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POINT OF VIEW *By Robert B. Smith and Dana L. Fleming*

Student Suicide and College's Liability

Virginia recently became the first state to pass legislation that bars public colleges and universities from punishing or expelling students "solely for attempting to commit suicide, or seeking mental-health treatment for suicidal thoughts or behaviors." While well intentioned, the law adds nothing to current law and will, in fact, make a bad situation even worse. By suggesting that institutions could have a basic duty to prevent student suicide, it opens the door for more high-profile lawsuits and ensures that a complex societal problem will continue to be mismanaged.

The scope of the campus mental-health crisis is staggering. On the American College Health Association's National College Health Assessment from spring 2006, covering nearly 95,000 students on 117 campuses, 16 percent of the students reported that on at least five occasions during the preceding academic year, they had "felt so depressed it was difficult to function." More than 9 percent had seriously considered suicide, and one in every 100 had attempted suicide in the previous year.

In student-suicide cases, colleges face liability on two fronts. First, an institution can be held liable if the court determines that it somehow caused the suicide. For example, in *Wallace v. Broyles* (1998), employees at the University of Arkansas at Fayetteville were sued for causing the suicide of a football player because the athletics director and others had provided him with Darvocet, a strong painkiller with mind-altering, addictive, and depressant effects. At the time that he shot and killed himself, the student had been taking the drug to cope with an injury.

Second, a college can be held liable if the court finds that it formed a "special relationship" with the student, triggering a duty to prevent the student from committing suicide. That was the situation in the case of *Shin v.*

MIT, in which a Massachusetts Superior Court judge allowed the parents of Elizabeth H. Shin, who had received treatment from campus psychiatrists and had eventually committed suicide, to sue two administrators and four medical employees of the Massachusetts Institute of Technology for \$27.7-million in damages. Although, as in *Wallace v. Broyles*, the university was not held directly liable, the legal and settlement costs were borne by MIT.

Ironically, and sadly, the law puts colleges in a double bind. On the one hand, if they adopt risk-management measures to avoid dealing with potentially suicidal students, that attitude will discourage students from revealing their depression and seeking help, making them more likely to commit suicide. On the other hand, if an institution reaches out to help a troubled student, the more contact the student has with campus counseling services, the more antidepressants the college's psychiatrist prescribes, and the closer watch administrators keep, the more likely the institution is to be held liable if that student takes his or her life.

The Virginia law compounds the predicament by, in effect, creating a statutory duty to identify and treat students who are contemplating suicide. A fair interpretation of the legislation suggests not only that colleges have that special duty, but also that evidence of a college's failure to comply with the terms of the statute could be used to claim that the college had breached its duty.

Ultimately, the courts' willingness to find colleges liable for damages hinges on the apparent "foreseeability" of the suicide. Courts ask, "Was the institution somehow put on notice that this was going to happen?" But far more people contemplate the act than actually commit it, and predicting which people are at the highest risk for suicide can be extremely difficult.

Meanwhile, colleges are hemmed in by legal red tape. For instance, one way colleges have tried to assist students struggling with mental-health issues is to disclose the students' condition to family members and friends, who can serve as a support network. But when a student fails to give permission for the disclosure, it will be prohibited by the Family Educational Rights and Privacy Act and the Health Insurance Portability and Accountability Act, which are designed to protect students' privacy rights.

Colleges also try to avoid suicides by screening incoming students, mandating psychiatric treatment for those deemed at risk, forcing students to withdraw on a temporary or permanent basis, and even evicting students from campus housing. Yet — and here is where the Virginia law offers nothing new — a program that seeks to identify students suffering from depression and to single them out for treatment or expulsion based solely on their disability runs the risk of violating the Americans With Disabilities Act of 1990 as well as a host of state and local statutes.

George Washington University ran afoul of those laws when it forced a student to leave after he had sought help for depression at the university's counseling center. Although administrators stated that the student was a threat to himself and others, the university recently settled the lawsuit out of court and is now revising its policy on involuntary medical withdrawals.

Hunter College of the City University of New York provides another cautionary tale for institutions considering the use of involuntary withdrawals. A student who overdosed on Tylenol returned from the hospital only to find that she had been locked out of her dorm room by campus security. She sued the college and challenged its eviction policy under federal and state antidiscrimination laws. As

part of a \$65,000 settlement agreement, the college agreed to suspend the policy.

Imagine that the student had attended a public college in Virginia subject to the new legislation prohibiting mandatory leaves. What if she had made a second, successful attempt to take her own life? Predictably, the college would have been held liable because a second attempt closely following the first is clearly foreseeable. Of course, all student-suicide cases are extremely fact driven. Here, in our bare-bones hypothetical, the college would probably be found liable if it had notice of the first attempt, had failed to intervene or had inadequately done so, or had somehow exacerbated the situation by intervening too aggressively.

In short, colleges are caught between Scylla and Charybdis. If they develop supportive mental-health policies, they risk costly and reputation-damaging litigation. If they don't, they risk students' lives.

While there are no easy solutions to this problem, colleges can do better. For example, a more narrowly tailored emergency exception to Ferpa would permit disclosures about suicidal students to deans, residential administrators, and others. Such disclosures would allow colleges to make more-informed decisions and better serve students suffering from severe depression. Although champions of Ferpa may resist the idea, students' privacy rights would still be safeguarded by the psychotherapist's privilege and the strict confidentiality rules that flow from it. Ferpa already has an emergency exception to "protect the health or safety of the student," but it remains largely untested

in the courts, makes no specific reference to self-inflicted harms, and provides no guidance about how colleges can help protect students from themselves.

In addition, screening programs for the early identification of students with mental-health problems would allow colleges to focus their counseling resources on the most at-risk students. Screening as a knee-jerk response to the threat of litigation will most likely only scare students away from the counseling center. But programs that take a long-term, holistic view of a student's well-being — a view that looks at all aspects of his or her college experience and considers mental health as one factor among many — should be able to stay within the bounds of the antidiscrimination laws and help at-risk students. The key to carrying out a successful and lawful screening program is to apply the policies consistently and to make informed decisions based on a multitude of factors, not solely the student's mental-health problems.

Requiring students to report mental illnesses as part of the application process, much like they report SAT scores and learning issues, would also permit colleges to marshal their resources and develop long-term treatment plans where appropriate. Although such a requirement seems radical and would probably be struck down under the current antidiscrimination laws, it is worth considering. The current legal system holds institutions responsible for student suicides without giving them the tools to deal with the problem. On the first day of classes, administrators know which students need tutoring or extended time

for test taking, but it may take weeks, months, or even years to uncover those who need psychiatric counseling.

A cultural shift in the courtroom must take place so that colleges can manage their risks and responsibilities in the mental-health arena. Rather than mechanically applying tort principles, judges must recognize that when such tragedies befall a family, the institution is not automatically to blame. Moreover, blaming the college has consequences for how it may treat other students suffering with depression.

Virginia will not be the last state to consider legislation on this issue. If lawmakers, judges, and regulatory agencies are going to craft a fault system in which colleges are responsible for preventing student suicides, college leaders should start to discuss what they think that system should look like. Every counselor, dean, and faculty member has an interest in ensuring that new laws and regulations recognize the complexity of the problem.

All of us who are concerned about higher education must recognize that student-suicide litigation has a profound impact on the lives of students. Although current law attends to the estate of the deceased, it runs the risk of forcing institutions to grossly underserve the students who remain. We owe it to those students to develop more-thoughtful legislation and to stop the cycle of litigation.

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