
COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. _____

CHO HYUN SHIN AND KISUK SHIN, INDIVIDUALLY AND AS
ADMINISTRATORS OF THE ESTATE OF ELIZABETH H. SHIN,

Plaintiffs / Appellees

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, et al.,

Defendants / Appellants.

On Appeal from an Interlocutory Order of the Superior
Court, Middlesex County

**MEMORANDUM OF AMICI CURIAE AMHERST COLLEGE, BOSTON
COLLEGE, BOSTON UNIVERSITY, BRANDEIS UNIVERSITY, THE
COLLEGE OF THE HOLY CROSS, EMERSON COLLEGE, LESLEY
UNIVERSITY, MASSACHUSETTS COLLEGE OF PHARMACY AND
HEALTH SCIENCES, NORTHEASTERN UNIVERSITY, SIMMONS
COLLEGE, SMITH COLLEGE, STONEHILL COLLEGE, TUFTS
UNIVERSITY, WELLESLEY COLLEGE, AND WILLIAMS COLLEGE IN
SUPPORT OF THE PETITION FOR RELIEF UNDER G.L. CH. 231,
§ 118 (FIRST PARAGRAPH) BY MIT ADMINISTRATORS ARNOLD
HENDERSON AND NINA DAVIS-MILLIS**

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Other Authorities

Prosser & Keeton, Torts § 53 (5th ed. 1984) 21, 22
Restatement (Second) of Torts, § 314A (1965) 13
William L. Prosser, Palsgraf Revisited, 52 Mich. L.
Rev. 1, 14-15 (1953) 22, 30

STATEMENT OF INTEREST OF THE AMICI

Amici Amherst College, Boston College, Boston University, Brandeis University, the College of the Holy Cross, Emerson College, Lesley University, Massachusetts College of Pharmacy and Health Sciences, Northeastern University, Simmons College, Smith College, Stonehill College, Tufts University, Wellesley College, and Williams College (the "*Amici*") submit this memorandum in support of petitioners Massachusetts Institute of Technology ("MIT") Administrators Arnold Henderson and Nina Davis-Millis (together, the "MIT Administrators").

Amici are fifteen Massachusetts educational institutions. They range from small, liberal arts colleges in rural areas to large, urban universities. Collectively, they enroll approximately sixty-four thousand undergraduate students and nearly thirty-six thousand graduate students. *Amici*, like colleges and universities across the country, have witnessed an increase in the number of students experiencing mental health issues (including those who complain of anxiety, stress, and depression) and those who report their own thoughts of suicide or report conversations

in which roommates, friends, and others on campus have mentioned suicide.

All *Amici* employ, or have access to, psychiatrists and other medical professionals who are trained and licensed to diagnose and treat serious mental health problems. All *Amici* also employ non-clinician administrators who routinely interact with students experiencing mental health issues. These non-clinician administrators include a variety of college and university employees such as deans of students and undergraduate life, deans of residential life and other residential life personnel, athletic coaches, academic and thesis advisors, and faculty members. Housemasters, graduate residents, residential assistants, and junior advisors may also be included among non-clinician administrators. *Amici's* non-clinician administrators vary widely in their education, training, and experience: some have advanced degrees, such as Ph.D.'s, while others have, or are pursuing, bachelor degrees.

From time to time, *Amici's* non-clinician administrators become aware of suicide threats. Although administrators treat seriously all such threats, the appropriate and customary response is to

refer the student to a psychiatrist or another trained medical professional for evaluation and development of a treatment plan. *Amici's* non-clinician administrators earnestly and diligently make such referrals. In doing so, they defer -- as they must -- to the psychiatrists and medical professionals on questions concerning the diagnosis and treatment of students with mental illness.

Amici have serious concerns about the Superior Court's holding that under some vague, ill-defined circumstances, non-clinician administrators have, or may have, a legal duty to secure the short-term safety and security of students who threaten suicide and a duty to protect these students from self-inflicted harm. *Amici* submit that the import of the Superior Court's holding is already being felt on their campuses and adversely affecting the ways in which non-clinician administrators perform their jobs. *Amici* therefore respectfully request that the Appeals Court grant the MIT administrators' petition for appellate review, reverse the Superior Court's holding as to these administrators, and grant summary judgment to them as a matter of law.

SUMMARY OF ARGUMENT

The Superior Court, denying summary judgment in part, held that the two non-clinician MIT administrators, Dean Arnold Henderson and housemaster Nina Davis-Millis, owed, or may have owed, MIT student Elizabeth Shin a duty to exercise reasonable care to secure her short-term safety on April 10, 2000, and to protect her from self-inflicted harm. This Court should reverse the Superior Court's ruling for several reasons.

First, *Amici* recognize that student suicide, and threats of suicide, are problems on all college and university campuses. All *Amici* treat this issue seriously and are committed to assisting at-risk students. Accordingly, *Amici* have in place support systems that enable them to effectively identify troubled students and intervene when these students exhibit suicidal behavior. The Superior Court's imposition of a duty on non-clinician administrators is therefore a misguided -- and unnecessary -- expansion of Massachusetts tort law that, unless reversed, will have far-reaching, and predictably detrimental, implications for the Commonwealth's colleges and universities and for their students.

Second, the Superior Court's novel holding is in direct conflict with well-settled precedent. For decades courts in Massachusetts, as well as in other jurisdictions, have held that non-clinician third parties have no duty to prevent a person from committing suicide or otherwise harming himself, except in certain limited circumstances not present here.

Third, the imposition of such a duty on non-clinician administrators is unworkable in practice. The Superior Court provided no standards to determine (1) when the duty arises; (2) how the duty is met; or (3) at what point the duty has been satisfied. Hence, the duty, as announced by the Superior Court, is vague, impractical, unworkable, and unreasonable.

Fourth, the imposition of such a duty may create conflicts between administrators and clinicians that inevitably will lead colleges to take steps that are not in the best interest of many at-risk students. These steps may include, among other things, involuntary hospitalization, involuntary withdrawal of the suicidal student from school, sending the student home (where the student's problems may actually be exacerbated), notifying the parents of students who

have specifically stated they do not want their parents notified, or moving students off campus.

Fifth, if non-clinician administrators react to every report of threatened suicide by taking steps to "secure the short-term safety" of suicidal students, as required by the Superior Court's opinion, these administrators may commit tortious acts or violate students' rights to privacy, their contractual rights, and even their federal and state statutory rights not to be discriminated against based on a perception of a disability. The Superior Court simply ignored the fact that non-clinician administrators are not within the group of professionals who have the authority under Mass. Gen. Laws ch. 123, § 12, to involuntarily commit dangerous students for treatment.

Sixth, the holding is incompatible with the current apportionment of rights and responsibilities between students and colleges. Over the last forty years, the trend on college and university campuses has been to grant students more privacy, more autonomy, and more freedom in making their own decisions. This trend is well-established. Examples of students' freedom, as compared to their predecessors of a generation ago, abound on all

college campuses. The imposition of the new duty cannot be squared with Massachusetts law, clearly evolving societal trends, and students' expectations concerning their ability to make their own decisions on campus.

THE SUPERIOR COURT'S OPINION

On June 27, 2005, the Superior Court (McEvoy, J.) appeared to hold that although MIT Administrators Henderson and Davis-Millis did not owe Elizabeth Shin a duty to prevent her from committing suicide, they nevertheless owed a duty to exercise reasonable care to "secure [her] short-term safety in response to Elizabeth's suicide plan in the morning hours of April 10." Shin v. Mass. Inst. of Tech., No. 02-0403, 2005 WL 1869101, at *11, *14 (Mass. Super. June 27, 2005). In denying the MIT Administrators' motion for summary judgment, the Superior Court also concluded that the plaintiffs, Elizabeth's parents, "provided sufficient evidence that Henderson and Davis-Millis could reasonably foresee that Elizabeth would hurt herself without proper supervision," and, therefore, they owed Shin a duty to "exercise reasonable care to protect [her] from harm." Id. at *13.

In reaching this seemingly inconsistent result, the Superior Court first acknowledged the basic tort principle that ordinarily "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." Id. at *11 (quoting Cremins v. Clancy, 415 Mass. 289, 296 (1993)). The Superior Court also noted that under Massachusetts law, persons who are not treating clinicians do not have a duty to prevent suicide unless they caused the decedent's uncontrollable suicidal condition or they had the decedent in their physical custody, such as in a prison or mental hospital, and also had knowledge of the decedent's risk of suicide. Id. (citing Nelson v. Mass. Port Auth., 55 Mass. App. Ct. 433, 435-36 (2002)). Finding neither of these situations present, the Superior Court appeared to conclude that the Administrators did not owe Elizabeth a duty to prevent her from committing suicide. Id.

Notwithstanding this conclusion (which should have ended the analysis), the Superior Court proceeded to find that because Henderson and Davis-Millis were "well-aware of Elizabeth's mental problems," they could "reasonably foresee that [she] would hurt herself without proper supervision." Id. at *12-*13.

Then, based on the foreseeability of the harm, the Superior Court erroneously determined that there was a "special relationship" between the MIT Administrators and Elizabeth, which could give rise to an affirmative duty to protect her where otherwise no duty would exist.¹ Id. at *12.

Amici respectfully submit that the Superior Court's holding is incompatible with current Massachusetts law, inconsistent with Massachusetts legislation and the public policy of the Commonwealth as reflected in that legislation, and unworkable in practice. For these and other reasons explained below, this Court should reverse and enter summary judgment for the MIT Administrators.

ARGUMENT

I. A NON-CLINICIAN HAS NO DUTY TO PREVENT A PERSON FROM COMMITTING SUICIDE EXCEPT IN NARROW CIRCUMSTANCES NOT PRESENT HERE

This Court, like courts in other jurisdictions, has held that even where a suicide attempt is clearly

¹ Although it appears that the Superior Court created a duty, it is not altogether clear what that duty would be. On the one hand, the Superior Court appeared to recognize that under Massachusetts law, because the MIT Administrators neither created Elizabeth's suicidal condition nor had her in physical custody, they had no duty to prevent her suicide. On the other hand, the Superior Court concluded that the MIT Administrators could have a duty to secure Elizabeth's short-term safety in response to her suicidal plan and to prevent her from harming herself, which could be read to create a duty to prevent her suicide.

foreseeable, a non-clinician owes a duty to take affirmative steps to prevent the suicide only in two well-defined situations: (1) when the defendant's negligence was the cause of the decedent's uncontrollable suicidal impulse; or (2) when the decedent was in the defendant's custody and the defendant had knowledge of the decedent's suicidal ideations. Nelson, 55 Mass. App. Ct. at 435-36; see also McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983) (collecting cases). As the Superior Court recognized, neither of those situations existed in this case.

In Nelson, defendant Massport, which owned and operated the Tobin Bridge, knew that approximately twelve people each year for at least ten years prior to the decedent's death had attempted suicide by jumping off the bridge. 55 Mass. App. Ct. at 433-34. Yet, in a succinct opinion relying on well-settled precedent, this Court refused to "impute to the defendant a greater duty than currently exists," notwithstanding the imminent foreseeability of suicide attempts. Id. at 436. The Nelson Court thus concluded that imposing a duty to prevent suicide would reach beyond well-established Massachusetts law,

and refused to do so. See id. Moreover, unlike the court below, the Nelson Court neither discussed nor found a special relationship.²

A. Nelson Embodies the Progression of Massachusetts Suicide Law

The rule announced in Nelson represents the evolution of Massachusetts case law concerning civil liability for the failure to prevent suicide. The earliest decisions follow the causation analysis in the seminal case, Daniels v. New York, N.H. & H. R. Co., 183 Mass. 393 (1903), in viewing suicide as a voluntary, willful act that constitutes an intervening cause, and holding that liability exists only if the defendant's actions caused the plaintiff's uncontrollable suicidal impulse. See Daniels, 183 Mass. at 399-400; Sponatski's Case, 200 Mass. 526, 529-30 (1915) (no liability); Tetrault's Case, 278

² This Court's subsequent opinion in Delaney v. Reynolds is not to the contrary. In Delaney, the plaintiff suffered serious injuries when she shot herself with the defendant's gun. 63 Mass. App. Ct. 239, 239 (2005). She claimed that the shooting was accidental and that the defendant was negligent in leaving a loaded weapon in the house they shared, because he knew of her mental and emotional problems. Id. Defendant moved for summary judgment solely on the narrow issue of causation, claiming that if the plaintiff intended to shoot herself, her intentional act was an intervening cause that precluded liability. See id. The lower court never considered the issue of whether the defendant owed Delaney a duty to prevent her from harming herself. This Court reversed summary judgment for the defendant because there was a material issue of fact as to whether Delaney intended to commit suicide. Id. at 244-45. Like the lower court, this Court did not address the issue of the defendant's duty. See id.

Mass. 447, 450 (1932) (no liability); Ruschetti's Case, 299 Mass. 426, 430-31 (1938) (no liability). None of these cases directly address the issue of duty and all rely exclusively on a causation analysis.

The first Massachusetts case to consider the issue of duty in the suicide context is Slaven v. Salem, 386 Mass. 885 (1982), in which plaintiff's decedent hung himself in a city jail. In Slaven, the Court noted that cases such as Daniels were decided on the basis of causation, which is not properly reached unless the plaintiff first establishes a duty. Id. at 887-88. Looking to other jurisdictions, the Court held that the jailor would not be liable for the suicide unless he knew or had reason to know of the prisoner's suicidal tendencies. Id. at 888. This Court's ruling in Nelson is therefore consistent with earlier Massachusetts suicide cases.

The Superior Court's failure to follow Nelson in this case represents a dramatic departure from well-established precedents and is grounds for reversal.

B. The Superior Court Misapplied Section 314A

In finding a special relationship in this case, the Superior Court looked to the Restatement (Second) of Torts § 314A (1965). Section 314A does not

provide, however, that foreseeability alone creates a duty; rather, foreseeability can give rise to a duty only where a special relationship already exists. In the context of a suicide, § 314A recognizes that a special relationship can arise when the defendant has the decedent in physical custody and the decedent is unable to protect herself. See § 314A(4); Slaven, 386 Mass. at 887-88. Section 314A thus offers additional support for the rule articulated in Nelson. Here, the Superior Court misapplied § 314A in concluding that foreseeability of harm, by itself, can actually create the special relationship.

C. The Massachusetts Cases Cited by the Superior Court Are Distinguishable

In addition, although the Superior Court attempted to support its finding of a special relationship in part by citing Mullins v. Pine Manor College and Irwin v. Town of Ware, neither case supports the Superior Court's holding. In Mullins, a student at Pine Manor was abducted from her dormitory and raped on campus by an unknown assailant. 389 Mass. 47, 47-48 (1983). The Supreme Judicial Court looked to "existing social values and customs" and held that Pine Manor and its vice president of operations owed a

duty to exercise care to protect the resident students from the criminal acts of third parties.³ Id. at 50-51. The narrowly-defined duty recognized in Mullins arose not from the foreseeability of the harm, but rather from the fact that Pine Manor required students to live on campus and the college alone was in the position to provide campus security. Id. at 52. The Court also reasoned that the students had no opportunity to protect themselves from intruders and were entirely dependent on the security measures provided by the school. Id. at 54. Nothing in Mullins suggests that colleges and their non-clinician administrators have a general duty to protect students from self-inflicted harm, nor did the Supreme Judicial Court discuss or find the existence of a "special relationship." Furthermore, unlike the present case, the issue presented in Mullins did not implicate concerns about students' privacy, independence, and autonomy.

³ The Court alternatively held that this duty of care could be grounded in the theory that Pine Manor had voluntarily undertaken to provide adequate security for the college dormitories and that the students reasonably relied on the college to exercise care to safeguard their well-being. Mullins, 389 Mass. at 52-54. Here, the MIT Administrators did not undertake to provide for the short-term safety of Elizabeth Shin, nor did she "rely," in any sense of the word, on the MIT Administrators to protect her from herself.

Irwin is also distinguishable. In that case, police officers failed to take into protective custody an intoxicated driver, who later caused an accident. 392 Mass. 745, 746-47 (1984). The Supreme Judicial Court held that there was "a special relationship between a police officer who negligently fail[ed] to remove an intoxicated motorist from the highway, and a member of the public who suffers injury as a result of that failure." Id. at 762. Irwin differs from this case for several reasons. In finding a "special relationship," the Court relied not solely on the foreseeability of the harm that would result from a failure to act, but on the specific statutes that required police to remove intoxicated drivers from the road in exactly these circumstances. Id. The Court explained that these statutes evidenced "a legislative intent to protect both intoxicated persons and other users of the highway." Id. College administrators have no statutory duty to protect students from self-harm. And, as in Mullins, the harm in Irwin was caused by a third party and those injured in the accident were powerless to protect themselves. Id. at 756, 760-61. Finally, even a cursory look at existing social values and customs reveals that the general

public relies on the police to remove intoxicated drivers from the roadways.

Thus, neither of the Massachusetts cases the Superior Court relied upon in creating this new duty for non-clinician administrators actually supports the Superior Court's rationale for creating such a duty.

II. IMPOSITION OF A DUTY IS INCOMPATIBLE WITH EXISTING LAW

A. Imposition of A Duty Runs Counter to Existing State Legislation

In addition to being contrary to common law precedent in Massachusetts, requiring a college's non-clinician administrators to take affirmative steps to secure the short-term safety of a suicidal student runs directly counter to existing Massachusetts legislation, and may expose colleges and administrators to liability for which they have no protection under state law. In Massachusetts, only qualified treatment providers and police officers may authorize the restraint of dangerous persons. In enacting Mass. Gen. Laws. ch. 123, § 12, the Massachusetts Legislature has concluded that only qualified persons (including physicians, psychiatric nurses, psychologists, and police officers) are empowered to involuntarily commit a dangerous person

to a hospital or other authorized treatment facility. See M.G.L. ch. 123, § 12(a). In addition, section § 22 of the same chapter expressly provides that "[p]hysicians, qualified psychologists, qualified psychiatric nurse mental health clinical specialists and police officers shall be immune from civil suits for damages" when they involuntarily commit a person pursuant to chapter 123. M.G.L. ch. 123, § 22. Together, sections 12 and 22 reflect the Legislature's careful examination of this complex issue and its reasoned decision as to who is permitted to make involuntary commitment decisions.

This makes perfect sense: clinicians are trained and licensed to make diagnoses and are therefore in the best position to evaluate the immediacy of a particular threat. Similarly, police officers are trained to safely and effectively restrain people who are about to commit a crime (suicide is a criminal act). Other categories of people -- no matter how well-intentioned -- have no such training, license, or recognized ability. If a clinician and a police officer, acting in good faith, take steps to restrain and involuntarily commit a person who professes suicidality, they are legally protected from suit due

to the express authority (and immunity) granted to them under chapter 123, sections 12 and 22. A non-clinician, however, enjoys no similar protection. Therefore, imposing on a non-clinician a duty to "secure" the physical safety of a suicidal student and stop the student from harming herself, when the non-clinician has neither the training nor the legal imprimatur to determine whether taking a step such as involuntary civil commitment would best protect the student, is illogical, conflicts with Massachusetts' express legislative pronouncement in chapter 123, sections 12 and 22, and thus places an unfair burden on the non-clinician.

B. Imposition of a Duty Exposes Colleges And Administrators to the Risk of Liability Under Federal Disability Law

The imposition of a duty to protect students from self-inflicted harm and to secure the short-term safety of suicidal students also exposes colleges and universities to a risk of liability under provisions of federal disability law, which impose certain affirmative obligations on educational institutions. For example, following an investigation of a complaint filed by a student at Bluffton University in Bluffton, Ohio, the United States Department of Education Office

for Civil Rights ("OCR") concluded that Bluffton was liable under Section 504 of the Rehabilitation Act of 1973⁴ because, among other things, it involuntarily withdrew a student who had exhibited suicidal behavior without determining whether she was a "direct threat" to the health and safety of herself or other students.⁵ See December 22, 2004 Letter to Bluffton University re: OCR Complaint # 15-04-2042, attached as **Exhibit A**. Specifically, OCR found that Bluffton had failed to consult with medical personnel or to assess the student based on "reasonable medical judgment relying on the most current medical knowledge or the best available objective evidence." Id. at 4-5 (emphasis added). In effect, OCR's Bluffton decision teaches that if a non-clinician takes steps to secure the short-term safety of a potentially suicidal student, and does so in a way that deprives the student of the right to participate in some program at the college, the college may have violated Section 504. See also

⁴ The federal Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits, among other things, discrimination on the basis of disability in programs receiving federal financial assistance. Section 504 states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under any program or activity that, *inter alia*, "receives Federal financial assistance."

⁵ According to the OCR letter, Bluffton stated that the student was removed because of a fear that she would attempt suicide again.

March 6, 2003 Letter to Guilford College re: OCR
Complaint #11-02-2003 (similar analysis and result),
attached as **Exhibit B**.

The requirement that a college's assessment of a student in a "direct threat" situation be based upon "a reasonable medical judgment relying on the most current medical knowledge" is consistent with the proper roles of medical professionals. This requirement recognizes that mental health professionals and trained clinicians are uniquely equipped to evaluate the gravity and sincerity of a particular student's suicidal expression. That is, they are entitled to practice medicine and make diagnoses. The Superior Court's ruling would force administrators to make judgments such as whether a student poses a "direct threat" -- a judgment that OCR has properly concluded rests with trained clinicians under federal disability law.

**III. THE COURT SHOULD NOT EXPAND MASSACHUSETTS TORT
LAW TO CREATE A DUTY THAT REQUIRES NON-CLINICIAN
COLLEGE ADMINISTRATORS TO PROTECT STUDENTS
AGAINST SELF-INFLICTED HARM**

The Court should not expand the law of negligence to impose a duty on non-clinician college administrators to secure the short-term safety of

suicidal students in order to protect them from harming themselves. It is well-settled that the existence of a duty is nothing more than a determination that, as a matter of policy, the plaintiff's interests are entitled to legal protection against the defendant's conduct. See Prosser & Keeton, Torts § 53, at 358-59 (5th ed. 1984) (explaining that "'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection"). Sound policy considerations counsel strongly against creating and imposing such a duty in the circumstances here.

A. Massachusetts Courts Consider Existing Social Values, Customs, and Appropriate Social Policy in Deciding Whether to Recognize a Duty of Care

Over fifty years ago, the leading authority on tort law, Dean Prosser, described the various factors that courts weigh when determining whether to impose a duty:

In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of the administration of the rule, and our social ideas as to where the law should fall. In the end, the court will

decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

William L. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 14-15 (1953).

Similarly, Massachusetts courts determine whether a legal duty exists by "reference to existing social values and customs and to appropriate social policy." Cremins, 415 Mass. at 292 (and cases cited). See also Luoni v. Berube, 431 Mass. 729, 735 (2000) (quoting W.L. Prosser & W.P. Keeton, Torts § 53, at 358-59 (5th ed. 1984)). Accordingly, to determine whether college administrators should be charged with a duty to take affirmative steps to prevent suicidal students from harming themselves, the Court should consider the nature of the relationship between colleges and their students, students' expectations of freedom, privacy, and autonomy, and the increasingly circumspect role played by colleges in supervising student conduct.

B. Imposition of a Duty is Incompatible with Existing Social Values and Customs

An examination of existing social values and customs reveals that the imposition of a duty is incompatible with college students' expectation of

greater freedom, privacy, and autonomy. The modern American college is an educational -- not a custodial -- institution. Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986); see also Univ. of Denver v. Whitlock, 744 P.2d 54, 59 (Colo. 1987) (noting that a university is not an insurer of its students' safety). Over the past forty years, the authoritarian role of the college has waned and "rights formerly possessed by college administrators have been transferred to students." Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979); see also Booker v. Lehigh Univ., 800 F. Supp. 234, 239 n.6 (E.D. Pa. 1992) (noting that the changes recognized in Bradshaw remained true in 1992); Whitlock, 744 P.2d at 59 ("The relationship between a university and its students has experienced important changes over the years" such that there has been a departure from *in loco parentis*). Consequently, *in loco parentis* -- that special relationship "that imposed a duty on the college to exercise control over student conduct, and reciprocally, gave students certain rights of protection by the college" -- is of limited applicability.⁶ Id.; see also Mullins, 392

⁶ This Court certainly need not resolve the entire debate concerning the scope of *in loco parentis* in the Commonwealth's colleges and universities in order to resolve the narrow question

Mass. at 52 (recognizing the decline of *in loco parentis* in the college-student context); Nero v. Kansas St. Univ., 253 Kan. 567, 573 (1993) (explaining that "[t]he *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary college life"); Whitlock, 744 P.2d at 59-60 (similar). Likewise, as the Mullins Court noted, colleges no longer "police the morals of [their] resident students." 389 Mass. at 52. Armed with a full arsenal of legal rights, college students have demanded, and received, expanded rights of privacy and autonomy and fewer intrusions into their lives while at college. See, e.g., Bradshaw, 612 F.2d at 138-39; Baldwin v. Zoradi, 176 Cal. Rptr. 809, 816-17 (Cal. Dist. Ct. App. 1981) (noting that "[s]tudents have insisted upon expanded rights of privacy").

Federal policy on student privacy, in particular the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, affords additional privacy to college students.⁷ Accordingly, imposition

of whether non-clinician administrators have a duty to prevent students from committing suicide or harming themselves.

⁷ Although FERPA includes a health and safety emergency exception, see 34 C.F.R. § 99.31, the general intent of the statute is to afford students a greater level of control over the privacy of their educational records. See Student Press Law Center v. Alexander, 778 F. Supp. 1227, 1228 (D.D.C. 1991).

of a duty in this case would be inconsistent with the nature of the relationship between student and college, and would produce an environment that is incompatible with the expectations and objectives of a modern college education. See Beach, 726 P.2d at 419. Considering "the hand of history" (especially recent history), as Dean Prosser counseled, this Court should reverse the Superior Court's ruling that a college's non-clinician administrators are required to secure the short-term safety of potentially suicidal students or prevent them from harming themselves.

C. Imposition of a Duty is Impractical and Unworkable

In addition to being incompatible with current expectations and existing social values and customs, the imposition of a duty on a non-clinician college administrator to prevent students from committing suicide or harming themselves would create an almost unlimited number of situations that would likely give rise to litigation. Notably, the Superior Court's opinion set forth no standards or guidelines for determining what set of facts and circumstances would give rise to the administrator's duty to act, what conduct would be considered adequate in a particular

case, or at what point the duty would be satisfied. As a result, courts would be asked to clarify and refine the scope of the duty on a case-by-case basis. Among the many questions that courts would be forced to answer are the degree of knowledge expected of an administrator that would trigger the duty to act, what affirmative actions are required to perform the duty properly, and under what circumstances has the duty been adequately discharged. As a result of the Superior Court's opinion, administrators have been left to act at their peril because they do not know what they are required to do, when they are required to do it, and for how long they must continue to do it.⁸

1. When Does the Duty Arise?

In determining whether and when the duty to secure an acutely suicidal student's short-term safety has arisen, non-clinician college administrators have no guidelines on which to rely. There is no uniform definition of what it means to be "suicidal."⁹

⁸ This analysis is fraught with even more risk to the administrator, given the ambiguity in the Superior Court's ruling as to whether this new duty requires administrators to secure students from all forms of self-inflicted harm, including suicide and other harms short of suicide.

⁹ According to the Jed Foundation (www.jedfoundation.org), a charitable organization dedicated to reducing the suicide rate

Therefore, whether a particular student's statements or actions constitute "suicidal behavior" will inevitably be a judgment call that non-clinician administrators are not qualified to make. See Suicide Prevention Resource Center, Promoting Mental Health and Preventing Suicide in College and University Settings, 22 (Oct. 21, 2004), available at http://www.sprc.org/library/college_sp_whitepaper.pdf. Accordingly, determining whether a student is in fact contemplating suicide will be considerably more difficult if these assessments must be made by non-clinician administrators who lack the training and expertise to make such determinations.¹⁰ See id.

Questions will inevitably arise as to the number of reports an administrator must receive before he is required to act. Will one report be enough? Will multiple reports be required? Will the duty arise only when the student himself reports a suicidal plan?

among college and university students by, among other things, focusing on the underlying mental health causes of suicide, there is no consensus among colleges about what constitutes a comprehensive, campus-wide approach to managing the acutely distressed or suicidal student. See Jed Foundation: Winter 2006 Update on Activities.

¹⁰ The Superior Court's ruling entirely discounts the fact that determining whether a particular student may attempt suicide is extremely difficult, even for trained clinicians who have experience in evaluating emotionally troubled students.

Can the duty arise based solely on lay, third-party reports? Will clinical evidence be required in order to identify the threat of suicide as sufficiently real? If so, what kind of evidence will be required and what level will be enough? By what authority does the non-clinician have the right to make what essentially amounts to a medical diagnosis? The Superior Court's opinion provides no guidance as to what factors administrators are expected to consider in these complex circumstances.

2. How is the Duty Properly Performed?

Even if a non-clinician administrator, and later a court, determines that the duty to take affirmative steps to protect a suicidal student from harm has arisen, additional questions will be raised as to what actions are sufficient to perform the duty adequately. For example, is an administrator required to knock down the door and break into the student's dormitory room? Alternatively, is the administrator required to physically restrain the student? Is the administrator required to call the student's parents to report the suicidal plan? Is the administrator expected to call the police, or campus security, or "911"? Again, the Superior Court offered no guidance as to what

administrators must do, what they can do, and what they are forbidden from doing in securing the short-term safety of a student in response to her suicidal plan.

3. When is the Duty Adequately Discharged?

Finally, even if the court pinpoints when the duty has arisen and determines that the non-clinician administrator's actions in performing the duty are appropriate, it would be unclear when the duty has been adequately discharged. Are non-clinician administrators expected to know when a student is no longer suicidal? May they rely on their judgment that the student no longer "seems" suicidal, even though many suicidal students hide their thoughts and suicide is typically carried out alone and privately? Or must the administrator post a guard at the door of the student's dormitory room and provide 24-hour surveillance of the student? The Superior Court's opinion provides no guidance for answering any of these questions. Nor does it define what constitutes a "short-term" period. Consequently, the duty imposed by the Superior Court is unworkable in practice, and clearly fails Dean Prosser's test concerning the

"convenience of the administration of the rule."

Prosser, Palsgraf, *supra*, at 14-15.

D. Imposition of A Duty Will Have A Chilling Effect on At-Risk Students and Non-Clinician Administrators

In addition to the adverse effect the Superior Court's ruling will have on the way non-clinician administrators perform their jobs, it may also have an unintended adverse impact on troubled students and drive the suicide problem underground. For instance, if non-clinician administrators are witnessed taking extreme steps to discharge their new "duty," potentially suicidal students may be unwilling to come forward and confide in these administrators. Likewise, if students are reluctant to confide in non-clinician administrators, who by virtue of their close and regular contact with students are often in the best position to identify those struggling with mental health issues, the number of students at risk may actually increase.

At the same time, the imposition of this new duty will encourage non-clinician administrators to withdraw from close contact with students and distance themselves from students' problems. Because non-clinician administrators interact with students on a

multitude of fronts and provide guidance and advice on a multitude of subjects, their participation in students lives is vital to the support systems all *Amici* have in place. Imposing this duty on non-clinician administrators will thus compromise the effectiveness of these systems.¹¹

E. Imposition of A Duty Will Create A Conflict Between Administrators and Clinicians

Another significant problem with the Superior Court's holding is that the imposition of a duty will create discord between administrators and clinicians. *Amici* recognize that student suicide is a problem on college and university campuses and are committed to helping at-risk students. *Amici* agree that when a student exhibits suicidal behavior or expresses suicidal ideations, the college's focus is on providing intervention, evaluation, and support with an eye toward creating the safest possible outcome for the student. *Amici* further agree that the likelihood of a safe outcome is greatest where non-clinician administrators, including residential life staff,

¹¹ *Amici* are also concerned that the imposition of this new duty, and the resultant increase in expectations and responsibilities, will make it much more difficult to attract and retain the non-clinician administrators whose work is essential to all aspects of campus life. This unintended chilling effect will be harmful to the entire community.

collaborate with clinicians as part of a communication network in which each member knows and understands her role. Accordingly, all *Amici* have in place comprehensive support systems designed to identify potentially suicidal students and intervene when students exhibit suicidal behavior.

To the extent that diagnoses are made, medical treatment plans devised, and involuntary commitment decisions implemented, however, *Amici* urge this Court to recognize that these decisions must be left to the clinicians who are educated, trained, and licensed to make them. *Amici* are concerned that imposing a duty on administrators to prevent students from harming themselves will create confusion and blur the distinction -- heretofore clear -- between the respective roles of clinicians and non-clinicians, and potentially disrupt the evaluation and treatment systems on their campuses. Furthermore, because non-clinician administrators may not be permitted access to the confidential information exchanged between a student and her treating clinician, requiring the non-clinician administrators to act without the benefit of that information might put a troubled student at

greater risk than when the informed clinician is making such critical treatment decisions.

As such, the Superior Court's ruling would work to unravel the close-knit affiliations that currently exist among clinicians and non-clinicians on Amici's campuses, all to the detriment of the at-risk students who benefit most from such integrated support systems.

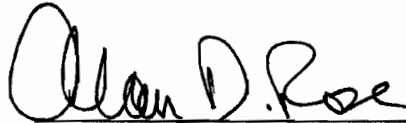
CONCLUSION

For the above reasons, *Amici* respectfully submit that this Court should reverse the Superior Court's denial of summary judgment and enter summary judgment for the MIT administrators.

Respectfully submitted,

AMHERST COLLEGE, BOSTON COLLEGE,
BOSTON UNIVERSITY, BRANDEIS
UNIVERSITY, THE COLLEGE OF THE
HOLY CROSS, EMERSON COLLEGE,
LESLEY UNIVERSITY, MASSACHUSETTS
COLLEGE OF PHARMACY AND HEALTH
SCIENCES, NORTHEASTERN UNIVERSITY,
SIMMONS COLLEGE, SMITH COLLEGE,
STONEHILL COLLEGE, TUFTS
UNIVERSITY, WELLESLEY COLLEGE, and
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