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BALANCING PREVENTION AND LIABILITY: THE USE OF WAIVER TO LIMIT UNIVERSITY LIABILITY FOR STUDENT SUICIDE

*Brittney Kern**

I. INTRODUCTION

When Ms. Li's son started university in the fall of 2013, Ms. Li was shocked when her son was asked to sign a "student management and self discipline agreement," which freed the university from any liability if a student were to commit suicide or suffer self-inflicted injuries.¹ The City College of Dongguan University of Technology, located in the Guangdong province of China, asked its 5,000 incoming freshman to sign the contract due, at least in part, to the staggering suicide rates that China has seen in the past years.² And the City College is not the first to make this request of its students; Shandong Jianzhu University, also located in China, requested that its 20,000 students sign a similar waiver of liability in November of 2010.³

According to the American Foundation for Suicide Prevention, 38,364 suicides were reported in the United States in 2010, equating to a death by suicide every 13.7 minutes.⁴

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¹ Chengcheng Jiang, *Chinese University Asks Students to Sign 'Suicide Waivers'*, Time (Sept. 17, 2013), http://world.time.com/2013/09/17/chinese-university-asks-students-to-sign-suicide-waivers/?hpt=hp_t3; Abby Kloppenburg, *Chinese university asks students to sign 'suicide waiver'*, USA TODAY (Sep. 20, 2013, 11:27 AM), <http://www.usatoday.com/story/news/world/2013/09/20/suicide-waiver-chinese-college/2841879/>.

² See Jiang, *supra* note 1; Kloppenburg, *supra* note 1.

³ Raymond Li, *University attacked for suicide waiver*, SOUTH CHINA MORNING POST (Nov. 10 2010, 12:00 AM), <http://www.scmp.com/article/729980/university-attacked-suicide-waiver>.

⁴ *Facts and Figures*, AMERICAN FOUNDATION FOR SUICIDE PREVENTION,

Further, statistics estimate that 7% of all college students in the United States have suicidal thoughts, while 1% of college students attempt suicide.⁵ With increasing suicide rates among their students, colleges and universities across the country have taken action. Some schools have ramped up their mental health programs and hired more college therapists, while others have instituted new policies requiring the expulsion of students who display symptoms that indicate the student may attempt suicide.⁶

Courts have traditionally held that suicide is a “deliberate, intentional and intervening act that preclude[d] another’s responsibility for the harm.”⁷ Exceptions to this general rule, however, have become more prevalent, particularly in two specific cases: (1) “where the individual or entity actually caused the suicide”; and (2) “when the individual or entity had a duty to prevent the suicide.”⁸ Courts in the United States have overwhelmingly freed colleges and universities from liability for student suicide, finding that the schools neither caused the suicide nor had a special duty to prevent the suicide.⁹ However, three cases, *Schieszler v. Ferrum College*,¹⁰ *Shin v. Massachusetts Institute of Technology*,¹¹ and *Leary v. Wesleyan University*¹² have somewhat muddied the waters.

<http://www.afsp.org/understanding-suicide/facts-and-figures> (last updated Sept. 16, 2014).

⁵ Susan Snyder, *Addressing suicide among seemingly successful college students*, PHILLY.COM (Feb. 10, 2014), http://articles.philly.com/2014-02-10/news/47171516_1_college-campuses-college-students-parking-garage.

⁶ For example, when Jordan Nott sought medical treatment after having suicidal thoughts caused by a medication he was taking, George Washington University evicted him from his dorm room and required that he withdraw from the university or else “face suspension, expulsion, or criminal charges for violating the code of student conduct.” See *infra* notes 120–128 and accompanying text; Juhi Kaveeshvar, Comment, *Kicking the Rock and the Hard Place to the Curb: An Alternative and Integrated Approach to Suicidal Students in Higher Education*, 57 EMORY L.J. 651, 654 (2008); see also *infra* Subsection II.B.4.

⁷ See Kaveeshvar, *supra* note 6, at 651–52 (citing PROSSER AND KEETON ON THE LAW OF TORTS 311 (W. Page Keeton ed., 5th ed. 1984)).

⁸ See Kaveeshvar, *supra* note 6, at 654–55.

⁹ See generally *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960); *White v. Univ. of Wyo.*, 954 P.2d 983 (Wyo. 1998); *Jain v. State*, 617 N.W.2d 293 (Iowa 2000); *Mahoney v. Alleghany College*, No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005), available at http://www.bsk.com/site/files/Mahoney_v._Allegheny_College.pdf.

¹⁰ *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

¹¹ *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

¹² *Leary v. Wesleyan University*, No. CV055003943, 2009 WL 865679 (Super. Ct. Conn. March 10, 2009).

These cases suggest that juries may find that a special relationship exists and therefore hold schools liable for student suicide in the future.

To date, no college or university in the United States has instituted a waiver that releases the school from liability for student suicide or self-inflicted harm, but with international institutions beginning to do so,¹³ it is likely that schools in the United States may at least consider taking a similar approach. Because institutions are able to create binding waivers to release themselves from liability for foreseeable negligence,¹⁴ a suicide waiver, if implemented by colleges in the United States, may prevent schools from facing liability for student suicide and self-inflicted harm in the future. Additionally, implementing waivers of this sort could incentivize the school to provide additional help and resources for students suffering with mental illnesses, which could help decrease suicide rates among college students. However, waivers are unlikely to deter student suicide unless schools take further action.

Part II of this Article discusses the case law history of university liability, beginning with an overview of the cases that have clearly held that schools are not liable for student suicide. Part II then dissects the *Schieszler*, *Shin*, and *Leary* cases, in which the courts have been less clear on university liability. Part III considers the waiver option by first illustrating the law of waiver generally and then exploring the different reasons a court may deem a waiver unenforceable. Part IV examines possible defenses to the enforceability of suicide waivers specifically, drawing on the law of waiver discussed in Part III. Part V evaluates the suicide waiver as a viable option by comparing it to other policies that universities have implemented to suppress liability and prevent student suicide. Part V concludes with a brief discussion of the use of suicide liability waivers in other forums, such as juvenile detention facilities and summer camps.

¹³ See *supra* notes 1–3 and accompanying text.

¹⁴ See *infra* Part III.

II. CASE LAW HISTORY OF UNIVERSITY LIABILITY FOR STUDENT SUICIDE

A. *Cases Finding No Special Relationship*

Numerous cases across the United States have considered the alleged negligence on the part of both the colleges as an entity and the individual faculty and staff in relation to student suicide.¹⁵ Until the early twenty-first century, all of these cases were decided in favor of the schools and their employees, as the courts found that no special relationship existed between the schools and their students.¹⁶

1. *Bogust v. Iverson*

In 1960, the Supreme Court of Wisconsin considered whether the director of student personnel of Stout State College, Ralph Iverson, was liable for the death of student Jeannie Bogust.¹⁷ Iverson had been aware of Bogust's "emotional disturbances, social conflicts, scholastic difficulties and personal problems," and had counseled Bogust in an attempt to help relieve her of the personal struggles she was facing.¹⁸ However, despite allegedly knowing that Bogust was still facing similar problems, Iverson stopped meeting with Bogust in April of 1958.¹⁹ Soon after, on May 27th, 1958, Bogust committed suicide.²⁰ Bogust's family sued Iverson, alleging that Iverson had (1) "failed to secure or attempt to secure emergency psychiatric treatment after he was aware or should have been aware of her inability to care for the safety of herself"; (2) "failed at all times to advise the said parents of Jeanie [sic] Bogust or contact them concerning the true mental and emotional state of their said daughter, thus preventing them from securing proper medical care for her"; and (3) "failed

¹⁵ See generally *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960); *White v. Univ. of Wyo.*, 954 P.2d 983 (Wyo. 1998); *Jain v. State*, 617 N.W.2d 293 (Iowa 2000); and *Mahoney v. Allegheny College*, No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005), available at http://www.bsk.com/site/files/Mahoney_v._Allegheny_College.pdf.

¹⁶ Many cases, in fact, did not survive a motion for summary judgment in favor of the college, or the college's faculty or staff member. See, e.g., *Bogust*, 102 N.W.2d at 228; *Jain*, 617 N.W.2d at 293.

¹⁷ *Bogust*, 102 N.W.2d at 228.

¹⁸ *Id.*

¹⁹ *Id.* at 229.

²⁰ *Id.*

to provide proper student guidance.”²¹ The court noted that the only relevant question on appeal was whether Iverson owed Bogust a legal duty, a requirement to sustain the claim against him.²² The court explained that “before liability can attach[,] there must be found a duty resting upon the person against whom recovery is sought and then a breach of that duty.”²³

The court focused heavily on the fact that Iverson was merely an educator, not “a medical doctor or a specialist in mental disorders.”²⁴ As such, the court reasoned, Iverson should not be expected to know or recognize any symptoms that Bogust displayed that suggested she might inflict self-harm.²⁵ Additionally, the court noted that there was no indication that Iverson was aware of Bogust’s suicidal thoughts or tendencies.²⁶

Perhaps the strongest evidence that swayed the court’s holding in favor of Iverson was the fact that there was no evidence that Bogust’s condition had worsened as a result of the meetings of Iverson and Bogust.²⁷ Because Bogust had a history of “suffering from emotional disturbances and social conflicts before she came under [Iverson’s] guidance,” the court determined that Iverson could not be held liable because Bogust’s condition had not further deteriorated under his guidance.²⁸ Additionally, because there was no indication that

²¹ *Id.* at 229.

²² *Id.*

²³ *Id.* at 230. (citing *Palmer v. Janesville Improvement Co.*, 219 N.W. 437 (Wis. 1928); *Miller v. Welworth Theatres*, 75 N.W.2d 286 (Wis. 1956)).

²⁴ *Id.*

²⁵ *Id.* Specifically, the appellate court reiterated in part the finding of the trial court, which stated that “to hold that a teacher who has had no training, education or experience in medical fields is required to recognize in a student a condition the diagnosis of which is in a specialized and technical medical field[] would require a duty beyond reason.” *Id.* If a similar case were to be heard in the twenty-first century, it is likely that the court would find a higher obligation on the part of Iverson, as a director of student personnel services today would likely be trained, at least to a minimal degree, to spot common symptoms of depression and other mental health diseases.

²⁶ *Id.*

²⁷ *Id.* at 231.

²⁸ *Id.* The court specifically discussed this because Bogust argued that liability should attach to Iverson based upon the Restatement of Torts, which states that “[t]he liability which this Section recognizes is not imposed as a penalty for the actor’s original misconduct, but for a breach of a separate duty to aid and protect the other after his helpless condition caused by the actor’s misconduct is or should be known.” *Id.* (quoting Restatement of Torts § 322, cmt. d (1934)). However, the court noted that the Restatement also, and perhaps more clearly, states that “[o]ne who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is

Bogust's condition had worsened between when Iverson discontinued the meetings and Bogust's suicide, the court determined that Iverson could not have anticipated Bogust's imminent suicide.²⁹ After considering these factors, the court ultimately determined that Iverson could not be held liable for Bogust's death.³⁰

2. *Jain v. State*

In 2000, the Supreme Court of Iowa held that the University of Iowa had not formed a special relationship with Sanjay Jain, who was a freshman at the university when he took his life.³¹ On November 20, 1994, resident assistants were beckoned to Jain's dorm room where they found Jain and his girlfriend "fighting over a set of keys to Sanjay's moped," which had been moved into Jain's dorm room.³² Jain's girlfriend explained to the resident assistants that Jain was "preparing to commit suicide by inhaling the exhaust fumes[,] and she was merely trying to stop him."³³ Jain admitted that he intended to commit suicide that night. The resident assistants resolved to meet with Jain the next morning.³⁴ The next day, Jain met with Beth Merritt, an employee of the university, who referred him to the university's counseling services and required that he

not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were begun." *Id.* (quoting Restatement of Torts § 323(2) (1934)). Accordingly, because the court determined that Bogust was in no worse condition when she and Iverson stopped meeting than when the interviews began, Iverson could not be held liable for her suicide. *Id.*

²⁹ *Id.* at 231–33. Specifically, the court stated that:

It is also significant that the complaint pleads no facts with respect to Jeannie's activities or mental condition during the period from April 15 to May 27, 1958. There are no facts alleged which, if proved, would establish a cause-effect relationship between the alleged nonfeasance of the defendant and the suicide of the deceased.

Id. at 232. This is interesting language on the part of the court, as it seems to suggest that if there were facts alleged that suggested a cause-effect relationship between Iverson's failure to maintain the interviews with Bogust and Bogust's suicide, the court may have found Iverson liable for Bogust's death. However, this is mere speculation, as the court did not take this point any further.

³⁰ *Id.* at 233.

³¹ *Jain v. State*, 617 N.W.2d 293 (Iowa 2000).

³² *Id.*

³³ *Id.* Further, Jain's roommate later testified that Jain stated that "he would kill himself by running the cycle in the room . . . when [the roommate] was not there," a threat that the roommate believed to be a joke. *Id.* at 296.

³⁴ *Id.*

remove the moped from his room.³⁵ Merritt then met with David Coleman, the assistant director for resident life, and explained that she was concerned for Jain's safety and suggested that the university contact Jain's parents.³⁶ Coleman refused her request, and Jain's parents were never made aware of his suicidal thoughts and actions.³⁷ On an early December morning, Jain was found dead in his dorm room; he had died from inhalation of carbon monoxide from his moped, which he had left running in his room overnight.³⁸

Jain's father, Uttam Jain, brought suit against the University of Iowa and claimed that because the university was aware of Jain's mental condition, a special relationship existed between the university and Jain.³⁹ First, in considering this claim, the court considered an exception found in the Family Educational Rights and Privacy Act (FERPA or Buckley Amendment), which "permits institutions to disclose otherwise confidential information to 'appropriate parties' when an 'emergency' makes it necessary to protect the health or safety of the student or other persons."⁴⁰ However, the court quickly dismissed this exception, noting that it is discretionary, not mandatory, and, more importantly here, that Uttam Jain had not preserved this issue for appellate review.⁴¹

Next, the court turned to Uttam Jain's claim under the

³⁵ *Id.*

³⁶ *Id.* at 295–96.

³⁷ *Id.* at 296.

³⁸ *Id.*

³⁹ *Id.* at 297. Specifically, Uttam Jain relied upon Restatement (Second) of Torts section 323, which states that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Id. (quoting Restatement (Second) of Torts § 323 (1965)). Notably, this is the same, though updated from the Restatement (First) to the Restatement (Second), section of the Restatement that Bogust's family relied on in *Bogust v. Iverson*. See *Bogust v. Iverson*, 10 Wis.2d 129, 135 (1960).

⁴⁰ *Jain*, 617 N.W.2d at 298 (quoting 20 U.S.C. § 1232g(b)(1)(I)).

⁴¹ *Id.* (quoting 34 C.F.R. § 99.36(a) (1994)). The court does express its "serious doubts about the merits of plaintiff's argument," but the court did not go any further into a possible requirement under this FERPA exception, which may leave later courts with the ability to hold that FERPA's "discretionary" disclosure exception should be "strictly construed," as a regulation that appears within FERPA suggests. *Id.* (quoting 34 C.F.R. § 99.36(b) (1994)).

Restatement (Second) of Torts Section 323 “that the university has voluntarily adopted a policy (consistent with the Buckley Amendment) of notifying parents when a student engages in self-destructive behavior[,] but it negligently failed to act on that policy in the case of Sanjay Jain.”⁴² However, this section of the Restatement requires, as iterated by the court in *Bogust*, that the student must have been in a worse position as a result of the intervention by the university.⁴³ Ultimately, the court determined that “the university’s limited intervention in this case neither increased the risk that Sanjay would commit suicide nor led him to abandon other avenues of relief from his distress. Thus, no legal duty on the part of the university arose under Restatement section 323 as a matter of law.”⁴⁴ Finding that no special relationship existed, the court affirmed the award of summary judgment in favor of the university.⁴⁵

3. *Mahoney v. Allegheny College*

In late 2005, a Pennsylvania Court of Common Pleas found that no special relationship existed between Allegheny College and Chuck Mahoney, a junior at the school.⁴⁶ Mahoney sought the help of Jacquelyn Kondrot, an Allegheny College counselor, after suffering a panic attack at football camp the summer before his freshman year.⁴⁷ Mahoney continued to meet with Kondrot regularly over the next three years, with increased frequency at times of personal turmoil for Mahoney.⁴⁸ In some of these meetings, Mahoney discussed his suicidal thoughts

⁴² *Id.* According to the court:

The record reveals that an unwritten university policy dealing with self-destructive behavior dictates that, with evidence of a suicide attempt, university officials *will* contact a student’s parents. The decision to do so rests solely with Phillip Jones, the dean of students. The dean bases his decision on information gathered from a variety of sources. In this case, no information was transmitted to the dean’s office until after his death.

Id. at 296 (emphasis added).

⁴³ *Id.* at 299. *See also* Restatement (Second) of Torts §323(a)–(b) (1965).

⁴⁴ *Id.* at 300.

⁴⁵ *Id.*

⁴⁶ *Mahoney v. Allegheny College*, No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005), available at http://www.bsk.com/site/files/Mahoney_v._Allegheny_College.pdf.

⁴⁷ *Mahoney*, No. AD 892-2003, slip op. at 3.

⁴⁸ *Id.* at 3–7. In particular, Mahoney sought the help of Kondrot during his tumultuous relationship with his on-and-off-again girlfriend Kristen, particularly when Kristen began dating one of his fraternity brothers. *Id.* at 9. Kristen also sought Kondrot’s help for Mahoney on more than one occasion, when Mahoney was feeling particularly suicidal and would make suicidal comments to her. *Id.* at 3, 5.

and even described how he planned to eventually commit suicide;⁴⁹ however, Kondrot always ensured that Mahoney was in good spirits before he left their counseling sessions.⁵⁰ Kondrot contemplated calling Mahoney's parents to discuss Mahoney's suicidal thoughts, but Mahoney pleaded with her not to do so.⁵¹ Ultimately, neither Kondrot nor any other school official ever contacted Mahoney's parents.⁵²

After Mahoney's suicide, his parents brought suit against the school.⁵³ Specifically, the suit alleged, in part, that the defendants "(1) breached a 'duty of care' to prevent the student's suicide; [and] (2) had a duty to notify the parents about their son's mental health problems."⁵⁴ The court began its analysis of this case by laying out the factors that must be balanced to determine whether a duty of care exists.⁵⁵ According to the court, these factors include (1) "[t]he relationship between the parties"; (2) "[t]he social utility of defendant's conduct"; (3) "[t]he nature of risk imposed and foreseeability of harm incurred"; (4) "[t]he consequences of imposing a duty upon the defendant"; and (5) "[t]he overall public interest in a proposed solution."⁵⁶ The court then considered whether a duty existed in three separate ways: first, whether the school had a duty to prevent suicide under Pennsylvania law;⁵⁷ second, whether the school had a "duty to prevent suicide where there is a 'special relationship' and harm

⁴⁹ *Id.* at 6. Mahoney told Kondrot only a few weeks before his death that he would overdose on sleeping pills to cause his own death. *Id.*

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 10.

⁵² *Id.* at 13.

⁵³ *Id.* at 2.

⁵⁴ *Id.*

⁵⁵ *Id.* at 14–15 (quoting *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 15. No Pennsylvania case had ever before imposed a duty to prevent another's suicide in the college setting. *Id.* However, the court noted that while a general duty to prevent the suicide of another has not been found,

[t]here are, however, limited exceptions to this rule. For example, Pennsylvania has recognized suicide as a legitimate basis for wrongful death claims involving hospitals, mental health institutions and mental health professionals, where there is a custodial relationship and the defendant has a recognized duty of care towards the decedent. . . . In other cases, where the decedent was not associated with a hospital or mental health institution, courts have required both a clear showing of a duty to prevent the decedent's suicide and a direct causal connection between the alleged negligence and the suicide.

Id. at 16 (quoting *McPeak v. William T. Cannon, Esquire, P.C.*, 553 A.2d 439, 440 (Pa. Super. 1989)).

is reasonably foreseeable”;⁵⁸ and third, whether the school had a duty to notify Mahoney’s family.⁵⁹

The court in *Mahoney* repeatedly referred to the *Jain* case, finding the situation analogous to the facts in the present case.⁶⁰ Here, the court similarly found that no special relationship existed, in part because “Allegheny College did not have a custodial relationship with Mahoney who was an adult who lived in an off campus fraternity house.”⁶¹ This determination limited the case significantly, but in 2006, the case was presented to a jury, which cleared Allegheny College of any liability for Mahoney’s death.⁶²

B. Cases Suggesting a Special Relationship May Exist: Is Change Imminent?

Despite the trend of courts finding that no special relationship exists between colleges and their students in student-suicide situations, three relatively recent cases have found that a special relationship could in fact exist.⁶³ In the *Schieszler*, *Shin*, and *Leary* cases, the trial judges determined that a jury may find a special relationship; however, each case was settled before it went to the jury.⁶⁴ While none of these

⁵⁸ *Id.* at 16. In describing the “special relationship” analysis, the court looked to the *Shin* and *Schieszler* cases for guidance. See *infra* Subsections II.B.1 and II.B.2.

⁵⁹ *Id.* at 18. Here, the court discussed the same FERPA exception that the *Jain* court examined. See *supra* notes 40–41 and accompanying text. Additionally, the *Mahoney* court noted the psychologist-patient privilege that makes all privileged communications between an individual and his therapist confidential, which only complicates the disclosure argument. *Mahoney*, No. AD 892-2003, slip op. at 19.

⁶⁰ *Id.* at 20–22.

⁶¹ *Id.* at 22. Further, the court distinguished this case from the *Shin* and *Schieszler* cases, finding those cases

factually distinctive in their neither precedential, nor non-persuasive finding of a ‘special relationship’ and ‘imminent probability’ of self-harm in consideration of the student’s assertions that they were going to kill themselves as well as their past and contemporaneous attempts to do so; such was within the knowledge of said college employees, as compared to Mahoney who despite a progressively deepening depression, had neither engaged in nor threatened any specific acts of self-harm.

Id. at 23.

⁶² *Id.*; see also Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students and Limits Liability*, 75 *FORDHAM L. REV.* 3081, 3094 (2007).

⁶³ See generally *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005); *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002); *Leary v. Wesleyan University*, No. CV055003943, 2009 WL 865679 (Super. Ct. Conn. March 10, 2009).

⁶⁴ See generally *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct.

cases provides strong authority for future cases considering a college's liability for student suicide, they do suggest that a change in analysis could be imminent. This change may lead more courts to acknowledge that special relationships exist between schools and their students.

1. *Schieszler v. Ferrum College*

Michael Frentzel was a freshman at Ferrum College, but he had trouble adjusting to his new environment.⁶⁵ In February 2000, during Frentzel's second semester, campus police and Odessa Holley, the resident assistant in Frentzel's dorm, responded to an argument between Frentzel and his girlfriend, Crystal.⁶⁶ Frentzel later gave Crystal a note indicating that he intended to hang himself in his dorm room.⁶⁷ Crystal shared the note with Holley and the campus police.⁶⁸ Upon breaking into Frentzel's dorm room, campus police and Holley found Frentzel with bruising on his head, which Frentzel admitted was self inflicted.⁶⁹ Campus police alerted the dean of student affairs, David Necombe, of the incident, and Necombe required that Frentzel sign a document stating that he would not harm himself.⁷⁰ A few days later, Frentzel sent two more notes to Crystal, who again shared them with Holley and the campus police.⁷¹ When Holley and the campus police finally checked on Frentzel, they found him dead in his dorm room.⁷²

Frentzel's guardian, LaVerne Schieszler, brought suit against Ferrum College, Necombe, and Holley, alleging "that the defendants 'knew or personally should have known that Frentzel was likely to attempt to hurt himself if not properly supervised,' that they were 'negligent by failing to take adequate precautions to insure [sic] that Frentzel did not hurt

June 27, 2005); *Schieszler*, 236 F. Supp. 2d at 602. See also Cohen, *supra* note 62, at 3095-3100.

⁶⁵ *Schieszler*, 236 F. Supp. 2d at 605. In his first semester, for example, the school required Frentzel to attend anger management counseling as a condition of reenrolling in his second semester. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The police failed to respond to the first note and prohibited Crystal from entering Frentzel's dorm room to check on him. *Id.*

⁷² *Id.*

himself,' and that Frentzel died as a result."⁷³ The defendants argued, in part, that they "had no legal duty to take steps to prevent Frentzel from killing himself."⁷⁴ When Schieszler moved to file an amended complaint, the defendants objected, claiming that the complaint failed to state a claim for which relief could be granted,⁷⁵ which led the trial court judge to consider whether a jury could find that Ferrum College could be liable.

The judge first noted that "[o]rdinarily, there is no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility."⁷⁶ However, the judge wrote that the Virginia Supreme Court has determined that "a special relationship may exist between particular plaintiffs and defendants because of the particular factual circumstances in a given case."⁷⁷ The judge then considered the specific facts of this case, as outlined in Schieszler's complaint, including that (1) Frentzel lived in on-campus housing; (2) Ferrum College, Necombe, and Holley were personally aware of Frentzel's mental health problems, as they had previously required him to attend anger management courses before returning for his second semester of schooling; (3) Frentzel had self-inflicted bruising on his head just one day before his death; (4) Frentzel sent a note to Crystal, who had shared the note with the campus police and Holley, indicating that he intended to kill himself; and, perhaps most importantly, (5) Necombe suspected

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 606. Specifically, the judge relied on the Restatement (Second) of Torts § 314A, which provides a nonexclusive list of special relationships, "including the relationship between a common carrier and its passengers, an innkeeper and his guests, a possessor of land and his invitees, and one who takes custody of another thereby depriving him of other assistance." *Id.* at 606-07 (citing Restatement (Second) of Torts § 314A cmt. b (1965)).

⁷⁷ *Id.* at 607 (citing *Thompson v. Skate America*, 540 S.E.2d 123 (Va. 2001)). For example, the judge considered *Burdette v. Marks*, a 1992 Virginia Supreme Court case in which "the Court considered whether a special relationship existed between a police officer and a passerby such that the officer had a duty to protect the passerby from an attack." *Id.* (citing *Burdette v. Marks*, 421 S.E.2d 419 (Va. 1992)). The Virginia Supreme Court considered that the police officer saw the passerby being attacked; the police officer was on duty and carrying his weapon, which decreased the likelihood that the police officer would be injured in an effort to protect the passerby; and the passerby asked the police officer for help. *Id.* The Virginia Supreme Court ultimately determined that a special relationship did exist given the specific facts of this case. *Id.*

that Frentzel could harm himself, as evidenced by his requiring Frentzel to sign a statement indicating that he would not harm himself.⁷⁸ Given these facts and other considerations,⁷⁹ the judge granted Schieszler's motion to file an amended complaint, explaining that a jury could find that a special relationship existed between Ferrum College and Frentzel.⁸⁰ However, the case settled before trial, leaving the question of whether a special relationship did in fact exist unresolved.⁸¹

2. *Shin v. Massachusetts Institute of Technology*

Elizabeth Shin was in the second semester of her freshman year at Massachusetts Institute of Technology (MIT) when she first began to exhibit suicidal tendencies.⁸² From that semester forward, numerous MIT employees were on notice of and involved in treating Shin's mental-health disease. These employees included the housemaster of her dorm, Nina Davis-Millis, and the dean of Counseling and Support Services, Arnold Henderson.⁸³ Shin's mental health continued to deteriorate during her sophomore year, at which point she was hospitalized for a second time and met almost daily with a member of the MIT staff.⁸⁴ Early in the morning of April 10, 2000, during the spring semester of Shin's sophomore year, two students residing in Shin's dorm alerted Davis-Millis that Shin "had told them that she planned to kill herself that day and requested one of the students to erase her computer files."⁸⁵

⁷⁸ *Id.* at 609.

⁷⁹ The judge also considered that "[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm." *Id.* at 610 (quoting *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983)). Additionally, the judge distinguished this case from both *Bogust* and *Jain*, finding that both of those cases were decided by considering whether liability attached under the Restatement (Second) of Torts § 323, which was not a theory that Schieszler brought before the judge in this case. *Id.* at 608.

⁸⁰ *Id.* at 615.

⁸¹ See Cohen, *supra* note 62, at 3097.

⁸² *Shin v. MIT*, No. 020403, 2005 WL 1869101, at *1 (Mass. Super. Ct. June 27, 2005). During this semester, she overdosed on Tylenol with codeine and was hospitalized for a week. *Id.* While undergoing a psychiatric evaluation, Shin admitted that she had cut herself in high school. *Id.*

⁸³ *Id.* at *1, *2. In addition to Davis-Millis and Henderson, at least two MIT psychiatrists, two professors, a teaching assistant, and a social worker were made aware of and personally assisted Shin with her mental health. *Id.* at *1–3.

⁸⁴ *Id.* at *2–4.

⁸⁵ *Id.* at *5. Davis-Millis contacted the on-call psychiatrist at MIT, who did not

Later that morning, Davis-Millis spoke with Shin on the phone.⁸⁶ During their conversation, Shin made “disturbing” comments such as “[y]ou won’t have to worry about me any more,’ or words to that effect.”⁸⁷ A few hours later, a “deans and psychs” meeting was held to discuss the report made by the two students that Shin intended to kill herself that same day.⁸⁸ During the meeting, Henderson, among other attendees, discussed a plan of action for helping Shin.⁸⁹ Following the meeting, a voicemail was left for Shin to let her know about the deans and psychs meeting and that an appointment at an external counseling center had been made for her for the next day.⁹⁰ No further action was made that day by anyone on the MIT staff.⁹¹ That night, MIT campus police were called to Shin’s dorm room after her smoke detector began to sound.⁹² Shin had set herself on fire and suffered burns on sixty-five percent of her body.⁹³ Shin’s parents removed her from life support four days later, after the doctors told them that Shin had “suffered irreversible neurological brain damage.”⁹⁴

Shin’s parents brought suit against MIT, Davis-Millis, Henderson, and others following their daughter’s death, alleging in part that Davis-Millis and Henderson had a duty to prevent the suicide due to their special relationship with Shin.⁹⁵ Davis-Millis and Henderson moved for summary judgment, claiming that no special relationship existed and that they did not have a duty to prevent Shin’s suicide.⁹⁶ The judge ultimately found that there was a question of fact for a

think that Shin needed to be brought to the counseling center because “(1) Elizabeth had assured him that she was fine and (2) her friends had overreacted [about another] episode.” *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at *5–6.

⁹⁵ *Id.* at *1, *11.

⁹⁶ *Id.* at *11. Davis-Mills and Henderson provided the court with a Massachusetts law that illustrates “that persons who are not treating clinicians have a duty to prevent suicide only if (1) they caused the decedent’s uncontrollable suicidal condition, or (2) they had the decedent in their physical custody, such as a mental hospital or prison, and had knowledge of the decedent’s risk of suicide.” *Id.* The judge agreed that neither of these exceptions applied to this case. *Id.*

jury as to whether a special relationship existed such that Davis-Millis and Henderson would have a duty to prevent the suicide.⁹⁷ In making this determination, the judge relied heavily on Section 314A of the Restatement (Second) of Torts, the same section that the judge in *Schieszler* relied upon.⁹⁸ Further, the judge in the *Shin* case relied on the *Schieszler* case directly, particularly in noting that because a special relationship existed between the defendants and the student, the defendants owed the student a duty of care.⁹⁹

In *Shin*, the judge found the facts to be analogous to those in the *Schieszler* case, particularly in that Henderson and Davis-Millis knew of Shin's mental health disease for at least a year before her suicide.¹⁰⁰ Furthermore, both Henderson and Davis-Millis were well aware of the report from students in Shin's dorm that she intended to commit suicide on the date that she actually attempted to kill herself, and Henderson and Davis-Millis had heard concerns from Shin's professors regarding Shin's mental health as well.¹⁰¹ Because the judge determined that the "[p]laintiffs have provided sufficient evidence that Henderson and Davis-Mills could reasonably foresee that Elizabeth would hurt herself without proper supervision," a "special relationship . . . imposing a duty on Henderson and Davis-Millis to exercise reasonable care to protect [Shin] from harm" was formed.¹⁰² Accordingly, the judge denied Davis-Millis and Henderson's request for summary judgment;¹⁰³ however, the case against Davis-Millis and Henderson was never heard by a jury because the parties settled out of court.¹⁰⁴

⁹⁷ *Id.* at *11, *13.

⁹⁸ *Id.* at *12; *see supra* note 762. Additionally, the judge in the present case also relied on *Mullins v. Pine Manor College*, which was cited in the *Schieszler* case. *Id.*; *see supra* note 85. In this case, a student was kidnapped from her dormitory and raped. *Id.* (citing *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983)). The court in that case found that the college "owed a duty to exercise care to protect the well-being of their current students, including seeking to protect them against the criminal acts of third parties." *Id.*

⁹⁹ *Id.* at *13 (citing *Schieszler v. Ferrum College*, 236 F.Supp. 2d 602 (W.D. Va. 2002)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at *15.

¹⁰⁴ *See* Cohen, *supra* note 62, at 3099.

3. *Leary v. Wesleyan University*

In November of 2003, Terence Leary had an extreme panic attack while he was enrolled at Wesleyan University.¹⁰⁵ Leary called Wesleyan University's public safety officers, who responded and transported him to Middlesex Memorial Hospital.¹⁰⁶ The public safety officers left Leary at the hospital "without further investigating or securing medical attention for him."¹⁰⁷ Soon after, Leary left the hospital and committed suicide.¹⁰⁸

Douglas Leary, the administrator of Leary's estate, filed a complaint against the university for negligence.¹⁰⁹ In his claim, Douglas Leary asserted that the university "knew or should have known that Terence Leary was in a distressed condition, had suicidal tendencies and was a threat to himself, and they failed to investigate or provide Leary with adequate care."¹¹⁰ Wesleyan denied any liability for negligence, specifically asserting that Leary's injuries were caused by "intentional acts on the part of Terence Leary" himself.¹¹¹

First, the court considered whether a special relationship existed between Leary and the university.¹¹² Though the court did not cite directly to *Schieszler* or *Shin*, the court nonetheless came to a similar conclusion, determining that a jury could find that a special relationship existed.¹¹³ The judge next considered whether the public safety officers had a duty under the Restatement (Second) of Torts Sections 323 and 324.¹¹⁴ Here,

¹⁰⁵ *Leary v. Wesleyan University*, No. CV055003943, 2009 WL 865679, at *1 (Super. Ct. Conn. March 10, 2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Douglas Leary asserted a total of six claims within his suit for negligence and also asserted a claim for breach of the university's fiduciary duty to Leary. *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at *2.

¹¹³ *Id.* at *5. However, this court relied not so much in the specific facts of this case forming a special relationship, as the *Schieszler* and *Shin* judges did, but rather relied on the custodial exception. *Id.* at *4–5. Here, the judge determined that there was a question of material fact concerning whether Leary was in the custody of the public safety officers and unable to provide help for himself. *Id.* If this were to be the case, then an exception to the special relationship rule may apply. *Id.* at *5.

¹¹⁴ *Id.* at *5–6. It is interesting to note that neither *Schieszler* nor *Shin* considered these Restatement sections, but Restatement (Second) of Torts § 323 was considered in *Bogust* and *Jain*. See *supra* notes 28, 44 and accompanying text.

the court found that because the public safety officers voluntarily provided services to Leary, they may have assumed a duty under the Restatement (Second) of Torts.¹¹⁵ The judge determined that the question of whether a duty existed was a substantial issue of material fact, and this question could only be answered by a jury.¹¹⁶ Finally, the court considered whether Leary's suicide was foreseeable to the university and determined that an issue of material fact existed regarding foreseeability as well.¹¹⁷ Accordingly, the university's request for summary judgment on the negligence claim was denied.¹¹⁸

4. *Possible Consequences of Cases Finding that a Special Relationship Might Exist*

With these three cases independently determining that a special relationship may exist between a school and a student who has committed suicide, it is evident that there may be a reversal in the trend of courts finding that no university liability exists. Although none of the cases listed in this Section has been presented to juries, much less returned a verdict in favor of the students' parents or estates, there seems to be a movement towards holding the higher-education institution more accountable for student suicides, especially when the school has been involved in treating the student.¹¹⁹ However, until a case is tried before a jury, it is unclear whether a jury would be willing to find a school liable for the suicide of one of its students.

Perhaps in part due to these recent cases, some schools have made policy changes regarding students who exhibit signs of suicidal behavior. For instance, George Washington University (GW) has enacted policies under which students who show suicidal tendencies may be evicted from on-campus housing, suspended, asked to withdraw from courses, or even

¹¹⁵ *Id.* at *5–8.

¹¹⁶ *Id.* at *8.

¹¹⁷ *Id.* at *8–10. There was conflicting testimony as to this question, as an expert for Daniel Leary testified that “suicide would be foreseeable to the public safety officers under the circumstances of the case,” while an expert for the university “stated that Terence Leary’s suicide would not be foreseeable to non-professionals.” *Id.* at *10. Finding once again that an issue of material fact existed, the judge concluded that this question must be answered by a jury. *Id.*

¹¹⁸ *Id.* at *13.

¹¹⁹ See generally Subsections II.B.1, II.B.2, and II.B.3.

expelled from the school.¹²⁰

In the fall of 2004, Jordan Nott, a student at GW, started having severely depressive thoughts as a side effect, he believed, of medication that he had been taking for a few weeks.¹²¹ Nott asked a friend to take him to the university's hospital for psychiatric help in the early morning of October 27, 2004.¹²² He was admitted to the hospital and the school was notified.¹²³ That same day, the school informed Nott "that consistent with the University residence hall's policy on 'Psychological Distress,' as a student who was subject to emergency psychological intervention or hospitalization, he was not permitted to return to his dorm room."¹²⁴ The next day, on October 28, 2004, Nott was informed that "he was suspended from the University and was charged with a disciplinary action."¹²⁵ He was told that "if he came onto campus for any reason, he would be considered a trespasser and could be arrested."¹²⁶ Nott sued the university for violations of the Americans with Disabilities Act, Rehabilitation Act, Fair Housing Act, and D.C. Human Rights Act, and also for intentional infliction of emotional distress, invasion of privacy, and breach of confidential relationship.¹²⁷ Nott and the university settled the lawsuit in 2006, but the university has not admitted to any wrongdoing or changed its policy following this incident.¹²⁸

With some students now facing the choice between getting help with their mental-health diseases and staying enrolled in their higher-education program, it is quite clear that some reform is needed. Not only do policies like the one enacted by GW threaten student well being, but they also do not protect the schools from later lawsuits, as illustrated by Nott's claim against GW. Rather than having policies that actively punish

¹²⁰ See generally Aaron Konopasky, Note, *Eliminating Harmful Suicide Policies in Higher Education*, 19 STAN. L & POL'Y REV. 328, 328–29 (2008); Kaveeshvar, *supra* note 6, at 651–52.

¹²¹ First Amended Complaint at 5, *Nott v. George Washington Univ.*, No. 05-8503 (D.C. Super. Ct. Oct. 25, 2005).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 5–6.

¹²⁶ *Id.*

¹²⁷ *Id.* at 3.

¹²⁸ See Kaveeshvar, *supra* note 6, at 651–52.

students for seeking help, universities may want to implement suicide liability waivers, which could waive any liability for negligence on the part of the schools and their employees for helping a troubled student.

III. THE ENFORCEABILITY OF WAIVERS

Waiver is a mix of contract and tort law, and waivers “are . . . written documents in which one party agrees to release, or “exculpate,” another from potential tort liability for future conduct covered in the agreement.”¹²⁹ The two most common forms of waiver are *waiver of liability* and *express assumption of the risk*.¹³⁰ Under waiver of liability, “a party is asked to sign a ‘written instrument in which the participant agrees not to hold the provider liable for any injuries or damages resulting from the provider’s negligence.’”¹³¹ Under express assumption of the risk, “the [participant], in advance, expressly consents . . . ‘to relieve the [provider] of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the [provider] is to do or leave undone’”¹³² An express assumption of the risk agreement, then, waives any duty on the part of the provider, which protects the provider from any liability for negligence as against the participant.¹³³

Traditionally, courts tend to enforce waivers, seemingly equating a waiver to any other contract that requires mutual assent and consideration. However, courts also regularly find waivers to be unenforceable for a variety of reasons, the vast majority of which stem from one of two overall themes: (1) unenforceable based on contract law; or (2) unenforceable based on public policy.¹³⁴ Each of these categories is discussed

¹²⁹ Robert S. Nelson, Comment, *The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive Their Children’s Tort Liability Claims*, 36 U.S.F. L. REV. 535, 541 (2002) (quoting Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to “Nerf” Tiddlywinks*, 53 OHIO ST. L.J. 683, 683 (1992)).

¹³⁰ Nelson, *supra* note 129, at 542.

¹³¹ *Id.* (quoting Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 7–8 (1997)).

¹³² *Id.* (quoting *Saenz v. Whitewater Voyages*, 276 Cal. Rptr. 672, 676 (Ct. App. 1990) (alterations in the original)).

¹³³ *Id.*

¹³⁴ *Id.* at 544. See also Mary Ann Connell & Frederick G. Savage, *Releases: Is*

in detail in the following Subsections.

A. *Waivers Unenforceable by Contract*

Waivers that are unenforceable under contract law can be deemed unenforceable for a number of reasons. However, three of the most common reasons concern (1) unclear drafting; (2) inconspicuous language; and (3) unconscionability.¹³⁵

1. *Drafting*

First, a court may deem a waiver unenforceable if the language is vague, unclear, or ambiguous.¹³⁶ Importantly, a waiver must be written in language that the signer will be able to understand, so the level of clarity required for waivers often depends on the intended signer.¹³⁷ However, regardless of the comprehension level of the intended audience, courts have found that waivers with excessive legalese, which is often incomprehensible to the average person, are unenforceable, as it is unlikely that an individual would be able to fully understand the form he signed.¹³⁸

In addition to being clear enough that the intended audience is able to understand the terms of the waiver, a waiver must also be specific enough to clearly articulate exactly what rights the signing party is waiving.¹³⁹ This, however, does not mean that the waiver must clearly articulate each and every possible instance or scenario for which the signing party is waiving his rights in an exclusive list.¹⁴⁰ Rather, courts consider whether the waiver sufficiently covers the situation

There Still a Place for Their Use by Colleges and Universities?, 29 J.C. & U.L. 579 (2003).

¹³⁵ See Nelson, *supra* note 129, at 546–49.

¹³⁶ *Id.* at 546.

¹³⁷ *Id.* For example, consider a waiver that is intended for use by college students to participate in a physical education class and a waiver that is intended to be used by professional hockey players for a hockey game. The former waiver would need to be written in language that an average eighteen-year-old student would understand and would likely need to not contain language highly specific to the athletic industry that a layman would not understand. However, the latter waiver, intended for individuals who compete at a high level within their sport and who have signed waivers of a similar kind, could likely use more advanced language that a professional hockey player would know. A court, in considering whether a specific waiver was sufficiently clear, would consider the waiver's intended audience in this manner.

¹³⁸ *Id.*

¹³⁹ *Id.* at 546–47.

¹⁴⁰ *Id.*

for which the signing party would otherwise be able to bring suit against the party protected by the waiver.¹⁴¹

2. *Conspicuous Language*

Next, courts require that waiver clauses be set apart from other contractual language in conspicuous language.¹⁴² Generally speaking, this requirement ensures that the individuals creating the waiver do not hide waiver language in the middle of a long document or in small print at the bottom of the page. Instead, courts require that waivers be placed conspicuously in the contract; however, whether a specific waiver is deemed conspicuous is considered on a case-by-case basis, as the entirety of the document must be examined.

For example, for a waiver that is included in a larger contract to be held enforceable, a court may require that the font of the waiver language is larger than the rest of the text, is highlighted, or is in some other way separate from the rest of the body of the contract to ensure that the waiver is seen by the signing party.¹⁴³ However, if the waiver is on its own sheet of paper, with no other terms or agreements listed on the same piece of paper, a court would likely not require that the typeface of the waiver be exceptionally large or highlighted.¹⁴⁴

¹⁴¹ For example, consider the following hypothetical waiver: “Traveler releases all claims for liability against Bussing Company and its employees for any delay or collision caused by the negligence of bussing company, its employees, or another passenger.” The traveler signs the waiver, and the bus subsequently collides with another vehicle due to the negligence of Bus Driver, injuring Traveler. It is likely that a court would find this waiver to be enforceable if Traveler later brings suit against Bussing Company, as this situation is clearly included in the waiver. *Cf. infra* Subsection IV.B. (discussing that a bussing company may not be able to waive liability if it is considered necessary for public good). Now consider that Traveler, having signed the same waiver, is injured when Bus Driver shoots Traveler with a gun that Bus Driver brought onto the bus with him. If Traveler were to bring suit against Bussing Company for their negligence in hiring Bus Driver, it is unlikely that a court would find the waiver enforceable and applicable to this specific situation because it is unlikely that Traveler would have understood that she was waiving liability for this type of negligence.

¹⁴² See Nelson, *supra* note 129, at 547.

¹⁴³ Under this same rationale, then, waiver language that is included on page twenty of a sixty-page document in the same typeface as the rest of the document would likely not be considered to be conspicuous.

¹⁴⁴ Presumably, most courts would assume that if an individual signs a sheet of paper that only contains the waiver, that individual recognizes that she is signing a waiver of some sort. This is not to say, though, that a waiver that is conspicuous cannot be found to have other drafting problems. See *infra* Subsection III.A.1.

3. *Unconscionability*

Finally, a court may deem a waiver unenforceable if it finds the waiver to be unconscionable. Unconscionability is commonly defined as “[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, [especially] terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.”¹⁴⁵ Typically in the waiver context, courts refuse to find waivers enforceable where the waivers were signed by parties who did not have a reasonable opportunity to reject or modify the agreements.¹⁴⁶

A state appellate court in Wisconsin, for example, found that a waiver presented to the visitors of the Lake Geneva Raceway (Raceway) was not enforceable on the basis of unconscionability.¹⁴⁷ Catherine Nyman was presented with a waiver upon entering the parking lot of the Raceway, and she asked the Raceway employee who gave her the form what the form was for, specifically asking if the form was intended to waive claims for injuries sustained at the Raceway.¹⁴⁸ The employee did not answer her, and Nyman signed the form without reading it to enter the Raceway.¹⁴⁹ The waiver freed the Raceway from any liability resulting from injury or death to the visitors of the Raceway if they were in the “restricted area.”¹⁵⁰ Upon entering the Raceway, Nyman watched a motorbike race from the “bleacher area” of the Raceway, which was not marked in any way as being part of the “restricted area” referenced in the waiver.¹⁵¹ Nyman was injured when a motorbike struck her while she was in the “bleacher area” of the Raceway.¹⁵² Nyman sued the Raceway for negligence, and the trial court granted summary judgment in favor of the

¹⁴⁵ BLACK’S LAW DICTIONARY 1664 (9th ed. 2009).

¹⁴⁶ See Nelson, *supra* note 129, at 548–49.

¹⁴⁷ See generally Eder v. Lake Geneva Raceway, Inc., 523 N.W.2d 429 (Wis. Ct. App. 1994).

¹⁴⁸ *Id.* at 431. Another litigant, Kristine Kaskowski, noted that the text of the form “was so small it could not be read rapidly.” *Id.*

¹⁴⁹ *Id.* Nyman testified that she felt rushed in signing the form, as she had a line of cars behind her waiting to enter the parking lot as well. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Raceway, finding that the waiver was enforceable.¹⁵³

On appeal, the court determined “that the exculpatory contract here was not consistent with the principles of freedom of contract,” which the court defined to “protect[] the justifiable expectations of parties to an agreement, free from governmental interference.”¹⁵⁴ In making this determination, the court considered that the Raceway was not “willing to discuss the terms,” nor did the Raceway “intend[] to engage in a process whereby . . . Nyman could form the required intent to be bound to certain terms.”¹⁵⁵ The Raceway did not provide Nyman with a reasonable opportunity to read the terms of the waiver and to object or ask for clarification regarding specific parts of the contract.¹⁵⁶ Because Nyman was unable to engage in making a meaningful choice in deciding to sign the waiver, the court held that the waiver was unenforceable as unconscionable.¹⁵⁷

Similarly, unconscionability has been found by courts in situations where there is unequal bargaining power between the parties.¹⁵⁸ For instance, the Tenth Circuit affirmed a jury finding that an unequal bargaining power existed between Arnold Oil Properties, LLC (Arnold) and Schlumberger Technology Corp. (Schlumberger).¹⁵⁹ In this case, Arnold hired Schlumberger for a cement job, which was completed negligently.¹⁶⁰ After the cement had been poured but before the negligence could be discovered, Schlumberger presented Arnold with a contract, which indemnified Schlumberger from “all claims arising out of or in connection with damage to or loss or destruction of property . . . arising out of or in connection with

¹⁵³ *Id.* Specifically, the trial court noted that Nyman should not be freed from the contract due to her own failure to read the contract. *Id.*

¹⁵⁴ *Id.* at 432.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See generally id.* Interestingly, the court does not seem to use the language of “unconscionability” in forming its opinion and rather relies simply on finding the waiver unenforceable on the grounds of public policy. *Id.* However, the reasoning of the court is analogous to the definition of “unconscionability” in Black’s Law Dictionary. *See supra* note 145 and accompanying text.

¹⁵⁸ Arguably, there may have been unequal bargaining power present in the *Eder* case, as Nyman was not given the opportunity to bargain at all, especially because the Raceway employees failed to answer her questions about the waiver. *Eder*, 523 N.W.2d at 432.

¹⁵⁹ *See generally* Arnold Oil Properties LLC v. Schlumberger Tech. Corp., 672 F.3d 1202 (10th Cir. 2012).

¹⁶⁰ *Id.* at 1204–05.

the contract or the services provided hereunder,” and which also included a “Special Indemnity” clause and a “Limitation of Liability” clause.¹⁶¹ Arnold signed the contract on an electronic signature pad, which did not display the language of the contract between the parties.¹⁶² After the negligence was discovered, Arnold brought suit against Schlumberger, and a jury found that the parties had unequal bargaining power, rendering the contract unenforceable.¹⁶³

On appeal, the court considered, among other things, whether the jury’s finding that an unequal bargaining power existed was appropriate and determined that evidence presented at trial was sufficient for the jury to make such a finding.¹⁶⁴ The court noted that

(1) the . . . cement top was “critical” to Arnold’s production from the well; (2) three companies were able to perform the work Arnold needed; (3) all three companies used standardized contracts with similar “onerous” terms regarding liability; (4) in Arnold’s chief operating officer’s experience, the terms were non-negotiable; and (5) a Schlumberger employee who has performed hundreds of cement jobs has never been asked to modify the terms of the contract, nor does he have the authority to do so.¹⁶⁵

Given this evidence, the appellate court determined that the evidence provided at trial was sufficient for the jury to find that an unequal bargaining power existed between the parties, as Arnold had no reasonable choice in signing the agreement.¹⁶⁶

B. Waivers Unenforceable Due to Public Policy

A waiver can also be rendered unenforceable for reasons outside those grounded in contract law, as waivers can be deemed unenforceable as a matter of public policy.¹⁶⁷ There are four main public policy considerations that can make a waiver unenforceable: (1) a waiver “being used in the context of services that are highly important or essential to the public”; (2) a waiver “asking signers to release liability for extreme

¹⁶¹ *Id.* at 1205.

¹⁶² *Id.*

¹⁶³ *Id.* at 1206.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1208 (citation omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *See* Nelson, *supra* note 129, at 550.

conduct such as gross negligence, recklessness, or willful misconduct”; (3) a waiver “seeking to release a duty of care established by statute”; and (4) a waiver “being used by or on behalf of children.”¹⁶⁸ Only waivers necessary for the public good and waivers releasing liability for gross negligence are relevant to suicide waivers used by higher-education institutions; accordingly, the other two types of waivers are not discussed further in this Article.¹⁶⁹

1. *Services Necessary for the Public Good*

In *Tunkl v. Regents of University of California*, the Supreme Court of California articulated a six-factor balancing test to determine when a service is necessary for the good of the public.¹⁷⁰ These six factors, none of which is independently dispositive, are (1) “[w]hen the activity at issue ‘concerns a business of a type generally thought suitable for public regulation’”; (2) “[w]hen the party seeking to enforce the release and be relieved of liability is ‘engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public’”; (3) “[w]hen ‘[t]he party holds himself out as willing to perform this service for any member of the public who seeks it’”; (4) “[w]hen as a result of the essential nature of the service, the party seeking exculpation holds ‘a decisive advantage of bargaining strength against any member of the public who seeks his services’”; (5) “[w]hen ‘in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation [with no provision for payment of additional fees to] obtain protection against negligence’”; and (6) “[w]hen ‘as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to

¹⁶⁸ *Id.*

¹⁶⁹ However, if the suicide waivers discussed in this Article were to be adopted by private juvenile detention facilities, the public policy concern regarding children would be applicable. For a discussion of private juvenile detention facilities, see generally Brittney Kern, *Giving New Meaning to ‘Justice for All’: Crafting an Exception to Absolute Judicial Immunity*, 2014 MICH. ST. L. REV. 148 (discussing the Cash for Kids scandal that led dozens of juveniles to be sentenced to a private juvenile detention facility in Luzerne County, Pennsylvania). See also *infra* Section V.C.

¹⁷⁰ See generally *Tunkl v. Regents of University of Cal.*, 383 P.2d 441 (Cal. 1963). See also Nelson, *supra* note 129, at 550–51; Connell & Savage, *supra* note 134, at 582–83.

the risk of carelessness by the seller or his agents.”¹⁷¹ Services that have been considered necessary to the public good include hospitalization services, health care services, “banking and escrow services, services involving public carriers, and public school sports programs.”¹⁷²

2. *Gross Negligence and Reckless Behavior*

Courts generally hold that individuals cannot waive liability for the gross negligence, recklessness, or willful misconduct of another.¹⁷³ The Supreme Court of Nebraska considered a contract that waived gross negligence in *New Light Company, Inc. v. Wells Fargo Alarm Services*.¹⁷⁴ New Light Company (New Light) and Wells Fargo Alarm Services (Wells Fargo) entered into an agreement in which Wells Fargo would install fire alarms at The Great Wall Restaurant, which was owned and operated by New Light.¹⁷⁵ The parties signed a renewal agreement in 1988, five years after the fire alarms were installed, and the renewal agreement “contained an exculpatory clause stating that New Light agreed that Wells Fargo would not be liable for any loss or damage, irrespective of origin, to persons or property whether directly or indirectly caused by performance or nonperformance of any obligation imposed by the agreement or ‘by negligent acts or omissions of Wells Fargo Alarm, its agents or employees.’”¹⁷⁶ In 1989, a fire occurred in the restaurant, and because “Wells Fargo failed to install a fire-sensing device in the basement-level clothes dryer room or the adjoining electrical room, which contained the main fire alarm control panel and its connection to the telephone junction box,” the alert system did not function.¹⁷⁷ As

¹⁷¹ Connell & Savage, *supra* note 134, at 583 (quoting *Tunkl*, 383 P.2d at 445–46). Courts have held that the third factor can be counted in favor of finding that the service was one necessary for the good of the public even when the entire public could not partake in the service, such that the service was limited to certain individuals who met listed criteria. See Nelson, *supra* note 129, at 551 (listing the third factor instead as “[t]he party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards”).

¹⁷² Nelson, *supra* note 129, at 551.

¹⁷³ See *supra* note 168 and accompanying text.

¹⁷⁴ See generally *New Light Company, Inc. v. Wells Fargo Alarm Services*, 525 N.W.2d 25 (1994).

¹⁷⁵ *Id.* at 27.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 28.

a result, the restaurant suffered major damage from the fire.¹⁷⁸

In evaluating whether the waiver freed Wells Fargo from any liability for the fire, the court noted that “[w]hether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved. . . . The greater the threat to the general safety of the community, the greater the restriction on the party’s freedom to contractually limit the party’s liability.”¹⁷⁹ Here, because the court found that there was a significant danger caused to the public as a result of Wells Fargo’s gross negligence, the ability of Wells Fargo and New Light to form a contract involving Wells Fargo’s liability is outweighed by the public policy considerations, and the court determined that the waiver was ineffective against New Light’s claim of gross negligence.¹⁸⁰

IV. COURT INTERPRETATIONS OF SUICIDE WAIVERS

Having explored the doctrine of waivers and the primary reasons for which courts can find waivers to be unenforceable, this Part considers whether courts are likely to enforce suicide waivers presented by universities to students and aims to find actions that the schools can take to increase the likelihood that courts would enforce suicide waivers.

This Part does not discuss in detail drafting problems that can render a waiver unenforceable or the need for universities to use conspicuous language when creating the waiver. However, as discussed in the previous Part, in drafting any suicide waiver it is essential not only that universities use language that students would be able to understand, but also that if the waiver is contained within a larger contract, the waiver itself is clearly identified by using a larger typeface, highlighting the language, or requiring the student to initial or sign where the waiver language actually appears.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 30. To illustrate this point, the court noted that “a contractual agreement to dig a ditch does not have the same public policy considerations as would the installation of a fire alarm system in a school, hospital, nursing home, restaurant, or other heavily occupied building.” *Id.*

¹⁸⁰ *Id.* at 30–31. Notably, the court did not determine that the contract as a whole was unenforceable, so if a similar claim were to arise out of an identical contract that was for negligence, rather than gross negligence, it is likely that the court would deem the waiver to be enforceable against this new claim.

A. *Unconscionability*

As illustrated in the previous Part, courts are likely to find that a waiver is unenforceable for being unconscionable if (1) the contract is “unfair or oppressive because of procedural abuses during contract formation”; or (2) there are “overreaching contractual terms, [especially] terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.”¹⁸¹ Suicide waivers could be found unenforceable for either of these reasons if the universities promoting the waivers do not take steps to help ensure the contract is deemed enforceable.

1. *Procedural Abuses During Contract Formation*

Universities must ensure that there are no “procedural abuses during contract formation.”¹⁸² This language can be interpreted in two ways. First, courts likely would not enforce a waiver disclaiming liability for the university if it is presented to a student who is already invested in the educational program. For example, if Student at University is already enrolled in the school, has completed six semesters of study, and only has two semesters left to graduate from University when she is required by University to sign a suicide waiver that disclaims all liability on the part of University if Student commits suicide or otherwise inflicts self-harm, Student is likely to win on an argument that she had no real choice but to sign the waiver because it would be impractical for her to transfer to a different school to complete her program.¹⁸³ On the

¹⁸¹ BLACK’S LAW DICTIONARY 1664 (9th ed. 2009).

¹⁸² *Id.*

¹⁸³ A court evaluating a case of first impression concerning a waiver for suicide liability on the part of a university may analogize the enforceability of this type of waiver to non-compete clauses in employment agreements. In these clauses, the employee signs an agreement in which the employee agrees not to work in a narrow field in a certain geographic area for a specific period of time following the employee’s relationship with the original employer. Courts have regularly determined that these clauses are enforceable, but only if they meet certain requirements. First, the non-compete clauses must have a purpose that is not primarily to restrict competition. *Diederich Ins. Agency, LLC v. Smith*, 952 N.E.2d 165, 168 (Ill. App. Ct. 2011) (citing *Woodfield Group, Inc. v. DeLisle*, 693 N.E.2d 464, 466–67 (Ill. App. Ct. 1998)). Second, the non-compete clause will only be enforceable if the terms of the clause are reasonable. *Id.* “It must be reasonable in geographic and temporal scope and necessary to protect a legitimate business interest of the employer.” *Id.* (internal citation omitted). Finally, the non-compete clause “must be ancillary to a valid contract, that is, it must be subordinate to the contract’s main purpose” and “there must be adequate

other hand, however, if Incoming Freshman was asked to sign the suicide waiver provided to him by University in the summer before enrolling in University, before Incoming Freshman had paid any tuition to University or began classes, a court would likely determine that if Incoming Freshman wishes not to sign University's waiver, he can choose to not sign the suicide waiver and to instead attend another school that does not require a suicide waiver.¹⁸⁴ As discussed in Part III, courts determine unconscionability by looking at the specific facts of each situation.¹⁸⁵ Therefore, it would be imperative for colleges that wish to implement a suicide liability waiver to present the waiver to incoming students, not to students already enrolled in the school who have little choice but to sign the waiver. By giving incoming students the option to sign the waiver or to attend a different school, the colleges would effectively preempt any unconscionability claim brought in this manner.

Second, courts likely would not enforce a waiver if the student were not given the opportunity to read and object to the terms of the waiver. As illustrated in *Eden*, in which

consideration to support the covenant.” *Id.* The most relevant aspect of the non-compete clause to the suicide liability waiver is this final component. Courts will likely only determine that the clauses will be enforceable if the waiver language is ancillary to a valid contract and if there is adequate consideration for the agreement. In order for the waiver to be ancillary to a valid contract, the waiver language should be presented to the potential student at a time logical for the student to be signing forms, such as when the student is enrolling in her first semester of study. The waiver would be only a subset of the documentation that would need to be signed and agreed to by the student. In order for the waiver to be enforceable, there must be consideration to support it. If the student signs the waiver as a condition of enrolling in the school, a court would be likely to find sufficient consideration, as the student is suffering a legal detriment by allowing the school to be free from liability should the student commit suicide, and the school is providing the student with an opportunity to study at the university. If this waiver language were presented to the student later in the student's career, after the student had already commenced studying at the university, it is likely that a court would not find a valid consideration on the part of the school, and therefore the court would likely hold the waiver to be unenforceable.

¹⁸⁴ This scenario would likely be similar to a situation in which an employee was presented with a non-compete clause at the time of the commencement of employment. At this point, the employee is able to negotiate for more beneficial terms in the overall employment contract, using the non-compete clause as a negotiation tool that favors the employer. If the employee is presented with this non-compete further in the employee's employment, the employee has no reasonable opportunity to negotiate for other beneficial employment terms. At the beginning of the employment agreement, employee is free to decline employment or bargain for better terms. Similarly, at the commencement of enrollment, Incoming Freshman is able to enroll in a different school that does not require a suicide liability waiver.

¹⁸⁵ See *supra* notes 1455–1666 and accompanying text.

Nyman was asked to sign a waiver in her car with no time to read the contract or to ask questions, it would be imperative for universities wishing to implement a suicide waiver to give students an opportunity to read through the waiver, ask the university questions regarding the waiver, retain counsel to advise them regarding the waiver, and, where appropriate, request that the university modify the waiver. Therefore, universities should mail the waiver to incoming students' permanent address during the summer before the students are due to enroll at the university. This would provide the students with ample time to consider their own best interests in signing the waivers and, consistent with the first consideration, make alternate arrangements for themselves if they determine that they are unwilling to sign the waiver. This suggestion would be significantly better than, for example, universities distributing the waiver during an in-person, new student orientation and requiring that students return the waiver to them that same day. Though this method would provide students with enough time to read through the waiver themselves, it likely would not provide ample time for students to ask meaningful questions about the waiver, consult with outside counsel, or request modifications to the waiver. As such, if this latter approach were taken, it would be likely that courts would hold the waivers unenforceable under the doctrine of unconscionability.

2. Unreasonably Favorable Language with No Meaningful Choice

Additionally, a court may find that a waiver is unconscionable, and therefore unenforceable, if (1) the waiver includes language that is unreasonably favorable towards one party; or (2) the parties to the waiver have unequal bargaining power.

First, courts may determine that language that is unreasonably favorable to the universities would be unenforceable. In order to avoid this scenario, universities drafting suicide waivers should include procedures that the universities will put into place to help students who reach out to faculty or staff of the university when expressing suicidal tendencies or who otherwise ask for help from the universities. For example, universities wishing to implement suicide liability waivers should ensure that the schools have counseling programs, or at least referral services to

nonaffiliated counseling services, for use by enrolled students who express a desire or a need for mental-health treatment or assistance. If the universities include language in the liability waivers that explain the steps a student can take to gain help and support from the universities—and the schools actually maintain such services—courts would likely find that students who have signed a suicide liability waiver and committed or attempted suicide without first utilizing the services available at the schools have effectively waived their rights to sue the university for negligence in their resulting deaths or injuries. If, however, the universities draft suicide liability waivers that explain that students and their families may not hold the schools liable in the event of suicide and that students who express suicidal tendencies will be expelled from the universities and evicted from on-campus housing, without providing any support for students or otherwise providing any language favorable to students, courts would likely hold this type of suicide waiver unenforceable as unconscionable, as the terms of the waiver would disproportionately benefit the universities.

Second, courts would likely hold the waivers to be unconscionable if the parties have unequal bargaining power, as the Tenth Circuit held in *Arnold Oil Properties LLC v. Schlumberger Technology Corp.*¹⁸⁶ Unequal bargaining power is a question of fact to be determined by a jury, and juries decide whether unequal bargaining power exists based on the specific facts of the case.¹⁸⁷ In order for courts to hold that universities and their students have equal bargaining power, universities should be willing to modify the suicide waivers if requested by the students. Additionally, because the universities would certainly have the support of lawyers in drafting the suicide liability waivers, students must be given an opportunity to consult with outside counsel before signing themselves, which would help create a more equal bargaining power.

B. *Services Necessary for the Public Good*

According to the *Tunkl* court, a waiver may be deemed unenforceable if it waives liability for a service that is deemed

¹⁸⁶ See *Arnold Oil Properties LLC v. Schlumberger Tech. Corp.*, 672 F.3d 1202 (10th Cir. 2012).

¹⁸⁷ See *id.*

necessary or essential for the good of the public.¹⁸⁸ In that case, the California state court created a list of six factors that are weighed to determine whether a service is necessary or essential for the good of the public.¹⁸⁹

The first factor considers whether the activity “concerns a business of a type generally thought suitable for public regulation.”¹⁹⁰ Depending on whether the universities implementing suicide waivers are public or private, this factor could weigh in favor of finding that the schools are necessary for the public good, as public universities are regulated by state governments. However, private schools likely would not satisfy this factor.

The second factor asks whether the schools are “engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.”¹⁹¹ Universities are generally considered important to the public, as it is a “practical necessity” that at least some members of society are college educated.¹⁹² However, universities do not perform services that are immediately necessary to help society function, such as public transportation or medical services. Therefore, this factor would need to be determined on a case-by-case basis.

The third factor considers whether the schools are “willing to perform [their] services for any member of the public who seeks it.”¹⁹³ As noted in footnote 171, this factor is still relevant even if the services are only provided to select members of the public who meet certain criteria.¹⁹⁴ Therefore, even though most universities have some sort of criteria that prospective students must meet before enrolling in the schools, this factor

¹⁸⁸ See *supra* notes 170–172 and accompanying text.

¹⁸⁹ See *supra* notes 170–172 and accompanying text.

¹⁹⁰ Connell & Savage, *supra* note 134, at 584 (quoting *Tunkl*, 383 P.2d at 445–46).

¹⁹¹ Connell & Savage, *supra* note 134, at 584 (quoting *Tunkl*, 383 P.2d at 445–46).

¹⁹² There certainly is an argument to be made that universities are not a practical necessity in this way; however, if universities ceased to exist, occupations that require intensive and expansive education, such as doctors, lawyers, and engineers, would no longer exist. While this example seems somewhat extreme, universities serve a very practical function in ensuring that society is able to thrive by educating the individuals who are the future of these highly specialized occupations.

¹⁹³ Connell & Savage, *supra* note 134, at 584 (quoting *Tunkl*, 383 P.2d at 445–46).

¹⁹⁴ See *supra* note 171 and accompanying text.

is likely met because the schools are open to educating any (or a subset of any class of) individuals who meet the criteria set forth by the school.

The fourth factor considers whether the schools “hold[] ‘a decisive advantage of bargaining strength against any member of the public who seeks his services.’”¹⁹⁵ While the last Section provided ways in which universities could avoid a finding of unequal bargaining power,¹⁹⁶ schools as a whole would likely still satisfy this factor, as universities have less to lose than students if students decide not to sign the suicide liability waivers. Students refusing to sign would need to find a new school in which to enroll, while universities would merely have to choose from other students interested in attending the universities to fill the spots of students unwilling to sign the waiver. So, while schools may try to ensure that a court finds that no unequal bargaining power exists, the universities will likely always be in a better bargaining position, especially as against individual students.¹⁹⁷ However, if the schools are willing to compromise on the language of the waivers and will at least consider modifying the language if students request modifications, then courts would likely be more willing to determine that there is not unequal bargaining power between the parties.

The fifth factor examines whether schools would provide their students “with a standardized adherence contract of exculpation [with no provision for payment of additional fees to] obtain protection against negligence.”¹⁹⁸ Despite the recommendation in the previous Section that universities be willing to modify the agreements if the modifications do not alter the fundamental terms of the waiver, this factor could be met if the universities refuse to modify the waivers or use a one-size-fits-all waiver for their student bodies.¹⁹⁹ Additionally,

¹⁹⁵ Connell & Savage, *supra* note 134, at 584 (quoting *Tunkl*, 383 P.2d at 445–46).

¹⁹⁶ See *supra* Section IV.A.2.

¹⁹⁷ If, however, one school in the United States were to implement a suicide liability waiver and prospective students either boycotted the school in large numbers or otherwise banded together to fight the waiver, this factor might not be satisfied, as the bargaining powers between a school desperate to enroll students and a band of students refusing to sign the waiver may be more equal.

¹⁹⁸ Connell & Savage, *supra* note 134, at 583 (quoting *Tunkl*, 383 P.2d at 445–46).

¹⁹⁹ See *supra* Section IV.A.

it likely would not be advantageous for universities to offer an option for the students to pay additional fees to avoid signing the waiver, as students likely to pay this fee are those who have previously experienced suicidal thoughts or tendencies, making them the students that the universities would most want to protect themselves against.

Finally, the sixth factor considers whether the students would be placed under the control of the universities “subject to the risk of carelessness by the [school] or [its] agents.”²⁰⁰ This factor is reminiscent of the *Leary* case, in which Wesleyan University’s public safety officers transported Leary to the hospital and left him without securing care for him.²⁰¹ The court in that case determined that there was a genuine question of fact concerning whether Wesleyan University had custody of Leary, thereby leaving Leary helpless.²⁰² This factor is unable to be predicted in the abstract, however, without having specific facts of the individual situations, and therefore courts would likely consider this factor on a case-by-case basis.

Even excluding the sixth factor, which would need to be determined on a case-by-case basis using the specific factual scenario, it is likely that courts could find that universities meet each of the first five factors and would be considered essential for the good of the public. If this standard were met, then higher education, and therefore universities, may be deemed necessary for the public good, and universities would therefore be unable to enforce suicide liability waivers in court, following the precedent of *Tunkl*.²⁰³ However, it is also plausible that none or few of the factors could be met, which would render the necessary-to-the-public-good doctrine unhelpful in defending against enforcement of the waivers.

C. *Gross Negligence and Reckless Behavior*

Finally, courts may find that suicide liability waivers are unenforceable if the universities attempt to waive liability for grossly negligent or reckless behavior. For example, the actions of MIT, in not following up on the report from Shin’s friends

²⁰⁰ Connell & Savage, *supra* note 134, at 584 (quoting *Tunkl*, 383 P.2d at 445–46).

²⁰¹ See *supra* notes 105–118 and accompanying text.

²⁰² See *supra* note 113 and accompanying text.

²⁰³ See *supra* notes 170–172 and accompanying text.

that Shin intended to commit suicide on the day that she did in fact commit suicide, could be determined to be grossly negligent.²⁰⁴ If a court were to find that a university was grossly negligent in handling a suicidal student, then a suicide liability waiver would not be enforceable, regardless of whether the same waiver would be enforceable if used to defend against a simple negligence claim.

Therefore, universities would need to ensure that they act in such a way that cannot be construed as grossly negligent or reckless. This would require universities to respond seriously to students' reports of their own or another student's suicidal behavior or thoughts. Additionally, universities would need to employ counselors who are trained to respond to students having suicidal thoughts or engaging in suicidal activities. At a minimum, the universities should have referral programs available for outside counselors. This would make it more feasible for smaller schools to provide resources to their students, as hiring full-time counselors may not be possible for small institutions. Finally, universities should consider implementing mandatory educational sessions for students that teach the warning signs of suicidal behavior so that other students can be resources for their peers, even if that only leads to students asking the universities for help on behalf of their peers. These actions, if implemented and maintained by universities, would likely help support findings that no gross negligence or reckless disregard for the safety of students exists because they show the universities' efforts to fulfill their legal duties to their students.

If universities that wish to implement suicide liability waivers adapt even some of the suggestions provided in this Part, courts would be less likely to find the waivers unenforceable under contract law or public policy. However, universities would need to evaluate their own circumstances individually to determine the best options for them, as some of these options would only work in limited circumstances. If

²⁰⁴ Black's Law Dictionary defines "gross negligence" as "[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages." BLACK'S LAW DICTIONARY 1133–34 (9th ed. 2009). Though it was never settled as to whether MIT had a special duty towards Shin, the trial court judge found that a genuine issue of material fact existed as to whether a special duty existed. *See supra* notes 102–104 and accompanying text. If a jury were to find that a special duty did exist, then MIT's actions would likely rise to the definition of gross negligence, as opposed to just negligence.

suicide liability waivers begin to be adopted by universities, however, there is little doubt that universities, courts, and perhaps legislatures would help determine the ideal conditions for which the waivers would be deemed enforceable.

V. ARE SUICIDE WAIVERS THE ANSWER? UNIVERSITY OPTIONS FOR PREVENTING LIABILITY AND DETERRING STUDENT SUICIDE

A. *Impact of Suicide Waivers*

Assuming arguendo that courts would generally accept suicide liability waivers as enforceable, universities need to consider whether the benefits of these waivers are worth the possible costs. The benefits of the waivers to schools are quite obvious; schools that successfully implement suicide liability waivers would be protected from negligence claims from students and their families for suicides and episodes of self-harm, regardless of whether a special relationship exists between the schools and the students. Given the recent decisions in trial courts throughout the country that suggest that a special relationship may be formed between schools and their students,²⁰⁵ the benefits of such waivers are clear; the waivers would not only protect the schools from civil damages, but they would also prevent negligence cases against the schools from continuing past the summary judgment stages of a lawsuit. These waivers, then, would save the universities that successfully implement them a great deal of expense and time in defending themselves in lawsuits.

Additionally, universities implementing the waivers would not need to worry about their behavior in helping treat the students who show suicidal tendencies, assuming that the universities' behavior did not rise to the level of gross negligence or reckless disregard. This is really a benefit to both the universities and to the students. The universities would benefit because they would be able to provide help to their students, which most universities would likely prefer to do rather than expel the students or evict them from campus housing if the student shows signs of suicidal tendencies or

²⁰⁵ See generally *Shin v. Massachusetts Institute of Technology*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005); *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002); *Leary v. Wesleyan University*, No. CV055003943, 2009 WL 865679 (Super. Ct. Conn. March 10, 2009).

mental health diseases.²⁰⁶ While the universities would want to keep costs at a minimum, and therefore may not want to spend any excessive money on counseling and treatment for mental-health diseases for their students, the individual counselors at the universities would likely be elated to know that they would be able to provide counseling to their students without risking liability should the student take a drastic action. For example, Jacquelyn Kondrot, the counselor employed by Allegheny College who met with Chuck Mahoney for the three years that Mahoney was a student at the college, seemed to genuinely care about treating Mahoney and wanted to ensure that Mahoney was safe.²⁰⁷ In the “Notes of Dictation” that Kondrot recorded regarding a therapy session with Mahoney, Kondrot stated that “[a]t this point, I had tears in my eyes and felt concerned and frustrated with [Mahoney’s] resistance.”²⁰⁸ Kondrot clearly had formed a relationship with Mahoney and was genuinely concerned about his well being, and it is likely that many counselors employed by universities would have similar reactions in analogous situations. Because of this, the counselors would benefit from knowing that they could intervene as they saw fit—so long as their actions did not amount to gross negligence or recklessness—without worrying about personal liability if the students they are attempting to aid later commit or attempt suicide.

Students would benefit because the students would be more likely to receive the help they need from their schools, through either on-campus counseling or referrals to unaffiliated counseling programs. Also, students would not need to worry about being expelled or evicted if they showed signs of depression or other mental health diseases.²⁰⁹ And, perhaps

²⁰⁶ Universities may not see an obvious benefit here, as increasing resources for students would lead to increasing costs for the institutions. However, the positive publicity would likely outweigh this cost, especially if universities advertise their student health programs. For many prospective students, especially those with past histories of mental-health diseases, university-sponsored programs may be the factor that convinces these students to enroll. Further, if universities fail to provide any support for their students and instead expel or evict them, such as what occurred to Jordan Nott when he was enrolled at GW, the negative publicity could cost the school more financially than it would have cost to implement mental health programs at the school.

²⁰⁷ See *supra* notes 46–52 and accompanying text.

²⁰⁸ Mahoney v. Allegheny College, No. AD 892–2003 (Pa. Ct. Com. Pl. Dec. 22, 2005), available at http://www.bsk.com/site/files/Mahoney_v._Allegheny_College.pdf.

²⁰⁹ See *supra* notes 120–128 and accompanying text.

even more importantly, students would not be incentivized to hide mental health diseases if they knew that they would be able to remain in school and in their housing if they show signs of mental illness.²¹⁰

However, there are very real costs to universities who choose to implement suicide liability waivers, particularly for those schools that act first in requiring students to sign the waivers. First, it is extremely likely that the first waivers would be litigated to determine whether, in fact, university suicide liability waivers are enforceable. If the universities take the suggestions listed in the previous Section to help promote the enforceability of the waivers, it is unlikely that the schools would end up paying damages to students or their families for negligence on the part of the school covered by the waiver. But the schools would need to defend themselves in the litigation, which would exhaust many resources. Second, the first schools to adopt suicide liability waivers may be subjected to negative publicity, as the waivers, at first, seem to benefit only the universities and not the students who sign them. However, if enough schools implement the waivers, they likely would become more accepted and common in higher education. Additionally, if the universities implementing these waivers create superior resources for students struggling with mental-health diseases, then the public would likely be encouraged by the increased benefits to these students. Until this happens, though, the first adopters may miss out on students who would otherwise attend their schools, but who choose not to do so to avoid signing the waivers.

An unfortunate reality that must also be considered is that a waiver of school liability for students' suicides or self-harming actions will almost certainly not, in and of itself, deter student suicide. Individuals who are prone to suicide are unlikely to change their mind based solely on a contract signed that limits the liability for the suicide, especially if that waiver was signed months or even years before the suicide occurred. However, the benefits to students are not in having to sign the

²¹⁰ A further concern for schools like GW is that students will feign recovery signs to avoid being expelled or evicted, which presumably would open up universities to more liability if these students were to later commit suicide or otherwise self-harm. If schools removed the policy to expel or evict, students would be less likely to hide their symptoms and seek the help they need. *See supra* notes 120–128 and accompanying text.

waiver directly, but come from the universities being more willing to accommodate and support students who show suicidal tendencies than they otherwise may be if the universities had to worry about their own liability. Therefore, while critics of the waiver likely will argue that this type of waiver would do nothing to directly curb student suicide, the secondary effects of imposing this type of waiver would ultimately help students in need.

In order for students to truly be benefitted, however, schools implementing these waivers would need to create superior resources for counseling and treatment of mental-health diseases. It would be ineffective for treatment purposes for the schools to simply use the waivers without providing further resources for their students. It is unlikely that schools would choose to spend money on mental-health programs as opposed to sporting programs, new buildings, and emerging technology, all of which would garner immediate and positive publicity. However, with the increased suicide rates among college students throughout the country, schools should consider the negative implications that attach when a student at the university inflicts self-harm or commits suicide.²¹¹ For instance, GW faced harsh criticism when Nott's story—of being evicted from student housing and threatened with expulsion if he failed to withdraw from the university—was publicized.²¹² If other students face similar responses from universities, it is only a matter of time before potential new students begin to seriously consider the mental-health facilities of potential colleges, especially if these students have a history of mental-health diseases. In order to combat harsh publicity and to aid potential students who suffer from mental-health diseases, universities, especially those implementing a suicide liability waiver, need to address mental health counseling and treatment, and need to make student safety and health a

²¹¹ See *supra* note 5 and accompanying text.

²¹² See, e.g., Brian Beutler, *Psyched Out*, WASH. CITY PAPER, June 3, 2005, available at <http://www.washingtoncitypaper.com/articles/30692/psyched-out>; Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar 10, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030902550.html>; Christine Lagorio, *Depressing Times on Campus*, CBS NEWS, Apr 5, 2005, available at <http://www.cbsnews.com/news/depressing-times-on-campus/>; Editorial, *Depressed? Get Out!*, WASH. POST, Mar 13, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200804.html>.

priority.

B. *Other Options*

Having identified the costs and benefits of imposing suicide waivers, it is prudent to compare the expected impact of suicide waivers to other options that universities may consider instead. Two of these options that are especially likely include (1) school policies mandating contacting parents under the FERPA exception; and (2) expulsion or eviction of students who exhibit signs of mental illness.

1. *Disclosure Requirement in the Wake of FERPA*

As noted by the *Jain* and *Mahoney* cases, FERPA “permits institutions to disclose otherwise confidential information to ‘appropriate parties’ when an ‘emergency’ makes it necessary ‘to protect the health or safety of the student or other persons.’”²¹³ This disclosure is discretionary under FERPA,²¹⁴ but universities may make policies either that make the disclosure mandatory if an employee of the school believes the situation is an “emergency” or that clearly articulate a list of elements necessary for the universities to contact students’ parents. By implementing either form of these policies, universities would protect themselves in cases analogous to the *Mahoney* case, in which Kondrot debated contacting Mahoney’s parents to alert them to their son’s suicidal thoughts, but ultimately decided not to contact them.²¹⁵ Having a clear, written policy in place would help protect the school in cases like these, as there would be fewer ambiguous decisions to be made in this regard.

While implementing a policy that distinguished when to contact students’ parents under the FERPA exception is a possible route for universities, this option would likely not protect the universities as fully as would implementing mandatory suicide liability waivers, as the FERPA exception only covers one aspect of a potential suit, while the suicide liability waivers cover many more of the possible scenarios. However, universities may find that it would be ideal to

²¹³ *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000) (quoting 20 U.S.C. § 1232g(b)(1)(I)).

²¹⁴ *See id.*

²¹⁵ *See supra* note 51 and accompanying text.

implement both of these options in order to provide parents of university students, especially those with knowledge of their children's mental illnesses, information on how to become involved in the students' treatment.

2. *Expulsion from School or Eviction from Dorm Housing*

Some universities, including GW, have implemented policies of expelling and/or evicting students who seek help for mental illness.²¹⁶ When Jordan Nott, a student at GW, sought treatment for suicidal thoughts he experienced while taking a new medication, he was evicted from his on-campus housing a mere twelve hours after arriving at the GW hospital and was asked to withdraw—and threatened with suspension, expulsion, and criminal prosecution for trespassing if he did not withdraw from the school—twenty-four hours later.²¹⁷ This type of policy opens universities up to a host of other problems, as evidenced in this GW example; Nott sued GW for violations of the Americans with Disabilities Act, Rehabilitation Act, Fair Housing Act, and D.C. Human Rights Act and also for intentional infliction of emotional distress, invasion of privacy, and breach of confidential relationship.²¹⁸

Policies like this one incentivize students to mask their symptoms and to not seek help, which could lead to even more opportunities for liability on the part of the universities. This would especially be the case, for example, if students fake recovery from their mental illnesses in order to remain enrolled in school. If these students later inflicted self-harm or committed suicide, it is likely that the students or their parents would have claims against the school for inflicting distress upon the students, as the school policy was a motivating factor in the students' actions.

Given the vast negative implications for policies that expel or evict students who seek help for their mental illnesses, suicide liability waivers provide far superior benefits to both universities and their students. As such, schools choosing between one of these policies should choose suicide liability waivers, and schools like GW that currently have the expulsion or eviction policy in place should consider switching their

²¹⁶ See *supra* notes 1211–28 and accompanying text.

²¹⁷ See *supra* notes 1211–28 and accompanying text.

²¹⁸ See *supra* notes 1211–28 and accompanying text.

policies, perhaps to use suicide liability waivers instead.

C. *Alternative Uses for Liability Waivers*

Suicide liability waivers could be applicable to forums other than universities. For instance, juvenile detention facilities and summer camps could also implement similar waivers for their residents. However, waivers in these forums may not be found enforceable for a reason previously excluded from this Article—infancy of one of the contract parties.

Juvenile detention facilities and summer camps often house individuals under the age of eighteen, who are not able to form many contractual relationships, including waivers of liability. For example, David Franco, a fourteen-year-old infant, signed a waiver, releasing defendant Louis Neglia Martial Arts Academy (Academy) from liability and from any action as a result of Franco sustaining an injury while participating in activities at the martial arts academy.²¹⁹ Franco suffered a broken toe after being paired with an advanced martial arts partner on his first day at the academy, and Franco brought suit against Academy resulting from these injuries.²²⁰ The Supreme Court of New York did not reach the merits of the case, as the judge wrote that “[i]t is well settled that infants are not bound by releases or waivers[,] which exculpate defendants from liability for causes of action to recover damages for personal injuries since they lack the capacity to enter into such agreements.”²²¹ Because of this, Academy’s motion for summary judgment was denied, as the waiver was deemed to be unenforceable as against Franco due to his infancy status.²²²

As evidenced by the *Franco* case, a waiver agreement entered into by an individual under the age of eighteen will not be enforceable. However, juvenile detention facilities and summer camps may be able to enforce suicide liability agreements if the parents of the children affected by the waivers sign them as well. The enforceability of a waiver signed by the infant and by the infant’s parents or guardians is

²¹⁹ *Franco v. Neglia*, 776 N.Y.S.2d 690, 691 (2004).

²²⁰ *Id.*

²²¹ *Id.* (citing *Kaufman v. American Youth Hostels*, 177 N.Y.S.2d 587 (1958) and *People ex rel. Bymes v. Goldman*, 302 N.Y.S.2d 926 (1969)).

²²² *Id.*

not certain, however, as courts have determined that judicial approval is needed to enforce these agreements in order to ensure that the agreement is in the child's best interest. In *Gomes v. Hameed*, the Supreme Court of Oklahoma stated that "[e]nforcement [of agreements not to sue] without court approval would allow the court to abandon its duty to guard the interests of minors in actions involving their rights. However, . . . the contract need not be approved before the exchanged promises are performed."²²³ Therefore, even if the infant's parent also signed the suicide liability waiver presented by a juvenile detention facility or a summer camp, a judge could find that the waiver was not executed in the infant's best interest, and the waiver could be deemed unenforceable.

While suicide liability waivers may be an option for other forums, such as juvenile detention facilities and summer camps, there is an added danger of the waivers being deemed unenforceable if the individual signing the waiver is under the age of eighteen. Because of these added risks, there are likely more fruitful options for organizations and facilities that house infants.

VI. CONCLUSION

With colleges facing an unprecedented number of student suicides, schools across the country need to reevaluate their policies for protecting themselves from liability and for deterring student suicide. And while no court has, to date, definitely found that a special relationship has existed between a school and a student that would leave the school vulnerable for a negligence claim, trial court judges have, in recent years, suggested that a jury could in fact find that a special relationship does exist between a school and a student. While suicide liability waivers, as those implemented in China, have been seen as somewhat drastic or surprising to some, waivers of this kind have the ability to protect both universities and students if adopted and implemented properly by the higher-education institutions. Not only would these waivers incentivize universities to take further action and provide additional resources to assist students who suffer from mental-

²²³ *Gomes v. Hameed*, 184 P.3d 479, 489 (Okla. 2008).

health diseases, but the universities also would be more protected from liability should a student or her parents sue the school following a suicide or infliction of self-harm. Perhaps higher-education institutions in the United States should adopt a form of the waiver sent to Ms. Li's son, as these waivers may not only save university money, but may also save lives.