities or businesses with healthcare programs fulfill their duty to prevent harm and protect their students or employees. If directors of universities or businesses petition for an AOT investigation in cases where they have knowledge of a student or employee's severe mental health issues, it is likely that a court will find the petitioner not negligent because they took reasonable steps to get the individual help with professionals and under constant supervision within the AOT program. Additionally, similar to the theory of outsourcing to a third-party provider mentioned earlier,<sup>168</sup> sending a student or employee to a program offered by a third-party allows a university or employer to be one-step removed from special knowledge of the individuals condition and therefore reduce liability.

On the other hand, because Kendra's Law and Laura's law are not federal laws, there is the opportunity for other states to implement similar legislation with a broader scope and applicability. Further, there is nothing preventing California or New York from amending the current legislation to expand the scope of the laws. Broader applicability of these laws can pose threats to the operations of businesses and their exposure to liability in negligence suits. For example, in counties that have adopted these laws and offer AOT programs, it is possible that, in negligence suits, courts may find that universities or businesses were negligent in failing to petition for AOT when they had knowledge of an individual's mental illness and had the opportunity to petition but failed to do so. Courts may find that petitioning was a reasonable preventative step that universities should have taken, in which case, failure to take advantage of such opportunity constitutes negligence. This would be a wrongful approach of the courts given that the ability to petition is optional and that the university could have taken other steps to prevent harm. Additionally, this would allow for inconsistent application of the standard of care imposed on universities because not every county has adopted these laws. A second concern about adopting these laws is that states have the ability to pass laws that expand on Kendra's Law and Laura's Law or, if a state has already implemented such laws, amend the law to perhaps make it mandatory that counties adopt the laws locally and provide AOT programs. Another route for states to influence the implementation of AOT programs is, as mentioned earlier,<sup>169</sup> through funding. Currently, California counties are able to utilize specified funding, such as Mental Health Services Act funds, for AOT programs.<sup>170</sup> Offering this funding, or disallowing the use

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<sup>168</sup> See discussion *supra* Section X.

<sup>169</sup> See generally discussion *supra* Section XI.C.

<sup>170</sup> *Laura's Law: Assisted Outpatient Treatment Demonstration Project Act of 2002*, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,

of those funds for the programs, is a way the state can control whether the programs are implemented or not and what services the programs must offer. In a way, states' departments of health care services can regulate the operations of the local businesses that offer AOT programs. A third concern of the expansion of these laws is that while currently only family members, directors of programs providing mental health services and in whose institution the person resides, treating or supervising licensed mental health treatment providers, and a few others can petition for AOT, state legislatures can amend these laws to include all businesses or institutions that provide healthcare plans to students or employees or have special knowledge of an individual's mental health issues. If any employer that has special knowledge of an employee's mental health is allowed to petition for AOT, then the potential duty to report will fall on almost all businesses. Again, it is possible that courts could find negligence in failure to petition for AOT for their employees.

To prevent these well-intentioned laws from being misinterpreted to impose upon universities or other businesses another form of preventative duty to students or employees, courts should narrowly interpret these laws as a mere opportunity for providing mentally ill individuals with the professional help they need rather than as another route in which these businesses failed to take all appropriate measures in preventing harm, and penalizing them for it.

AMANDA GUARISCO\*

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<https://www.dhcs.ca.gov/formsandpubs/Documents/Legislative%20Reports/Lauras-Law-FY2012-13andFY2013-14.pdf> (last visited Apr. 13, 2019).

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