

## When Is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act

*Elizabeth was a freshman at an elite east-coast university. Elizabeth's parents visited their seemingly happy nineteen-year-old daughter on a Sunday. They watched her laugh with her dorm mate and review her sheet music for an upcoming clarinet rehearsal. Her parents took her out to dinner and later said goodbye, assuring her that they would return if she needed anything. The next day, Elizabeth's parents received a phone call from the University informing them that Elizabeth had committed suicide by setting herself on fire.<sup>1</sup> The family sued the university for \$27 million in a wrongful death lawsuit alleging that the University was concerned about privacy violations, but not worried enough about Elizabeth's mental health and suicidal tendencies. The family contends that if the University had informed them of Elizabeth's many visits to its mental health center and of her numerous contacts with administrators where she admitted depression, Elizabeth would be alive today. The University defends the lawsuit by arguing that Elizabeth did not want her family to know, and that the University was under no legal obligation to inform them.<sup>2</sup>*

### I. INTRODUCTION

The above facts are based on the real-life story of Elizabeth Shin, an M.I.T. student who committed suicide in 2000, and illustrate a tragedy that has

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1. See Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES, Apr. 28, 2002, at 57. The Shins filed a \$27 million wrongful death law suit against M.I.T. in Massachusetts Superior Court against M.I.T. *Id.* While the court has dismissed the lawsuit against the institution, the Shin matter is still pending against individual university officials. Kelley Rivoire, *Charges Against MIT Thrown Out in Elizabeth Shin Lawsuit*, TECH., Jul 15, 2005. The Shin case has was filed in 2002. Sontag, *supra*, at 57 (explaining grounds for lawsuit). Sontag's article discusses how all colleges and universities are closely watching the Shin case because in addition to setting legal precedent, it may also impact the public's perception of a university's duties. *Id.* At the time of publication, Justice Christine M. McEvoy of the Massachusetts Superior Court granted M.I.T.'s motion for summary judgment on all four counts brought against the institution. Rivoire, *supra*, at 1. Counts of wrongdoing filed against individual M.I.T. employees are still active. *Id.* In a separate case, a court ruled that a university did not breach a duty by failing to notify the parents of a student who previously tried to kill himself. Jon Marcus, *Judge Backs Family in MIT Suicide Case*, TIMES HIGHER EDUC. SUPP. Aug. 12, 2005 at 11 (discussing two differing decisions).

2. See Sontag, *supra* note 1, at 57 (noting school not prohibited legally from informing parents by law). An M.I.T. official asserted, "[w]e have to win. If we don't, it has implications for every university in this country." *Id.*; see also Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 137 (2002) (discussing exception to FERPA restrictions on counseling session disclosure).

become far too common on college campuses.<sup>3</sup> The Shins' major protest is that M.I.T. failed to notify them of Elizabeth's mental health problems.<sup>4</sup> Today, colleges and universities face a delicate balance in attempting to protect simultaneously a student's privacy and health.<sup>5</sup>

The Family Educational Rights and Privacy Act (FERPA) restricts universities from disclosing academic and conduct records to parents unless there is a FERPA-recognized exception.<sup>6</sup> While FERPA does not grant an individual right to sue, multiple FERPA violations can lead to administrative fines, and withdrawal of an institution's federal funding.<sup>7</sup> Although FERPA contains an express exception allowing for disclosure in a health or safety emergency, the statute does not ever require disclosure.<sup>8</sup>

Additionally, FERPA's present definition of what constitutes an actual

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3. See Sontag, *supra* note 1, at 57 (discussing Shin matter and increase in mental health problems on college campuses); see also Karen W. Arenson, *Colleges Work to Prevent Student Suicides*, N.Y. TIMES, Dec. 4, 2004, at 2 (finding suicide rate in colleges steady at 1100 per year). The author also notes that suicide statistics do not always include off-campus suicides. *Id.* see also Daniel McGinn & Ron Depasquale, *Taking Depression On*, NEWSWEEK, Aug. 23, 2004, at 59 (discussing article published in Harvard's student newspaper). "An overwhelming majority" of Harvard undergraduates experience mental-health problems. *Id.*

4. See Sontag, *supra* note 1, at 57 (highlighting Shins' desired notification of daughter's precipitous decline); see also Edward Stern, *Outcome of MIT Lawsuit Likely to Present Ramifications for Mental Health Professionals*, Mass. Psychologist (March 2002) (discussing mother's desire for some form of notification) at [http://masspsy.com/columnists/stern\\_0203.html](http://masspsy.com/columnists/stern_0203.html). The author notes that Mrs. Shin believes Elizabeth would be alive if M.I.T. contacted them. *Id.*; see also Qian Wang, HIGHBEAM RESEARCH, *Shin Family Files Wrongful Death Lawsuit* (pointing to Kisuk Shin's anger over lack of notification) at <http://www-tech.mit.edu/N121/N70/70shin-article.70n.html>. Mrs. Shin states that she should have received at least one phone call. *Id.*

5. See Sontag, *supra* note 1, at 5 (discussing administrators' conflict between obligations to tuition-paying parents and student privacy rights); Sarah L. Park, *Parents Sue MIT Over Suicide*, HARVARD CRIMSON, Jan. 31, 2002, at 1 (outlining debate over notification in emergency situations); Sara Lipka, *Retaliation Claims Against Colleges Are on the Rise, Insurance Expert Says*, CHRON. OF HIGHER EDUC., Feb. 25, 2005, at 26 (noting administrators must decide between defending suit wrongful death lawsuit versus privacy lawsuit).

6. 28 U.S.C. § 1232g (2004)(allowing disclosure only in emergency situations); FERPA specifically allows for disclosure "in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons. 28 U.S.C. § 1232g(I) (2004). Where circumstances do not fall within an express exception, institutions can still advise students to make a disclosure to their parents. See Lake & Tribbensee, *supra* note 2, at 138.

7. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (holding private action foreclosed because FERPA creates no personal rights). Chief Justice Rehnquist asserts that spending legislation cannot possibly confer enforceable rights. *Id.* at 279; see also

Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 11 (2001) (discussing procedures available when institutions violate FERPA). Individuals who believe an institution has violated FERPA may file a complaint with the Family Policy Compliance Office (FPCO). *Id.* If the FPCO determines institution violated the statute, the Office of the Secretary of the Department of Education will provide the school with a list of conditions to meet. *Id.* In extreme cases where a pattern exists, the Office may begin proceedings to withdraw federal funds. *Id.*

8. See *Jain v. Iowa*, 617 N.W.2d 293, 298 (Iowa 2000) (reasoning discretionary exception does not mandate action). The court rejected the plaintiff's argument that because FERPA authorized the University to disclose important facts, the statute also imposed a duty on the University to reveal them. *Id.*

emergency is extremely ambiguous.<sup>9</sup> FERPA allows for emergency disclosure to “appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”<sup>10</sup> Complicating the matter further, a regulation accompanying the statute requires strict construction of the exception.<sup>11</sup>

Without a specific disclosure requirement, and a clearer definition of an emergency, schools often err on the side of non-disclosure even if the circumstances may actually qualify for the FERPA exception.<sup>12</sup> Increasingly, many educational institutions are now forcing students to take a medical leave at the first sign of mental health problems.<sup>13</sup> Failing to disclose information to parents, however, is antithetical to modern psychological theory that suggests involving the family when students suffer from mental health problems is a positive rehabilitative step.<sup>14</sup> This failure to notify the parents of a child’s mental health issues sometimes results in suicide, and subsequent litigation.<sup>15</sup> More frequently than ever, the parents of children who commit suicide are attempting to hold colleges accountable by filing wrongful-death claims.<sup>16</sup>

Despite the increasing threat of wrongful-death litigation, colleges and universities often still choose to protect a student’s privacy because they fear violating FERPA, and losing valuable federal funding.<sup>17</sup> This may be a result

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9. 20 U.S.C. § 1232g(l) (2004) (allowing private record disclosure for emergencies); *see also* Alana Semuels, *A Healthy Relationship; Parents Should Talk to Their Child About Having College Share Medical Info*, PITT. POST-GAZETTE, Feb. 16, 2005, at 14 (discussing confusion over what constitutes an emergency). Semuels observed that neither schools nor courts have determined exactly what an emergency is; *see also* Michael Doyle, Letter to Editor, CHRON. OF HIGHER EDUC., Oct. 7, 2005, at 63 (contending reasonable expectations for institutional response should be established).

10. 20 U.S.C. § 1232g(l) (2004).

11. *See* 34 C.F.R. § 99.36(b)(1994) (asserting strict construction of emergency disclosure exception).

12. *See* 34 C.F.R. § 99.36(b) (1994) (asserting strict construction); *see also* Semuels, *supra* note 9, at 14 (discussing challenges in sharing medical information). The definition of an emergency may differ greatly between a worried parent and a busy health center. *Id.*

13. Marcella Bombardieri, *Lawsuit Allowed in MIT Suicide*, BOSTON GLOBE, July 30, 2005, at B1 (observing recent trend of universities forcing medical leave upon initial signs of suicide).

14. *See* DAVID CAPUZZI & LARRY GOLDEN, PREVENTING ADOLESCENT SUICIDE, ch. 13, at 418 (Accelerated Dev. Inc. Publishers 1988) (suggesting parental involvement important in treatment).

15. *See* Sabrina Tavernise, *In College and in Despair, with Parents in the Dark*, N.Y. TIMES, Oct. 26, 2003, at 31 (discussing negligence allegations against school administrators and campus police in Shin case). While some parents understand the privacy issue, others allege that privacy should never take precedence over safety. *Id.* Tavernise quotes Dr. David A. Brent, a professor of psychiatry at the University of Pittsburgh School of Medicine as stating, “[i]t’s tricky because the kid is an adult . . . . If the child doesn’t want them to contact the parent, then you’re in a difficult situation.” *Id.*; *see also* Lipka, *supra* note 5 at 26, (articulating need for colleges to improve defenses as more lawsuits filed). The adjudication of a wrongful-death suit will provide an important legal framework for future cases. *Id.* Janice M. Abraham, president and chief executive of United Educators Insurance, asks in reference to a privacy violation or wrongful death lawsuit, “Which case would you rather defend?” *Id.*

16. *See* Lipka, *supra* note 5, at 26 (discussing increasing trend of holding universities accountable for wrongful death). Lipka also asserts that FERPA places absolutely no restrictions on parental notification in cases where students may endanger themselves or others. *Id.*

17. *See* 34 C.F.R. § 99.36(b) (1994) (asserting disclosure exception for emergency strictly construed);

of the fact that while suicide on our nation's campuses has increased within the last decade, it still remains a relatively rare problem.<sup>18</sup> The lack of a FERPA requirement, along with the inconsistent case law deciding whether there is ever a legal duty to prevent suicide also dissuades colleges from informing parents even where it may be appropriate.<sup>19</sup>

Conforming to the conventional legal view that no third party liability should attach to suicide, courts have been reluctant to recognize suicide-related wrongful death claims.<sup>20</sup> One exception to this rule is when the third party has a "special relationship" with the victim.<sup>21</sup> The more notice a school has of an imminent suicide, the more likely courts are to impose this "special relationship."<sup>22</sup>

In some cases, for example, students express to a counselor or teacher that

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Daggert & Huefner, *supra* note 7, at 4 (noting FERPA conditions all federal funding on compliance). Additionally, prior to *Gonzaga*, some courts allowed plaintiffs to recover money damages. Daggert & Huefner, *supra* note 7, at 4 (noting FERPA conditions all federal funding on compliance). *But see* Tavernise, *supra* note 15, at 31 (observing shift towards safety over privacy). Some institutions are willing to risk FERPA violations when a student's safety is at stake. *Id.*; *see also* Britta L. Hyllengren, Note, *Violations of Family Educational Rights and Privacy Act Create No Personal Rights Under 1983*, 37 SUFFOLK U.L. REV. 563, 563 (2004) (discussing continual refusal to recognize private § 1983 actions to enforce FERPA). Hyllengren states that the sole action of terminating funds is not a comprehensive enforcement scheme. *Id.* at 567. She also argues that the language in the statute acknowledging a right to prevent unauthorized release manifests a Congressional intent to create individual rights. *Id.* at 567.

18. *See* Richard Fossey & Perry A. Zirkel, *Liability for Student Suicide in the Wake of Eisel*, 10 TEX. WESLEYAN L. REV. 403, 404 (2004) (alleging suicide problem not as ubiquitous as portrayed). The authors argue that suicide is a leading cause of death among teens only because teens are at a low risk of death for many other illnesses. *Id.* at 404; *see also* Sontag, *supra* note 1, at 57 (stating suicide second leading cause of death among college students, but still relatively rare).

19. *See* *Jain v. Iowa*, 617 N.W.2d 293, 299-300 (2000) (holding no duty to prevent suicide because no special relationship). *But see* *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002) (finding special relationship can exist between college and student in certain circumstances). The *Schieszler* court opined that a special relationship alone will not give rise to a duty, but may when the harm is foreseeable. *Id.* at 609.

20. *See* *Grant v. Bd. of Trs. of Valley View Sch. Dist.* No. 365-U, 676 N.E.2d 705, 707 (Ill. App. Ct. 1997) (refusing to recognize cause of action for failure to warn parents); *Killen v. Indep. Sch. Dist.* No. 706, 547 N.W.2d 113, 117 (Minn. Ct. App. 1996) (holding no duty to notify where public officials' discretionary acts not willful or malicious); *see also* Fossey & Zirkel, *supra* note 18, at 404 (noting no decision prior to *Eisel* recognized claim where school district was sued for suicide). The commentaries about *Eisel* only provide general pragmatic advice regarding its ramifications. *Id.* at 405.

21. *See* Daniel Berglund, Note, *Recent Decisions of the Minnesota Supreme Court: Torts: Taking the "I" Out of Suicide: The Minnesota Supreme Court's Alarming Extension of Duty in "Exceptional Relationships,"* 28 WM. MITCHELL L. REV. 1307, 1309 (2002) (explaining "special relationship" recognized exception to lack of duty to prevent suicide rule); *see also* Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 NEB. L. REV. 301, 310 (1997). Initially, courts considered custody and control as the key factors in determining whether the defendant assumed the victim's duty of self-care. *Id.*

22. *See generally* *Schieszler*, 236 F. Supp. 2d at 602 (finding duty based upon college's knowledge of student's mental health problems); *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997) (finding duty where notice of prior attempts); *see also* Kara DeTufo, *Mondaq Business Briefing*, Oct. 14, 2005, at Legislation & Regulation (discussing recent decision in Shin case). The M.I.T. administrators had received numerous reports from students about Elizabeth's mental health problems. *Id.*

they or other students are contemplating suicide.<sup>23</sup> In cases where school officials fail to act after learning this information, families of student victims have sometimes succeeded in wrongful death claims.<sup>24</sup> In other cases, however, even where a third party possesses considerable notice of mental health problems, courts are still reluctant to impose a duty to act.<sup>25</sup>

Recently, some scholars have suggested that the usual policy rationale for not imposing a duty to prevent suicide is absent when considering whether there is a lesser duty to notify parents that their child has threatened suicide.<sup>26</sup> The duty to inform the parents of their student's mental health problems is significantly easier to perform than the more expansive duty of suicide prevention.<sup>27</sup> Until the law clearly states that a duty to notify exists, there is little hope that higher-education institutions will disclose mental health information, risking possible FERPA violations.<sup>28</sup> Thus, Congress should amend FERPA to impose affirmative duties during an emergency thereby overriding confusing common-law precedents that leave colleges unsure about parental disclosure.<sup>29</sup> Additionally, Congress should also amend FERPA to

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23. See Fossey & Zirkel, *supra* note 18, at 404 (noting students sometimes confide in counselor or teacher prior to attempting suicide). In circumstances where students confided in members of the administration, many student victims' families have sued school districts. *Id.* at 404. Before *Eisel*, however, no court recognized these claims. *Id.*

24. *Schieszler*, 236 F. Supp. 2d at 611 (finding duty based upon college's knowledge of mental health problems); *Wyke*, 129 F.3d at 571-74 (1997) (imposing duty where school officials had notice of prior suicide attempts); Fossey & Zirkel, *supra* note 18, at 404 (noting prior to *Eisel* decision third party liability rarely recognized). The *Eisel* decision marked the beginning of a line of cases where parents and guardians sued schools for the failure to warn of or prevent suicide. Fossey & Zirkel, *supra* note 18, at 405. *Id.* *Eisel* also generated many suicide-prevention programs in schools. *Id.* The authors concede, however, that cases following *Eisel* present a muddled picture of the case's common-law and constitutional effects. *Id.*

25. See *Jain v. Iowa*, 617 N.W.2d 293, 298 (Iowa 2000) (expressing doubt regarding duty to inform). The *Jain* court noted that the plaintiffs abandoned the contention that a FERPA duty arose at oral argument. *Id.*

26. See Lake & Tribbensee, *supra* note 2, at 142 (stating discharge of duty to notify less difficult than discharge of duty to prevent suicide); Semuels, *supra* note 9, at 14 (discussing difficulty in running counseling center without assuring students of confidentiality). Professor Robert P. Gallagher of the University of Pittsburgh expressed concern that lawsuits may push schools to share information in an effort to absolve themselves of liability. Semuels, *supra* note 9, at 14. He also added that some students may be less candid with counselors if they knew their parents could be contacted. *Id.*; see also Shelby Opper Wood, *Suicides Lead Universities to Tighter Intervention Rules*, OREGONIAN, Oct. 6, 2004, at B09 (noting present stigma to university surrounding suicide).

27. See Lake & Tribbensee, *supra* note 2, at 132-33 (observing amount of effort required for notification less than prevention in most situations).

28. See Lake & Tribbensee, *supra* note 2, at 150-51 (noting colleges harbor legal concerns when informing parents coupled with professional rules of ethics). But see Tavernise, *supra* note 15, at 31 (noting some universities desire to reach out rather than neglect student in danger); Semuels, *supra* note 9, at 14 (noting slew of lawsuits may push colleges toward more liberal disclosure policy). Robert P. Gallagher conducted a survey finding that only forty-two percent of all counselors would ever disclose to a parent that their child is a suicide risk, and only if doing so would not harm the student. *Id.*

29. See Bombardieri, *supra* note 13 at B1 (discussing legal uncertainty among college officials). The author notes the uncertainty surrounding how an institution should react to mental health issues often results in the removal of students from campus. *Id.*

clearly define what constitutes an emergency situation.<sup>30</sup> Finally, FERPA should also require colleges and universities to establish programs to prevent willful ignorance of the requisite notice that will give rise to this new duty of notification.<sup>31</sup>

This Note begins in Part II.A by discussing traditional liability of third parties when an individual commits suicide.<sup>32</sup> Part II.B details the increasing problem of suicide on our nation's college campuses and the need for a legal response.<sup>33</sup> Turning to FERPA in Part II.C, this Note focuses on the discretionary provision allowing for disclosure, and the potential punishments for FERPA violations.<sup>34</sup> Part II.D then discusses the confusing recent case law addressing a duty to prevent or a lesser duty to notify.<sup>35</sup> Part II.E discusses the recent increase in suicide-related litigation against colleges and universities, and further extrapolates on frustration felt by institutions that are presently unsure of how to handle these situations.<sup>36</sup>

Part III.A contends that the traditional reasons for not imposing a duty to prevent suicide do not apply when considering a duty to notify.<sup>37</sup> Part III.B expounds on the merits of family involvement in a student's mental health treatment, and Part III.C details how Congress should amend the discretionary provision of FERPA to encourage such family involvement.<sup>38</sup> Part III.D then explains how the present case law sends a confusing message to colleges and universities, and has created a need for uniformity in the law.<sup>39</sup> In III.E, this Note asserts that clearer guidelines will help institutions make better decisions, and help decrease litigation.<sup>40</sup> In Part IV, this Note concludes that FERPA must be amended in three related ways by: 1) requiring institutions to address mental health issues; 2) clearly defining what an emergency is; and 3) mandating parental notification in these emergency situations.<sup>41</sup>

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30. See Semuels, *supra* note 9, at 14 (noting courts' failure to interpret what constitutes emergency situation under statute). The author contends schools are very unclear as to what an emergency is. *Id.*

31. See generally Scott v. Montgomery, No. 96-2455, 1997 U.S. App. Lexis 21258 (4th Cir. Aug. 12, 1997) (refusing to recognize proximate cause when counseling sessions not given).

32. See Jain v. Iowa, 617 N.W.2d 293 (Iowa 2000) (holding no legal duty on school); Nally v. Grace Cmty. Church, 763 P.2d 948, 960-61 (Cal. 1988) (imposing no duty on clergy member to prevent); see also *infra* Part II.A. But see Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 611 (W.D. Va. 2002) (imposing duty to prevent in specific extraordinary circumstances); Eisel v. Bd. of Educ., 597 A.2d 447, 456 (Md. 1991) (holding duty to notify).

33. See *infra* Part II.B (outlining increasing problem of suicide on college campuses).

34. See *infra* Part II.C (explaining FERPA requirements and remedies).

35. See *infra* Part II.D (discussing duty to prevent versus parental notification).

36. See *infra* Part II.E (discussing litigation and confusion among college administrators).

37. See *infra* Part III.A (explaining duty to notify parents easier to discharge than duty to prevent suicide).

38. See *infra* Parts III.B-C (outlining how to change FERPA to encourage greater family involvement).

39. See *infra* Part III.D (arguing amending FERPA would clear up confusing precedent).

40. See *infra* Part III.E (arguing uniformity in law will reduce litigation).

41. See *infra* Part IV (proposing solution to reducing suicide problem includes amending FERPA in three ways).

## II. HISTORICAL BACKGROUND

### *A. Traditional Third-Party Liability When an Individual Commits Suicide*

Traditionally, courts have been hesitant to impose liability on third parties when an individual commits suicide.<sup>42</sup> Common policy reasons for narrow third-party liability in suicide cases are:

(1) the suicide victim was a wrongdoer entitled to no relief in the court system for himself or on behalf of his relatives, (2) suicide is extremely difficult to prevent and therefore liability should be limited, (3) responsibility to prevent suicide entails an affirmative duty, for which the common law traditionally provides significant limitations, and (4) the issue of foreseeability is prominent in suicide cases, and only individuals with training and special knowledge are in a position to foresee and address suicide risk.<sup>43</sup>

Additionally, courts are reluctant to create liability for a deliberate and intentional act that many consider the sole responsibility of the actor.<sup>44</sup>

The general rule of not recognizing third party liability applies unless there is a “special relationship” between the third party and the individual who commits suicide, and the suicide is foreseeable by the third person.<sup>45</sup> Exactly when this “special relationship” exists and what is necessary to extinguish such a duty is rather unclear from the case law.<sup>46</sup> The Restatement (Second) of Torts states that a special relationship arises when “[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such

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42. See Fossey & Zirkel, *supra* note 18, at 406 (discussing no common-law duty to prevent suicide). Fossey & Zirkel opine that when suicide was considered a mere criminal act, non-criminal parties bore no responsibility. *Id.*

43. See Lake & Tribbensee, *supra* note 2, at 146 (outlining reasons for no third-party liability). Lake and Tribbensee also add that suicide and self-inflicted harm are enormous social problems in the college-age population, and the number of students arriving on campus with mental health problems is steadily increasing. *Id.* at 126; see also SCOTT POLAND, *SUICIDE INTERVENTION IN THE SCHOOLS*, ch. 5, at 68-72 (1989) (discussing common warning signs of suicide).

44. See Berglund, *supra* note 21, at 1309 (recognizing third-party liability for another’s suicide relatively recent development). In addition to the concern over shifting liability from the responsible actor, governmental immunity also poses problems at state-run institutions. *Id.* at 1310.

45. See RESTATEMENT (SECOND) OF TORTS § 314A (1965) (explaining exception to third party liability in suicide cases); see also Lake & Tribbensee, *supra* note 2, at 130 (noting exceptions to common law third-party liability). Liability may attach when the third party is considered the cause of the suicide. *Id.* Liability may also attach when a “special relationship” exists. *Id.* at 132; see Williams, *supra* note 21 (noting liability arises from duty of care, breach, and resulting injury). Williams adds that the goal of tort law is to prevent unreasonable behavior. *Id.*

46. Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, *CHRON. OF HIGHER EDUC.*, Jun. 25, 2004, at 18 (commenting on inconsistent analysis in past suicide lawsuits). Franke hopes that the Shin litigation may provide some predictability because past cases have turned more on facts than legal principles. *Id.*

as to deprive the other of his normal opportunities for protection is under a similar duty to the other.”<sup>47</sup> The Restatement lists several relationships that automatically qualify for “special relationship” status, but the Restatement also notes that the list is not exclusive.<sup>48</sup> When a special relationship is established between the defendant and decedent, and the suicide is foreseeable, some courts are more willing to impose a duty to prevent the suicide, or at least to impose a duty to warn.<sup>49</sup>

*B. A Discussion of the Current Suicide Problem in the United States, Changing Attitudes, and the Need for a Legal Response*

The lack of a third-party duty to prevent a suicide was the extension of a common-law concept that there is no affirmative duty to rescue another from peril.<sup>50</sup> The law also treated suicide as a crime for which the perpetrator or perpetrator’s family deserved no compensation.<sup>51</sup> It is true that some individuals continue to view suicide in this fashion.<sup>52</sup> In many ways, however, societal attitudes toward suicide have changed from treating it as a crime to realizing it as the tragic effect of mental illness, and civil liability relating to suicide has changed accordingly.<sup>53</sup>

Much of this evolution may be a reaction to the growing problem of suicide among our nation’s college-age population.<sup>54</sup> Suicide has increased

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47. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

48. *Id.* (highlighting nonexclusive list of “special relationships”).

49. *See* Eisel v. Bd. of Educ., 597 A.2d 447 (Md. 1991) (distinguishing failure to communicate cases from negligence cases); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609-10 (W.D. Va. 2002) (holding duty to prevent suicide and breach of duty).

50. *See* Fossey & Zirkel, *supra* note 18, at 406 (explaining no duty to rescue someone in danger). The authors also mention that some courts considered suicide to be a criminal act, and non-criminal parties could not bear any responsibility. *Id.*

51. *See* Lake & Tribbensee, *supra* note 2, at 146 (indicating suicide victim traditionally considered wrongdoer so no compensation); *see also* Fossey & Zirkel, *supra* note 18, 406 (explaining non-criminal parties could bear no responsibility for criminal act).

52. *See* Jeremy Suttles, Letter to the Editor *The Legal Aftermath of a Student’s Suicide*, CHRON. OF HIGHER EDUC., Oct. 7, 2005, at 63 (opining greatest responsibility falls on individual who commits suicide). Suttles, an Area Coordinator of Residential Life at Kalamazoo College, sympathizes with parents who wish to blame authorities when their child commits suicide, but finds it unreasonable to think that administrators who are often unfamiliar with mental illness could have done anything. *Id.*; *see also* Joan Gandy, *College Students Are Not Children*, VANGUARD, Feb. 19, 2002, at 2 (stating college not daycare). The author states that tragedies on campuses should not threaten student privacy by leading to “tattle telling.” *Id.*

53. *See* Fossey & Zirkel, *supra* note 18, at 406 (noting shift in societal view toward suicide affects civil liability). In modern society, there is an increasing resistance to classifying suicide as a crime. *Id.* This change in criminal law has greatly affected the possibility of civil liability for another’s suicide. *Id.*

54. *See* Arenson, *supra* note 3, at 2 (acknowledging about 1,100 suicides per year among college students). There are about 7.5 suicides per 100,000 students. *Id.* In an attempt to reduce suicidal behavior, students are sometimes asked to fill out mental health questionnaires. *Id.* Duke University is asking members to be alert to changes in a student’s behavior that may signal a suicidal intent. *Id.* Columbia University, New York University, and Cornell University now place counselors in residence halls. *Id.*

dramatically in the United States during the past half century.<sup>55</sup> The suicide rate has tripled over the past thirty-five years, leading some commentators to describe it as an “epidemic.”<sup>56</sup> While suicide rates are still lower among the college population in comparison to individuals who are the same age but do not attend college, the numbers are increasing.<sup>57</sup>

Recently, some courts have held third parties liable for the suicide of another when a “special relationship” exists, reasoning that the third party has assumed responsibility for the decedent’s well being.<sup>58</sup> Initially, the courts limited their reasoning to therapeutic or custodial contexts such as hospitals and prisons, but later expanded it to educational settings.<sup>59</sup> The courts based this expansion on modern psychological theory, which favors the inclusion of family members when a student suffers from mental health problems.<sup>60</sup>

### C. Statutory Restrictions of FERPA and Resulting Complications

While many psychologists suggest that involving parents when students suffer from mental health issues may save lives, such a notion seems inapposite to the FERPA, otherwise known as the Buckley Amendment.<sup>61</sup> Congress enacted FERPA to protect the privacy of student education and conduct records.<sup>62</sup> The first section of the statute compels schools to allow students access to their own records.<sup>63</sup> The second section proscribes the release of

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55. See Fossey & Zirkel, *supra* note 18, at 403 (noting some commentators describe youth suicide as growing at “epidemic” pace). Fossey & Zirkel explain that the teen suicide rate has tripled over the past thirty-five years, and it is now the second leading cause of death among teenagers. *Id.*; see also Tavernise, *supra* note 15, at 31 (discussing suicides on college campuses). A study of college students on Big 10 campuses from 1980 to 1990 found the overall student suicide rate was 7.5 per 100,000, per year, about half the rate for non-students in the same age group. Tavernise, *supra* note 15, at 31; Williams, *supra* note 45, at 302 (asserting suicide rate in United States now exceeds homicide).

56. See Fossey & Zirkel, *supra* note 18, at 403 (explaining boys four times more likely to kill themselves than girls); see also McGinn & Depasquale, *supra* note 3, at 59 (highlighting more than 1000 college students commit suicide each year). Forty percent of college students reported feeling “so depressed, it was difficult to function.” *Id.*; see also Semuels, *supra* note 9, at 14 (acknowledging high number of suicide attempts).

57. See Arenson, *supra* note 3, at 2 (announcing suicide rate lower for college students than non-students in same age bracket).

58. See Fossey & Zirkel, *supra* note 18, at 406 (stating “special relationship” analysis generally limited to custodial context).

59. See Fossey & Zirkel, *supra* note 18, at 406 (describing cases where no duty imposed on college and church counselors).

60. See Lake & Tribbensee, *supra* note 2, at 150-51 (justifying involvement of family members when clinically determined to have impact).

61. Compare 28 U.S.C. § 1232g (2004) (restrict family involvement by limiting access to student’s records); with David Capuzzi & Golden, *supra* note 14, at 418 (discussing value of parental involvement).

62. See Daggett & Huefner, *supra* note 7, at 4 (providing overview of FERPA).

63. See Cara Runsick Mitchell, *Defanging the Paper Tiger: Why Gonzaga Did Not Adequately Address Judicial Construction of FERPA*, 37 GA. L. REV. 755, 757 (2003) (setting forth FERPA’s policy on personal access). The *Gonzaga* decision neglects to explain why a policy or practice is required, fails to address a FERPA weakness, and ignores an important circuit split. *Id.* at 757.

these records to third parties without the student's consent.<sup>64</sup> FERPA also restricts the disclosure of informal counseling sessions between a student and campus officials.<sup>65</sup> While the Supreme Court definitively stated in *Gonzaga v. Doe*<sup>66</sup> that FERPA's provisions do not create individual rights or remedies, FERPA conditions the receipt of federal funds upon strict compliance with its restrictions.<sup>67</sup>

Despite FERPA's message of strict compliance, the statute provides an express exception allowing for disclosure in a health or safety emergency.<sup>68</sup> A regulation accompanying the statute adds that the exception must be strictly construed.<sup>69</sup> Thus, it is extremely difficult for institutions to ascertain when they may or may not notify parents of children exhibiting suicidal behavior.<sup>70</sup> An institution's failure to notify when it probably should may lead to a wrongful death lawsuit if a suicide actually results.<sup>71</sup> Adopting a policy of parental notification, on the other hand, could potentially result in the loss of all federal funding.<sup>72</sup> As nearly all private institutions rely on federal funding in

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64. See *id.* at 756 (setting forth limits on third party access under FERPA). Mitchell outlined the facts of *Gonzaga*, in which a student at Gonzaga University complained that the university released records of misconduct without his consent. *Id.*

65. See 28 U.S.C. § 1232g (2004) (restricting education records); see also Tavernise, *supra* note 15, at 31 (noting lack of information available to parents). Tavernise discusses one parent's frustration at paying \$35,000 a year in tuition, and not receiving feedback on her child's mental health. *Id.* Congress passed FERPA to allow students to examine their records, but it also prohibits releasing information about students without permission. *Id.*; see also Richard Ecke, *Inquiring Parents Want to Know: Are Their Adult Children Safe?*, GREAT FALLS TRIB., Jan. 25, 2005, at 12H (indicating parent's frustration with inability to obtain information). A frustrated parent stated, "I can't get any information about my daughter at her school (Colorado State University). We're paying the tuition, and it's not like she wouldn't want us to have it." *Id.*

66. 563 U.S. 273 (2002).

67. *Gonzaga*, 563 U.S. at 279 (discussing how FERPA enacted under Spending Power and confers no individual rights); see also Clayborne S. Stone, Comment, *Drug Interdiction Efforts and the Rights of Bus Passengers* United States v. Drayton, 55 ARK. L. REV. 1313, 1317 (2003) (noting federal funds not available where school maintains policy in violation of FERPA). Under FERPA, the Secretary of Education is responsible for enforcing spending conditions. *Id.* The Secretary may only withhold funds only if the institution "is failing to comply substantially" and compliance cannot be attained. *Id.*

68. See 28 U.S.C. § 1232g (2004) (allowing exception to restrictions on disclosure); see also, Wood, *supra* note 26, (noting regulations keep information confidential). Wood asserts that although FERPA often allows for an exception, universities prefer to persuade students to tell their parents themselves. *Id.* Rebekah Lebwohl, age twenty, a senior at the University of Oregon stated, "[w]hen you intervene on someone who is suicidal, you can make a difference. We know that for a fact."

69. See 34 C.F.R. § 99.36(b) (1994) (asserting disclosure exception in case of emergency strictly construed).

70. See Semuels, *supra* note 9, at 14 (discussing how emergency determination difficult in gray areas). Some colleges inform parents if the child is debilitated or unable to make a sound health decision. *Id.* At Carnegie Mellon University, parents are informed if a student with anorexia is unable to keep him or herself healthy. *Id.* Similarly, the University would also inform the parents of a student who suffers a serious head injury and is unable to make medical decisions. *Id.*

71. See generally, Sontag, *supra* note 1, at 5 (discussing pending Shin lawsuit claiming failure to notify). In addition to the Shins' anger over a failure to notify, they also criticize the lack of coordinated mental health care. *Id.*

72. See Daggett & Huefner, *supra* note 7, at 11-12 (discussing discipline of schools for violating records laws); see also Mitchell, *supra* note 63, at 763-64 (stressing statute only provides for one remedy: complete

some manner, notification is a risk most schools are unwilling to take.<sup>73</sup> In fact, many school administrators acknowledge an even greater adherence to privacy within the last five years despite increasing mental health problems on campuses.<sup>74</sup>

#### D. A Survey of Case Law Addressing Third Party Duties for Suicide

##### I. A Duty to Prevent

In the *Schiesler v. Ferrum College*<sup>75</sup> case of 2002, a federal district court held that a college could possess a “special relationship” with a suicidal student when the suicide was foreseeable and there was an imminent probability of harm.<sup>76</sup> The court was careful to note that a “special relationship” does not exist inherently between a student and a college, but could arise under specific circumstances.<sup>77</sup> In *Schiesler*, Michael Frentzel was a student suffering from depression at Ferrum College.<sup>78</sup> He revealed to his girlfriend that he intended to hang himself, and she told the campus police who subsequently informed the Dean of Student Affairs.<sup>79</sup> The Dean required Frentzel to sign a statement indicating that he would not hurt himself.<sup>80</sup> A few days later, however,

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withdrawal of all federal funding).

73. See Daggett & Huefner, *supra* note 7, at 4-6 (discussing broad range of FERPA). The authors note that FERPA is Spending Clause legislation. *Id.* While no specific federal funding is tied to FERPA, it has exceedingly broad coverage. *Id.* If one department of an educational agency receives federal funding, the law applies to the entire agency. *Id.* See also Ethan M. Rosenzweig, Comment, *Please Don't Tell: The Question of Confidentiality in Student Discipline Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 453 (2002) (describing breadth of Department of Education budget). Because the Department's budget is approximately \$54 billion per year and touches on every level of education, practically all institutions abide by FERPA. *Id.*

74. See Rob McDonald, *Pellet Gun Incident Raises Privacy Issues; Schools Must Balance Parents' Right to Know with Students' Right to Privacy*, SPOKANE REV., Mar. 3, 2005, at B1 (suggesting greater emphasis on privacy because of legal liabilities). A school administrator explains that schools must be cautious about the information they release. *Id.*

75. 236 F. Supp. 2d 602 (W.D. Va. 2002).

76. *Id.* at 609 (holding special relationship exists because defendants knew of emotional problems). Unlike the *Jain* court, the *Schiesler* court did not base its decision on section 323 of the Restatement (Second) of Torts. *Id.* at 608 (noting Restatement argument abandoned at oral argument); see also, Jen McCaffery, *Ferrum College Admits Fault in Student Suicide*, ROANOKE TIMES & WORLD NEWS, July 25, 2003, at A1 (discussing prior incidents when police called to break up fights). The settlement in *Schiesler* may affect the pending Shin case. *Id.*

77. *Schiesler*, 236 F. Supp. 2d at 609 (holding Virginia imposes no special relationship as matter of law between colleges and their students). The court noted, however, the specific facts of a case could create a special relationship. *Id.* The court observed that school authorities required the student to sign a paper pledging he would not hurt himself, thus indicating they knew of his suicidal tendencies. *Id.*

78. *Id.* at 605 (discussing Frentzel's disciplinary issues during first semester).

79. *Id.* (discussing note to girlfriend in which student threatened suicide).

80. *Id.* at 609 (noting signing of statement as most important factor). The court explained that signing the paper provided the best indicator that Ferrum College was on notice of Frentzel's suicidal tendencies. *Id.*

Frentzel killed himself in his dormitory room.<sup>81</sup>

The court focused on notice, adding that Frentzel lived in an on-campus dormitory, and the defendants were well aware of his emotional problems.<sup>82</sup> The defendants previously required Frentzel to seek anger management counseling before permitting him to return to school, and most importantly once found him alone in his room with bruises on his head that he claimed were self-inflicted.<sup>83</sup> Importantly, the court found that a duty existed even though the college did not have control or custody of Frentzel.<sup>84</sup>

Other courts have said that a school's policies must be mandatory and specific in order for a duty to prevent to arise.<sup>85</sup> In *Scott v. Montgomery Board of Education*,<sup>86</sup> for example, the court refused to impose a duty where the school recognized the child's serious emotional problems, but did not provide adequate counseling or assistance.<sup>87</sup> In *Scott*, Aaron Scott struggled with behavioral problems beginning in the seventh grade.<sup>88</sup> For over a year, Aaron continued to struggle in school and cause disturbances by refusing to do his work and publicly threatening to kill himself.<sup>89</sup> A final incident occurred in 1994 when Aaron refused to do his work in class, and then assaulted his teacher.<sup>90</sup> The school suspended Aaron for the incident and sent him home, where he killed himself that evening.<sup>91</sup>

Aaron's mother filed an action claiming that her son should have received an earlier and more extensive psychiatric evaluation from the school.<sup>92</sup> The court did not consider the school's duty to protect Aaron, but instead focused its analysis on the lack of causation.<sup>93</sup> The court concluded the insufficient psychological counseling was not the proximate cause of Aaron's suicide.<sup>94</sup>

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81. Schiezler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (indicating defendants found Frentzel in his room after he hanged himself with his belt).

82. *Id.* at 609 (discussing prior problems with Frentzel).

83. *Id.* at 609 (describing administration as very aware of Frentzel's propensity to hurt himself).

84. *Id.* at 611 (considering defendants' lack of control argument). The court plainly states plainly that there was no need to establish facts indicating the college had taken sufficient control of Frentzel. *Id.*

85. *See Fosse & Zirkel, supra* note 18, at 421-22 (explaining courts examine local prevention policies before determining existence of duty).

86. *Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258, at \*17-\*18 (4th Cir. Aug. 12, 1997) (holding no duty to warn where no indication of immediate threat).

87. *Id.* (holding no duty to warn where no indication of immediate threat).

88. *See id.* at \*2 (discussing start of behavioral issues).

89. *See id.* at \*2-6 (outlining escalation of behavioral problems).

90. *See id.* at \*7 (detailing violent incident in math class).

91. *See Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258, at \*8 (4th Cir. Aug. 12, 1997) (summarizing suicide and mother's call to emergency personnel). After Ms. Scott came home for lunch and spoke with Aaron, she left Aaron alone with a warning not to leave the house. *Id.* Noticing the light on in Aaron's room after 10:00 that evening, she walked in and found Aaron had hanged himself with a cord. *Id.*

92. *See id.* at \*9 (outlining Ms. Scott's complaint after son's suicide).

93. *See id.* at \*14-\*17 (stating unclear if further counseling would reduce stressors).

94. *See id.* at 18 (concluding mere failure to adequately provide education will not support award of damages).

The preceding cases indicate an ambiguity in the common law with regard to whether there is ever a third-party duty to prevent a suicide.<sup>95</sup> Some courts refuse to consider a duty to prevent if the alleged action or omission was not the proximate cause of the suicide, yet other courts are perfectly comfortable imposing a general duty to prevent.<sup>96</sup> As to whether there is at least a duty to notify parents when students express suicidal tendencies, the common law is equally imprecise.<sup>97</sup>

## 2. A Lesser Duty of Notification

In *Tarasoff v. Regents*,<sup>98</sup> the California Supreme Court determined that a psychotherapist had a duty to warn a foreseeable and identifiable victim, and to protect third parties from a patient's foreseeable dangerous tendencies.<sup>99</sup> The California Supreme Court, however, later refused to extend this duty to share information in suicide cases.<sup>100</sup> In *Nally v. Grace Community Church*,<sup>101</sup> the California Supreme Court distinguished danger to others from danger to oneself.<sup>102</sup> The court specifically stated that *Tarasoff* did not require disclosure where the presented danger was that of self-inflicted harm.<sup>103</sup> The court further distinguished *Nally* from *Tarasoff* explaining that in *Nally* the defendant was a clergy member, and not a therapist.<sup>104</sup> The court warned that extending liability to voluntary, non-custodial relationships would create a dangerous precedent.<sup>105</sup>

In *Eisel v. Board of Education*, however, the court recognized the existence

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95. See generally *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602; *Scott v. Montgomery Bd. of Educ.*, No. 96-2455, 1997 U.S. App. Lexis 21258 (4th Cir. Aug. 12, 1997).

96. See generally *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (imposing duty to prevent); *Scott*, 1997 U.S. App. Lexis 21258 (not imposing duty to prevent).

97. Compare *Jain v. Iowa*, 617 N.W.2d 293, 300 (Iowa 2000) (holding no duty to warn), with *Eisel v. Bd. of Educ.*, 597 A.2d 447, 456 (1991) (holding duty to notify).

98. 551 P.2d 334 (Cal. 1976).

99. *Id.* at 345-46 (holding duty where psychiatrist able to predict dangerous outcome). The court conceded that it is difficult for a therapist to forecast danger, and therefore only the exercise of reasonable skill, knowledge, and care is required. *Id.*

100. *Nally v. Grace Cmty. Church*, 763 P.2d 948, 960-61 (Cal. 1988) (noting disclosure not required where harm self-inflicted). The court specifically noted that *Tarasoff* did not require such disclosure where the presented harm was suicide. *Id.* at 958. The court also distinguished prior suicide cases concluding they created no duty to notify, but instead recognized a cause of action for professional malpractice. *Id.*

101. 763 P.2d 948 (Cal. 1988).

102. *Id.* at 958 (noting *Tarasoff* still recognized importance of confidential relationship). The court clarified that it is only willing to infringe on a confidential relationship when there is a serious threat of danger to a third party. *Id.*

103. *Id.* (indicating prior cases created no duty to prevent suicide but rather rested upon professional malpractice). The court noted that the prior professional malpractice cases actually militated against finding a duty to prevent on the facts of the case. *Id.*

104. *Id.* at 959-60 (deferring to public policy goal of encouraging "good samaritans"). The court acknowledged greater liability may dissuade citizens from offering assistance. *Id.* Additionally, the court indicated that it would be difficult to determine the application of these new duties. *Id.*

105. *Id.* at 960 (noting extending liability to such relationships is contrary to legislative intent). The court indicated that imposing a duty on pastoral counselors could be unconstitutional. *Id.*

of a “special relationship” in a school setting. This *Eisel* court imposed a duty of notification on educators that was formerly required only of mental health professionals in non-self-harm cases.<sup>106</sup> The decedent in *Eisel* threatened suicide in front of her classmates who then relayed that information to school counselors.<sup>107</sup> As their theory of negligence, the plaintiffs relied on the school’s failure to communicate information concerning the child’s suicidal thoughts rather than the school’s failure to prevent the suicide.<sup>108</sup> Noting that a special relationship does not exist between students and school administrators per se, the court asserted that certain factual circumstances could create a special relationship even in an educational environment.<sup>109</sup>

Identifying foreseeability as the “most important variable in the duty calculus,” the *Eisel* court noted that, in this particular case, the suicide was foreseeable because the defendants possessed direct evidence of the decedent’s intent.<sup>110</sup> The court also explained that a duty attached because the risk was severe (the death of a child) while the school counselor’s burden (parental notification) was minor.<sup>111</sup> The court concluded that a simple telephone call would have discharged the duty and prevented negligence liability.<sup>112</sup>

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106. 597 A.2d 447 (Md. 1991); see also Fossey & Zirkel, *supra* note 18, at 407-10 (pointing to *Eisel* court’s inclusion of educators in special-relationship exception). While the American teen suicide rate rose steadily from the 1960s to the 1990s, no court prior to *Eisel* ever held a school district liable for a student’s suicide. *Id.*

107. See Fossey & Zirkel, *supra* note 18 at 407-08 (noting decedent informed several friends and fellow students of intention to kill herself). The *Eisel* court observed that some of the student’s friends reported her intentions to school counselors. *Id.* at 407-09. The court also recognized the school board’s own policy that required counselors to notify parents of their child’s suicidal tendencies. *Id.* at 450. After the lower court ruled that no duty existed, Maryland’s highest court reversed. *Eisel*, 597 A.2d at 456; see also *id.* (discussing knowledge of counselors). The author asserts that the level of foreseeability is extremely important in this analysis. *Id.* at 408.

108. *Eisel v. Bd. of Educ.*, 597 A.2d 447, 455 (Md. 1991) (explaining telephone call to parents would discharge duty entirely). The court described the burden on the school counselors as slight. *Id.* In addition, the court strongly rejected the counselor’s claim that confidentiality should prevent the imposition of a duty, stating that where the school policy disavows confidentiality, it cannot be a defense. *Id.* The court also considered moral blame as a factor. *Id.*

109. *Id.* at 454 (noting counselors failing to intervene not negligent). The court noted that negligence liability does not automatically attach when a counselor fails to intervene in a potential suicide, but that counselors may still be held to a reasonable duty of care to prevent suicides. *Id.*; see also Fossey & Zirkel, *supra* note 18, at 410 (arguing imposition of duty would not adversely impact schools).

110. *Eisel*, 597 A.2d at 452 (declaring foreseeability most important factor). The court noted that without foreseeability there can be no duty to prevent suicide, and that *Eisel*’s suicide was foreseeable because defendants possessed direct evidence of her intent. *Id.* The court also added that the prevention of youth suicide is an important public policy. *Id.* at 453-54. The opinion also noted that the legislature did not intend a statutorily based cause of action against school counselors who negligently fail to intervene in a potential suicide. *Id.* at 454. The decision held, however, that it could hold counselors to a common-law duty of reasonable care in preventing suicides when they have clear evidence of suicidal intent. *Id.*

111. *Eisel*, 597 A.2d at 455 (declaring physical burden of informing parents minor).

112. *Id.* (holding communication required and confidentiality not breached). The school counselors argued that notifying the parents would infringe upon the confidential relationship between counselors and students. *Id.* The court rejected this argument, and stated that discretion is not boundless, nor does it create absolute immunity. *Id.* See generally, Cristi Hegranes, *Walking the Edge*, VILLAGE VOICE, Sept. 28, 2004, at 34

While *Eisel* appeared to mark a crucial shift towards more extensive third-party liability for administrators failing to notify parents, cases following *Eisel* did not adopt similar holdings.<sup>113</sup> A recent Iowa Supreme Court case concluded there was no duty to notify where a college possessed substantial notice of a student's suicidal intent.<sup>114</sup> In *Jain v. Iowa*,<sup>115</sup> Sanjay Jain was involved in fight with his girlfriend, and indicated to his resident assistants that he was going to end his own life.<sup>116</sup> Despite a policy that would allow for the notification of parents in the case of a suicide attempt, the resident assistant and other counselors did not do so, and instead only encouraged Sanjay to seek additional counseling.<sup>117</sup> Sanjay later killed himself in his dormitory room by inhaling the exhaust from his running moped.<sup>118</sup> The court concluded, despite the lack of notification, that no affirmative act by the University employees increased the risk of self harm.<sup>119</sup> The court also ruled that the residents and staff acted with reasonable care in attempting to manage the situation.<sup>120</sup> Because the university neither assumed a duty to protect the student nor increased his risk of injury, the court deemed the third parties bystanders, and stated that no special relationship existed.<sup>121</sup> Noting that no affirmative duty to act exists absent a special relationship or other special circumstances, the court found in favor of the University.<sup>122</sup>

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(discussing New York University's walking fine line between civil rights and safety promotion). The article quotes author Kay Redfield Jamison as stating, "[t]here will always be ethical, legal, and civil rights concerns. But there are also concerns about doing nothing." *Id.*

113. See *Nalepa v. Plymouth-Canton Cmty. Sch. Dist.*, 525 N.W.2d 897, 904 (Mich. Ct. App. 1994) (dismissing suit because no recognition of educational malpractice); *Killen v. Fabish*, 547 N.W.2d 113, 117 (Minn. Ct. App. 1996) (upholding dismissal of claims based on governmental immunity); see also *Fossey & Zirkel*, *supra* note 18, at 411 (noting pertinent decisions not relying on *Eisel*). *Eisel* left many open questions, including what constituted "reasonable means" by school counselors. *Fossey & Zirkel*, *supra* note 18, at 410. The authors suggest that confusion over *Eisel* may have contributed to its lack of influence. *Id.* But see *Killen v. Fabish*, 547 N.W.2d 113, 117 (Minn. Ct. App. 1996) (Mansur, J., concurring in part and dissenting in part) (contending school district owed duty to notify).

114. *Jain v. Iowa*, 617 N.W.2d 293, 300 (Iowa 2000) (finding no third-party duty to prevent student's suicide).

115. *Id.*

116. *Id.* at 295 (explaining Sanjay admitted suicidal intention to counselors during interview).

117. *Id.* at 295-298 (discussing how resident assistants urged seeking help at university counseling center). One of the resident assistants also gave Sanjay her phone number, instructing him to contact her if he thought he was going to hurt himself. *Id.* at 295.

118. *Jain*, 617 N.W.2d at 299 (noting Jain pronounced dead from self-inflicted carbon monoxide poisoning).

119. *Jain*, 617 N.W.2d at 299 (noting resident assistants offered encouragement). The counselors encouraged Sanjay to talk things over with his parents, and to seek professional help. *Id.* One of the counselors did seek permission to contact Sanjay's parents, but he refused. *Id.*

120. *Id.* (holding no increase in risk).

121. *Jain v. Iowa*, 617 N.W. 2d 293, 299; see also *Lake & Tribbensee*, *supra* note 2, at 141 (noting lack of emphasis on school's unwritten policy). The authors argue that the *Jain* court could have imposed a duty, but determined that it was not breached because the University used reasonable care. *Id.* at 142.

122. *Id.* at 300 (affirming district court's summary judgment). The Iowa court noted that the state's traditionally recognized rule was that the act of suicide was a deliberate and intentional act that generally

In *Wyke v. Polk County School Board*,<sup>123</sup> however, where the school administrators had considerable notice of the decedent's suicidal tendencies, the court imposed a duty on the university to warn parents that their child was suicidal.<sup>124</sup> In *Wyke*, the student attempted suicide twice at school before finally killing himself at his home.<sup>125</sup> As in *Eisel*, however, the court refused to find a per se special relationship between school administrators and students because of the absence of a custodial relationship, but held that a special relationship could exist under certain specific circumstances.<sup>126</sup> The *Wyke* court also mirrored the *Eisel* reasoning by weighing the burden and benefit, specifically stating that "[t]he risk of a child's death substantively outweighs the burden of making a phone call."<sup>127</sup> Thus, the court concluded that liability could attach to the school because it could derive a duty to warn from a "special relationship" in these extraordinary circumstances.<sup>128</sup>

As illustrated in the preceding cases, whether there is a duty on the part of a school to prevent a student's suicide or notify parents of a risk is unclear.<sup>129</sup> It is unlikely that schools are even aware of the recent duty-related law decisions in their respective jurisdictions, and thus they simply look to FERPA for guidance.<sup>130</sup> Unfortunately, FERPA provides little insight regarding when

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precludes a third party's responsibility. *Id.*

123. 129 F.3d 560 (11th Cir. 1997) (holding duty to notify parents of child's suicidal behavior).

124. *See id.* at 564 (noting prior suicide attempts by same student on school grounds). The evidence of notice in *Wyke* was very strong because the student attempted on two previous occasions to kill himself in the school's restroom. *Id.* The court strictly limited the holding to situations where suicide is actually attempted on school premises. *Id.* at 571.

125. *Wyke*, 129 F.3d at 563 (explaining history behind circumstances of student's suicide).

126. *Id.* at 574 (contending duty arises when "person of ordinary prudence" would recognize troubled emotional state). The court noted that while foreseeing suicide may be difficult, it could expect a person of ordinary prudence to recognize a problem when a student previously attempted suicide on school grounds. *Id.* at 574. The court concluded that if a "person of ordinary prudence" would have a duty to notify one's parents, the school should be held to the same standard. *Id.* Additionally, the court declared that a school's failure to discharge those obligations would result in liability for reasonably foreseeable injuries. *Id.* *But see* *Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258, at \*18 (4th cir. Aug. 12, 1997) (holding no duty to warn where no indication of immediate threat). The court also heavily focused its analysis on the lack of causation, stating that the Board's failure to obtain psychological counseling may have only been a contributory factor. *Scott*, 1997 U.S. App. LEXIS 21258, at \*16.

127. *Wyke*, 129 F.3d at 574 (stating notification of parents necessary in this instance). The court reasoned that the statutory provisions, along with the regulatory guidelines, served as evidence that schools must notify parents of emergency health problems that arise at school. *Id.* at 574.

128. *Id.* at 574-75 (noting schools not normally held responsible for suicide). The court noted that generally a school cannot be held liable for a death absent a custodial relationship. *Id.* The court also explained that the policy behind this rule was that suicide usually constitutes an independent, intervening cause, that is not ordinarily foreseeable. *Id.* at 574. Under these particular circumstances, however, the court found it possible for the jury to conclude the suicide was foreseeable. *Id.* The court noted that no set of facts would provide more reason to anticipate suicide than two previous attempts. *Id.* at 575.

129. *See generally* *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997); *Scott*, 1997 U.S. App. Lexis 21258; *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D.V.A. 2002); *Jain v. Iowa*, 617 N.W.2d 293 (Iowa 2000); *Eisel v. Bd. of Educ.*, 597 A.2d 447 (Md. 1991).

130. *See* *Daggett & Huefner*, supra note 7, at 4 (discussing broad range of FERPA's coverage).

parental notification can occur, and never requires it.<sup>131</sup> As a result, many educators are unaware that certain circumstances allow for parental notification.<sup>132</sup>

*E. An Increasing Trend: Suicide-Related Wrongful Death Lawsuits*

As recently as five years ago, university lawyers privately would discuss perhaps one or two pending suicides.<sup>133</sup> In 2004, however, there were roughly ten suicide cases pending nationwide.<sup>134</sup> The potential for institutional liability is larger than it has ever been before.<sup>135</sup> When a suicide occurs, the most common claims are that the institution put the student in harm's way, that the institution negligently created unreasonable access to the means of suicide, that the institution failed to recognize suicide warning signs, and that the institution failed to respond appropriately to warning signs.<sup>136</sup> With regard to the last claim of inadequate responses to warning signs, family members will often argue that the institution should have notified them of their child's mental health issues.<sup>137</sup> School administrators, on the other hand, will argue vigorously that FERPA inhibits them from picking up the phone to notify parents.<sup>138</sup> Some scholars contend that in deciding whether to notify parents, schools essentially are choosing between defending a privacy lawsuit or a wrongful death lawsuit.<sup>139</sup> Generating agreement, however, is that these are terrible lawsuits that "exacerbate grief, guilt, and blame on all sides."<sup>140</sup> Recently, a judge in the Shin case dismissed the claims against M.I.T. as an institution, but concluded that Shin's parents presented sufficient evidence to

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Any educational agency, public or private, K-12 or postsecondary, that (1) (a) provides education services or instruction, or (b) is authorized to direct and control public K-12 or postsecondary educational institutions, and 2) receives federal education funds (including federally guaranteed student loans) is subject to FERPA. If one part of an education agency receives funds, FERPA applies to the entire agency.

*Id.* at 6.

131. See 20 U.S.C. § 1232g(l) (2004); see also *Jain*, 617 N.W.2d at 298 (Iowa 2000) (indicating notice provision is discretionary and creates no violation).

132. See *Lipka*, *supra* note 5, at 26 (explaining administrators let misguided fears over privacy hinder safety protection).

133. See *Franke*, *supra* note 46, at 18 (noting growth of suicide related lawsuits).

134. *Id.* (explaining pending litigation).

135. *Id.* (noting current waive of litigation).

136. See *Franke*, *supra* note 46, at 18 (detailing four most common suicide lawsuits).

137. *Id.* (discussing lawsuits stemming from failure to warn).

138. *Id.* (explaining administrators' defenses in failure to warn cases).

139. *Id.* (noting schools must decide which lawsuit they would rather defend). The author opines that a privacy lawsuit over is preferable to a suicide-related lawsuit. *Id.* The author, however, also notes the unanticipated difficulties that can come with notification such as informing parents who do not speak English. *Id.*

140. See *Franke*, *supra* note 46, at 18 (discussing difficulty of defending wrongful death lawsuit over number of years); see also *Arenson*, *supra* note 3 (noting severity of wrongful death claims from financial and reputation standpoint).

continue a negligence lawsuit against two administrators and four medical employees.<sup>141</sup> Many commentators consider this ruling an indication that the legal responsibilities of colleges in student suicide cases could expand.<sup>142</sup>

### III. ANALYSIS

#### *A. The Traditional Reasons for Not Imposing a Duty to Prevent Do Not Apply to a Duty of Notification*

Both within and beyond the educational context, the common law has failed to recognize a third-party duty to prevent a suicide because:

(1) the suicide victim was a wrongdoer entitled to no relief in the court system for himself or on behalf of his relatives, (2) suicide is extremely difficult to prevent and therefore liability should be limited, (3) responsibility to prevent suicide entails an affirmative duty, for which the common law traditionally applies significant limitations, and (4) the issue of foreseeability is prominent in suicide cases and only individuals with training and special knowledge are in a position to foresee and address suicide risk.<sup>143</sup>

While the law has shifted away from treating suicide as a criminal act, the remaining policy reasons for not imposing a duty to prevent are still largely applicable today.<sup>144</sup> These policy reasons, however, are completely inapplicable when considering the lesser duty to notify.<sup>145</sup> Admittedly, imposing a duty on colleges and universities to prevent a suicide from occurring would be extremely onerous as institutions would be required to take physical control of students in order to prevent any self-inflicted harm.<sup>146</sup> A school cannot watch and guard a student at all times in a college environment,

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141. Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, CHRON. OF HIGHER EDUC., Aug 12, 2005, at 1 (detailing status of Shin case). The article mentioned that the "imminent probability" of suicide was a key factor in the judge's decision. *Id.*

142. *Id.* (contending decision could increase university liability). Sheldon Steinbach, vice president and general counsel at the American Council on Education stated that the decision "increases the scope of liability, the expansion of the blame game, and the potential for suits solely designed for settlement." *Id.* *But see id.* (noting some think decision will not cause new headaches for college officials). David A. DeLuca, the lawyer representing the Shins, argued that this decision did not create an absolute duty to ensure the safety of all students under all circumstances. *Id.* DeLuca was careful to add that a case in which a student kills herself without alerting anyone about her immediate intentions would differ from a case where a student notifies others of her plans. *Id.*

143. See Lake & Tribbensee, *supra* note 2, at 146 (outlining common policy reasons for lack of third party liability for suicide).

144. See Lake & Tribbensee, *supra* note 2, at 146 and accompanying text (delineating policy concerns and explaining how burden of prevention remains extremely high).

145. See Lake & Tribbensee, *supra* note 2, at 142 (contending duty of notification less demanding than duty to prevent).

146. See Lake & Tribbensee, *supra* note 2, at 137 (citing control of student as means of prevention).

even if the student is experiencing mental health problems.<sup>147</sup> Compliance with a duty to notify would be substantially less burdensome for colleges.<sup>148</sup>

In light of this lesser burden, Congress should amend FERPA to specifically impose a duty to notify parents of their child's suicidal thoughts.<sup>149</sup> The ultimate goal of notification, would be to prevent suicide, but a school would not be held liable where notification of parents was unsuccessful in thwarting the actual suicide attempt.<sup>150</sup>

*B. Suicide is an Increasing Problem on College Campuses And Needs to be Addressed By Encouraging Family Involvement*

There is a need for Congress to respond to the growing problem of suicide on our college campuses.<sup>151</sup> Recent mental health theory demonstrates that involving parents and loved ones may be an important factor in lowering the risk of self-inflicted harm.<sup>152</sup> While family problems may sometimes contribute to a student's mental health issues, most psychologists agree that notification is generally helpful in the healing process.<sup>153</sup> Some psychologists go so far as to suggest that a parent must acknowledge the problem before the student can take ownership of his or her issues.<sup>154</sup> Thus, family involvement, resulting from notification will likely lead to fewer suicides on our nation's college campuses.<sup>155</sup>

*C. Congress Must Amend FERPA to Lessen the Pervasive and Sometimes Unfounded Fear of Losing Federal Funding*

Without legislators imposing a duty of notification in FERPA, many institutions are hesitant to provide parents with information about a student's

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147. See *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002)(conceding colleges not *in loco parentis* and not insurers of student health).

148. See Lake & Tribbenese, *supra* note 2, at 147 (opining duty to notify much lower cost alternative than prevention). While a school does not have custodial control over students, schools do have unique relationships with students that mandate guidance through difficult times. *Id.*

149. See *supra* note 72 and accompanying text (discussing provisions of FERPA).

150. See Lake & Tribbenese, *supra* note 2, at 142 (explaining ease of discharging duty of notification).

151. See *supra* note 54 and accompanying text (discussing increasing suicide problem in United States).

152. See Semuels, *supra* note 9 at 14 (noting experts favor parent-child communication). The article quotes Peg Spear, director of Penn State University Health Services explaining that residence halls are not "like having a mom and dad." Spear added that parents should continue to communicate with their kids when they go to college, and should try to help them if a problem arises. *Id.*

153. See CAPUZZI & GOLDEN, *supra* note 14, at 418 (characterizing importance of family involvement in healing process).

154. See CAPUZZI & GOLDEN, *supra* note 14, at 419 (stating parental acknowledgment of problem key despite initial denial).

155. See Lake & Tribbenese, *supra* note 2, at 137 (characterizing notification as another method to prevent suicide). The authors point out that other individuals may be able to act on the information for the benefit of the individual in trouble. *Id.*

mental health difficulties even where it may be permissible to do so.<sup>156</sup> Disclosing information regarding counseling sessions blatantly violates FERPA.<sup>157</sup> As the law stands presently, however, the FERPA exception allowing for disclosure in emergencies is extremely ambiguous, and discourages notification even in dangerous and appropriate instances.<sup>158</sup> Additionally, FERPA is only permissive, and thus, there is no statutory obligation to notify based upon FERPA or any other federal law.<sup>159</sup>

While some courts have imposed a duty where the facts indicate significant notice of suicidal behavior, other courts are still reluctant to require such a duty.<sup>160</sup> Thus, because there is no statutory notification requirement, and a lack of consensus among the courts, there is little incentive for schools to notify parents and risk a potential FERPA lawsuit.<sup>161</sup> Requiring parental notification through FERPA would be successful because institutions would comply to avoid administrative fines, and also because neglecting to follow a federal statute would be incredibly damaging in a subsequent wrongful death lawsuit.<sup>162</sup> Equally dangerous as not informing is the recent trend where schools respond to suicidal threats by immediately dismissing students from campus in order to excuse themselves of any responsibility.<sup>163</sup>

*D. Present Case Law Sends a Confusing Message to Schools: There Is a Need for Uniformity and Clarity Through FERPA*

The *Eisel v. Board of Education* and *Schieszler v. Ferrum College* courts have imposed a duty to notify in an educational setting.<sup>164</sup> Unfortunately, the

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156. See Wood, *supra* note 26, at B9 (discussing FERPA restrictions on disclosure of information). Federal law requires universities to keep most student information confidential, and thus universities often prefer to encourage students to tell their families about their problems rather than relying on campus officials. *Id.*

157. See 20 U.S.C. § 1232g(6)(b)(1) (2004) (prohibiting release of personally identifiable information not in directory). See generally Semuels, *supra* note 9 (expressing concern about excessive notification). One administrator worries that because of the increased number of wrongful death lawsuits, there will be excessive notification which could absolve colleges of responsibility, and discourage students from seeking counseling. Semuels, *supra* note 9, at 14.

158. See 28 U.S.C. § 1232g (2004).

159. *Id.*; see also Jain v. Iowa, 671 N.W.2d 293, 298 (Iowa 2000) (holding permissive exception creates no duty of parental disclosure).

160. See Jain, 671 N.W.2d at 298 (holding no duty where student previously threatened suicide).

161. See Stern, *supra* note 4 (discussing position of M.I.T. on Shin matter). Stern observes that the Shin family argues that the school had a duty to notify, but the school asserts that it is absolutely prohibited from notification. *Id.*

162. See Stern, *supra* note 4 (observing duty necessary to prevail in wrongful death case). The author quotes a Boston Globe article asserting that without an established duty to act, it is difficult for parents to successfully litigate campus suicides. *Id.*

163. See *Bombardieri*, *supra* note 13, at B1 (articulating recent trend of forcing students to take medical leave when depression occurs).

164. See *supra* notes 76-81 and accompanying text (discussing Schieszler holding); *supra* note 110 and accompanying text (discussing Eisel holding).

*Jain v. Iowa* court hindered a small state court movement for broader third party suicide liability.<sup>165</sup> The *Jain* decision, however, did not earnestly attempt to distinguish between a duty to notify and the more burdensome duty to prevent.<sup>166</sup> Where courts have actually considered notification as a separate duty, they have been more eager to impose it.<sup>167</sup>

While courts are still reluctant to conclude that a per se special relationship resulting in a duty to warn exists between a school and student, they are more willing to consider the factual circumstances of each case.<sup>168</sup> Some courts have imposed a duty to warn based upon the theory of a special relationship where the school had substantial notice of an imminent threat of self-inflicted harm.<sup>169</sup> This is, however, a worrisome trend, because courts are now more likely to impose a duty where a school has instituted some type of mandatory prevention policy that detects these mental health issues.<sup>170</sup> Some courts even have established that a school's policies must be mandatory and specific to give rise to a duty to warn.<sup>171</sup>

In *Scott v. Montgomery Board of Education* for example, the court refused to impose a duty where the school recognized the child's serious emotional problems, but did not provide adequate counseling or assistance.<sup>172</sup> In *Wyke v. Polk County School Board*, however, the Eleventh Circuit Court of Appeals found liability where the school actually made an effort to reach out to the student, but failed to notify his parents.<sup>173</sup> Thus, as the law stands presently, the more involved a school becomes, the greater chance some duty will be imposed, and liability established.<sup>174</sup> Such decisions encourage schools to remain uninvolved and subsequently rely on a doctrine of privacy to insulate

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165. See *supra* notes 115-122 and accompanying text (discussing *Jain* holding and implications for third party liability). Although state court rulings are not binding on judges in other states, jurists often look to them for guidance especially if the ruling comes from an appellate court. See Bombardieri, *supra* note 13.

166. See Lake & Tribbensee, *supra* note 2, at 142 (noting *Jain* may come under attack). Lake & Tribbensee argue that the *Eisel* court applied the proper analysis in holding a middle-school counselor responsible for failing to notify the parents of a student's suicide threats. *Id.* They contend that the court did not find the school liable because of a custodial relationship, but rather because middle-school counselors' failure to provide notification. *Id.* at 143.

167. See *Eisel v. Bd. of Educ.*, 597 A.2d 447, 451 (distinguishing case from others because negligence of failure to notify).

168. See generally Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002); *Eisel v. Bd. of Educ.*, 597 A.2d 447 (Md. 1991).

169. See *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 571 (holding school liable when school knows of prior attempt(s)). See generally Schieszler, 236 F. Supp. 2d 602; *Eisel*, 597 A.2d 447 (Md. 1991).

170. See Fossey & Zirkel, *supra* note 18, at 421-23 (explaining mandatory and specific policies now give rise to duty to warn).

171. See Fossey & Zirkel, *supra* note 18, at 422 (maintaining courts examine local prevention policies before determining existence of duty).

172. See *Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258, at \*18 (4th cir. Aug. 12, 1997) (holding no duty to warn where no indication of immediate threat).

173. *Wyke*, 129 F.3d at 564-71 (applying duty to notify where school aware of prior attempts).

174. Compare *Wyke*, 129 F.3d at 571 (holding duty to notify); with *Scott*, 1997 U.S. App. LEXIS 21258, at \*18 (refusing to consider duty to warn where no indication of immediate threat).

themselves from wrongful death litigation.<sup>175</sup>

By establishing a comprehensive duty to warn in FERPA in emergency situations, FERPA will require schools to reach out to students in jeopardy.<sup>176</sup> Some schools may still wish not to become involved, and will attempt to avoid possessing the requisite notice that gives rise to a duty to notify.<sup>177</sup> Thus, an absolute duty to warn parents in foreseeable circumstances must be coupled with a requirement that colleges institute a program to manage mental health issues that facilitates the discovery of these emergency situations when they arise.<sup>178</sup>

The imposition of a FERPA-mandatory duty to notify in emergencies would place schools in the challenging position of determining when a student's mental health problems actually constitute an emergency.<sup>179</sup> To simplify this task, Congress must provide an additional provision clearly defining what constitutes an emergency.<sup>180</sup> The present murky definition emergency leaves too much room for guesswork and unfairly asks institutions to risk breaking the law if they wish to reach out to a student in need of mental health assistance.<sup>181</sup>

Advancements in mental health facilitate determining when a student's situation reaches an emergency level.<sup>182</sup> Establishing comprehensive guidelines that define emergency, and compelling disclosure in such situations will decrease litigation because schools will have a better understanding of their obligations.<sup>183</sup>

*E. Clear Guidelines for Educational Institutions Will Help Schools Make Better Decisions and Decrease Litigation*

The various cases discussed in this Note, including the recent ruling in the Shin case, continue to confuse schools as to what action they should take when

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175. Compare Wyke, 129 F.3d at 571 (holding duty to notify) with Scott, 1997 U.S. App. LEXIS 21258, at \*18 (refusing to even consider duty because no immediate threat).

176. See Daggett & Huefner, *supra* note 7, at 4 (explaining importance of compliance with FERPA to receive federal funds).

177. See generally Scott, 1997 U.S. App. LEXIS 21258, at \*18 (holding no duty to warn where no indication of immediate threat).

178. See Scott v. Montgomery County Bd. Of Educ., No. 96-2455, 1997 U.S. App. Lexis 21258, at \*18 (4th Cir. Aug. 12, 1997) (holding no duty because no immediate threat).

179. See Sontag, *supra* note 1, at 57 (quoting President of University of Pennsylvania, Judith Rodin). Rodin opined that risking a violation of the law is often necessary in order to provide social and psychological support. *Id.*

180. See Semuels, *supra* note 9, at 14 (suggesting definition of emergency may differ depending upon perspective). Neither the educational system nor the legal system have provided a definition of what an emergency is. *Id.*

181. See Sontag, *supra* note 1 (stressing schools must often risk a FERPA violation in to help a student).

182. See Lake & Tribbensee, *supra* note 2, at 148-49 (maintaining mental health problems more detectable than in past). Modern research has improved dramatically in identifying factors that are indicative of suicide. *Id.* see also Poland, *supra* note 43, at 68-72 (explaining how school staff can look for warning signs).

183. See Semuels, *supra* note 9, at 14 (discussing gray area and confusion over emergency provision); see also *id.* (stressing slew of lawsuits could lead to notification in inappropriate instances).

a student expresses suicidal tendencies.<sup>184</sup> This is perhaps the worst of all possible results because the problem of suicide remains unaddressed, and universities fear litigation regardless of which action they choose to take.<sup>185</sup> Psychologists, on the other hand, suggest that every college should have clear and consistent policies and procedures for dealing with students living on campus.<sup>186</sup>

The current FERPA exception allowing for disclosure in emergencies is essentially useless without an unambiguous definition of what constitutes an emergency.<sup>187</sup> The present legal uncertainty is causing furor among college officials.<sup>188</sup> Colleges have an interest in decreasing the number of wrongful death lawsuits, and often resort to extreme measures in order to avoid these cases.<sup>189</sup> As a result, instead of notifying parents and trying to assist students, there is now an increasing trend among colleges to force students to take a medical leave at the first sign of depression to avoid any liability.<sup>190</sup>

#### IV. CONCLUSION

The original intention of FERPA was to assist students in retrieving their education and conduct records, and to maintain a level of privacy over those records. The present discretionary exception allowing for the notification of parents in emergency situations, however, obviously indicates that Congress believed privacy concerns should not always trump safety. As FERPA is presently written, it deters colleges from ever notifying a child's parents because of harsh economic penalties. The present FERPA law, therefore, which is designed to assist students, actually places the most troubled students in further jeopardy.

Congress should amend FERPA in three ways. First, it should force colleges to establish campus programs to deal with mental health issues thus preventing colleges from claiming a lack of notice where students try to seek help. Secondly, FERPA should specifically define what constitutes an

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184. See *infra* Parts II.D-E (discussing recent case law and confusing message from courts to institutions).

185. See *infra* Part II.E (discussing how either decision can result in some form of litigation).

186. See Doyle, *supra* note 9 (explaining clear guidelines should be established).

187. See *Semuels*, *supra* note 9, at 14 (explaining ambiguity of FERPA exception). The definition of an emergency might be vastly different to a worried parent versus a busy college health center. *Id.* Colleges can share medical records when a student consents. *Id.*

188. *Bombardieri*, *supra* note 13, at B1 (explaining reasons for discontent among college officials). *Bombardieri* also quoted Gary Pavela, director of judicial programs at the University of Maryland College Park as calling the *Shin* decision "new ground." *Id.* Pavela also cautioned universities not to panic, stating that forcing students off campus could lead to further legal and ethical difficulties. *Id.*

189. See *Arenson*, *supra* note 3, at 2 (contending lawsuits hurt schools financially and emotionally). *Arenson* also argues that suicide litigation can be very damaging to a school's reputation. *Id.*

190. See *Arenson*, *supra* note 3, at 2 (stating new trend to send suicidal students off campus). Such an approach is also problematic because the Americans with Disabilities Act protects the rights of students with mental health problems. *Id.*

emergency situation so that colleges will not have to worry about making the wrong choice, and losing federal funding if they erroneously notify parents. Experienced psychologists and psychiatrists should carefully develop this definition, but it would seem that a prior suicide attempt, at a minimum, would qualify as an emergency situation. Finally, Congress should amend FERPA to impose a duty of notification when a student's mental health problems reach this newly defined emergency level, enabling the family to have an opportunity to assist the student. In limited circumstances where it is apparent that parental notification will hinder the student's recovery, notification could be excused. Importantly, however, the presumption would now be in favor of notification.

Without the imposition of this affirmative duty, colleges will likely continue their dangerous practices of keeping parents in the dark, or simply removing students from campus in order to avoid a stigmatizing wrongful death lawsuit. Troubled students like Elizabeth Shin and their families deserve better from Congress.

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